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A PROPOSAL TO STRENGTHEN THE RIGHT OF RESPONSE TO NEGATIVE CAMPAIGN COMMERCIALS

Michael Kimmel[*]

In the 1996 elections, the candidates, their political parties, and outside interest groups spent several hundred million dollars on election-related television and radio commercials.[1] Approximately half of these commercials were negative ads that attacked a candidate's character or putative position.[2] Election analysts predict that spending for election ads, including negative ads, will increase significantly in the 1999-2000 election cycle.[3] Meanwhile, reformers have proposed a variety of campaign finance changes that will lessen the impact of money on the political process. Commentators and lawmakers have given less consideration to specific problems posed by negative campaign ads.

I. THE DILEMMA OF NEGATIVE CAMPAIGN COMMERCIALS

There is some tension between the postulated and practical rationales for using negative ads. Some political analysts have defended negative

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1. *See* ELIZABETH DREW, WHATEVER IT TAKES: THE REAL STRUGGLE FOR POLITICAL POWER IN AMERICA 253 (1997) (estimating that outside groups spent about $50 to $75 million on "issue ads"); Carroll J. Doherty, *Inquiry on Campaign Finance: Burning With a Short Fuse*, 55 CONG. Q. WKLY. REP. 767, 768 (Apr. 5, 1997) (stating that the Federal Election Commission reported that the 1995-96 federal campaigners spent over $2 billion); Fed. Election Comm'n, Press Release, *FEC Reports Major Increase In Party Activity for 1995-96* (Mar. 19, 1997) (stating that Democratic and Republican party committees spent about $270 million in party "soft money" receipts and partially used this money for "issue ads"), *available at* http://www.fec.gov/press/ptyye1.htm; Television Bureau of Adver., Inc., Press Release, *Broadcast Television Political Ad Volume Hit Record High of $400 Million In 1996* (Jan. 22, 1997) (reporting that political advertising reached an all-time high of $400 million for express election ads) (on file with the *Catholic University Law Review*).

2. *See* DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952-1996 58-61 (2d ed. 1997); *see also* STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 90 (1995).

3. *See* Stuart Elliott, *The Media Business: Advertising*, N.Y. TIMES, July 1, 1999, at C6.

ads as an important means of informing voters about issues.[4] Campaign consultants recommend their use, however, mainly as a way of decreasing voter support for targeted candidates.[5] Consequently, negative campaign ads are subject to abuse and can have serious adverse consequences, including the following:[6]

(a) they can be misleading, deceptive, or inaccurate;

(b) they are frequently designed, with help of modern advertising techniques and imagery, to disparage a candidate's reputation and integrity, and to weaken voters' trust of targeted candidates, rather than fairly addressing campaign issues;

(c) they can cause a vicious cycle of ad hominem attacks;

(d) they require the amassing of large "war chests" and constant fundraising efforts by candidates and parties;

(e) they give well-financed candidates and interest groups a large media advantage against lesser-financed candidates;

(f) they have more impact on the public than other ads, and television's wide reach makes these negative ads hard to counter;

(g) their threatened use can inhibit politicians from addressing difficult but needed policy choices; and,

(h) they create political cynicism and alienation in the electorate, and can easily suppress voter turnout.

These factors suggest that unremitting negative campaigns are at odds with the public interest, to the extent they create an unfair and uninformative electioneering process, suppress voter turnout, and inhibit political discourse and comity.

Many politicians share this view,[7] though in some cases with regard to

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4. *See* KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, NEGATIVE POLITICAL ADVERTISING: COMING OF AGE 278-81 (1991); William G. Mayer, *In Defense of Negative Campaigning*, 111 POL. SCI. Q. 437, 441 (1996).

5. *See* LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE 230 (1995); ED ROLLINS WITH TOM DEFRANK, BARE KNUCKLES AND BACK ROOMS: MY LIFE IN AMERICAN POLITICS 350-51 (1996); LARRY J. SABATO, THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS 16, 165-66 (1981).

6. *See* ANSOLABEHERE & IYENGAR, *supra* note 2, at 90, 112-14, 147-49; GROSSMAN, *supra* note 5, at 230; JOHNSON-CARTEE & COPELAND, *supra* note 4, at 276-78; MONTAGUE KERN, 30-SECOND POLITICS: POLITICAL ADVERTISING IN THE EIGHTIES 185, 208-12 (1989); SABATO, *supra* note 5, at 324-26; James A. Albert, *The Remedies Available to Candidates Who are Defamed by Television or Radio Commercials of Opponents*, 11 VT. L. REV. 33, 37-41 (1986).

7. *See* 143 CONG. REC. H1345 (daily ed. Apr. 9, 1997) (statement of Rep. Tiahrt) (arguing that voters cannot make good decisions if the information on TV is false and misleading); 143 CONG. REC. S2509-10 (daily ed. Mar. 19, 1997) (statement of Sen. Cle-

an opponent's or outsider's ads rather than their own. In the past, congressional legislators have introduced proposals addressing negative ads. Some have called for free response time at public or media expense.[8] These proposals have not become law. Current, more general reform proposals, which call for public financing of campaigns, or require free airtime for candidates, do not distinguish between negative and positive election ads.[9]

This Article describes a reform proposal that will reduce the adverse effects of negative ads and will protect the integrity of the electoral process by strengthening a candidate's right to respond to these ads. After describing the main features of the suggested reform and relevant First Amendment decisions of the Supreme Court, this Article sets forth the reasons that the proposed reform is consistent with the First Amendment and is sound policy.

II. STRENGTHENING THE RIGHT OF RESPONSE

In brief, the proposed reform would grant candidates targeted in negative television or radio ads the opportunity of a contemporaneous equal time response, which would air immediately after the negative ad. Unless the candidate himself speaks about an opponent in a negative ad, the sponsor of the negative ad would be required to share the media cost of a response ad. The proposed remedies would apply only to ads aired three months or less before the election.

For purposes of the proposal, a negative ad is "a paid advertisement spoken on television or radio, three months or less prior to an election, that opposes a clearly identified candidate." Sponsors subject to the rule include any person or entity paying for a negative ad, including candidates, campaign committees, political parties, or outside interest groups.

The proposed reform would apply to campaign season commercials that "oppose" clearly identified candidates, for example, by referring adversely to a particular candidate's character, qualifications, public record,

land); 143 CONG. REC. S2481 (daily ed. Mar. 18, 1997) (statement of Sen. Durbin); 143 CONG. REC. E392 (daily ed. Mar. 5, 1997) (statement of Rep. Christensen); 143 CONG. REC. S808 (daily ed. Jan. 29, 1997) (statement of Sen. Bumpers) (introducing The Public Confidence in Campaigns Act of 1997).

8. *See* S. 3, 102d Cong. (1991); 137 CONG. REC. 12,358-59 (1991); S. REP. NO. 102-37, at 18, 50 (1991) (public subsidy to respond to independent ads); 137 CONG. REC. 12,358-59 (1991); 131 CONG. REC. 33,612-13 (1985) (statement of Sen. Boren) (introducing proposal for free airtime for responses to negative ads).

9. *See* S. 229, 105th Cong. (1997); S. 25, 105th Cong. (1997); 143 CONG. REC. S808 (daily ed. Jan. 29, 1997) (publishing text of Public Confidence in Campaigns bill); 143 CONG. REC. S659, (daily ed. Jan. 21, 1997) (statement of Sen. McCain) (proposing free airtime in initial McCain-Feingold bill for candidates who accept spending limits).

or position on an issue. Such ads would trigger the targeted candidate's right of response, regardless whether the ad includes special words such as "vote against" or "defeat."

The essential elements of the proposal include shared cost and contemporaneous opportunity for targeted candidates to respond to negative ads. These elements require particular explanation.

A. Shared Cost

When negative ads are aired in typical election campaigns, targeted candidates either ignore the ad, run unrelated and unresponsive negative ads against the sponsoring candidate, or respond directly to the charge made in the negative ad. Direct responses are the most useful for voters, as such responses tend to elucidate contentions and issues raised in a campaign.

Broadcast advertising time, including response time, is expensive. The question is whether the cost of media time to respond to negative ad charges should continue to be borne entirely by the targeted candidate or should be shared by the negative ad's sponsor. This proposal calls for sharing response time cost. The primary justification is to ameliorate the substantial financial advantage that wealthy sponsors now deploy in mass media negative campaigning against targeted candidates. Excessive and repetitive use of negative ads by wealthy candidates, political parties, and outside interest groups can result in a targeted candidate's defeat solely because of financial disparity in purchasing media time.[10] Dividing the cost of response time between negative ad sponsors and targeted candidates will significantly reduce this unfair advantage.

The shared response time cost requirement has the related benefit of providing an incentive for targeted candidates to address the merits of negative ad charges. This promotes a responsive and informative debate in election advertising instead of unrelated attacks and counter-attacks, or inability to finance a response.

The net result of response time cost sharing should be more balanced airing of campaign issues and less domination of campaign advertising by sponsors amassing the most money. Response time cost sharing may also remove some existing disincentives against consideration of legislation that is opposed by special interests inclined to use negative ads to attack

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10. *See* Kennedy for President Comm. v. FCC, 636 F.2d 432, 440 (D.C. Cir. 1980) (quoting Sen. Mathias); ANSOLABEHERE, *supra* note 2, at 69-70, 116 (possible effect of negative ads on election outcomes); KERN, *supra* note 6, at 185; WEST, *supra* note 2, at 30-31, 190-91.

supporters. Cost sharing will place these persons in a more viable position to support legislation they believe is needed, and to defend their positions at election time.

In contrast to political parties and organized interest groups, many candidates, particularly those with modest campaign funds, cannot reasonably and invariably share response time costs when they sponsor commercials criticizing their opponents. The proposal resolves this matter through an exception allowing candidates to air their own spoken ads that criticize opponents without incurring response time costs. This exception protects candidates who have limited funds. Furthermore, by creating an incentive for candidates to speak directly, rather than using narrators, the exception may result in greater attention to accuracy.

One potential objection to any shared cost requirement is that this requirement may "chill" outside interest groups' right to air such ads. Without denigrating this concern, the objection, as a general proposition, is speculative in nature. The typical interest group sponsor appears to be wealthy enough to afford to pay for the media cost of the negative ad as well as part of the media cost of response time. Of course, a sponsor who knows that a negative ad misrepresents the facts or raises immaterial matters will probably not air such an ad if having to share response time costs makes the ad more costly than effective.

It might also be objected that not all outside sponsors of negative ads are equally wealthy, and, indeed, some may have less cash than the candidates they attack. The financial position of a candidate who may be attacked by many outside interest groups, some now and some yet to come, and who must use campaign funds for affirmative advertising and expenses as well as responding to negative ads, cannot, however, realistically be balanced against the financial position of any one outside interest group. More relevant is the fact that many candidates are financially unable to respond to all negative ads against them; that the outside sponsor of a negative ad suffers no risk in their use, but the targeted candidate does; and that the candidate's response is just as important as the negative ad. Moreover, most negative ads are repeatedly aired many times. Cost considerations might limit the number of times the same ad is aired, but would not prevent the message from being aired.

Considering that mass media advertising requires abundant financial resources, the "poor sponsor" point is a theoretical rather than practical objection. Television and radio negative campaigning is not a pursuit of the average American citizen. This type of campaign is the business of candidates, political parties, and well-organized and well-funded interest groups. Cost sharing seeks to remedy the practical problem of deploy-

ment of organized wealth by these political entities, in repetitive and frequently unfair and misleading negative campaigning.

Prior campaign reform proposals have called for public or media subsidy of response time for negative ads sponsored by outside interest groups.[11] The need for some subsidy is apparent when a candidate, faced with disproportionate televised attacks by interest groups or the other political party, must respond, but cannot because of "disparity based on wealth."[12] The negative ad sponsor is the entity that imposes the need to respond on the targeted candidate. For this reason, some subsidy for response time seems more appropriately an equitable obligation of the negative ad sponsor than of the public or media, if the question is who should provide it.

If a sponsor is wealthy enough to finance a mass media negative election campaign, parsimony or immunity regarding response time cost sharing is neither a fundamental interest, nor an equitable one. Negative ad sponsors do not have a right to drown out the voices of candidates they oppose by the sheer dominance of their wealth. Sharing the media cost of response time should be seen as a fair and civil adjunct of the cost of mounting a negative campaign on the nation's mass media—our national and popular "town hall." Sharing that forum is the price owed for public and civilized debate of election campaign issues.

In sum, with specified limitations, requiring negative ad sponsors to partially assume response time costs for targeted candidates is a reasonable and necessary measure to remedy unfair campaign advantage in the electoral process. It will also promote informative public debate of issues raised in negative ads. Whether cost sharing, if constitutional, should be 50-50, or some other reasonable proportion, would be a matter of legislative discretion.

B. Contemporaneous Response

The proposal to strengthen the right of response to negative ads also requires that targeted candidates have the opportunity for equal and contemporaneous response time. This aspect of the reform has two main

11. *See supra* note 8 (listing prior campaign reform proposals). If Congress should require public or media subsidy, there would be no need to consider a subsidy by negative ad sponsors.

12. Bullock v. Carter, 405 U.S. 134, 144 (1972) (holding that the Equal Protection Clause bars excessive candidate filing fees). Statutes that require equal broadcast opportunities for candidates and grant candidates the lowest unit charge for election advertising, *see* 47 U.S.C. § 315(a)-(b) (1994), do not resolve this wealth disparity if opponents or outsiders choose to outspend a candidate in the number of ads aired, especially if these ads are negative.

purposes. First, a contemporaneous response reduces prejudice to targeted candidates resulting from widespread public airing of misleading or inaccurate charges. Second, the public would have a realistic opportunity to hear and assess both the negative ad and the response.

The alternative is a delayed response that will often be missed by listeners who heard the original negative ad. A contemporaneous response is much more effective than a delayed response in protecting legitimate reputational interests and in exposing voters to both sides of a campaign issue.[13]

Campaign season negative ads are aired in order to defeat targeted candidates. Even when the facts in these ads are technically accurate, they only tell one side of a controversy. Charges in negative ads are often innocuous and can be clarified or explained to voters on the basis of differing views of policy, if the targeted candidate has an opportunity to respond contemporaneously so that voters can judge. Moreover, when a widely aired TV or radio ad attacks a candidate's personal character, the attacked candidate, in simple fairness, should have an immediate opportunity to respond, before the prospect of substantial damage to reputation.

To make a contemporaneous response possible, the targeted candidate must be able to review a tape of the negative ad and prepare any response before the negative ad is broadcast. This will cause a brief but not substantial delay in the initial airing of a negative ad. A short delay to allow a contemporaneous response is consistent with current law granting candidates "reasonable," but not absolute, access to broadcast facilities.[14]

The idea of a contemporaneous option to respond to ads is not unprecedented or radical. The United States Senate, for example, passed a campaign reform bill in 1991 that included this type of provision for independent ads.[15] Providing a contemporaneous procedure is standard in debate practice, in judicial proceedings, and in news coverage of contro-

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13. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (holding that fair procedure requires opportunity to be heard "at a meaningful time," before suspension of welfare benefits); ANSOLABEHERE & IYENGAR, *supra* note 2, at 43; MICHAEL PFAU & HENRY C. KENSKI, ATTACK POLITICS: STRATEGY AND DEFENSE 70 (1990).

14. Communications Act of 1934, 47 U.S.C. § 312(a)(7); CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (stating that 47 U.S.C. § 312 (a)(7) "creates a *limited* right to 'reasonable' access" by federal candidates).

15. *See* Senate Election Ethics Act of 1991, S. 3, 102d Cong. § 202 (1991); S. REP. NO. 102-37, at 56-57 (1991); 137 CONG. REC. 12,355, 12,363 (1991) (publishing S. 3 as passed by the Senate prior to the President's veto) (providing a right of reply "immediately after" an ad).

versies.[16] The need for a contemporaneous response procedure is no less critical for negative campaign commercials that attack identified candidates.

III. ELECTION RULES AND FIRST AMENDMENT

Legislation that places any conditions on election campaign advertising must be consistent with First Amendment protections for political speech. Political speech is highly protected because this type of speech is at the core of the First Amendment.

The question of whether reasonable regulation of negative TV/radio campaign ads is constitutional is not foreclosed by any decision of the United States Supreme Court. Strong arguments support rules that reasonably balance the rights of negative ad sponsors and targeted candidates in airing election campaign advertisements on television and radio.

As a threshold matter, Congress has the underlying legislative power to enact necessary and proper election rules "to protect the integrity of the electoral process."[17] Some of these rules have been challenged as infringing First Amendment speech or associational rights. The United States Supreme Court has enunciated familiar standards for analyzing these challenges. In general, the Court has invalidated electoral rules that prevent political speech, or place severe burdens on speech,[18] unless they are narrowly tailored and serve "compelling" electoral interests.[19] On the other hand, the Court has upheld certain types of regulations that impose lesser or incidental burdens on political speech and association if these regulations serve important or substantial interests.[20]

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16. *See* Richard C. Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 892, 895-96 & n.58 (1948) (discussing news media practices).

17. California Med. Ass'n v. FEC, 453 U.S. 182, 201 (1981); *see also* Burson v. Freeman, 504 U.S. 191, 199 (1992); Buckley v. Valeo, 424 U.S. 1, 13-14 n.16, 26-27 (1976) (citing U.S. CONST. art. I, § 4).

18. *See* Buckley v. American Constitutional Law Found., 119 S. Ct. 636, 642 n.12 (1999) (holding that a Colorado state statute restricting initiative-petition circulators violated the First Amendment free speech guarantee); FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985) (striking down 26 U.S.C. § 9012(f), the $1000 spending cap for independent political committees in the Presidential Election Campaign Fund Act, as a facially unconstitutional violation of the First Amendment freedoms of speech and association); *cf.* Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (construing FECA to allow political party "independent expenditures").

19. *See Burson*, 504 U.S. at 198-99 (upholding a Tennessee state statute that prohibited campaign speech within 100 feet of a polling place); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding a Michigan state statute that banned the use of general treasury funds by corporations for state candidate elections).

20. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (fusion

In the leading case of *Buckley v. Valeo*,[21] the Court reviewed dollar limitations on campaign contributions and expenditures[22] mandated by the Federal Election Campaign Act.[23] The *Buckley* Court held that contribution limits are restraints on association, but upheld these restraints as serving the weighty public interest in avoiding actual or potential corruption.[24] The Court invalidated the spending limits, however, because it viewed these limits as restraints on speech and association that do not serve the interest in avoiding corruption.[25]

In later cases, the Court held that a state's interest in curtailing unfair deployment of corporate wealth that "can unfairly influence elections" is a compelling reason to regulate these actions.[26] In view of such "unfair advantage,"[27] the Court has sustained an outright prohibition on corporate spending for candidate elections,[28] and elaborate regulation of corporate political action committees.[29]

In a 1997 case involving First Amendment association rights, *Timmons v. Twin Cities Area New Party*,[30] the Court identified the following additional electoral interests with approval: assuring "fair and honest" elections; preventing "misrepresentation"; and providing "order" and "stability" in the political system.[31]

Another vital electoral interest concerns the "ability of the citizenry to

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candidacies); Burdick v. Takushi, 504 U.S. 428, 434, 438-39 (1992) (write-in voting); Clements v. Fashing, 457 U.S. 957, 972-73 (1982) (partisan political activity by judges); Broadrick v. Oklahoma, 413 U.S. 601, 606 (1973) (partisan political conduct by state employees); *cf.* Buckley v. Valeo, 424 U.S. 1, 66-68 (1976) (FECA financial reporting rules).

21. 424 U.S. 1 (1976).

22. *See id.* at 23, 35, 38-39, 51, 54.

23. 86 Stat. 3 (1971), *amended by* 88 Stat. 1263 (1974) (current version of FECA at 2 U.S.C. §§ 431-456 (1994 & Supp. III)).

24. *See Buckley*, 424 U.S. at 28-29.

25. *See id.* at 19, 47-48. The Court added that a $1000 cap on "independent expenditures," which is spending by an outside interest group or person for electronic or print advertising promoting or opposing a candidate, is not a valid way to deal with election campaign disparities. *See id.* at 48-49.

26. *See* Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 659-60 (1989); *see also* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259 (1986) ("Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.").

27. *Massachusetts Citizens for Life*, 479 U.S. at 257.

28. *See Austin*, 494 U.S. at 660 (state spending ban). *But see Massachusetts Citizens for Life*, 479 U.S. at 263-64 (nonprofit public interest corporation).

29. *See* FEC v. National Right to Work Comm., 459 U.S. 197 (1982) (public fundraising bar in 2 U.S.C. § 441b (1994)).

30. 520 U.S. 351 (1997).

31. *See id.* at 358, 364-66 (1997).

make informed choices among candidates for office."[32] The *Buckley* opinion noted that promoting informed choices by voters is one of the most fundamental First Amendment activities, and is an integral part of our democratic system of government.[33]

The various electoral interests cited above are not necessarily distinct. Some of these interests are interrelated and all serve to protect the integrity of the electoral process.

IV. CONSTITUTIONALITY OF PROPOSED RIGHT OF RESPONSE

Standards that govern the validity of electoral rules partially support constitutionality of this proposed reform. In addition, this proposal also draws support from separate principles concerning regulation of television and radio mass media. This Section discusses separately these two matters. Other matters that warrant a brief discussion include the proposed definition of negative ads for purposes of response and compliance considerations.

A. As an Electoral Reform

Strengthening the right of response to television and radio negative ads protects the integrity of the electoral process. The two specific reforms, shared cost and contemporaneous response, serve essential electoral interests in several ways.

Sharing response time cost reduces the "unfair advantage" of excessive spending for negative ads that, like corporate wealth, can unfairly influence elections. If the "unfair advantage" of wealth justifies *prohibiting* corporations from any electioneering for or against candidates,[34] this advantage also justifies *conditioning* negative mass media electioneering by other moneyed interests on partial subsidy of response time. There is no principled basis for holding that one is constitutional and the other is not.

The contemporaneous response option serves the fundamental procedural interest of targeted candidates in securing a timely and fair oppor-

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32. Buckley v. Valeo, 424 U.S. 1, 14-15 (1976).

33. *See id.*; *see also* Norman v. Reed, 502 U.S. 279, 290 (1992) (promoting the "fostering [of] an informed electorate"); CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981); Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 392 (1969) (noting the "First Amendment goal of producing an informed public").

34. *See Austin*, 494 U.S. at 668-69; *supra* text accompanying notes 26-29. *Austin* involved a state ban on corporate electioneering. *See id.* at 654-55. The federal corporate prohibition also applies to labor unions. *See* 2 U.S.C. §§ 431(9), 441b(a) (1994 & Supp. III 1998); *see also* 26 U.S.C. § 501(c)(3) (tax-exempt churches, charities, etc.). The corporate and union prohibitions have been weakened under a controversial application of the express advocacy rule. *See infra* note 54.

tunity to answer widely-aired prejudicial charges affecting that candidate's reputation and chance of election. Shared cost and contemporaneous response provide a related and needed incentive for reducing outright "misrepresentation" of a targeted candidate's character or public record. Finally, strengthening the right of response to negative ads in the manner suggested promotes reasoned debate of issues raised in negative ads, and, hence, promotes "informed choices" by voters in judging positions and qualifications of candidates.

These electoral interests are important, substantial, and compelling. At the same time, under the proposal, negative ad sponsors may bear significant, but not severe burdens. Disproportionate use of negative ads would cost more and a brief delay in initial airing would occur. The proposal does not purport to penalize, chill, or abridge political speech, however, and will not in fact do so. Rather, the proposed reforms are designed to give targeted candidates the opportunity to respond adequately to negative ads, thus increasing speech and promoting First Amendment values. Furthermore, considering the large expenditures needed to finance mass media commercials, sharing part of the media cost of response time appears to be well affordable by sponsors of negative mass media ads and is not, therefore, an undue burden.[35]

The critical question is one of balance. The burdens imposed on negative ad sponsors by cost sharing and contemporaneous response are substantially outweighed by these compelling electoral interests: ameliorating unfair campaign advantage, assuring access to the public by candidates to respond to charges, and giving voters the opportunity to hear both sides of campaign issues. The proposed reforms are a minimally restrictive means of serving these overriding interests in the integrity of the electoral process as well as the First Amendment interest in protecting debate of public issues.[36]

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35. *See supra* Part II.A (analyzing shared costs). In the case of opposed candidates who use narrator-spoken negative ads and response time to the same extent, sharing response time cost would result in a wash, and net broadcast costs would remain unchanged.

36. The proposal for cost sharing is for this reason distinguishable from cases disapproving compelled subsidy or display of opposed speech where no overriding public interest was served. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 19-20 (1986) (plurality opinion) (distribution by utility of consumer group literature); Wooley v. Maynard, 430 U.S. 705, 716 (1977) (display on automobiles of State motto); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (using fees for objected, nongermane political activities by union). *But see* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (*Turner II*) (carriage by cable operators of broadcast signals); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (free time for candidate replies to adverse TV/radio political editorials); *cf.* Life & Cas. Co. v. McCray, 291 U.S. 566 (1934) (payment by insurer of prevailing opponent's attorney fees).

The proposed strengthening of the right of response is narrowly tailored and covers only what is essential to serve its purpose. The proposal covers paid TV/radio ads opposing candidates during the campaign season, but would not apply to any other campaign speech, nor to any print medium attacking a candidate. The proposal does not apply to "issue ads" where no target candidate is identified, nor to ads that are aired more than three months before an election. The cost sharing provision does not apply to ads spoken by candidates. Furthermore, the proposal places no bar on the content of covered negative ads, nor does it impose expenditure caps. Sponsors could continue to air those ads without substantive restrictions and only subject to a reasonable right of response.

Under the foregoing analysis, cost sharing and contemporaneous response electoral proposals pass muster under the Court's standards for reviewing First Amendment challenges and, thus, are constitutional.

B. As a Mass Media Regulation

Section 312(a)(7) of the Communications Act requires a right of "reasonable access" by candidates to air their campaign advertisements on broadcast media.[37] In *CBS, Inc. v. FCC*,[38] the Supreme Court held that this access provision did not violate First Amendment rights of broadcasters. The Court reasoned that the provision "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[39] This principle also applies to the right of response to television and radio negative ads.

The Supreme Court considered right of response issues in *Red Lion Broadcasting Co. v. FCC*.[40] The Court held that FCC rules that require broadcasters to provide free time for candidates to reply to adverse TV/radio political editorials and for others to reply to personal attacks do not violate First Amendment guarantees to free speech.[41] The challenged rules sought to promote use of broadcast media in accordance

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37. *See* 47 U.S.C. § 312(a)(7) (1994). *But see* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678-83 (1998) (holding that a state-owned public television broadcaster may exclude a candidate from a debate because a publicly broadcast debate was a "nonpublic forum"); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (holding that broadcasters may decline to air party or non-candidate political advertising).

38. 453 U.S. 367 (1981).

39. *Id.* at 396.

40. 395 U.S. 367 (1969).

41. *See id.* at 386, 400-01.

with the public interest standard of the Communications Act.[42] The Court held that the rules legitimately implemented that standard, and, as applied to broadcast media were consistent with the First Amendment.[43]

The Supreme Court commented on the *Red Lion* decision in *Buckley* and observed that "'broadcast media pose unique and special problems not present in the traditional free speech case.'"[44] *Red Lion* discussed several of these problems: the licensing regime governing the medium, public interest, rights of viewers and listeners, limited access by the public, entry barriers, and the limited spectrum of frequencies.[45] Although some commentators have criticized the limited spectrum rationale in light of new technological developments such as cable and satellite television, the Court has not departed from right of reply rules for broadcasting approved in *Red Lion*.[46] Moreover, the Court has distinguished First Amendment review of public regulation of cable TV from print media because cable TV has "control of a critical pathway of communication."[47]

The "uniquely pervasive presence" of broadcasting[48] and cable television provides further reason for legislation of some public interest stan-

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42. 47 U.S.C. §§ 303, 303(r), 315(a) (1994). The current federal regulations are facets of the FCC's former fairness doctrine. *See* 47 C.F.R. §§ 73.1920 (personal attack rule), 73.1930 (political editorial rule); *see also Red Lion*, 395 U.S. at 386-401 (approving FCC's fairness doctrine). The FCC recently proposed to rescind or modify these rules, but ultimately decided not to. *See* Radio-Television News Directors Ass'n v. FCC, Nos. 98-1305, 98-1334, 1999 WL 561975 (D.C. Cir. Aug. 3, 1999) (petition for rehearing filed Sept. 3, 1999) (remanding challenge of the FCC's decision not to rescind the personal attack and political editorial rules for further agency explanation).

43. *See Red Lion*, 395 U.S. at 379-80, 385-86, 400-01.

44. Buckley v. Valeo, 424 U.S. 1, 49-50 n.55 (1976) (citing *Red Lion* and quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973)).

45. *See Red Lion*, 395 U.S. at 386-92, 400.

46. *Cf.* Reno v. ACLU, 521 U.S. 844, 868 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994) (*Turner I*); FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11, 380 (1984); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1723-32 (1997).

47. *Turner I*, 512 U.S. at 657; *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) (*Turner II*) (upholding the "must-carry" rules after finding them narrowly tailored to serve important public interests, and thus valid under the First Amendment).

48. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (upholding FCC's decency standard); *cf. Reno*, 521 U.S. at 868-85 (distinguishing radio and television communications from the Internet, and striking down on First Amendment grounds the "indecent transmission" and "patently offensive display" provisions of the Communications Decency Act of 1996); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 745 (1996) (discussing cable television's uniquely pervasive presence in American homes in the context of federal statutes seeking to regulate "patently offensive" sexual material on cable television).

dards to deal with serious problems. The Court has emphasized, especially for political campaigns, that there is a public interest against allowing those with the greatest wealth to dominate television and radio communication.[49] These manifold factors continue to support the Court's assessment that there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[50]

The Court's approval in *Red Lion* of a subsidized and thus free right of reply as a valid broadcast regulation under the First Amendment supports a related rule for sponsors of TV/radio negative campaign ads. In view of the pervasiveness of such ads and the unfairness that can ensue from their use, one can make an equally strong or stronger case for improving the right of response to such ads than for TV/radio political editorials. Unlike newspaper or other print media,[51] Congress has discretion to enact an appropriate right of response reform for television and radio. Congress can exercise that discretion in a manner that protects the electoral process as well as the First Amendment rights of all participants in mass media campaign advertising.

Strengthening the right of response to television and radio negative ads would refine candidates' existing "reasonable access" rights to air campaign ads. Reducing disparities between candidates and negative ad sponsors is ostensibly constitutional if such a law "properly balances the First Amendment rights of federal candidates, the public, and broadcasters."[52] The response remedy proposed here undertakes to reach an appropriate balance.

C. Definition of Negative Ad

This proposal defines negative ads as television or radio paid advertisements, aired three months or less before the election, that oppose

49. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973) (finding that the FCC was justified in concluding that access to broadcast media should not be based solely on "wealth"); *Red Lion*, 395 U.S. at 390, 392 (expressing concern over "monopolization" of broadcasting by licensees or by "the highest bidders").

50. *Red Lion*, 395 U.S. at 388; *see also* Buckley v. Valeo, 424 U.S. 1, 50 n.55 (quoting *Red Lion*).

51. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that a newspaper may refuse to print replies to criticism of a candidate, and that the government may not regulate newspaper editor's choice of newspaper articles). In *Commonwealth v. Wadzinski*, 422 A.2d 124 (Pa. 1980), a divided state court invalidated a state statute with criminal sanctions that sought to facilitate right of reply to late-breaking negative ads, in print or broadcast.

52. CBS, Inc. v. FCC, 453 U.S. 367, 397 (1981).

clearly identified candidates. The operative term "oppose" also appears in the political editorial rule that the Supreme Court sustained in the *Red Lion* case.[53]

Under this definition, the right of response would be triggered by campaign-season paid commercials that oppose an identified candidate, for example, by adversely referring to the candidate's character or record. The ad does not need to include special words such as "vote against" or "defeat." Defining negative ads in this way makes the response remedy effective and not subject to facile evasion. This definition establishes a clear standard, and avoids application to TV/radio ads that deal only with issues and not with attempts to decrease electoral support for specific candidates.

The suggested scope of the response remedy, like the political editorial rule in *Red Lion*, does not violate First Amendment overbreadth or vagueness principles.[54]

D. Compliance Considerations

Negative ad sponsors and TV/radio managers would have to afford targeted candidates the opportunity to respond contemporaneously to negative ads. Responses that address the particular matters that are charged against the targeted candidate must be aired immediately after the negative ad. Any disputes that arise ought to be settled quickly by informal discussion or mediation. Unjustified failure to afford the response option could be the basis for a post-election request for declaratory relief and compensation for any equal time response if made. Because the subject matter is political speech, elaborate compliance mechanisms, such as injunctive relief or criminal penalties, are inappropriate.

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53. *See Red Lion*, 395 U.S. at 374-75 (referring to precursor of 47 C.F.R. § 73.1930(a)(2)); *see also* 26 U.S.C. § 501(c)(3) (1994) (denying tax-exempt status for charitable organizations that participate in political campaigns "on behalf of (*or in opposition to*) any candidate for public office") (emphasis added).

54. *See Red Lion*, 395 U.S. at 395-96 (rejecting argument that the political editorial reply rule is facially vague). Vagueness issues under the FECA were dealt with in *Buckley*, 424 U.S. at 40-44, 76-80, and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-50 (1986), by construing various FECA provisions as applicable only to expenditures for "express advocacy" of the election or defeat of a candidate. *See also* 2 U.S.C § 431(17) (defining independent expenditures as entailing "express advocacy"). Under a narrow and controversial interpretation of this definition, several of FECA's finance and disclosure rules have been evaded. *See* Michael D. Leffel, Note, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 MICH. L. REV. 686 (1996); *see also* ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS 51-52 (1999).

V. CONCLUSION

Strengthening the right of response to negative ads, through shared cost and contemporaneous response, is a reasonable and effective way to reduce negative campaign abuses and to protect the integrity of the electoral process. Any reforms seeking to stem negative campaign abuses will face First Amendment challenge. Without gainsaying the gravity of the constitutional issue, the remedial measure proposed in this paper is supportable in First Amendment law.[55]

As an electoral reform, strengthening the right of response to TV/radio negative ads, through shared cost and contemporaneous response, is a narrowly tailored rule serving substantial and compelling electoral interests that outweigh the pecuniary and time burdens imposed on sponsors. It therefore survives stricter scrutiny than is currently employed under the First Amendment in reviewing broadcast regulations promoting communication of candidates' positions on issues. The particular characteristics of television and radio provide added weight in supporting the validity of this type of rule, regardless of the level of scrutiny that a court might give the proposed reform. Therefore, the proposed rule is justified as an electoral reform and as a mass media regulation under any constitutional standard.[56]

Many American voters are dissatisfied with excesses of negative campaigning. Mass communications campaigns bent on creating widespread mistrust of candidates easily create mistrust of all politicians and the political process. Voters deserve an election campaign procedure that promotes political discourse more than personal attack if they are to participate more in the electoral process, and if they are to make reasonably informed candidate choices. These two essential features of democracy should be goals, not victims, of robust political campaigns.

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55. For other commentary, see Albert, *supra* note 6; Rebecca Arbogast, *Political Campaign Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform*, 23 AKRON L. REV. 209 (1990); Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1539 (1997); Scott M. Matheson, Jr., *Federal Legislation to Elevate and Enlighten Political Debate: A Letter and Report to the 102d Congress about Constitutional Policy*, 7 J.L. & POL. 73 (1990); Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663 (1992); Robert M. O'Neil, *Regulating Speech to Cleanse Political Campaigns*, 21 CAP. U. L. REV. 575 (1992); Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853 (1987).

56. In practice, this untried reform might be tested if some participants in political campaigns voluntarily adopted such a procedure by modeling their brief but pertinent presentations on traditional debate practice. For a proposed draft of legislation implementing the reform described in this Article, see *infra* Part VI.

VI. APPENDIX

A BILL

To amend the Federal Communications Act to strengthen the right of response to negative campaign commercials.

Section 1. [Congressional findings and purpose.]

Section 2. The Communications Act of 1934 (47 U.S.C. 151 *et seq.*) is amended by adding a new section 615, as follows:

SECTION 615. NEGATIVE ELECTION CAMPAIGN ADVERTISEMENTS.

(a) Definitions. For purposes of this section,

(1) a "negative advertisement" means a paid advertisement spoken on television or radio, [three] months or less prior to the election, that opposes a clearly identified candidate;

(2) "election," "candidate," and "clearly identified" have the meanings set forth in the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. 431;

(3) "candidate" includes candidates for state or local office of any state enacting legislation ratifying this section;

(4) "sponsor" means any person, committee or entity paying for the airing of a negative advertisement; and

(5) a "television or radio facility" includes broadcast stations and networks, and cable and satellite television systems.

(b) Sponsors. A sponsor of a negative advertisement shall

(1) transmit to the opposed candidate (or to his or her authorized representative), at least [24] hours before it is aired, a duplicate of the advertisement and name and address of the television or radio facility that will air it;

(2) provide the television or radio facility with a written affirmation of the date and time the duplicate was transmitted to the candidate; and

(3) except in the case of an advertisement sponsored and spoken in its entirety by a candidate about an opponent, pay [50] percent of the media charge for airing the opposed candidate's equal-time response to the matter raised in the negative advertisement.

(c) Television and radio facilities. A television or radio facility may air a negative advertisement only if:

(1) it is aired at least [24] hours after a duplicate has been transmitted to the opposed candidate;

(2) any equal-time response of the opposed candidate to the matter raised in the negative advertisement is aired immediately after airing of the negative advertisement; and

(3) subject to the exception in section 615 (b)(3), [50] percent of the media charge for airing such response is billed to the sponsor.

(d) Remedy and non-compliance. A sponsor or candidate aggrieved by failure to comply with this section may obtain post-election declaratory and compensatory relief in a court of competent jurisdiction, but not injunctive relief.