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WHEN FIRST AMENDMENT PRINCIPLES COLLIDE: NEGATIVE POLITICAL ADVERTISING & THE DEMOBILIZATION OF DEMOCRATIC SELF-GOVERNANCE

Clay Calvert*

The page-one headline in the May 25, 1996 edition of the San Francisco Chronicle told a predictable and sad story about the current state of American politics: “Clinton, Dole Ready to Air Attack Ads: Race gets personal earlier than usual.”1 Writing in the Washington Post two months later, Howard Kurtz observed that “the Republican and Democratic national committees have uncorked a series of attack ads, often based on highly selective facts or outright distortions.”2

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Negative advertisements in the 1996 election year, of course, prevailed in more than just the presidential campaign. For instance, Maria Elena Milton, a Democratic candidate for the United States House of Representatives and follower of Lyndon LaRouche, ran televised ads alleging that her opponent “wants to push your parents into the gas ovens of managed care” and “send your Social Security crashing into the Everglade swamps.” Both Sides Denounce Challenger’s Commer-
The danger posed by televised attack ads goes far beyond polluting the marketplace of ideas with inaccuracies and distortions. New research by scholars at the Massachusetts Institute of Technology (MIT) and the University of California, Los Angeles (UCLA) suggests a more grave threat to the self-governing process. Negative, attack advertising "actually suppresses voter turnout." It "extracts a toll on electoral participation," and political strategists aware of this phenomenon deliberately use negative campaign advertisements for purposes of "the shrinking of the electorate."

3. Attack ads "are negative in focus and designed to call attention to a candidate's weaknesses (character and/or issue positions)." MICHAEL PFAU & HENRY C. KENSKI, ATTACK POLITICS: STRATEGY AND DEFENSE 2 (1990). They are "viewed by many as the electronic equivalent of the plague." DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952-1992, at 51 (1993).

In contrast to negative ads, "[p]ositive messages are designed to promote the attributes of a candidate's character, positions, and performance in public office." PFAU & KENSKI, supra, at 2.


5. ANSOLABEHERE & IYENGAR, supra note 4, at 9. This finding contradicts the results of an experiment by a group of Michigan State University researchers who found that negative and positive political advertisements do not differ in their effect on voter turnout. See Gina M. Garramone et al., Effects of Negative Political Advertising on the Political Process, 34 J. BROADCASTING & ELECTRONIC MEDIA 299, 308 (1990). That research, however, was based on a sample of college students as the experimental subjects, and the candidates featured in the advertisements were not real. See id. at 302-03. Part II of this Article reviews and critiques experiments and studies that suggest negative ads suppress voter turnout.

6. Ansolabehere et al., supra note 4, at 835. The research suggests that attack ads "produce the highest drop in political efficacy and in intentions to participate among nonpartisans." ANSOLABEHERE & IYENGAR, supra note 4, at 148. Negative ads divide "the American electorate into a voting public of party loyalists and a non-voting public of apathetics." Id.

7. ANSOLABEHERE & IYENGAR, supra note 4, at 9. Signs of disinterest in the 1996 presidential campaign were not hard to find. For instance, 116.8 million fewer people tuned in to the 1996 televised debates between incumbent William Jefferson Clinton, and his Republican challenger, former Kansas Senator Robert Dole. See
Voter turnout is diminishing. The turnout of the voting-age population in the 1996 presidential election was about 49%, less than half of all potential voters and the lowest figure since 1924.\(^8\) Voter turnout for the presidential election in 1988 was just 50.1% of the voting-age population.\(^9\) Although the figure was a slightly higher 55.2% in 1992, this is still far less than voter turnout during the elections of 1960, 1964, and 1968, each of which topped more than 60%.\(^10\) There has been, writes Columbia University communication scholar James W. Carey, a steady "evacuation of the public realm."\(^11\) The new data suggest that negative advertising plays a

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9. See Jon R. Sinclair, *Reforming Television's Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements*, COMM. & L., Mar. 1995, at 65, 84. It should be noted that the 1980s was an era of "explosive growth in attack politics." PFAU & KENSKI, supra note 3, at 13. The 1988 presidential election, in particular, brought "the extensive use of attack politics within both political parties in the presidential nomination contests and the early and widespread use of negative messages in the presidential race as well." Id. at 39. As Adam Nagourney writes, the "conventional wisdom" is that "the 1988 presidential election was the one that pioneered vicious attack ads." Adam Nagourney, *Snooze Alarm: The Year of the Yawn*, N.Y. TIMES, Nov. 3, 1996, at E1.

Although the volume and vociferousness of attack ads may have increased during the 1980s, they are not a new phenomenon. The first direct attack television ad was used in 1952 by Estes Kefauver against Dwight Eisenhower, and "every presidential election year since 1952 has had its share of negative television ads. What is new is the pervasiveness of this technique." JOHNSON-CARTEE & COPENLAND, supra note 2, at 3.


11. James W. Carey, *The Press, Public Opinion, and Public Discourse, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT* 373, 374 (Theodore L. Glasser & Charles T. Salmon eds., 1995). Communication and law scholar David S. Allen observes: "[W]e are confronted with an inactive public composed of individuals who have become isolated from their political institutions. It is a public that has been separated from political life—a public that rarely enters the political arena and, when it does, lives that political life through the institutional press." David S. Allen, *The Supreme Court and the Creation of an (In)active Public Sphere, in FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION* 93, 93 (David S.
key role in keeping citizens away from voting booths.\textsuperscript{12}

Negative political advertisements create tension between First Amendment\textsuperscript{13} principles. On the one hand, they are on their face political speech—"expression situated at the core of our First Amendment values."\textsuperscript{14} Political speech receives the most protection under the Supreme Court-created hierarchy of speech values.\textsuperscript{15} Negative political ads, despite their tone, may also convey substantive political information to the electorate,\textsuperscript{16} and they serve


\textsuperscript{12} In contrast to negative ads that may turn potential voters away from polling places, social science research suggests that registration initiatives such as same-day registration and motor-voter registration may increase voter turnout. \textit{See} Staci L. Rhine, \textit{Registration Reform and Turnout Change in the American States}, 23 AM. POL. Q. 409, 421-22 (1995). Rhine observes that "[m]otor-voter registration is found to have a positive and significant effect on turnout." \textit{Id.} at 419.

\textsuperscript{13} The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local governments. \textit{See} Gitlow v. New York, 268 U.S. 652, 666 (1925).

\textsuperscript{14} Texas v. Johnson, 491 U.S. 397, 411 (1989). In an earlier case, the Supreme Court observed that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966).

\textsuperscript{15} Although political speech is at the core of First Amendment values, the United States Supreme Court has accorded commercial speech less protection under the First Amendment and has stripped obscene speech of all protection. \textit{See} McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1519 (1995) (providing a recent Supreme Court discussion of "core political speech"); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 (1995) (noting that although the First Amendment protects commercial speech, "certain types of restrictions might be tolerated in the commercial speech area because of the nature of such speech," and \textit{Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n}, 447 U.S. 557, 562 (1980), provides the relevant standard for testing the constitutionality of such restrictions); Miller v. California, 413 U.S. 15, 23 (1973) (providing that it has been categorically settled by the Supreme Court that "obscene material is unprotected by the First Amendment").

Some commentators argue that today's political advertisements are really nothing more than commercial speech that proposes a transaction with the potential voter. Thirty-second televised spots trivialize political discourse. Law professors Ronald Collins and David Skover observe that "[a]s politicians master the strategies of advertising and entertainment programming, the gulf between important political expression and pure amusement nearly vanishes." \textit{Ronald K.L. Collins & David M. Skover, The Death of Discourse} 17 (1996). This vanishing distinction supports the argument made in Part III of this Article that negative political ads should not fall within the category of political speech that receives the most protection under the First Amendment. \textit{See} discussion \textit{infra} Part III.

\textsuperscript{16} For instance, Brown University's Darrell West observes in studying political advertisements that "it is somewhat surprising to discover that the most substantive appeals actually came in negative spots." \textit{West}, \textit{supra} note 3, at 51. Negative ads
an informational function. Negative ads are perhaps an inevitable part of the "uninhibited, robust, and wide-open" debate on political issues that a self-governing democracy prizes.

A self-governing democracy, however, also requires citizen participation. Voting is the most basic form of political participation. Increasingly, however, as public-journalism practitioner Davis Merritt observes, "public life—the way in which our democracy is expressed and experienced—is not going well." When negative ads deter citizens from voting—they demobilize the electorate—they conflict with the principle of democratic self-governance that free speech exists to serve.

What should be done? Censoring or regulating negative political ads restricts political speech and violates the First Amendment. Allowing such ads to proliferate, however, inhibits self-governing democracy, breeds cynicism, and, most importantly, suppresses citizen participation at the voting booths.

Legal scholars have considered the constitutionality of restricting negative political advertisements on broadcast television.

"are more likely to have a policy-oriented content because campaigners need a clear reason to attack the opponent." Id. at 52. Writing in The New York Times Magazine, John Tierney argues that "[o]n balance, poll-driven consultants and attack ads have been good for democracy. If they have turned off many people, they have also educated unprecedented numbers of voters, made politicians more accountable and counteracted the biases of the media establishment." John Tierney, Why Negative Ads are Good for Democracy, N.Y. Times, Nov. 3, 1996, (Magazine), at 52.

19. As Alexander Meiklejohn wrote, "voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them." Alexander Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245, 255.
21. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948). Meiklejohn's premise was that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government." Id. at 27.
22. See McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1519 (1995) ("when a law burdens core political speech, we apply 'exactng scrutiny'").
23. See, e.g., Rebecca Arbogast, Political Campaign Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform, 23 AKRON L.
Their articles focus on the erosion of substantive debate and deception that negative ads cause. For instance, Timothy Moran notes that “many observers contend that the nature of political advertising impedes self-government by creating advertising that at best lacks substance and at worst obscures and distorts crucial issues.”

These analyses are incomplete and, perhaps, misguided. They fail to consider results obtained by new scientific research that reveals that negative advertising may actually suppress voter turnout. “The debate over campaign advertising to date has been completely miscast. Focusing the debate on veracity or manipulation or deception is just missing the point,” argues Shanto Iyengar, the UCLA professor partly responsible for the new findings.

Restrictions on political ads must be considered anew in light of this suppressed voter turnout. The harms to democratic self-governance legal scholars have considered may be real. Today, however, another harm must be added to the equation that balances the free speech essential for a self-governing democracy against the citizen participation that is the essence of a self-governing democracy—a democracy in which the “[r]ulers and ruled are the same individuals.” Decreased voter turnout promoted by political attack ads militates in favor of restricting the content of political advertisements.


24. Moran, supra note 23, at 663. Lawrence M. Frankel observes that the two most serious harms caused by negative political advertisements on television are “that (1) negative advertising may result in candidates winning elections that they would not win in a world of completely accurate information, and that (2) negative ads increase cynicism among the electorate.” Frankel, supra note 23, at 379. Communication scholars Kathleen Hall Jamieson and Karlyn Kohrs Campbell identify a number of harms—harm other than the suppression of voter turnout—caused by televised political ads. See Kathleen Hall Jamieson & Karlyn Kohrs Campbell, The Interplay of Influence: News, Advertising, Politics, and the Mass Media 335 (4th ed. 1997). They state that “[b]ecause ads are partisan sources of information, they are poor sources of primary information. Ads suppress information that would hurt their candidate; ads occasionally take evidence out of context; ads occasionally invite false inferences.” Id.

25. See infra notes 78-95 and accompanying text.


27. Meiklejohn, supra note 21, at 12.
The argument for regulating televised political advertisements is now stronger than ever. Not only do attack ads often denigrate discourse and include false or misleading information that appeals to voters' emotions rather than their rational thought processes, but these ads keep voters away from the polls. Informed, rational discourse and participation are necessary in a deliberative democracy. Regulation of political ads is essential to obfuscate the undesirable consequences of attack ads and, more importantly, to preserve a deliberative democracy.

This Article takes an interdisciplinary approach in considering whether to restrict the content of televised political advertisements. Part I articulates fundamental notions of democratic self-governance that underlie free speech protection in the United States. Part II reports and critiques new data suggesting that negative political ads decrease participation in democracy. Part III considers how social science research about negative ads affects legal arguments to restrict the content of televised political advertising. Legal tests and challenges that content-based and viewpoint-based regulations on political ads would face are examined, and the Article suggests how social science data could be used to provide legislative facts—facts that influence the creation and evolution of laws—to support new regulations on political ads under those legal tests.

Part III offers a somewhat radical argument to support regulations on televised negative political advertisements: that negative political ads are not, in fact, political speech. Rather, they are anti-political speech—speech that turns people away from participation in democratic self-governance. They run counter to principles of deliberative and participatory democracy. Although negative ads have informational value, there is a sharp difference between promoting an informed public and promoting an active public. Negative ads facilitate an inactive, detached public.

28. An informed public is only one reason for protecting speech in a self-governing democracy. If citizens do not act on the information, they have not participated in democracy. In brief, an informed citizenry serves the instrumental function of facilitating a telos of active, wise decision-making.
29. See infra notes 36-77 and accompanying text.
30. See infra notes 78-146 and accompanying text.
31. See infra notes 147-48 and accompanying text.
33. See Allen, supra note 11, at 94 (observing that there is often "a confusion
Negative political ads convey information at a very high price. The new data suggest that negative ads decrease even the most basic form of involvement in politics—voting.

Part III addresses a thorny public policy question: Does the informational value of negative ads outweigh their detrimental effect on participatory democracy? Parsed differently, does the goal of promoting an informed public outweigh the goal of promoting an active public? In considering this issue, note that the informational value of negative ads is somewhat questionable. An informed public is valuable only to the extent that the public acts on the information it possesses. An informed but inactive public is a public lost, mimicking a group of spectators passively watching a movie.

Ultimately, of course, the results of a few controlled experiments standing alone cannot change the law. As communication scholars Jeremy Cohen and Timothy Gleason observe, "[l]aw is not lame without social science." Public policy, reflected in public laws, is influenced by a multitude of factors, and social science data may be ignored altogether. This Article, however, suggests that recent social science data support a compelling government interest in regulating the content of televised political ads.

I. THE ROLES OF FREE EXPRESSION IN DEMOCRATIC SELF-GOVERNANCE

Free speech, writes First Amendment scholar Rodney A. Smolla, is "an indispensable tool of self-governance in a democratic society." The United States Supreme Court's seminal decision in New York Times Co. v. Sullivan recognizes and adopts this principle as part of constitutional jurisprudence.

34. The United States Supreme Court recognizes that the free-press goal of promoting an informed public serves the larger goal of facilitating a politically active public. The Court has observed: "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).


38. Sullivan is "one of the defining cases of modern free speech law . . . [and] is often understood to reflect the conception of freedom of expression advocated by Alexander Meiklejohn—a conception of self-government, connected to the American principle of sovereignty." CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 205-
A. Sullivan and the Citizen-Critic

In March, 1964, against the backdrop of a growing civil rights movement in the South and the use of state libel laws to stifle coverage in the national press, the Supreme Court handed down a decision that would indelibly change the landscape of defamation law. The Court held for the first time in *New York Times Co. v. Sullivan* that libel law “must be measured by standards that satisfy the First Amendment.” Prior to *Sullivan*, the Supreme Court had never held that the First Amendment protections of speech and press limit the reach of state libel laws designed to compensate

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39. Anthony Lewis, the Pulitzer Prize-winning *New York Times* columnist, observes that Southern officials such as L.B. Sullivan, the plaintiff in the seminal libel action against the *New York Times*, used the traditional libel actions as “a state political weapon to intimidate the press . . . [and] to scare the national press—newspapers, magazines, the television networks—off the civil rights story.” ANTHONY LEWIS, *MAKE No LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35 (1991).

At the time *Sullivan* was decided, defamation was “a tort of strict liability.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 85 (1991). This rule is particularly harsh for libel defendants. As media attorney Hal Fuson writes:

[If you were found to have spoken falsely, it did not matter that you had made an innocent mistake. Thus, if you carefully had taken down facts obtained by phone from the public library, only to find that the librarian had given you erroneous information, you still could be held liable for the resulting damage.]


If a publication could be liable for any factual error, no matter how accidental or innocent, the aggregate monetary toll of plaintiff verdicts could eventually silence a lawsuit-wary press—a press fearful of the imposition of liability for its coverage of the civil rights movement. Rather than risk liability, the press could choose the option of silence and self-censorship. This was the goal of local officials like L.B. Sullivan.

The *Sullivan* Court recognized this problem. It observed that “[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . ‘self-censorship.’” *Sullivan*, 376 U.S. at 279. The Supreme Court also noted that the *New York Times* faced several lawsuits by Southern officials in addition to Sullivan’s defamation action. See id. at 278 n.18.

40. Defamation includes two separate torts: libel and slander. See JOHN D. ZELEZNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA* 102 (2d ed. 1997). Libel consists of “the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.” RESTATEMENT (SECOND) OF TORTS § 568 (1977). Slander, in contrast, traditionally is considered the oral or spoken form of defamation. See W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 112, at 785 (5th ed. 1984).

plaintiffs for reputational injury.\textsuperscript{42} Defamatory speech traditionally fell beyond the purview of First Amendment protection.

That changed with \textit{Sullivan} when the Court adopted the actual malice standard\textsuperscript{43} to give the “citizen-critic of government”\textsuperscript{44} the breathing room necessary to make accidental and uncalculated factual errors when engaging in speech about public officials. The actual malice standard, the Court stated, is a “privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.”\textsuperscript{45} Only if a defendant published a defamatory statement about a public official with the knowledge that it was false or with a reckless disregard for its veracity could the defendant be held liable.\textsuperscript{46} The actual malice standard decreased the chances of self-censorship that existed under the common law rule of strict liability for libelous publications.\textsuperscript{47}

In adopting the actual malice standard, the \textit{Sullivan} Court recognized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”\textsuperscript{48} Amidst the hurly-burly of such debate, the Court reasoned that “erroneous statement is inevitable”\textsuperscript{49} and that it “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”\textsuperscript{50} It held that “[t]he right of free public discussion of the stewardship of public

\textsuperscript{42} See \textsc{Kenneth C. Creech}, \textsc{Electronic Media Law and Regulation} 272 (2d ed. 1996) (providing that “[b]efore 1964 and the \textit{New York Times} decision, libel suits were a matter of state law”).

\textsuperscript{43} Actual malice is the publication of a defamatory falsehood “with knowledge that it was false or with reckless disregard of whether it was false or not.” \textit{Sullivan}, 376 U.S. at 280. Reckless disregard for the truth requires “that the defendant in fact entertained serious doubts as to the truth of his publication.” \textit{St. Amant v. Thompson}, 390 U.S. 727, 731 (1968). Actual malice is thus a subjective state of mind requirement—“merely negligence does not suffice.” \textit{Masson v. New Yorker Magazine, Inc.}, 501 U.S. 496, 510 (1991).

The Supreme Court has observed that the term actual malice “is unfortunately confusing in that it has nothing to do with bad motive or ill will.” \textsc{Harte-Hanks Communications, Inc. v. Connaughton}, 491 U.S. 657, 666 n.7 (1989).

\textsuperscript{44} \textit{Sullivan}, 376 U.S. at 282.

\textsuperscript{45} Id.

\textsuperscript{46} \textit{See id.} at 279-80.

\textsuperscript{47} \textit{See supra} note 39 (discussing the rule of strict liability). Strict liability in tort law is one of “three theories of redress [which] have provided the framework for constructing a comprehensive basis of liability for unintended harm.” \textsc{Robert L. Rabin}, \textsc{Perspectives on Tort Law} 1 (4th ed. 1995).

\textsuperscript{48} \textit{Sullivan}, 376 U.S. at 279.

\textsuperscript{49} \textit{Id.} at 271.

\textsuperscript{50} \textit{Id.} at 271-72.
officials was . . . a fundamental principle of the American form of government." 51 The Sullivan Court "recognized that the First Amendment was grounded on principles of self-government." 52

B. The Meiklejohn-Sullivan Axis

The Court's reasoning in Sullivan often follows philosopher-scholar Alexander Meiklejohn's vision of democratic self-governance. 53 In fact, since First Amendment scholar Harry Kalven, Jr., linked the Court's reasoning to Meiklejohn, 54 legal scholars have cited what Lee C. Bollinger calls an axiomatic "Meiklejohn-Sullivan alliance." 55 Justice Brennan, who authored Sullivan, solidified this link when he paid homage to Meiklejohn in a Brown University lecture. 56 Today, as University of Chicago constitutional law scholar Cass R. Sunstein puts it, it is "a relatively uncontroversial working hypothesis, that the decision rested on Professor Meiklejohn's conception of the first amendment." 57

Meiklejohn believed that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government." 58 In a self-governing democracy, wise decisions about public policy issues require that "all facts and interests relevant . . . shall be fully and fairly presented." 59 The final aim or telos of speech "is the voting of wise decisions." 60 Speech about "matters of public interest" 61 deserves the most protection because it fosters wise and informed decision making. For Meiklejohn, as law professor Steven H. Shiffrin writes, "the Constitution's commitment to freedom of speech is nothing more than a reflection of

51. Id. at 275.
52. Mark D. Walton, The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc., in Light of Lower Federal Court Public Figure Formulations, 16 N. ILL. U. L. REV. 141, 146 (1995).
54. See id.
55. LEE C. BOLLINGER, THE TOLERANT SOCIETY 49 (1986). Bollinger observes that the Meiklejohn-Sullivan alliance "provides the core structure around which much First Amendment discourse and many opinions are built." Id.
58. MEIKLEJOHN, supra note 21, at 27.
59. Id. at 26.
60. Id.
61. Id. at 24.
our commitment to self-government.\textsuperscript{62}

Before going further, two points about Meiklejohn's theory are critical. First, Meiklejohn emphasizes that voting—wise and informed voting—is "the final aim\textsuperscript{63}" of free speech in a self-governing democracy. As he states, "the voters ... must be made as wise as possible."\textsuperscript{64} This concept is critical for considering whether negative political ads merit regulation. The concept suggests that if speech either does not inform citizens or deters them from voting, then such speech is subject to regulation.

A citizen's vote, as Meiklejohn would say in a later article, is "the official expression of a self-governing man's judgment on issues of public policy."\textsuperscript{65} To the extent that citizens do not vote, self-governing democracy erodes. Accordingly, if speech deters citizens from voting, speech does not further democratic self-governance.

This leads to the second point. Meiklejohn did not believe that all speech deserves protection. He observed that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."\textsuperscript{66} At first, this appears to open the door for regulations on negative political advertisements. Arguably, negative advertisements are simply not worth saying. They do not promote wise decision making and, in fact, they may deter people from taking part in the decision making process.

This reading of Meiklejohn, however, must be tempered by his admonition that citizens "may not be barred [from speaking] because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it un-wise, unfair, un-American."\textsuperscript{67} Read broadly, this suggests that even if negative political ads are false or unfair they still deserve protection.

Meiklejohn reinforces this point when addressing the defama-

\textsuperscript{63} MEIKLEJOHN, supra note 21, at 26.
\textsuperscript{64} Id.
\textsuperscript{65} Alexander Meiklejohn, supra note 19, at 256.
\textsuperscript{66} MEIKLEJOHN, supra note 21, at 26. Robert Post observes that this concept is "one of Meiklejohn's most quoted aphorisms." ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 270 (1995). Post suggests that Meiklejohn and other legal scholars like Owen Fiss "would use governmental power to censor speakers whose expression is deemed incompatible with the achievement of a rich and informative public dialogue." Id. at 276.
\textsuperscript{67} MEIKLEJOHN, supra note 21, at 27.
tion of public figures. He argues that if a "verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. . . . Though private libel is subject to legislative control, political or seditious libel is not."68

C. How Negative Political Ads Conflict with Democratic Self-Governance

The Meiklejohnian vision of democratic self-governance "seeks to promote, as a central democratic goal, reflective and deliberative debate about possible courses of action."69 Concomitant with the principle of reflective deliberation is the principle of participation in self-governance.70 Voting—the most basic form of participation—should be the product of debate and dialogue. To vote is to actively join in the decision-making process.

The following quartet of reasons support the argument that negative political ads conflict with the principles of rational, deliberative debate and participation that are essential for democratic self-governance:

1. Rational and deliberative debate is diminished by negative, 30-second, sound-bite advertisements that provide little context and substantive information;71

2. Rational and deliberative debate is diminished by negative, 30-second, sound-bite advertisements that appeal to emotions rather than reason;72

68. Meiklejohn, supra note 19, at 259. These remarks were made prior to the Supreme Court's decision in Sullivan.
70. See SMOLLA, supra note 36, at 12 (providing that "speech is a means of participation [in government], the vehicle through which individuals debate the issues of the day, cast their votes, and actively join in the processes of decision-making that shape the polity").
71. See Frankel, supra note 23, at 368 (stating that "[t]he more that negative ads replace intelligent political debate over the issues, the more the democratic process suffers").
72. See JOHNSON-CARTEE & COPELAND, supra note 2, at 276 (providing that "[n]egative political advertising, as does all political advertising, often takes complex issues and reduces them to emotion-laden snippets wrapped in stirring music and patriotic symbols. Such ads could be ripe for use by a would-be demagogue by appealing to the emotions and prejudices of people"). As Cass Sunstein observes, "[d]emocracy by soundbite is hardly a perfect ideal." Sunstein, supra note 69, at
3. Rational and deliberative debate is diminished by negative, 30-second, sound-bite advertisements that provide false and misleading information; and

4. Participation in democratic self-governance, as reflected in voter turnout, is diminished by negative, 30-second, sound-bite advertisements.

Negative ads not only diminish participation in democracy by shrinking the electorate, but they disable a certain portion of that electorate—nonpartisan, independent citizens. The data compiled by Ansolabehere and Iyengar reveal that negative ads "are shrinking the electorate, especially the non-partisan electorate. As the independents in the middle stop voting, the partisans at the extremes come to dominate electoral politics. It is the voice of this increasingly small and increasingly polarized voting public that representatives hear." This is troubling. James Madison, one of the principle architects of the First Amendment, wrote in Federalist Paper No. 39: [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people . . . . It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . . It seems that when only half the people vote in presidential elections, power is not derived from "the great body" of the people or society. There is nothing great about a bare majority of eligible voters that does not include independent thinkers not bound by party affiliation. That negative ads compound this problem militates against their use and proliferation.

Balanced against these arguments for regulating negative ads is the argument that they convey information that informs the public, albeit a public less likely to vote as a result of the manner and style in which that information is transmitted. A rich judicial tradition of protecting political speech weighs heavily on the side

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73. See ANSOLABEHERE & IYENGAR, supra note 4, at 148.
74. Id. at 10.
76. Id.
77. See supra note 16 and accompanying text.
of protecting negative political ads.

Negative political ads thus are subject to a tension between an informed public and an active public. A self-governing democracy in which the rulers and ruled are the same requires both an informed public and one that actively participates in the self-governing process. The "self" in "self-government" is meaningless when only half of all eligible voters go to the polls.

Although negative political ads may convey information, they also promote a politically inactive public. What informs the public may harm the public, not simply because it is false or pollutes the marketplace of ideas but because it hinders public involvement at its most basic level—voting.

Before further analyzing the issue of regulating negative political ads, the next part of this Article reviews and critiques the recent data that suggest that negative political ads suppress voter turnout. Before one can make a controversial and somewhat paradoxical argument that political speech should be regulated in the name of enhancing self-governance, one should scrutinize the social science data that add fuel to that argument. In addition, Part II summarizes prior social science research about other harms caused by negative advertisements.

II. SUPPRESSING VOTER TURNOUT: THE SOCIAL SCIENCE RESEARCH

In December 1994 a group of MIT and UCLA political scientists published the results of a series of controlled experiments on the effects of campaign advertising tone on intention to vote. The same article also included the results of a systematic, aggregate-level content analysis and a comparison of advertising tone

78. A controlled experiment is "a procedure for testing cause-and-effect relationships within a setting that permits maximum control over extraneous variation and allows the experimenter to observe the effect of one variable on another in such a way as to demonstrate that no other variable could have produced the same effect." Bruce H. Westley, The Controlled Experiment, in Research Methods in Mass Communication 200, 204-05 (Guido H. Stempel & Bruce H. Westley eds., 1989). For a primer on social science experiments and experimental methodology, see Earl Babbie, The Practice of Social Research 236-59 (6th ed. 1992). "Experiments are an excellent vehicle for the controlled testing of causal processes" that allow researchers to test "the effect of an experimental stimulus on some dependent variable through the pretesting and posttesting of experimental and control groups." Id. at 258.

79. See Ansolabehere et al., supra note 4, at 829.

80. In a content analysis, researchers examine and code the content of messages
This combination of experimental design and analysis of real-world data to analyze the same phenomenon is rare. Replicating the experimental framework with real-world data enhances the external validity of the results. In 1995 two of the authors of the *American Political Science Review* article, MIT's Stephen Ansoulouse and UCLA's Shanto Iyengar, published an expanded version of their findings, *Going Negative: How Attack Ads Shrink and Polarize the Electorate*.83

The experimental findings and the analysis of the data from the 1992 United States Senate races suggested the same result—"negative campaigns tend to demobilize the electorate."84 Lending empirical support to a common sense hypothesis, Ansolabehere and his colleagues found that "attack advertisements discourage people from voting."85 Their research also found that negative political ads decrease a sense of political efficacy, defined as the belief in the responsiveness of public officials and electoral institutions to the popular will.86 Attacks produce "the highest drop in political efficacy and in intentions to participate among nonpartisans."87

In terms of numbers and percentages, the experimental data published in the *American Political Science Review* suggest that:

[Voting intention dropped by 5% when [experiment] participants were shown an attack advertisement in place of a positive advertisement. Our aggregate-level replication of the experimental results suggests that Senate turnout in 1992 was roughly 4% lower when the candidates waged relatively negative campaigns. Since the scope of the experimental manipulations never exceeded a single advertisement, our estimates of the demobilizing effects of cam-

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81. See Ansolabehere et al., *supra* note 4, at 829.
82. External validity refers to "the generalizability of experimental findings to the 'real' world." BABBIE, *supra* note 78, at 249. There is a danger that "[e]xperimental findings may not reflect real life." *Id.* at 258.
84. Ansolabehere et al., *supra* note 4, at 833.
85. *Id.* at 834.
86. See *id.* at 835.

or articles found in communication media such as magazines, newspapers, and television programs. See BABBIE, *supra* note 78, at 312-13. In the research Ansolabehere and his colleagues analyzed newspaper and magazine articles about the 1992 Senate campaigns and candidates' advertisements. Ansolabehere et al., *supra* note 4, at 833.
Ansolabehere and Iyengar estimate that, holding all other factors constant, 6.4 million more people would have voted in the 1992 senatorial elections had the tone of the campaigns been more positive. In a nutshell, the results of both the experimental and nonexperimental procedures provide a damning indictment of negative advertising.

Before accepting these data and conclusions, however, it is essential to review and critique the research methods and techniques that led to those results. Section A, below, briefly describes the experimental methodology and manipulations and provides an overview of the researchers' analysis of the tone of thirty-four United States Senate campaigns in 1992 and the voter turnout in those elections. Section B points out possible weaknesses in the research and methodology that mitigate the strength of the findings. Section C describes the results of other social science research on negative ads.

A. The Research

Ansolabehere and Iyengar focused their research on three potential effects of televised political advertisements: (1) distortion of voter information; (2) manipulation of voter choice, and (3) demobilization of voter turnout. This Article focuses on their research addressing the latter problem—the demobilizing effects of negative political ads. Although Ansolabehere and Iyengar found

88. Ansolabehere et al., supra note 4, at 835.
89. See ANSOLABEHERE & IYENGAR, supra note 4, at 108-09. The news from the experiments about advertising tone and voting intentions is not all bad. Specifically, positive advertisements can actually raise intentions to vote. See id. at 105.
90. The researchers found that “despite the typical advertisement’s brevity and superficial format, voters can and do learn from advertising, even on matters of substance such as the candidates’ positions on the issues.” Id. at 9. They observed that the tone of the ads—whether positive or negative—does not influence “[h]ow much voters learn about the candidates’ positions.” Id. at 51. Ansolabehere and Iyengar found that “voters come away from positive and negative advertisements with about the same level of issue information.” Id. at 49.
91. Ansolabehere and Iyengar found that the manipulative powers of political advertising were weak, observing instead that “exposure to advertising reinforces or ‘awakens’ latent partisan predispositions.” Id. at 10. As they state, “[a]dvertisements induce few Republicans to vote Democratic and few Democrats to vote Republican.” Id. at 64. They did find, however, that “Republican candidates persuade their supporters more effectively with negative advertisements, while Democrats tend to be more persuasive with positive appeals.” Id. at 10.
92. See id. at 8.
that political advertisements in general are informative and generally nonmanipulative, they observed that "negative advertisements, which account for approximately half of all campaign messages, are shrinking the electorate, especially the nonpartisan electorate." Section 1 of Part A examines the experiments that led to this conclusion. Section 2 analyzes the nonexperimental data drawn from the 1992 senate races that support the finding that negative ads cause demobilization.

1. The experiments

The overview below provides nontechnical synopsis of one version—the one-ad design used to measure the impact of advertisement tone on voting intentions—of the experiments conducted by Ansolabehere and his colleagues. The overview is not a complete description of the series of experiments. Rather it is intended for legal scholars, untrained in social science methodology, who are interested in a basic understanding of one of the ways in which the researchers measured the impact of negative ads on voting. The other parts of this section provide greater detail. Readers of this article are strongly encouraged, however, both to review Going Negative: How Attack Ads Shrink and Polarize the Electorate for a complete understanding of the experimental methodology and to reach their own conclusions about the internal and external validity of the experiments.

a. overview

A controlled experiment is the "best—and very nearly only—way of finding out what causes what." It involves a "direct test of a hypothesis by observing the effect of one variable [the independent variable] on another [the dependent variable] under controlled conditions."

In the experiments conducted by Ansolabehere and Iyengar, for instance, "[t]he demobilization hypothesis predicts that exposure to negative advertising will lower the percentage of likely vot-

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93. Id. at 10.
94. The overview describes the one-ad version of the experimental design. The researchers also used a two-ad version not analyzed in this Article.
95. See ANSOLABEHERE & IYENGAR, supra note 4.
96. Westley, supra note 78, at 200.
97. Id. at 205.
The independent variable—the variable manipulated by the researchers to see if it causes a change in the dependent variable—was a televised campaign ad. The researchers "manipulated" campaign ads by making a particular ad appear in either a negative or positive tone. As Ansolabehere and Iyengar state, the "essence of these experiments was that we could manipulate the tone of the experimental advertisement while keeping all other features identical."

For instance, in one of the experiments, the researchers created two versions of an advertisement for former San Francisco Mayor Dianne Feinstein, a candidate for the United States Senate. In both versions, the video track was the same. Only the words varied. In the positive version an announcer read the following:

For over 200 years the United States Senate has shaped the future of America and the world. Today, California needs honesty, compassion, and a voice for all the people in the U.S. Senate. As Mayor of San Francisco, Dianne Feinstein proposed new government ethics rules. She rejected large campaign contributions from special interests. And Dianne Feinstein supported tougher penalties on savings and loan crooks.

California needs Dianne Feinstein in the U.S. Senate.

In contrast to the positive version of the advertisement for Feinstein, the negative version attacked one of Feinstein's opponents in the Democratic primary, then-California State Controller Gray Davis. The voice-over of the attack or negative version was:

For over 200 years the United States Senate has shaped the future of America and the world. Today, California needs

98. Ansolabehere et al., supra note 4, at 832.
99. "A variable is a concept which can take more than one value; it is any distinguishable and distinguishing property which is of interest to the researcher." JAMES A. ANDERSON, COMMUNICATION RESEARCH: ISSUES AND METHODS 91-92 (1987). In a controlled experiment and, in terms of cause and effect, "the independent variable is the cause and the dependent variable is the effect." BABBIE, supra note 78, at 238.
100. ANSOLABEHERE & IYENGAR, supra note 4, at 102.
101. See id.
102. See id. The visuals for the one-ad design, like that used in the Feinstein ads, "featured a panoramic view of the Capitol Building and the camera then zoomed in to a closeup of an unoccupied desk inside a Senate office." Id. at 23.
103. See id. at 102-03. The researchers also used the same announcer for both the positive and negative versions. See id. at 25.
104. Id. at 102.
honesty, compassion, and a voice for all the people in the
U.S. Senate. As State Controller, Gray Davis opposed new
government ethics rules. He accepted large campaign con-
tributions from special interests. And Gray Davis opposed
tougher penalties on savings and loan crooks.
California can't afford a politician like Gray Davis in the
U.S. Senate.105

The researchers also created similar ads for the Republican
primary race between John Seymour and William Dannemeyer
and for the other Democratic primary race for U.S. Senate in Cal-
fornia between Barbara Boxer, Mel Levine, and Leo McCarthy.106
All of the experiments "took place during an actual campaign and
featured real candidates—Democrats and Republicans, liberals
and conservatives, males and females, incumbents and challeng-
ers—as the advertisers."107

The researchers embedded the experimental advertisements
"in a fifteen-minute recording of a recent local evening news-
cast."108 Participants in the one-ad experimental design watched
one of three versions of the news tapes—they were exposed to a
news tape that featured a negative political ad, a tape that included
a positive political ad, or one that did not include a political ad but
instead featured a commercial for a product.109 Researchers ran-
domly assigned participants to watch one of the three versions of
the local newscast.110

Before watching the news tapes "subjects were given an in-
struction sheet informing them that the study concerned selective
perception of local newscasts. They then completed a short pretest

105. Id. at 103.
106. See id. at 23-25, 31-32. The complete series of experiments, which occurred
over a period of several years, also featured advertisements relating to other cam-
paigns, including the 1990 California gubernatorial race between Dianne Feinstein
and Pete Wilson; the 1992 presidential election between Bill Clinton, George Bush,
and Ross Perot; and the 1993 race for mayor of Los Angeles between Richard Rior-
dan and Michael Woo. See id. at 30. The issues and themes of the ads were relevant
or salient to the various campaigns. See Ansolabehere et al., supra note 4, at 831.
The researchers used both image and issue advertisements. In image ads
"candidates attempt to highlight their personal strengths." ANSOLABEHERE &
IYENGAR, supra note 4, at 34. In issue ads "candidates attempt to position them-
selves advantageously." Id.
107. ANSOLABEHERE & IYENGAR, supra note 4, at 20.
108. Id. at 21.
109. See id. at 105. Subjects who watched the tape that did not include a political
advertisement were in what is known as a control group. See id.
110. See Ansolabehere et al., supra note 4, at 837 n.4.
questionnaire concerning their social background, media activities, and political interest. However, the pretest questionnaire did not ask participants about their voting intentions—a potential weakness in the research discussed later. In brief, there was no pretest-posttest or before-after comparison of voting intentions.

Upon completion of the pretest questionnaire, the participants watched the tapes in viewing rooms furnished with sofas and easy chairs and replete with coffee and snacks. After watching the tapes, subjects were given a posttest questionnaire that asked, among other questions, whether they intended to vote in the upcoming election. Researchers then hypothesized that advertising tone influenced intention to vote. In addition to asking subjects whether they intended to vote, the researchers asked whether, in fact, subjects were registered to vote. Participants were also asked a series of questions about their confidence in the electoral process and their own ability to influence the electoral process.

The results, each of which are statistically significant, are striking. As Ansolabehere and Iyengar write:

Intentions to vote were 4.6 percentage points lower among those who saw a negative advertisement than among those who saw the positive version of the same spot. The percent expressing confidence in government was 2.8 points lower among those who saw the negative versions of the ads. And the fraction who felt that their own vote counted were 5.2 points lower among those who saw the negative versions of the ads.

Importantly, Ansolabehere and Iyengar state that their find-

111. Id. at 831.
112. See infra notes 142-43 and accompanying text.
113. In a pretest-posttest design, subjects "serve as their own comparison group in that their performance prior to treatment is compared with their performance after the manipulation." ANDERSON, supra note 99, at 101.
114. See Ansolabehere et al., supra note 4, at 831. The experiments were conducted at two sites in the Los Angeles area—one in West Los Angeles and one in the Orange County town of Costa Mesa. See id.
115. See ANSOLABEHERE & IYENGAR, supra note 4, at 103.
116. See id. at 177. The registration question was used to sort out "people who lied about their intentions." Id.
117. See id. at 103.
118. The researchers state that "a one-sided t-test showed that advertising tone significantly (at the .05 level) affected turnout." Ansolabehere et al., supra note 4, at 833.
119. ANSOLABEHERE & IYENGAR, supra note 4, at 104.
ing that negative advertisements lower intention to vote "held up after we had controlled for a host of factors that social scientists have found to predict participation—such as age, income, partisanship, and past participation." 120

A related discovery also merits mention. Ansolabehere and Iyengar found that individuals who identify themselves as independents are particularly susceptible to the demobilizing effects of negative advertisements. 121 Specifically, they found that among Republicans and Democrats, "the drop in turnout produced by negative advertising was 3 percentage points. Among nonpartisans, the decline was an astounding 11 points." 122 Negative ads thus may polarize the electorate—the middle drops out and the two extremes are left.

Subsections b and c below provide more detail about the experiments that lead to these results.

b. subjects

The participants in the experiments were not drawn from a random sample 123 of the Los Angeles area population. 124 This is a potential weakness of the experiment. According to the researchers, however, the sample population resembled that of the Los Angeles area. 125 A total of 2252 people participated in the one-ad versions of the experiments. 126 Subjects were told about the true

120. Id.
121. See id. at 111.
122. Id. (footnote omitted).
123. A "simple random sample is a probability sample where each member of the population has an equal chance of being selected." ANDERSON, supra note 99, at 151. The sample used by Ansolabehere and Iyengar was a convenience sample. "[A] convenience sample is one which is readily available to the researcher. Convenience samples are usually 'prepackaged' groups such as classes or work teams . . . ." Id. at 150. The problem with a convenience sample is that it "contains no evidence that it informs us about any group other than itself." Id.
124. See ANSOLABOHERE & IYENGAR, supra note 4, at 29.
125. See id. at 29. The researchers state:

Across all the experiments, 46 percent of the participants were male, 52 percent were white, 24 percent were black. The median age was 34. Forty-eight percent of the participants claimed affiliation with the Democratic party, 21 percent were Republicans, and 31 percent were independents. Thirty-nine percent were college graduates, with the balance being evenly divided between high-school graduates and individuals with some college.

Id. (footnote omitted).
126. See id. at 181. The subjects, each of whom were paid $15 for participating in the hour-long experiment, were recruited by the researchers through "advertising in local newspapers, distributing flyers in shopping malls and other public venues, an-
purpose of the experiments after completion.  

\[c. \text{ generalizability}\]

A potential problem with all controlled experiments is that artificial "laboratory" results will not explain how the phenomenon in question actually works or occurs in non-lab situations.  

To reduce such problems and to enhance the external validity of their one-advertisement experiments, the researchers used real candidates, real campaigns, real newscasts, and actual political advertisement footage.  

The setting for the experiment—"an informal, living room-like setting" furnished with a couch, easy chairs, plants, and coffee—was designed to minimize the aura of a research laboratory.  

Finally, to increase the external validity of their experimental findings, the researchers studied actual data from the 1992 United States Senate campaigns and elections.  

The next section describes the analysis of that data and the researchers' findings.

2. The 1992 senate campaigns and voter turnout

Ansolabehere and Iyengar did more than conduct experiments to gauge the impact of negative advertisements. They examined the tone of the thirty-four United States Senate campaigns in 1992 and compared the tone of each campaign with its voter turnout.  

Using a systematic content analysis of news coverage of the various campaigns, the researchers classified the campaigns into one of three categories: positive tone, negative tone, or mixed tone.  

The findings? Ansolabehere and Iyengar report that:

The positive Senate campaigns in 1992 averaged high turn-
out rates—57.0 percent of the voting-age population. Turnout in the mixed-tone races was almost five percentage points lower, 52.4 percent, and turnout in the negative races was down even further, to 49.7. These differences are significant using conventional statistical tests, and they hold up after controlling for the sense of civic duty in the state, past rates of participation, the dollar volume of the campaign (amounts spent), the closeness of the race, and the age and income of the electorate.\textsuperscript{1}

In addition to finding that turnout was lower in campaigns dominated by negativism, Ansolabehere and Iyengar found that negative campaigns increase a phenomenon called ballot rolloff.\textsuperscript{3}

"Ballot rolloff occurs when people vote for offices high up on the ticket, but ignore less important elections."\textsuperscript{136} For instance, an individual might cast a vote for President but ignore a senatorial election. The researchers found that in "the positive Senate races in 1992, 3.3 percent of those who voted for President did not vote for Senator. In the negative senate races, the rate of ballot rolloff was 6.0 percent."\textsuperscript{137}

\textbf{B. Critique}

Before adopting wholesale the conclusions of Ansolabehere and Iyengar that televised negative ads should be restricted, we should note several potential weaknesses in their methodology.

First, as noted above, the researchers did not draw participants from a random sample of individuals.\textsuperscript{138} Individuals who chose to participate in the experiment may be different from those who did not. A nonprobability sample of individuals like that used by Ansolabehere and Iyengar may not be representative of the population of potential voters as a whole. "A sample of individuals from a population, if it is to provide useful descriptions of the total population, must contain essentially the same variations that exist in the population."\textsuperscript{139}

Ansolabehere and Iyengar point out that their sample rea-

\textsuperscript{134} ANSOLABEHERE \& IYENGAR, supra note 4, at 108 (footnote omitted).
\textsuperscript{135} See id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. The difference is statistically significant at the .05 level. See Ansolabehere et al., supra note 4, at 833.
\textsuperscript{138} In a random sample "each element has an equal chance of selection independent of any other event in the selection process." BABBIE, supra note 78, at 200.
\textsuperscript{139} Id. at 194.
reasonably represents—in terms of ethnicity and party affiliation—that of the Southern California voting-age population and that they did not draw the sample from the usual pool of subjects for such experiments, namely college sophomores. In addition, although the researchers did not select the subjects through a random sample, they randomly assigned the subjects to the different experimental and control conditions, and the researchers controlled for background variables such as partisanship, prior voting history, age, and education.

Random assignment to conditions increases the likelihood that the groups are comparable.

A second possible weakness is the lack of a pretest measure of participants' voting intentions. The researchers did not ask the participants before watching the news tapes whether they intended to vote. There was no measure, then, against which to compare voting intentions after administration of the experiment. In other words, the one-ad experiments featured an *after-only* design, in which researchers were randomly assigned subjects to one of three conditions, administered the stimulus, and then tested the subjects for their voting intentions. This type of design is necessary, however, to mitigate the danger that a pretest measure of voting intentions might sensitize or alert the participants to the purpose of the experiment.

Another possible weakness is that the experiment measured participants' *intentions* to vote but *not* their actual voting behavior. Based on these findings that negative ads suppress voter turnout, one must believe that intentions about voting will probably translate into voting behavior. Attitudes and behaviors, however, are

140. See Ansolabehere & Iyengar, *supra* note 4, at 22, 29.
141. See Ansolabehere et al., *supra* note 4, at 837 n.4.
142. In an after-only design, "no measures [are] taken before the manipulation as a basis for comparison with the measures taken after the manipulation." Westley, *supra* note 78, at 198.
143. Sensitization poses a threat to the generalizability of an experiment, and one must ask whether "the observed effect [would] also occur with persons who had not been reactively measured before receiving the communication." Steven H. Chaffee et al., *Estimating the Magnitude of Threats to Validity of Information Campaign Effects*, in *Information Campaigns: Balancing Social Values and Social Change* 285, 288 (Charles T. Salmon ed., 1989).

As Bruce Westley states, an "advantage of after-only designs is that they eliminate the possibility that the preinduction measure may have an undesirable effect on the postinduction measure, especially when they are measuring the same thing to get a direct change measure, such as attitude change." Westley, *supra* note 78, at 204-05.
not always the same. We do not know whether the participants who said they intended to vote actually did vote, and we do not know whether the participants who said they did not intend to vote did not, in fact, vote.

Furthermore, Ansolabehere and Iyengar measured the effects of short-term exposure to negative ads. The study did not look at the long-term, cumulative effects of advertisements or follow up with the participants to later monitor their voting behavior. However, if watching one negative advertisement can have the impact on voting intentions found by Ansolabehere and Iyengar, it is likely that the impact may be even greater when considering negative ads in the aggregate.

Another potential problem with the experiment is that the messages created by the researchers to represent positive and negative ads may not, in fact, represent those concepts. In other words, the defining concepts of negative and positive ads may be problematic. Likewise, there is a problem of message generalizability—will the research results generated with the specific commercials used in the Ansolabehere and Iyengar experiments generalize to other examples of supposedly negative ads? “Generalization about a whole category of messages requires careful analysis of multiple members of the category.” No two attack ads in the real world are exactly the same. The question is whether the findings gathered with the commercials created by Ansolabehere and Iyengar would apply to other attack ads.

On the other hand, Ansolabehere and Iyengar went to great lengths to control for message variables that may have confounded with the independent variable under study—the tone of the ad.147

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144. See generally Steven H. Chaffee & Connie Roser, Involvement and the Consistency of Knowledge, Attitudes and Behaviors, 13 COMM. RES. 373, 375 (1986) (describing the relationship between knowledge, attitudes, and behaviors as “variable and moderate, not constant and high”).

145. See ANSOLABEHERE & IYENGAR, supra note 4, at 21.

146. Sally Jackson & Scott Jacobs, Generalizing About Messages: Suggestions for Design and Analysis of Experiments, 9 HUM. COMM. RES. 169, 171 (1983). “Any particular message chosen to represent any message category must be assumed to differ from other members of the category in unknown and indefinitely numerous ways.” Id.

147. Michael D. Slater observes that a fundamental validity problem with “message experiments is the risk that message stimuli do not cleanly operationalize the variable under study—that is, some uncontrolled third variables are confounded with the operationalization of the independent variable.” Michael D. Slater, Use of Message Stimuli in Mass Communication Experiments: A Methodological Assessment and Discussion, 68 JOURNALISM Q. 412, 413 (1991).
In other words, they took steps to isolate message tone—positive or negative—as the only message characteristic that would change between the positive and negative versions of the advertisements. By keeping the other characteristics of the message unchanged, they were able to focus their attention on the impact of advertising tone on voting intentions.

This section has pointed out potential weaknesses with Ansolabehere and Iyengar’s research. None of these problems is serious enough to discount the findings. The findings, as Part III argues below, provide powerful support for the argument that negative political advertisements are not political speech.

III. RETHINKING REGULATION OF NEGATIVE POLITICAL ADS: ATTACK ADS AS DEMOCRACY DISABLING SPEECH

Negative political ads are not political speech deserving of heightened First Amendment protection. Attack ads are better categorized as democracy disabling speech. These ads, which deter participation in the political process, should receive only the intermediate protection afforded commercial speech.

A. The Current State of the Law

Televised campaign advertisements, no matter how vicious or defamatory, currently receive protection under the First Amendment as political expression. Any law that singles out a particular type of content or topic of speech for regulation is subject to what courts call the strict scrutiny standard of review. The United States Supreme Court observed in *Turner Broadcasting System, Inc. v. FCC* that courts must “apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose dif-

148. For instance, under the equal opportunities provisions of the Communications Act of 1934, broadcast licensees “have no power of censorship over the material broadcast” by legally qualified candidates for public office. 47 U.S.C. § 315(a) (1994).

149. See *Action for Children’s Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) (using the term “strict scrutiny” to describe the standard of review for content-based regulations). “[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). In addition, the United States Supreme Court has held that “even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.” *Id.* at 645 (citation omitted).

ferential burdens upon speech because of its content." The Court stated in Sable Communications, Inc. v. FCC\(^5\) that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."\(^6\)

The application of the strict scrutiny standard varies depending on the medium.\(^7\) The Court observed in Turner that "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."\(^8\) This stems in part from the spectrum scarcity rationale\(^9\) and the "unique physical limitations of the broadcast medium."\(^10\)

The Federal Communications Commission is charged with ensuring that broadcasters act on behalf of "the public interest, convenience, and necessity."\(^11\) Under this power and in light of spectrum scarcity, the United States Supreme Court has upheld limited content restraints and the imposition of affirmative obligations on broadcast licensees.\(^12\) For instance, in Red Lion Broadcasting Co. v. FCC\(^13\) the Court upheld the validity of the so-called Fairness Doctrine\(^14\) despite its intrusion on the editorial autonomy of
broadcast licensees.\textsuperscript{162} In 1995 in \textit{Action for Children's Television v. FCC},\textsuperscript{163} the United States Court of Appeals for the District of Columbia upheld the channeling of indecent speech to so-called safe-harbor time periods.\textsuperscript{164}

Political speech, as a category of speech, receives the most protection under the First Amendment.\textsuperscript{165} The Supreme Court has held that it “occupies the core of the protection afforded by the First Amendment.”\textsuperscript{166} Thus, it is clear that any restriction on political expression faces extraordinarily high obstacles before its constitutionality is secure. Moreover, a regulation that allows “positive” televised political advertisements but that restricts “negative” ones may face even tougher scrutiny as a viewpoint-based regulation.\textsuperscript{167} The FCC may, however, make regulations that serve the public interest and restrict content in the broadcast medium to serve the public interest.\textsuperscript{168}

Section B below argues that one mechanism for regulating negative political ads is simply not to define them as political speech. Instead, they may be categorized as commercial speech and thus more readily subjected to government regulation.

\textbf{B. Negative Political Ads: Democracy Disabling Speech}

In a 1992 law journal article on format restrictions for televised political advertising, legal scholar Timothy J. Moran argues that “[t]here is no legitimate government interest in suppressing or inhibiting negative [political] advertising.”\textsuperscript{169} Moran asserts, without the benefit of the extensive research conducted by Ansolabehere and Iyengar,\textsuperscript{170} that “there is no indication that negative advertising per se is less informative or provides a less-meaningful

\begin{itemize}
  \item 162. \textit{See id.} at 400-01.
  \item 163. 58 F.3d 654 (D.C. Cir. 1995) (en banc).
  \item 164. \textit{See id.} at 656.
  \item 165. \textit{See supra} notes 13-17 and accompanying text.
  \item 166. McIntyre v. Ohio Elections Comm’n, 115 S. Ct. 1511, 1518 (1995). The Court observed that when “a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” \textit{Id.} at 1519.
  \item 167. “The state may not ordain preferred viewpoints . . . . The Constitution forbids the state to declare one perspective right and silence opponents.” American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985).
  \item 168. \textit{See supra} notes 153-58 and accompanying text.
  \item 169. Moran, \textit{supra} note 23, at 697.
  \item 170. \textit{See supra} notes 4-7 and accompanying text.
\end{itemize}
discussion of issues than positive advertising."\textsuperscript{171}

Moran's article misses the point. There is a legitimate interest—in fact, there is a compelling interest—in regulating negative ads. It has nothing do with the information value of negative ads, however. Instead, it has everything to do with their ability to disable democracy—to turn people away from political participation. To narrowly focus on the information value is to ignore the fact that information only serves a valuable purpose if the recipient acts upon the message.

An informed public is not the final end of protecting political expression. Rather, information is protected only so that it may enable individuals to participate in a wise and informed manner in a self-governing democracy. Negative political ads, the Ansolabehere and Iyengar data suggest, may provide information but they deter political participation.

In her 1989 law journal article on political campaign advertising, Rebecca Arbogast emphasizes that "[r]ich public debate involves not only the quantity and nature of the information presented to the electorate, but an element of participation in the process as well."\textsuperscript{172} A major "challenge to the continued vitality of a democracy then is to facilitate [potential voters'] participation and enhance their sense of engagement in the process."\textsuperscript{173}

Illinois State University Professor David S. Allen emphasizes that courts often conflate an informed public and an active public.\textsuperscript{174} An informed public is not the same construct as an active public. An informed public that does nothing with the information it possesses—even if it is the highest quality information—serves little value in a self-governing democracy.

NBC television news anchor Tom Brokaw summarized the situation well after the 1996 presidential election. "If we don't sell hard the idea of participation, we will be left with a system be-

\textsuperscript{171} Moran, supra note 23, at 697.
\textsuperscript{172} Arbogast, supra note 23, at 211.
\textsuperscript{173} Id.
\textsuperscript{174} See Allen, supra note 11, at 94. The confusion extends beyond the law. Communication researchers Paul F. Lazarsfeld and Robert K. Merton identified in 1948 a phenomenon that they dubbed the narcotizing dysfunction. See WERNER J. SEVERIN & JAMES W. TANKARD, JR., COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA 300 (3d ed. 1992). This phenomenon suggests that "[t]he interested and informed individual may know about the problems of the society without recognizing that he or she has failed to make decisions and do something about them." Id. In other words, mass media audience members may confuse being informed about a subject with taking action about it.
holden only to the highly motivated, very narrowly defined special interests whose only interest is advancing their own causes.175 This captures the admonition of James Madison, primary architect of the First Amendment, that “[i]t is essential to such a [democratic] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class.”176

This Article does not argue that negative political ads do not convey information of substance that might inform the potential electorate. Instead, it asks: Does the informational value of negative ads outweigh their detrimental affect on participatory democracy? This Article answers this query in the negative.

Speech that harms political participation is difficult to call political speech. If anything, it is anti-political speech. It disables democracy and is counter-productive to a more inclusive, participatory culture in which the public sphere should expand rather than contract. Negative political ads appear to be this kind of speech.177 Simply because their subject matter concerns politics does not mean that they have value in a self-governing democracy.

The FCC, as noted above, is charged with regulating broadcast content in the public interest.178 The FCC must consider the public interest—the collective-level general welfare of society—to provide some room for legal maneuvering to reduce speech that harms participation in democracy. Red Lion is precedent for the view that the audience’s interest must sometimes take priority over the interests of the speakers—be the speakers broadcast licensees or political candidates—in the broadcast medium.179 As the Supreme Court observed in that case, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”180 It is time to consider whether the public interest entails sacrificing some forms of political speech—specifically, televised negative political ads—to better serve the interests of the audience. As members of a self-governing democracy, all citizens have

175. Bored to the Bone, NEWSWEEK, Nov. 11, 1996, at 38, 40.
177. Future replications of the Ansolabehere and Iyengar experiments may further increase the validity of this proposition if the results produced resemble the current findings.
178. See supra note 157 and accompanying text.
180. Id.
a compelling interest in increasing political participation. Supreme Court decisions, as Justice Breyer recently observed, “have not left Congress or the States powerless to address the most serious problems.”¹⁸¹

Televised negative political ads pose the most serious problems to our self-governing democracy. They are not political speech but democracy-disabling speech. They are more akin to commercial speech designed to sell a product than to speech that facilitates democratic self-governance. The sponsoring candidate is the product. As Collins and Skover observe, “[t]he concept of the voter as consumer necessarily leads to the concept of the politician as seller.”¹⁸²

Commercial speech is protected under the First Amendment, but not to the extent of political speech.¹⁸³ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*¹⁸⁴ the United States Supreme Court held that:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary . . . .¹⁸⁵

Under this standard, negative political ads that are not false or misleading receive protection under the First Amendment but may be regulated if the government offers a substantial interest. The interest in promoting participation in a self-governing democracy in which less than one-half of the voting-age public casts a ballot is an interest of a compelling nature. Restricting negative political ads—as opposed to all political advertisements—may provide the necessary remedy for serving that interest. Such a remedy does

¹⁸². COLLINS & SKOVER, supra note 15, at 94. Collins and Skover observe that “[a]dvertising-agency professionals serve as ‘media consultants’ to the candidates and orchestrate elections as if they were mass-marketing campaigns. All three of the major candidates in the 1992 presidential election race turned to Madison Avenue gurus.” Id. at 94-95.
¹⁸⁵. Id. at 566.
not prohibit all televised campaign ads, but only those that attack an opponent.

A problem, of course, with such a regulation is a potential void-for-vagueness challenge based on ambiguous definitions of concepts like “negative ads” or “attack ads.” To survive a vagueness challenge, a law must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and “provide explicit standards for those who apply [the law].”  

Vague laws, as Stanford University constitutional law scholar Kathleen Sullivan observes, are troublesome because they “pose a terrible danger of promoting self-censorship, which can be just as chilling of protected speech as formal government regulation is.”

Advertisements that criticize or attack a political opponent based either on a personal characteristic or a policy position would fall within the scope of negative political ads. Drafting a more precise definition is beyond the scope of this Article. The purposes of this Article, instead, are to suggest—using social science evidence—that negative political ads are problematic in a self-governing democracy and to argue that they should not be afforded absolute protection as political expression because they demobilize potential voters.

Is this Article’s suggestion that negative political ads must be restricted because they represent democracy-disabling speech a case of, as the United States Supreme Court once stated, “burn[ing] the house to roast the pig”? Does it sacrifice the informational value of negative political ads at the altar of political participation? These are questions about which reasonable legal minds may disagree. What would be more troubling than a disagreement, however, would be if no one stopped to ask what can be done to enhance participation in the democratic process in an era of pervasive cynicism in which people drop out of politics as if it were some elective course in college.

If negative political ads do suppress voter turnout, as the data described herein suggest, then a logical starting point is to consider their regulation.

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IV. Conclusion

Using social science research, this Article offers an argument that negative political ads must be restricted because they disable democracy and suppress voter turnout. Public policy judgments must take into account solid social science research when problems that strike at the core of what it means to live in a self-governing democracy lie in the balance between inaction and regulatory reform.

Much of the argument herein contradicts traditional thinking about political expression. Speech about politics seems on its face like political expression. This Article, in fact, agrees that speech that serves democratic self-governance must be protected. Speech about politics, however, is not the same thing as speech that serves politics. Negative political ads do not serve democratic self-governance—they inhibit it. They are not political expression to the extent one uses that term to define speech in the public interest that promotes the collective welfare. Although the topic may be about politics, the message conveyed is debilitating to participatory democracy.

Alexander Meiklejohn, as noted in Part I of this Article, suggested that the final aim of free speech is “the voting of wise decisions.” Unfortunately, negative campaign ads may prevent the voting of wise decisions. This is not because the information the ads contain may be false and thus cause citizens to vote incorrectly. Negative political ads prevent the voting of wise decisions simply because they deter people from even taking the steps necessary to cast a ballot. An informed but inactive public is not self-governing.

189. For instance, Meiklejohn defines political speech as “matters of public interest—roads, schools, poorhouses, health, external defense, and the like.” MEIKLEJOHN, supra note 21, at 24.
190. Id. at 26.