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STEMMING THE "SLEAZE": A COMPREHENSIVE APPROACH TO THE PROBLEMS OF NEGATIVE POLITICAL ADVERTISING

Lawrence M. Frankel*

The problem of "sleaze" in political campaigns was one of the dominant themes of the campaigns of 1992.¹ While it is not entirely clear what sleaze refers to,² it does seem apparent that one of the principal sources of sleaze is "negative" political advertising, principally on television.³ Over the past several years, substantial attention has been directed at the perceived problems of such advertising. Negative political advertising generally refers to advertising in which a candidate attacks an opponent, often using misleading language or images to make a point. Numerous articles have appeared in the popular press⁴ and a fair amount of editorial wrath has been di-

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². See, e.g., Truly Slick, WASH. POST, Aug. 19, 1992, at A18 ("[P]art of the problem is that no one has exactly defined what is and is not sleaze or what does constitute irrelevance or out-of-bounds assaults in the campaign."). Among some of the topics that appear to be at the borderline between permissible, legitimate subjects of inquiry, and "sleazy" illegitimate topics are: a candidate's marital and/or sexual history; a candidate's past financial history; a candidate's family's financial dealings; and a candidate's family's social or political views. A particularly vicious attack may be considered "sleazy" even if it relates to a legitimate subject of inquiry.

³. One characteristic of recent campaigns has been that news and advertisements tend to blend together. See, e.g., KATHLEEN H. JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 3 (1992) (discussing footage of Michael Dukakis in a tank that "[b]y the [1988] campaign's end . . . had appeared in news, the news footage had appeared in a Bush ad, the Bush ad had appeared in a Dukakis ad, and the Bush and Dukakis ads had appeared in news"); id. at 123-59 (discussing this phenomenon in depth). However, since most recent attention has focused on negative advertisements, and since news coverage of campaigns presents a separate host of issues and problems, this article focuses almost entirely on negative advertisements and reforms directed at curbing their particular harmful effects.

rected against these negative ads. Very recently, the problems of political advertising have begun to receive attention from the legal academic community as well. “Going negative” has become a commonplace term in the lingo of political campaigns. Consequently, there is a general perception that the American public is fed up with the tenor of campaigns and with what is seen as excessive “mudslinging” rather than intelligent discussion of the issues. The popularity of H. Ross Perot’s presidential campaign may be, in part, another symptom of the electorate’s dissatisfaction with negative “politic-as-usual.”

The concern with this issue has led to a number of proposals, some introduced in Congress, designed to either curtail or eliminate negative advertising. However, any solution must be carefully tai-


5. See, e.g., Gary Nordlinger & Curtis Gans, Negative Political Ads—Good or Bad?, GANNETT NEWS SERVICE, Sept. 18, 1990, available in LEXIS, Nexis Library (statement of Curtis Gans that in a contest with many negative ads “50 percent of the consultants win and 100 percent of the public loses’’); Goodman, supra note 4 (criticizing campaigns in which both candidates go negative by reminding readers that “[t]wo wrongs . . . don’t make a right’’); see also Michael Posner, U.S. Voter Blitzed by Negative Political Advertising, REUTER LIBRARY REPORT, Oct. 14, 1990, available in LEXIS, Nexis Library (“Editorial writers are up in arms against nasty campaign advertising . . . .’’); sources cited supra note 4. Interestingly, almost always, the specific people or candidates responsible for the ads are not attacked. See Daniel S. Hinerfeld, How Political Ads Subtract, WASH. MONTHLY, May 1990, at 12. Instead, it is the general tenor of the campaign or the ads themselves that are attacked. See id.

Often the press achieves a false objectivity by criticizing both candidates even though it may be only one that is primarily or solely responsible. See id.; Jack Winsbro, Comment, Misrepresentation in Political Advertising: The Role of Legal Sanctions, 36 EMORY L.J. 853, 893-94 (1987).

6. See, e.g., Timothy Moran, Format Restrictions on Televized Political Advertising, 67 IND. L.J. 663 (1992); Peter F. May, Note, State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks, 72 B.U. L. REV. 179 (1992); Winsbro, supra note 5. It should be noted that the problems of negative political ads are related to, but somewhat distinct from, the problems of political advertising on television in general. See Moran, supra (focusing on the problems of all political TV ads, such as their brevity and lack of substance, rather than those problems specific to negative ads).


8. See Goodman, supra note 4, at A27 (noting that people generally hate negative ads).

9. See, e.g., Moran, supra note 6, at 679 n.94 (discussing three bills that would require the candidate’s image to appear in each advertisement accompanied by the candidate’s statement that he or she has approved the advertisement); Kevin J. McNamara, Positive Words About Negative Ads, NEWSDAY, Sept. 30, 1990, Ideas, at 5 (describing legislation proposed by Sens. Danforth and Boren designed to curb negative advertising); Nordlinger & Gans, supra note 5 (describing a bill introduced by Sens. Rudman and Inouye designed to curb negative advertising). The proposals contained in these bills, and several other potential policy solutions to the problems of negative advertising, are discussed infra at notes 82-102 and accompanying
lored so as not to interfere with the First Amendment of the United States Constitution, and perhaps even more importantly, so as to control the harms of negative ads without interfering with any of their benefits. Political advertising reform needs an analysis that distinguishes between types of negative ads, isolates and identifies the beneficial and harmful effects, and provides a comprehensive solution, narrowly tailored to minimize the damaging effects of negative advertising without interfering with the substantial benefits that such ads confer on the democratic process. This article attempts to provide such an analysis.

I. DEFINING AND CLASSIFYING NEGATIVE ADVERTISING

Many different kinds of ads are often classified under the general heading of "negative advertising." Several negative ads have achieved considerable notoriety. A recent example is the infamous "Willie Horton" ad of the 1988 Bush campaign. Prior to 1988, the most famous negative ad of the television era was probably an ad produced by the Johnson campaign in 1964 that attempted to raise fears about a Goldwater Presidency by playing on fears that the Senator was a warmonger. The ad showed a little girl with a flower gradually being replaced with a mushroom cloud. Negative attacks on an opponent are nothing new in American politics; they have taken place for over two hundred years. However, in an era when most people receive the majority of their information about candidates through political advertising (particularly on television), ads

10. The Willie Horton ad involved a convicted murderer who committed an additional assault and rape while out on furlough under the Massachusetts prison furlough program. The ad blamed Governor Dukakis and used the image of Willie Horton, an intimidating black male, to frighten voters. For an excellent and thorough discussion of the ad and the circumstances surrounding it, see Jamieson, supra note 3, at 15-42.

11. See Winsbro, supra note 5, at 857 n.24 (describing the ad in more detail); see also Sig S. Mickelson, From Whistle Stop to Sound Bite 158 (1989) (describing a less well-known but more explicit companion ad that essentially equated Goldwater's opposition to the Nuclear Test Ban treaty with killing little girls).

12. There is a long history of unsupported, outlandish charges in American political campaigns. Even two hundred years ago, George Washington was accused of having monarchical aspirations and Thomas Jefferson was rumored to be an "illegitimate madman and atheist." Winsbro, supra note 5, at 853; see also Bruce L. Fein, Dirty Politics 17-41 (1966) (reviewing almost two hundred years of false and misleading charges in American presidential campaigns, including charges made against each of the first three Presidents); Jamieson, supra note 3, at 43 (quoting a number of outrageous attacks on Presidents Jefferson, Jackson, and Lincoln).

13. See Goodman, supra note 4 (noting that "most of the electorate is getting their 'information' from TV ads"); Hinerfeld, supra note 5 ("Political advertising is now the princi-
like these are a cause of concern, particularly when it appears that negative ads may be increasing. The 1988 Bush campaign was one of the most negative in modern American political history. The more that negative ads replace intelligent political debate over the issues, the more the democratic process suffers. However, certain negative ads are much more dangerous than others. In fact, some negative ads may even be useful to a sound democratic process. This section sorts through the universe of negative ads to isolate the ones causing the greatest problems. Any legal or public policy remedy should be directed at this subgroup of negative ads.

A. "Good" Negative Ads

The most general, and probably useful, definition of a negative political ad is an advertisement that "serves to paint the opponent in a bad light . . . . If an ad casts a shadow on an opponent . . . it's negative." This exceptionally broad definition encompasses a great many ads that might be viewed as "good" ads—ads that provide voters with useful and accurate information and thereby aid the democratic process. For instance, ads that are simply "comparative"—they compare one candidate's positions or experiences with another's—may be viewed as negative (since they, at least in part, reflect badly on the opposition candidate). However, such ads, if truthful, can be among the most useful for informing the voters as to legitimate and critical differences between the candidates.

14. See Mickelson, supra note 11, at 152 (noting that negative ads have grown "in volume and acerbity from election to election"); May, supra note 6, at 181-82 (discussing the increased spending on advertising as well as the increased percentage spent on negative ads). Kathleen Jamieson identifies the advent of television as a primary reason negative attacks are more of a concern now than in the first century-and-a-half of the Republic. See Jamieson, supra note 3, at 50 ("Television has capacities that stump speakers, print barrages, and radio appeals lacked.").

15. See Alfred I. Blaustein, Departing from the National Noise, Recorder, June 12, 1992, at B; McNamara, supra note 9.

16. Nordlinger & Gans, supra note 5 (statement of Gary Nordlinger). It is possible for an ad to be considered negative and "paint [an] opponent in a bad light" without it even mentioning the opponent. Nordlinger & Gans, supra note 5. For instance, the Johnson campaign in 1964 ran an ad that showed a red phone ringing on a desk while the announcer stated that the phone only rings in a serious crisis, "let's keep it in the hands of a man who's proven himself responsible." Although the ad never mentioned Goldwater, it played on fears that the Senator was "trigger-happy." See Jamieson, supra note 3, at 61.
Even an advertisement that is entirely negative—it only attacks the other candidate without even mentioning the sponsoring candidate—may have sufficiently positive effects to make it something that society would not want to actively discourage. "The opposition's record, character, issue positions, source of funds, and advisers all are legitimate subjects of public debate." An ad that truthfully and accurately portrays a flaw or pertinent unpleasant fact concerning the opposing candidate is one that the voters should be able to see. As one commentator put it, "a good negative ad is one that honestly and fairly shows the difference between what a candidate says and does. A person who says 'I fight for senior citizens' but votes to kill every program important to older Americans is fair game." Certainly, when a candidate has done something or taken some position sufficiently distasteful so as to cause a great many people to vote against him, his opponent should have every right to make these facts known to the public. Truthful negative ads may allow a challenger to gain ground against an entrenched incumbent. However, even these good negative ads may have unwanted effects.

In summary, it is important to realize that there is a distinct, definable category of negative ads in which a truthful and accurate attack is made upon an opposition candidate. These ads have substantial positive benefits and present fewer problems than the other kinds of negative ads discussed below. The recent public outcry over negative advertising has resulted much more from the kinds of ads discussed below than from the "good" negative ads identified in this section.

18. Nordlinger & Gans, supra note 5 (statement of Gary Nordlinger). At least some believe that "[d]espite their visceral, visual character, oppositional ads tend to carry a high level of 'factual content.'" JAMIESON, supra note 3, at 103.
19. There is, of course, a continuing debate over what subjects are legitimate for public debate in a campaign, particularly in the aftermath of charges of marital infidelity against Gary Hart in 1988 and Bill Clinton in 1992. Given the complexity of many substantive issues and the relatively little interest voters have in thoroughly comprehending detailed policy proposals, it is perhaps neither surprising nor necessarily detrimental to our democratic system that votes are cast based upon people's "gut" feelings about a candidate. Arguably, many people voted for Ronald Reagan not principally because they agreed with his policies but rather because they found him personally appealing. "Character" is, therefore, indisputably an important issue in modern campaigns. Thus, true and accurate information which reflects poorly on a candidate, whether policy-related or not, is something that opponents should be able to make available to the public.
20. See infra notes 37-64 and accompanying text.
B. False Negative Ads

At the opposite end of the spectrum from the good, truthful, and accurate negative ads discussed in the preceding section, there are occasionally ads that are clearly and demonstrably false. Perhaps the most notorious example of this involved a 1950 Senate race in which "a fake composite photograph . . . [that] showed Senator Millard Tydings conferring closely with the American Communist Party leader Earl Browder received wide distribution." In addition, the opposition candidate circulated advertisements that included "completely false charges that Tydings' Senate committee had, among other things, held up the shipment of arms to American troops in Korea and retained a known Communist on the government payroll." Tydings, initially a strong favorite, lost the election.

Advertisements like these, however, appear to be few and far between. It is difficult to find an ad that is completely and demonstrably untrue. Rarely are major facts or photos simply fabricated without some basis in reality. Indeed, if a candidate's ads could be proven false, it is possible that it would cause a scandal sufficient to ensure that candidate's defeat. There may even be legal consequences to a demonstrably false ad. Thus, it is not surprising that campaigns attempt to produce ads that are as harsh as possible on an opposition candidate without being demonstrably false. "[P]ractitioners have refined the art form considerably so that the best ads make a simple, nasty point, yet hew closely enough to the truth to avoid the lethal charge that the ads are false." Thus, although completely false negative ads would be a major problem if

21. Winsbro, supra note 5, at 856.
22. Winsbro, supra note 5, at 856.
23. It may be readily observed that demonstrably false statements quickly draw media attention. Recall the furor surrounding Presidential candidate Biden's false assertion that he graduated near the top of his law school class. See Crystal Nix, Candidate Scrutiny Giving Next Generation Pause, N.Y. TIMES, Nov. 17, 1987, at 16. In addition, many of the harshest ads also draw unfavorable press coverage. Whether the Willie Horton ad was a net plus or minus for the Bush campaign, it is clear that it received a great deal of criticism. See, e.g., Howard Kurtz, Past Brings Perspective to Negative Ads, WASH. POST, July 28, 1992, at A8. The bottom line is that an advertisement that does not have even a hint of truth or that is perceived as completely out-of-bounds is likely to become the source of a scandal and more of a liability than an asset to the campaign responsible.
24. See James A. Albert, The Remedies Available to Candidates Who Are Defamed by Television or Radio Commercials of Opponents, 11 VT. L. REV. 33 (1986) (citing examples such as filing a suit for libel, seeking injunctive relief from false advertising, or filing a claim under state campaign laws); May, supra note 6, at 198-99 (possibility of statutory regulation of advertising context).
25. Nasty Ads, supra note 4, at 50.
they were commonplace, they are not currently a major problem because they are not commonplace. The political and legal process currently seems to have sufficient safeguards so as to prevent candidates from basing their advertisements on completely untrue charges.

C. The Problem: Negative Ads that Misrepresent, Mislead, and Manipulate Emotions

Between negative ads that are true and those that are clearly false are ads that have some element of truth but substantially bend reality so as to paint an unfavorable picture of the opponent. Most negative ads on the air today fall within this category, and it is this type of ad that seems to have provoked most of the outrage against negative ads.\(^{26}\) There is, however, great variety within this category of negative ads. Some rely heavily on selective presentation of facts or the use of statistics. For instance, in a 1984 Georgia congressional race, the challenger, Pat Swindall, attempted to paint his opponent (a moderately conservative incumbent named Elliott Levitas) as a liberal: "Swindall noted that in 1983 Levitas had, unbelievably, 'voted with Tip O'Neill on every single issue on which the speaker himself actually voted.' Swindall, however, neglected to provide voters with the further information that the Speaker of the House had only voted on three occasions during that entire year."\(^{27}\)

Many negative ads attempt to play heavily on emotions. The Willie Horton ad\(^{28}\) relied on provoking the emotion of fear in the minds of those who viewed it. A recent Jesse Helms ad from the 1990 Senate race depicted a white hand crumpling a job rejection letter while a voice related that the job had to be given to a minority to fill a racial quota.\(^{29}\) The ad was clearly trying to play on voters' emotions, in particular, the emotion of outrage resulting from perceived injustice.

In order to avoid being factually false, many ads use pictorial

\(^{26}\) See, e.g., Nordlinger & Gans, supra note 5 (statement of Curtis Gans that while negative ads in theory are not a problem, most actual negative ads are a problem because they involve "oversimplifications, distortions, irrelevancies and downright dishonesty, which are unaccountable and debatable"); Hinerfeld, supra note 5, at 12 ("It's not the negative ads that are perverting democracy. It's the deceptive ones.").

\(^{27}\) Winsbro, supra note 5, at 862. A more recent example involving manipulation of statistics is the well-publicized contention of the Bush campaign that Bill Clinton raised taxes in Arkansas 128 times. See Adam Pertman, The High Art of Shaping the Facts, BOSTON GLOBE, Oct. 1, 1992, at 20.

\(^{28}\) See supra note 10.

images rather than words to achieve the desired results.\textsuperscript{30} The infamous anti-Goldwater mushroom cloud spot\textsuperscript{81} relied heavily upon imagery for its message. In the 1988 campaign, an effective ad used imagery to attack Governor Dukakis' environmental record. The ad showed "technically 'accurate' close-up shots of fouled water [in Boston Harbor] to amplify dramatically the political message."\textsuperscript{82} Naturally, however, the ad neglected the fact that "Dukakis was the first Massachusetts governor to try to clean up the harbor, and that the Reagan-Bush administration blocked his efforts. The ad gave the impression that Bush had a stronger environmental record, which . . . 'was simply a deeply misleading notion to convey to the voting public.'"\textsuperscript{83} Television visuals allow a candidate to transmit a message that would not be possible to transmit using words because the words would be either false\textsuperscript{34} or ridiculous.\textsuperscript{35}

The common denominator of all of these ads is that they do not contain the kind of true and accurate factual information that voters require to make an informed electoral decision in favor of one candidate and against another. Quite the contrary, they are designed to cause voters to vote against a particular candidate based on fears that have only a limited basis in reality.\textsuperscript{36} These ads transform the electoral process into a battle of which candidate can make the public more fearful of (and more outraged at) the other. Although at the outset it may be obvious that this situation in itself is not particularly

\textsuperscript{30} See Jamieson, supra note 3, at 5 ("Politicians craft visuals to create false impressions."); Hinerfeld, supra note 5 (relating statement of Julian Kanter that "in today's ads 'the most important messages are those that are contained in the visual imagery.' That imagery, he points out, 'can be used to create impressions that are untrue.' ").

\textsuperscript{31} See supra note 11 and accompanying text.

\textsuperscript{32} Hinerfeld, supra note 5.

\textsuperscript{33} Hinerfeld, supra note 5 (quoting, in part, Jonathan Alter).

\textsuperscript{34} An example of this may be drawn from the 1960 Kennedy campaign:

From the first Kennedy-Nixon debate, the Democrats lifted moments showing Nixon nodding agreement to the goals he and Kennedy shared. By the wonders of editing, the Democrats injected that scene into a section of the debates in which Kennedy outlined specific controversial proposals. Had Kennedy proclaimed at the moment before or after the edited insert, "Nixon agrees with me," he would have been lying. Yet there was the Republican Vice President appearing to agree.

Jamieson, supra note 3, at 54.

\textsuperscript{35} An example of this may be found in a 1968 Nixon ad that intercut pictures of Humphrey with still photos of the war in Vietnam, poverty in Appalachia, and rioting at the convention. While a verbal contention that Humphrey had caused or approved of war, poverty, or rioting would have been dismissed as ridiculous, the visuals were able to successfully make the negative associations. Jamieson, supra note 3, at 56.

\textsuperscript{36} See, e.g., Moran, supra note 6, at 668 (noting that a negative ad "capitalizes on fears and uncertainties that the viewers already have and it intensifies them").
NEGATIVE POLITICAL ADVERTISING

II. THE EFFECTS OF NEGATIVE POLITICAL ADVERTISING

A. Effects on Candidates and on the Conduct of the Campaign

The observation that an excess of negative political advertising has substantial detrimental effects is nothing new; however, fashioning an appropriate package of reforms requires that we first pinpoint the beneficial as well as the harmful effects of negative advertising (particularly misleading negative ads) on the candidates themselves, on the voters, and on the electoral process in general. With respect to the effects of such ads on candidates, the first thing that may be readily noticed is that misleading negative ads often tend to lead to a long series of increasingly misleading and negative advertisements. A "downward spiral" is created in which the candidates react to each other's ads by producing even more harsh and manipulative spots.7

A frequent complaint about negative advertising is that it "crowd[s] out substantive debate."8 Indeed, each dollar that a candidate spends on a misleading ad or on responding to an opponent's misleading attack is one less dollar that can be spent on advertising focusing on more substantive issues.9 Often, the "downward spiral" may reach a level where the candidates have largely abandoned intelligent debate on key issues in favor of name-calling and unfounded attacks on the opponent. In many of the elections of 1990, the "downward spiral" appeared to reach unacceptable proportions. One commentator lamented at the time that "mudslinging and fairness-in-advertising have become more of a focus than war, peace and the economy in the election of 1990. Ads not only frame and distort the issues . . . they've become the issues and sometimes the only

7. See Hinerfeld, supra note 5, at 36 (noting that "[d]eceptive tactics tend to propagate"). A recent interesting phenomenon has been that of candidates reacting to negative ads by accusing the opponent, in harshly negative terms, of producing unfair negative ads. See Goodman, supra note 4 (noting that "candidates are charging each other with the most heinous crime of politics: 'going negative'" and citing three examples of this phenomenon from the 1990 campaigns).

8. Nasty Ads, supra note 4, at 50; see also Dillin, supra note 4, at 2 ("Analysts say the greatest loss from negative campaigning is a debate of the major issues.").

9. See May, supra note 6, at 188-89 (noting, in particular, the detrimental effect on "financially strapped candidates").
While it seems that negative advertising can result in a less enlightened, less substantive debate, it is not clear whether negative ads routinely cause political discourse to be less enlightened and substantive than it would be without the ads. Indeed, positive ads are often much less informative than negative ones. Positive ads often "do little more than try to establish a favorable name recognition for a candidate, who will often be shown uttering good-sounding generalities, albeit in a forceful manner, and frequently to the accompaniment of stirring patriotic music." The 1984 Reagan campaign commercials, centering on the "Morning in America" theme, showed scene after scene of heartwarming Americana—flags flying, farmers harvesting, boy scouts trooping, etc.—without ever raising any issue of real substance. Negative ads, even misleading ones, may actually improve the debate in that they "focus attention on the race and highlight differences between candidates." Of course, whether particular ads enhance or detract from the level of debate is partially a subjective question, and one that depends heavily on how misleading the ad is and on what issues are raised by the ad. Personal name calling is obviously not as useful as criticism of a voting record (even if the record is somewhat distorted.) Thus, negative political ads may or may not crowd out substantive political debate depending on particular circumstances. Such ads may actually, at times, constitute such debate. However, as a general proposition, the more misleading the ads are, the more likely they will be damaging to the level of discourse.

Negative advertising does seem to have an effect on who runs and who wins an election. The harsh, often personal criticism that negative ads contain is probably one factor that causes a great many people to not run for public office. While this may have some positive effect—in that it "weeds out" unworthy candidates who have

40. Goodman, supra note 4; see also May, supra note 6, at 184 (describing the 1989 New Jersey gubernatorial campaign in which one negative ad led to another until "[t]he broadcast battle eventually became a full-scale television advertising war, with both sides offering deceptive negative advertisements").
41. Winsbro, supra note 5, at 860-61.
42. See Daniel Golden, And Now a Word from Hal Riney, from Bartles and Jaymes to "It's Morning Again in America," BOSTON GLOBE, Oct. 9, 1988, Magazine, at 23.
43. Nasty Ads, supra note 4, at 50.
44. See Nordlinger & Gans, supra note 5 (statement of Curtis Gans that negative ads have the effect of "destroying choice in the political marketplace as more and more qualified candidates eschew politics rather than face such a barrage"). Negative ads are one major factor that apparently drove Paul Tsongas out of the 1992 presidential race. See Crain, supra note 4, at 13.
serious liabilities that they do not want publicly aired—it is probably better viewed as a negative effect, since it limits the candidate choices available and may eliminate many viable candidates.

The most important effect of negative advertising, however, may be that it changes who wins an election. Indeed, that is why candidates employ negative advertising. One thing that appears clear from the material written about negative ads is that they "work," meaning that they give the candidate employing them a definite edge. Although there are instances of negative advertising backfiring and hurting the candidate using them, more often than not, negative ads help a candidate and can even allow a candidate to go from a substantial underdog to an ultimate victor. This is not necessarily a problem, particularly if the negative ads are of the mostly true and accurate sort and reveal legitimate flaws in a candidate. As one commentator has noted, negative ads also provide a much needed tool for challengers to attack incumbents:

In congressional races, incumbents have clear advantages. They tend to be better known, they usually have come to the aid of many grateful constituents, and they have readier access to the money, that fuels modern campaigns. Incumbents also have an established record of performance. This is the strongest advantage for a hard-working congressman. A record, however, can also represent an embarrassment to an incumbent who has not represented his constituents well.

Challengers need to criticize their opponents' records in order to make the argument that the incumbent is the second type of congressman and not the first. In making this argument, they must wage a "negative campaign." Challengers who fail to be adequately "negative" will lose. . . . [V]oters will not remove...
from office an incumbent who apparently has done nothing wrong. Why should they? The burden falls on the shoulders of the challenger to show that the incumbent has not been doing a good job. 48

In an era in which the benefits of incumbency allow more than 95% of members of Congress to be re-elected, 49 a practice that aids challengers would seem to be something that should be encouraged, not restricted. 50

Changing the winner, however, is still at least as much of a detrimental effect of negative ads than a positive one. All negative ads, whether they are true, false, or misleading, try to persuade people to vote against a candidate rather than for one. Almost all try to get people to vote on the basis of fear and outrage rather than on a careful consideration of the issues. This is probably not a healthy condition for a democratic system. 51 Of even more concern is the vast majority of negative ads that are misleading or manipulative. Today, most voters rely on advertisements as their principal source of information about candidates. 52 It is essential to a properly functioning democratic process that voters rely on accurate information when they mark their ballots. 53 If voters are basing their decisions on misleading information gathered from negative ads, and their opinion of a candidate is shaped principally by the distorted picture the candidate’s opponent has painted, their electoral decision will not be a wise one. 54 Victory will go with increasing frequency to the candi-

48. McNamara, supra note 9.
50. See Moran, supra note 6, at 698 (arguing that restrictions that “make it more difficult for challengers to win” are “intolerable” because “[F]irst [A]mendment protections are most necessary for speech that is critical of the status quo and advocates change”).
51. See infra notes 55-64 and accompanying text (discussing how negative ads reduce voter confidence in government, reduce legitimacy, and increase cynicism).
52. See Goodman, supra note 4 (noting that “most of the electorate is getting their ‘information’ from TV ads”); Hinerfeld, supra note 5, at 13 (“Political advertising is now the principal means of communicating with voters; most campaign money goes into TV advertising, rather than into political functions that directly involve voters ... .”).
53. See Winsbro, supra note 5, at 863 (“Democratic theory assumes that voters will evaluate candidates on the basis of the information that is available to them.”); see also Moran, supra note 6, at 673 (“A wise choice by the electorate almost certainly requires both a rational evaluation of a candidate’s proposals and a less articulatable judgment of the character of that candidate.”).
54. Indeed, under economic theory, for any market to function properly, perfect information (or as close to perfect as possible) is essential; otherwise, consumers will make unwise choices. The lack of sufficient information in a given market is a principal form of market failure demanding government intervention—such as required labeling of food products. See A. ALLAN SCHMID, PROPERTY, POWER, AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND
date who is more willing to distort the truth. This sort of outcome is one that endangers the very foundation of a democratic society. Thus, the most troublesome aspect of negative political advertising is that it may result in candidates winning elections who, if the truth were known, would not and should not win.

B. Effect on Voters

Negative political ads not only have important effects on the candidates and the electoral process, but they also have a major impact on voters. One recurrent theme in articles discussing the problem of negative ads is that the American public, by and large, intensely dislikes them. This, in itself, may not be a major problem. While people might be more satisfied with a campaign in which all candidates are relentlessly upbeat and speak in warm, comforting terms about issues and opponents, it is not clear that such a campaign would produce the best outcomes in terms of electing the best leaders or stimulating the most useful public debate concerning critical issues. However, public dislike for campaigns that are overly negative may have serious secondary effects that constitute cause for concern.

As the public becomes "turned off" by negative campaigns, voter turnout in elections may decrease. This makes intuitive sense—people who are convinced by negative ads that all candidates are unworthy become less likely to vote for anyone. People who are disgusted by the level of debate may remove themselves from the political process altogether. If negative campaigns could conclusively be shown to reduce voter turnout, it would be a powerful motive to find a public policy solution that reduces the negativity of campaigns. However, there is reason to believe that negative campaigns may not always decrease voter turnout; in fact, in some cases, they may increase voter turnout. Negative campaigns capture voter attention.

ECONOMICS 104-06 (1987). It is by no means a far stretch to compare the political marketplace to a more conventional product marketplace, and view misleading negative ads as a form of imperfect information that requires a remedy.

55. See Goodman, supra note 4.
56. See Nasty Ads, supra note 4, at 50.
57. Higher voter turnout is usually seen as a worthy societal goal. Every election year, government-sponsored commercials may be seen that urge people to "get out and vote." Media outlets (i.e., television and radio stations) also encourage people to vote. Higher voter turnout increases government legitimacy and makes larger numbers of people part of the political process. Dissent is channeled into the system rather than outside it. When more people vote, the electoral outcome more accurately reflects societal preferences.
They may raise interest in a campaign. By playing on people's emotions (particularly their fears), negative campaigns may encourage voters to cast their ballots. In today's world of television, viewers are regularly bombarded with clever, flashy, and catchy sounds and images in the form of product advertisements and programming. Biting, clever, negative ads are one of the few ways a candidate can grab the viewers' attention and get voters to think about the campaign. Therefore, it seems unclear whether negative ads have such a depressing effect on voter turnout as to make curbing such ads a wise policy; the need to get viewer attention is a powerful factor countering such arguments and cuts in favor of allowing unrestricted use of negative ads.

One final effect of negative ads, and one that may be a source of long-term concern, is the amount of cynicism such ads induce in the electorate. All negative ads, whether true or not, are designed to make voters dislike and lose respect for the opponent. When campaigns become predominantly negative, voters get the impression that none of the candidates are "good" candidates. They lose respect for the process as well as the participants. Consequently, there is a loss of governmental legitimacy and increased dissatisfaction with the political system. This is a serious problem, and one that does not de-

58. See Nasty Ads, supra note 4, at 50 (noting that negative ads may "focus attention on the race"); Nordlinger & Gans, supra note 5 (statement of Gary Nordlinger citing research of political scientist Christopher Arterton that purportedly shows that "the nastiest races often have higher than normal turnouts").

59. See Dillin, supra note 4, at 1 ("Today, the average American viewer is exposed to an estimated 32,000 TV commercials a year, or 88 per day. The ads ballyhoo everything from glitzy cars to exotic perfumes. Political ads must contest for attention with this cacophony of commercialism."); Moran, supra note 6, at 697 ("[T]echniques used in current negative political advertising can be quite effective in communicating information to voters and interesting them in the political process. Voters tend to remember negative advertisements longer than positive ones precisely because the negative advertisements are hard hitting, entertaining, and stylistically interesting.").

60. Dillin, supra note 4, at 1 (relating statement of William Schneider that negative ads are contributing to "a deep cynicism among the public"); Hinerfeld, supra note 5 (noting that negative advertising "degrades the political process and turns voters into cynics"); see also Charles Krauthammer, Why Americans Hate Politicians, Time, Dec. 9, 1991, at 92 ("A generation of negative advertising has poisoned our view of politicians in general.").

61. See Dillin, supra note 4, at 1 (relating statement of Kathleen Frankovic, director of surveys for CBS News, that the "high level of negative campaigning has lowered the public's opinion of candidates"). The 1992 presidential race produced a sort of "none-of-the-above" syndrome, as voters expressed dissatisfaction with the choice of candidates and announced support for individuals who tried to avoid the image of a traditional politician (e.g., Paul Tsongas, H. Ross Perot). See Ralph Nader, Breaking Out of the Two-Party Rut, Nation, July 20, 1992, at 98.

62. See Nordlinger & Gans, supra note 5 (statement of Curtis Gans noting that negative ads may have the effect of "eroding political institutions").
Thus, while negative advertising has some benefits, including getting the attention of the electorate, providing important information, and making it easier for challengers to unseat incumbents, it has many more unwanted effects. The two most serious of these 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. While the latter effect results from an excess of negative advertising of all sorts, the former is mainly a problem only when negative advertising is of the misleading type. In addition, several other less significant problems of negative advertising—that negative advertising is detrimental to the level of debate and leads to a “downward spiral” and that it discourages worthy candidates from running—are only problems if the negative advertisements are misleading or false. With these effects of negative ads in mind, the question of what should be done may now be addressed.

III. Policy Solutions to the Problems of Negative Advertising

Given that negative advertising, particularly accurate negative advertising, may serve a useful and necessary purpose of informing the electorate, it would be unwise to seek a solution that severely curbs or eliminates all negative advertising. On the other hand, the tendency of recent campaigns to become increasingly negative combined with the undesirable effects of excessive negative advertising, suggests that a policy tool that would reduce the number of negative ads is in order. In particular, since many of the unwanted effects of negative ads stem primarily or entirely from misleading negative ads, a policy tool that severely curtails the use of these ads is warranted. However, a policy solution must not create more problems than it solves. The First Amendment must also be considered—both as a constitutional limitation, and as a policy directive. In other words,
any solution to the negative advertising problem should strive to place as few restrictions on speech as possible.

A. Existing Mechanisms—Candidates, the Public, and the Press

Before one attempts major reforms in order to curb the undesirable effects of negative advertising, it is important to realize what the current "marketplace" system does and does not achieve. While existing mechanisms clearly do not sufficiently address the problems of negative advertising, there are, in fact, some built-in checks in the system—not all campaigns become negative, and even the worst negative campaigns remain within some limits. Candidates, the media, and the public itself all currently play a role in preventing advertising from becoming too negative and, more importantly, too misleading. Care must therefore be taken not to overestimate the problems of negative advertising since there are already constraints on how far such ads can go.

Because the public does not like negative advertising, it may react by voting against a candidate that is perceived as overly negative. In particular, if attacks become too personal, mean-spirited, or blatantly inaccurate, the ads will backfire—the public will rally behind the attacked candidate rather than behind the attacker. In addition, the American public is conditioned not to believe everything it sees and hears. As negative ads become more outlandish and misleading, the public is less likely to give them any credence. It is a fairly well-known tenet of political advertising that the ad "must

May, supra note 6, at 197-99; Moran supra note 6, at 680-702. While this sort of analysis is indisputably important, it is almost as important to consider the public policy judgments embedded in the amendment. The First Amendment may be viewed as embodying the principle that free speech is a good thing to be encouraged to the greatest extent possible in our democratic republic. Thus, proposed solutions to the problems of negative advertising should be examined not only from the perspective of whether they violate the First Amendment, but also from the perspective of whether they encourage or discourage vigorous political dialogue.

66. See supra note 55 and accompanying text.

67. See, e.g., Adam Nagourney, Negative Campaigning Risky, USA TODAY, Aug. 19, 1992, at 6A ("Clinton’s surge in the polls began after Bush aides began attacking independent candidate Ross Perot, affirming predictions that voters would turn against the first candidate who got negative."); supra note 34 and accompanying text. Sometimes a candidate may feel the effects of a negative ad years after sponsoring it. See, e.g., Kurtz, supra note 22, at A8 (quoting Kathleen Jamieson for the suggestion that Bush's negative 1988 campaign, and the Willie Horton ad in particular, make Bush "very vulnerable to a backlash" in 1992).

68. See Winsbro, supra note 5, at 858-59 (statement of one “poorly informed voter” to one of the more outlandish claims made by Nixon campaign ads against McGovern) (“That’s just politics. They say the stupidest things. I wonder what they take us for. No one could believe that.”); see also Hinerfeld, supra note 5 (relating belief of Robert Spero that voters “don’t believe anything anyone says”).
have enough plausibility to resonate with the viewer.”69 Furthermore, negative advertising may not work if the sponsoring candidate has not “first established . . . a positive identity.”70 This is especially true in a race with more than two candidates, where voters can choose to avoid both the attacked and attacking candidates in favor of a third option.

Candidates can also develop effective strategies for dealing with negative ads launched against them. There are a wide variety of techniques available to candidates who are faced with the need to counter an opponent’s negative ads.71 Of course, one strategy is to launch equally negative and misleading ads, but this only contributes to the “downward spiral”72 of relevant political discussion. A more meritorious strategy, and one that is frequently used, is for attacked candidates to “set the record straight”: they can counter opponent’s attacks by telling the truth and by making an issue of the opponent’s unfair techniques.73 The second part of this strategy is often used as frequently and as successfully as the first.74 By raising the issue of an opponent’s negative tactics, a candidate can create a public backlash. On the other hand, a candidate who is consistently defending her positions and record against distortions and misleading statements will find herself looking defensive and unable to raise substantive issues of her own.75 This, in fact, was the position that Governor Dukakis found himself in for much of the 1988 presidential campaign. While candidates can do a substantial amount to reduce the impact of negative ads, it appears that they cannot (and have not) even come close to eliminating the problems that these ads cause. Furthermore, even when a candidate successfully counters a negative

69. Moran, supra note 6, at 668; see also Steve Weinstein, Emotions Add Up to Political Potency, L.A. TIMES, Aug. 1, 1992, at F15 (suggesting that ads only work if they “ring true for the public”).


71. For an insightful, comprehensive discussion of these techniques, see Jamieson, supra note 3, at 106-20.

72. See supra note 37 and accompanying text.

73. See Dillin, supra note 4, at 1. Frank Greer, consultant to Governor Douglas Wilder in his successful 1989 gubernatorial campaign, explains his strategy for dealing with negative ads: “First, fight back immediately. Second, tell the truth. Third, make an issue out of the other candidates' unfair techniques.” Dillin, supra note 4, at 1.

74. See Goodman, supra note 4, at A27 (citing examples of candidates making an issue out of the opponent’s negative ads).

75. See Winsbro, supra note 5, at 890 (It is the belief of political consultant F. Clifton White that candidates “should never respond to attacks from the opposition” because doing so would create a situation in which “the original charges receive even more publicity, while the candidate himself sounds defensive.”).
In a nation with a vigorous and independent press, it would seem that it should be the press that has primary responsibility for uncovering the truth about misleading negative ads; it should be the press that provides the public with true and accurate information about ads and the issues raised in them. Unfortunately, given the rampant complaints about negative advertising, it seems that the press is not doing an adequate job. Part of this is because, in a political campaign, the press tends to focus on items other than candidate statements and positions on issues. Campaign events and the "horse race" element of the campaigns (including detailed analysis of all the latest polls) are usually viewed as much more newsworthy than a campaign's statements and advertisements concerning issues or opponents. Lately, the press has been devoting considerable attention to candidates' personal lives. Even if the press does focus on the problem of misleading negative advertising in a campaign (and there is some evidence that it has been doing more of this lately), there is an even bigger problem: "false objectivity." The media has been too timid to clearly identify and criticize particular candidates for making misleading statements in an advertisement. More often, it restricts its role to blandly pointing out factual inaccuracies, or bemoaning the general tenor of the campaign and berating both candidates, even if only one candidate is primarily responsible for the misleading negative ads. In order to give the appearance of balanced, even-handed reporting and objectivity, the media presents a distorted picture to the public by suggesting that both candidates are equally guilty of misleading ads, while in reality, it may only be one. A candidate who employs misleading negative ads cannot be expected to stop as a result of media pressure if the media criticizes an innocent opponent as much as the guilty candidate. Clearly, if the

76. See Winsbro, supra note 5, at 891-92.
77. See, e.g., Godfrey Sperling Jr., Media Double Standard, CHRISTIAN SCI. MONITOR, June 30, 1987, at 15 (discussing the rising media insistence on questioning candidates about their sexual activities).
78. See Goodman, supra note 4 ("In the aftermath of 1988, newspapers have taken on the job of 'ad police'—analyzing the content of ads, separating fact from fiction."); Rondell Rosenberg, Newspapers Watch What People Watch in the Campaign, N.Y. TIMES, Nov. 4, 1990, § 4, at 5. See also infra note 106.
79. See Winsbro, supra note 5, at 893-94 (citing examples from the 1972 Nixon-McGovern campaign illustrating this type of reporting).
80. See Hinerfeld, supra note 5 (discussing the 1988 Bush-Dukakis campaign as an excellent example of this type of reporting).
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media were to abandon this practice of “false objectivity,” and vigorously identify misleading ads, many of the problems of these ads would be reduced. However, there is no reason to believe that the media is about to do so. Even if it did, it is unlikely that this would completely solve the problems of negative advertising.  

One must look elsewhere for solutions.

B. Government Identification of Misleading Ads (Administrative and Legal)

If one wishes to eliminate or seriously diminish the number of misleading ads, the simplest solution is for the government to forbid or impose penalties on such ads. Theoretically, this could be done either by statute and adjudicated in the courts, or by administrative regulation, which an agency such as the Federal Communications Commission (hereinafter FCC) would enforce. A variety of concerns, however, make this solution unacceptable.

A truth-in-political-advertising law that forbade candidates from engaging in deceptive or misleading advertising would face a number of practical as well as constitutional hurdles. Of course, such a law might raise First Amendment concerns since it seeks to prohibit candidates from engaging in certain kinds of political speech. But even if the law were constitutional—and it might be, since it could be argued that there is no right to engage in misleading defamatory speech—such a law, as a practical matter, would be virtually useless and therefore unwise. First of all, it is unlikely that a court could review an ad and accurately determine whether it was misleading before it had already done its damage. Although damages

81. Indeed, in instances where the media has identified specific misleading ads, an interesting phenomenon has occurred. “It seems that the candidates use the newspaper’s analysis of their opponents’ ads in their counter-ad. They flash the headlines and quote the reporting. But not always accurately. In total role reversal, journalists can be quoted out of context.” Goodman, supra note 4.

82. Some recent articles on the problems of negative ads seem to have focused on government action as the answer. See, e.g., May, supra note 6, at 207 (suggesting that a law be passed that establishes a mechanism whereby injunctive relief can be obtained in court against misleading ads).

83. See May, supra note 6, at 197-98 (discussing the First Amendment constraints on political advertising regulations).

84. See, e.g., Pestrak v. Ohio Elections Comm’n, 926 F.2d 573 (6th Cir.), cert. dismissed, 112 S. Ct. 673 (1991) (suggesting that laws limiting false political speech could in some circumstances be legal); May, supra note 6, at 198 (noting that “the Supreme Court has recognized that states have a legitimate interest in regulating elections”).

85. See, e.g., May, supra note 6, at 204 (A Montana statute makes the airing of misleading political ads a crime, but it is ineffective at least partially because “[w]ithout an expe-
might be awarded after the fact, the main problem of misleading ads (i.e., that they allow the "wrong" candidate to win) would not be helped. Before a court could make an informed decision, the ad would have already aired and the election would most likely be over.\textsuperscript{86}

An equally, or perhaps even more intractable problem arises from the difficulty of determining exactly what constitutes misleading or deceptive advertising. As discussed previously, negative ads rarely make factually false statements. More often they selectively use facts and use provocative images to mislead the audience.\textsuperscript{87} The task of drawing a line, and determining what is sufficiently misleading to be considered illegal, would be exceedingly difficult if not impossible.\textsuperscript{88} Any court attempting it would find itself in the center of a storm of controversy. The highly political nature of the issue combined with the difficulty of line-drawing would place this task beyond the institutional competence of the courts. When one realizes that such a necessarily arbitrary line might determine what the electorate would and would not be permitted to see, it becomes apparent that laws that attempt to judicially define and eliminate misleading ads would not be wise.\textsuperscript{89}

Allowing an administrative agency such as the FCC or the Federal Election Commission (hereinafter FEC) to monitor ads and take action against misleading ones (by banning them, or even better, by withholding funds), seems to be a somewhat better solution from a
policy standpoint. These agencies are institutionally better suited for such a role than the judiciary. They could promulgate detailed rules concerning negative ads and could act quickly to hear complaints and investigate violations. However, many of the same factors that make a judicial solution unwise also make the administrative solution unworkable. Acting with sufficient speed to prevent irreparable damage and making concrete determinations as to what is misleading and what is not are things that are inherently difficult for any governmental body. In addition, administrative bodies as well as the judiciary are necessarily filled with political appointees. A decision by a politically appointed official to prohibit or sanction an ad by the opposition party would present the appearance (and perhaps even the reality) of impropriety. Finally, there may be more First Amendment problems with administrative regulation of ads than judicial regulation. The related policies of allowing a maximum amount of free political speech and avoiding governmental limitations on speech suggest that the government should not be entrusted with the power to prohibit political ads based on a potentially arbitrary standard that the ads are excessively misleading.

C. *Indirect Statutory Solutions*

Most of the public policy remedies for negative advertising currently under serious discussion involve regulating the *format* of advertising, particularly television advertising. These solutions are perhaps the most workable; however, they too have their flaws. In particular, these solutions do not specifically attack misleading negative ads, which are the source of most of the complaints concerning negative advertising. Although format limitations would be a positive step, they cannot provide a complete answer by themselves.

One prominently discussed option for regulating advertising format would be a “talking-heads” requirement. Under this proposal, all television advertising would have a uniform format in which the

90. See Moran, *supra* note 6, at 692 (“The danger of arbitrary and discriminatory enforcement of format restrictions would appear to be strongest in the context of administrative adjudication, because the decisions of administrative agencies might be heavily influenced by political considerations . . . .”).

91. See Moran, *supra* note 6, at 692. May, *supra* note 6, at 205 (The author concludes, after a review of case law, that because of First Amendment concerns “any proposal to regulate political speech must provide for immediate judicial, rather than administrative, review.”).

92. There is not much substantive difference between the government prohibiting an ad and the government withholding funds from a candidate because of an ad. The latter has much the same effect as the former since both substantially penalize a candidate and both have the almost certain effect of ensuring that the ad is no longer aired.
candidate (or a representative) speaks directly to the camera for the duration of the ad. Bills implementing this proposal have already been introduced in Congress.93 This proposal would require that there be "[n]o more uplifting music and heartwarming scenes of Americana, no more inflammatory sequences of prison gates or escaped rapists. Candidates would have to present their messages in person, unaided by television wizardry."94 The idea behind this proposal is that if a candidate, or clearly identified representative, had to speak directly to the camera, there would be more accountability. Consequently, it would be more difficult to attack an opposition candidate, since the ad would be more likely to backfire. It would also be more difficult to manipulate emotions, since there would be no provocative visual imagery. All of this is probably true. However, this proposal creates more problems than it solves. The uniform format proposal places serious restraints on speech—there is something very repugnant about coercing candidates into a highly restrictive format that they would almost never choose of their own free will. An even greater problem is that if ads were restricted to a rather dull talking-heads format, no one would watch or pay attention.95 One of the principal reasons candidates now use flashy, catchy images for both positive and negative ads is to capture and hold viewers’ attention. A talking-head would not do this. Significantly less information would successfully be passed to voters, and significantly fewer voters would maintain interest in the campaign. Even if a talking-heads approach reduced the amount of negativity in a campaign, the positive effects are outweighed by the harmful effects of requiring a uniform, dull format of all candidates.96

Finally, there is one proposal that has been introduced in Con-

93. See Nordlinger & Gans, supra note 5 (discussing such a bill introduced by Sens. Inouye and Rudman). France already restricts candidates “to a straightforward, ‘talking-head’ format.” Winsbro, supra note 5, at 912.

94. Hinerfeld, supra note 5, at 22.

95. See Dillin, supra note 4, at 2 (statement of consultant Douglas Bailey) ("[W]ith that remote control button, the moment the ad comes on the air—Bang! If you haven’t [immediately] got their attention, that ad is gone.") (alteration in original); see also supra note 59 and accompanying text (discussing the difficulty candidates have in getting the attention of viewers).

96. See Moran, supra note 6, at 702 (A talking-heads restriction “could impair the effective communication of important ideas, make advertisements less likely to reach and involve voters, and substantially reduce the overall quantity of political advertising.”). Given the severe constraints a talking-heads restriction would place on political speech, it might well be found unconstitutional. See Moran, supra note 6, at 696 (The article suggests that a requirement that all ads be in a talking-heads format would be unconstitutional because it “would suppress a significant amount of speech that can be quite effective at communicating ideas and information to voters.”).
gess that probably would alleviate some of the effects of negative advertising without causing additional unwanted side-effects. However, this idea is likely to achieve only limited success. This proposal involves requiring all candidates to either appear in, or be clearly identified in their ads. Of these two variations, requiring only an identifier would be preferable to actually requiring the candidate to appear since it imposes less of a constraint on speech. Actually, in order for candidates to receive a "bargain-basement rate for their campaign advertising" the law already requires that the candidate be "identified or identifiable" in the ad. However, the FCC has never stringently enforced the rule and candidates frequently avoid the law by "running the identifiers so small, and leaving them on the screen so briefly, that no one could possibly read them." If Congress were to pass a law, or the FCC were to promulgate a rule that laid out specific requirements for the identifier so that viewers would instantly associate an ad with the candidate sponsoring it, candidates would be more fearful of a backlash from negative ads. Thus, some of the negativity of campaigns might be reduced. One should not be too optimistic about this proposed reform—since candidates have often shown little hesitation to attack their opponents in person, it is unlikely that an identification requirement would seriously deter a candidate from a negative attack.

D. A Comprehensive Approach

Negative ads do present some problems. However, the problems are not so severe as to require a drastic solution that would likely do more harm than good. Since the principal problems of negative ads stem from the fact that the electorate receives an excess of negative,

97. See McNamara, supra note 9 (mentioning legislation drafted by Sen. Danforth that "would require candidates to appear in their own ads"); Moran, supra note 6, at 679 n.94 (citing and discussing three such bills proposed in Congress).
98. Compare Moran, supra note 6, at 696 ("Requiring a candidate to personally present negative campaign advertisements is inconsistent with freedom of expression . . .") with Moran, supra note 6, at 702 ("The Court has generally upheld disclosure requirements that provide valuable information to the public.").
100. Oreskes, supra note 4.
101. This could be done in a variety of ways. For instance, candidates could be required to leave the identifier on the screen for five seconds in letters of a size sufficient to occupy 25% of the screen. In addition, someone would have to orally identify the candidate in the ad.
102. The willingness of candidates to personally attack their opponents, while proclaiming their own innocence of any wrongdoing, also suggests that "voluntary fair campaign codes" recommended by some would have little effect. See, e.g., May, supra note 6, at 206-07 (suggesting a voluntary fair campaign code).
often distorted, information, an appropriate cure would be to provide the public with additional true and accurate information as a counterweight. Indeed, solutions that provide additional information rather than restrict the flow of information are much more likely to provide positive side-effects than negative ones. Requiring candidates to be clearly identified in their ads is an easily implemented proposal that attempts to reduce campaign negativity by providing voters with additional, useful information. It should certainly be attempted. However, while it may do some good, it probably does not go far enough. In order to achieve a comprehensive solution to the problem of negative advertising, two other policy solutions should be implemented. One operates by using the media to increase the flow of information and aims specifically at the problem of misleading negative ads, while the other places slight format constraints on most advertising in order to encourage greater substantive discussion of the most important issues and less reliance on negative attacks (misleading or otherwise).

1. Advertising Review Commissions

Although making the public aware of distortions in advertising would seem to be a role for a vigorous free press, the press has not yet filled this role. As a result, there is no reason to believe that without some changes, it will do so in the future. The solution to this problem may be to institutionalize a media role in debunking deceptive ads. Commissions could be established for each major election made up primarily or solely of members of the media. Perhaps both parties could play a role in selecting people to serve on these commissions, much as they select neutral moderators for debates. The commissions would have to be strictly non-partisan and governed by professional ethics. The job of these commissions would be to review campaign advertisements on a weekly basis and issue a report. The report would "set the record straight" by identifying misleading ads and explaining in detail how each ad was misleading or deceptive. The weekly report would be given wide circulation in the media, including print, radio, and television.104

103. Most of the proposed solutions discussed above, including government bans on misleading ads and the talking-heads solution, restrict the flow of information rather than augment it.

104. It is essential that the reports be given attention on television, as well as other media, so that as many people as possible who saw the original misleading ad also view the impartial review of it. Otherwise, this reform may fall victim to a problem that some analysts contend plagues the current environment: "[E]ven if the press successfully counteracts the dis-
This solution would allow the media to play an appropriate role in exposing deception in campaigns by eliminating the obstacles that currently prevent the media from actively filling this role. By specifically having a body that has the sole job of reviewing ads, the problem of the media being distracted by the “horse race” element of the campaign would be eliminated. Since the commissions would be forced to comment and criticize ads on an individual basis, “false objectivity” would be much more difficult—if one candidate engaged in more deceptive tactics than the other, it would almost certainly have to be revealed in the report. (To do otherwise would require active distortions on the part of the commissions.) Furthermore, the presence of a single, authoritative body to review ads would guarantee that its determinations would be given attention.

This reform is vastly superior to having the government determine what constitutes a misleading ad for a number of reasons. First, a commission report could specifically identify what was accurate and what was misleading in an ad without necessarily having to place a definitive label (i.e., true or false) on it. This conforms much more to the reality that ads are neither completely true nor completely false, but rather a complex blend of fact and fiction. In addition, the commissions would not be able to either ban ads or withhold money from candidates (as could the government under a government-based solution). Instead, the commissions would provide information to the public concerning the nature of advertising. This, however, would probably be sufficient to alleviate much of the problem with misleading negative ads. If the commissions were to find an ad substantially deceptive and misleading, the ad would receive considerable attention in the news media, not to mention in the opponent’s commercials. Candidates would be very reluctant to produce misleading ads if they knew with a certainty that the ad would be reviewed, analyzed, and evaluated by a non-partisan group with considerable public exposure. Finally, the absence of government involvement with the commissions would ensure their constitutionality.

As a practical matter, it would be relatively simple to put this reform into practice. The simplest and probably the most effective way would be for the major news organizations to get together and announce the formation of an Advertising Review Commission at the beginning of a campaign. Perhaps, the news organizations could even announce as a matter of policy that henceforth, commissions

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*torions and evasions in a political advertisement, the information provided may not reach many of those who viewed the advertisement.* Moran, *supra* note 6, at 676.
will be established for each and every major election—congressional, presidential, mayoral, and so forth. It is not difficult to imagine a state of affairs in which the major press organizations and candidates announce the names of individuals to serve on the Advertising Review Commission at the beginning of every campaign. In essence, this proposal would create non-binding referees for each election to critically analyze information distributed by the candidates and to augment it where necessary. The problems of misleading political ads would be curbed not by oppressive government regulation, but rather by the institutionalized use of the considerable power of the press to educate and widely disseminate truthful information.

105. This proposal has a superficial resemblance to the Fair Campaign Practices Committee (FCPC), a nonpartisan group that existed in the 1950's. The FCPC monitored election advertising, and when it determined that a candidate had violated the code, it pressured the candidate to withdraw or alter the advertisement in question. If the candidate refused, the FCPC threatened to publish its findings in the media. The FCPC ultimately proved ineffective because of lack of funding and lack of enforcement power.

Moran, supra note 6, at 676.

The differences between the unsuccessful FCPC and the commissions suggested here are obvious. First, and most importantly, the "enforcement power" that the FCPC lacked would be provided here in the power (and duty) of the commissions to make their findings public. Second, the commissions could make detailed evaluations of ads rather than only characterize them as permissible or impermissible. Third, the commissions would be comprised of prominent, respected members of the press. Finally, unlike the FCPC that sought to prohibit ads from airing and thereby deprive the public of information, the commissions would review ads after they air and augment the information contained in those ads by widely circulating true and accurate "corrections."

106. In the 1992 campaign, a number of newspapers and television news programs began analyzing candidate advertisements. Some made this "adwatch" a regular feature. See, e.g., Leslie Phillips, Adwatch, USA TODAY, Oct. 13, 1992, at 5A; Leslie Phillips, Adwatch, USA TODAY, Oct. 8, 1992, at 11A; Leslie Phillips, Adwatch, USA TODAY, Oct. 2, 1992, at 4A; Richard C. Berke, The 1992 Campaign: The Ad Campaign, N.Y. TIMES, Oct. 30, 1992, at A19; Richard C. Berke, The 1992 Campaign: The Ad Campaign, N.Y. TIMES, Oct. 23, 1992, at A21, Richard C. Berke, The 1992 Campaign: The Ad Campaign, N.Y. TIMES, Oct. 22, 1992, at A20. While certainly this is a step in the right direction, it does not go nearly far enough. For the most part the "adwatch" was confined largely to Presidential candidates' advertisements. Also, not all advertisements aired by the candidates were examined; the "adwatch" appears to have been selective. Furthermore, even when an ad was analyzed, the analysis focused at least as much on strategy and the effectiveness of the ad as on its accuracy. Finally, and perhaps most importantly, even where the accuracy of an ad was critiqued, the critique was by a single journalist in a single publication and was unlikely to have much effect.

The system of Commissions recommended in this article, however, remedies these problems. Commissions would review all ads by candidates for all major offices (a different Commission for each office—President, senator, etc.), and would focus solely on accuracy. The Commission report would represent an authoritative statement by a group of impartial respected panelists, and would be widely circulated and publicized through all major news outlets. This would carry more weight and have more of an impact than the opinion of a single journalist in a single publication. The Commission system, by coordinating the various media organizations, would magnify the ability of the press to provide the electorate with true and accurate infor-
2. Issue-Based Advertising Format

The idea of increasing candidate accountability by making them identifiable in their ads is one that may profitably be extended. The government could require that a relatively large percentage\(^{107}\) of all advertising expenditures of a campaign be used on advertisements that meet certain basic, non-restrictive format requirements. For each major election, a list of ten to fifteen major issues would be developed. The entities involved and mechanics of compiling the list are not particularly important. The candidates and the press would probably play a role, as might other organizations such as the League of Women Voters. Perhaps polls could be used to ascertain what issues the voters felt were important. The FEC also might have some involvement, if only in a coordinating function. A sample list of issues might include crime, taxes, the environment, ethics-in-government, foreign relations, drugs, civil rights, defense, and the economy. The issues would almost certainly overlap and might vary depending upon the office in question.\(^{108}\) Candidates would be required to spend a certain percentage of their advertising funds on commercials that begin with the statement "Candidate X on Issue Y," where X, of course, is the candidate name and Y an issue from the list.\(^{109}\) Candidates could also be required to spend a minimal amount, say 1% of the total, on each issue in order to make it easier for the public to get information about the candidates' positions on a wide variety of issues.\(^{110}\)

This ad format, by its nature, would encourage candidates to appear in the ads and would discourage negative attacks. While a

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107. Two-thirds seems to be a reasonable figure.
108. Obviously, the issues for a congressional race might differ somewhat from the issues in a presidential race.
109. Although this reform is primarily directed at television advertising, the requirement would probably best be applied to all forms of advertising to avoid the possibility that candidates would simply shift their negative attacks to another medium. This phrase, "Candidate X on Issue Y," would have to be read aloud for radio, read aloud and shown on screen for television, and printed in large typeface for print ads. For television, standards as to the size of the letters or the length of time the statement must appear on the screen might be desirable.
110. Thus, the ads might begin something like: President Bush on taxes, or Senator Helms on civil rights, or Governor Cuomo on the death penalty.
111. Forcing a candidate to speak on an issue could pose constitutional problems. See Moran, supra note 6, at 706-07. The requirement might, therefore, have to be voluntary. Or, perhaps the 1% requirement could be tied into public funding: If a candidate receiving public funds refused to spend 1% on a given issue, the 1% would have to be returned to the public treasury. In this way, candidates would not be forced to speak on every issue, but would have a strong incentive to do so.
candidate theoretically could use a commercial to talk about something other than the substantive issue named at the beginning of the advertisement, it is unlikely that she would, since to do so would make the candidate look foolish—it would appear that the candidate was avoiding the issue. It is also hard to imagine a candidate using an ad beginning with “Senator Smith on the environment” as a 30-second opportunity to lambaste an opponent. On the other hand, since this format does not restrict the content of the ads in any way (as the talking-head proposal does), there is plenty of room for cleverness, appealing images, and even measured attacks on an opponent. This solution, therefore, allows candidates a tremendous amount of freedom in how they wish to advertise, encourages substantive debate on the issues, discourages excessive negativity, and still permits candidates to do whatever necessary to grab viewers’ attention. Because a percentage of advertising money could be spent on ads not in the standard format, candidates could also discuss issues not on the list or attack opposition candidates if they feel it is necessary. The practical limits on how much could be spent on completely free-form ads, however, would keep the campaign from entering a “downward spiral.” The non-restrictive nature of this proposal suggests that it would probably be constitutional.\footnote{See Moran, \textit{supra} note 6, at 664. Moran suggests the following standards for whether a format restriction on political advertising is constitutional: [A] restriction should be judged by the degree to which it advances the government’s interest in informed and rational political debate without substantially reducing the quantity of speech, decreasing its communicative potential, inhibiting certain views, or creating the opportunity for dangerous governmental interference with political speech. A restriction that advances the government’s interest in informed political debate and is narrowly tailored to minimize the above threats to free expression is constitutional. Moran, \textit{supra} note 6, at 664. In the unlikely event that this proposal is found unconstitutional, perhaps it could be made constitutional by tying it into public funding, or by making the format constraint voluntary. The format limitation might also usefully be combined with the suggestion of some authors that free air time be provided to candidates. \textit{See id.} at 663. Perhaps candidates could be allowed to use paid time any way they pleased, but would be forced to conform to the format restriction in the “free time” ads.}

IV. CONCLUSION

Negative political advertising is a definite problem in modern political campaigns; however, it is probably not as much of a problem as many of the recent articles in the popular press have assumed. Among the most damaging effects of negative advertising are the widespread cynicism it introduces into the public mind, and the
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fact that misleading negative ads may result in candidates winning elections that they would not otherwise win. While neither of these undesirable effects is so critical as to seriously endanger our political system, they do pose problems that should be eliminated if at all possible. However, any reform intended to eliminate the problems of negative ads must be carefully tailored and relatively mild in order to avoid making the cure worse than the disease. Thus, proposed reforms that attempt to restrict speech (such as requiring a single uniform restrictive format of all ads), or inject burdensome government regulation into campaigns (such as requiring government review of all ads in order to ban, or financially discourage, misleading ones), or alter the structure of our political system (such as giving large grants of public money to political parties) all have negative effects that outweigh their positive ones. A successful solution to the negative ad problem should maintain our current campaign system largely intact, and should work by increasing the flow of information. Such a solution could be achieved by a three-step reform package in which: 1) candidates are required to be clearly identified in all of their ads; 2) Advertising Review Commissions of media representatives are established to issue weekly reports on the accuracy of campaign ads; and 3) a large percentage of ads are required to begin with a uniform statement identifying the sponsoring candidate and an issue. If all of these reforms are adopted, the electorate will be provided with more accurate information, campaigns will become less negative and more oriented to substantive issues, and the democratic process as a whole will be improved. Our political system, as successful as it has been for the past two centuries, is in constant need of attention and fine-tuning to meet new demands presented by new technologies and changing societal trends. The comprehensive approach suggested in this article is a carefully tailored solution to a relatively new, but growing problem.

113. While there is much to be said for strengthening political parties in the United States, there is also much to be said against it. While giving money to parties for advertising might reduce the problem of negative advertising, the considerable side effects of creating a stronger party system suggest that such a reform should not be instituted unless there is an explicit societal determination that a stronger party system is something worth having purely on its own merits.