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Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises

Stephen D. Sencer

[M]y opponent, my opponent won't rule out raising taxes. But I will and the Congress will push me to raise taxes, and I'll say no, and they'll push, and I'll say no, and they'll push again. And I'll say to them, read my lips, no new taxes.

— Presidential Candidate George Bush, August 18, 1988.¹

What they did agree to was that they would not get involved in discussions about taxation or specific issues but rather to stick to the phrase of "no preconditions" and begin an open debate that is unfettered with conclusions about positions taken in the past.

— White House Spokesman Marlin Fitzwater announcing President Bush's intention to consider raising taxes, May 7, 1990.²

They're going to do it over my dead veto, or live veto, or something like that, because it ain't going to happen, I'll guarantee you.

— President Bush restating his no-tax promise, November 8, 1990.³

At the 1984 Democratic National Convention, presidential nominee Walter Mondale announced that if elected as president, he would raise taxes.⁴ His decision to announce this plan directly was disastrous; he lost the election in a landslide.⁵ By comparison, at the 1988 Republican National Convention, presidential nominee George Bush

1. *Transcript of Bush Speech Accepting Presidential Nomination*, N.Y. TIMES, Aug. 19, 1988, at A14.

2. Maureen Dowd, *Bush Eases Stand, Saying New Taxes Can Be Discussed*, N.Y. TIMES, May 8, 1990, at A14; see also Andrew Rosenthal, *Bush Now Concedes A Need for "Tax Revenue Increases" to Reduce Deficit In Budget*, N.Y. TIMES, June 27, 1990, at A1 (President Bush issued a statement saying "[i]t is clear to me that both the size of the deficit problem and the need for a package that can be enacted require . . . tax revenue increases . . .").

3. Andrew Rosenthal, *Eye on Voters, Bush Resurrects Anti-Tax Pledge*, N.Y. TIMES, Nov. 9, 1990, at A1.

4. *Transcript of Mondale Address Accepting Party Nomination*, N.Y. TIMES, July 20, 1984, at A12 ("Let's tell the truth. That must be done — it must be done. Mr. Reagan will raise taxes, and so will I. He won't tell you. I just did.").

5. Commentators suggest that Mondale's admission about taxes, while not decisive, was a major factor in his defeat. See JACK W. GERMOND & JULES WITCOVER, *WAKE US WHEN IT'S OVER 408* (1985) ("And in that flash of candor, his slim chances to upset Reagan very probably went down the drain."); Carol Rosenberg, UPI Wire Service (Nov. 7, 1984) ("Former President Jimmy Carter said Wednesday Walter Mondale's defeat in the 1984 presidential election was predictable because he announced he would raise taxes if elected. . . . 'Mondale was telling the American people the truth . . . but this was a very big mistake.'"); Tom Wicker, *In the Nation: Politics and Taxes*, N.Y. TIMES, May 7, 1985, at A31 ("The promise probably did not defeat Mr.

promised not to raise taxes. He won by a landslide. Polls show that voters favored his absolutist position on taxes.⁶ In the second year of his presidency, President Bush broke his 1988 promise by signing a budget which included a tax increase⁷ and subsequently repeated his no-tax promise.⁸

Undoubtedly many factors influenced the 1984 and 1988 presidential elections. One political fact, however, is clear: honesty is not necessarily a virtue, at least where tax increases are concerned.⁹ Voters want to hear good news from their prospective leaders. When a candidate's honest thoughts will not be well received, there is an incentive for the candidate to lie to gain the public's favor.¹⁰ As the 1992 elections approach, candidates across the country will be making promises to voters. Many of these promises will be kept, while others will be broken for valid reasons.¹¹ Some promises, however, will be made by politicians who, at the time of making the promises, will have no intention of keeping them. In a word, some of these campaign promises will be lies.¹²

Mondale . . . But his promise of a tax increase almost certainly inflated Ronald Reagan's victory margin.").

Notwithstanding Mondale's assertion, there is no evidence that Reagan knew during the election that he too would eventually have to raise taxes. There is evidence, however, that he ought to have known. See GERMOND & WITCOVER, *supra*, at 539 ("On November 13, 1984, just seven days after the election, David Stockman, President Reagan's budget director, disclosed that the federal deficit in the next fiscal year was now expected to be \$210 billion, not the \$175 billion the Reagan administration had previously estimated. The situation was so dire, Stockman made clear, that further radical measures would be required to correct it. . . . But few in the capital were really surprised. Nearly everyone knew that Ronald Reagan had been just blowing smoke.").

6. In one poll, over two thirds of those voters who identified taxes as their most important issue favored Bush's position. William Schneider, *Solidarity's Not Enough*, NATL. J. 2854 (Nov. 12, 1988).

7. See David E. Rosenbaum, *Budget Passed By Congress, Ending 3-Month Struggle: Bush Says He's Pleased*, N.Y. TIMES, Oct. 28, 1990, at A1.

8. See Rosenthal, *supra* note 3 ("In a new twist to his political gyrations over taxes, President Bush promised today that he would never again break the no-new-taxes promise that he broke last summer in the Federal budget fight.").

9. See Wicker, *supra* note 5 ("[Mondale's] gamble that the public would honor a candidate who was frank about his intentions only proved once again that elections are not often won by promises to raise taxes.").

10. Lying will often be in a politician's short-term interest, in part because lies are so often believable. Hannah Arendt writes:

Lies are often much more plausible, much more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear. He has prepared his story for public consumption with a careful eye to making it credible, whereas reality has the disconcerting habit of confronting us with the unexpected, for which we were not prepared.

Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, in *CRISES OF THE REPUBLIC* 6-7 (1972).

11. For example, when a politician breaks a promise because she has learned information that renders her previous position no longer in her constituents' best interests, she could be said to have a "valid reason" for breaking her promise.

12. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 689 (1988) (defining a "lie" as

The knowingly false campaign promise, one form of political lie, has apparently never received serious consideration as an actionable wrong.¹³ This Note explores the historical judicial and legislative inability — or unwillingness — either to enforce campaign promises or to punish campaign lies. By isolating one specific type of campaign speech — the knowingly false campaign promise made with the intent to deceive — this Note questions why a politician may treat her promises with a cavalier disrespect for the truth not allowed ordinary citizens. In doing so, it asks a few challenging questions: Why are campaign promises treated differently than other promises? Do legal tools exist to punish or deter campaign lies? Is there a proper role for the courts in policing this type of false speech? This Note attempts to demonstrate that these questions warrant consideration.¹⁴

To be sure, the political system does have nonlegal enforcement mechanisms for deterring and punishing false campaign promises. Voters may vent their dissatisfaction in subsequent elections. To the extent politicians fear the loss of reputation, this may also deter knowing lies. While these considerations probably affect candidates' decisionmaking to some degree, this Note begins with the proposition that the present nonlegal mechanisms are insufficient safeguards.¹⁵ Further, even if the current nonlegal mechanisms are effective, their effectiveness should not end an inquiry into the desirability of supplementary legal mechanisms.

This Note does not argue that campaign speech should always be held to the same standards of accuracy to which other forms of speech are held. Campaign speech is unique in form, with its own idioms and rhetorical devices, and serves unique purposes. Often, when a candidate promises, he simply urges his "vision" or general policy preferences, akin to the legitimate business practice of "puffing."¹⁶ For instance, a candidate's promise not to raise taxes might be understood to rhetorically convey the message: "I am less likely to raise taxes than is my opponent." On some occasions, however, a politician may take steps to "guarantee" certain statements — proclaiming, for example, that a certain promise is more than mere political rhetoric, or that his position is different from his opponent's by virtue of his promise.¹⁷

"an assertion of something known or believed by the speaker to be untrue with intent to deceive").

13. See *infra* section I.C.2 for discussion of judicial reluctance to entertain such claims.

14. Legislation such as that recently proposed in West Virginia, see *infra* section IV.B, which would make the knowing campaign misrepresentation a criminal misdemeanor, is unlikely to be adopted. Nevertheless, that it was proposed, and that it has an intuitive appeal, suggest that the proposition should not be dismissed lightly.

15. See *infra* section I.A.

16. See *infra* notes 197-200 and accompanying text.

17. An example of this practice occurred in the 1989 gubernatorial race in New Jersey. In the primary campaign, candidate Jim Florio distanced himself from the other candidates by promising not to raise taxes. Peter Kerr, *Civility Sets Debate Tone in New Jersey*, N.Y. TIMES,

It is these cases — where a candidate takes steps to persuade the voters that his is a reliable promise, knowing at the same time that the promise is false — that this Note addresses.

Part I discusses the ways false campaign promises damage the political process and suggests that attaching legal liability to knowingly false campaign promises could serve important public policy interests. Part II applies common law contract doctrine to a hypothetical broken campaign promise, finding all the elements of a breach of contract claim. Part II concludes, however, that contract remedies are poorly suited to cure the damage of unperformed campaign promises. Part III applies tort doctrine to the hypothetical campaign promise, finding all the elements of the tort of deceit. Although the tort claim more closely serves the goal of deterring knowingly false campaign promises,¹⁸ it also lacks a practicable method of assessing damage awards.

Finally, Part IV examines state regulation that regulates other forms of campaign speech and recently proposed state legislation that would criminalize the making of knowingly false campaign promises. The proposed legislation features elements of the tort claim of deceit, yet avoids the problem of assessing damages by providing a criminal sanction. Thus the statute more effectively focuses on the problem of deterring false speech rather than the problem of compensating for unfulfilled expectations. The Note concludes that significant problems exist with the proposed legislation, but that these problems should not preclude the exploration of alternative methods of legal enforcement. Will Rogers once said a politician's promise isn't worth the paper it isn't written on.¹⁹ This need not always be true.

I. POLITICAL LIES IN A DEMOCRATIC SOCIETY

Part I of this Note attempts to demonstrate sound policy reasons for involving the legal system in the area of false campaign promises. Section I.A describes how political lies damage the political process. Section I.B examines the role of the representative in a democratic society, demonstrating that the proposal in this Note accords with the

May 15, 1989, at B1 ("Mr. Florio separated himself from his opponents . . . with the flat promise not to raise taxes."). By isolating his position from the others, Florio took steps to increase the significance of his promise *as a promise not as a rhetorical device*. Within two months of his inauguration, however, Governor Florio had announced a \$1.4 billion tax increase. Peter Kerr, *Florio Plans to Balance Budget With \$1.4 Billion Tax Increase*, N.Y. TIMES, Mar. 15, 1990, at A1.

18. In contrast to the contract claim, which serves the goal of restoring the injured voter to her previous position.

19. Quoted by former Secretary of State Edmund S. Muskie in McGEORGE BUNDY & EDMUND MUSKIE, *PRESIDENTIAL PROMISES AND PERFORMANCE* (THE CHARLES S. MOSKOWITZ MEMORIAL LECTURES) 71 (1980) ("At least where economic policy is concerned, a superficial review of promise and performance in presidential politics would tend to confirm such cynicism.").

prevailing view of this role. Section I.C explores potential constitutional concerns and the courts' historical unwillingness to become involved in these types of disputes, concluding that these concerns may be addressed by a properly limited conception of the courts' role in policing campaign lies.

A. *Broken Campaign Promises and the Political Process*

Popular distrust of politicians is an enduring part of American culture and at least as old as the democratic political process. Immediately after the American Revolution, confidence was so low the electorate commonly sent representatives to assemblies with binding instructions, dictating how they were to cast their votes.²⁰ Although this practice has long since been abandoned, American voters remain troubled by the quality of their representation,²¹ and distrustful of their representatives.²² While some voter dissatisfaction may be inherent in any representative structure,²³ there are nonetheless several identifiable, potentially curable causes of the present dissatisfaction. In fact, legislatures have acknowledged some of these causes of harm by enacting legislation regulating a variety of campaign practices, including campaign financing,²⁴ distribution of campaign literature,²⁵ and some forms of campaign speech.²⁶

This section explains how false campaign promises damage the political process. In addition to contributing to the electorate's general distrust of all political speech,²⁷ false campaign promises reduce the amount of accurate information available to voters and weaken the belief that our political choices are based on reasoned and open debate.²⁸ The effect of false campaign promises on voter decisionmaking

20. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 370-72 (1969) ("[M]any Americans believed their representatives to be — mere agents or tools of the people who could give binding directions 'whenever they please to give them.'"). This relationship between the constituency and the representative predated the formation of the American republic. See NANCY L. SCHWARTZ, *THE BLUE GUITAR: POLITICAL REPRESENTATION AND COMMUNITY* 27 (1988) ("A delegate from a Puritan Massachusetts town, for example, was understood to be instructed by the corporate town as a whole.") (citing JACK R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 350 (1971)).

21. See generally JAMES D. WRIGHT, *THE DISSENT OF THE GOVERNED: ALIENATION AND DEMOCRACY IN AMERICA* chs. 4-5 (1976).

22. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* xviii (1978) (1975 survey found 69% of respondents believe that the government lied to them); *Congress, Spiraling Downward*, N.Y. TIMES, Oct. 28, 1991, at A16 (discussing recent poll showing that only 34% of Americans consider representatives "honest").

23. See *infra* notes 38-39 and accompanying text.

24. See Note, *Developments in the Law — Elections*, 88 HARV. L. REV. 1111, 1237-72 (1975).

25. See *id.* at 1286-92.

26. See *infra* section IV.A.

27. See *infra* notes 35-37 and accompanying text.

28. One may dispute that false campaign promises have these effects, and that these effects

can operate on two levels. First, if voters believe the false promise, they are making their decisions based on false information.²⁹ Second, if voters do not believe any political promises, in part due to the frequency of false promises, we might question how reasoned and open our political debate really is.³⁰

Social scientists isolate other negative effects of political lies. Professor Sissela Bok, a leading ethicist, argues that by taking from the electorate the possibility of an informed choice, political lies have negative psychological consequences:

Voters and candidates alike are the losers when a political system has reached such a low level of trust. Once elected, officials find that their warnings and their calls to common sacrifice meet with disbelief and apathy, even when their cooperation is most urgently needed. . . . And the fact that candidates, should they win, are not expected to have meant what they said while campaigning, nor held accountable for discrepancies, only reinforces the incentives for them to bend the truth the next time, thus adding further to the distrust of the voters.

Political lies, so often assumed to be trivial by those who tell them, rarely are. . . . When political representatives or entire governments arrogate to themselves the right to lie, they take power from the public that would not have been given up voluntarily.³¹

Professor R.E. Goodin, a political scientist, argues that voters act under rational ignorance,³² whereby they “rationally invest in addi-

are damaging. This Note does not attempt to prove the former; instead, it relies on the work of social scientists, *see infra* notes 31-37, and on an intuitive sense that these effects occur. Nor does this Note attempt to prove these effects are damaging. However, maintaining that false campaign promises do have the negative effects described, yet do not damage the political process, displays an unhealthy, and hopefully incorrect, cynicism.

29. Suppose candidate *A* promises to increase spending on social programs, but admits that to do so he must raise taxes. Candidate *B* promises not to raise taxes, and admits that she must, as a result, cut spending on social programs. Voters might support candidate *B* if their dislike of taxes outweighs their concern for social programs. However, if voters know that both candidates will raise taxes, they might shift their support to candidate *A* because, with the tax issue neutralized, they support spending on social programs.

Analogously, a car purchaser might value both comfort and gas mileage. If the salesperson falsely claims that a less comfortable car gets higher gas mileage, the buyer might make a different choice than he would have made had he had truthful information.

30. It is possible that voter decisions are based on a set of factors that does not include campaign promises. This Note assumes that campaign promises have some effect. In part, this assumption is based on the apparent effectiveness of persuasive political promises.

31. Bok, *supra* note 22, at 175.

Another ethicist argues that as a society we err in accepting political rhetoric that falls below the standard of truthfulness required in court.

As a nation, we have probably been exposed to more rhetoric per capita than any people in the history of the world. Most of us are subjected to it almost every day of our lives, and we are sick to death of half-truths and rationalizations that fall just short of outright lies. There is no need for the level of rhetoric to fall this low, of course: it is much higher in law courts.

Richard S. Burke, *Politics as Rhetoric*, 93 ETHICS 45, 54 (1982).

32. Four elements comprise the model of rational ignorance:

1. Citizens have imperfect information.
2. Citizens know they have imperfect information.
3. It is costly:

tional information if and only if they expect that it will turn up something important."³³ Because voters have imperfect information, he explains, political lies "reduc[e] the stock of accurate information available to citizens by cancelling out some true information with lies tending to contradict it."³⁴

Goodin also compares the effect of political lies to the underproduction of public goods.³⁵ The benefits of producing public goods, such as information, are shared among nonproducers and producers alike. As a result, such goods are underproduced.³⁶ Similarly, the lost credibility due to political lies is shared among all politicians — even to direct competitors. Goodin states:

If a politician is caught lying, his stigma is to a large extent shared with the entire class of politicians — the public concludes not only that the particular individual lacks credibility but also that politicians in general are not to be trusted. This makes 'loss of credibility' a public evil, the converse of a public good, and as such it is overproduced for precisely the same reasons public goods are underproduced.³⁷

Therefore, the common stigma attached to lying, acting as a disincentive in nonpolitical contexts, is lessened in the political context.

B. *Role of the Representative*

Any delegation of authority creates the possibility of a divergence between the preferences (or interests) of the delegating entity and the performance of its representative. Limiting this discrepancy incurs agency costs — essentially the monitoring costs required to keep the agent acting in the interest of the principal.³⁸ A common example is

a. to acquire more information and

b. to assess more information.

4. The expected gains from further information are thought likely to be less than these costs.

ROBERT E. GOODIN, *MANIPULATORY POLITICS* 38 (1980).

33. *Id.* at 37-38.

34. *Id.* at 39.

35. *Id.*

36. See RICHARD G. LIPSEY ET AL., *MICROECONOMICS* 428-29 (9th ed. 1990).

37. GOODIN, *supra* note 32, at 43-44.

38. Professors Jensen and Meckling explain:

In most agency relationships the principal and the agent will have positive monitoring and bonding costs (non-pecuniary and well as pecuniary), and in addition there will be some divergence between the agent's decisions and those decisions which would maximize the welfare of the principal. . . .

Note also that agency costs arise in any situation involving cooperative effort . . . by two or more people even though there is no clear cut principal-agent relationship.

....

... The problem of inducing an "agent" to behave as if he were maximizing the "principal's" welfare is quite general. It exists in all organizations and in all cooperative efforts.

....

Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-09 (1976) (footnotes omitted). See also Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983).

the corporation, where the fiduciary obligation of the corporate officer (agent) "bonds" the agent's actions to the shareholder's (principal's) desires. The cost to the shareholders of policing the corporate officer's decisionmaking is presumably less than the cost of allowing the fiduciary to operate without restraints.³⁹

The political system, by contrast, operates with weaker assurances that the representative will act in the interest of the electorate. The primary enforcement mechanism is the threat of electoral defeat in the next election. Today, that threat is demonstrably minimal; for example, in 1990, for the fourth straight election, over ninety-five percent of the congressional incumbents who ran won reelection despite widespread voter discontent.⁴⁰ Whatever the reasons for this high incumbency rate⁴¹ — many undoubtedly having little or no relation to campaign lies — elected officials enjoy a high level of job security. The failure of voter discontent to translate into electoral removal may allow politicians to lie with relative impunity, compounding the inevitable costs of delegating authority.

Nevertheless, political representatives operate under some constraints. Most would agree that a representative (the agent) ought to respect the expressed desires of her constituency (the principal) and, at the same time, pursue policies she thinks are correct. This dual role of the representative — roughly speaking, that of delegate⁴² and of trustee⁴³ — is a major tension in political theory. Representatives

39. "We define *agency costs* as the sum of (1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss." Jensen & Meckling, *supra* note 38, at 308 (footnote omitted).

40. R.W. Apple, Jr., *Crystal Unclear, Will Tuesday's Disaffection Become Rejection At the 1992 Polls?*, N.Y. TIMES, Nov. 11, 1990, at D1. Similarly high incumbency rates prevail in state legislatures. See, e.g., Kevin Sack, *The 1990 Elections: Legislative Contests; Most Incumbents Win in Races for Legislature*, N.Y. TIMES, Nov. 8, 1990, at B12 (97.8% reelection rate for New York state legislators).

41. In fact, analysts are uncertain as to why the incumbency rates are so high, when much of the electorate expresses discontent. See, e.g., Apple, *supra* note 40; Nancy Gibbs, *Keep the Bums In*, TIME, Nov. 19, 1990, at 32; Robin Toner, *The 1990 Elections: Signals — The Outcome*, N.Y. TIMES, Nov. 8, 1990, at A1. Voter restlessness took its strongest form in the 1990 elections in referenda limiting legislator terms. See Seth Mydans, *The 1990 Elections: California Politicians Reel After a Vote Limiting Terms*, N.Y. TIMES, Nov. 11, 1990, at A26; *Toss the Rascals Out: Just the Rascals*, N.Y. TIMES, Nov. 6, 1990, at A22; Michael Oreskes, *Bush Backs Move for Limiting Terms of U.S. Lawmakers*, N.Y. TIMES, Dec. 12, 1990, at A1.

42. Under the delegate, or mandate, theory the representative gives extreme deference to the wishes of the electorate. See Hanna F. Pitkin, *The Concept of Representation*, in REPRESENTATION 1, 17-18 (Hanna F. Pitkin ed., 1969) ("[Mandate theorists] stress the popular mandate given to a representative by those for whom he acts, his obligation to do what they expect of him, to act as if they were acting themselves."); Heinz Eulau, *The Legislator as Representative: Representational Roles*, in THE LEGISLATIVE SYSTEM 267, 276 (John C. Wahlke et al., eds., 1962) ("All delegates are agreed, of course, that they should not use their independent judgment or principled convictions as decision-making premises. . . . [T]hey seem to imply that . . . consultation [with the electorate] has a mandatory effect on their behavior.").

43. Trustee, or independence, theorists "maintain that the representative must act independently, on his own judgment, that he is selected precisely for his special abilities, and that his job is to adapt and enlarge the constituents' special, separate needs into the national welfare." Pit-

need some leeway to make decisions. They have access to more information than is available to the general population, are able to participate directly in the deliberative process, and are therefore presumably better able to make good choices on behalf of the people whom they represent. At the same time, representatives are expected to respect the wishes of their constituents.

In her seminal book on theories of representation, Professor Hanna Pitkin explains the dilemma:

[T]hese two elements form two opposed sides in a long-standing debate, undoubtedly the central classic controversy in the literature of political representation. The question at issue may be summarized as: Should (must) a representative do what his constituents want, and be bound by mandates or instructions from them; or should (must) he be free to act as seems best to him in pursuit of their welfare?⁴⁴

Pitkin adopts a compromise position: "The formulation of the view we have arrived at runs roughly like this: representing here means acting in the interest of the represented, in a manner responsive to them."⁴⁵

Proponents of the "trustee" theory assert that a representative "has an obligation to look after his constituents, but not to consult or obey them."⁴⁶ This view assumes that the representative is more capable of making a correct decision than is the electorate, due partly to superior information and partly to superior wisdom. Although few legislators would admit to being adherents to the trustee theory, elements of the view survive today.⁴⁷

At the other extreme is the mandate theory, a variation on the delegate theory. A mandate theorist maintains that "true representation occurs only when the representative acts on explicit instructions from his constituents, that any exercise of discretion is a deviation from this ideal."⁴⁸ The mandate conception of representation was present in the early years of the American republic⁴⁹ and was included in many original state constitutions.⁵⁰ While rejecting extreme versions of the mandate theory,⁵¹ Pitkin describes a moderate version.

kin, *supra* note 42, at 18. This view is most closely associated with the writing of Edmund Burke. *Id.* at 20-21.

44. HANNAH F. PITKIN, *THE CONCEPT OF REPRESENTATION* 145 (1967).

45. *Id.* at 209.

46. Pitkin, *supra* note 42, at 21. This does not mean, however, that the trustee ignores his constituents: "Yet even Burke acknowledges that the trusteeship 'must have a foundation in' elections and consultation of the people." *Id.*

47. *See infra* note 53.

48. PITKIN, *supra* note 44, at 146.

49. *See supra* note 20.

50. PITKIN, *supra* note 44, at 149.

51. Adherence to a strict or pure mandate theory seems to exist in only Great Britain, where the parliamentary system focuses more heavily on party platforms or "manifestoes" than does the American political system. *See, e.g.,* CECIL S. EMDEN, *THE PEOPLE AND THE CONSTITU-*

"Very close to the independence position [trustee theory] would be the argument that the representative must do as he thinks best, except insofar as he is bound by campaign promises of an election platform."⁵²

These theories suggest that a workable and reasonable view of the role of the representative includes recognition of both the freedom to make independent decisions and the obligation to respect and, if possible, to follow the expressed interests of the electorate.⁵³ This view of how a political representative *ought* to act suggests that legal mechanisms to hold candidates obligated to *some* of their promises may be sound public policy.

C. False Campaign Promises and the Legal System

Although the harm caused by false campaign promises may be apparent, courts have never been willing to enforce campaign promises, nor punish those who make false campaign promises.⁵⁴ Two distinct legal arguments against punishing or enforcing false campaign promises can be distilled from the limited authority on the issue. First, any restrictions on campaign speech are disfavored as potential First Amendment violations. Second, those few court decisions that discuss claims to enforce campaign promises suggest conclusorily that the claims are inappropriate for the legal system. None of these decisions, however, offers a reasoned explanation for this judicial inability or unwillingness to hold candidates to their words.

TION 315-16 (1956); cf. J.L. Caldwell, *Election Manifesto Promises: The Law and Politics*, 1989 N.Z. L.J. 108.

Vestiges of the mandate theory survive in American political culture as well. See J. Roland Pennock, *Political Representation: An Overview*, in REPRESENTATION 3, 14-16 (J. Roland Pennock & John W. Chapman eds., 1968).

52. PITKIN, *supra* note 44, at 146. Pitkin continues, "At the other extreme is the idea of complete independence, that constituents have no right even to exact campaign promises . . ." *Id.*

53. It appears that this "compromise" view reflects the intuitions of many voters and representatives:

Similarly, commentators who turn to empirical study of the contemporary American political scene find great diversity. Some legislators pronounce themselves as most responsive to the demands of constituency, and some to those of party, while others maintain that they act on their own independent judgment of the national interest. Study of their voting behavior also shows considerable variety. Public opinion polls to determine what the people expect from their representatives show a fairly even division of opinion. The legislators tend to incline toward independence, the people toward mandate, but in each division there is a substantial minority. Empirical investigation is no less ambiguous in its results than the traditional "normative" controversy.

PITKIN, *supra* note 44, at 149 (footnotes omitted). See generally John C. Wahlke & Leroy C. Ferguson, *Rules of the Game*, in THE LEGISLATIVE SYSTEM, *supra* note 42, at 141. Pitkin recognizes that these two theories may never be reconciled. See Hannah Pitkin, *Commentary: The Paradox of Representation*, in REPRESENTATION, *supra* note 51, at 40 ("What is most striking about this problem is the length of time the controversy has been going on without coming any nearer to a solution . . . Now, to me at least, this suggests that there might be a conceptual problem, a philosophical paradox . . .").

54. See *infra* section I.C.2.a.

1. *Constitutionality*

Campaign speech is clearly "political speech" and as such receives the highest form of constitutional protection.⁵⁵ This protection, however, is not absolute. In *Garrison v. Louisiana*,⁵⁶ the U.S. Supreme Court stated that a knowingly false libelous statement by a political official would not enjoy constitutional protection. The court explained:

That speech is used as a tool for political ends does not necessarily 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 premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.⁵⁷

Admittedly, libel is traditionally an "unprotected" category of speech.⁵⁸ The Court, however, has also indicated that some restrictions on nonlibelous political speech may be permissible.⁵⁹

In 1982, the U.S. Supreme Court addressed the issue of campaign promises in *Brown v. Hartlage*,⁶⁰ a Kentucky case in which a candidate for county commissioner promised to serve for less than the statutorily allocated salary for his position. The candidate was unaware, however, that because of an unchallenged statute requiring an elected official to accept his entire salary, he was legally prohibited from fulfilling that promise. As a result, making the promise violated the Kentucky Corrupt Campaign Practices Act.⁶¹ The Kentucky Court of Appeals held that the statute was constitutional, and that the false promise was not constitutionally protected.⁶²

In an opinion by Justice Brennan, the U.S. Supreme Court struck down the *application* of the statute for overbreadth reasons, while leav-

55. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

56. 379 U.S. 64 (1964). *Garrison* held a Louisiana libel statute unconstitutional for not conforming to the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), standard.

57. 379 U.S. at 75 (citation omitted).

58. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

59. Neither *Garrison* nor *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), upon which *Garrison* relied, forbid application of the "knowingly false" standard to nonlibelous statements.

60. 456 U.S. 45 (1982). For an extended discussion of *Brown*, see Paul J. Weber & Delta Felts, *The Strange Case of the Reckless Promise: Reflections on Brown v. Hartlage*, 10 N. KY. L. REV. 227 (1983); see also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1130-31 (2d ed. 1988).

61. KY. REV. STAT. ANN. § 121.055 (Michie/Bobbs-Merrill 1982).

62. 456 U.S. at 50-51.

ing open the possibility that a state may legislate against some misrepresentations: "It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty."⁶³ Brennan explained that the state's "legitimate interest in upholding the integrity of the electoral process" must be considered in light of the "limitations on state authority imposed by the First Amendment."⁶⁴ Without drawing a distinct line,⁶⁵ Brennan at least sketched what types of promises are on the different sides of the line: "Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. But 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive."'"⁶⁶

In *Brown v. Hartlage*, the Court was evaluating a *nonlibelous* false statement of fact — precisely the type of statement considered by this Note. Libelous campaign statements⁶⁷ and false campaign promises share several characteristics. First, each involves a knowing misrepresentation of fact. Second, each statement is intended to deceive the voter. Third, neither is an "essential part of any exposition of ideas" as they each introduce false information into the political debate.⁶⁸ However, the facts underlying the two types of statements are significantly different. A false defamatory statement usually involves an historical fact. In contrast, the falsehood in a campaign promise misrepresents future intention, a "fact" more difficult to prove.⁶⁹ While this may pose a serious evidentiary problem, the harm produced by the two types of speech are sufficiently similar to warrant the same constitutional treatment.

Justice Brennan suggested that the libel standard enunciated in *Sullivan* could also apply to prohibitions on campaign promises: "Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain

63. 456 U.S. at 55.

64. 456 U.S. at 52.

65. "We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given . . . the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment." 456 U.S. at 56.

66. 456 U.S. at 60 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964)).

67. State statutes regulating libelous statements in a campaign are discussed *infra* section IV.A.

68. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); Note, *supra* note 24, at 1278-79 (comparing the state interest in prohibiting libelous statements with the state interest in prohibiting campaign falsehoods).

69. See *infra* section III.B.

paramount.”⁷⁰ The Court used the language of libel law in holding the statute’s application unconstitutional as interpreted, finding “no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not.”⁷¹

The Court’s formulation of the libel law test, “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not,”⁷² fits neatly with the factors used to determine violations of the state statutes discussed in Part IV.⁷³ It would appear, then, that the constitutionality of a statute such as the one recently proposed in West Virginia⁷⁴ remains an open question.

2. Judicial Unwillingness

a. *Case law.* Of the few cases that address broken campaign promises,⁷⁵ most appear to rely on the assumption that the political process better handles these issues than does the judicial system. For instance, in *Williams v. Police Jury of Concordia Parish*,⁷⁶ a Louisiana court refused to give legal weight to a promise made to voters by supporters of a bond proposal. Deciding the case on other grounds, the court stated that “[t]he breach of such promises is to be reckoned with at the ballot box and not in the courts of this state.”⁷⁷ Similarly, in *City of Farmers Branch v. Hawnco, Inc.*,⁷⁸ plaintiffs tried to enjoin a Texas city from considering changes to a zoning ordinance because

70. 456 U.S. at 61.

71. 456 U.S. at 61.

72. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

73. The state libel statutes adhere closely to the *Sullivan* standard. See *infra* section IV.A. The proposed West Virginia statute discussed in section IV.B requires that the candidate “knowingly make a false promise.” However, the proposed statute also includes language applying a negligence standard for “falsity” — “the candidate should reasonably know such promise cannot be carried out” — which is a lower and less constitutionally defensible standard than reckless disregard. See *infra* note 225.

74. See *infra* section IV.B.

75. The only case discovered that directly addresses the enforcement of campaign promises is *O'Reilly v. Mitchell*, 148 N.Y.S. 88 (Sup. Ct. 1914), discussed *infra* notes 124-27 and accompanying text. The court in *O'Reilly* dismissed the case, stating that there was an “absence of any authority” for the proposition. 148 N.Y.S. at 89.

Other cases that indirectly address the legality of enforcing campaign promises include: *State v. Newton*, 328 So. 2d 110 (La. 1976); *Canales v. City of Alviso*, 474 P.2d 417 (1970); *Bush v. Head*, 97 P. 512 (Cal. 1908); *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288 (Tex. Civ. App. 1968); *Williams v. Police Jury of Concordia Parish*, 107 So. 126 (La. 1926); *Concerned Bus. & Prop. Owners v. DeSoto Parish School Bd.*, 528 So. 2d 567 (La. Ct. App. 1988); *Velazquez v. Soliz*, 490 N.E.2d 1346 (Ill. App. Ct. 1986); *Izaak Walton League of Am. v. Monroe County*, 448 So. 2d 1170 (Fla. Dist. Ct. App. 1984).

76. 107 So. 126 (La. 1926).

77. 107 So. at 129 (“Fortunately, promises made to the uncertain voter cannot be accepted in law as binding upon the official conduct or action of members . . . of any other legislative body.”).

78. 435 S.W.2d 288 (Tex. Civ. App. 1968).

certain officials had campaigned on a platform against such changes. While holding that elected officials cannot be precluded from voting on an issue due to a previously made campaign promise, the court said, "In any event public officials are not legally required to keep their campaign promises and whether they do or not they are answerable to the voters at the next election" ⁷⁹

This ability to correct the dispersal of inaccurate and misleading information through the political process depends upon the availability of a public forum and of political opposition to bring campaign misrepresentations to light.⁸⁰ In a situation involving factual misrepresentations of an opponent's record, these conditions may be present and working.⁸¹ When the misrepresentation, however, is one of future intention, and therefore capable of proof only after the election, the corrective and deterrent roles of a strictly political response are weakened.⁸² As a result, political correction does not allow the public to protect itself adequately from false campaign promises.⁸³

Legislatures have cautiously recognized that certain aspects of political campaigns warrant regulation.⁸⁴ Since the mid-1970s, there has been a growing recognition that aspects of the campaign process,⁸⁵

79. 435 S.W.2d at 292. In a similar case, plaintiffs tried to prevent certain commissioners from voting on specific projects, claiming that the commissioners were biased by virtue of their campaign statements in favor of the projects. A Florida court stated:

It is fundamental to our system that the members of . . . any governing body of a political subdivision . . . act . . . in the Aristotelian sense, as politicians. Any supposed errors in the substance of their views or the manner in which their opinions are expressed are therefore ordinarily subject only to relief at the polls, not in the courts.

Izaak Walton League of Am. v. Monroe County, 448 So. 2d 1170, 1171 (Fla. Dist. Ct. App. 1984).

80. "Newsmen and opposing politicians have special reasons for wanting to expose lies." GOODIN, *supra* note 32, at 44; *see also* KAY L. SCHLOZMAN, ELECTIONS IN AMERICA 23 n.36 (1987) ("[T]he media may increase the likelihood that an incumbent will fulfill campaign pledges, since they will criticize him for not so doing.").

81. Interestingly, legal recourse for this aspect of campaign speech presently exists. *See infra* section IV.A for discussion of state statutes regulating false campaign speech attacking an opponent's record. In addition, the common law claim for defamation is available for those whose reputation has been damaged. Note, *supra* note 24, at 1273.

82. *See* GOODIN, *supra* note 32, at 42 ("[Exposing a lie] may take a long time to accomplish. The politician might be out of office by the time his lie has been exposed, so the credibility gap he has created will penalize only his successors.").

83. *See supra* note 40-41 and accompanying text.

84. *See* Note, *supra* note 24, at 1115-17.

Once the structure for elections is created, states could, theoretically, leave all other decisions unregulated; any person desiring to vote could be permitted to do so; no limits need be placed on who could run for office; all campaign activity not violative of criminal and civil laws of general applicability might be tolerated; and the candidate receiving the most votes on election day could be installed as the winner. No state, however, has chosen this option; rather all states extensively regulate a variety of aspects of the electoral process.

Id. at 1115.

It is not clear why courts (and legislatures) should be so reluctant to intervene when a candidate lies, for example, while they are willing to intervene when the candidate misrepresents a financial statement.

85. The campaign process can be distinguished from other elements of the election process, e.g., party nomination rules, voter access, ballot fraud.

including campaign financing, campaign speech, and campaign practices, need regulatory and judicial oversight.⁸⁶ Every state has some form of election law that affects the manner in which campaigns are conducted.⁸⁷ As of 1975, forty-one states and the District of Columbia had statutory provisions allowing courts to hear cases contesting elections.⁸⁸ Although such statutes will never provide full protection from campaign deception, they do serve a necessary and useful role in guarding against the most extreme abuses.⁸⁹

b. Why politics should be different. Reliance solely on the corrective mechanisms of the electoral process to ensure campaign truth is analogous to reliance on the market to ensure the honesty of business people. Courts have long rejected caveat emptor as sufficient legal protection in all transactions.⁹⁰ In particular, courts will intervene on behalf of the buyer when there is evidence of abuse of the bargaining process, such as fraud or coercion.⁹¹ The argument that courts should not intervene in the electoral process says, in essence, "Let the Voter Beware." Rigidly adhering to this doctrine has the same negative consequences as rigidly adhering to caveat emptor.⁹²

For example, the securities markets were historically guided by the doctrine of caveat emptor. For many years, securities had been traded with no federal regulation, allowing the markets to police themselves. In the early 1930s, however, Congress recognized that this self-correcting mechanism was insufficient to protect securities buyers. As a result, Congress passed legislation to require truthful disclosure of in-

86. See Note, *supra* note 24, at 1233-34.

87. See *id.* at 1115; see also Richard F. Neel, Jr., Note, *Campaign Hyperbole, The Advisability of Legislating False Statements Out of Politics*, 2 J.L. & POL. 405 (1985) (examining 17 state statutes prohibiting political libel and slander).

88. Note, *supra* note 24, at 1303 n.24.

89. See Sam J. Ervin, Jr., *Campaign Practices and the Law: Watergate and Beyond*, 23 EMORY L.J. 1 (1974).

90. Although the doctrine of caveat emptor has virtually disappeared in disputes involving the sale of goods, it is still applicable, in a weakened form, in the sale of realty. Leo Bearman, Jr., *Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542 (1961); William D. Grand, *Implied and Statutory Warranties in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L.J. 44 (1986) (attributing decline to judicial establishment of implied warranties); see also Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1186-87 (bemoaning, yet admitting, the decline of caveat emptor).

91. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.9 (1990) ("In a system of contract law based on supposedly informed assent, it is in the interest of society as well as of the parties to discourage misleading conduct in the bargaining process.").

92. See GOODIN, *supra* note 32, at 42.

Parallel to the present claim that citizens will learn from experience to distrust deceitful politicians is the familiar argument that there is no need for public regulation of product quality since consumers will learn from experience to distrust unreliable producers. . . . But where consumers are making major investments in durable goods that are not soon replaced, there is less reason to suppose that consumer learning will suffice to ensure product quality. . . .

The same objection[] might be made against the argument that citizens will learn by experience to distrust lying politicians.

Id.

formation material to securities transactions.⁹³ One can draw an interesting analogy between one element of federal securities law, the proxy statement regulations, and the role of courts in punishing or enforcing campaign misrepresentations.

Prior to the passage of the Securities Exchange Act of 1934,⁹⁴ courts had rarely intervened in proxy disputes.⁹⁵ The doctrine of caveat emptor had controlled in shareholder voting, just as it ostensibly controls in electoral contests today. Congress, in passing the Act, delegated to the Securities and Exchange Commission (SEC) the authority to regulate the solicitation of proxies in elections for membership on corporate boards of directors. The purpose of these regulations was to afford a "fair opportunity for the operation of corporate suffrage."⁹⁶ In 1935, the SEC promulgated a set of proxy rules, the most important of which has become Rule 14a-9.⁹⁷ In a battle for corporate control, any party desiring to use the proxy device may directly contact proxy holders. Theoretically, then, one side could correct any misrepresentation by the other party through dissemination of information. However, insurgents do not have equal access to information resources such as the corporate shareholder lists, and generally have fewer financial resources with which to distribute their message.⁹⁸ Rule 14a-9 was developed in response to this disparity of abilities to deliver information and the resulting opportunity for unchallenged misrepresentations.⁹⁹

93. Securities Act of 1933, 48 Stat. 74 (codified as amended in scattered sections of 15 U.S.C. (1988)); Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. (1988)).

94. Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. (1988)).

95. See Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 226 (1939) ("Prior to the adoption of Section 14 of the Securities Exchange Act of 1934, the solicitation of proxies was controlled, or it might better be described as uncontrolled, by appropriate state law. State statutes and decisions . . . where not completely absent, were vague and doubtful.") (citation omitted).

96. SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947).

97. Rule 14a-9(a) reads:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9(a) (1990).

98. See IV LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 1922 (3d ed. 1990); Note, *Securities and Exchange Commission Regulation of Proxy Contests*, 69 HARV. L. REV. 1462, 1463 (1956).

99. Note, *supra* note 98, at 1464. Loss and Seligman report:

The House report on the 1934 Act stated, albeit at the end of a paragraph that referred mostly to failure to make adequate disclosure, that the bill would authorize the Commission "to control the conditions under which proxies may be solicited with a view to preventing

Battles for corporate control share many similarities with political elections.¹⁰⁰ Large corporations often have as many shareholders as most states have active voters.¹⁰¹ Most importantly, the present management in a proxy battle will typically be able to use corporate funds to deliver its message.¹⁰² Similarly, an incumbent in a political election generally has greater financial resources to devote to his campaign.

These similarities suggest that shareholders and voters face common problems caused by the process of delegating decisionmaking authority to elected representatives. In both cases, to make an effective choice, those voting need truthful and accurate information about their potential representatives. In the corporate context, Congress has determined that the free market does not provide sufficient protection for the shareholder, and therefore the courts should be employed to safeguard the corporate election process. In the same way, courts have a potential role in policing the effective and accurate dissemination of information to voters in the political context.

* * *

In summary, the damage caused by campaign lies is sufficient to suggest that courts ought to examine seriously the possibility of enforcing certain campaign promises, or alternatively punishing certain campaign lies. Further, the limited sort of judicial intervention suggested here is unlikely to violate First Amendment limitations and accords with the present role of the judiciary in other areas of law

the recurrence of abuses which have frustrated the free exercise of the voting rights of stockholders."

IV LOSS & SELIGMAN, *supra* note 98, at 1396 n.36 (quoting H.R. REP. NO. 1383, 73d Cong., 2d Sess. 13-14 (1934)).

Loss and Seligman explain the basic operation of Rule 14a-9:

The basic questions are whether a particular statement or omission is false and misleading and whether the statement or omission is material. These two questions tend to merge here as they do in other fraud provisions both under the federal securities law and at common law

....

One side's omissions are not cured by the other side's disclosures. Similarly, one's omissions are not automatically excused by his own disclosure in an earlier communication.

....

In considering what is false or misleading there is some indication that a degree of freedom is permitted in proxy fights along the lines of the traditional concept of "puffing."

IV LOSS & SELIGMAN, *supra* note 98, at 2053-57.

100. See *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1971) ("It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of . . . the Securities and Exchange Act of 1934 to give true vitality to the concept of corporate democracy.").

101. For example, on December 31, 1988, AT&T had 2,702,000 common stockholders of record, N.Y. STOCK EXCH. FACT BOOK 1989, at 36 (1989), more than the number of registered voters in 32 states. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 263 (110th ed. 1990).

102. See EDWARD R. ARANOW & HERBERT A. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 547 (2d ed. 1968) ("One of the most important advantages available to management in a proxy contest is its ready access to the corporate treasury to defray many of the expenses of waging the contest.").

historically avoided by the courts. The remainder of this Note explores the legal tools potentially available for enforcing campaign promises or punishing campaign lies.

II. CONTRACT CLAIM

This Part argues that, under commonly accepted contract doctrine, some campaign promises should create contractual obligations. Application of the bargain theory of contract formation and the doctrine of promissory estoppel demonstrates that some campaign promises satisfy all the elements of a successful claim for breach of contract. This Part concludes, however, that a breach of contract claim is the least appealing of the legal tools available to redress knowingly false campaign promises, because of difficulties in crafting an appropriate remedy.

A. *Bargain Theory*

The first objective of contract law is to decide which promises the legal system ought to enforce.¹⁰³ Although most contract claims arise in commercial contexts, courts will hold parties to noncommercial promises as long as certain requirements are satisfied. These requirements take the form of the "bargain theory of consideration."¹⁰⁴

The *Restatement (Second) of Contracts* defines a bargain as an "agreement to exchange promises or to exchange a promise for a performance or to exchange performances."¹⁰⁵ A common campaign promise takes the form of an offer for a unilateral contract, in which a promise is made contingent on some performance.¹⁰⁶ For instance, a candidate might say, "If you vote for me, I promise to build a pool in the neighborhood for your children." Contrast this campaign promise to an offer for a unilateral contract in a commercial context: "If you pay me \$1000, I promise to build a pool in the neighborhood for your children." These two promises are distinguishable (1) by the performance required to bind the promisor, (2) by the contractual intentions of the parties, and (3) by the role in society of the promisor.

103. "The law of contract is for the most part the law of promises. Therefore, the first great question of contract law . . . is, what kinds of promises should the law enforce." Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); see also 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 210 (1963) ("In the law of contracts, the central and the inevitable problem is that of enforceability of promises.").

104. See GRANT GILMORE, THE DEATH OF CONTRACT 14-21 (1974), for the evolution of bargain theory.

105. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981); see also RESTATEMENT (SECOND) OF CONTRACTS § 71 ("A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

106. See FARNSWORTH, *supra* note 91, at 43 ("Sometimes, however, the consideration is not a return promise but some performance by the promisee, as when a seller delivers apples in return for a buyer's promise to pay at the end of the month.").

1. *Performance Required To Bind the Promisor*

To create a binding unilateral contract, performance by the promisee constitutes consideration.¹⁰⁷ In the commercial example above, the consideration is the payment of \$1000. In the political example, the act of voting is the consideration. The candidate has bargained for the vote by promising future performance.¹⁰⁸ The consideration could take other forms,¹⁰⁹ such as a public endorsement or volunteer time. In each case, the performance would satisfy the doctrinal requirements of consideration.

Characterizing a vote as adequate consideration raises a difficult but surmountable public policy challenge to a successful breach of contract claim. If, rather than asking for a vote, a candidate or an elected official were to suggest, "If you pay me \$1000, I will have the City build a pool in your neighborhood," she would be requesting a bribe or illegal gratuity, a transaction illegal under common law,¹¹⁰ federal law,¹¹¹ and most state statutes.¹¹² Similarly, if a candidate paid a voter cash for his vote, she would be making a bribe or illegal gratuity.¹¹³ Bribes are prohibited to prevent elected officials and voters from using their public trust for private purposes.

At some point, however, an individual elected official's (or voter's) exercise of this "public trust" in his own self-interest becomes acceptable at law. Clearly there are some promises that a politician makes that inure to the benefit of the voters, are made to induce their support, and do not constitute bribes. For example, in *State v. Newton*,¹¹⁴ the Louisiana Supreme Court interpreted an antibribery statute to exclude certain promises: "a platform promise of better government,

107. *Id.*

108. "Virtually anything that anyone would bargain for in exchange for a promise can be consideration for that promise." FARNSWORTH, *supra* note 91, at 42-43. Consideration for a promise does not have to be of equal value to the promise, so the value of a vote is irrelevant to this inquiry. See RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. c ("Ordinarily, therefore, courts do not inquire into the adequacy of consideration, particularly where one or both of the values exchanged are difficult to measure."). Even if it were relevant, however, it is clear that to the politician seeking election, a vote is of great value.

For a case in which a court considers a vote for a merger proposal as consideration, see *Schreiber v. Carney*, 447 A.2d 17 (Del. Ch. 1982).

109. "The performance is usually the doing of something — some affirmative act, such as the delivery of apples or the payment of money. But it may also be the refraining from doing something — some inaction, such as the forbearance from collecting a debt." FARNSWORTH, *supra* note 91, at 43.

110. See *Perrin v. United States*, 444 U.S. 37, 43 (1979).

111. 18 U.S.C. § 201 (1982); 18 U.S.C. § 666 (Supp. III 1985). See Robert L. Freeman, Jr., *Bribery*, 24 AM. CRIM. L. REV. 415 (1987), for a survey of federal bribery offenses and their application ("Any direct or indirect action to give, promise or offer anything of value to a public official or witness, or an official's or witness' solicitation of something of value is prohibited as a bribe or illegal gratuity.").

112. See Freeman, *supra* note 111, at 110.

113. See *id.* at 415.

114. 328 So. 2d 110 (La. 1976).

lower taxes, or welfare reform made generally to a group of voters or to individual voters is not bribery within the meaning of the statute."¹¹⁵

The casting of a ballot, the public endorsement of a candidate, and the support as a volunteer campaign worker¹¹⁶ are not considered bribery, yet they do confer value onto the candidate.¹¹⁷ In a commercial context, these acts would constitute consideration, and therefore are sufficient to create a binding obligation on the promisor. Analogous, legally valid promises are common. For instance, celebrities are legally paid to endorse products. In addition, courts recently have held that vote buying in a corporate merger contest may be legal activity, absent fraud.¹¹⁸ These examples of "performance" are no different in form than the "performance" requested in a campaign promise. Therefore, if contracts between voters and elected officials are to be held invalid, it must be for a reason other than the nature of the performance rendered.

2. *The Contractual Intentions of the Parties*

Under the bargain theory, parties need not demonstrate an intention to be legally bound. According to the *Second Restatement*, "[n]either real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."¹¹⁹ One commentator writes that circumstances

115. 328 So. 2d at 118.

116. For a case dismissing a contract claim based on a promised job, see *Brill v. Wagner*, 161 N.Y.S.2d 490 (Sup. Ct. 1957). The case, however, was dismissed for public policy reasons, rather than for lack of consideration. ("The Court can only sympathize with the plaintiff and note that the numbers of those suffering from similar situations are legion all over the land. However, . . . such promises and representations cannot give rise to any cause of action for damages, being against public policy and ultra vires.") 161 N.Y.S.2d at 493.

117. Yet some "consideration" in exchange for the promise of action by an elected official rises to the level of a bribe. Clearly cash payments for political favors rise to that level. Just as clearly, cash payments in the form of campaign contributions are legal, encouraged, and are a protected form of political speech. See *Buckley v. Valeo*, 424 U.S. 1 (1976). Presumably, these contributions are not tied to specific promises by the politician; instead contributions are made on the basis of political considerations as to who is the "best" candidate. Legally, then, the distinction between a bribe and a campaign contribution is the absence of a quid pro quo in the latter.

In contrast, the hypothetical campaign promise is phrased in the terms of a quid pro quo, as the candidate specifically conveys the impression that the voter will receive something of value. An interesting question beyond the scope of this Note is whether a contributor who expects a politician to behave in a certain fashion could ever have a claim for promissory estoppel, having reasonably relied upon the candidate's assertions and past history.

118. *Schreiber v. Carney*, 447 A.2d 17 (Del. Ch. 1982) ("[T]he rationale that vote-buying is, as a matter of public policy, illegal per se is founded upon considerations of policy which are now outmoded as a necessary result of an evolving corporate environment.").

119. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1979); see also FARNSWORTH, *supra* note 91, at 172-73 ("Under the objective theory, a court will honor that intention if the other party has reason to know it. And it will honor it if the other party actually knows it.").

may indicate that the requisite intention exists: "The easiest way for a party to make clear his intention not to be legally bound is to say so."¹²⁰ Common illustrations of this doctrine include agreements between family members,¹²¹ agreements made as a "frolic and banter,"¹²² and agreements of a social nature.¹²³

At least two leading contract hornbooks and one casebook use *O'Reilly v. Mitchell*,¹²⁴ a breach of contract case based on a broken campaign promise, to illustrate the "intention not to be bound" doctrine.¹²⁵ In *O'Reilly*, a plaintiff taxpayer/voter sued to enjoin the mayor of New York City from altering the City's Civil Service Law, alleging that the mayor was breaching "ante-election pledges, promises, and representations made to the voters during the campaign."¹²⁶ In its dismissal of the claim, the court made no mention of the "intention not to be legally bound," doctrine, stating instead:

The authorities cited by the learned counsel for the plaintiff do not in the remotest degree tend to establish the remarkable proposition that a contract may be predicated upon ante-election promises. . . . The student of politico-legal science may discover a fertile field for research and thought in the study of the interesting question as to whether any legal method may be devised for compelling public officials to live up to the platforms of principles upon which they are elected. . . .¹²⁷

O'Reilly is the only case discovered that addresses this claim. Commentators who use the campaign promise as an example of "intention not to be bound" beg the question whether any such intention should be inferred.

Courts understandably address intrafamily promises and promises of a clearly social nature with reluctance. It is not clear that the same

120. FARNSWORTH, *supra* note 91, at 117.

121. See *Balfour v. Balfour*, [1919] 2 K.B. 571, 578-79 ("[A]rrangements made between husband and wife . . . are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences.").

It is clear, however, that the court was also reluctant to inject itself into intrafamily affairs. 2 K.B. at 579 ("In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."); see also *Miller v. Miller*, 42 N.W. 641, 642 (Iowa 1889) ("[J]udicial inquiry into matters of that character, between husband and wife, would be fraught with irreparable mischief, and forbidden by sound considerations of public policy.").

122. See *Keller v. Holderman*, 11 Mich. 248, (1863) ("When the court below found as a fact that 'the whole transaction between the parties was a frolic and banter . . . ' the conclusion should have been that no contract was ever made by the parties . . . "). But see *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954) (applying the objective theory of assent to uphold a contract when one party did not know, and had no reason to know, that the other party was joking).

123. *Mitzel v. Hauck*, 105 N.W.2d 378 (S.D. 1960) (agreement between friends regarding use of a car on hunting trip).

124. 148 N.Y.S. 88 (Sup. Ct. 1914).

125. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 30 n.4 (3d ed. 1987); FARNSWORTH, *supra* note 91, at 119; JOHN H. JACKSON & LEE C. BOLLINGER, *CONTRACT LAW IN MODERN SOCIETY: CASES AND MATERIALS*, 306 (2d ed. 1980).

126. 148 N.Y.S. at 88.

127. 148 N.Y.S. at 89.

policy reasons apply to political statements.¹²⁸ Treating political promises in the same way as agreements between hunting buddies or as a “frolic and a banter” is cynical and describes the problem, rather than solves it.

More importantly, neither elected officials nor the electorate makes any outward demonstration of an intention not to be bound, nor do circumstances necessarily suggest such an intention. In fact, politicians sometimes will go out of their way to create the impression that *their* promise is not like other political promises. Even if one accepts that in the standard rhetorical context campaign promises are not intended to create legal obligations, persuasive activity by the candidate should change the analysis. By taking steps to persuade the electorate that her statements are not the typical political statement, the candidate is arguably moving away from a “frolic and banter”¹²⁹ to a deception.¹³⁰ In such a circumstance, a candidate should not be allowed to hide behind her supposed lack of intention to be bound.

3. *The Role in Society of the Promisor*

Courts do not ordinarily consider personal or professional characteristics of the parties in determining whether to enforce a contract.¹³¹ Instead, courts assume all parties are rational actors, pursuing their self-interest at arm's length. Therefore, a court must have a compelling reason to hold a contract formed by a campaign promise invalid solely because it was made by a politician.

In some instances, the courts or the legislature has determined that, for public policy reasons, specific classes of parties should not be allowed to enter binding contracts.¹³² For instance, infants who lack the intelligence and experience necessary to protect their interests are considered lacking in the capacity to enter a contract.¹³³ Evidence of unequal bargaining power suggests “elements of deception or compulsion”¹³⁴ preventing the weaker party from protecting his interests. To argue that a politician, because she is a politician, is somehow incapable of entering a binding contract is to suggest that she is unable to protect her own interests. This, of course, is not our objection to such contracts.

128. See generally *supra* Part I.

129. See *Keller v. Holderman*, 11 Mich. 248 (1863); *supra* note 122.

130. See *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954); *supra* note 122.

131. See FARNSWORTH, *supra* note 91, at 213-14 (“Even though individuals differ markedly in their ability to represent their own interests in the bargaining process, a person is generally assumed to have full power to bind himself contractually.”).

132. *Id.* at 214 (“Two principal kinds of defects are today recognized as impairing the power to contract: immaturity and mental infirmity.”).

133. See CALAMARI & PERILLO, *supra* note 125, at 305.

134. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1979); see also *McKinnon v. Benedict*, 157 N.W.2d 665 (Wis. 1968).

B. *Promissory Estoppel*

A second doctrine by which campaign promises may be found to create contractual obligations is promissory estoppel or "reliance."¹³⁵ A relatively new doctrine,¹³⁶ promissory estoppel emerged out of a recognition that sometimes a promise should be enforced even though the promise was not bargained for.¹³⁷ Today, it is commonly recognized as a separate and distinct route to contract formation.¹³⁸ Promissory estoppel is most clearly understood as the enforcement of a donative promise¹³⁹ due to detrimental reliance by the promisee.¹⁴⁰ A campaign promise can be characterized as a donative promise when there is no return action demanded of the voter but the voter can reasonably be expected to act based on the promise.

This portion of the Note applies the elements of a promissory estoppel claim to a hypothetical breached campaign promise. In particular, analysis will focus on two questions: (1) Was there a promise that the promisor should reasonably expect to induce action or forbearance on the part of the promisee; and (2) Did the promise induce such action or forbearance?¹⁴¹

1. *A Hypothetical Campaign Promise*

Imagine an election for one vacant seat on the Mayberry City Council, a legislative body with sole land use decisionmaking authority. The single most important issue in the campaign is the placement of a much needed town dump. Although all voters agree a dump is needed, each neighborhood wants it put somewhere else. Mayberry

135. For evolution of nomenclature, see CALAMARI & PERILLO, *supra* note 125, at 274.

136. Scholars date the emergence of promissory estoppel as an accepted doctrine at the publication of the *First Restatement of Contracts* in 1932. See Eisenberg, *supra* note 103, at 19.

137. See Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 347 (1969) ("[B]argain is not essential to reliance theory. . . . The factual element of reliance cuts across bargain lines, and may, in the absence of bargain, serve as a separate basis for imposing contract obligations.").

138. See CALAMARI & PERILLO, *supra* note 125, at 272. For an argument that promissory estoppel is not only a distinct form of contract law, but an independent, noncontractual, theory of recovery, see Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983).

139. See Eisenberg, *supra* note 103, at 1.

140. According to the *Second Restatement*:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979); see also Henderson, *supra* note 137, at 344 n.4.

141. See Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 460 (1950). Boyer adds to the claim a third element: "Can injustice be avoided only by enforcement of the promise?" He suggests, however, that this element augments the analysis performed by the application of the first two elements, *id.* at 482-84; see also Eisenberg, *supra* note 103, at 23 (arguing that this element was intended to address the issue of whether expectation or reliance damages should be awarded).

Heights is one of the two proposed locations; the other is adjacent to the South Fork Country Club golf course. The other members of the council, who are not up for reelection, are evenly split. Below is an excerpt from a speech given by Floyd the Barber, who is one of two candidates running for the seat, to a crowded meeting of the Mayberry Heights Neighborhood Association:

As you all know, whoever wins this election will be the swing vote on the placement of the new dump. As you also know, my opponent, Sheriff Andy Taylor, has said that he has not made up his mind where the dump should be placed. He says he needs more information. Well let me tell you, I have made up my mind. Today, I promise you that if I receive the endorsement and support of the Mayberry Heights Neighborhood Association, and am elected to the City Council, I will never vote to place the dump in this neighborhood. Read my lips: No New Garbage.

You all know me. I am not a politician. I am a businessman. I know the meaning of a promise; how to close deals on a handshake. Ask anyone in the county, when you have Floyd's word, you have a firm commitment.

The Neighborhood Association endorses Floyd. He distributes literature containing their endorsement. The Neighborhood Association mails a flier to all voters in the district that reads "Vote Floyd the Barber for City Council. He has cut your hair, now let him cut your taxes. Most importantly, he is the one candidate who has promised to keep the dump out of Mayberry Heights. Floyd on the City Council will keep the smell down and your *property values up*."

Floyd is elected to the City Council by a slim margin. The day after the election, Mayberry Heights resident Aunt Bea rejects a \$100,000 offer for her house, assuming that without the dump in the neighborhood, property values will remain high. Gomer the auto mechanic quickly purchases the house next to Aunt Bea for \$110,000, assuming that prices will remain stable. One month later, Floyd votes, without explanation, to place the dump in Mayberry Heights. Encountering irate Mayberry Heights homeowners outside City Hall, Floyd's campaign manager, Opie Cunningham, was heard snarling, "What are you going to do, sue him?" The next day, Aunt Bea's and Gomer's properties have dropped in value to \$80,000.

2. *Application of the Elements of Promissory Estoppel*

a. *There was a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee.*¹⁴²

142. "[One] must first determine whether the words involved constitute a promise, as distinguished, for example, from an expression of good will or of anger or jest." Boyer, *supra* note 141, at 461.

Some courts, however, do not require even a clearly stated promise. See, e.g., *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770, 774 (Ala. 1976) ("An express promise is not necessary to establish a promissory estoppel. It is sufficient that there be promissory elements which would lull the promisee into a false sense of security.").

Floyd promised to vote against the dump in Mayberry Heights. He was not merely stating a "future intention";¹⁴³ he was pledging to "conduct himself in a specified way or bring about a specified result in the future."¹⁴⁴ He made statements specifically to dispel the skepticism that usually greets political speech, and to convince the audience that he was committing himself in a "solemn" fashion.

Floyd should reasonably have expected his promise to induce action or forbearance. Determining whether action or forbearance should be expected requires the application of a "reasonable person" standard, "in the light of all the facts and circumstances as they were then known to him."¹⁴⁵ Assuming he was rational and acting in his self-interest, Floyd not only reasonably *expected* action on the part of the Association, he purposefully induced such action. The promise only makes sense as an attempt by Floyd to convince the homeowners that supporting him would maintain their property values.¹⁴⁶

Floyd's promise is analogous to the promise in *Mazer v. Jackson Insurance Agency*,¹⁴⁷ in which a developer mailed a memorandum to a group of homeowners promising that a particular plot of land bordering the homeowners land would be left undeveloped as a "buffer zone."¹⁴⁸ Relying on that promise, the homeowners ceased lobbying the county legislature, thereby allowing a zoning change permitting the development.¹⁴⁹ Subsequently, the developer announced plans to build on the buffer zone, in direct breach of the earlier promise.¹⁵⁰ The court held that the developers were liable because they "intended that the residents . . . cease their opposition . . . in reliance on the assurances stated in the memorandum."¹⁵¹ In the same way, Floyd intended reliance by the Neighborhood Association and individual homeowners in the form of endorsements and votes. In addition, he should have reasonably expected that the homeowners would make economic decisions regarding their property based on his promise.

b. The promise induced such action or forbearance. At least five

143. See CALAMARI & PERILLO, *supra* note 125, at 272.

144. CORBIN, *supra* note 103, at § 13.

145. Boyer, *supra* note 141, at 462.

146. See *id.* at 464 ("Sometimes the promisor should expect his promise to cause a change in the economic activities of the promisee. . . . Indeed, these precise acts by the promisees were to be expected if they were to enjoy the fruits of the promise.").

147. 340 So. 2d 770 (Ala. 1976).

148. [I]t will be our desire and purpose to develop this property in a manner which would be an asset to all of the surrounding property owners and after the studies made by our Engineer and Architect, you, the property owners, may much prefer what we propose than [the present buffer zone], but if there should be a change from [the buffer zone], 90% of you people would have to agree.

340 So. 2d at 771.

149. 340 So. 2d at 774.

150. 340 So. 2d at 772.

151. 340 So. 2d at 774.

distinct acts or forbearances can be attributed to Floyd's promise: (1) the endorsement and mailing of a letter by the Neighborhood Association; (2) the forbearance of support for Floyd's opponent by the Neighborhood Association; (3) the casting of ballots by individual members of the Neighborhood Association; (4) Aunt Bea's decision not to sell her home; and (5) Gomer's decision to buy a home in the neighborhood. To satisfy the requirement that Floyd's promise "induced" these actions and forbearances, a sufficient causal relationship must be established.¹⁵²

The first two examples are analogous to the actions taken or not taken by the homeowners in *Mazer*. In each case, the use of organized political power was influenced by the relevant promises. The *Mazer* court stated:

Regardless, however, of the actual effect of the elimination of the opposition, the Homeowners' ceasing to exercise their right to lobby against proposed legislation before their elected representatives was forbearance of a definite and substantial character. After all, our representative form of government is based on the assumption that the voice of the electorate carries substantial weight with its representatives.¹⁵³

The Neighborhood Association's support of Floyd, and the third instance of reliance, the casting of ballots, were also exercises of rights of a "definite and substantial" character.¹⁵⁴ The latter two examples of induced reliance are easy cases. Both Aunt Bea and Gomer made financial decisions due to Floyd's promise that the dump would be placed elsewhere.¹⁵⁵

Floyd could assert the contract defense of changed circumstances or impossibility.¹⁵⁶ If, for example, at the time he made the promise, there was an alternative to the Mayberry Heights site, which subsequently discovered facts proved impossible to develop, Floyd would

152. "If one causes another to act in a particular way he furnishes a justifiable basis for intervention by the court. Absent such cause-effect relationship there appears to be no acceptable justification for imposing contractual liability on the gratuitous promisor." Boyer, *supra* note 141, at 470-71.

153. 340 So. 2d at 774.

154. The requirement of "definite and substantial character" was included in § 90 of the *First Restatement* but was omitted from the *Second Restatement*. However, *Restatement (Second)* § 90, comment b states that these are still factors to be considered. See CALAMARI & PERILLO, *supra* note 125, at 273.

155. It does not matter, in terms of promissory estoppel, whether the reliance that occurred was the reliance desired by the promisor. FARNSWORTH, *supra* note 91, at 95 ("[T]he promisor must have had reason to expect the reliance that occurred, although he might not have sought it. . .").

In the hypothetical, it is clear that Floyd's vote was the decisive one in determining the placement of the dump. In any real life situation, causality questions will arise about the politician's ability to actually control events. This problem is addressed *infra* section II.C.

156. See Taylor v. Caldwell, 3 B.& S. 826, 122 Eng. Rep. 309 (K.B. 1863); FARNSWORTH, *supra* note 91, at 678 ("The new synthesis [of the doctrine of impossibility] candidly recognizes that the judicial function is to determine whether, in the light of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty of performance.").

not be bound to fulfill his obligation. Clearly, the availability of this defense would be crucial. Otherwise, Floyd would have to act other than in the best interests of the citizenry to avoid a breach of contract claim. Requiring officials to fulfill foolish campaign promises in this way places an unwise restriction on the ability of officials to adapt and respond to changing events.¹⁵⁷

C. Remedies

Crafting an appropriate remedy would create the most problematic obstacles to enforcing contract claims created by campaign promises. This portion of the Note examines two of the remedies available for breach of contract claims, specific enforcement and monetary damage awards,¹⁵⁸ and concludes that neither is adequate to compensate the public for damage resulting from misleading and false campaign promises.

The standard contract remedy protects the promisee's expectation interest, "which is his interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract been performed."¹⁵⁹ One method of providing the "benefit of his bargain" is to force the breaching party to perform precisely what she promised. Although courts have traditionally viewed specific performance as a secondary remedy, available only when monetary damages are inappropriate,¹⁶⁰ it is commonly applied in disputes over real property.¹⁶¹ If a private party promises to build a neighborhood pool, or promises not to build in a certain location, a court would likely award specific performance rather than monetary damages.¹⁶²

Specific performance is not, however, an adequate remedy when the breaching party is a governmental body. Although the candidate may have made his promise as a private citizen, once in office, he is an agent of the government. Forcing him to take a specific action in order to protect the legal expectations of a hard-to-define subgroup of the electorate¹⁶³ would be an inappropriate subjugation of the rights of other members of the electorate.¹⁶⁴

157. See *infra* note 164 for similar arguments against estopping the government.

158. See RESTATEMENT (SECOND) OF CONTRACTS § 345 (1979).

159. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1979).

160. FARNSWORTH, *supra* note 91, at 821.

161. *Id.* at 829 (stating that because land is unique, money damages would of necessity be speculative).

162. For instance, the court in *Mazer* enjoined the developers from building on the "buffer zone," thereby specifically enforcing the actual agreement. 340 So. 2d at 774-75.

163. With respect to any one promise, some of the candidate's supporters may have relied on that promise, others may have relied on a different promise, and still others on none of his promises.

164. The rationale denying specific performance for broken campaign promises is similar to that generally rejecting estoppel of the government. According to one commentator, "courts have reasoned that executive responsibilities for adapting and correcting regulations and proce-

A second method of satisfying the breached party's interest¹⁶⁵ is to require the breaching party to pay the plaintiff monetary damages. This is, of course, the preferred judicial approach to remedying breaches of contractual obligations.¹⁶⁶ Determining a monetary figure for the voter's expectation interests in the hypothetical is fairly straightforward.¹⁶⁷ In the swimming pool hypothetical, the expectation interest of the voters is the value of a swimming pool, which can be calculated by determining the cost of arranging a substitute transaction.¹⁶⁸ In the town dump hypothetical, the expectation interest of the Mayberry Heights Neighborhood Association may be impossible to calculate, but the financial loss to each homeowner is quite clear.¹⁶⁹

Although assessing the amount necessary to satisfy the breached party's claims may be feasible, determining who should pay that amount may be impossible. Three legal entities could conceivably be required to satisfy the award: the candidate, the governmental body to which he was elected, or his campaign committee.

First, the candidate could be held personally liable in his private capacity. This is particularly appealing in a promissory estoppel claim, since the act of promising that caused the reliance was performed by the candidate on his own behalf. Nonetheless, this approach presents significant problems. The danger of personal liability, while undoubtedly an incentive for caution in the making of promises, would deter some worthwhile, but less well-financed, candidates.¹⁷⁰

dures might be impaired if estoppel could be used to block the retroactive implementation of such changes." David K. Thompson, Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 554 (1979). The Supreme Court endorsed this general principle in *Heckler v. Community Health Services of Crawford County, Inc.*: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." 467 U.S. 51, 60 (1984).

The need to protect those in the citizenry who were not party to the contract should not excuse the elected official from liability. Instead, the official may have conflicting legal obligations. His situation would be analogous to a contractor who signs two construction contracts for the same time period, but cannot complete both. In that situation, the contractor must breach one of the contracts, and provide a remedy other than specific performance to the breached party. Similarly, an elected official with conflicting legal obligations would have to breach one contract. In such a case, the legal system would require specific performance of those duties that attach to the office, and require another form of remedy for the satisfaction of the expectations of the breached party.

165. Of course, in the hypothetical, arguments may be made for both expectation and reliance damages. For the purposes of this discussion, however, any distinction between the two figures is irrelevant.

166. RESTATEMENT (SECOND) OF CONTRACTS § 346, cmt. a (1979).

167. Certainly no more difficult than determining the expectation interest in many commercial contract breaches.

168. See RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1979).

169. See RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. b (1979). Of course, this hypothetical is designed to contain calculable monetary damages. More likely is a scenario with incalculable damages, which is a major flaw in the contract theory.

170. This problem also arises in the corporate context, where fear of director liability is so great that indemnification insurance is quite common. See generally JOSEPH W. BISHOP, THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE

Even the cost of a neighborhood swimming pool could easily deplete whatever private resources the candidate may have.

In addition, because an action for breach of contract would apply when a candidate unknowingly misleads, requiring payment of damages may be too harsh a punishment. Although the candidate may be responsible for creating reasonable expectations, he is not "culpable" in the same way, as he has not exhibited "scienter,"¹⁷¹ as does one who knowingly misleads.¹⁷²

Second, the governmental body to which the candidate was elected could be held liable. This approach has the advantage of attacking the deepest pockets available. Nevertheless, requiring payment by the government leads to encounters significant public policy and legal problems. Paying individual contract claims out of the public fisc would in effect redirect public money to specified private individuals. This redistribution violates the basic premise that the legislature, not the courts, should determine dispensation of the government budget. In addition, there is the danger of an excessive number of damage awards.¹⁷³ Finally, this approach would require taxpayers to pay for the candidate's misdeeds, thwarting any deterrence effect of the judgment.

A third source for the payment of damage awards, and in some ways the most appealing, is the candidate's campaign committee. Campaign committees are legal entities capable of entering into contracts during the campaign, and oftentimes remain in existence after the campaign concludes. In many cases, the promise that created the obligation may have been communicated in an advertisement paid for and authorized by the campaign committee. Furthermore, campaign committees have been granted standing to claim libel in a political context.¹⁷⁴ Similarly, an aggrieved party could bring an action against a committee, assuming the committee itself had made the actionable promise.

In summary, these problems in crafting an adequate remedy make

¶ 1.01[2] (1981) ("[T]he corporation, if it is to find people willing to serve on its board, must give them some assurance that, in proper cases, the burden of liability and litigation costs will be shifted to its own broader shoulders.").

171. See *infra* section III.B.

172. The availability of the defense of changed circumstances, discussed *supra* notes 156-57 and accompanying text, might render this distinction meaningless. If a candidate breaks a promise because he learns new information, he would not have scienter, and would have the defense of changed circumstances. A different result might occur, however, if the candidate *should* have known about the new information.

173. Furthermore, promises a candidate made prior to the election are arguably ultra vires and not binding on the governmental body. See *Brill v. Wagner*, 161 N.Y.S.2d 490 (Sup. Ct. 1957) (promise of employment as consideration for volunteer campaign work ultra vires and not binding on the government).

174. *Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers*, 674 P.2d 1159, 1162 (Or. 1983) ("[P]laintiff committee was an aggrieved party under [statute] to bring an action for a false statement about its candidate.").

the contract claim an unappealing vehicle for dealing with broken campaign promises. A separate conceptual problem with the contract claim exists as well. The objective of this Note is less compensating those harmed — the objective of contract remedies — than it is deterring false promises. Therefore, the next two Parts examine tort law and statutory reform, where deterrence is more clearly an appropriate objective.

III. TORT CLAIM

This Part explores the potential for holding candidates liable for the tort of deceit¹⁷⁵ when a candidate knowingly misrepresents her future intention. It concludes that the elements of the tort of deceit are satisfied, but as with the contract claim, the assessment of damages poses a major obstacle.

The *Restatement (Second) of Torts* defines the tort of deceit:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.¹⁷⁶

The tort of deceit arises in some situations that also involve breach of contract claims, particularly promissory estoppel claims. While procedural differences may favor one claim over another,¹⁷⁷ the primary

175. The terms "deceit" and "misrepresentation" in this context are synonymous. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 726-27 (5th ed. 1984). For the purposes of this Note, "deceit" refers to the tort claim and "misrepresentation" refers to the statement by the candidate.

176. RESTATEMENT (SECOND) OF TORTS § 525 (1976). For purposes of analysis, this Part will examine five distinct elements as defined by Prosser:

The elements of the tort cause of action in deceit . . . have been stated as follows:

1. A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
2. Knowledge or belief on the part of the defendant that the representation is false — or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of "scienter."
3. An intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation.
4. Justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it.
5. Damage to the plaintiff, resulting from such reliance.

KEETON *supra* note 175, at 728 (citations omitted).

177. In a case in which the Statute of Frauds barred contract recovery on a broken oral promise, the New York State Court of Appeals stated:

The present action is in tort, not contract, depending not upon agreement between the parties, but rather upon deliberate misrepresentation of fact, relied on by the plaintiff to his detriment. In other words, the "legal relations" binding the parties are created by the utterance of a falsehood "with a fraudulent intent" and by reliance thereon . . . and the cause of action is entirely "independent of contractual relations between the parties." . . . [O]ne who fraudulently misrepresents himself as intending to perform an agreement is subject to liability *in tort* whether the agreement is enforceable or not.

Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 151 N.E.2d 833, 836 (N.Y. 1958) (citations omitted).

doctrinal distinction is the element of "scienter," or knowledge of falsehood. The presence of this element makes the tort claim a more persuasive case for personal liability.

For the purposes of this analysis, reconsider the Mayberry Heights hypothetical, adding the following facts. Two days before making his promise to the Mayberry Heights Neighborhood Association, Floyd the Barber sent a message to Mr. J.R. Potter, President of the South Fork Country Club. The ninth green of the country club golf course is adjacent to a second possible site for the Mayberry town dump. Floyd, eager for the support of the country club members, wanted to assure Mr. Potter that if elected to the city council, he would vote to place the dump in Mayberry Heights and not adjacent to the South Fork course. Floyd wrote the following message:

In a few days there will be a meeting of the Mayberry Heights Neighborhood Association. I will stand before them and promise to vote against the dump in their neighborhood. My consultants say this is necessary to win. But don't worry, when it comes time for the vote, I will stick the dump in their backyard. What do I care. Four years from now, there won't be anyone left in Mayberry Heights to vote against me anyway.

Floyd gave the note to his campaign assistant, Goober, and told him to deliver it to Mr. Potter. On the way to the South Fork course Goober, a lifelong resident of Mayberry Heights, secretly made a photocopy of the note. The remainder of the hypothetical occurs as stated in Part II. Floyd is elected and votes to place the dump in Mayberry Heights.

The following analysis demonstrates that Floyd committed the common law tort of deceit by knowingly misrepresenting his future intention. Although this revised hypothetical also satisfies the elements of the contract claim as discussed in Part II, the tort claim is preferable because it more closely addresses the real harm of campaign lies — the voters' lost opportunity to make a choice which truly reflects their interests.

A. *False Representation of Fact*

Floyd said, "I promise that . . . I will never vote to place the dump in this neighborhood." As a statement of future intention, this promise is characterized in tort law as a statement of fact.¹⁷⁸ Not all campaign promises are statements of fact — most are more accurately

178. See W. Page Keeton, *Fraud — Statements of Intention*, 15 TEXAS L. REV. 185 (1937) ("The state of a man's mind is as much a fact as the state of his digestion." (quoting *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (Ch. App. 1885)); see also *Von Hake v. Thomas*, 705 P.2d 766, 770 (Utah 1985) ("We have repeatedly held that a promise of future performance, when made with a present intent not to perform and made to induce a party to act in reliance on that promise, constitutes actionable deceit and fraud. This principle is a matter of hornbook law.")

This view of misrepresentations of intent holds in all but a few jurisdictions. See KEETON, *supra* note 175, at 736 n.96; see also RESTATEMENT (SECOND) OF TORTS § 525 cmt. f (1976) ("[A] statement that is in the form of a prediction or promise as to the future course of events

characterized as statements of opinion.¹⁷⁹ For example, if Floyd had promised, "If I am elected, Mayberry will be a nicer place to live," no cause of action for deceit would have been created, in part because Floyd did not state a present belief as to future intention. Instead, he merely used a rhetorical device to convey the message, "I think I am a better candidate."¹⁸⁰ The distinction lies in the specificity of Floyd's hypothetical promise; by pledging to perform an act that only he could perform, and by stating his intention as a present fact, he fulfilled the first element of the claim.¹⁸¹

B. *Knowing Misrepresentation*¹⁸²

Known as "scienter,"¹⁸³ this element of the claim can be established by Goober's evidence. Floyd, at the time of making the promise to the Neighborhood Association, knew he would not fulfill the promise.¹⁸⁴ With evidence of his assurances to Mr. Potter, this is an easy case. A harder situation arises when the candidate promises to perform an act which he ought to know he cannot perform, or lacks sufficient information upon which to base his promise. For instance, if Floyd should have known that the only feasible location for a town dump was in Mayberry Heights, yet promised that the dump would be elsewhere, his promise would still satisfy the requirement of scienter.¹⁸⁵ This latter situation is a less appealing case for tort liability

may justifiably be interpreted as a statement that the maker knows of nothing which will make the fulfillment of his prediction or promise impossible or improbable.").

179. See KEETON, *supra* note 175, at 755 ("In the absence, then, of special circumstances affording some reason to the contrary, a representation which purports to be one of opinion only is not a sufficient foundation for the action of deceit."). Campaign promises that are appropriately characterized as statements of opinion are analogous to the business practice of "puffing." See *infra* notes 197-200 and accompanying text.

180. In all cases, the words must be considered in light of the circumstances.

It is not, however, the form of the statement which is important or controlling, but the sense in which it is reasonably understood. Statements very positive in form, asserting facts without qualification, may be held to be only those of opinion, where the recipient is aware that the speaker has no sufficient information or knowledge as to what he asserts; . . . there are numerous circumstances in which statements which are in form only of opinion will be held to convey the assertion of accompanying facts.

KEETON, *supra* note 175, at 755.

181. The fact/opinion distinction arises more explicitly in the discussion of reliance by the voter. See *infra* notes 197-200 and accompanying text.

182. See RESTATEMENT (SECOND) OF TORTS § 526 (1976).

183. See RESTATEMENT (SECOND) OF TORTS § 526 cmt. a (1976) ("The word 'fraudulent' is here used as referring solely to the maker's knowledge of the untrue character of his representation. This element of the defendant's conduct frequently is called 'scienter' by the courts.").

184. See RESTATEMENT (SECOND) OF TORTS § 526 cmt. c (1976).

185. See RESTATEMENT (SECOND) OF TORTS § 526 cmt. e (1976):

Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented. This is often expressed by saying that fraud is proved if it is shown that a false representation has been made without belief in its truth or recklessly, careless of whether it is true or false.

than when a knowing falsehood has been stated.

Scienter also requires "the intent to deceive, to mislead, to convey a false impression."¹⁸⁶ In the hypothetical, this intent is clear. Floyd promised to vote against the dump specifically to convince the voters that he would vote against the dump. This was misleading and created a false impression.¹⁸⁷

Establishing evidence of scienter is more problematic,¹⁸⁸ but no more difficult than in standard commercial fraud claims.¹⁸⁹ In the hypothetical, the note photocopied by Goober is persuasive evidence. Another example of evidence of scienter might include internal campaign memos advising the candidate against publicly supporting a project that the candidate privately supports.¹⁹⁰

C. *Intent To Induce the Reliance*¹⁹¹

By promising to vote against the dump, Floyd intended to persuade the voters to support him and not his opponent. No other explanation for his conduct is credible, since he must have been aware that breaking his promise would damage his credibility, at least in the short run. Furthermore, the representation was intended for a wide audience, all of Mayberry Heights. Under tort law, Floyd would be liable to all those individuals whose position he intended to change and who suffered injury.¹⁹²

D. *Justified Reliance*

This element of the claim has two parts. First, there must be reliance in fact that is causally related to the action that caused the harm.¹⁹³ Second, the reliance must have been justified. In the hypothetical tort claim, these will be difficult, but not impossible, to prove.

186. KEETON, *supra* note 175, at 741.

187. *See id.* ("In the usual case, . . . this is present beyond dispute.").

188. *See* MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 1094 (4th ed. 1987) ("In civil fraud cases, most state courts have stated that plaintiffs must prove their cases with 'clear and convincing evidence.'").

189. *See* KEETON, *supra* note 175, at 763 n.93 for examples of commercial fraud claims.

190. *See* Cook v. Corbett, 446 P.2d 179 (Or. 1968) (district attorney's memorandum advising against use of slogan "Re-elect," when candidate was not incumbent, allowed as evidence of candidate's intention to deceive), discussed *infra* notes 212-18.

191. *See* RESTATEMENT (SECOND) OF TORTS § 531 (1977).

192. "The maker may have reason to expect that his misrepresentation will reach any of a class of persons, although he does not know the identity of the person whom it will reach or indeed of any individual in the class." RESTATEMENT (SECOND) OF TORTS § 531 cmt. e (1976).

Verification of membership in the plaintiff class would pose a minor obstacle. To gain membership to the class, a putative plaintiff would have to demonstrate reliance, but not necessarily that he voted for the candidate. For instance, Gomer could satisfy the claim, even if he did not vote for Floyd, since he relied by purchasing property in Mayberry Heights.

193. RESTATEMENT (SECOND) OF TORTS § 546 (1976) ("[liability exists] if his reliance is a substantial factor in determining the course of conduct that results in his loss").

Political candidates make promises to gain electoral support. To the extent their promises are successful, their popular support increases. Evidence of this increase can be found on election day in election returns and prior to election day in public opinion polls. In a close election, a few votes can make the difference between election and defeat. A dramatic promise by a candidate can affect those few votes and satisfy the requirement of causation in fact. At issue in the hypothetical is whether the residents of Mayberry Heights relied on Floyd's promise in making their decision. The answer can be established using evidence of public opinion polls and election results.¹⁹⁴ In addition, there is clear evidence that the Neighborhood Association relied on Floyd's promise by giving its endorsement, and that individual members relied by performing volunteer work.

The greater difficulty is demonstrating that the voter's reliance is justified.¹⁹⁵ First, justified reliance requires proof of "materiality." A misrepresentation is "material" if the voter has in fact considered the misrepresented fact important in his decision.¹⁹⁶ A statement that causes an increase in voter support must be important in the voters' decisionmaking process.

The second element of justified reliance requires that the statement by the candidate be of fact and not of opinion.¹⁹⁷ Many, if not most, campaign statements are better characterized as opinion than as fact,¹⁹⁸ analogous to the business practice of "puffing."¹⁹⁹ For instance, a car dealer who says, "This car is the best on the market"

194. For instance, ticket splitting might be evidence that a particular issue had a significant effect on the electorate.

195. "The recipient of a fraudulent misrepresentation of intention is justified in relying upon it if the existence of the intention is material and the recipient has reason to believe that it will be carried out." RESTATEMENT (SECOND) OF TORTS § 544 (1976).

196. See RESTATEMENT (SECOND) OF TORTS § 538 (1976). In the corporate context, courts have established that a misrepresentation is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

197. See RESTATEMENT (SECOND) OF TORTS § 538a (1976) ("A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment.").

198. In discussing advertising by vacuum salesmen, Judge Learned Hand wrote:

There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.

Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918).

199. A false representation of the actor's own intention to do or not to do a particular thing is actionable if the statement is reasonably to be interpreted as expressing a firm intention and not merely as one of those "puffing" statements which are so frequent and so little regarded in negotiations for a business transaction as to make it unjustifiable for the recipient to rely upon them.

RESTATEMENT (SECOND) OF TORTS § 530 cmt. a (1976).

cannot be held liable.²⁰⁰ However, a car dealer who says, "Buy this car and I promise to sell you gas from my own private pump for \$1.00 a gallon for the next five years, regardless of the market price," is not puffing. Similarly, a campaign statement that is specific, demonstrating an underlying analysis of the best information available, should be held to the same standard to which statements by private individuals are held in commercial transactions.

Finally, the reliance must be reasonable.²⁰¹ Reliance would be reasonable when the voter, as a reasonable person, believes that the representation is one of a true future intention, rather than a rhetorical flourish. According to the *Second Restatement*, "[w]hether the recipient has reason for this belief depends upon the circumstances under which the statement was made, including the fact that it was made for the purpose of inducing the recipient to act in reliance upon it and the form and manner in which it was expressed."²⁰²

Applying this reasoning, Floyd's promise, taken in context, was worthy of reliance. It was made to induce reliance. It was specific and directed at an identifiable issue and identifiable vote. The audience was informed and clearly concerned about his position on this issue, not his general policy statements. To deny that it is reasonable for a voter to rely upon Floyd's promise is to hold political candidates to a lesser standard of honesty than a private citizen. This ultimately harms those voters who choose to take the political process seriously, as well as those candidates who choose to speak honestly.

E. Proof of Damages

The final element requires proof of damage to the voter or voters claiming the tort.²⁰³ Actual damages must be established, since courts historically do not award nominal damages in deceit actions.²⁰⁴

In the hypothetical, the clearest cases for establishing damages are the pecuniary losses of Aunt Bea and Gomer. Floyd would argue, however, that his opponent might have voted for the dump in Mayberry Heights as well. If so, his argument goes, Floyd's misrepresentation did not proximately cause Aunt Bea's and Gomer's losses.²⁰⁵

200. See KEETON, *supra* note 175, at 756-57; see also *Presidio Enters. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986) (holding that statements that new movie will be "your blockbuster for the summer of '78" and "this will be the most 'want-to-see' movie of the year" are statements of opinion and therefore not actionable).

201. RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1976) (explaining that matter misrepresented is not material if a reasonable man would not find it important).

202. RESTATEMENT (SECOND) OF TORTS § 544 cmt. a (1976).

203. KEETON, *supra* note 175, at 765 ("[T]he plaintiff must have suffered substantial damage because the cause of action can arise.").

204. *Id.*

205. *Id.* at 767 ("[T]he consequential or special damages must have been proximately caused by the fraudulent conduct.").

However, Gomer invested in Mayberry Heights property based on Floyd's misrepresentation, irrespective of Floyd's opponent's position. Moreover, Aunt Bea's decision to reject the offer for her house was also based on Floyd's misrepresentation.

Although parties may be able to identify cognizable damages, the problems in assessing these damages are the same as the problems identified in section II.C. Nonetheless, that all the elements of the tort of deceit are satisfied suggests that knowingly false campaign promises are harmful in the same way that other actionable statements are harmful. It also suggests that a statutory cause of action that tracks the tort of deceit, yet applies a more effective remedy, might be appropriate. Part IV examines such a statute.

IV. STATUTORY CAUSE OF ACTION

Parts II and III of this Note demonstrated that enforcement of campaign promises or punishment for campaign lies under contract or tort doctrine is conceivable under common law principles. However, neither contract nor tort theories provide an adequate remedy. Part IV examines the possibility and advisability of state statutes prohibiting false campaign promises. Section IV.A provides an overview of existing state laws regulating campaign speech. Section IV.B analyzes a recently proposed West Virginia state statute prohibiting the making of false campaign promises.

A. Existing Campaign Misrepresentation Statutes

At least sixteen states have statutes prohibiting misrepresentations in campaign speech.²⁰⁶ Most of these laws specifically prohibit libelous statements regarding an opponent's record.²⁰⁷ The common legislative purpose of these statutes is to protect the electorate from false statements, particularly libelous ones, acknowledging that such statements lower the level of political discourse.²⁰⁸ Although only a

206. *E.g.*, ALASKA STAT. § 15.56.010(a)(3) (1983); COLO. REV. STAT. § 1-13-109 (1980); IND. CODE ANN. § 3-14-3-22 (West 1988); MASS. ANN. LAWS ch. 56, § 42 (Law. Co-op. 1990); MINN. STAT. § 210A.04 (1982); MISS. CODE ANN. § 23-15-875 (1990); MONT. CODE ANN. § 13-35-234 (1985); N.C. GEN. STAT. § 163-274(8) (1987); N.D. CENT. CODE § 16.1-10-04 (1989); OHIO REV. CODE ANN. § 3599.091(B) (Anderson 1988); OR. REV. STAT. § 260.532 (1989); TENN. CODE ANN. § 2-19-142 (1985 & Supp. 1991); UTAH CODE ANN. § 20-14-28 (1984); WASH. REV. CODE ANN. § 29.85.070 (1986); W. VA. CODE § 3-8-11(e) (1990); WIS. STAT. ANN. § 12.05 (West 1986).

207. *E.g.*, ALASKA STAT. § 15.56.010(a)(3) (1988); MASS. ANN. LAWS ch. 56, § 42 (Law. Co-op. 1990); MINN. STAT. § 210A.04 (1982); MONT. CODE ANN. § 13-35-234 (1985); N.C. GEN. STAT. § 163-274(8) (1987); TENN. CODE ANN. § 2-19-142 (1985 & Supp. 1991); WASH. REV. CODE ANN. § 29.85.070 (1985); W. VA. CODE § 3-8-11(e) (1990).

208. For a discussion of the purposes of these statutes, see Neel, *supra* note 87; Jack Winbrow, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L. J. 853 (1987); see also TRIBE, *supra* note 60, 1129-30 ("Nonetheless, the countervailing concern that completely unregulated political campaigns would degenerate in such a way that the electorate would be divested of its power to make a reasoned choice among the candi-

small body of case law applies these statutes,²⁰⁹ a brief look at two states' experiences is illuminating.

The Ohio and Oregon campaign misrepresentation statutes do not specify what sorts of factual misrepresentations are covered.²¹⁰ With the exceptions of justifiable reliance and damages — the elements of the tort claim that are more difficult to establish²¹¹ — these statutes track the language of the tort of misrepresentation. Conceivably, then, pursuing a cause of action under these statutes would avoid the problems of proving damages and fairly identifying the source for payment.

The leading case interpreting the Oregon statute is *Cook v. Corbett*,²¹² a 1968 case in which a state senate candidate was convicted of falsely promoting herself as the incumbent. After determining that the statements made by the defendant were false and deliberate,²¹³ the court addressed the question of materiality. The court concluded that it must apply the statute, "even if we were inclined to the view that Corbett's conduct was trivial and unimportant."²¹⁴ The court held that if the candidate thought that the misrepresentation was important to electoral victory, then it was material.²¹⁵ Under this reasoning, a knowing misrepresentation like that in the second Mayberry Heights hypothetical²¹⁶ also would be material.

In *Corbett*, the defendant argued that because the misrepresentation did not affect the outcome of the election, it was not material. The court rejected this argument, stating:

The Corrupt Practices Act was passed "to secure and protect the purity of the ballot." To require the contestant in every case involving a viola-

dates has persuaded state legislatures to enact and courts to uphold some restrictions on campaign practices.").

209. See Winsbrow, *supra* note 208, at 876.

210. The Ohio statute reads:

No person, during the course of any campaign . . . shall knowingly and with intent to affect the outcome of such campaign . . . disseminate a false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate.

OHIO REV. CODE ANN. § 3599.091(B)(10) (Anderson 1988).

The Oregon statute reads:

No person shall be caused to be . . . communicated [any representation] . . . with knowledge or with reckless disregard that the [representation] contains a false statement of material fact relating to any candidate, political committee or measure.

OR. REV. STAT. § 260.532(1) (1989).

211. See *supra* section III.B.

212. 446 P.2d 179 (Or. 1968).

213. 446 P.2d at 183.

214. 446 P.2d at 184.

215. "We need not speculate on how much advantage, if any, accrues to an incumbent in an election contest from the fact of his incumbency. We know that most, if not all, incumbents believe, as Corbett believed, that incumbency is important If incumbency is important to candidates, it is material." 446 P.2d at 184.

216. See *supra* Part III.

tion of the Corrupt Practices Act, no matter how deliberate and material the violation, to prove that the violation affected the outcome of the election, would render the act nugatory and impossible of enforcement.²¹⁷

As a result, the deterrent effect should be strong on all candidates. Furthermore, the Oregon court's definition of materiality properly values the general negative impact of the deliberative political process more highly than the limited impact on the specific election.²¹⁸

In *Dewine v. Ohio Elections Commission*²¹⁹ the Ohio statute was applied against a candidate who misrepresented his opponent's record. Although the court held in the specific case that the wrong standard of proof had been applied,²²⁰ it clearly defined the elements of the criminal statute:

First, it must be a statement concerning a candidate for public office. Secondly, such statement must be intended to promote the election or defeat of the candidate about whom it is made, which means that the statement is such that it will probably have a meaningful effect upon the outcome of the election. Thirdly, the statement must be false. Fourth, the person publishing the statement must have knowledge of the falsity of the statement.²²¹

The defendant also challenged the statute's constitutionality. Denying the defendant's argument, the court stated:

There is indeed a compelling state interest in preventing the publication of false statements concerning candidates for election to office where such statements are purposely published with full knowledge of the falsity thereof and are designed to promote the election or defeat of a candidate for office. It is a very compelling state interest to promote honesty in the election of public officers.²²²

Thus, as in *Brown v. Hartlage*,²²³ the court recognized that the state's interest in truthful campaigns must be balanced with First Amendment concerns. While the state statutes address libelous statements, the potential harms to the political process caused by knowing misrepresentations, whether libelous or of future intent, are similar.²²⁴ The existence of campaign libel statutes, therefore, recommends consideration of state statutes prohibiting false campaign promises.

B. *Proposed Legislation Prohibiting False Campaign Promises*

In January 1991, a member of the West Virginia House of Dele-

217. 446 P.2d at 185.

218. This view of materiality addresses the harms of campaign lies identified *supra* section I.A.

219. 399 N.E.2d 99 (Ohio 1978).

220. 399 N.E.2d at 105.

221. 399 N.E.2d at 103.

222. 399 N.E.2d at 103.

223. See *supra* section I.C.1.

224. See *supra* notes 67-69 and accompanying text.

gates introduced legislation creating a misdemeanor offense of "mak[ing] a false promise" in the course of a campaign for public office.²²⁵ Motivated by the West Virginia governor's broken campaign promise not to raise taxes, the sponsor of the bill said, "When someone makes a promise that is so ludicrous and doesn't do what they say they would, I think that is something that can be enforced When there is an out and out outrageous promise just to get votes, then I would prosecute."²²⁶ To date there are no statutes of this specificity in any state in the country.

The proposed legislation defines a "false promise" as "a promise made by a candidate, which the candidate does not intend to carry out, is knowingly unable to carry out, or the candidate should know such promise cannot be carried out."²²⁷ This language essentially tracks the first two elements of the tort claim of deceit, misrepresentation of fact and scienter. The third element of the tort, intention to induce reliance, is invoked in the next sentence: "The primary purpose of a false promise is to deceive the electorate and to positively affect voting behavior to the candidate's advantage."²²⁸ It is not clear whether "intent to deceive" is therefore an element of the crime, or merely an instruction for the court in determining a "false promise." The last two elements of the tort, justifiable reliance and proof of damages, are not included in the proposed legislation. This distinction makes the crime easier to prove than the tort by removing the problems of proving reliance and by establishing a causally related loss.²²⁹

Potential violations of the statute may be pursued in two ways. Individuals may file complaints with an independent ethics commission,²³⁰ which then, armed with subpoena power, investigates the com-

225. H.B. 2159, 70th Leg., 1st Sess. (1991) [hereinafter *Proposed Legislation*], introduced in the West Virginia House of Delegates on January 18, 1991 by Delegate Charlotte Lane (on file with *Michigan Law Review*). The relevant portion of the proposed legislation reads:

no candidate during the course of any campaign for nomination, election or reelection for any public office shall knowingly make a false promise.

As used in this section, "false promise" means a promise made by a candidate, which the candidate does not intend to carry out, is knowingly unable to carry out, or the candidate should reasonably know such promise cannot be carried out. The primary purpose of a false promise is to deceive the electorate and to positively affect voting behavior to the candidate's advantage.

Proposed Legislation, supra, at 5. The maximum penalty for violation of the statute would be a fine of no more than \$1,000 and a jail term of not more than one year.

226. *Proposal to Prosecute Campaigners Who Lie*, N.Y. TIMES, Jan. 21, 1991, at A14.

227. *Proposed Legislation, supra* note 225, at 5.

228. *Proposed Legislation, supra* note 225, at 5.

229. See *supra* section III.D.

230. W. VA. CODE § 6B-2-4(a) (Supp. 1991). The West Virginia ethics commission was established by the state legislature before the proposed legislation. It consists of twelve members, no more than seven of whom may be from any one political party. W. VA. CODE § 6B-2-1(a) (1990). According to the statute, members must be drawn from a variety of professions, including all levels of state and local government. W. VA. CODE § 6B-2-1(b) (1990). While this certainly will not remove the influence of politics on the commission, it may help dilute it.

plaint. Alternatively, the ethics commission may initiate an investigation on its own.²³¹ If the complaints are found meritorious, the commission is empowered to apply sanctions including public reprimand, cease and desist orders, orders of restitution, and fines.²³² Alternatively, the commission may recommend potentially criminal violations to the local county attorney or a special prosecutor.²³³ The maximum punishment under the statute would be up to six months in jail or a fine of up to \$1,000.²³⁴

Just as Floyd would be guilty of the tort of misrepresentation in the second version of the hypothetical, he would be guilty under the proposed West Virginia statute. Two advantages of the statute over the tort and contract claims are apparent. First, conviction under the statute does not require evidence of reliance by the voters. This improvement is in line with the goal of punishing false campaign speech rather than satisfying voter expectations, and avoids the difficulty of identifying proper plaintiffs. Second, the statute avoids the problem of identifying an appropriate party to pay damage awards.

A criminal penalty for campaign lies, however, has obvious problems of its own. Criminal penalties carry the heaviest social stigmatization the judicial system can impose. Safeguards are therefore necessary to ensure that such a harsh sanction is applied only to knowing misrepresentations, and not to speech that is merely imprecise. In addition, because criminal sanctions are prosecuted by local or state officials, there exists the danger of harassment of elected officials for political purposes. The West Virginia legislature attempts to address this problem by establishing an independent ethics commission with the authority to investigate allegations of false promises.²³⁵ The commission has subpoena powers and the authority to impose fines, but, of course, cannot impose jail terms. Prosecution by an independent commission will not be free from political interference, but it does seem to hold more possibility for neutral prosecution than does prosecution by a state agency.

If enacted,²³⁶ this legislation could have a significant and positive impact on the truthfulness and realism of campaign promises. At the same time, it creates the Big Brother-like specter of the prevailing re-

231. *Proposed Legislation*, *supra* note 225, at 8.

232. *Proposed Legislation*, *supra* note 225, at 17.

233. W. VA. CODE § 6 B-2-9(a) (1990).

234. *Proposed legislation*, *supra* note 225, at 32. These sanctions already exist for other campaign violations. W. VA. CODE § 6B-2-10 (1990).

235. *See supra* note 230.

236. Passage of this particular bill in any state would be unlikely. In West Virginia, the issue seems closed: "Delegate Jim Rowe, a Democrat who heads the House Judiciary Committee, says the proposal would be a nightmare to enact and even worse to enforce. The bill is not now on the committee's agenda, which only Delegate Rowe can set." *Proposal to Prosecute Campaigners Who Lie*, *supra* note 226.

gime selectively punishing its opponents under the pretense of prosecuting campaign lies.²³⁷ This concern might not be as serious as it initially appears. First, as discussed earlier,²³⁸ many states have campaign libel statutes, which may also be prosecuted by local officials. There is no indication that these statutes have been abused. Second, alternative noncriminal sanctions are conceivable.

First, a judicial determination of a false campaign promise could void the election.²³⁹ This approach would allow the voters to rechoose their representative, with the knowledge that the previously made promise was false. The logistical difficulties of this approach are, of course, formidable. In addition, significant questions would arise as to the functioning of the office during the second campaign, as well as to the binding nature of actions taken by the official prior to the voiding of the election.²⁴⁰

A second alternative would replace the criminal penalties with a declaratory judgment that the candidate did or did not lie. Rather than a fine, jail time, or suspension of elections, the sole punishment would be a judicial statement that the politician had lied. This approach deals in the stock and trade of candidates — their good name.²⁴¹ The threat of a judicial determination that "Councilman Floyd lied to the voters," may carry more weight at the next election than "Candidate Taylor accuses Floyd of lying." Admittedly, such a charge carries less weight than a fine or jail term, but in light of the potential for abuse discussed earlier in this section, the lesser punishment might be more cautious and therefore wiser.²⁴²

237. All state or federal prosecution of crimes by elected officials creates this problem. From Aaron Burr to Marion Barry, Jr., those prosecuted have claimed persecution.

238. See *supra* section IV.A.

239. For a full discussion of avoiding elections due to deceptive campaign practices, see Note, *Avoidance of an Election or Referendum When the Electorate Has Been Misled*, 70 HARV. L. REV. 1077 (1957).

240. A variation on this alternative would be to void the first election and disqualify the offending candidate from participation.

241. A similar scheme was recently proposed as an alternative to the monetary judgments for libel claims. See Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986); David A. Barret, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 (1986). Judges and commentators had become concerned that excessive monetary awards could chill the press and discourage meritorious suits. Because the principal concern of many libel plaintiffs was rescuing their reputation, the declaratory judgment was seen as a practical alternative.

242. Two problems with the declaratory judgment scheme are apparent. First, it requires the court to make a finding of "the truth." While courts make these determinations in many cases, they rarely determine "the truth" of political speech. Nonetheless, state campaign libel statutes also require courts to make these assessments. Furthermore, while the fact that the speech in question is political may require a court to apply a higher standard of "falsity," it should not deprive the electorate of a legal forum. A second problem with the declaratory judgment is determining who would prosecute the action. If the state is the adverse party, then the same problems arise as in the criminal penalty discussed above. However, if the statute allows private parties to bring the action, financial considerations may cause the statute to be applied unfairly.

CONCLUSION

Political candidates lack effective incentives to state honestly many of their future intentions. And in some cases, rational candidates will understand that it is in their self-interest to falsely state a future intention. Our legal system's historical reluctance or inability to play a role in policing this type of campaign deception compounds the problem.

A knowingly false campaign promise satisfies most of the requirements of each of the legal mechanisms examined in this Note. Each mechanism is flawed, however, due to the absence of an effective and precise remedy. Yet these flaws should not preclude an honest and continuing examination of the judicial system's approach to campaign misrepresentations. As the Supreme Court stated in *Garrison*, "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected."²⁴³ The law demands truth and honesty in the world of commerce. The law should demand the same standard in the world of politics.

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