# THE THREAT OF FREE SPEECH TO DEMOCRACY: REDUCING THE DANGER OF CACOPHONOUS DISCOURSE

by

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## Introduction

Television has become one of the primary contemporary tools for dissemination of information in society. As early as 1981, studies indicated that nearly 99 percent of all American households had at least one television; more than 50 percent of those same American households had two or more televisions.[1] This trend has not been lost on the political community. Consequently, it is no surprise that televised political advertising has become one of the focal points of the modern political campaign. The television is nearly unmatched in its ability to convey political messages and has largely replaced the traditional leaflet and town hall style meeting for that purpose. The 30-second commercial spot has come to dominate contemporary political advertising. Studies have indicated that 30 to 60 second spots account for between 75 and 90 percent of all paid TV political advertising.[2] Nearly half of all campaign dollars are funneled into paid political advertising.[3]

Such startling findings prompts one to ask the following question: *Given that a rational, informed, politically literate citizenry is fundamental to democracy*[4]*, does the current nature of short, commercially oriented, image based, televised advertising make a meaningful contribution to the aforementioned goals of providing a rational, informed, politically literate citizenry?* Furthermore, one must ask: given the fact that conventional First Amendment doctrine declares that political speech should be free of government interference, is it possible, in recognition of the danger of television advertising, to restrict the use of political spot advertising, the nature of which has been criticized for "at best lack of substance and at worst obscuring and distorting information"[5] in order to facilitate First Amendment goals of informed self-government and wide open, robust political speech? As Professor O. Lee Reed eloquently states in the 2000 spring issue of the American Business Law Journal, "if freedom of speech is not absolute, where do the parameters of free speech lie in an increasingly uncivil society when parsed against the claims of speech harm?"[6]

As a response to these problems, this article attempts to provide a rationale for the restriction of or modification of the current political advertising system to heighten the level of rational public debate conducive to producing an informed, politically literate citizenry for the purpose of self- government.

Part I of this article describes several significant cases in which the Court has held that both individual campaign speech and organizational political speech can be regulated.

Part II of this article describes the normative case for reform of political advertising. Analysts are quite certain that television has become an indispensable tool of political campaigning and should continue as such; however, they are oft critical of the current format of the political spot.

Part III of this article then describes the legal framework for claiming that political spots may be regulatable in the interests of elevating the level of rational public debate and informed self-government. The framework's rationale is grounded in the works of Alexander Meiklejohn, Jeffrey Blum, Robert Post and C. Edwin Baker.

Part IV of this article asserts that the ideal speech situation, as described by Jurgen Habermas, provides an exemplary evaluative model for the elevation of political discourse and describes the gap between political advertising and the ideal speech situation as described by Habermas.

Finally, Part V of this article suggests a tentative solution to the problem caused by the current permissive attitude toward political advertisements. It would be folly to ignore the communicative impact of television and its potential for spreading political messages. However, a complete halt to the current variety of televised political advertising may simply be infeasible given the Court's current stance on diminishing the quantity of political speech.[7] A possible solution may be to mandate that a candidate air some minimum level of publicly funded, more lengthy, issue oriented advertisement, modeled along the notion of Habermas's ideal speech situation.[8]

## I. SIGNIFICANT CASE LAW: POLITICAL SPEECH REGULATION IN THE COURT

The Court has wrestled with the issue of regulation of speech for many years. Rulings in two recent cases, *Austin v. Michigan Chamber of Commerce* and *Burson v. Freeman*, provide insight into the circumstances in which the Court has ruled that the regulation of political speech is acceptable.

In the landmark case of *First National Bank of Boston v. Bellotti*[9], the Court took the opportunity to rule that the government could not restrict corporate political speech by virtue of its corporate identity. The Court reasoned that the inherent informative capacity of speech precluded the denial of speech rights based upon the identity of the political speaker, in this case a corporation.[10] This case established the fact that corporate political speech would be afforded a degree of protection under the First Amendment. Professor Michael Garrison noted in the summer 1989 issue of the American Business Law Journal that corporations, under First Amendment protection, have spent huge sums of money attempting to

influence the outcomes of elections.[11] Professor Garrison also notes that such unrestricted corporate political speech is potentially threatening to the integrity of the democratic process.[12] In partial recognition of this danger, the Court's decision in *Austin v. Michigan Chamber of Commerce*[13] has shed light onto permissible regulation of political speech.

At the core of *Austin* was a Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or opposition to political candidates running for state offices.[14] Michigan did not bar corporations from making such independent expenditures provided that the monies came from segregated funds for express political purposes.[15] The Michigan Chamber of Commerce protested this statute as an unconstitutional restriction of free expression and a violation of the equal protection of rights under the Federal Constitution. Although, the Chamber was a non-profit corporation comprised of some 8000 members, the majority were for-profit corporations.[16] The Chamber sought relief against enforcement of the aforementioned statute. Despite the fact that the Chamber maintained a segregated fund for political purposes, the Chamber wished to expend general treasury funds on a newspaper advertisement for a specific candidate for the Michigan House of Representatives.

The Court's analysis in *Austin* hinged upon two key requirements for the regulation of political speech, whether the statute burdened the exercise of political speech and if so, was the regulation narrowly tailored to serve a compelling state interest.[17] Based on a prior ruling in *FEC v. Massachusetts Citizens for Life*[18] the Court reasoned that the Michigan statute did not stifle corporate expression though the statute did burden the chamber's politically expressive activity.[19] As such, the Court required a compelling state interest in regulation to support such a burden on expressive activity. Michigan argued that the statute in question was aimed at limiting "political war chests"[20] and served a compelling governmental interest in the prevention corruption and the appearance of corruption.[21] The Court concurred with the state's argument, reasoning that by virtue of the unique advantages and characteristics conferred upon corporations, said corporations' potential to amass such quantities of resources constitutes an unfair political advantage.[22] The Chamber argued that as a nonprofit corporation, the organization should be exempted from such regulations as a voluntary political association. However, the Court ruled that despite the Chamber's nonprofit status, the organization failed to exhibit the key features of a voluntary political association.[23] The Court also ruled that the Michigan statute was sufficiently narrowly tailored to pass constitutional muster as it was designed to achieve the compelling governmental interest in preventing the damaging effects of political war chests amassed by legally advantaged corporations.[24] Consequently, *Austin* provides a substantive example of the Court ruling that the regulation of political speech can serve a socially desirable purpose.

Is the logic of *Austin* applicable to regulation limiting the political speech of an individual, particularly one campaigning for political office? The recent case of *Burson v. Freeman*[25] suggests that the logic does apply in this broader domain.

The Court noted in *Mills v. Alabama*[26] that state government has the power to regulate conduct in and around the polling place to maintain peace, order and decorum presumably to facilitate the polling process. The Court relied on this key assertion in *Burson v. Freeman* in which the Court was forced to reconcile "the right to engage in political discourse with the right to vote."[27] The law of the state of Tennessee creates a 100-foot buffer zone surrounding the polling place on election day, inside of which, the solicitation for votes, display of campaign material, or distribution of campaign literature is forbidden.[28] A city council candidate's campaign treasurer filed suit alleging that the statute violated the First and Fourteenth Amendment of the Federal Constitution.[29] The Court crafted its decision with analysis of each of the three major First Amendment concerns: the regulation of political speech, speech regulation in a public forum, and regulation of speech based on content.[30] Because the Tennessee statute undoubtedly restricted political speech in a public forum, the Court applied its time honored test of requiring both proof of a compelling governmental interest justifying regulation and evidence that the statute in question was precisely tailored to serve said interest.[31]

The appellants succeeded in demonstrating two compelling governmental interests, namely protecting the right of its citizens to unencumbered participation in the polling process and the right to vote in an electoral system that is fundamentally reliable and conducted with integrity.[32] Based on an historical analysis of the genesis of election reform, the Court noted that some form of restricted zone around the polling place was necessary to serve the governmental interest of protecting voters from intimidation and fraud.[33] Furthermore, the Court asserted that the statute in question properly served the aforementioned governmental interests. The respondents argued unsuccessfully that the statute was both over-inclusive in that Tennessee could secure the same governmental interests by employing previously legislated statutes that make interference or voter intimidation illegal and under-inclusive in that the zone did not regulate other types of speech within its boundaries.[34] Finally, it was ruled that although a campaign free zone could become an impermissible regulation of speech at some measurable distance, 100 feet was a minor limitation and did not substantially interfere with speech rights.[35] Thus, the Court ruled that the Tennessee statute was sufficiently narrowly tailored to pass constitutional muster.

As one can see, the Court has in no uncertain terms, ruled that speech, even political speech can be regulated in certain circumstances given that a compelling governmental interest can be justified and the regulation be narrowly tailored to achieve such an interest. Many scholars and analysts have expressed the need for similar regulation of the current format of political advertising based on the jurisprudence of both the aforementioned cases and others similar in nature.[36]

The arguments in these two cases are essential bases for restrictions on political advertising for they make it quite clear that speech is never protected absolutely. Once we accept the need to regulate speech for democratic purposes, the question is no longer *should* we regulate, but rather *which* regulations of speech should we embrace.

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program for convicted criminals, including first-degree murderers who were ineligible for parole. As the advertisement progressed, the words "268 Escaped" appeared simultaneously on the television with the narrator stating that the Massachusetts penal system had granted furloughs to first-degree murderers.[52] This advertisement created the misleading impression that 268 first-degree murderers had violated the furlough system when in actuality only 4 prisoners on the furlough system had escaped, thereby creating a false notion among viewers that 268 murderers were on the loose.[53] The advertisement also failed to mention that the furlough system was not of Dukakis' creation, it was a system inherited from Frank Sargent, the liberal Republican who preceded Dukakis in office; these omitted facts are highly pertinent indeed if the record and ability of Dukakis was to be rationally judged.[54]

The questionable use of the juxtaposition of words and images is also exemplified in recent campaign ads; the 2000 George W. Bush campaign that superimposed a part of the word "bureaucrats" such that the word "rats" appeared simultaneously with a description of the fallacies of the Democratic record. Both the 1988 "Revolving Door" and 2000 Bush advertisements create a recognizable, condensed image rather than a substantive argument in favor of one candidate, and this image then acts as a substitute for informed debate.[55] Studies indicate that this substitution phenomenon exists in the minds voters. Certain voters indicated that they held the belief that Dukakis was soft on crime yet could not produce evidence for the acquisition of such a belief aside from a restatement of the "Revolving Door" advertisement.[56] Political spots as described above lend credence to the proposition that the political spot debases public discourse by disseminating misleading, deceptive information.

b. The Questionable Amount of Information provided by Political Spots

A second fundamental prerequisite for informed political debate is the communication of both substantive information regarding policy choices and the personal characteristics of the candidate in question. Critics argue that current political spots provide far too much of the latter and nowhere near enough of the former.[57] The televised ad tends to debase the political debate in two ways: by providing far too many vague policy references and an excess of information regarding image and candidate personality.

The televised political spot simply does not provide the information necessary to provoke substantive learning nor rational debate due to a focus on image rather than policy choice.[58] Indeed, one study concluded that only about five percent of political spots contain necessary statements needed by viewers to ascertain a candidate's policy preferences with the majority of advertisements providing some differing levels of policy discussion.[59] Vague political advertisements tend to appeal to widely, near universally held ideals of the voting public.[60] For example, in a 1970 ad run by Senator Edward Kennedy, he responds to the rising costs of medical care by stating that the "we [the U.S.] ought to devise a system which increases total manpower, health manpower, in this country and, secondly, devise a better delivery means for health services…so that better health will not be a privilege of the few, but will actually be a right of the many."[61] The right of a all citizens to better health care is a nearly universally held belief, the advertisement responds in such a vague manner to the problem of health care costs that it is nearly impossible to engage in reasoned debate on the merits of a plan to reduce health care costs when no details of the plan were stated.[62] Such advertising is clearly a case of political advertisement, providing information far too vague and consequently debasing to the spirit of informed, rational debate.

Research also indicates that over half of political spots contain explicit references to candidates' personal characteristics and are focused on several core attributes: compassion, empathy, activity, knowledge, strength, and integrity.[63] These core characteristics are used to portray the different facets of the candidate's persona. For example, strength is used to paint a picture of a candidate who is tough on crime, and unafraid to stand up for the disadvantaged, integrity could be used in conjunction with family values. Personal information regarding candidates is an important facet of electoral decision-making and is one of the primary merits of the contemporary political advertising format. However, critics agree that image based advertising is no substitute for substantive discussion of policy issues as a means of fostering informed political debate.[64] A blending of substantive and personal issues would provide a more balanced political debate.

c. Brevity and the Political Spot

Brevity is a characteristic endemic to the modern political advertisement. Most political ads run for a mere thirty seconds.[65] Thirty seconds can actually prove a quite adequate amount of time in which to present a candidate's position; however, thirty seconds is quite inadequate for the explanation of the rationale behind the position, citation of evidence or statistics, or clarification of accusations made by competitiors.[66] Given the fact that creating an informed and rational debate is a goal of the political process, thirty seconds is an inadequate amount of time in which to explain complex policy choices and foster such debate.[67] The 30 second advertisement is best at creating doubt and anxiety by reinforcing uninformed

perceptions that viewers already have, rather than trying to convince viewers of the merits of the particular candidates' position through evidence and logic.[68]

The presidential election of 1964 provides a noted example of this technique of reinforcing viewer perceptions. Governor Nelson Rockefeller of New York and Senator Barry Goldwater of Arizona were the top contenders for the Republican presidential nomination in 1964.[69] The Rockefeller campaign, concerned with their own candidates' questionable activities in his personal life, formulated a strategy of attacking Goldwater to act as a diversion.[70] Indeed, the Rockefeller campaign sought to create, according to Gene Wyckoff "a first-class villain to make a first-class hero in image-candidate terms".[71] The Rockefeller campaign published a list of somewhat inflammatory Goldwater quotes (absent circumstances in which the quotes were made) implying that Goldwater could not be trusted with the United States nuclear arsenal and concurrently created a film which implied that Goldwater was backed by political extremists, reactionaries, and de facto terrorists.[72] The crux of the matter is that during the general election, the Johnson campaign used this preconceived notion of Goldwater as a man bent on nuclear holocaust to rouse fears in the electorate, despite the fact that the image was a mere product of a political advertising campaign.[73] By the time of the general election, polls found that voters felt Goldwater was five times more likely to employ nuclear weapons than was Lyndon Johnson.[74] This emotionally laden type of political advertising clearly reduces a complex issue, such as nuclear launch policy, to a thirty second commercial which plays upon the deep seated fears of the electorate.[75] These ads that play upon fear, emotional appeals, or prejudice clearly fall outside the framework for rational, informed political debate and are arguably closer to a form of demagoguery rather than vehicles for the political enlightenment of the electorate.[76]

Analysts indicate that there are varying explanations for the brevity of the political spot ranging from a perception that shorter ads are a more effective means of reaching the electorate to the unwillingness of broadcasters to significantly alter their programming schedules to accommodate political advertisement of length necessary for the substantive discussion of policy position.[77] The increasing costs of televised political advertising has also been pointed to as a culprit, promoting the thirty second spot. However, it is more likely that cost efficiency is one of the primary reasons for both the existence of the spot and their endemic brevity.[78] Though the notion is counterintuitive, grass roots campaigning is very expensive. Not only are such campaigns expensive but they have a multitude of hidden costs that simply decrease the feasibility of campaigning in this fashion on a large scale.[79] Paid political advertising is not only more cost efficient but tailor made as well. The candidates have complete control over the message, thus preempting any possible misrepresentation of the candidate via their campaign employees.[80] Consequently, well-funded candidates are far more apt to channel large amounts of funds into a cost efficient, powerful medium such as television and are far more likely to ignore grass roots activities, which have long been considered a haven for substantive political debate.[81]

2. The Commercial Underpinnings to Contemporary Political Advertising

Given the fact that primary means of communication between the candidate and a substantial portion of the public is through television, the political message has been forced to adapt a commercial nature to compete for the attention of viewers.[82] Critics note that the use of commercial advertising techniques are incompatible with the dissemination of information for the purposes of robust political debate.[83] A danger exists in using the same types of advertising techniques used to sell products given the fact that there is a fundamental difference between choosing a product and a candidate. First, the electoral process is an expression of collective determination regarding national policy, a choice with consequences and ramifications far beyond those of choosing the family brand of toothpaste.[84] Second, commercial advertising exists in a different legal realm than does political advertising, despite their use of similar techniques. The Court has recognized the dangers of such unregulated commercial speech and has affirmed the need to balance governmental interests against those of consumers.[85] For instance, the Court held opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Counsel*[86] that the state may regulate misleading and deceptive commercial speech. Pursuant to this goal, the Federal Trade Commission imposes significant regulation on commercial speech for the purpose of protecting citizens from false and misleading speech yet the domain of the political advertisement has remained unencumbered despite the use of the same potentially damaging techniques.[87]

Political advertising makes use of several noted commercial techniques including associational techniques and the use of image over substance.[88] Associational techniques invoke the traditional "good vs. evil" argument in which one candidate is associated with a recognized evil while the other is associated with good. Nuclear war was a thematic constant of the political advertisements of the 1960s.[89] The Johnson campaign of 1964 ran a series of ads, which associated challenger Barry Goldwater with an increased threat of nuclear war. The ads, which included the famous "Daisy Girl" ad, included both implied and explicit references to Goldwater as a nuclear hawk.[90] These ads explicitly show the danger of using commercial techniques rather than logical argument in a political campaign. The Johnson campaign ads are a clear manipulation of powerful emotions, such as fear, for purpose of personal gain rather than informing the electorate.[91]

3. Disengagement and Alienation of the Electorate

Critics have pointed to the political advertisement, particularly the contemporary prevalence of the negative political advertisement, as a definite factor in the alienation of large portions of the electorate from the political process.[92] As previously stated, participative political activities are far more expensive and are of a local, rather than national nature. Consequently, campaigns are far more likely to spend dollars on advertising rather than on participative activities. It is possible that the lack of expenditure for such activities combined with the uninspirational nature of political ads themselves discourage both voting and other forms of political participation.[93] Evidence suggests that political advertising has an effect on feelings of the political efficacy of the electorate, particularly among members of the lower socioeconomic stratus.[94] Researchers indicate that these members of the populace tend to have lower levels of education and have high TV watching tendencies.[95] Consequently, these are the people who tend to need greater incentive to participate in the political process. Given that the members of the lower socioeconomic have high TV watching tendencies, they bear the brunt of televised political advertising, whose contemporary qualities do not foster an informed political debate. Rather, critics indicate, political advertisements foster cynicism and passivity toward the political process thereby decreasing political efficacy and increase feelings of alienation from the political process.[96] It is entirely possible that reforming televised political advertising toward a more substantive format would arouse greater interest in political debate among the disengaged members of the electorate. A rise in political participation would, in theory, not only enlighten the quality of political debate but also make a significant contribution to the quantity of contemporary political speech.

## III. THE LEGAL FRAMEWORK FOR POLITICAL ADVERTISING REFORM

The numerous problems permeating political advertising previously discussed certainly cast doubt upon the legitimacy of such advertising to fulfill the First Amendment role of contribution to informed self-government. The purpose of elections can be described as the transformation of the public will into political power.[97] The key aspect of this normative theory of elections is that the "public will" has sufficiently debated both substantive policy issues and candidates personal qualities to ensure informed self-government. Political debate and public will formation is not limited to the electoral season by any means. However, the process comes to fruition at these times and as a result, there is an increased quantity of political debate.[98] Given that television is becoming an increasingly important method of political communication, one should demand a more balanced style of advertising, if the television is to adequately function as one of the primary communicative means of political discourse.

As previously discussed, contemporary political ads do not provide the necessary, substantive qualities to be considered balanced and conducive to informed, rational self-government. Consequently, reform is necessary to correct such an imbalance and the law is a manner by which this reform may be accomplished. Indeed, Oliver Wendell Holmes stated that

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[99]

However, this need for reform creates a constitutional quandary: can the government restrict political speech in such a way that it conforms with dual First Amendment goals of informed self-government and protection of the freedom of speech? The following section explores plausible rationales for doing so. Drawing mainly upon the works of Alexander Meiklejohn, C. Edwin Baker, Jeffrey Blum, and Jurgen Habermas the remainder of the article examines several different, yet interrelated, rationales, for speech regulation. This article contends that the First Amendment has multiple objectives, some of which require protection of speech, some of which require regulation of speech.

### A. A Legal Theory for General Speech Regulation

Indeed, it is common knowledge that under certain circumstances, the government may regulate general speech. One must begin by asking the question: under what circumstances has the Court held that the restriction of speech rights, in general, is acceptable? Scholar Jeffrey Blum postulates that the Court conceives of the protection of speech rights as dichotomous in nature.[100] Blum states that the Court applies two types of protection to speech in general, absolute protection in certain circumstances and discretionary protection in others.[101] In certain circumstances, the Court will accord an absolute protection to a speech activity, in effect creating a "behavioral entitlement", meaning that the Court has affirmed an individual's right to speech in a certain situation.[102] Any attempt by the government to substantially interfere with the individual's speech is an abridgement of the speech right, thus the protection is termed absolute. By creating such "behavioral entitlements", the Court effectively limits the discretionary authority of lower courts regarding such speech activities.[103]

However, the Court does not always allocate First Amendment protection via "behavioral entitlements"; the Court may instead assign a measure of discretionary protection.[104] Blum posits that the Court applies discretionary protection where regulatory interests may be "substantial, complex, and at times unforeseeable" to a wide variety of speech behavior given the,

er the location of the speech activity is public or private; the Court will consider, in certain circumstances, whether the manner of expression is consistent with the normal operations of the location, such as in a school or a courthouse and so on and so forth.[107] Consequently, one can safely assume that there are instances in which speech activities can be regulated. However, one must also ask, does this principle apply to political speech as well?

B. Meiklejohn, The First Amendment, and "Governmental Collectivism"

A question: is there a framework of legal theory, which propounds the regulation of speech, particularly political speech, in certain instances for the greater good of society? Alexander Meiklejohn's work, *Political Freedom: The Constitutional Powers of the People*, discusses such a theory based on an interpretation of the fundamental nature of the First Amendment. Specifically, Meiklejohn postulates that the essence of the First Amendment is not primarily the guarantor of private speech rights, as traditionally thought of, but rather is focused upon the creation of an enlightened, informed public capable of self-government. This logic has been aptly termed by Robert Post, and shall be referred to hereinafter, as the collectivist First Amendment theory due to the subjugation of individual autonomy to the collective governmental process.[108] Meiklejohn states that the First Amendment exists for the express purpose of facilitating the exchange of ideas such that no ideas, beliefs, opinions and other relevant material be withheld from the public for the purpose of self government.[109] Meiklejohn also states that since information is to be disseminated for the purpose of the public's self governance, the primary goal of the First Amendment is therefore to provide a sentinel against the distortion of the "the thinking process of the community."[110] Consequently Meiklejohn reasons that "what is essential is not that everyone shall speak, but that everything worth saying shall be said."[111]

To provide a standard and model for what type of speech advances the public consciousness, Meiklejohn proposes the traditional American "town meeting" in which the town meeting is defined as a group of free and equal men uniting " in a common enterprise, using for that enterprise responsible and regulated discussion."[112] Meiklejohn asserts that the town meeting is gathered not for the purpose of "unregulated" talking but for action upon matters of the public interest. The town meeting format is used as an institutional, managerial structure for wise decision making.[113] Consequently, if the aim of the First Amendment is the protection of the communal thinking process, legal regulation of the participants' speech is justified, and the quality of public debate is measured by the effectiveness of the managerial structure to enhance decision making.[114] Because, according to Meiklejohn, speech is routinely regulated in order to achieve the consensus on matters of public opinion (including one could assume the election of officials), one could argue that because contemporary political advertising often lacks substantive information, as well as often being misleading and deceiving, it detracts from the communal thinking process and should be regulated accordingly.

This particular interpretation of the First Amendment has not fallen on deaf ears. Indeed, the Court has granted some credence to the aforementioned line of thinking that the autonomy of the individual may be subordinated for the benefit of the collective good without unduly impinging upon freedom of speech. The Court, in *Austin v. Michigan Chamber of Commerce* "upheld a ban on corporate expenditures for campaign activities…even though such a ban burdens the expressive rights of corporations".[115] The Court also held in *Red Lion Broadcasting Co. v. FCC* that the rights of individual listener to balanced presentation of issues take precedence over the ability of broadcasters to exercise full editorial control over programming choices.[116]

Meiklejohn's work as a rationale for the regulation of speech is not unassailable by any means. Robert Post argues that Meiklejohn fails to reconcile the collectivist need for a specified objective of public discourse with the fundamentally indeterminate nature of public discourse.[117] Post also asserts that Meiklejohn poses a contradiction that unduly circumscribes individual autonomy in such a way that is inconsistent with First Amendment doctrine.[118] However, even scholars like Post, who believe that the autonomy of individuals is the essential component to public discourse, agree in part with collectivist proponents such as Alexander Meiklejohn, Owen Fiss, and Cass Sunstein that public discourse can and should be regulated in certain circumstances. Post himself makes the statement that when a speaker crosses the threshold from private citizen to an agent of the public, the speaker passes beyond traditional First Amendment boundaries.[119] According to Robert Post:

> [It] is not that public discourse can never be regulated, but that it ought not to be managed in ways that contradict its democratic purpose. This purpose need not preclude "time, place, and manner regulations" that function as rules of the road" to coordinate and facilitate expression within public discourse. Nor need it rule out government action designed to supplement or augment communications within public discourse…but the democratic function of public discourse is inconsistent with government regulations that the suppress speech…for the sake of imposing a specific vision of national identity.[120]

Given this admission, one can conclude that there is a key similarity between the proponents of collectivist speech theory and traditional speech theory. Both collectivists and traditionalists concede that regulation of speech may be necessary for the facilitation of public discourse in the pursuit of an informed, rational democracy.[121] Consequently, it seems as though there is agreement that it is constitutionally plausible to regulate public discourse in certain circumstances. However, the Court has stated that that the First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office."[122] Yet, as previously argued, contemporary campaign speech is an instance in which such regulation has an apparent need be applied.

### C. Political Advertising as "Institutionally Bound" Speech

To provide a legal framework for the regulation of political advertising, one may turn to C. Edwin Baker, who proposes the theory that campaign speech, and for the purposes of this article, political advertising, is "institutionally bound" speech; meaning that such speech should receive protection similar to that received by other speech within the same institution.[123] This form of speech is so integrally associated with government that it's framework requires the same regulatory interests as applies to speech in Congress and the judicial system. As a foundation for his theory, Baker argues that, indeed, within the machinery of government, various formats of speech regulation are pervasive.[124] Within the confines of the Congress, speech may be ruled out of order, may be constrained due to time limitations or subject matter, and even may be cut off such as the cloture of a filibuster.[125] Yet despite the fact that the free speech rights of officials and private citizens may be abrogated in governmental proceedings, there is little challenge to the constitutionality of such regulations.[126] Baker asserts that the reason for this speech dichotomy is the institutional nature of the speech; the limits are necessary for the proper functioning of the institution to which the speech belongs to.[127] Continuing from this thesis, elections are legally structured to serve certain means, the transformation of public will into political power. Thus electoral speech, which includes political advertising, is a domain of speech that is separate from general political speech.[128]

Baker asserts a crucial view with regards to the treatment of elections. Indeed, the role of elections is at the very heart of Baker's thesis and plays an important role in this article as well. The fundamental assumption being made is that politics are not electorally centered.[129] This view conceptualizes politics as being very broad and all encompassing, and posits that public political opinion is formed largely during non-campaign and pre-campaign periods. As evidence, Baker points to people's "informal…unregulated discussion" and mobilization in response to certain issues e.g. feminism, gay rights, abortion, housing policy, public education, welfare, military policy etc.[130] Baker also cites the near constant media coverage of both "the substance and practice of politics" as evidence of a larger political consciousness, separate from elections themselves.[131] In this scenario, the regulation of campaign speech is constitutionally plausible given that elections, and subsequently their associated speech, serve a "narrower, translational"[132] function while general political speech remains unencumbered.[133] Baker points to the body of case law that treats campaign speech as distinct from general political speech as evidence that the Court subscribes to a non-electorally centered political viewpoint. Indeed, the Court has applied special regulation to campaign speech in such cases as *United States Civil Service v. National Ass'n of Letter Carriers*[134], *Greer v. Spock*[135], and *Austin v. Michigan Chamber of Commerce*[136]. Baker argues that by doing so, the Court has held that "the need to create a fair and effective electoral process as justifying rules restricting speech".[137] The Court has reasoned that the format of political advertising can be restricted when it detracts from self government, and incentives to favor one specific type of advertising over another can be consistent with free speech given that certain formats are superior in providing the necessary information for stimulation of enlightened debate.[138]

## IV. HABERMAS'S IDEAL SPEECH SITUATION AS A MODEL FOR POLITICAL ADVERTISING

In the quest to foster an increased level of substantive political debate one must provide some particular, desirable framework to model ideal political advertising upon. In his work *The Theory of Communicative Action*, 20th century philosopher Jurgen Habermas posited his ideal speech situation as a means for validating of social norms and as a method for the proper discussion and resolution of contested courses of action.[139] The debate of political candidacy and relevant social issues certainly seem to fall within this framework. Habermas argues that there are four universal pragmatic presuppositions of argument. These presuppositions are the conditions upon which the rational agent assumes exist in order to enter into discourse. The first presupposition is truth, by which the rational agent assumes that all other participants in the argument assert facts and states of affairs both accurately and objectively.[140] The second presupposition of rational argument is rightness, by which the arguments of other participants suggest a "proper relationship of the statement to the world of intersubjective or social norms".[141] The third presupposition is truthfulness, not to be confused with truth, as a means by which all other participants accurately reflect their own subjective feelings and experiences.[142] The fourth presupposition is coherence, by which the agent assumes that all other participants are using similar linguistics in their communications.[143]

In addition to his universal pragmatic presuppositions, Habermas also asserts two essential elements in order to achieve the ideal speech situation, namely that participants must enter into discourse freely and accept a set of rules of argumentation. Second, Habermas asserts that the force of rational argument be the only persuasive factor outside of the rules of argumentation which apply equally to all parties. Habermas's rules of argumentation include 4 precepts, the first of which

terests: creating the literate, informed citizenry, the fundamental prerequisite for democracy, and regulating the political advertising system to counterbalance the misleading, deceptive nature of contemporary ads, thus maintaining the integrity of the electoral process. By providing a scheduled time for such advertisements, citizens will be free to enter or abstain from the discourse. This analysis should be multifaceted in nature such that both the pros and cons of prospective policy positions. The advantage of this pro/con analysis allows the citizen to play a role that aligns itself more closely to Habermas's ideal speech. Given the current technological limitations of television, a pro/con analysis may provide a closer substitute for an in person discourse, which allows the participants to raise new propositions or questions, than the current format of advertising allows. By publicly funding the endeavor, the effort to enhance the level of discourse will not unduly burden a candidate nor restrict the quantity of political speech.[151]

The aforementioned proposal for the reform of political spot advertising is by no means above criticism. Those who disagree with my proposal would probably argue it contains several potentially damning faults. One could argue that this type of proposal impugns the dignity of the electorate by assuming that great numbers of citizens are incapable of critically analyzing political spots and evaluating the veracity of their claims. If the electorate is indeed able to evaluate the veracity of political spots then my proposal no doubt seems overly paternalistic, perhaps even an impermissible intrusion upon the realm of free speech.

Another possible fault with my proposal is the practicability of enforcement. Monitoring political spots in the manner described by my proposal would be a labor-intensive effort given the number and frequency of elections in the U.S. There does not exist any regulatory agency properly equipped to monitor and research the veracity of claims made in political spots. Furthermore, election dates cannot be forestalled, consequently, there may be inadequate time available to enforce political advertising regulations should enforcement via the courts be necessary. Given that political spots often help form critical first impressions in the minds of voters, a speedy rectification of any deceptive information contained within is necessary. A protracted battle in the courts may not facilitate this need for rapidity.

A final fault with my proposal is the difficulty eliciting cooperation from broadcasters and the electorate themselves. Broadcasters would no doubt be outraged at being mandated to provide thirty-minute time slots devoted to political programming during prime viewing hours and would doubtlessly demand substantial compensation. Government may be loath to spend funds to compensate broadcasters that could be utilized elsewhere. This proposal also depends upon the electorate being willing to sit down and spend thirty minutes becoming more intimately acquainted with candidates' policy proposals. This may be difficult to achieve given the enormous time constraints and general political apathy of much of the American citizenry.

The infatuation of political campaigns with spot advertising, combined with the diversity of views regarding free speech make any potential solution to the problem of inadequate political advertising unlikely to please all parties involved. However, by mandating the dissemination of accurate, truthful information from political campaigns, in the form of dedicated programming, I believe we take a substantial step forward in forming a more perfect polity.

## CONCLUSION

Given the fact that television is becoming one of the primary means of campaign communication, it stands to reason that if we as a nation are to achieve a level of political debate conducive to informed self-government, the current format of political advertising is inadequate to achieving such a goal. Indeed, at first glance, it seems paradoxical that the government may mandate speech, restrict speech, or regulate content in order to further the goal of informed self-government. However, given the above analysis, one can certainly argue that reform is both needed and plausible. Indeed if the law is indeed based largely on the felt necessities of the day; if, as Justice Benjamin Cardozo stated, "the law, like the traveler, must be ready for the morrow…It must have a principle of growth.", perhaps the time has come to more forcefully apply the law to serve one of the fundamental goals of the First Amendment, creating a populace capable of rational, informed self-government.

Footnotes:

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1. Larry Sabato, *The Rise of Political Consultants* 117 (1981).
2. *Id*. at 124.
3. *See* Edwin Diamond & Stephen Bates, *The Spot: The Rise of Political Advertising on Television*, at x (1992).
4. *See* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential for the identities of those who are elected will inevitably shape the course that we follow as a nation."); *see also* James Fennimore Cooper, *The American*

*Democrat* 55 (Funk & Wagnall's 1969) (1838) ("As the success of democracies is mainly dependent on the intelligence of the people, the means of preserving government are precisely those which conduce to the happiness and social progress of man. Hence we find the state endeavoring to raise its citizens in the scale of being, the certain means of laying the broadest foundation of national prosperity."); *cf.* George A. Graham, *America's Capacity to Govern* 30-31 (1960) ("The first prerequisite of democratic government is "a sufficiently general standard of technical skill and literacy." Some go further and argue that the technical skills must include considerable capacity for abstract thought in reading, and writing, and speaking."); (Undoubtedly the need for an informed, literate citizenry is a fundamental building block in a democracy. Government needs such a citizenry to function at all. Such evidence provides a compelling governmental interest in the regulation of certain speech pursuant to this higher goal.).

5. Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 Ind. L.J. 663, 665 (1993).
6. O. Lee Reed, *The State is Strong But I am Weak; Why the Imminent Lawless Action Standard Should Not Apply to Targeted Speech That Threatens Individuals With Violence*, 38 American Business Law Journal 177, 179 (2000). (Discussing a potential overt speech harm aimed at individuals. The main thrust of this article does not deal speech harm at such an individualistic level rather the article deals with speech harms aimed at the fundamental prerequisites for democracy, a literate citizenry. However, the underlying assumptions in Professor Reed's article can still be applied. Speech is not protected absolutely but where such protection applies, especially regarding political speech, is a matter of debate.).
7. 424 U.S. at 19 (striking down campaign expenditure limits, reasoning that they represented a material restraint on the both the quantity and diversity of political speech).
8. *Cf.* Moran, supra note 4 at 706. (constitutional analysis of proposal for the distribution of public funds for issue oriented campaign advertisement).
9. First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
10. *See* Michael J. Garrison, *Corporate Political Speech, Campaign Spending, and First Amendment Doctrine*, 27 American Business Law Journal 163, 180 (1989) (further discussion of the rationale behind the Bellotti decision).
11. *Id*. at 164.
12. *Id*.
13. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).
14. *Id*. at 655 (Defining independent expenditures as those "not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee". Committees in this case referred to political action committees whose express purpose is to influence the nomination or election of a candidate.).
15. *Id*. at 666-667 (Discussing the exclusion of "media corporations" from the Michigan statute that broadcast support or opposition for political candidates in the regular course of business. The Court held this provision constitutional based on its similarity to a provision within the Federal Election Campaign Act.).
16. *Id*. at 656 (Establishing the purposes of the Michigan Chamber of Commerce, which are set out in its by-laws. The chamber sought to promote economic conditions favorable to private enterprise; to analyze, compile, and disseminate information about laws of interest to the business community and to publicize to the government the views of the business community on such matters; to foster ethical business practices; to collect data on, investigate matters of, social, civic, and economic importance to the State; to receive contributions and to make expenditures for political purposes and to perform any other lawful political activity; and to coordinate activities with other similar organizations.).
17. *Id*. at 657
18. *See* FEC v. Massachusetts Citizens for Life, Inc., 473 U.S. 238 (1986), hereinafter MCFL.
19. 494 U.S. at 657-658 (Discussing the Court's findings in FEC v. MCFL that a federal statute requiring corporations to make independent political expenditures only through segregated funds burdened corporate speech. The federal statute required that a treasurer administrate such funds, keep records of contributions, file organizational statements containing information about the fund, and solicit contributions only from members of the organization. The Michigan statute in question closely resembled the aforementioned federal statute and ipso facto the Court reasoned that the Michigan statute burdened corporate expression.).
20. *Id*. at 659-660 (explaining the Court's findings that the Michigan statute was aimed at the potentially "corrosive and distorting" effects of such large sums of money, whose accumulation was aided by the advantages of the corporate form).
21. *See* FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) (discussing the Court's finding that the prevention of corruption and the appearance of corruption are compelling governmental interests which can justify the regulation of campaign finances).
22. *See* 494 U.S. at 659-660 (Providing an elaboration of the Court's reasoning that corporations have an unfair advantage in the political marketplace. The Court cited its previous reasoning in MCFL that the fact that the state confers upon corporations the advantages of "perpetual life, limited liability, and the favorable treatment of the accumulation and distribution of assets"; also, the fact that treasury resources do not represent incidences of popular support for the

corporate political ideas but are rather reflections of economic decisions made by customers and investors. The Court found that the potential for amassing such political resources served to unduly advantage corporate speakers.).

23. *Id*. at 661-665 (Describing the threefold characteristics of voluntary political associations as defined by the Court in MCFL. The first key characteristics of such associations are narrowly defined, express political purposes. The Court cited MCFL's purpose "to foster respect for human life and to defend the right to life of all human beings, born or unborn, through educational, political and other forms of activities" and the subsequent design of all the corporations' activities as to further its agenda. Consequently, the Court stated that "MCFL's narrow political focus thus ensured that its political resources reflected political support." The Court ruled against the Michigan Chamber of Commerce stating that the Chambers' bylaws set forth goals that were not "inherently political", particularly those goals which related to dissemination of information regarding social, civic, and economic conditions. The second characteristic of voluntary political associations as described by the Court is the "absence of shareholders or other persons affiliated so as to have a claim on its assets or earnings", such that said persons have no economic disincentive for withdrawing from the group should they disagree with the political views espoused by the organization. Though the Chamber did lack shareholders, the Court reasoned that members might view withdrawing from the organization over political views distasteful; such members may still have a desire to benefit from the Chamber's nonpolitical activities and business contacts. The third characteristic of voluntary political associations is independence from the influence of business corporations. The Court noted in MCFL that the association was not founded by a corporation and had a policy of not accepting contributions from business corporations. Consequently, MCFL was incapable of serving as the funnel for the type of direct spending that creates a threat to the political marketplace. The Chamber, on the other hand, consisted primarily of for profit corporations whose political expression can be constitutionally regulated. The Court noted the danger of allowing corporations to utilize treasury funds in support of elections given the fact that payments into the Chamber's treasury fund are not considered payments for the influence of elections and are therefore unregulated by the Michigan statute in question.).
24. *Id*. at 666.
25. Burson v. Freeman, 504 U.S. 191 (1992).
26. Mills v. Alabama, 384 U.S. 214 (1966).
27. 504 U.S. at 198.
28. 504 U.S. at 193-194.
29. *Id*. at 194-195 (Elaborating that the respondent, Freeman, argued that the Tennessee statute limited her ability to communicate with the voters. Tennessee's Chancery Court dismissed the suit based on a threefold ruling. The statute was ruled content neutral and a reasonable time, manner and place restriction; the Chancery Court also ruled the statute served a compelling state interest, namely the protection of voters from interference during the polling process; finally, it was ruled that the speaker had an alternative means of exercising speech rights, outside the 100-foot boundary. The Tennessee Supreme Court subsequently overturned the ruling holding that the statute effectively restricted a certain class of speakers and a certain class of speech and consequently required justification by a compelling state interest. The Tennessee Supreme Court found that Tennessee had shown a compelling interest in regulating the speech inside the polling place but not surrounding said polling place. Finally, it was held that voter intimidation laws currently on the books in Tennessee provided a less restrictive alternative than the statute in question.).
30. *Id*. at 196-197 (Noting that the Tennessee statute obviously restricts political speech. The Court also noted that the statute restricted speech in a public forum. The Court stated that although speech in public forums has been part of civil liberties for much of recorded history, speech in public places could be regulated if speech activity "interferes with other important activities for which the property is used." However, any time, manner, or place regulation such expressive activity must be narrowly tailored to serve significant governmental interests, leave open substantial alternative means of communication, and be content neutral. The Court noted that content- based political speech regulation must pass strict scrutiny regardless of whether a free speech theory or equal protection theory is argued.).
31. *Id*. at 198.
32. *Id*. at 198-199.
33. *Id*. at 206 (Discussing the evolution of the electoral system, particularly the development of the secret ballot, accompanied by a partially restricted polling zone as a means of protecting voters from intimidation and fraud. The Court also discusses the ubiquity of this particular solution to the problems of fraud and voter intimidation amongst the 50 states and other Western democracies.).
34. *Id*. at 206-207 (Stating that current intimidation and interference laws "deal with only the most blatant and specific attempts" to impede elections. The Court noted that this aforementioned statement was particularly true in that law enforcement officers are generally barred from the vicinity of the polling place to avoid the appearance of coercion. Consequently, subtle, less blatant voter interference may avoid detection. Given that such interference may drive away voters, the regulation is not deemed over-inclusive. The Court also reasoned that the regulation was not under-inclusive based on the historical data that clearly evidenced that politicians had employed campaign workers to commit fraud and intimidation. The Court stated that there was no evidence that politicians had used other expressive activities, such as solicitation or exit polling, to intimidate or commit fraud and States are not required to regulate nonexistent problems.).

37.

70 (Describing the purpose of political advertising as to create and foster debate regarding political issues. This purpose is abrogated when libelous and slanderous enters the political marketplace. Indeed, one of the fundamental assumptions of any marketplace is the presence and universal access to perfect information. If one of the primary sources of political information is the spot advertisement, false or misleading information presented within contributes to the failure of the aforementioned market.).

40. *See* Garrison, *supra* note 10 at 177 (discussing that the Court held in Buckley v. Valeo that the appearance of political quid pro quo's struck a blow at the public's confidence in the integrity of the electoral system and, that the government's interest in protecting procedural integrity justified limitations on political contributions, which were determined to be political speech activities).
41. *See* Lance Conn, Comment, *Mississippi Mudslinging: The Search For Truth In Political Advertising*, 63 Miss. L.J. 507, 510 (Discussing the harms to the public interest that are created by negative and misleading campaign advertisement. One must be careful to note that simply because a political advertisement is negative does not automatically necessitate the need for regulation. There is a long tradition of negative political advertising in this nation. A valid issue in any campaign is the past practices of an opposing candidate; the negative aspects of said past are exceptionally relevant information that needs to enter into the voting equation. The contention of this article is that regulation is needed in order to prevent the spread of misleading and deceptive information, which adversely affects the fundamental prerequisite of democracy, the informed, literate citizen. A potential problem for such speech regulation exists in that the Court ruled in New York Times v. Sullivan 376 U.S. 254 (1964) that non-malicious, false speech may be directed at government officials without fear of government censorship. The Court held that the necessity of open political dialogue essentially trumped the possible harms that might be suffered by government officials. However, I would posit this question: Does the need for open speech trump the very real harm being suffered by the disengagement of the electorate?).
42. *See* Michael Kimmel, *A Proposal to Strengthen the Right of Response to Negative Campaign Commercials*, 49 Cath. U.L. Rev. 89, 90-91 (1999) (Discussing the dilemmas presented by negative political advertising. Mr. Kimmel states that such advertisements are designed with the disparagement of an opponent's reputation, trustworthiness and integrity rather than addressing pressing issues. Mr. Kimmel also states that threat of such advertisements may inhibit politicians from addressing difficult but imperative policy issues and as a result, such advertisements run contrary to the public interest.).
43. *All Things Considered* (National Public Radio broadcast, Mar. 19, 2001) (Stating Mr. Bopp's vehement opposition to the McCain-Feingold campaign finance reform bill. Mr. Bopp believes that the bill's measure to ban soft money donations unduly suppresses free speech. Mr. Bopp states that it is of the utmost importance that voters have access to relevant information about both the candidates and their policies prior to exercising their right of suffrage. Mr. Bopp makes a valid point; substantive information is crucial for the rational exercise of suffrage and indeed if political advertising provided such information, to limit the source of funding for such advertisement would certainly chill vital political speech. However, Mr. Bopp assumes that campaign advertisements provide the requisite substantive information needed by the public. I contend that the contemporary nature of political advertising provides an altogether inadequate amount of substantive policy positions and proposals needed by the voting public. *See infra* note 59).
44. Diamond & Bates, *supra* note 3 at 381.
45. Spero, *supra* note 11 at 155.
46. *Id*.
47. *Id*.
48. *Id*. at 156.
49. *See* Cleveland Ferguson III, *The Politics of Ethics and Elections: Can Negative Campaign Advertising Be Regulated in Florida?*, 24 Fla. St. L. Rev. 463, 469-470 (1997) (Stating that one must be careful to differentiate the difference between a "fair" negative advertisement and a "deceptive" negative advertisement. "Fair" negative advertisements are those that contrast publicly stated opinions/attitudes/beliefs while the so-called truth of "deceptive" advertisements hinge on a mere kernel of truth. Both of the aforementioned types of ads often employ vehement, caustic language. It is not the point of this article to suggest that the government regulation of such ads is necessary due to their caustic nature. Indeed, the world of politics has never been known for niceties. However, democracy rests upon the bedrock of the informed voter. Consequently, I contend that vehement, caustic attacks that are grounded in fact are properly part of the realm of politics, while those based on a mere hint of the truth are not.).
50. *But see* Garrison, *supra* note 10 at 172 (Discussing the barriers to campaign funding restrictions. Professor Garrison argues that ensconced within the First Amendment is a strong "laissez-faire" doctrine in which it is the responsibility of the participants within the political marketplace to judge the relative worth of the ideas. This doctrine also rejects the

e that given that one of the primary functions of televised political advertising is to foster informed discussion of pertinent political issues, the ubiquitous deception and falsehoods present in political advertising certainly seems to qualify as a wrongful setback of the public interest, by striking a blow at the integrity of the electoral system. While Professor Reed acknowledges that harms analysis is by no means perfect, it serves as clear evidence that contemporary scholars have not accepted wholesale the notion that commercial speech and political speech should not be held to similar standards of analysis.).

88. Kern, *supra* note 30 at 23.
89. *See* Diamond & Bates, *supra* note 3 at 122-133; *see also* Spero, *supra* note 8 at 83-85.
90. *See* Diamond & Bates *supra* note 3 at 122-130 (Contending that nuclear launch policy is a relevant political topic, which should contribute to politically enlightened debate, however, the simplistic, perhaps demagogic manner in which the Johnson campaign portrayed the issue was inappropriate for public debate. The Daisy Girl ad was run only once during the 1964 campaign. The ad itself portrayed a young girl of perhaps 6 years old counting, from one to nine, the number of petals on a daisy. As she reaches the number ten, a man's voice is heard counting down from ten in the fashion of a nuclear launch. The little girl freezes on screen as the picture zooms in to a close up of her eye, eventually fading to black. The fading gives way to a nuclear detonation accompanied by a voice over of President Johnson stating "These are the stakes-to make a world in which all of God's children can live, or to go into the dark. We must love each other or we must die. Vote for President Johnson on November 3. The stakes are too high for you to stay home." Other advertisements explicitly linked Goldwater's name with nuclear irresponsibility, such as those stating that Goldwater felt that nuclear bomb was "just another weapon".).
91. *See* Johnson-Cartee & Copeland, *supra* note 8 at 276-277 (Linking the problems of negative advertising and demagoguery. This argument can be applied to the Johnson ads of 1964, which focused primarily on the fear of nuclear holocaust.); *see also* R. Spero, *supra* note 8 at 78-89. (Discussing the creation Barry Goldwater as a "straw man". Ironically, Johnson adopted a similar foreign policy with regards to the Vietnam conflict that was recommended to Goldwater in early 1964. A prime example of the use of deceptive and misleading facts, inappropriate for an enlightened political debate.).
92. *Id*. at 275-276; *see also* Richman, *supra* note 37 at 672-673 (positing that the contemporary state political advertising has engendered a trend of "voter disassociation" from mainstream politics.).
93. *But see* Diamond & Bates, *supra* note 3 at 374-375. (stating that the decrease in voter turnout is more likely due to a multitude of different factors, of which, the contemporary form of political advertising is only one.); *compare with* Johnson-Cartee & Copeland, *supra* note 8 at 273-274 (stating that there is inadequate evidence upon which to base any conclusion about the effects of political advertising on voter turnout).
94. Johnson-Cartee & Copeland, *supra* note 8 at 275-276.
95. *Id*.
96. *Id*. at 275-276; *see also* Marshall, *supra* note 43 at 371-374 (discussing the dangers of voter alienation; voters may be incapable of making political decisions even when they believe it is necessary.).
97. C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1, 33 (describing a preferred normative theory of elections.).
98. *Id*. at 33-35 (describing the ubiquity of politics and elections serving a narrow translational function rather than as the center of politics. This argument does not contend that politics is limited to the electoral season, however, it is arguable that despite the ubiquity of politics, political debate tends to encompass a greater number of participants during the electoral season.).
99. Oliver Wendell Holmes, *The Common Law* 1 (Mark DeWolfe Howe ed., 1963).
100. Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U.L. Rev. 1273, 1296-1299 (1983).
101. *Id*.
102. *Id*. (Discussing the concept of behavioral entitlements and their methods of formation. Blum states that entitlements may be created in three ways. First entitlements may be created via affirmative statements of individual right to a category of speech. Second, entitlements may be created by the Court's declaration that there are no legal interests in suppressing certain categories of speech, entitlement by negative implication. Finally, the Court may create entitlements simply through decisions to strike down regulation.).
103. *Id*. (Arguing that by definition, behavioral entitlements grant unequivocal speech rights to individuals. Lower courts merely have the ability to decide whether or not a particular regulation interferes with or denies the individual that entitlement.).
104. *Id*.

105. *See id*. at 1302-1306 (discussing the fact that absolute protection is needed at certain times however, given the substantial unknowns regarding speech activities, the Court prefers to accord some measure of discretionary protection for future review.).
106. *See id*. at 1314-1315.
107. *See id*. at 1315-1318.
108. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. Colo. L. Rev. 1109, 1109-1110 (1993).
109. Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 75 (1960).
110. *See id*. at 27.
111. *Id*. at 26.
112. *Id*. at 25.
113. *See* Post, *supra* note 70 at 1117.
*114*. *Id*.
115. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (discussing corporate speech rights in political campaigns under the First Amendment); Moran, *supra* note 4 at 717, n128.
116. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
*117*. *See* Post, *supra* note 70 at 1115-1120 (arguing that Meiklejohn assumes that there is a determined objective, that results from public discourse. Post argues that public discourse is by definition indeterminate. Post draws upon Justice Harlan in *Cohen v. California* who states that the "verbal cacophony" is a necessary side effect of public discourse which is not designed to serve any particular purpose but is instead meant to serve as a medium in which "heterogeneous versions of collective identity can be free to continuously collide and reconcile.); *Cf.* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 Wake Forest L. Rev. 1135, 1179-1182 (1994). (discussing the nature and purposes of public discourse.); *but see* Toni Massaro, *Post, Fiss, and the Logic of Democracy*, 64 U. Colo. L. Rev. 1145, 1151-1152 (1993). (stating that public discourse, which does not ultimately establish managerial organizations for the furthering of publicly, decided objectives is impotent.).
118. *See* Post, *supra* note 70 at 1115-1120 (Arguing that the inability of participants to determine the managerial structure causes a conflict between self-determination and public discourse. Post argues that mere possibility of censorship ensures that not all of alternatives and issues will be addressed as Meiklejohn's model appeals to a "neutral moderator". Post's argument is two-fold: one, humans are, by nature, biased, and cannot act as "neutral moderators" second, the actual standards used by the "neutral moderator" to determine relevance and irrelevance are matters of dispute, yet they are above debate in Meiklejohn's model.).
119. *Id*. at 1126-1127.
120. *Id*. at 1121.
121. *See* Massaro, *supra* note 80 at 1147-1157 (Describing the similarities between Robert Post's traditionalist speech theory and Owen Fiss's collectivist theory whose groundwork is based upon the arguments of Alexander Meiklejohn. Massaro also argue that it is merely the set of "estimations and predictions" which is found more compelling that is the true difference between the theories and not the actual "logic of speech and democracy.").
122. Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-272 (1971).
123. Baker, *supra* note 62 at 2-3 (asserting that speech within certain institutions is restricted and subjected to limits for the purpose of smooth institutional functioning and enhancing democracy).
124. *See id*. at 21-24.
125. *See id*. at 21-22.
126. *Id.* (Asserting that such speech regulation is constitutionally permissible for the proper functioning of government. Baker acknowledges that criticism of the speech rules exists but that they are limited to the details of the rules, not the actual existence of such rules.).
127. *Id*.
128. *See id*. at 28-29
129. *Id*. at 32-35.
130. *Id*.
131. *Id*.
132. Baker, *supra* note 62 at 33.
133. *Id*. (Baker argues that a non-electorally centered view of politics is both pragmatically and normatively desirable. Baker also asserts that one can conceive of politics as being electorally centered. If politics is indeed electorally centered, any attempt to regulate campaign speech is an unacceptable intrusion into the boundary of political speech.); *see* Joseph E. Finley, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 Emory L.J. 735, 735 (1995) (Discussing that there seems to be no lack of anecdotal evidence to support this electoral centered view of politics. Candidates are constantly questing for monies to fill their political war chests for the purpose of advertising and other campaign expenses pursuant to elections. Mr. Finley notes that former Senate Majority Leader Robert C. Byrd was

often pressured by other senators to not hold votes on Mondays, Fridays, and weekdays after 4:00PM in order to facilitate fundraising activities pursuant to their next election campaign.).

134. *See* United States Civil Service v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (preventing federal employees from taking an "active part in political campaigns").
135. *See* Greer v. Spock, 424 U.S. 828 (1976) (restricting the electoral speech on military bases).
136. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (restricting corporate speech rights via a limitation on expenditures in support of a political campaign.)
137. Baker, *supra* note 62 at 33-34.
138. Moran, *supra* note 4 at 684. (discussing the government's interest in informed debate)
139. Logan Atkinson, *Coming to Terms with Procedure: The Potential of the "Ideal Speech Situation" for Michael Walzer's Communitarian Justice*, 56 U.T. Fac. L. Rev. 223, 235-236 (1998).
140. *Id*.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*. (Habermas's rules as stated above are in a simplified fashion, for further analysis of the argumentative rules see D.B. Rasmussen, *Political Legitimacy and Discourse Ethics*, 32 (1992).)
145. *See* J. Habermas, *Moral Consciousness and Communicative Action*, trans. C. Lenhardt & S.W. Nicholson, 93 (Cambridge, MA: MIT Press, 1990).
146. Habermas's ideal speech situation is simply that, ideal, and is not immune to criticism. The ideal speech situation's purpose in this article is as an evaluative framework and a goal to strive for in terms of elevating the level of rational political debate.
147. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976).
148. *See* Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 Loy. L.A. L. Rev. 1539, 1553- (1997) (Describing new research which provides some empirical evidence that suggests that negative political advertising which contain "highly selective facts or outright distortions" is shrinking the electorate. The study indicates that negative advertising has a particularly strong effect on nonpartisan voter participation, which leads to an increase in electoral polarization. Professor Calvert argues that the participative electorate is the bedrock of democracy and consequently the constricting effects of negative campaign advertising poses a serious threat to democracy. Such findings demonstrate the aching need for an effort to elevate the quality of political debate and voter efficacy.).
149. Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 Conn. L. Rev. 779, 789-790 (stating that there are widespread doubts about the ability of negative advertising to replace more substantive political debate).
150. Lack of cooperation from the broadcasting industry may be a major problem in the implementation of such a lengthy advertising format. Despite some compensation broadcasters would be loathe to give up valuable air time in favor of running 30 minute political spots, especially considering the frequency of elections in the U.S. However, the Court held in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) that the rights of listeners to receive a balanced presentation outweighed the interests of broadcasters in retaining complete editorial control over programming. This decision undoubtedly serves as a social instrument designed for the enlightenment of the voting public. Following upon this logic, one could assert that not only does the government have an interest in providing a balanced presentation but also an interest in facilitating a substantive presentation as well.
151. An inherent problem in publicly funding any political endeavor is inclusion doctrine. On what basis or criteria will political candidates be chosen to receive funding to more fully expound their political rhetoric? One could propose that candidates receive funding contingent upon some reasonable likelihood to garner a particular percentage of the vote. However, since this article contends that these 30-minute "ads" be mandated speech, to exclude any participant seems to violate standards of equal protection under the law. On the other hand, publicly funding any and all political candidates for a particular office may be largely infeasible. Broadcasters would no doubt argue that being forced to carry such a volume of political speech would be unduly burdensome. *See* Finley, *infra* note 131 for further discussion of the problems associated with publicly funded political endeavors.