

Symposium: Political Discourse, Civility, and Harm  
January 14, 2012

**FREEDOM OF SPEECH, LIBERAL  
DEMOCRACY, AND EMERGING EVIDENCE ON  
CIVILITY AND EFFECTIVE DEMOCRATIC  
ENGAGEMENT**

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*On January 8, 2011, a mentally disturbed man opened fire on Congresswoman Gabrielle Giffords at her “Congress on Your Corner” event. Six people died and several others, including the Congresswoman, were seriously wounded. In the aftermath of the tragedy, a renewed call to more civil political discourse arose, followed immediately by strenuous objections to this call on constitutional, political, and practical grounds. In this Article, we address these objections and conclude that none is sufficiently compelling to derail a civil political-discourse project.*

*We argue that the more important issues are whether, and how, incivility in political discourse poses a problem for democracy. Facts matter in the debate about what consequences may flow from how we “talk politics.” This Article analyzes the emerging data about the nature, causes, and consequences of incivility in modern political discourse. As we explain, the currently available empirical evidence is inconclusive on many specific points. However, it does suggest that some types of incivility, in certain contexts, may cause harm to democratic engagement and governance. At the same time, empirical evidence*

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*gives the lie to claims that perceptions of incivility are either completely idiosyncratic or completely determined by political partisanship. Research suggests a fairly substantial consensus among citizens and between citizens and researchers about what “counts” as political incivility. We therefore suggest preliminary steps that might inform a civil political-discourse agenda that respects the enduring value of full-throated freedom of expression. We also identify empirical research questions that must be answered if we are to assess the accuracy of the explicit and implicit behavioral assumptions underlying current legal and political debates about civil discourse.*

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## INTRODUCTION

Tucson suffered a wrenching tragedy on January 8, 2011. A mentally disturbed young man made an assassination attempt on Congresswoman Gabrielle Giffords, then opened fire on the congregation of people who had assembled at her “Congress on Your Corner” event. Six people died.<sup>1</sup>

Mourning of the deaths, injuries, breach of a sense of safety and peace continues. Yet attempts to find some meaningful path forward likewise continue. Humans tend to resist the undertow of tragedy and can display remarkable resilience and meaning-making in the face of incomprehensible madness. So has it been here, in Tucson.

These uplifting characteristics have been modeled most visibly by Congresswoman Giffords, who suffered very serious brain damage when the shooter’s bullet lodged in the left lobe of her brain.<sup>2</sup> Early, erroneous reports were that she died from the injuries.<sup>3</sup> The community then became aware that she had survived—miraculously—but would have a very long road to recovery, the fullest nature of which is still unknown.

Her recovery has captivated the nation. People were buoyed when her first, unexpected public appearance on the floor of the House was televised during the August 2011 debt-ceiling crisis.<sup>4</sup>

1. The dead included nine-year-old Christina-Taylor Green, who was there because of her budding interest in politics.

Also among the dead was much-liked and universally respected Chief Judge John M. Roll of the U.S. District Court for the District of Arizona. His funeral drew over 1,400 aghast and heartbroken people—many of whom were turned away when the large Catholic church reached capacity.

At the ceremony, the large group of mourners heard many accounts of Judge Roll’s decency, his deep faith, his love for his family, his respect for all at the courthouse, and his ability to maintain cordial relationships across political, religious, and other divides. Every word was true—not a sentimental polish on his life, but an accurate rendering of the character of this very good, responsible, and hardworking jurist.

They also heard of Judge Roll’s almost unbelievable bravery up to the very last minute. He told the emergency personnel that he could not be saved, and urged them to instead tend to the wounds of others. Video footage of the event revealed that Judge Roll stepped in front of another shooting victim and covered him with his own body, thereby saving the man’s life and sacrificing his own. Knowing this was both a comfort of sorts—seeing nobility and responsibility for others in the face of insanity and a murderous catastrophe—and an underscoring of what the community and the Roll family had lost.

2. See Kim Carollo, *Gabrielle Giffords Defies Medical Odds After Gunshot to Brain*, ABC NEWS (Jan. 9, 2011), <http://www.abcnews.go.com/Health/News/gabrielle-giffords-doctors-surviving-gunshot-head/story?id=12573502>.

3. Naimah Jabali-Nash, *Arizona Shooting Update: Gabrielle Giffords’ Husband Thought She Was Dead*, CBS NEWS (Jan. 19, 2011, 1:18 PM), [http://www.cbsnews.com/8301-504083\\_162-20028888-504083.html](http://www.cbsnews.com/8301-504083_162-20028888-504083.html).

4. See Christine Mai-Duc, *Gabrielle Giffords Returns for Debt Vote*, L.A. TIMES, Aug. 2, 2011, at A6.

In mid-November, many were heartened by her interview with Diane Sawyer, in which stark pictures of the early days of her recovery were broadcast alongside her current, vastly improved appearance.<sup>5</sup> A few weeks later, Giffords and her husband, Mark Kelly, published a biography that detailed the ten months of recovery and therapy, and expressed continued hope for continued improvement.<sup>6</sup>

On Thanksgiving, Giffords made her first local appearance, and helped serve dinner to the troops at the Davis–Monthan Air Force Base in Tucson.<sup>7</sup> Each event became a positive calendar marker—another step away from January 8, 2011 and toward mending. And, on the one-year anniversary of the shootings, she returned to Tucson to participate in various local remembrances of those lost and injured. Her husband stated that she was eager to “return to work.”<sup>8</sup> Finally, however, she recognized that the rigors of pursuing her recovery could not compete with the rigors of congressional office, and so she resigned on January 25, 2012.<sup>9</sup>

Giffords was joined by others, who likewise sought to promote public-service-oriented work after the shootings, while healing in other ways. These efforts ranged from a community memorial service shortly after the event that drew a huge local and national audience,<sup>10</sup> to the creation of memorial scholarships

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5. See Kevin Freking, *Giffords: Won't Return to Congress Until 'Better,'* WASH. TIMES (Nov. 14, 2011), <http://www.washingtontimes.com/news/2011/nov/14/giffords-wont-return-to-congress-until-better/?page=all>.

6. GABRIELLE GIFFORDS & MARK KELLY, *GABBY: A STORY OF COURAGE AND HOPE* (2011).

7. Ben Forer, *Rep. Gabrielle Giffords Serves Thanksgiving Meal to Troops*, ABC NEWS (Nov. 24, 2011, 2:40 PM), <http://www.abcnews.go.com/blogs/headlines/2011/11/video-rep-gabrielle-giffords-serves-thanksgiving-meal-to-troops>.

8. *Arizona Rep. Gabrielle Giffords to Resign from Congress*, FOX NEWS (Jan. 22, 2012), <http://www.foxnews.com/politics/2012/01/22/giffords-to-resign-from-congress>.

9. David Ariosto, *Gabrielle Giffords Resigns from Congress*, CNN.COM (Jan. 25, 2012), [http://articles.cnn.com/2012-01-25/politics/politics\\_gabrielle-giffords\\_1\\_gabrielle-giffords-gabby-giffords-debbie-wasserman-schultz](http://articles.cnn.com/2012-01-25/politics/politics_gabrielle-giffords_1_gabrielle-giffords-gabby-giffords-debbie-wasserman-schultz).

10. The University of Arizona, which is located in Tucson, undertook a major initiative in the aftermath of the shootings. With breathtaking speed, it organized a community gathering held at the basketball arena shortly after the shootings. Tucson is a college town, and Arizona basketball is to Tucsonans what Packers football is to Green Bay residents. The town roots together, claps and gnashes its teeth together, is “red and blue” together, and takes a break from the spin of ordinary adult life together—all with the Arizona Wildcats as a unifying bond. It thus made great local sense to congregate at McKale Center, and not just because the arena could accommodate many people. It is the town’s agora.

President and Michelle Obama, along with many dignitaries, attended the event—an event that local people lined up for many hours ahead of time to see. Among those who stood in line were health-care professionals who took care of the shooting victims. When they arrived, the queued-up crowd erupted into grateful applause and ushered them to the front of the line. Those who did not attend the ceremony in person watched on television. Friends from around the country watched the ceremony, and many phoned, e-mailed, or

and other ways of remembering those lost,<sup>11</sup> to new means of advancing the work of those who died or were injured, and preventing similar occurrences. One such collaborative effort was the University of Arizona's creation of a National Institute for Civil Discourse ("NICD"), devoted to exploring issues that most divide us, and seeking ways to promote meaningful civic engagement across these divides.<sup>12</sup>

The NICD is a nonpartisan center for advocacy, research, and policy regarding the understanding and practice of civil discourse. Its premise is that excessively hostile political discourse threatens democratic values and effective democratic governance, and that negative political discourse is rising in some contexts. It laments that the nation seems to be locked in perpetual political-campaign mode, rather than oscillating between the rancor of campaign seasons and the relatively less rancorous phase of governance. Its organizers sensed that new media contributed to this phenomenon, but the founders were committed to investigating this assumption and other behavioral assumptions about the nature, level, sources, and consequences of extremely hostile political discourse.<sup>13</sup> The university location of the Institute thus was a critical aspect of its formation: Facts, not mere impressions, were to drive its evolving work.

No one associated with the Institute believed that the January 8 shootings were caused by exceptionally polarizing, vitriolic, or violent political speech. But

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texted afterwards to affirm the Tucson community and to extend sympathy and solidarity. It was, for many here, an important step forward.

President Obama remarked:

The loss of these wonderful people should make every one of us strive to be better. To be better in our private lives, to be better friends and neighbors and coworkers and parents. And if, as has been discussed in recent days, their death helps usher in more civility in our public discourse, let us remember it is not because a simple lack of civility caused this tragedy—it did not—but rather because only a more civil and honest public discourse can help us face up to the challenges of our nation in a way that would make them proud.

We should be civil because we want to live up to the example of public servants like John Roll and Gabby Giffords, who knew first and foremost that we are all Americans, and that we can question each other's ideas without questioning each other's love of country and that our task, working together, is to constantly widen the circle of our concern so that we bequeath the American Dream to future generations.

They believed . . . , and I believe that we can be better.

President Barack Obama, Remarks at Memorial Service for the Victims of the Shooting in Tucson, Arizona (Jan. 12, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/12/remarks-president-barack-obama-memorial-service-victims-shooting-tucson>).

11. See Marc Lacey et al., *As Tucson Weighs How to Honor the Dead, Many Are Already Doing So*, N.Y. TIMES, Jan. 18, 2011, at A14.

12. See *Purpose*, NAT'L INST. FOR CIVIL DISCOURSE, <http://www.nicd.arizona.edu/purpose> (last visited Mar. 5, 2012).

13. We are both on the Working Board of the NICD, but the ideas expressed here are ours alone and in no way express the official views of the Institute.

all believed that the unifying national and community *spirit* that became visible in the aftermath of the event felt welcome, healing, and healthy.

Those founding the Institute also believed that the six people lost on January 8, along with those injured, together epitomized a worthy civic spirit. Chief Judge John M. Roll, nine-year-old Christina-Taylor Green, political activist Gabe Zimmerman, and interested citizens Dorothy Morris, Dorwin Stoddard, and Phyllis Schneck, together represented a mosaic that seemed to represent an American whole—young and senior, conservative and liberal. A literal *e pluribus unum*—out of many, one.<sup>14</sup>

Finally, the Congresswoman herself epitomized that same civic and politically ecumenical spirit. A moderate Democrat, Giffords is widely known for her personal decency, and for her efforts to fairly represent a complex, multicultural district that includes the University of Arizona and Davis-Monthan Air Force Base, that hangs on the border between Mexico and the United States, and that disagrees internally about gun control, the fiscal crisis, immigration policy, religion, and the appropriate balance between state and federal power, between government and individual autonomy. Giffords tried to reach them all, and she nearly died trying to do so—standing unprotected at a local Safeway store, greeting constituents on that sunny Saturday morning.

It therefore seemed to be the right moment, and the University of Arizona the right place, to form a working Institute that would call the nation to greater civility in political discourse.

But there were, and still are, naysayers. Civil *political* discourse? *Really?*

Some of the objections echo partisan divides more generally. These range from bitter murmurs that President Obama's well-received Tucson address to the nation was merely a calculated way to launch a reelection campaign, to more open cries that the calls to civility are one-way accusations—hypocritical “blue” political maneuvers designed to silence “red” voices.<sup>15</sup> These last suggestions were fueled by claims shortly after the shootings that drew a link between a conservative website that placed the Congresswoman's district in crosshairs,<sup>16</sup> and also by an early, and later retracted, statement of Pima County Sheriff Clarence

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14. See *Victims of the Tucson Shooting Rampage*, CBS NEWS (Jan. 14, 2011, 11:37 AM), <http://www.cbsnews.com/stories/2011/01/08/national/main7226900.shtml>.

15. The Phoenix radio station 550 KFYI aired a January 3, 2012 program on the *Barry Young Show* devoted to this concern. During an hour-long segment, the co-hosts claimed that the NICD's work was an effort to chill conservatives' First Amendment speech and “shut them up.” *The “Nearly Famous” Barry Young Show: A Civility Celebration* (KFYI radio broadcast Jan. 3, 2012), available at [http://media.ccomrcdn.com/media/station\\_content/622/0103\\_9am\\_Hour\\_1325610765\\_31426.mp3](http://media.ccomrcdn.com/media/station_content/622/0103_9am_Hour_1325610765_31426.mp3).

16. See Brian Montopoli & Robert Hendin, *Sarah Palin Criticized over Gabrielle Giffords' Presence on “Target List,”* CBS NEWS (Jan. 8, 2011, 7:16 PM), [http://www.cbsnews.com/8301-503544\\_162-20027918-503544.html](http://www.cbsnews.com/8301-503544_162-20027918-503544.html).

Dupnik that decried the rise in partisan bickering and lamented that Arizona had become a “mecca for prejudice and bigotry.”<sup>17</sup>

Nonpartisan objections to the call for civil political discourse also arose, as columnists and commentators invoked constitutional and liberal democratic principles, and expressed skepticism about the ability of anyone to define and monitor “civility” in political speech without running afoul of these worthy commitments.<sup>18</sup> Freedom of speech, they underscored, is never more important or cherished than when it embraces political ideas, opinions, or critiques. Civility may chill or silence core protected expression in ways that make any efforts to insist on it especially dangerous for democracy, not protective of it. As applied to the shootings themselves, some argued that a vapid call for civility and bipartisanship would mute legitimate, politically inflected arguments that the shootings were a natural product of poorly enforced gun-control laws and the lack of adequate services for mental illness, and that the random murder of six people in Tucson paled in comparison to the constant threat of explosions, gunfire, and other violence that citizens in other countries endure almost daily. Official recognitions of the tragedy that sought to walk a bipartisan line by resorting to therapeutic tones and candlelight vigils, and that studiously avoided engagement with the underlying divisive issues, underscored how “civility” can direct genuine political engagement underground.

Still others expressed doubt that the more heated voices within political campaigns or among the media ever would heed a schoolmarmish and gauzy admonition to moderate their tone.<sup>19</sup> For one thing, they presumed that going negative “works” in terms of turning elections and drawing devoted cable and radio audiences.<sup>20</sup> For another, politics inevitably mobilizes exceptionally strong feelings that cannot be tamped down by strong enforcement measures; no

17. Sandhya Somashekhar, *Sheriff Dupnik’s Criticism of Political ‘Vitriol’ Resonates with Public*, WASH. POST (Jan. 9, 2011, 9:16 AM), <http://voices.washingtonpost.com/44/2011/01/sheriff-dupniks-criticism-of-p.html>. The high-pitched online comments to the article criticized this *Washington Post* report as inaccurately describing Dupnik’s remarks, while also condemning the Sheriff for his remarks and noting the hypocrisy of accusing conservatives of vitriol when the blame lies on both sides. *Id.*

18. See, e.g., Jack Shafer, *In Defense of Inflamed Rhetoric*, SLATE (Jan. 9, 2011, 12:24 PM), [http://www.slate.com/articles/news\\_and\\_politics/press\\_box/2011/01/in\\_defense\\_of\\_inflamed\\_rhetoric.single.html](http://www.slate.com/articles/news_and_politics/press_box/2011/01/in_defense_of_inflamed_rhetoric.single.html) (“Any call to cool ‘inflammatory’ speech is a call to police all speech, and I can’t think of anybody in government, politics, business, or the press that I would trust with that power.”).

19. See Linton Weeks, *Giffords Recovering, but Civil Discourse Hasn’t*, NPR (Jan. 8, 2012), <http://www.npr.org/2012/01/08/144850275/a-year-after-tucson-tragedies-incivility-continues> (reporting that the campaign rhetoric a year after the shootings remains “sharp-horned”).

20. See *infra* notes 214–76 and accompanying text. Whether—and under what conditions—“going negative” works has been the focus of much empirical research. See, e.g., Richard R. Lau & Ivy Brown Rovner, *Negative Campaigning*, 12 ANN. REV. POL. SCI. 285, 295–97 (2009) (concluding that in the electoral context and based on the totality of relevant empirical research, skepticism should greet the claim that negative campaigning works).

thoughtful research paper, or message campaign, will make a dent in the aggressive tenor of political debates. Last, but surely not least, harsh words against officials and policies one regards as truly “traitorous,” “socialist,” “racist,” or “fascist” should never be off limits: If the rhetorical shoe fits . . .

We analyze some of these objections here. In particular, we address whether civil political-discourse appeals are inconsistent with, or may undermine, the First Amendment or liberal democratic principles of civic engagement. In other words, is it unconstitutional, illiberal, or undemocratic to insist on civility norms within political discourse? Is such a call inherently a call to censorship and antithetical to the promotion of vigorous, even devastatingly cruel, political discourse essential to a free society?<sup>21</sup> What would civility norms appropriate to the purposely critical and adversarial political context even look like? We then address whether modern efforts to inspire greater civility in political discourse are worth the candle, even if they are constitutionally and theoretically defensible.

In Part I of this Article, we focus on three of the most powerful objections to a call to civil political discourse, and explain why none is a sufficiently compelling reason to abandon the project. The first objection is the constitutional objection, which is best captured by the “one man’s vulgarity is another’s lyric” bromide.<sup>22</sup> The First Amendment proceeds from prized liberal democratic values, and thus requires close attention if one is arguing for discourse civility as an aspect of liberal democracy. We explain how this potential conflict between civility and free discourse is handled within the case law and why nothing about First Amendment orthodoxy *settles* the question of whether civility norms hinder or advance freedom-of-expression values.

The second objection is more abstract and difficult to address: Can civility norms be squared with liberal democratic values writ large? In accounts of why discourse freedom is essential to a liberal democracy, theorists typically focus on the notion that “in respect to words as opposed to deeds, persuasion as opposed to force, anything goes. . . . *A liberal society is one which is content to call ‘true’ whatever the upshot of [free and open] encounters turns out to be.*”<sup>23</sup>

We conclude that civility norms are consistent with these liberal democratic values. Liberal democratic values as applied to freedom of expression focus on the individual’s right to autonomy, as well as the democratic interest in freedom from government interference with speech, especially political speech. On a deeper level, liberalism recognizes that humans have an abiding need for respect and recognition, and seek to avoid the painful emotions of shame and humiliation.

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21. We seek to channel, in this regard, the late Christopher Hitchens, whose brilliantly vicious political essays and speeches attacked high and low, sacred and profane, and who almost certainly would scoff (or worse) at the call to civil discourse. He is reported to have said civility is “overrated.” Weeks, *supra* note 19. Any civil-discourse agenda worth the candle should attempt to meet the arguments of such critics.

22. Cohen v. California, 403 U.S. 15, 25 (1971).

23. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 52 (1989). As we will show, the assumption that speech in American politics is truly free and open is itself, at best, extremely problematic.



As Richard Rorty once wrote, borrowing from Judith Shklar, “liberals are the people who think cruelty is the worst thing we do,” and they hope that “the humiliation of human beings by other human beings may cease.”<sup>24</sup>

Political speech that is uncivil and aimed at others may assume forms that undercut these liberal, dignitary aspirations. Political *discourse* is interactive and relational. Civility is also an inherently interactive and *relational* concept that implies that participants observe rules of engagement that are mutually respectful, that avoid ad hominem vitriol, and that otherwise preserve others’ dignity. Unlike *homo economicus*, *homo* (and *femina*) *politicus* is a *social* animal. So polities (including, especially, democratic polities) are communities, in which each of us has a role to play, and which are subject to a great number of informal social norms, as well as formal legal ones.<sup>25</sup> Among these informal norms, political-civility norms may promote the liberalism-based interest in respect for others’ autonomy and right to participation.

To the extent that liberalism favors conditions that permit *rational* and *informed* decisionmaking by autonomous, uncoerced political actors, civility arguably serves this end as well. As we show in Part II, empirical research suggests that excessive incivility may have speaker-silencing, discourse-distortion, and framing effects that may skew information relevant to political decisionmaking and undermine the liberal vision of self-determination.

Constitutional law and liberal theory both tend to assume that less regulation of political speech is better than more in promoting these ends. But few constitutionalists or liberal theorists deny that words and deeds may cause serious harms, that counter-speech or “averting one’s eyes” is often impossible or pointless, or that access to political discourse (especially in forums where access is expensive) is uneven—sometimes profoundly uneven—in ways that may undermine the very premise of a free marketplace of ideas that promotes truth.<sup>26</sup>

24. *Id.* at xv.

25. For an elegant argument that the concept of society necessarily implicates the concept of social norms, that is, the expectations for appropriate behavior, see Ralf Dahrendorf, *On the Origin of Inequality Among Men*, in *THE LOGIC OF SOCIAL HIERARCHIES* 3, 3–30 (Edward O. Laumann et al. eds., 1970).

26. See generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011) (arguing that the distortions of the political process caused by corruption of money—which have been made worse by cases that open further the channels of campaign expenditures—are so serious that democracy itself is at risk). Empirical data show that access to being heard in politics, whether through lobbying, media advertising, or participation in the public sphere as an elected official or an informed citizen is profoundly unequal, depending on income and wealth. See DENNIS GILBERT, *THE AMERICAN CLASS STRUCTURE IN AN AGE OF GROWING INEQUALITY* 155–88 (8th ed. 2011). Disparities in individuals’ civil and political engagement traditionally have been associated with differences in income, education, age, race, and gender, and there is now a large literature on what Pippa Norris called the “digital divide” accompanying the advent of electronic media. PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE* 12–14 (2001); see also AARON SMITH ET AL., *PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CIVIC ENGAGEMENT* 3–7 (2009),

Consequently, general liberal democratic principles, like First Amendment theory more specifically, do not point inexorably against civility norms. Rather, the relevant question is *when* does allowing incivility versus demanding civility in political discourse best promote the liberal democratic interest in maximizing individual liberty, maximizing free flow of information, dismantling cruel practices, disempowering cruel people, or promoting the equal dignity of all? Answering this question sensibly requires combining philosophical and legal-doctrinal analysis with empirical research. In effect, we approach the legal questions through the lens of behavioral realism that: (1) recognizes that legal argument contains many explicit and implicit assumptions about human behavior and the causes and consequences of that behavior; and (2) insists on subjecting these presumptions to *empirical* as well as legal analysis.<sup>27</sup>

The third important objection to civil political-discourse norms is a practical one: Civility norms, some argue, are wildly out of sync with human nature. People are inevitably more rancorous, outrageous, and even cruel when attacking their political opponents. Today, this tendency distorts political discourse so pervasively because newer political-discourse structures (e.g., cable news, talk radio, and other forms of new media), as well as our “carnival culture”<sup>28</sup> more generally, promote and reward *exceptional* rhetorical excess. Ad hominem forms of political critique that *intentionally*, not merely incidentally, trigger the emotions of fear, anger, and disgust are good business because they keep things lively—even shocking.<sup>29</sup> Outrageous political attacks garner people’s attention and engage

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available at <http://www.pewinternet.org/~media/Files/Reports/2009/The%20Internet%20and%20Civic%20Engagement.pdf> (“Just as in offline civic life, the well-to-do and well-educated are more likely than those less well off to participate in online political activities . . .”).

27. We borrow the term “behavioral realism” from recent literature on employment discrimination. The term was used initially to promote a typically plaintiff-friendly concept of discrimination guided by the cognitive and social psychologies of stereotyping and cognitive bias. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1016–20 (2006). But one of us has shown that adopting behavioral realism would favor defendants, not plaintiffs, in some areas of Title VII doctrine. Robin Stryker et al., *Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science*, 37 LAW & SOC. INQUIRY (forthcoming 2012) (manuscript at 31). More generally, whether behavioral realism is plaintiff- or defendant-friendly at any particular time depends on the state of the extant case law vis-à-vis new discoveries in scientific research. *Id.* (manuscript at 29–31).

By using the term in this context, we intend only to emphasize that *all* legal and philosophical argument is subject to behavioral assumptions and that therefore the quality of legal and philosophic argument is improved by seeking behavioral knowledge from the empirical sciences.

28. JAMES B. TWITCHELL, *CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA* (1992) [hereinafter TWITCHELL, *CARNIVAL CULTURE*].

29. See KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, *ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT* 132–39 (2008) (conducting a content analysis of Rush Limbaugh’s radio program for eight weeks in 1996 and finding that Limbaugh used passionate emotional appeals, attaching negative affect to

their memory.<sup>30</sup> But this turn to outrage is not a new commodity, even if outrage has new forms of expression.<sup>31</sup>

Human anger and disgust, the argument continues, not only are enduring emotions likely to surface within politics. They also are useful emotions that can serve good ends. Both can help establish and maintain worthy moral, social, and political boundaries.<sup>32</sup> Hot emotions mobilize people to recognize and attack many

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people and policies he opposed to invite his listeners to feel moral outrage toward political opponents); JEFFREY P. JONES, ENTERTAINING POLITICS: SATIRIC TELEVISION AND POLITICAL ENGAGEMENT 47–51 (2d ed. 2010) (discussing the belligerent style of political discourse by liberals and conservatives alike on cable television and talk radio); Sarah Sobieraj & Jeffrey M. Berry, *From Incivility to Outrage: Political Discourse in Blogs, Talk Radio, and Cable News*, 28 POL. COMM. 19, 24–26, 28 tbl.3 (2011) (using a coding scheme categorizing multiple types of “outrage” speech, including insulting language, name-calling, character assassination, misrepresentative exaggeration, mockery, belittlement, obscenity, conflagration, ideologically extremizing language, emotional displays, and emotional language to examine both liberal and conservative blogs, cable television programs, and talk-radio shows, systematically comparing these with each other, as well as with traditional newspaper columns).

30. See Kim Leslie Fridkin & Patrick J. Kenney, *Do Negative Messages Work? The Impact of Negativity on Citizens’ Evaluations of Candidates*, 32 AM. POL. RES. 570, 572–73, 599 n.2 (2004) [hereinafter Fridkin & Kenney, *Do Negative Messages Work*] (citing empirical research that shows that people attend to negative information more so than positive and that almost all of the studies show that negative information also is more memorable than positive information); Richard R. Lau, *Two Explanations for Negativity Effects in Political Behavior*, 29 AM. J. POL. SCI. 119, 121–23, 132 (1985) (concluding that there is empirical support for both a perceptual and a motivational hypothesis about why people attend to and remember negative messaging and attacks—negativity stands out and people are risk averse and perceive negativity as connoting risk).

31. See, e.g., JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 16, 31–38, 124–28, 139–48 (2000) (providing colorful examples of extreme incivility, including false and scurrilous personal attacks unrelated to the political issues and disputes at hand, and the use of media and campaign surrogates to make such attacks, from the moment George Washington indicated he would relinquish the presidency, in 1796); David W. Brady & Hahrie C. Han, *Polarization Then and Now: A Historical Perspective*, in 1 RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 119, 119–29 (Pietro S. Nivola & David W. Brady eds., 2006) [hereinafter 1 RED AND BLUE NATION] (showing that neither polarization, nor the incivility that may accompany it, is new).

32. See Ron Aminzade & Doug McAdam, *Emotions and Contentious Politics*, in SILENCE AND VOICE IN THE STUDY OF CONTENTIOUS POLITICS 14–15, 17 (Ronald R. Aminzade et al. eds., 2001) (arguing that heightened emotion can help to identify and combat injustice); Sharon Erickson Nepstad & Christian Smith, *The Social Structure of Moral Outrage in Recruitment to the U.S. Central American Peace Movement*, in PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS 158, 158 (Jeff Goodwin et al. eds., 2001) (“[W]e propose that moral outrage was a logical emotional response to information about human rights abuses and atrocities . . .”); David Ost, *Politics as the Mobilization of Anger: Emotions in Movements and in Power*, 7 EUR. J. SOC. THEORY 229, 229 (2004) (“Anger is central to politics both as a diffuse, untargeted sentiment citizens experience . . . and as the emotion political organizers need to capture and channel, which they do by offering up an ‘enemy’ they identify as the source of the problem.”); Jonathan H.

affronts, including affronts to justice and equality.<sup>33</sup> Clamping down on political speech simply because it triggers anger or disgust thus may disrupt the positive functions these emotions play in effecting social and political change. At best, one might hope that some of the most uncivil political discourse will be harnessed in service of worthy social and political ends, or (perhaps) will be zoned out of some venues (e.g., where the rolled-up-sleeves version of policymaking occurs).

We conclude that calls to more civil political discourse and calls to understand the nature, causes, and consequences of uncivil political discourse are not pointless, despite these practical and normative concerns. The prevalence of political trash-talking—like the prevalence of trash-talking in other contexts—does not make it impossible to moderate, analyze, or occasionally condemn it. Moreover, the ubiquity of incivility in political discourse does *not* mean our taste for it cannot be better understood and—more importantly—influenced.

First, the structures of modern political discourse promoting the rhetoric of outrage are based on incentives. If the incentives change, then the discourse may adjust accordingly.<sup>34</sup>

Second, although the emotions of anger and disgust are useful, they—like fear—can operate in ways that skew our ability to draw reasonable moral and political boundaries.<sup>35</sup> Anger may be associated with resentment and is—like

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Turner & Jan E. Stets, *Sociological Theories of Human Emotions*, 32 ANN. REV. SOC. 25, 41–46 (2006) (showing when and how perceptions of injustice arise and the link to the negative emotion of anger).

33. See JOHN F. KASSON, *RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA* 3 (1990) (examining nineteenth-century urban America and finding that civility is a double-edged sword; it is both an indispensable “prerequisite to a democratic society” and serves “in support of special interests, institutions of privilege, and structures of domination”); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 97–99 (discussing the role of uncivil speech by marginalized groups); Virginia Sapiro, *Considering Political Civility Historically: A Case Study of the United States* 8–10, 16–17 (July 1999) (unpublished manuscript) (on file with *Arizona Law Review*) (presented to the 22nd Annual Meeting of the International Society of Political Psychology) (arguing that norms and practices of civility are socially constructed, fluid and negotiated, that there are “[c]ultural differences in civility patterns,” that “[p]erceived degrees of civility depend on people’s status and social situation and their relationship to others,” and that elites often set insurmountable bars for civility when it comes to disadvantaged or marginalized groups).

34. For example, as we discuss more thoroughly, empirical research suggests that political polarization is negatively associated with civility (i.e., more extreme polarization is accompanied by more incivility). See *infra* notes 158–70 and accompanying text. It is not clear, however, whether polarization produces incivility, incivility produces polarization, or both. Institutional change that inhibits polarization—including examples such as nonpartisan primaries that lessen the influence of party activists or re-incentivize pragmatism over ideological purity among party activists—might likewise re-incentivize civility.

35. For example, anger typically leads to “simpler cognitive processing, less attention to available information, and greater reliance on heuristics,” although this effect can be reversed when people are told that they have to justify their decisions. G. E. Marcus,

fear—a “sticky” emotion that can endure long past the incidents that initially gave rise to it.<sup>36</sup> This lingering effect may cause irrational, grudge-based behavior that can adversely affect civic engagement, insofar as civic engagement seeks to promote political knowledge and understanding.

Anger and disgust also are clouding and consuming emotions. Like fear, anger and disgust can absorb the person experiencing them in ways that may crowd out other emotions and thoughts that assist political reasoning.<sup>37</sup> To say that “we need our anger” thus is correct, but unhelpful. We also need “anger management.”

Obviously, the line between outrage that is “rational” and outrage that is “irrational” is not self-defining. Also, how people evaluate the issue and policy content of “a politics of moral outrage” depends on their general political perspectives and partisanship.<sup>38</sup> We are not “calling the line” here: We are pointing out that lines exist, and that anger, disgust, and fear operate in ways that can make the lines harder to *see*, let alone to draw in a thoughtful manner. Recognizing this may help us harness our emotions in ways that assist our best thinking more than disabling it.

Third, *government regulation* of uncivil political speech *in the public forum* is not the same thing as civility norms that are self- or community-imposed *without government force*. We acknowledge that the constitutional argument against government-imposed civility regulation in the public forum is dispositive (and, to us, entirely persuasive). But informal norms—that is, social expectations for appropriate behavior for self, other, and situation—are inevitable products of human association. Thus, it makes sense to inquire whether and how civility norms in political discourse are related to effective democratic governance. Norm inculcation by non-governmental means, including greater awareness of the harms of uncivil behavior and the incentive structures that promote it, can be important ways of checking the excesses of our constitutional freedoms.

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*Emotions in Politics*, 3 ANN. REV. POL. SCI. 221, 233 (2000); *see also infra* notes 326–33 and accompanying text. Unlike Aristotle, who separated persuasion by logic from persuasion by emotion, ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37–38 (George A. Kennedy trans., Oxford Univ. Press 1991) (c. 367 B.C.E.), modern neuroscience and cognitive and behavioral psychology instruct us that reasoning and emotion are deeply intertwined. *See* ANTONIO R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 165–204 (1994); ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS 40–42, 79–81 (1999); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 237–38 (2011).

36. In *Thinking, Fast and Slow*, Nobel Prize-winner Daniel Kahneman discusses: [W]e have inherited from our ancestors a great facility to learn when to be afraid. Indeed, one experience is often sufficient to establish long term aversion and fear. . . . All of us tense up when we approach a spot in which an unpleasant event occurred, even when there is no reason to expect it to happen again.

KAHNEMAN, *supra* note 35, at 237.

37. *See infra* notes 326–33 and accompanying text.

38. Ost, *supra* note 32, at 237.

*Excessive* incivility in political discourse—like excessive campaign expenditures, especially on negative advertisements—does pose a problem for democracy. The baser aspects of our political speech, like the baser aspects of human nature more generally, likely are “hard-wired.” Yet this is no reason to give up on norm-inculcation efforts that encourage us to “stop and think” or “soft wire” the contexts in which we give these harsher emotions free rein. That is, we can enlist the aid of our better angels, even in political contexts, when we believe the harms of our vitriolic speech vastly outweigh the potential benefits.

The moment to enlist our better angels arguably has arrived.

People have become dangerously turned off by the political outrage carnival, even if they still tune in to their favorite sideshows.<sup>39</sup> The reputation of Congress has never been lower.<sup>40</sup> State and local officials who resist political compromise and olive-branch diplomacy face recalls.<sup>41</sup> Popular disaffection has spawned new movements—from the Tea Party to Occupy Wall Street. Hyper-partisanship, which thrives on extreme rhetoric, has produced policymaking log jams.<sup>42</sup>

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39. Americans generally dislike mean-spirited campaigns. A recent poll conducted by the Public Religion Research Institute found that “[e]ight-in-ten Americans say the lack of civil discourse in our political system is a serious problem.” *Survey – Americans Say Elections More Negative than Past, Lack of Civility As Major Problem*, PUB. RELIGION RESEARCH INST. (Nov. 11, 2010), <http://publicreligion.org/research/2010/11/americans-say-elections-more-negative-than-past-lack-of-civility-as-major-problem>. And, a recent representative survey found that 82% of Americans strongly or somewhat agreed that campaign advertising was “so nasty that I stop paying attention.” Kim L. Fridkin & Patrick J. Kenney, *Variability in Citizens’ Reactions to Different Types of Negative Campaigns*, 55 AM. J. POL. SCI. 307, 314 (2011) [hereinafter Fridkin & Kenney, *Variability in Reactions*].

40. See Scott Neuman, *Congress Really Is As Bad as You Think, Scholars Say*, NPR (Dec. 27, 2011), <http://www.npr.org/2011/12/27/144319863/congress-really-is-as-bad-as-you-think-scholars-say> (noting that congressional approval ratings are in the single digits for the first time since ratings have been measured).

41. For example, Arizona Senator Russell Pearce, best known for his fierce support of Arizona’s strict, anti-immigration law, Senate Bill 1070, was successfully recalled last November. Marc Lacey & Katharine Q. Seelye, *Recall Election Claims Arizona Anti-Immigration Champion*, N.Y. TIMES, Nov. 10, 2011, at A22.

42. See David W. Brady et al., *Polarization and Public Policy: A General Assessment*, in 2 RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA’S POLARIZED POLITICS 185, 211–12 (Pietro S. Nivola & David W. Brady eds., 2008) [hereinafter 2 RED AND BLUE NATION] (“Given the potential for policy gridlock, particularly in those areas where partisan differences are large, there is a risk that polarization may limit the ability of the government to address long-range domestic policies . . . . This polarization of the congressional parties has led to some gridlock because in the American system, a supermajority is required to cover the various veto and filibuster pivots, and unlike in the early New Deal period, no party in recent years has had a majority sufficient to cover the veto points.”); William A. Galston & Pietro S. Nivola, *Delineating the Problem*, in 1 RED AND BLUE NATION, *supra* note 31, at 1, 35 (concluding that hyper-partisanship creates risk for gridlock and for inability to sustain a “steady, resolute foreign policy and national security strategy”); Norman J. Ornstein, Annual McCormick Lecture at the University of Arizona James E. Rogers College of Law (Oct. 18, 2011), in 54 ARIZ. L. REV. 481, 487–88

Even the credibility of the third branch is in peril. News accounts increasingly focus on the party affiliation of the Justices as primary indicators of how they are likely to vote in high-profile cases regarding the individual mandate for healthcare, immigration laws, and congressional districting.<sup>43</sup>

In the midst of all this, more voices are rising in defense of a truce in order to carve out wider spaces for governance—for “ceasefire” rather than “crossfire.” A social-norm cascade (not a law-reform cascade) thus may be looming, and it may point toward a restoration of at least some civility brakes on political discourse, in at least some contexts. Whether we are at the beginning of such a norm cascade—and we hope that we are—the moment for thoughtful deliberation about civility certainly has arrived. We agree with Virginia Sapiro, who wrote: “Civility is *itself* something that needs to be sought, deliberated, and negotiated. . . . Achieving civility, for better or worse, requires engaging in [a] political process of deliberation. Unfortunately, in real life, there is no meta-language for politics. Civility is *of* politics; not *above* it.”<sup>44</sup>

In sum, there is no dispositive constitutional, theoretical, or practical reason to reject a goal of urging more civil political discourse in the United States, and the popular appeal of such a correction is growing. Lest anyone doubt that informal social norms can be effective, empirical research shows that these sometimes are more—not less—effective than formal legal norms and their accompanying sanctions.<sup>45</sup>

The maddeningly complex questions therefore involve operationalizing and calibrating civility norms: *When and how* might we best effect the constitutional and normative balance between unbridled and moderated discourse?

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(2012). A 2011 survey found the American public to be very unhappy about budget gridlock. *Public Sees Budget Negotiations as “Ridiculous,” “Disgusting,” “Stupid.”* PEW RESEARCH CTR. (Aug. 1, 2011), <http://pewresearch.org/pubs/2078/debt-ceiling-limits> (indicating that 72% of Americans described ongoing debt-ceiling negotiations as disgusting, ridiculous, and stupid). For further discussion of political polarization, see *infra* notes 158–70 and accompanying text.

43. William Galston and Pietro Nivola emphasize that hyper-partisanship “can do lasting damage to vulnerable institutions, most notably the judiciary.” Galston & Nivola, *supra* note 42, at 35. Reviewing empirical research on the consequences of political polarization, Morris Fiorina and Samuel Abrams report that today’s polarized party politics are associated with “vicious judicial confirmation fights” and that an experiment embedded within a survey showed that “trust in a judge varies significantly with whether respondents are told that his confirmation vote was conflictual or unanimous. The effect is particularly strong among independents . . . .” Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563, 583 (2008).

44. Sapiro, *supra* note 33, at 18.

45. See, e.g., Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC’Y REV. 837, 842–48 (1990) (providing direct comparison of the deterrence effect of formal law and of informal sanctions—such as approval or disapproval from significant others and the internalized guilt that stems from violating informal social norms).

As Holmes famously quipped, our First Amendment is “an experiment.”<sup>46</sup> What counts, in this corner of our experiment, as a good result?

Consistent with our behavioral realism, a starting point in answering this question is to consult the available facts. In Part II of this Article, in which we examine the explicit and implicit behavioral assumptions underlying the arguments about uncivil political discourse and democracy, we therefore turn to the emerging data about the nature, causes, and consequences of incivility in modern political discourse. We examine four issues: (1) Do we know incivility when we see it?; (2) What causes it?; (3) Is it worse today than in the past?; and (4) What are its consequences? The emerging evidence, as we explain, is in many respects inconclusive. However, it does suggest that extreme incivility may cause harms to democracy, depending upon the type of incivility and the context in which it occurs.

Finally, we move from the emerging data and the principles that drive our First Amendment experiment to the world in which political speech norms emerge and operate. We suggest preliminary steps that might advance a properly crafted civil political-discourse agenda. We do so mindful of the complexities and enormous obstacles to this agenda, and committed to ongoing investigation of whether the steps produce the intended results.

Our overarching goal here is to inspire a more thoughtful national conversation about how we talk when we “talk politics,” and to inspire reflection on the possible untoward consequences of our discourse ethics. And, to be clear, this is meant as an invitation into this conversation, not as the final or even provisionally final word.

## I. TRADITIONAL OBJECTIONS

### A. *First Amendment Constraints*

Political-discourse civility and traditional First Amendment principles often appear to be incompatible, and where they conflict, the latter prevail. A few notable quotations make the basic doctrinal point:

- (1) “[O]ne man’s vulgarity is another’s lyric.”<sup>47</sup>
- (2) “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.”<sup>48</sup>
- (3) “Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude . . . . [The] appeal of the

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46. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

47. *Cohen v. California*, 403 U.S. 15, 25 (1971).

48. *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949).



political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal.”<sup>49</sup>

- (4) “[A] state may not ban a film on the basis of a censor’s conclusion that it is ‘sacrilegious.’”<sup>50</sup>
- (5) “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>51</sup>

An early and consistent response to the call for political-discourse civility thus is that the First Amendment counsels against regulation of the form of political speech. The first and most often intoned phrase, “one man’s vulgarity is another’s lyric,”<sup>52</sup> is virtually dispositive when speech occurs in a traditional public forum, addresses a matter of public concern, and is an opinion uttered by a private citizen acting in his or her private capacity.

Likewise, many cases uphold freedom of speech rights of speakers—often on the ground that regulations aimed at the speech are overbroad—who deploy vulgarity directed toward law enforcement officials,<sup>53</sup> who burn flags<sup>54</sup> or crosses,<sup>55</sup> who accuse public officials of being fascists,<sup>56</sup> who write hyperbolic parodies of public figures that imply they had sexual relations with their mother,<sup>57</sup> or who engage in shockingly vulgar, often uncivil speech on cable television, the Internet, or satellite radio.<sup>58</sup> All of these cases support the notion of the First Amendment as a very large blanket of speaker protection, even when the speaker may be vulgar, disgusting, intentionally distorting another’s ideas or impugning his or her reputation, wildly mistaken, or capable of drowning out others’ speech.

Recent cases fortify this First Amendment shield for political speech. The Roberts Court has overturned congressional restrictions on corporate campaign expenditures<sup>59</sup> and state clean election laws,<sup>60</sup> upheld the right of religious

49. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53–54 (1988).

50. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952).

51. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

52. *Cohen*, 403 U.S. at 25.

53. *See, e.g.*, *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972).

54. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989).

55. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *cf.* *Virginia v. Black*, 538 U.S. 343, 361–62 (2003) (permitting the regulation of cross burning when such conduct is done with the intent to intimidate).

56. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

57. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

58. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (Internet); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000) (cable television); *Reno v. ACLU*, 521 U.S. 844 (1997) (Internet); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (cable television).

59. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 913 (2010) (striking down federal restrictions on corporate independent expenditures in elections).

protesters to picket a serviceman's funeral,<sup>61</sup> struck down a congressional measure that restricted commercial trafficking in images of animal cruelty,<sup>62</sup> and struck down a state law that sought to restrict minors' access to violent video games.<sup>63</sup> In all of these contexts, the current Court has been quite bullish on free speech, despite the potentially harmful consequences of the expression.<sup>64</sup>

The First Amendment even protects falsehoods, though the scope of this protection is bounded. The constitutional limits on laws aimed at lies may soon be clarified in an important pending case that deals with the Stolen Valor Act of 2005, which makes it unlawful to falsely represent oneself as having received military honors.<sup>65</sup> But *New York Times Co. v. Sullivan* famously extended First Amendment protection to falsehoods that damage the reputation of public figures, provided they are not uttered with malice.<sup>66</sup>

The Roberts Court also has rejected outright the creation of any new, categorical exceptions to freedom of expression that lack historical basis, on the ground that the Constitution does not permit any "free-floating test for First Amendment coverage" based on "ad hoc balancing of relative social costs and benefits."<sup>67</sup> Such "freewheeling authority to declare new categories of speech

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60. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828–29 (2011) (striking down Arizona's public funding "Clean Elections" measure on First Amendment grounds).

61. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–19 (2011) (overturning award of tort damages where injurious speech by protesters embraced a matter of public concern, was not disruptive, was uttered on public property, and complied with applicable time, place, and manner restrictions).

62. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010).

63. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741–42 (2011) (striking down a California law that banned sale or rental of violent videos to minors without parental consent).

64. See Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 723–25 (2011). It almost certainly would strike down a measure such as the controversial Racial and Religious Hatred Act 2006—legislation proposed in England to "make a new offence of inciting hatred against a person on the grounds of their religious or racial background"—insofar as it would apply to political speech. *Racial and Religious Hatred Act 2006*, GUARDIAN (Jan. 19, 2009, 3:52 AM), <http://www.guardian.co.uk/commentisfree/libertycentral/2008/dec/16/racial-religious-hatred-act>. It likewise would object to anti-blasphemy regulations designed to prohibit defamation of religion, such as those proposed by the United Nations in nonbinding resolutions. Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (striking down state censorship of motion pictures on ground of "sacrilegious" content); see also Adelle M. Banks, *Blasphemy Resolution Passes U.N. Committee*, HUFFINGTON POST (Nov. 25, 2010, 8:02 PM), [http://www.huffingtonpost.com/2010/11/25/blasphemy-resolution-pass\\_n\\_788305.html](http://www.huffingtonpost.com/2010/11/25/blasphemy-resolution-pass_n_788305.html).

65. *United States v. Alvarez*, 617 F.3d 1198, 1218 (9th Cir. 2010) (striking down the Stolen Valor Act as unconstitutional), *cert. granted*, 132 S. Ct. 457 (2011); see also 18 U.S.C. § 704(b) (2012).

66. 376 U.S. 254, 279–80 (1964).

67. *Stevens*, 130 S. Ct. at 1585.

outside the scope of the First Amendment,” the Court noted, would be “startling and dangerous.”<sup>68</sup>

Finally, current case law protects speaker anonymity: The government may not constitutionally require that a political speaker disclose his or her identity absent important or compelling reasons.<sup>69</sup> This means that the source of a political diatribe can be masked, which may embolden some speakers to be less prudent, more outrageous, and less civil. Moreover, although the advent of the Internet makes the reach of anonymous demagogues and defamers easily and literally global,<sup>70</sup> the Court has emphasized: “[W]hatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”<sup>71</sup>

In short, the very worst distortions that may exist in modern political speech—baseless, vicious, anonymous accusations that favor one side of a debate and can quickly “go viral” with no *time for effective counter-speech* (which the famous Brandeis adage emphasizes)<sup>72</sup>—enjoy impressive First Amendment protection.

Yet this street corner, or “anything goes,” model is hardly our full First Amendment story.<sup>73</sup> Once we move beyond the quintessential speech venues, the First Amendment commitment weakens considerably. In several places, it vanishes altogether. Our First Amendment selves are actually quite internally contradictory, and the current case law reflects this.

68. *Id.* at 1585–86. Less clear is whether speech that historically was not protected now may be deemed to be protected by the Court. Given the steady expansion of protection of political speech, defamation of a public figure, and of sacrilegious speech, one must assume the Court would allow the First Amendment to expand beyond historical limits, but not contract within them.

69. *See, e.g., Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995). The concern about anonymity of political speech, and desires to demand that speaker identity be disclosed, have escalated with the emergence of political action committees, or “Super PACs,” like Restore Our Future. *See* Peter Overby, *Attacking Super PACs Fueled by Anonymous Donors*, NPR (Jan. 5, 2012), <http://www.npr.org/2012/01/05/144698884/attacking-super-pacs-fueled-by-anonymous-donors>. For additional discussion of whether anonymity increases incivility, see *infra* text accompanying notes 208–11.

70. For a thoughtful discussion of anonymity and technology, see DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 125–60 (2007).

71. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

72. The Brandeis statement that the best remedy for bad speech is counter-speech has an oft-overlooked caveat: “*If there be time to expose through discussion the falsehood and fallacies . . .*” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added).

73. Erwin Chemerinsky made this same point in a recent *Arizona Law Review* article. *See* Chemerinsky, *supra* note 64, at 734.

Speech in bounded forums, in nonpublic forums, or in settings in which private parties rather than the state assert regulatory control may be regulated on content-specific, and even in some cases viewpoint-specific ways. Indeed, even in the public forum, the idea that expression must be tailored to avoid vulgarity and other offensive forms—blasphemy,<sup>74</sup> group libel,<sup>75</sup> defamation,<sup>76</sup> fighting words,<sup>77</sup> true threats,<sup>78</sup> words that might incite imminent lawlessness,<sup>79</sup> public nudity,<sup>80</sup> broadcast indecency,<sup>81</sup> obscenity,<sup>82</sup> child pornography<sup>83</sup>—has a long American history, though the Court has narrowed or even eliminated some of these traditional exceptions. The form of expression also plays an inherent role in whether the speech in question fits some of these exceptions, even when government insists that its focus is on “secondary effects” of the speech rather than on its uncivil or vulgar content. For example, words likely to provoke an imminent disruption or physical violence often are incendiary and uncivil. When this fuller arc of expressive freedom is reviewed,<sup>84</sup> the notion that freedom of speech protects all uncivil expression is much cloudier than the “one man’s vulgarity” bromide suggests.

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74. Although blasphemy would not currently be unprotected, it was not always so. See Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 306–07 (1988).

75. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

76. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

77. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

78. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003).

79. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech advocating lawless action is protected unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); cf. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010) (upholding federal statute that prohibits lending “material support” to a foreign terrorist organization, even when the support includes training or assistance that itself is not unlawful or aimed at illegal ends, where the assistance is coordinated with the terrorist organization versus independent advocacy on its behalf).

80. See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

81. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

82. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

83. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982).

84. Again, the current Court seems to be quite focused on using history as the benchmark for expressive autonomy in the area of the First Amendment. Categorical exceptions to full First Amendment protection must be grounded in history, not in a “free-floating” balance of harms versus benefits of speech. *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). Less clear is whether the Court will also use history as a brake on expansions of First Amendment protection. In other words, should history (and if so, as of when?) determine whether blasphemy, commercial speech, workplace speech, seditious libel, or defamation receive First Amendment protection? Or does history merely define the floor of First Amendment protection, not a ceiling that may rise as contemporary standards and constitutional decisionmaking evolve? If it is the latter, then does this “one-way ratchet” for constitutional evolution apply solely to expansions of First Amendment freedoms but not, say, substantive due process, equal protection, privileges or immunities, or the Fourth Amendment?

If one examines early American history, one will see that state and local governments in particular were hardly kind to speakers who swore, engaged in religious blasphemy, impugned the reputation of others, or used words that “by their very utterance” caused offense.<sup>85</sup> On the contrary, freedom of speech practices in the United States once departed significantly and pervasively from the “avert your eyes” or “engage in counter-speech” response to provocative discourse coined by the Court in later decades. This is especially true of speech directed at private parties versus government officials as such.

In fact, the principle that the U.S. Constitution constrains state and local power to regulate speech at all is a fairly recent judicially constructed extension of due process liberty to embrace fundamental rights—“enumerated” and “unenumerated.” Incorporation of freedom of speech into the Fourteenth Amendment did not begin until 1925,<sup>86</sup> and nearly all of the doctrine that protects a wide range of vulgarity and even disgusting speech was developed by the Court *post*-World War II.

In his influential treatise on constitutional law, Thomas Cooley noted that the state constitutions of the mid-nineteenth century protected freedom of expression, but they likewise included express caveats for “abuse of that liberty,”<sup>87</sup> as well as for speech acts that “from their blasphemy, obscenity, or scandalous character, may be a public [offense], or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.”<sup>88</sup> The freedom of expression was “like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.”<sup>89</sup> Libels on the system of government, in contrast, triggered higher protection,<sup>90</sup> and prosecution for such speech was subject to abuse. Thus, Cooley warned, “[r]epression of full and free discussion is dangerous in any government resting upon the will of the people.”<sup>91</sup> When speakers “exceed all the proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.”<sup>92</sup> But when the attacks were aimed at public officers, “good faith” limits still applied.<sup>93</sup>

Of course, that the lines between good faith and malice, between truth and lies, and between attacks on the public versus private aspects of an individual’s life, are difficult ones to draw was well understood by our forebearers. But until

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

86. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

87. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 518–22 n.1 (4th ed. 1878) (collecting state constitutional provisions on the freedom of expression).

88. *Id.* at 527.

89. *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 314 (1825).

90. COOLEY, *supra* note 87, at 535–36.

91. *Id.* at 537.

92. *Id.*

93. *Id.* at 540.

the twentieth century, there was significantly greater legal protection against scandalous or libelous attacks, despite the historically strong commitment to freedom of expression in the United States.

Nor has this instinct to prohibit or otherwise condemn especially offensive or recklessly false forms of expression died.<sup>94</sup> Instead, it has migrated to bounded settings such as public-sector workplaces,<sup>95</sup> public schools,<sup>96</sup> libraries,<sup>97</sup> courthouses,<sup>98</sup> broadcast media,<sup>99</sup> and even to Congress.<sup>100</sup> In these and many other

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94. George Washington authored his own book of rules of civility and decent behavior. *GEORGE WASHINGTON, RULES OF CIVILITY AND DECENT BEHAVIOUR IN COMPANY AND CONVERSATION* (Applewood Books 1988) (1796). In his 49th rule, he noted, “Use no reproachful language against any one; neither curse nor revile.” *Id.* at 18. In his 58th rule, Washington also provided, “Let your conversation be without malice or envy, for [it is] a sign of a tractable and commendable nature; and in all causes of passion, admit reason to govern.” *Id.* at 20. Of course, he also said, “Cleanse not your teeth with the table cloth . . .,” *id.* at 28, but the point is that this Founding Father endorsed civility in discourse as the mark of a cultured and well-mannered person. James Madison likewise believed that virtue matters in a free society. *THE FEDERALIST NO. 57*, at 384 (James Madison) (Jacob E. Cooke ed., 1961) (“The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping their virtuous, whilst they continue to hold their public trust.”).

95. Several cases describe the bounded nature of public-employee speech. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 418–20 (2006) (noting that public-employee speech pursuant to job duties, versus as a citizen, is not protected); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968) (holding that public-employee speech must embrace a matter of public concern and not disrupt the workplace to receive First Amendment protection). For a discussion of the research on the harmful consequences of workplace dynamics that permit or encourage incivility, see *ROBERT I. SUTTON, THE NO ASSHOLE RULE: BUILDING A CIVILIZED WORKPLACE AND SURVIVING ONE THAT ISN’T* (2007).

96. *See, e.g., Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“[T]he ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate [that are] highly offensive or highly threatening to others.” (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979))); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The public school’s power to censor speech, even on a viewpoint-specific basis, is at its highest when the speech is “curricular” or might otherwise be construed as bearing the school’s imprimatur. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269, 273 (1988). In fact, to the extent the curricular speech is deemed to be “government speech” it arguably—and problematically—may lie beyond the First Amendment altogether. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).

97. *See, e.g., United States v. Am. Library Ass’n*, 539 U.S. 194 (2003); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

98. For discussion on the role of civility as applied to court proceedings, see Kenji Yoshino, *The “Civil” Courts: The Case of Same-Sex Marriage*, 54 *ARIZ. L. REV.* 469 (2012).

important discourse contexts, discourse rules were and are imposed without full-dress First Amendment opposition.

In fact, when the speech may be characterized as the government's *own*, the current Court has declared there is no First Amendment issue *at all*.<sup>101</sup> Even if government is funding private speakers, if the speakers can be characterized as implementing a "government program" then First Amendment constraints weaken considerably.<sup>102</sup> When the government funds private speech that is not occurring within a "government program," First Amendment constraints still are quite flabby. The speech restrictions must be reasonable and viewpoint neutral, but these criteria are fairly easy to satisfy.

For example, the Court has upheld, on a facial challenge, government restrictions on funding for the arts that make "decency" a criterion for grants.<sup>103</sup> The Ohio school-voucher program upheld in *Zelman v. Simmons-Harris* conditioned application of such vouchers to private schools that did not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>104</sup> And the oft-intoned desire for "civic education" of the nation's youth (and adults) often goes beyond teaching a common curriculum about American history and extends as well to more

99. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). However, the Court is likely to review *Pacifica* in the pending case of *Fox Television Stations, Inc. v. FCC* (*Fox II*), 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011), and may revise the applicable First Amendment standards for content-specific regulation of "indecent or profane" language on broadcast media, or may determine that the current Federal Communications Commission ("FCC") standard is unduly vague or overbroad.

100. See ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., REPORT SER. NO. 2011-1, CIVILITY IN CONGRESS (1935–2011) AS REFLECTED IN THE TAKING DOWN PROCESS 2 (2011) [hereinafter ANNENBERG PUB. POLICY CTR., CIVILITY IN CONGRESS], available at [http://www.annenbergpublicpolicycenter.org/Downloads/Civility/Civility\\_9-27-2011\\_Final.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Civility/Civility_9-27-2011_Final.pdf).

101. *Sumnum*, 555 U.S. at 467.

102. See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). The case law on the distinction between a "government program" that becomes "government speech" such that government has complete discretion to "call the tune," and government-funded private speech that triggers a reasonableness and viewpoint-neutrality test, is extremely hazy, however, and the subject of considerable academic commentary and critique. See, e.g., Toni M. Massaro, Christian Legal Society v. Martinez: *Six Frames*, 38 HASTINGS CONST. L.Q. 569, 611–17 (2011).

103. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572–73 (1998) (upholding congressional standards, on a facial challenge, that directed the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" when evaluating the artistic merit of grant applications (quoting 20 U.S.C. § 954(d)(1) (1994))).

104. 536 U.S. 639, 645 (2002) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (1999 & Supp. 2000)). For a similar application, consider Arizona House Bill 2281, which conditions state funding on not including any courses or classes that "promote resentment toward a race or class of people" or that "advocate ethnic solidarity instead of the treatment of pupils as individuals." ARIZ. REV. STAT. ANN. § 15-112(A)(2), (4) (2012); see also H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

controversial “civic values” education, which may include efforts to instill greater empathy for others and promote civil means of talking about past and present political conflicts.<sup>105</sup> Finally, in privately controlled settings—many of which are very important venues for political discourse—the First Amendment is simply inapplicable because there is no “state action.”

Discourse rules thus may be adopted in a wide variety of settings to control a wide range of speech, media, and social norms without violating the First Amendment. And self-policing obviously may play a significant role in establishing baseline rules about discourse boundaries, with no constitutional obstacles.

Consequently, the notion that nothing can be done to stem the rising tide of trash-talk in American political discourse is simply incorrect. Whether one considers enforcing civil discourse standards to be a worthy goal, or a form of censorship, it is no answer to say, “It is constitutionally impossible.” A more accurate response is: “Well, it depends.” Likewise, it is no answer, or at least not a complete one, to say that “civil discourse” is a hopelessly vague term that cannot be defined, let alone enforced.

### ***B. Liberal Democratic Values***

Perhaps our uneven constitutional commitment to tolerance of incivility reflects an uneven commitment to liberal democratic principles. The First Amendment is an imperfect expression of liberal democratic faith that is sometimes balanced against other commitments. But regulation of discourse civility properly may *only* be seen as in fatal tension with more purely wrought liberal democratic principles.

A bit of reflection, though, reveals that this too is inaccurate. Even a devout libertarian knows that freedom of some to speak may compromise the freedom of others. One may decide that the best way of handling this conundrum is to minimize government regulation, but there are liberty costs to liberty.

Legal realists who tilt in the libertarian direction, as Jack Balkin noted over two decades ago, clearly recognize that First Amendment laissez-faire arguments can undervalue the very values that drive the First Amendment commitment (i.e., it “protects dissent, egalitarian participation in public and private forms of social power, individual conscience, and individual autonomy”).<sup>106</sup> Progressives, of course, grasp the dilemma as well, whether they choose to jettison liberalism altogether in service of progressive goals, or “cling to libertarianism because [they] cannot think of any other way to conceptualize [F]irst

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105. Needless to say, these efforts themselves are politically sensitive and subject to abuse. Current conflict over the ethnic studies program—and its dismantling—in the Tucson Unified School District is a case in point. For an overview of this controversy, see Nicholas B. Lundholm, Note, *Cutting Class: Why Arizona’s Ethnic Studies Ban Won’t Ban Ethnic Studies*, 53 ARIZ. L. REV. 1041 (2011).

106. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 385.



[A]mendment problems.”<sup>107</sup> More radical critiques of liberalism make the point even more powerfully: A common consequence of freedom of speech, in such accounts, is the reinforcement of preexisting unequal distributions of economic and other forms of power.<sup>108</sup> Aspects of American constitutional and political order are profoundly anti-democratic in ways that make dogged adherence to liberalism mythology highly problematic, even sinister.

The problem, however, goes beyond a conflict between liberalism—premised on an individualistic, atomistic, and privatized notion of human nature—and more communitarian, progressive, or radical visions based on a more socially constructed account of human beings and American history. One need not stray from even strong versions of liberalism and libertarianism to see that unregulated discourse may compromise freedom of expression ideals. That is, government and other norm inculcators may have a *liberalism-based* interest in encouraging speakers to adopt the habits of civility, to respect other speakers’ right to a turn in the dialogue, to avoid “going negative” in political campaigns, to eschew outright lies or outrageous speech when advancing an idea or political candidate, to privilege reason over rants and facts over nonsense, and to observe rough rules of content relevance and form decency when dealing with one’s political enemies. At a theoretical and practical level, civility may well “protect[] dissent, egalitarian participation in public and private forms of social power, individual conscience, and individual autonomy.”<sup>109</sup> Civil discourse therefore is not *inherently* antithetical to liberal democratic values.

Václav Havel, the late Czech dissident, playwright, and president, penned an eloquent and relevant essay titled *Politics, Morality, and Civility* in which he argued against political order without moral values.<sup>110</sup> He deplored a political scene in which pre-election campaigns had become

a colourful range of attractive nonsense. Mutual accusations, denunciations, and slander among political opponents know no

107. *Id.* at 387.

108. For a particularly interesting critique of liberalism, see Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007). Kahan argues that liberal notions of “harm” discount how human beings naturally impute socially harmful consequences to behavior that defies their moral norms. *Id.* at 131. That is, we are cognitively “illiberal” and thus unable to pursue secular ends without moral inflections. *Id.* He advocates that we not envision deliberation as taking place in public squares or in “acoustically separated chambers but rather in a building with thin walls.” *Id.* at 147–48 (footnote omitted). In his view, civility requires citizens to “avoid the types of advocacy—akin to behaving raucously in a room that abuts one’s neighbor’s bedroom—that foreclose or impede the efforts of other groups to form understandings of law affirming to them.” *Id.* at 148. Politicians should not deny their moral commitments when seeking to pass laws or invoke an unconvincing “secular reason” as the basis for laws, but should embrace “expressive overdetermination” that gives voice to multiple, illiberal perspectives. *See id.* at 145. Candor and cooperation, in his view, are not incompatible goals. *Id.* at 147.

109. Balkin, *supra* note 106, at 385.

110. VÁCLAV HAVEL, *Politics, Morality, and Civility*, in SUMMER MEDITATIONS 1, 1–20 (Paul Wilson trans., 1992).

bounds. One politician will undermine another's work only because they belong to different political parties. Partisan considerations still visibly take precedence over pragmatic attempts to arrive at reasonable and useful solutions to problems. Analysis is pushed out of the press by scandalmongering. . . . Anyone can accuse anyone else of intrigue or incompetence, or of having a shady past and shady intentions.<sup>111</sup>

In reply to cynics who insisted that politics is power and that decency is “a mere ‘superstructure’ of the forces of production,”<sup>112</sup> Havel answered that “[p]olitical intrigue is not really politics.”<sup>113</sup> *Genuine* politics is something different—something more—and it demands of politicians that they do their best to be decent, civil, tolerant, reasonable, and responsible.<sup>114</sup>

Havel's description of rhetorical excesses in political campaigns and the ways in which hyper-partisanship can undermine the process of governing is hardly unique to European-style politics. It also describes much in current American politics that is wearily uncivil, hyperbolic, and divisive. Many Americans also find the lack of civility and the emphasis on party affiliation excessive. One cannot dismiss all of these concerns as “illiberal” or “undemocratic,” especially insofar as they relate to perceived distortion and corruption of the political process itself.

Libertarianism is just not that wooden or insensitive to the complexities of the “harm” principle that limits its reach, or of the contested and often porous boundary between the “private” and “public” domains. Lines always “must . . . be drawn somewhere,”<sup>115</sup> and it matters where the line is sketched. In freedom of speech cases, as we have seen, there are plenty of lines drawn daily, in ways designed to minimize speech harm where the positive speech consequences are doubtful or categorically denied.

The lines also reflect an abiding concern about human dignity and what Rorty has deemed a liberal revulsion to cruelty.<sup>116</sup> Less abstractly, a liberal democracy-based argument for political-discourse limits goes as follows: “[T]he ideal of civility requires us to find common currency with those with whom we must discuss practical matters. . . . [D]emocracies aren't simply organizing a struggle for power between competing interests; democratic politics isn't war by other means. Democracies are, or should be, *spaces of reasons*.”<sup>117</sup>

What counts as a legitimate reason within democratic spaces, of course, is very debatable. But the notion of a “discussion,” held to address “practical

111. *Id.* at 2–3.

112. *Id.* at 5.

113. *Id.* at 6.

114. *Id.* at 6–8.

115. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 7 (1990).

116. RORTY, *supra* note 23, at xv.

117. Michael P. Lynch, *Reasons for Reason*, N.Y. TIMES (Oct. 2, 2011, 5:00 PM), <http://www.opinionator.blogs.nytimes.com/2011/10/02/reasons-for-reason> (emphasis added).

matters,” conducted within the shadow of an *ideal* of civility, is not antithetical to liberal democracy. On the contrary, it is a *baseline* for such a political order and is necessary for most *governance*.

This may be why many contemporary Americans sense that extreme fraying of this baseline, even if it has always been tattered, is a serious problem. Spaces of reason are necessary for political governing, as opposed to political warfare, and are becoming harder and harder to locate. Congress itself seems increasingly dysfunctional, uncivil, and incapable of finding the “common currency” necessary to forge democratic solutions.<sup>118</sup> People worry about this because they rightly fear that extreme erosion of our common political currency is not evidence of healthy dissent, but of damage to foundations that enable us to coexist peacefully and productively despite our dissent. A little revolution once in a while may be a good thing, as Thomas Jefferson believed, but few people welcome the dislocations and damage of civil wars.

The ideal of civility thus is not just about the verbal means with which one attacks another’s political ideas (although it is also about this), but the *substantive goals* of these attacks. Sharp-tongued political debates *ideally* are not just blood sport for easily bored television or radio audiences; rather, they should be part of the democratic process of seeking shared governance outcomes that may be lawfully enacted and peacefully imposed without unduly alienating political losers. Political parties *ideally* are not athletic teams, militia, or co-religious communities; rather, they should be part of a shared democratic process. Demagoguery *ideally* is not democratic discourse. Voters *ideally* are not herds. Nor is it—nor should it be—illiberal to demand this “something more” of political speech, of politicians, of voters, of ourselves.

The elusiveness and ever-evolving definition of a “common good” likewise is not a sufficient reason not to seek it, any more than the many current and inter-temporal complexities of virtue or decency are reasons to abandon them as ideals. In other words, substantive and structural limits implied by liberal democracy make it both liberal and democratic to endorse some substantive and structural limits on political discourse, even though these are contested and organic.

All of this, however, is very well rehearsed. Again, it comes down to a question of how to strike the balance.

In recent times, the more thoughtful debates over hate speech,<sup>119</sup> campaign falsehoods,<sup>120</sup> and campaign finance restrictions,<sup>121</sup> have reflected the

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118. See Ornstein, *supra* note 42, at 487–89. When, for example, a prominent political leader declares that his sole objective is to defeat the sitting President, and when legislators cast votes that fall entirely on party lines—because doing otherwise would be political suicide, versus permitted as a matter of substantive principles—then something is seriously amiss. Public confidence in Congress has ebbed dramatically in part due to such perversions of partisanship. See Neuman, *supra* note 40.

119. The materials on the hate-speech controversy are plentiful. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986); Richard Delgado, *Words That Wound: A Tort*

concern that unregulated speech with political content may *not* produce “more speech,” better insights based on “truth” or “reason,” a well-functioning “marketplace of ideas,” or other positive consequences that animate constitutional or political faith in robust expressive autonomy.<sup>122</sup> Absent these *hypothesized*, positive outcomes, the conceded *actual* harmful consequences of unregulated speech obviously become more worrisome. But we plainly do realize that:

- (1) Tolerance for intolerance is problematic.
- (2) Free spending on campaigns is problematic.
- (3) Lies and grossly misleading assertions by political candidates and political officials are problematic.
- (4) Freedom to insult others in terms that are disgusting, outrageous, blasphemous, overtly and undeniably racist, or damaging in ways that prompt severe psychological distress and even suicide is problematic, even if the speech arguably embraces a matter of public concern.

Indeed, even unbridled freedom to offer re-descriptions of others,<sup>123</sup> or “truthful” descriptions of their nature, personalities, location, or actions, may be humiliating and thus problematic. This is especially true if the affected person considers the feature or action being described private or shameful. That the person has decided to run for political office or is a public figure does not automatically morph him or her into someone impervious to such attacks. This is even truer of a public figure’s partner, children, parents, and other intimates, who often suffer spillover effects of these attacks.

However, the other side of the balance is also well-recognized. Calls to “civility” in political debates, or even to Havelian versions of political morality

*Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439 (1995); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000).

120. See, e.g., Paul Krugman, Op-Ed., *The Post-Truth Campaign*, N.Y. TIMES, Dec. 23, 2011, at A31 (complaining about the ways in which modern political campaigns run on falsehoods); POLITIFACT, <http://www.politifact.com> (last visited Mar. 7, 2012) (analyzing truth of political claims).

121. See, e.g., ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* 114–23 (2009) (discussing the corruption of democracy by campaign contributions); LESSIG, *supra* note 26, at 91–124 (same); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708–17 (1999) (reviewing campaign finance jurisprudence and its unintended consequences).

122. The scare quotes here are intentional and necessary. We wish to signal that we grasp the contested nature of all of these terms, even as we push for civil-discourse boundaries based on less skepticism about the need for substantive brakes on expression.

123. RORTY, *supra* note 23, at 90 (“Redescription often humiliates.”).

and decency, surely can be abused. Justice Clarence Thomas worries that “by yielding to a false form of civility, we sometimes allow our critics to intimidate us.”<sup>124</sup> Again, discourse is relational and can be unequal. Concerns about “political correctness” stifling political debate and skewing discourse power dynamics therefore surface immediately,<sup>125</sup> and they matter a lot. Indeed, they have largely prevailed in many contexts, such that highly abusive speech *is* protected in the public arena.<sup>126</sup>

These “silencing” objections to civility norms are often paired with legitimate concerns about cultural or class-based differences about what passes for “manners,” and the inevitable insider-culture preferences that conventional notions of civility and order reflect. To the extent that one views freedom of speech as a primary tool for re-imagining these boundaries and reorganizing private power, one should reverberate like a tuning fork to the libertarian apprehensions about calls to civility. In a libertarian utopia, individuals would have maximum freedom to set these decency boundaries for themselves. In a democratic utopia, class-based hierarchy would be minimized.

Moreover, that “rude democracy” may harm others is hardly a new insight, or one that the liberal theorists have ignored.<sup>127</sup> Rude, disrespectful, intentionally inflammatory, or mocking political speech is not a twenty-first-century innovation. Nineteenth-century political cartoons ridiculed John Stuart Mill’s support of women’s rights by depicting him wearing women’s clothing and referring to him as “Miss Mill.”<sup>128</sup> Newspapers that opposed the policies of Abraham Lincoln carried political cartoons that depicted white men dancing with African-American women, and captioned “The Miscegenation Ball”—patent efforts to mobilize racist anxieties about interracial relations to promote anti-Republican sympathies.<sup>129</sup>

Liberal accounts do acknowledge that some decency limits may be necessary to respect others’ right to set similar boundaries for themselves; they

124. David Savage, *Thomas’ Star Rises as Bush Puts Allies in Key Legal Posts*, L.A. TIMES, Feb. 16, 2001, at A1; *see also* Clarence Thomas, *Civility and Public Discourse*, 31 NEW ENG. L. REV. 515, 515–21 (1997) (underscoring the importance of civility and expressing concern about its decline).

125. In France, the very controversial Eric Zemmour “has made a career of speaking on the edge in a culture where the ideal of social harmony often takes precedence over freedom of speech” and denies that his comments about blacks, homosexuals, and other minorities are defamatory. Scott Sayare, *With Sharp Tongue, French Provocateur Enters Battle*, N.Y. TIMES, Feb. 12, 2011, at A5. At his trial, he is reported to have said, “When you describe reality . . . you’re treated as a criminal.” *Id.*

126. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–19 (2011).

127. *See* SUSAN HERBST, RUDE DEMOCRACY: CIVILITY AND INCIVILITY IN AMERICAN POLITICS 1–5 (2010).

128. *See* Alan Ryan, *The Passionate Hero, Then and Now*, N.Y. REV. BOOKS, Dec. 8, 2011, at 59, 60 (reviewing RICHARD REEVES, JOHN STUART MILL: VICTORIAN FIREBRAND (2008)).

129. *Political Caricature. No. 4, The Miscegenation Ball*, LIBR. CONGRESS, <http://www.loc.gov/pictures/item/2008661682> (last visited Mar. 7, 2012).

have long been aware of the underbelly of unregulated political speech. Yet libertarians *still* place a meaty thumb on the side of non-regulation. Indeed, the willingness to do so may be the defining characteristic of a true libertarian.

But, this thumb on the scales always has caused, and still does cause, heartburn. It also has prompted exceptions, and led people to exhort others (especially children) to adopt better discourse ethics even when they are not willing to demand it as a legal matter.

Consequently, liberalism-based objections to civility also beg an important, fundamentally empirical, although obviously also a normative question: *When* do the benefits of civility norms promote the liberal democratic goal of dismantling cruel practices, of disempowering cruel leaders, or other obstacles to an open society in which the dignity of all is maximized? *When* do verbal hand grenades that traffic in hyperbole, defamation, and ad hominem vitriol work more effectively in mobilizing political forces and crumbling obstacles to equality than do even-tempered, balanced, and fact-sensitive speeches? *When* do the uncivil means justify the liberal democratic ends? *To what extent* do our modern political-discourse mechanisms (e.g., political blogs, cable news, etc.) shift this balance in ways that may justify a collective response? *How* should we respond, if at all?

One thing is clear: Liberal democratic principles, like constitutional principles, are not *inherently* antithetical to a civil discourse ideal. They line up on both sides of this debate. Again, the difficult questions for the American people are how to balance the costs and benefits of political-discourse freedom *within* this political framework, and how to define what counts as a cost or a benefit.

### C. Modernity

The final cluster of objections to a civil-discourse project proceeds from practical, often gloomy depictions of the state of modern cultural discourse. We are simply too crude, this argument goes, to make civility norms feasible.

Almost 20 years ago, Ronald Collins and David Skover outlined a “cultural approach” to the First Amendment, in which they began with an unromantic look at how electronic technologies “affect the very logic of much thought and discourse.”<sup>130</sup> Mass communication, advertising, consumption, and “TV talk” now dominate. To update their observation, one now would add “Internet talk.”

Professor James Twitchell also lamented years ago that we live in a vulgar world—one in which modern mass media shifted our taste norms to a “trash culture.”<sup>131</sup> People demand, and the media supply, *amusement*. Discourse that matches civility ideals, or that seeks to create spaces of reason, fails to meet this

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130. Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 785 (1993) (reviewing TWITCHELL, *CARNIVAL CULTURE*, *supra* note 28).

131. TWITCHELL, *CARNIVAL CULTURE*, *supra* note 28, at 161.

insatiable demand. Pursuing either end thus is just a fool's (or a romantic's) errand.

Like the social critics in the 1990s who condemned modern culture, then for its embrace of shamelessness,<sup>132</sup> contemporary social critics make sweeping indictments of American culture. Modern culture, some insist, destigmatizes mediocrity, vulgarity, and pursuit of self without limits. The media control the discourse, and they cater to an audience that has little interest in character, civility, the common good, or democratic excellence. They also do not adequately police lies, and we now live, according to Paul Krugman, in an era of “post-truth” political campaigns.<sup>133</sup> People are not interested in something higher or better. Media reflect this lack of interest in something higher. We thus have the political discourse, and the political leadership, we deserve.

These globalizing indictments of how bad things are—how bad *we* are—cry out for more evidence. But we do not think these criticisms require concentrated attention here, for three reasons.

For one thing, many of the culture critics betray how much they long for it to be otherwise and thus they are best understood as lamenting the loss of civil discourse rather than scoffing at its value.

For another, some of the critics rely on the very techniques they condemn, which makes it difficult to take them entirely seriously. For example, Twitchell writes provocatively and in a popular voice, on popular themes.<sup>134</sup> His work is effective, in the sense of conveying a simplified account of people. His tales are of “others,” and pit a romanticized, one-dimensional past against a threatening, one-dimensional present. But it is (we think, intentionally) theatrical and hyperbolic: The reader knows it is an entertaining *story*, not a nuanced documentary.

More importantly, however, these glossy indictments of Americans as vulgar, shameless, and willfully ignorant are inapplicable to too many settings and too many people to be a convincing reason to abandon the civility project. Even the modern world is not this flat or unnuanced.<sup>135</sup> And even “reality” television is

132. See, e.g., CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 202 (1995) (condemning those who “dismiss shame as the vestigial remnant of an outmoded prudery”).

133. See Krugman, *supra* note 120.

134. See, e.g., JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* (1996); TWITCHELL, *CARNIVAL CULTURE*, *supra* note 28; JAMES B. TWITCHELL, *DREADFUL PLEASURES: AN ANATOMY OF MODERN HORROR* (1985); JAMES B. TWITCHELL, *FOR SHAME: THE LOSS OF COMMON DECENCY IN AMERICAN CULTURE* (1997); JAMES B. TWITCHELL, *SHOPPING FOR GOD: HOW CHRISTIANITY WENT FROM IN YOUR HEART TO IN YOUR FACE* (2007).

135. See Joe Klein, *Civil Union: Lessons in Moderate Discourse from a Road Trip Through the Heartland*, *TIME*, Oct. 24, 2011, at 26, 30 (reporting that the people the author encountered on a trip through Iowa, Missouri, Arkansas, and Texas were “far more reasoned and thoughtful than the breathless tide of sensationalism and vitriol that passes for discourse on talk radio and the cable news networks”).

not who “we” are, though many viewers find the people and lives captured there (weirdly) riveting.

This is why the concept of the “loyal opposition” has gained new currency in the United States.<sup>136</sup> That political “carnivals” exist and attract audiences that enthusiastically applaud (or reward with ratings) “trash-talk” against political opponents does not mean this is what all Americans want from politics. Watching crime shows does not mean people want more crime.

Most people also want affordable housing, decent jobs, “no asshole” workplaces,<sup>137</sup> effective K–12 learning environments, accessible post-secondary institutions that innovate and prepare students for the knowledge-based economy, clean air and drinking water, pothole-free roads, adequate infrastructures, retirement benefits, affordable health care, cultural stimulation that includes the arts and theater, and a host of other common goods. These common goods require *daily, political and social cooperation across ideological divides, evidence-based decisionmaking, and wise leaders who can find ways to produce these common goods. Thus, to the extent that civil political discourse advances these goals, people logically want such discourse.*

The difficult questions are where and when we are willing to abandon cooperative discourse ethics versus harness worthier instincts. These worthier instincts still do surface, regularly, in many contexts—even in the very same people who may violate civil discourse norms in other contexts.

## II. EMPIRICAL INSIGHTS

In this section, we explore many of the practical questions that should inform a discussion about civil political discourse. First, do we know incivility when we see it? Or is it impossible to define? Second, if we can define it, what causes incivility? Third, is it really worse today than it was in the past? Fourth, what are its consequences for democratic engagement?

### *A. We Do Know Incivility When We See It*

We are painfully aware of the derisive responses to Justice Potter Stewart’s infamous quip about hard-core pornography—we “know it when [we] see it.”<sup>138</sup> Claims that incivility can be defined also have been met with a certain amount of derision. The real issue, though, is whether there is sufficient consensus on the meaning of political incivility in various modern contexts that promoting political-civility norms is reasonable and practicable. Our answer to this question is yes.

A burgeoning social and behavioral science literature provides clear and explicit definitions of incivility. Many social and behavioral scientists are careful

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136. The *New York Times* now has a regular feature that is labeled “The Loyal Opposition.” See *The Loyal Opposition*, N.Y. TIMES, <http://www.loyalopposition.blogs.nytimes.com> (last visited Mar. 7, 2012).

137. See generally SUTTON, *supra* note 95.

138. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).



to distinguish incivility in political discourse from social impoliteness, as well as from speech categories with which incivility sometimes overlaps, including negative messaging and emotional or outrageous appeals.<sup>139</sup> Recent empirical research examining the fit between researchers' definitions of incivility and the perceptions of ordinary citizens exposed to campaign or mock campaign messages has found a strong, albeit not perfect, relationship between the two.<sup>140</sup> In short, incivility, like obscenity, is in the eye of the beholder, and that eye varies depending on such factors as the social position or role of the speaker, context of the speech, and the beholder's political partisanship, ideology, or position on specific issues.<sup>141</sup> *Nevertheless, sufficient consensus exists about what type of speech counts as extremely uncivil to take seriously the idea that civility norms can profoundly shape attitudes and behaviors.*

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139. Elements of incivility, including verbal intimidation, ad hominem attacks, personal vitriol, purposive or careless deception, and exaggerated claims often do find their way into emotionally resonant appeals and negative messaging. See Sobieraj & Berry, *supra* note 29, at 20. Among empirical researchers who have defined incivility explicitly in one or more contexts, such as political campaigning, media coverage, or the floor of Congress, and who have worked to create valid and reliable measures of incivility so as to research its prevalence, causes, and consequences are Deborah Jordan Brooks, Erika Falk, Kim Fridkin, John Geer, Kathleen Hall Jamieson, Patrick Kenney, Diana Mutz, Zizi Papacharissi, Byron Reeves, and Eric Uslaner. See, e.g., Deborah Jordan Brooks & John G. Geer, *Beyond Negativity: The Effects of Incivility on the Electorate*, 51 AM. J. POL. SCI. 1 (2007); Kim L. Fridkin & Patrick J. Kenney, *The Dimensions of Negative Messages*, 36 AM. POL. RES. 694 (2008) [hereinafter Fridkin & Kenney, *The Dimensions of Negative Messages*]; Fridkin & Kenney, *Variability in Reactions*, *supra* note 39; Kathleen Hall Jamieson & Erika Falk, *Continuity and Change in Civility in the House*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 96, 96–108 (Jon R. Bond & Richard Fleisher eds., 2000); Diana C. Mutz & Byron Reeves, *The New Videomalaise: Effects of Televised Incivility on Political Trust*, 99 AM. POL. SCI. REV. 1 (2005); Zizi Papacharissi, *Democracy Online: Civility, Politeness, and the Democratic Potential of Online Discussion Groups*, 6 NEW MEDIA & SOC'Y 259 (2004); Eric M. Uslaner, *Is the Senate More Civil than the House?*, in ESTEEMED COLLEAGUES: CIVILITY AND DELIBERATION IN THE U.S. SENATE 32, 32–56 (Burdett A. Loomis ed., 2000). For a succinct review of how incivility has been defined and operationalized in these research studies, see ROBIN STRYKER ET AL., NAT'L INST. FOR CIVIL DISCOURSE, RESEARCH BRIEF NO. 7, NEGATIVE CAMPAIGNING (2011), available at [http://www.nicd.arizona.edu/sites/default/files/research\\_briefs/NICD\\_research\\_brief7\\_0.pdf](http://www.nicd.arizona.edu/sites/default/files/research_briefs/NICD_research_brief7_0.pdf).

140. In one study, the advertisements that researchers created to be "civil" were seen by study respondents, on average, as 1.5 points higher on a civility scale than those advertisements researchers created to be "uncivil." Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 704. The association between respondents' and researchers' perceptions of civility was "strong and statistically significant." *Id.* at 709.

141. *Id.* at 708–09; Fridkin & Kenney, *Variability in Reactions*, *supra* note 39, at 314–15; see also Dan M. Kahan et al., "They Saw a Protest": Cognitive Illiberalism and the Speech–Conduct Distinction, 64 STAN. L. REV. (forthcoming 2012) (discussing cognitive illiberalism and its effect on the perception of "facts").

In the First Amendment context, the problem of vague rules regarding disruptive or harmful speech is a common one. When is speech regulation too ambiguous to be constitutionally enforceable?<sup>142</sup> The answer: It depends.

In *Federal Communications Commission v. Pacifica*, a plurality of the Court upheld the FCC's ability to regulate "indecent" language during certain hours over the radio.<sup>143</sup> This aspect of *Pacifica* is controversial, and may be revisited in a currently pending case involving FCC regulation of "fleeting expletives."<sup>144</sup> But the notion that decency limits on speech are not always unconstitutionally vague is well established.

To take another important example, the Court has upheld the power of public schools to punish students for "offensively lewd and indecent speech."<sup>145</sup> And it has upheld against a facial challenge the National Endowment for the Arts funding criteria, which included "general standards of decency."<sup>146</sup>

For lawyers, the concept of civility limits on speech and actions is best captured by rules of professionalism<sup>147</sup> that aim at curbing excesses of behavior, including verbal behavior, that can arise in the heat of adversarial proceedings. Violation of these rules can trigger admonitions. When they surface in a courtroom, they even may trigger contempt rulings. That is, extremely vigorous advocacy in a context designed to be adversarial is permitted, yet courtroom courtesy must be observed.<sup>148</sup>

The street-corner advocate may choose to adopt these decency or courtesy norms, or not. Politicians may choose to adopt these norms, or not. And one can argue that the norms should not be applicable to a particular speech or publication.

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142. In *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), the Court recently wrestled with this question in the context of regulation of "violent video games." The majority struck down the regulation on the ground that it was not narrowly tailored to advance a compelling government interest. *Id.* at 2741–42. Chief Justice Roberts and Justice Alito concurred in the judgment, but believed that the law did not define the term with sufficient specificity to "provide the fair notice that the Constitution requires." *Id.* at 2746 (Alito, J., concurring).

143. 438 U.S. 726, 748–51 (1978) (plurality opinion).

144. *Fox II*, 613 F.3d 317, 319 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

145. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

146. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572–73 (1998) (quoting 20 U.S.C. § 954(d)(1) (1994)).

147. In Arizona, all newly admitted lawyers are required to take a course on professionalism, ARIZ. SUP. CT. R. 34(n), as well as successfully pass the Multistate Professional Responsibility Examination, which covers the standards governing a lawyer's professional conduct, ARIZ. SUP. CT. R. 35(b)(7).

148. For an especially illuminating discussion of this point, see Yoshino, *supra* note 98.

But there are reasonably shared values that make expression—even if it has political content—“indecent” or “uncivil” in certain contexts. The characteristics of such expression tend to fall into the following categories<sup>149</sup>:

- (1) Speech that is excessively ad hominem, demonizes political opponents, and relies on globalizing attacks on their character rather than their ideas and conduct.
- (2) Speech that is recklessly false and negative about a political opponent, or that is intentionally misleading regarding opponents’ views, character, or conduct.
- (3) Speech that is excessively vulgar or disrespectful, or relies on excessive profanity aimed at a person (versus an idea or institution) to advance an argument.
- (4) Speech that pejoratively, hyperbolically, and falsely paints political opponents as “traitors,” “deadbeats,” “Nazis,” “lunatics,” “rednecks,” “satanic,” or “unpatriotic” rather than as fellow citizens within a pluralistic political order, with whom one vigorously, even passionately, disagrees on specific issues for specific reasons.
- (5) Speech that is intentionally threatening to political opponents’ physical well-being, or that encourages others to cause physical harm to them.
- (6) Speech that deploys racial, sexual, religious, or other epithets against a political opponent that a reasonable person would consider extremely demeaning.
- (7) Speech intentionally aimed at closing down “spaces of reason” and ceasing discourse, rather than maintaining speech zones for future consideration of issues and policies.
- (8) Speech that intentionally denies the right of political opponents to participate equally in applicable procedural or political processes or debates, or that denies the legitimacy of their participation, where they have a lawful right to do so.

Note that the list does not focus on manners, politeness, deportment, or gentility per se. These are not Marquis of Queensbury rules. The list does *not* rule out very

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149. Although our categories do not perfectly mirror the definitions and measures of incivility employed by any particular empirical researcher, they do overlap substantially with the nature of incivility as identified by political scientists and communication scholars examining the discourse of candidates or mock candidates in political campaigns, the discourse of political advertising and messaging more generally, and the discourse of traditional media, cable, talk radio, and digital media. And, as we have pointed out, empirical research shows that there is substantial overlap between researchers’ definitions and measures and the perceptions of ordinary citizens. *See supra* text accompanying note 141. This does not negate the fact that precise boundary drawing is difficult and lacks perfect consensus. It does suggest substantial consensus around the core of the concept, and that citizens’ judgments about what is more or less politically uncivil are more consensual than any definitive line drawing between civil and uncivil.

heated speech, use of lusty or vulgar adjectives, or expressions of utter contempt for others' ideas or behavior. It does favor offering reasons for one's contempt (as one might in a courtroom), and specificity regarding objections (same), over blanket appeals to anger or disgust or fear. But an opponent may be properly and viciously dissected, even skewered (as in the commentary style of the late political and cultural analyst Christopher Hitchens),<sup>150</sup> with an eye toward principles of relevance, truthfulness, and proportionality.

In the rare occasions in which one finds absolutely no worth to another person or his or her views, civil-discourse ethics, as we imagine them here, still counsel one to provide the objective grounds for the indictment. That is, the case against someone should be a predicate for the adjectives one uses to describe others. "Going ad hominem," in other words, is "going nuclear" and should be a last resort, not the opening salvo.

Avoiding personal attacks as one's lead-off does not mean tempering criticism of political practices or institutions. One most definitely may say, "Fuck the Draft."<sup>151</sup> Arguments against the draft ideally should be part of this attack, but nothing in the above list of factors rules out a well-placed swear word or evocative intellectual shortcut to punctuate or make the point. Our point is that saying, "fuck you," to a political opponent who favors the draft is *less acceptable*, tempting as this may be.<sup>152</sup>

Even personally targeted incivility, of course, may be warranted in some contexts,<sup>153</sup> especially if the person against whom the attack is launched is a political official or metonymically stands in the place of the thing attacked. But the move to a personal attack amps up the volume of the discourse and shifts the attack away from reasons and logic. The discourse becomes aimed at crushing opponents, not engaging them.

We recognize that the proper applications of the proposed definitional criteria will be—and should be—contested.<sup>154</sup> We introduce them as factors

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150. See *supra* note 21.

151. Cohen v. California, 403 U.S. 15, 16 (1971).

152. See *id.*

153. Imagine, for example, a protestor defying a police officer order to exit Zuccotti Park. But in this example, the police officer represents the government policy (he or she is "the draft"), and thus is expected to tolerate this kind of incivility despite its inevitable personal impact. Likewise, a Wall Street investment banker might be expected to tolerate invectives aimed at "Wall Street" despite feeling them as a personal attack.

In contrast, were the police officer, banker, and protestor to appear at a public debate about the legality of measures taken in response to the Occupy Wall Street protest, or about the causes of the economic crisis, few would consider "fuck you" to advance the dialogue between participants. The debate moderator would be likely to remonstrate. And, if the protestor followed the police officer or banker home and continued to holler "fuck you," the targeted vulgarity would become more threatening, and cross the civility line as we have begun to delineate it here.

154. We are moved by the concerns about civility norms operating to suppress dissent, and by the argument that "harm" occurs on both sides of the ledger here, as that argument is advanced by Bernard Harcourt. Bernard E. Harcourt, *The Politics of Incivility*,

relevant to a determination that discourse lines have been crossed and to conditions that often are necessary for productive political debate and decisionmaking. Each criterion would need to be applied *in a given context*. We would not apply exactly the same criteria, or the criteria in exactly the same way, to a town-hall discussion or a candidate debate as we would to editorial cartooning or acknowledged political satire.

In particular, when the goal of political speech is to reach consensus or to examine and analyze the arguments and assumptions underlying disagreements, speakers should observe different rules. They should rely on facts, avoid personal attacks, avoid excessive vulgarity, and carefully identify specific areas of disagreement rather than engaging in sweeping and nuance-suppressing generalizations about their opponents that deemphasize common ground, distort their arguments, or obscure their foundations. Of course, the goal of politics is not always consensus or even thoughtful analysis. When these are the goals, however, civility matters. This is why such modest ground-rule expectations actually are quite commonplace in courtrooms, classrooms, companies, Congress, and other discourse settings.<sup>155</sup>

Thus, we do “know it when we see it,” even if we do not insist on it in every context relevant to political debate.

### ***B. What Causes Extreme Incivility in Political Discourse?***

Many people imagine that political discourse has gotten more vitriolic, and many offer theories for why this might be so. The theories range from an erosion of community ties—think *Bowling Alone*<sup>156</sup> or *The Big Sort*<sup>157</sup>—to many other possible causes: political party polarization; the proliferation of mass media and increased ability of people to reach and rely exclusively on like-minded political information sources; the business incentives for media to exaggerate and thus exacerbate political conflict; the rise of the Internet (especially anonymous use of the Internet); the increasing political involvement of religious leaders; economic or “class warfare”; unanticipated consequences of redistricting; unanticipated consequences of election reforms; the role of money in campaigns more generally; changing demographics that expand political diversity and shrink common ground; and decreased political literacy.

We introduce emerging evidence on some of the important theories that bear on this part of the civil political-discourse debate below. Some of the evidence undermines pessimistic notions that we are going to political hell in a media hand basket. But there also is evidence supporting those who believe that political discourse is, in some contexts, out of control.

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54 ARIZ. L. REV. 345 (2012). It is a premise of our argument that civility norms are of politics and not above it. *See supra* text accompanying note 44.

155. *See supra* notes 95–100 and accompanying text.

156. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 25 (2001).

157. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 89 (2008).

*I. Political Polarization*

Many blame increasing political polarization for extreme incivility in politics.<sup>158</sup> Hyper-partisanship, some think, increases the tendency to vilify political opponents and deny them legitimacy as a “loyal opposition.”

Political scientists use the term “elite party polarization” to discuss the degree of partisanship that exists among political party leaders; candidates for, and occupants of, elected positions in Congress; and the executive branch. There is general agreement that current U.S. party politics are polarized.<sup>159</sup> Although substantial elite party polarization is the usual state of affairs historically,<sup>160</sup> today’s elite party polarization is much higher than it was 40 years ago, with the 1970s standing out as one of the most *bipartisan* eras in American history. Numerous studies show increased Democratic and Republican Party polarization among members of Congress between the late 1960s, early 1970s, and the late 1990s through 2000s.<sup>161</sup> And although in some earlier polarized eras, polarization revolved around one type of issue—for example, the New Deal era was polarized around economic issues—today’s elite party polarization is generalized across a wide variety of issues.<sup>162</sup>

Greater debate exists about trends in polarization in mass partisanship than about trends in elite polarization. Researchers agree that mass polarization *with respect to political party identification* has increased since the early 1970s.<sup>163</sup>

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158. This discussion of polarization relies heavily on a report written by one of the Authors. ROBIN STRYKER, NAT’L INST. FOR CIVIL DISCOURSE, RESEARCH BRIEF NO. 6, POLITICAL POLARIZATION (2011), available at [http://www.nicd.arizona.edu/sites/default/files/research\\_briefs/NICD\\_research\\_brief6.pdf](http://www.nicd.arizona.edu/sites/default/files/research_briefs/NICD_research_brief6.pdf).

159. See Marc J. Hetherington, *Review Article: Putting Polarization into Perspective*, 39 BRIT. J. POL. SCI. 413, 413–15 (2009); Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 85–86 (2006).

160. Layman et al., *supra* note 159, at 85; see also Brady & Han, *supra* note 31, at 133; Hetherington, *supra* note 159, at 415–19.

161. Layman et al., *supra* note 159, at 85, 89. These studies assess party polarization in Congress by examining change over time in the following measures: *percentage of party votes* (i.e., votes in which a majority of one party votes against a majority of the other party); *party unity scores* (i.e., percentage of members voting with a majority of their party on votes in which a majority of one party opposed a majority of the other party); *interest group ratings* of voting records of members of Congress; and *measures of congressional member ideology* called D-NOMINATE scores. *Id.* at 87. Party polarization in congressional support for presidential initiatives and on congressional committees also has risen in recent years. *Id.*

162. Brady & Han, *supra* note 31, at 130–31; Hetherington, *supra* note 159, at 429–31; Layman et al., *supra* note 159, at 85–86.

163. Layman et al., *supra* note 159, at 94–95. Morris Fiorina and Matthew Levendusky labeled the increase in ideological and issue polarization among those who identify with the Republican or Democratic political parties as “party sorting.” Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People*, in 1 RED AND BLUE NATION, *supra* note 31, at 49, 57. In other words, people are selecting

This does *not* mean, however, that the nation is beset by more general societal “culture wars.”<sup>164</sup> From 1972–2002, within the American electorate there was *convergence* in issue opinions by age, education, race, religion, and region, suggesting at the very least that the culture wars trope is exaggerated.<sup>165</sup>

With elite party polarization and the polarization of mass partisanship now feeding on each other,<sup>166</sup> does such hyper-partisanship translate into political incivility? We know that during the time period that polarization increased, uncivil discourse on the floor of the House of Representatives likewise increased.<sup>167</sup> Incivility in the Senate also has risen as political polarization has increased, although the Senate remains more civil than the House.<sup>168</sup>

However, although “[i]ncreased party polarization . . . receives much of the blame for a perceived decline in the civility of American political debate,”<sup>169</sup> we do not have the necessary research to show definitively whether polarization produces incivility, incivility produces polarization, or—as it seems most likely—there is a reciprocal relationship between the two. Indeed, Diana Mutz has suggested that “emotionally extreme” rhetoric showing lack of mutual respect on televised talk shows may increase political polarization “by helping partisans think even less of their opponents than they already did.”<sup>170</sup>

## 2. Echo-Chambers, Cyber-Balkans, and Incivility

The notion that new media have exacerbated discursive fragmentation by providing seemingly infinite and specialized options for sources of information has

themselves better into the correct party given their own ideologies and issue opinions. Alan I. Abramowitz, *Disconnected, or Joined at the Hip?*, in 1 RED AND BLUE NATION, *supra* note 31, at 72, 72–73 (commenting on Fiorina & Levendusky, *supra*); Hetherington, *supra* note 159, at 429–31.

164. MORRIS P. FIORINA ET AL., *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* 1–10 (3d ed. 2011); *see also* Layman et al., *supra* note 159, at 93–94.

165. *See* Paul DiMaggio, John Evans & Bethany Bryson, *Have Americans' Social Attitudes Become More Polarized?*, 102 AM. J. SOC. 690, 722–23 (1996); John H. Evans, *Have Americans' Attitudes Become More Polarized?—An Update*, 84 SOC. SCI. Q. 71, 76–77, 80 (2003).

166. If either elite party polarization or mass partisanship is to be blamed for starting this reciprocal polarization dynamic, the evidence points to elites, especially because elite party polarization *preceded* polarization in mass partisanship. *See* Layman et al., *supra* note 159, at 94–95. Most likely, however, it was partisan activists who were the original instigators of this reciprocal polarization dynamic. *See infra* notes 262–69 and accompanying text.

167. Jamieson & Falk, *supra* note 139, at 97–99. The authors measured incivility by words ruled out of order and demands that something spoken on the floor of Congress be removed from the record. *Id.* at 105–06.

168. Uslaner, *supra* note 139, at 34; *see also* ERIC M. USLANER, *THE DECLINE OF COMITY IN CONGRESS* 2 (1993) (describing the increased polarization of Congress and the decline of comity).

169. Layman et al., *supra* note 159, at 101.

170. Diana C. Mutz, *How the Mass Media Divide Us*, in 1 RED AND BLUE NATION, *supra* note 31, at 223, 240.

gained considerable currency.<sup>171</sup> Scholars toiling in the vineyards of deliberative democracy argue that informed, reasoned discourse among citizens is essential to a functioning democracy.<sup>172</sup> It requires dialogue or conversation that is “egalitarian, rational-critical[,] and inclusive.”<sup>173</sup> Ideally, according to this view, it is also a conversation held among people with diverse perspectives.<sup>174</sup> If people tend to expose themselves selectively to information and new media allow people to satisfy this urge more easily, however, then the rise of cable TV and the digital media will result in discursive fragmentation. That fragmentation in turn could exacerbate political polarization. And extremely polarized media discourse might itself be characterized by greater incivility.

Research indicates that both offline and online, people tend to discuss politics with like-minded others.<sup>175</sup> Similarly, they tend to select like-minded media sources.<sup>176</sup> This is not surprising given that theory and empirical research in cognitive psychology suggest that all of us are prone to “confirmation bias”—the bias to selectively search for, believe, and confirm that which we already think we know. This includes searching for evidence that confirms our preexisting beliefs.<sup>177</sup>

Tamara Witschge notes that many find conversation with people of opposing views threatening or uncomfortable.<sup>178</sup> Natalie Stroud suggests that

171. The discussion of research pertaining to digital media in this and the following Subsection rely substantially on ROBIN STRYKER & HEIDI REYNOLDS-STENSON, NAT'L INST. FOR CIVIL DISCOURSE, RESEARCH BRIEF NO. 1, CIVIL DISCOURSE ONLINE (2011), available at [http://www.nicd.arizona.edu/sites/default/files/research\\_briefs/NICD\\_research\\_brief1\\_0.pdf](http://www.nicd.arizona.edu/sites/default/files/research_briefs/NICD_research_brief1_0.pdf).

172. See, e.g., JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY, at xii (Thomas Burger trans., MIT Press 1991) (1962); Sharon Meraz, *Analyzing Political Conversation on the Howard Dean Candidate Blog*, in BLOGGING, CITIZENSHIP, AND THE FUTURE OF MEDIA 59, 60–62 (Mark Tremayne ed., 2007).

173. Meraz, *supra* note 172, at 60; see also Michael Keren, *Blogging and Mass Politics*, 33 BIOGRAPHY 110, 110–13 (2010); J. Macgregor Wise, *Community, Affect, and the Virtual: The Politics of Cyberspace*, in VIRTUAL PUBLICS 112, 113–14 (Beth E. Kolko ed., 2003).

174. This is hardly a uniform view, however, of what ideal political discourse looks like. See, e.g., PETER DAHLGREN, MEDIA AND POLITICAL ENGAGEMENT: CITIZENS, COMMUNICATION, AND DEMOCRACY 162–63 (2009) (criticizing “cocoon” arguments because they are based on the strong assumption that reaching consensus and compromise is the goal of political conversation); Lincoln Dahlberg, *Rethinking the Fragmentation of the Cyberpublic: From Consensus to Contestation*, 9 NEW MEDIA & SOC'Y 827, 832–34 (2007) (challenging the claims about “cocoon” effect of Internet and that ideal political discourse must be all-inclusive and consensus seeking).

175. NATALIE JOMINI STROUD, NICHE NEWS: THE POLITICS OF NEWS CHOICE 19 (2011).

176. *Id.* at 18–20.

177. KAHNEMAN, *supra* note 35, at 80–81.

178. See Tamara Witschge, *Online Deliberation: Possibilities of the Internet for Deliberative Democracy*, in DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET 109, 111, 119 (Peter M. Shane ed., 2004).



avoiding conflicting information allows people to avoid psychological discomfort, and that even the most informed, knowledgeable individuals will seek cognitive simplicity when deciding what news to watch or read and how to interpret political events. Regardless of their political partisanship, people try to simplify information because exposure to information against their current beliefs is difficult to process and takes more time and energy to consider.<sup>179</sup> Kathleen Hall Jamieson and Joseph Cappella emphasize that “the inclination to seek out or selectively expose oneself to one-sided information compatible with one’s existing beliefs” exacerbates political polarization.<sup>180</sup>

In short, having an Internet buffet of discourse options may not translate into engagement with a wider array of viewpoints or a “global village.” On the contrary, it may deepen and fortify ideologically narrow silos: “cyber-balkans,”<sup>181</sup> akin to the “echo-chambers”<sup>182</sup> that many presume result from partisan cable news programming.

Attempts to test these concerns empirically are hobbled by definitional ambiguities. “New media” and “the Internet” are not monolithic categories. Thus, determining how either affects the civility or fragmentation of political discourse—or the explicitly or implicitly presumed negative relationship between the two—creates questions that require significant refinement and also longitudinal data. Longitudinal data are essential to teasing out the impact of political partisanship on selective media exposure *from* the impact of selective media exposure on political polarization. With respect to whether digital communication increases incivility, we also need better evidence than we currently have on the implicit relevant baseline: How “civil” is face-to-face communication? We need research that specifies common criteria to define civility in the digital compared to the face-to-face context. Future research therefore should be conducted to tease out what modes of Internet use, in what types of virtual spaces, and for what kinds of purposes might promote civility (or result in incivility).

At present, and subject to these large caveats, emerging evidence about cyber-Balkanization is not conclusive. Some emerging evidence suggests that such Balkanization may not be as bad as we might think. But other evidence gives us reason to be concerned, especially given what we know about selective exposure within the confines of more traditional print media and television. Based on analysis of Nielson data, data from the National Annenberg Election Surveys (“NAES”) in 2000, 2004, and 2008, and data from the Pew Research Center Media Consumption Survey 1996–2004, as well as from experiments involving magazines and the Internet search engine Google, Natalie Stroud found that selective exposure characterizes nearly *all* media platforms.<sup>183</sup> For example,

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179. STROUD, *supra* note 175, at 15–20.

180. JAMIESON & CAPPELLA, *supra* note 29, at 214.

181. Marshall Van Alstyne & Erik Brynjolfsson, *Global Village or Cyber-Balkans? Modeling and Measuring the Integration of Electronic Communities*, 51 MGMT. SCI. 851, 851–52 (2005).

182. JAMIESON & CAPPELLA, *supra* note 29, at 75–78.

183. See STROUD, *supra* note 175, at 47, 57.

newspaper subscribers more often read papers that endorsed like-minded candidates, and the Nielson data showed that viewer patterns in selecting cable news channels also were becoming more entrenched on partisan lines.<sup>184</sup> Similarly, a 2004 report from the Pew Research Center for the People and the Press reported a strong cross-sectional relationship between political partisanship and ideology, on the one hand, and consumption of news magazines and televised news programs on the other.<sup>185</sup>

Magdalena Wojcieszak and Diana Mutz surveyed a representative sample of 1,028 American adults who reported having visited some type of online discussion forum within the previous year.<sup>186</sup> Respondents were asked about the groups they visited and the discussion occurring on these sites.<sup>187</sup> Respondents reported that they encountered views with which they disagreed, but that such encounters were infrequent and incidental.<sup>188</sup> They were more likely to have such encounters when they participated in forums not organized around political ideas, such as hobbies or professions.<sup>189</sup>

Sharon Meraz analyzed the Howard Dean candidate blog from the 2004 presidential election primary season on six days chosen for their importance: the four debate days, the day of the Iowa caucus, and the day of the New Hampshire primary.<sup>190</sup> She found that the blog was—not surprisingly—primarily used to show support for Dean rather than to facilitate dialogue.<sup>191</sup> Posts rarely included factual evidence for reasons stated. In short, this was not rich political deliberation among opposing points of view.

At least one study interviewing a small number of participants in online discussion found that they *perceived* they interacted with a more diverse range of opinions online than they would otherwise encounter.<sup>192</sup> Similarly, a larger,

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184. *Id.* at 54–57.

185. For example, this 2004 nationwide poll of 3,000 adults found that, although audiences for National Public Radio, the News Hour, and such magazines as the *Atlantic*, *Harper's*, and the *New Yorker* “tilt[ed] liberal and Democratic,” those for “Rush Limbaugh’s radio show and Bill O’Reilly’s TV program remain[ed] overwhelmingly conservative and Republican.” PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, ONLINE NEWS AUDIENCE LARGER, MORE DIVERSE – NEWS AUDIENCES INCREASINGLY POLITICIZED 2 (2004), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Public\\_Opinion/Public\\_opinion\\_and\\_polls/pew\\_research\\_news\\_060804.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Public_Opinion/Public_opinion_and_polls/pew_research_news_060804.pdf).

186. Magdalena E. Wojcieszak & Diana C. Mutz, *Online Groups and Political Discourse: Do Online Discussion Spaces Facilitate Exposure to Political Disagreement?*, 59 J. COMM. 40, 43 (2009).

187. *Id.*

188. *Id.* at 45–46.

189. *Id.* at 50.

190. Meraz, *supra* note 172, at 67–68.

191. *Id.* at 69–71.

192. Jennifer Stromer-Galley, *Diversity of Political Conversation on the Internet: Users’ Perspectives*, J. COMPUTER-MEDIATED COMM. (Apr. 2003), <http://jcmc.indiana.edu/vol8/issue3/stromergalley.html> (conducting in-depth interviews with 69 online discussion participants).

representative survey conducted in 2010 by the Pew Research Center found that 61% of Americans *believed* that the Internet exposed them to greater diversity in political views than they would be exposed to otherwise.<sup>193</sup> But it is hard to know what to make of this finding given that 54% of the survey respondents believed that the Internet made it easier for them to connect with others with similar political views, and 55% believed that the Internet encouraged political extremism.<sup>194</sup> In any case, perceptions are distinct from reality.

Still, a recent study analyzing a Facebook group in opposition to use of torture by the United States found that a sizable number of the participants disagreed with the stated opinion of the group.<sup>195</sup> Other studies likewise have found significant *heterogeneity* of opinion among discussion groups organized around political issues.<sup>196</sup> Conducting a recent study of a representative sample of Internet users, Jennifer Brundidge estimated the effect of online political discussion and online news consumption against a baseline estimate of the likely heterogeneity of users' discussion networks, which was based solely on the demographic heterogeneity of their residential communities.<sup>197</sup> She found that online political discussion and news consumption produced small increases in

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193. AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CAMPAIGN 2010, at 3 (2011), *available at* <http://www.pewinternet.org/~media/Files/Reports/2011/Internet%20and%20Campaign%202010.pdf>.

194. *See id.*

195. *See* Matthew J. Kushin & Kelin Kitchener, *Getting Political on Social Network Sites: Exploring Online Political Discourse on Facebook*, FIRST MONDAY (Nov. 2009), <http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2645/2350> (showing that 73% of the group's posters agreed with the group's purpose, and 17% disagreed).

196. JOHN HARRIGAN ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND DEMOCRATIC DEBATE 14–18 (2004), *available at* [http://www.pewinternet.org/~media/Files/Reports/2004/PIP\\_Political\\_Info\\_Report.pdf](http://www.pewinternet.org/~media/Files/Reports/2004/PIP_Political_Info_Report.pdf); John Kelly et al., Debate, Division, and Diversity: Political Discourse Networks in USENET Newsgroups 26–27 (2005) (unpublished manuscript) (presented to the Second Conference on Online Deliberation: Design, Research, and Practice), *available at* <http://www.online-deliberation.net/conf2005/viewpaper.php?id=27>; Jesse W. Kline, Political Discussion and Debate on Slashdot 4–12 (Nov. 28, 2007) (unpublished manuscript), *available at* <http://www.jesse.kline.ca/papers/57-political-discussion-and-debate-on-slashdot> (summarizing the findings of other researchers). *But see* David Ingenito II, *Democracy in the 21st Century: Social Media and Politics—Global Village or Cyber-Balkans?* 45 (May 2010) (unpublished M.A. thesis, University of Southern California), *available at* <http://digitallibrary.usc.edu/assetserver/controller/item/etd-Ingenito-3318.pdf> (“Although, as previously outlined, many in academia have suggested that the political utilization of the Internet will result in its Balkanization as disparate groups organize and separate themselves along ideological boundaries, within the realm of online social networking, these fears have been found to be ultimately unnecessary.”).

197. Jennifer Brundidge, *Encountering “Difference” in the Contemporary Public Sphere: The Contribution of the Internet to the Heterogeneity of Political Discussion Networks*, 60 J. COMM. 680, 680–81 (2010).

heterogeneity, but that the more politically partisan the Internet user, the less was the impact of online news consumption and political discussion.<sup>198</sup>

Whether digital media enhance political extremism is unclear. A 2004 single-city mail survey of a random sample of adults found that those reporting that they used the Internet were no more likely to exhibit extreme views than those who did not report using the Internet.<sup>199</sup> This study is less than ideal, however, because we do not know whether and how study participants were using the Internet differently.

A troubling 2009 cross-sectional study of a random sample of participants in neo-Nazi online discussion groups showed that those who reported visiting the site more often also reported more support for racial violence and for Hitler, holding constant their gender, education, age, income, news media exposure, and more general online participation.<sup>200</sup> Of course this begs the question of cause and effect: It may be that the most ideologically extreme individuals find a natural home on the Internet, rather than that their extremism increases as a result of their Internet activity.

Attempting to tease out cause and effect, a 2010 study *randomly assigned* participants to an ideologically homogenous “very liberal” group, an ideologically homogenous “very conservative” group, a moderate group, or a group that combined elements of the three positions.<sup>201</sup> The very conservative, ideologically homogenous condition produced greater extremism among its participants as compared to the moderate or mixed condition; but the very liberal, ideologically homogenous condition did not.<sup>202</sup> This complicates the picture, suggesting that selective exposure to ideologically extreme positions can, in fact, *produce* extremism, but support for this hypothesis may vary across the political spectrum.<sup>203</sup>

Even where Internet echo-chambers exist, however, this does *not* mean that those who frequent them invariably fail to engage in online civil discourse with people who hold quite different views. For example, Kelly Garrett recruited participants from politically partisan online discussion groups, assessed their views

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198. *Id.* at 695–96.

199. Peter Muhlberger, Polarization of Political Attitudes and Values on the Internet 10–11, 23–24 (2004) (unpublished manuscript) (on file with *Arizona Law Review*) (presented to the 2004 Annual Conference of the International Communication Association).

200. See Benjamin R. Warner, *Segmenting the Electorate: The Effects of Exposure to Political Extremism Online*, 61 COMM. STUD. 430, 433 (2010) (“The amount an individual participated in an online discussion board for either neo-Nazi groups or radical environmentalist groups significantly predicted the amount of movement-supporting and movement-promoting activities even when ideological extremism, frequency of political discussion, and news media exposure were controlled for.”).

201. *Id.* at 435–36.

202. *Id.* at 440–42.

203. See Magdalena Wojcieszak, *‘Don’t Talk to Me’: Effects of Ideologically Homogeneous Online Groups and Politically Dissimilar Offline Ties on Extremism*, 12 NEW MEDIA & SOC’Y 637, 648–50 (2010).

on controversial political topics, and then provided them with a diversity of political news story headlines.<sup>204</sup> He used tracking software to monitor which stories participants read and how long they kept story windows open in timed periods requiring them to prioritize readings.<sup>205</sup> Although people did tend to select articles that reinforced their views, they also chose some articles that challenged their views.<sup>206</sup> If they started to read something and found it did challenge their views, they only infrequently stopped reading for this reason.<sup>207</sup> Similar results were found in a study conducted by Tetsuro Kobayashi and Ken'ichi Ikeda.<sup>208</sup>

In sum, people may be more motivated to seek out opinion-*confirming* information than they are to avoid information that challenges their opinion. Well-evidenced confirmation bias notwithstanding, Internet use may increase the chances that people inadvertently become aware of information that tends to disconfirm their prior beliefs.<sup>209</sup> Still, the selective exposure motivated by confirmation bias is as worrisome to ideals of deliberative democracy when it occurs in cyberspace as when it occurs with respect to cable television and print media. And we need more research on whether, and the conditions under which, participation in ideologically homogeneous digital-discussion communities can enhance hyper-partisanship, political polarization, and political extremism.

### 3. Anonymity and Flame Wars

The Internet allows “trolls” (people who try to provoke “flame wars” or conflicts) and “anons” (those with no identifying information or screen names) to speak. The assumption is that both increase incivility. Available data suggest the matter is not that simple.

For one thing, most posters *do* provide some identifying information, and many sites require it.<sup>210</sup> For another, technology may be catching up with the

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204. R. Kelly Garrett, *Echo Chambers Online?: Politically Motivated Selective Exposure Among Internet News Users*, 14 J. COMPUTER-MEDIATED COMM. 265, 269–70 (2009).

205. *Id.* at 270–71.

206. *Id.* at 274–75.

207. *Id.* at 278.

208. Tetsuro Kobayashi & Ken'ichi Ikeda, *Selective Exposure in Political Web Browsing: Empirical Verification of 'Cyber-Balkanization' in Japan and the USA*, 12 INFO. COMM. & SOC'Y 929, 949–50 (2009).

209. See HERRIGAN ET AL., *supra* note 196, at 13–14.

210. See RICHARD DAVIS, *POLITICS ONLINE: BLOGS, CHATROOMS, AND DISCUSSION GROUPS IN AMERICAN DEMOCRACY* 65 (2005) (finding that, while flaming, including personal verbal attacks on other posters, was frequent, those appearing to use their real names were as likely to flame as those providing aliases or no name); Susan C. Herring et al., *Longitudinal Content Analysis of Blogs: 2003–2004*, in *BLOGGING, CITIZENSHIP, AND THE FUTURE OF MEDIA*, *supra* note 172, at 3, 8; Richard Pérez-Peña, *Unmasking the Commenters*, N.Y. TIMES, Apr. 12, 2010, at B1.

problem. Automated moderating software has been developed that uses algorithms that can find comments that are off-topic or contain angry language.<sup>211</sup>

The assumption that incivility dominates the Internet may be incorrect.<sup>212</sup> Although the online environment seems to facilitate passionate, and at times very rude, conversation, if incivility is defined as exchanges that “threaten democracy, deny people their personal freedoms, and stereotype social groups,”<sup>213</sup> then incivility may be more marginal than dominant.

Here again, of course, measurement issues complicate the search for empirical confirmation or disconfirmation of assumptions about the relationship between Internet use and incivility. Even with substantial agreement about core aspects of incivility in particular contexts, the results of quantitative empirical analyses can be quite sensitive even *to very small variations* in the way that multiple researchers measure the concept or provide instructions for coding potentially ambiguous borderline instances. As well, fewer researchers have worked on such measurement issues for the digital context than for political-campaign advertising, cable television, and congressional discourse. Thus, we need substantially more research defining and measuring systematically the prevalence of incivility in different types and different uses of digital media. We especially need research that compares the incidence and types of incivility in digital media to incivility demonstrated in other forums, including political debates, town halls and other face-to-face conversation, print media, and network and cable television. The culmination of such research will allow more certain empirical inferences.

#### 4. Campaign Rhetoric and the Role of Political Elites

One thing is clear from the research: Negative campaigning and persuasive appeals based on emotion are common in American politics.<sup>214</sup> Of

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211. Charles Q. Choi, *Anger Management for Online Trolls*, WIRED (Oct. 5, 2010, 1:03 PM), <http://www.wired.com/wiredscience/2010/10/troll-anger-management>.

212. See Kline, *supra* note 196, at 11 (finding that less than 4% of posts in political conversations on Slashdot were uncivil); see also Kushin & Kitchener, *supra* note 195 (finding that an overwhelming number of posters on a Facebook political group were civil). Kline attributed the low level of incivility on Slashdot to the site’s moderating system, in which posters are randomly selected to moderate and rank other posters to ensure that none detract from reasoned, civil discourse. Kline, *supra* note 196, at 10–11.

213. Papacharissi, *supra* note 139, at 267.

214. MICHAEL M. FRANZ ET AL., CAMPAIGN ADVERTISING AND AMERICAN DEMOCRACY 6–7, 39 (2008); JOHN G. GEER, IN DEFENSE OF NEGATIVITY: ATTACK ADS IN PRESIDENTIAL CAMPAIGNS 22–23, 35 (2006); KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 43–44 (1992); KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, THE INTERPLAY OF INFLUENCE 297–98 (6th ed. 2005); Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 696–98; Fridkin & Kenney, *Variability in Reactions*, *supra* note 39, at 308–09; Lau & Rovner, *supra* note 20, at 286–87; Marcus, *supra* note 35, at 231–32; Ira Teinowitz, *Study: Obama Gains on McCain in Negative-Ad Race*, ADVERTISING AGE (Oct. 31, 2008), <http://www.adage.com/article/campaign-trail/study-obama-gains-mccain-negative-ad-race/132167>.

course incivility and negative messaging are not coterminous, but incivility (as we have described it here) often is an element of negative campaigning.<sup>215</sup> “Going negative” is so prevalent because political operatives and elites *believe* that mudslinging works,<sup>216</sup> particularly on ill-informed or less-informed voters.<sup>217</sup> Unsurprisingly, empirical research shows that negative campaigning in presidential elections increased between 1960 and 2004.<sup>218</sup>

The good news is that political operatives probably overestimate both the degree to which and the conditions under which negative campaigning works. In reviewing substantial research on the impact of negative campaigning, Richard Lau and Ivy Brown Rovner instruct us in how to carefully evaluate claims of effectiveness against empirical evidence.

[I]f attacking one’s opponent is an effective campaign strategy, it must result in the attacker receiving more votes than he or she would have if some other (less negative) campaign strategy had been adopted. Assuming the vote choice is little more than selecting the more highly evaluated candidate, attacks that lower mean evaluations of the target of those attacks would constitute additional evidence for the effectiveness of negative campaigns. However, . . . [c]andidates who attack their opponent might be perceived as mean-spirited or nasty, particularly by voters who were taught “if you can’t say anything nice, don’t say anything at all.” But even if backlash effects against the sponsors of campaign

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215. See *supra* note 139 and accompanying text.

216. STEPHEN ANSOLABEHRE & SHANTO IYENGAR, GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE 114 (1995); Owen G. Abbe et al., *Are Professional Campaigns More Negative?*, in PLAYING HARDBALL: CAMPAIGNING FOR THE U.S. CONGRESS 70, 86 (Paul S. Herrnson ed., 2001); Peter L. Francia & Paul S. Herrnson, *Keeping It Professional: The Influence of Political Consultants on Candidate Attitudes Toward Negative Campaigning*, 35 POL. & POL’Y 246, 261–62 (2007); Lau & Rovner, *supra* note 20, at 287–88. In the current presidential campaign, the issue arose in connection with Newt Gingrich’s candidacy for the Republican nomination. Some political strategists urged Gingrich to “fight fire with fire” by launching negative ads after his opponents gained ground attributed to effective negative ads against Gingrich. See Trip Gabriel, *As Gingrich Reels from Attack Ads, Some Aides Suggest Fighting Back*, N.Y. TIMES, Dec. 31, 2011, at A13.

217. A 2007 study surveyed almost 3,000 political candidates running for office at all levels of government, including Congress, state legislatures, and other statewide offices and judgeships between 1996 and 1998. Francia & Herrnson, *supra* note 216, at 248, 251. The researchers found that candidates were more likely to find the use of negative campaigning, including push polls, focusing on opponents’ negative characteristics, making statements of fact out of context, and negative advertisements, as well as of personal attacks based on such behaviors as infidelity, previously unpublicized homosexuality, and youthful illegal drug use, if the candidates believed that the electorate was *poorly informed* about politics. See *id.* at 251–52, 255.

218. See GEER, *supra* note 214, at 39–41; see also Steven E. Finkel & John G. Geer, *A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising*, 42 AM. J. POL. SCI. 573, 581–83 (1998) (describing a general increase in the use of negativity in campaigns between 1960 to 1992).

attacks are frequent occurrences, attacking one's opponent would still be an effective strategy if evaluations of the target of the attacks went down more than evaluations of the sponsor, such that the net differential evaluation of the two competing candidates worked to the advantage of the attacker.<sup>219</sup>

When Lau and Rovner applied these criteria to the relevant research, they concluded: "Looking at all of these studies together, no one could conclude that negative campaigning is a particularly effective campaign strategy."<sup>220</sup>

Still, it is likely that different kinds of negative campaigning have different effects, and many earlier studies defined negative campaigning as *any* criticism or attack on an opponent.<sup>221</sup> More recent research is more nuanced, examining the impact of different types of negative campaigning, including: issue-focused attacks versus person- or trait-focused attacks; pure attack advertising versus contrast advertising; relevant versus irrelevant negative messages; and civil versus uncivil negative messages.<sup>222</sup> Recent research also examines the impact of negative campaigning by incumbents, differentiated from that of negative campaigning by challengers.<sup>223</sup>

The implications of these studies are mixed. A 2004 study combined survey data from the 1988–1992 National Election Studies, with content coding of a database of political advertisements in 97 contested Senate races.<sup>224</sup> It showed that both incumbents and challengers who leveled only issue-based criticism at their opponents succeeded in lowering respondents' evaluations of their opponents.<sup>225</sup> In contrast, person- or trait-based criticism had no effect on respondents' evaluations of the targeted candidate.<sup>226</sup> Proponents of deliberative democracy can take heart then, given that attacks that are issue-focused typically will be more useful for influencing voters than will be person-based attacks.

A 2008 study that situated experimental manipulations of the civility and relevance of negative messaging within a representative public opinion survey offers more good news for deliberative democracy's proponents. It demonstrated that irrelevant negative messages were the least effective form of campaign

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219. Lau & Rovner, *supra* note 20, at 295.

220. *Id.* at 296. For more detailed discussion of the data and analysis on which Lau and Rovner base their conclusion, see STRYKER ET AL., *supra* note 139, at 9–11. Because in this case cause (belief that negative campaigning works) and intended consequence are deeply intertwined, we discuss the evidence on whether negative campaigning works as intended in this Section.

221. STRYKER ET AL., *supra* note 139, at 3, 6–7.

222. See, e.g., Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 575–77; Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 700–03; Fridkin & Kenney, *Variability in Reactions*, *supra* note 39, at 308–10.

223. See, e.g., Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 577; Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 697, 700–03.

224. Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 575–76.

225. *Id.* at 589–90.

226. *Id.* at 589.



messaging.<sup>227</sup> That is, irrelevant messaging resulted in the most *positive* evaluations of the targeted candidate.<sup>228</sup> But when messages were relevant, uncivil messages were more effective than civil messages in lowering respondents' impressions of the targeted candidate.<sup>229</sup> This last finding is not good news for proponents of civility. In this study, the researchers measured incivility in two different ways and found the same pattern of results for both.<sup>230</sup> First, the researchers created incivility through an experimental manipulation that added pointed insults to what was otherwise a civil negative message.<sup>231</sup> As is necessary in sound experimental research, the researchers conducted a manipulation check.<sup>232</sup> They verified that respondents in the study agreed with the researchers' experimental categorization of messages as civil or uncivil—and also whether they

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227. Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 710.

228. *See id.* For information on how the researchers operationalized relevance, see STRYKER ET AL., *supra* note 139, at 11–12. Results were the same whether the authors analyzed the impact of respondents' own perception of the relevance of messages or whether respondents were subjected to the researchers' experimental manipulation of relevance. *See id.*

229. Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 710. The authors used advertisements based on real commercials from the 2004 elections, with the state and name of the targeted candidate changed to make sure that respondents did not have preexisting biases. *Id.* at 700. The full text used in experimental manipulations of both relevance and civility is available in the article. *Id.* at 700–03.

A 2011 study by the same researchers shows that voters have differing degrees of tolerance for incivility. Fridkin & Kenney, *Variability in Reactions*, *supra* note 39, at 311–12. For this study, the researchers created a detailed codebook to train and guide coders in assessing campaign advertising content for civility. *Id.* at 311. The codebook instructions reminded coders that, “[s]ome ads, even if negative, present the information in a civil matter (diplomatically, without derision, etc.), while other ads rely on a more uncivil tone (e.g., overly strident, rude, discourteous).” *Id.* at 311 n.15. Coders were instructed to assess whether most people “watching the ad would consider it somewhat civil, very civil, somewhat uncivil, or very uncivil.” *Id.*

Fridkin and Kenney reported that they “adopted a generous interpretation for determining civility given the rough-and-tumble nature of campaign messages in Senate campaigns. That is, there needed to be an *explicit* use of harsh, shrill, or pejorative adjectives describing candidates, their policies, or their personal traits for an advertisement to be considered uncivil.” *Id.* at 311–12 (emphasis added) (citation omitted). The 2011 study found that those who more strongly identified with political parties were more tolerant of incivility and irrelevance, as were people who were more interested in political campaigns. *Id.* at 315. Ideological conservatives were more tolerant of incivility and irrelevance than were ideological liberals, and young persons were more tolerant than older persons. *Id.* Variations in the relevance and civility of messaging did not matter for respondents who were highly tolerant of irrelevance and incivility, but these variations *did* matter for respondents who were less tolerant of irrelevance and incivility. *See id.* at 320.

230. Fridkin & Kenney, *The Dimensions of Negative Messages*, *supra* note 139, at 708.

231. *Id.* at 700–01.

232. *Id.*

were relevant or irrelevant.<sup>233</sup> Indeed “respondents, for the most part, agreed with [the researchers’] categorization of relevant and civil messages.”<sup>234</sup> Second, the researchers also created an index summarizing respondents’ perceptions about the civility of the message based on their response “to three statements, ranging on a [four-point scale] from *strongly agree* to *strongly disagree*.”<sup>235</sup> The scale ranked level of agreement or disagreement with statements indicating that the advertisement was “offensive,” “polite,” or “hostile.”<sup>236</sup> The civility scale ranged from low to high based on responses to the three statements.<sup>237</sup>

A study of campaign “mudslinging” as assessed by campaign managers also found a mixture of good and bad news for proponents of deliberative democracy and civility. The study found that, although respondents who were politically knowledgeable were not affected by mudslinging, this particular type of campaigning *did* work to influence those who were ill-informed about politics.<sup>238</sup> The study assessed mudslinging by asking campaign managers an open-ended question about the themes of their opponents’ campaigns.<sup>239</sup> When campaign managers reported that their opponents engaged in “smear tactics,” “relentless attacks,” “deceptive messages,” or “unwarranted” or “unconscionable criticisms,” this finding was coded as mudslinging.<sup>240</sup> If both candidates’ campaign managers judged that their opponents ran a mudslinging campaign, the race ranked highest on mudslinging.<sup>241</sup> If neither candidate’s campaign manager judged that the opponent ran a mudslinging campaign, the race ranked lowest on mudslinging.<sup>242</sup> The race ranked in-between if just one of the campaign managers judged that the opponent ran a mudslinging campaign.<sup>243</sup>

That mudslinging seems to work as long as voters are ill-informed is a serious concern because Americans are less well-informed than their counterparts in other post-industrial democracies,<sup>244</sup> and the gap between the politically

233. *Id.* at 708.

234. *Id.*

235. *Id.* at 704.

236. *Id.*

237. *Id.*

238. Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 594.

239. *Id.* at 578.

240. *Id.*

241. *Id.* at 578–79.

242. *Id.*

243. *Id.*

244. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 89–91 (1996); Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 194–95 (1996); Shanto Iyengar et al., *Cross-National Versus Individual-Level Differences in Political Information: A Media Systems Perspective*, 20 J. ELECTIONS PUB. OPINION & PARTIES 291, 304 (2010); Michael Schudson, *America’s Ignorant Voters*, WILSON Q., Spring 2000, at 16, 18–19; David J. Andersen, *The Electoral Environment and House Races: Political Knowledge, Political Interest, and Government Evaluations as a Function of Electoral Density 2* (Apr. 2009) (unpublished presentation manuscript, Rutgers University) (on file with *Arizona Law Review*) (presented to the 67th Annual Conference of the Midwest

knowledgeable and politically ill-informed in the United States is widening.<sup>245</sup> Access to cable television and the Internet allows those who favor entertainment over news to easily avoid news.<sup>246</sup> The empirically validated tendency to seek and consume media sources that confirm prior beliefs likewise restricts exposure to ideas and arguments that are inconsistent with prior beliefs.<sup>247</sup> Consequently, the decreased cost of gathering political information given new media does *not* translate into a more informed electorate overall.

Worse, human beings are cognitive misers: They try to reduce mental costs associated with using higher-level processes in decisionmaking.<sup>248</sup> People use shortcuts—cognitive heuristics—and they base them on environmental cues.<sup>249</sup> Available evidence suggests that a majority of American voters rely on informational cues such as party affiliation, candidate ideology, interest-group endorsement of candidates, and candidate likeability to make voting decisions.<sup>250</sup>

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Political Science Association). A few researchers argue that these results may not reflect true voter ignorance, but may stem instead from how researchers gathered, coded, and evaluated the data. *See, e.g.,* Cheryl Boudreau & Arthur Lupia, *Political Knowledge*, in *CAMBRIDGE HANDBOOK OF EXPERIMENTAL POLITICAL SCIENCE* 171, 172–77 (James N. Druckman et al. eds., 2011).

245. *See* Markus Prior, *News vs. Entertainment: How Increasing Media Choice Widens Gaps in Political Knowledge and Turnout*, 49 *AM. J. POL. SCI.* 577, 578 (2005); *see also* DELLI CARPINI & KEETER, *supra* note 244, at 163 (“In general, pre-baby boomers and baby boomers are about equally informed, although there was a slight tendency for the latter cohort to have been less informed than the former when they first entered the electorate . . .”). For a more detailed discussion of both comparative and longitudinal research on political knowledge, its correlates, causes, and consequences, *see* J. TAYLOR DANIELSON & ROBIN STRYKER, *NAT’L INST. FOR CIVIL DISCOURSE, RESEARCH BRIEF NO. 5, POLITICAL KNOWLEDGE, PERSUASION AND CAMPAIGN RHETORIC* (2011), *available at* [http://www.nicd.arizona.edu/sites/default/files/research\\_briefs/NICD\\_research\\_brief5.pdf](http://www.nicd.arizona.edu/sites/default/files/research_briefs/NICD_research_brief5.pdf).

246. Prior, *supra* note 245, at 578–79.

247. *See supra* notes 175–209 and accompanying text.

248. *See* KAHNEMAN, *supra* note 35, at 35; Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 752, 752–54 (1980).

249. *See* Chaiken, *supra* note 248, at 752–54 (describing the human tendency to “rely on . . . more accessible information such as the source’s identity or other non-content cues in deciding to accept a message’s conclusion”).

250. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 *AM. J. POL. SCI.* 951, 953–54 (2001) [hereinafter Lau & Redlawsk, *Cognitive Heuristics*] (explaining that the five common heuristics voters use are political party, ideological stereotypes, endorsements, poll results, and candidate appearance; the latter triggers perceptions of likeability and also race, gender, and age-related stereotypes); *see also* Tereza Capelos, *Feeling the Issue: How Citizens’ Affective Reactions and Leadership Perceptions Shape Policy Evaluations*, 9 *J. POL. MARKETING* 9, 14, 27 (2010) (discussing how citizens evaluate policies based on simple cues; mainly, citizens’ feelings about *politicians* influence their evaluations of policy proposals); Richard R. Lau et al., *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 *AM. J. POL. SCI.* 395, 395–96 (2008) [hereinafter Lau et al., *Correct Voting*] (“Because of limited cognitive resources, people simply do not have the time and energy to pay that much attention to politics.” (citation omitted)).

Rather than conduct independent information gathering, they rely on others whom they perceive to be political experts.<sup>251</sup> This may mean that ill-informed voters cast votes that are not in their best interest.<sup>252</sup> It also means that they are more open to persuasion than are well-informed voters.<sup>253</sup>

Aiming at the most “persuadable” voters—the ill-informed—thus makes sense. Whether mudslinging is the best way to reach them, however, is less clear, because if one campaign engages in mudslinging the other is likely to retaliate. Consistent with the results of at least one study, when campaign managers for *both* candidates perceived that their opponent engaged in mudslinging, ill-informed voters lowered their evaluations of both the incumbent and the challenger in the race.<sup>254</sup> As for better-informed voters, they are more resistant to mudslinging,<sup>255</sup> but may be more vulnerable to other types of campaign effects, such as media focus on a particular issue, known as “priming.”<sup>256</sup>

Whatever the reality, the key point is that political consultants and campaign managers *believe* that their best strategy is to “go negative.”<sup>257</sup> Thus it is

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251. T. K. Ahn et al., *Communication, Influence, and Informational Asymmetries Among Voters*, 31 POL. PSYCHOL. 763, 774 (2010).

252. Bartels, *supra* note 244, at 201–02; *see also* Lau & Redlawsk, *Cognitive Heuristics*, *supra* note 250, at 966 (describing that when individuals of low political sophistication use cognitive heuristics, their decisionmaking becomes less accurate); Lau et al., *Correct Voting*, *supra* note 250, at 395–96 (same).

253. *See* Ryan L. Claassen, *Political Awareness and Electoral Campaigns: Maximum Effects for Minimum Citizens?*, 33 POL. BEHAV. 203, 220–21 (2011).

254. Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 594. A 1997 experiment found that those with less political awareness were more readily persuaded by political statements concluding that a policy would have a particular negative effect without explaining why or how the negative effect would happen. Michael D. Cobb & James H. Kuklinski, *Changing Minds: Political Arguments and Political Persuasion*, 41 AM. J. POL. SCI. 88, 91–92, 98–104 (1997). Such conclusory political statements were labeled “easy” arguments, as opposed to “hard” arguments that took listeners through each step of a process through which the policy would produce the negative consequences claimed for it. *See id.* at 92–93. Hard arguments were more persuasive to those with greater political awareness. *Id.* at 114–16.

255. *See* Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 587 tbl.2, 594; John Gastil & James P. Dillard, *Increasing Political Sophistication Through Public Deliberation*, 16 POL. COMM. 3, 20 (1999) (“[D]eliberative discussions of political issues can increase the sophistication of individuals’ political judgments.”).

256. Sungtae Ha, *Attribute Priming Effects and Presidential Candidate Evaluation: The Conditionality of Political Sophistication*, 14 MASS COMM. & SOC’Y 315, 316, 336–39 (2011); *see also* Claassen, *supra* note 253, at 218 (“On balance, priming did not matter among low awareness citizens statistically . . . .”); Jeffrey W. Koch, *Political Rhetoric and Political Persuasion: The Changing Structure of Citizens’ Preferences on Health Insurance During Policy Debate*, 62 PUB. OPINION Q. 209, 211–12 (1998) (“Public opinion is vulnerable to framing and priming effects because many political attitudes are composed of a diverse set of considerations.”).

257. *See supra* note 216. Substantial research shows that candidates who trail in the polls are more likely to use negative advertising, but when political competition narrows between two candidates, the frontrunner may use negative advertising to maintain a lead.

of little surprise that their candidates bend to the magnetic pull of campaign trash-talk, sound bites, and distortions of others' positions. This obviously dovetails with concerns about the impact of money on elections. If a campaign has more money to spend and believes that "going negative works," then there will be more negative political messaging—including uncivil messages that attack people rather than issues. The money issue also dovetails with other election reforms, such as Clean Elections or finance rules that force candidates to raise money sooner and sooner. Wedge-issue candidates can split the electorate, and campaign seasons become much longer—indeed, interminable.<sup>258</sup> This is why the nation feels it is stuck in political mud. And even though some voters are resistant to political mudslinging, enough voters are not resistant that there is good reason to worry about the quality of our democracy and its discourse.

### 5. Districting

Many believe that redistricting also has had some unanticipated and pernicious effects on campaigning and on partisan politics.<sup>259</sup> Where there is, for example, a "Republican-safe" district, the campaign energy (and vitriol) shifts to the primaries, where the candidates have no incentive to play to the political middle but must outflank the opponent in the battle for primary votes. Again, to create some distance between themselves and their political opponents, the candidates not only "go negative"; they do so from one side of the political spectrum. Groups on the far left denounce centrists as ideological sell-outs or Wall Street appeasers; groups on the far right denounce centrists as "RINO" (Republicans in name only) or "socialist sympathizers." Getting an edge requires a wedge—and wedging often means dealing harshly with one's opponents.

That said, redistricting to create more ideologically diverse districts may not make campaigns more civil. Policy gaps between candidates may narrow, but close races tend to produce the most bare-knuckled campaigns.<sup>260</sup> When policy disagreements are absent, candidates may turn to personal attacks.<sup>261</sup> In other

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Lau & Rovner, *supra* note 20, at 292; *see also* Stergios Skaperdas & Bernard Grofman, *Modeling Negative Campaigning*, 89 AM. POL. SCI. REV. 49, 55–56 (1995) ("If the front-runner were to engage in negative campaigning, it would be directed against the stronger opponent.").

258. Norman J. Ornstein, Response, *Fixing Congress*, BOS. REV., May–June 2011, at 20 ("Campaign consultants and pollsters used to disappear after elections, but now they stick around as consultants, aides, and lobbyists, ever-present.").

259. *But see* Peter Orszag, *Too Much of a Good Thing*, NEW REPUBLIC, Oct. 6, 2011, at 11, 11 ("If gerrymandering were the main culprit, we would expect polarization to be considerably worse in the House (where districts are gerrymandered) than in the Senate (where they are not). Yet polarization patterns have been roughly similar in both parts of Congress.").

260. *See supra* note 257 and accompanying text.

261. For example, commentators highlighted the steady stream of personal attacks between Mitt Romney and Newt Gingrich, two candidates who had similar platforms and who ran—along with Rick Santorum—in the 2012 South Carolina Republican primary. *See, e.g.*, Joe Garofoli, *Romney's Attack Ads Tarnishing His Image*, S.F. CHRON., Mar. 15, 2012,

words, the problems seen in party-safe primaries may percolate up to the general election. Redistricting aimed at fixing civility issues would be difficult and unlikely to succeed—especially if it is the only corrective method adopted.

6. *Other Unintended Institutional Incentives for Incivility*

To the extent that political polarization is associated with incivility,<sup>262</sup> other political structures, aside from gerrymandering, may also be at work. Selection of party nominees through caucuses and primaries rather than the old-style “smoke-filled room,” may have been salutatory in many respects, but it very likely contributed to polarization.<sup>263</sup> Partisan activists, who hold more extreme opinions on issues than do other voters, including party identifiers overall, participate disproportionately in caucuses and primaries, and they also contribute more financially.<sup>264</sup>

When party primaries are closed, moderates in both parties tend to be challenged by others who are more ideologically extreme.<sup>265</sup> In the past 50 years, partisan activists have become “hyper-partisan,” that is, substantially more polarized in general ideology and specific issue positions.<sup>266</sup> This is the same period in which the nominating process for President has become more open, with reform initiated mostly by the Democratic Party between 1968 and 1972.<sup>267</sup> Thus, issue-oriented activists and “ideological purists” now have far greater influence over party policy agendas and the selection of party nominees than do moderates and “pragmatists.”<sup>268</sup>

With good reason, then, partisan activists often are flagged as the instigators of today’s reciprocal polarization dynamic in which elite party polarization fuels polarization in mass partisanship and vice versa. Institutional change in candidate nomination procedures has incentivized party leaders, candidates, and office holders to take more rather than less extreme positions. Hyper-partisanship, in turn, seems to be associated with incivility.<sup>269</sup>

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at A1; Thomas Sowell, *Pettiness, Mudslinging Unhelpful in GOP Race*, DAILY NEWS J. (Mar. 1, 2012, 11:01 PM), <http://www.dnj.com/apps/pbcs.dll/article?AID=2012303020027>.

262. See *supra* notes 158–70 and accompanying text.

263. See Layman et al., *supra* note 159, at 96.

264. *Id.*

265. See *id.*

266. See ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 33, 37–40 (2010) [hereinafter ABRAMOWITZ, *THE DISAPPEARING CENTER*]; see also Abramowitz, *supra* note 163, at 72–73; Fiorina & Abrams, *supra* note 43, at 574; Kyle L. Saunders & Alan I. Abramowitz, *Ideological Realignment and Active Partisans in the American Electorate*, 32 AM. POL. RES. 285, 307 (2004).

267. See Layman et al., *supra* note 159, at 97.

268. *Id.*

269. See *supra* notes 166–70 and accompanying text.

### 7. *Outrage News*

Studies confirm what even casual media viewers suspect: Talk radio and cable news programs deploy speech designed to “provoke visceral responses (e.g., anger, righteousness, fear, moral indignation) from the audience through the use of overgeneralizations, sensationalism, misleading or patently inaccurate information, ad hominem attacks, and partial truths about opponents, who may be individuals, organizations, or entire communities of interest (e.g., progressives or conservatives) or circumstance (e.g., immigrants).”<sup>270</sup> In other words, outrage discourse is “incivility writ large.”<sup>271</sup> It often involves mockery, hyperbole, insulting language, and name-calling (e.g., “Up-Chuck Schumer,” “Obamatards,” and “hack-in-the box”).<sup>272</sup>

Although both the right and left engage in outrage discourse, including obscenities, systematic empirical research indicates that “the right uses decidedly more outrage speech than the left.”<sup>273</sup> Despite this difference in frequency, however, both the right and the left use outrage similarly.<sup>274</sup> Moreover, although mockery and outrage are hardly new to politics, studies suggest that outrage commentary in blogs, cable news, and radio is much more common than it is in newspaper writing generally, or than it was on talk radio earlier in time.<sup>275</sup> The reason seems to be that the “business model of outrage-oriented political commentary succeeds.”<sup>276</sup>

### C. *Is Political Discourse Less Civil Today than in the Past?*

As indicated above, outrage discourse likely is on the rise in some settings—especially talk radio and cable news programs.<sup>277</sup> Although several

270. Sobieraj & Berry, *supra* note 29, at 20. Sobieraj and Berry go on to point out:

Outrage talk is not so much discussion as it is verbal competition, political theater with a scorecard. What distinguishes this type of discourse is not that it seeks to evoke emotion in the political arena. On the contrary, emotional speech has an important place in political life, and many emotional appeals are not outrageous. What makes outrage distinctive are the tactics used in an effort to provoke the emotion.

*Id.* (footnote omitted); see also JAMIESON & CAPPELLA, *supra* note 29, at 132–39 (conducting a content analysis of Rush Limbaugh’s radio program); JONES, *supra* note 29, at 47–51 (discussing the belligerent nature of political discourse on cable television and talk radio).

271. Sobieraj & Berry, *supra* note 29, at 20.

272. *Id.* at 29–30.

273. *Id.* at 30. Sobieraj and Berry point out that, “[t]aken as a whole, liberal content is quite nasty in character . . . . Conservatives, however, are even nastier.” *Id.* As discussed earlier, research has found that ideological conservatives are more tolerant of incivility than ideological liberals. See Fridkin & Kenney, *Variability in Reactions*, *supra* note 39, at 315.

274. Sobieraj & Berry, *supra* note 29, at 32.

275. *Id.* at 34–35.

276. *Id.* at 36; see also Ornstein, *supra* note 42, at 491.

277. Sobieraj & Berry, *supra* note 29, at 34–35.

studies have suggested that, in the past 50 years, incivility has been on the rise in both the U.S. House of Representatives and the Senate,<sup>278</sup> a recent study examining incivility since the 1930s suggests that civility rises and falls and may not be worse now than in decades long past.<sup>279</sup> Specifically, this study measured incivility by evaluating words that had been ruled out of order and demands that something spoken on the floor of Congress be removed from the record.<sup>280</sup> Moreover, studies evaluating the rates of incivility in print newspapers have mixed findings,<sup>281</sup> and high levels of incivility may—or may not—characterize some types of Internet sites and usage.<sup>282</sup>

People, however, have always worried about civility, and we have always experienced moments in which political actors honored civility norms in the breach.<sup>283</sup> Political archenemies have long deployed mockery, savage rhetoric, ad hominem attacks, and defamatory accusations against each other.<sup>284</sup> Political satire, perhaps, especially political cartoons, has always thrown sharp elbows and inspired anger, even violence.<sup>285</sup>

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278. Jamieson & Falk, *supra* note 139, at 105–06 (measuring incivility by words ruled out of order and demands that something spoken on the floor of Congress be removed from the record); Uslaner, *supra* note 139, at 36–37.

279. ANNENBERG PUB. POLICY CTR., CIVILITY IN CONGRESS, *supra* note 100, at 3.

280. *Id.*

281. Whereas Lau and Pomper relied on newspaper reports to analyze candidate discourse, Sobieraj and Berry analyzed newspaper discourse itself. Compare Richard R. Lau & Gerald M. Pomper, *Negative Campaigning by U.S. Senate Candidates*, 7 PARTY POL. 69, 80 (2001) (evaluating the nature and scope of negative campaigning between 1988 and 1998 by relying on newspaper reports, and concluding that “negative campaigning [was] clearly evident,” but was not “predominant” during the campaigning), with Sobieraj & Berry, *supra* note 29, at 34 (analyzing outrage speech by comparing nonprint sources, such as blogs, talk radio, and cable news, with traditional newspaper sources, and concluding that newspaper column “outrage levels” were rising).

282. See *supra* text accompanying notes 209–13.

283. See, e.g., RICHARD L. BUSHMAN, *THE REFINEMENT OF AMERICA: PERSONS, HOUSES, CITIES* 409–15, 425–30 (1992); LAWRENCE E. KLEIN, *SHAFTESBURY AND THE CULTURE OF POLITENESS: MORAL DISCOURSE AND CULTURAL POLITICS IN EARLY EIGHTEENTH-CENTURY ENGLAND* 3–23, 195–98 (1994); DAVID S. SHIELDS, *CIVIL TONGUES AND POLITE LETTERS IN BRITISH AMERICA* 6–10, 308–28 (1997). For additional examples, see *supra* note 31 and accompanying text.

284. See Sapiro, *supra* note 33, at 8–11 (noting the complexities of longitudinal studies of civility given changing civility norms).

285. See Victor S. Navasky, Op-Ed, *Why Are Political Cartoons Incendiary?*, N.Y. TIMES, Nov. 13, 2011, § 4, at 5 (discussing the particular power of political cartoons to agitate, which the author suggests is related to the fact that they are unanswerable; people can write a letter to the editor in response to an op-ed piece, but they cannot draw a retaliatory cartoon). Yet the very institutionalization of political cartooning at least in the print media prompts inquiry into whether something about the role of the political cartoonist or the particular context for political cartooning (when, for example, it appears on the op-ed page in print media) makes it subject to a different standard for incivility. We might inquire the same for today’s cable political satirists who parody the political-media establishment



Likewise obvious is that people seek positive self-esteem and social status. As such, attacks on others' reputations or disregard for their dignity, an inherent aspect of extreme incivility, have always held special wounding force. Slurs, deathly duels, and other historical evidence of extreme political hostility abound. (A particularly vivid example of a historical instance of incivility is the severe caning of Senator Charles Sumner by Representative Preston Brooks in Congress.)<sup>286</sup> We therefore doubt that the instinct to vilify an opponent has changed in kind over time, although it likely spikes during periods of heightened domestic and international conflict or unrest. The consequences of political civility may be harsher today because cable television, talk radio, and political and social media sites on the Internet allow for the instantaneous transmission of incivility—just like political gaffes—to a world-wide audience. But the underlying instinct to attack political opponents in an uncivil tongue is hardly new.

We leave to others a fuller analysis of the longitudinal study of incivility and outrage. For our purposes here, it is sufficient to note that extreme incivility in political discourse today exists, and seems to affect the political process in ways that matter for our democratic and social well-being.

#### ***D. What Are the Consequences of Uncivil Political Discourse?***

What do we know about the documented, political, and social consequences of incivility and outrage discourse? Here again, the evidence is nuanced, contextual, and incomplete. The assumption of many who favor vibrant and civil political discourse is that such discourse will translate into increased voter knowledge and participation, increased tolerance for ideological pluralism, and so on. But much of the time we are proceeding on the basis of faith or intuition, rather than on the basis of empirical data.<sup>287</sup> To the extent that data are available—and much of the available data is indirect—these suggest that our evaluation of the costs of departures from civility will depend on *which* of a series of potential negative outcomes we are most concerned about.<sup>288</sup>

##### *1. Effect on Elections and Governance*

Some argue that outrage discourse skews elections and hobbles effective governance. In outrage discourse, “the red meat is good versus evil and heroes working at great odds against powerful villains. This favors the most ideological

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through the acknowledged creation of “fake news” and “truthiness.” See JONES, *supra* note 29, at 5–9.

286. Brady & Han, *supra* note 31, at 120–21.

287. See Michael X. Delli Carpini et al., *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 ANN. REV. POL. SCI. 315, 316 (2004) (“[E]mpirical research on deliberative democracy has lagged significantly behind theory.”).

288. *Id.* at 336; Simon Jackman & Paul M. Sniderman, *The Limits of Deliberative Discussion: A Model of Everyday Political Arguments*, 68 J. POL. 272, 281–83 (2006); Diana C. Mutz & Jeffrey J. Mondak, *The Workplace as a Context for Cross-Cutting Political Discourse*, 68 J. POL. 140, 153–54 (2006); David M. Ryfe, *Does Deliberative Democracy Work?*, 8 ANN. REV. POL. SCI. 49, 49–50, 63–64 (2005).

within parties, helping them raise money and gain votes . . . when they oppose more moderate candidates.”<sup>289</sup>

Some evidence indicates that political polarization—which is associated with political incivility<sup>290</sup>—does affect governance adversely. Specifically, strong evidence exists that polarization exacerbates the negative impact of *divided control of Congress and the executive branch* on federal government capacity for policymaking.<sup>291</sup> The effect of polarization in the absence of divided government is more debatable. For example, Sarah Binder defined gridlock as “Congress’s relative [inability] over time . . . to broach and secure policy compromise on issues high on the national agenda.”<sup>292</sup> Specifically, she noted that gridlock “is best viewed as the share of salient issues on the nation’s agenda that is left in limbo at the close of Congress.”<sup>293</sup> Using this definition, Binder found that issue polarization on a bill reduced the likelihood that it would become law.<sup>294</sup> Similarly, David Brady, John Ferejohn, and Laurel Harbridge found that between 1970 and 2002, polarization in Congress led to gridlock in government spending on environmental and energy programs.<sup>295</sup> Alan Abramowitz, however, identified divided control of Congress and the executive branch as the major barrier to federal government policymaking.<sup>296</sup>

Two recent scholarly reviews of this topic come to different conclusions. Morris Fiorina and Samuel Abrams report that “there is no consensus among scholars that elite polarization leads to gridlock.”<sup>297</sup> But Geoffrey Layman, Thomas Carsey, and Juliana Menasce Horowitz note that multiple studies “show that party polarization in Congress is strongly associated with legislative gridlock and policy inaction. . . . [I]deological divergence between the parties has a stronger negative effect on government’s legislative productivity than does divided party control of government.”<sup>298</sup>

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289. Sobieraj & Berry, *supra* note 29, at 36. For discussion about the persuasive impact of different types of negative campaigning, and conditions under which such campaigning may work to lower voter evaluations of the targeted candidate without unleashing countervailing backlash against the negative campaigner, see *supra* text accompanying notes 219–56.

290. See *supra* text accompanying notes 158–70.

291. Layman et al., *supra* note 159, at 101 (“There is no such ambiguity concerning the consequences of party polarization under divided government. The combination of divergent parties and divided party control tends to make interaction between the executive and legislative branches highly contentious and has a particularly deleterious effect on government’s policy capabilities.”).

292. SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 3 (2003).

293. *Id.* at 35.

294. *Id.* at 55–56.

295. Brady et al., *supra* note 42, at 199–200.

296. ABRAMOWITZ, *THE DISAPPEARING CENTER*, *supra* note 266, at 160.

297. Fiorina & Abrams, *supra* note 43, at 582.

298. Layman et al., *supra* note 159, at 100.

No research directly assesses whether incivility in political campaigns makes governance more difficult. However, it is hard to imagine that extreme incivility would not make it harder to negotiate seriously and in good faith with those who one perceives to have engaged in unwarranted vitriol, purposeful deception, or unconscionable personal attacks.

### 2. *Effect on Political Engagement*

The effect of political polarization on political engagement may actually be positive, whereas the effect of incivility itself on political engagement is unclear. Elite party polarization has led to increased recognition of party differences and a heightened sense that electoral outcomes matter.<sup>299</sup> Consistent with this finding, there is substantial evidence that elite party polarization since the 1970s has increased citizen political engagement. For instance, Alan Abramowitz used data from the American National Election Surveys between 1962 and 2004 to analyze trends in political engagement, including following public affairs, interest in elections, political knowledge, caring which party wins the presidency or Congress, and political activity beyond voting.<sup>300</sup> All of these measures of engagement increased, rather than decreased, as polarization increased.<sup>301</sup> As for voter turnout, turnout in presidential elections fell through the low-polarization 1970s, reached its lowest points in 1988 and 1996, and has been rising since 1996—especially among self-identified conservatives and liberals, but also among those who are non-ideological.<sup>302</sup>

Substantial empirical research examines the impact of various types of negative advertising on voter turnout. A 2006 study concluded that negative campaigning had a small *positive* effect on voter turnout as long as the messaging resonated with its target audience.<sup>303</sup> One 1999 study—particularly influential because it distinguished among *types* of negative campaigning—combined information from the 1990 Senate Election Study with coding of an independent database of televised advertisements in the 30 contested Senate campaigns.<sup>304</sup> The research team not only identified different types of negative campaigning based on the text of advertisements, but also conducted interviews with campaign managers,

299. Fiorina & Abrams, *supra* note 43, at 582.

300. ABRAMOWITZ, THE DISAPPEARING CENTER, *supra* note 266, at 15–33.

301. *Id.* at 19 tbl.2.1, 33. But, others attribute increased political engagement to the increase in party mobilization that accompanies polarization rather than to enhanced polarization itself. Fiorina & Abrams, *supra* note 43, at 583.

302. Marc J. Hetherington, *Turned Off or Turned On? How Polarization Affects Political Engagement*, in 2 RED AND BLUE NATION, *supra* note 42, at 1, 5–6.

303. John Geer & Richard R. Lau, *Filling in the Blanks: A New Method for Estimating Campaign Effects*, 36 BRIT. J. POL. SCI. 269, 284–86 (2006). This study is important in that it tried to overcome a methodological limitation of an earlier study that likewise had found that negative campaigning did not diminish voter turnout, controlling for the demographic and political factors known to affect turnout. *See id.*

304. Kim Fridkin Kahn & Patrick J. Kenney, *Do Negative Campaigns Mobilize or Suppress Turnout? Clarifying the Relationship Between Negativity and Participation*, 93 AM. POL. SCI. REV. 877, 878–79 (1999).

asking them to describe their opponent's campaign and the media coverage of both campaigns.<sup>305</sup> The research team constructed a measure of campaign negativity that distinguished campaigns with no negative messaging from those with a minor and major emphasis on negativity respectively. The research team also constructed a measure of campaign mudslinging based on campaign managers' reports.<sup>306</sup>

Predicting whether persons voted based on the tone of campaign messaging, the tone of coverage in the state's largest newspaper, closeness of the election, closeness of the governor's election in the same state, competitiveness of house races, respondent's political interest, knowledge, partisan attachment, exposure to and familiarity with the candidate, and respondent's education, age, employment, income, home ownership, and length of residence, the study concluded: "[P]eople are more likely to vote as the proportion of negative information in the candidates' ads increases and as the proportion of media criticism of the candidates escalates, holding all remaining forces constant. Even when controlling for a host of individual and contextual factors, negative information significantly *enhances* turnout."<sup>307</sup>

In stark contrast, this same 1999 study found that turnout fell as campaign managers' perceptions of campaign mudslinging rose.<sup>308</sup> Underscoring the importance of their nuanced findings, the researchers noted:

These results suggest that people distinguish between legitimate and tempered criticisms, on the one hand, and acrimonious and unjust criticisms on the other hand. Voters seem to find substantive and reasoned criticisms useful, and apparently these provide them with reasons to go to the polls. In contrast, excessive mudslinging by the candidates that is covered extensively by the news media alienates voters. People become disenchanted with the candidates and the media coverage and abstain from the electoral process.<sup>309</sup>

Thus, criticism—especially if it includes substantial criticism that is issue-focused—may well focus and energize voters, leading to increased political participation. To the contrary, extreme incivility, including “smear tactics,” “relentless attacks,” “deceptive messages,” or “unwarranted” or “unconscionable criticisms,”<sup>310</sup> may well cause voters to disengage, thereby diminishing political participation. Clearly, we need more research that directly assesses the impact of different types of incivility and outrage discourse, including incivility by political

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305. *Id.* at 879, 881.

306. *Id.* at 879–80; *see supra* notes 238–43 and accompanying text (emphasizing that mudslinging taps into deception, unconscionable criticism, smear tactics, and attacks that are relentless).

307. Kahn & Kenney, *supra* note 304, at 883 (emphasis added) (footnote omitted).

308. *See id.* at 887; *see also* Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 580–82.

309. Kahn & Kenney, *supra* note 304, at 884.

310. Fridkin & Kenney, *Do Negative Messages Work*, *supra* note 30, at 578.

candidates and their surrogates, and incivility by media commentators across various media platforms, on diverse forms of civic and political engagement.

### 3. *Effect on Trust, Efficacy, and Legitimacy*

Considerable evidence exists about how polarization and negative campaign advertising are related to political trust and citizens' sense of political efficacy in democratic politics. Considerably less evidence exists on the consequences of incivility itself. It is hard to draw implications from the evidence we do have because the studies use different analytic techniques to assess incivility's impact and also create somewhat different measures of incivility.<sup>311</sup>

Morris Fiorina and Samuel Abrams point out that—perhaps counter-intuitively—“perceptions of government responsiveness generally have risen as national polarization has increased.”<sup>312</sup> Studies assessing how negative advertising affects Americans' trust in government and their sense of self-efficacy in politics give mixed results. But even if trust or efficacy is diminished, the studies overall suggest that the effects of polarization on trust and efficacy are quite small.<sup>313</sup>

One 2009 study improves methodologically on many of the previous studies by examining variable exposure to negative messaging, as well as variations in the content and tone of that messaging.<sup>314</sup> It suggests that being exposed to negative messaging did not diminish respondents' sense of political efficacy or their approval of Congress.<sup>315</sup>

A reasonable expectation is that varying the level of civility or incivility of negative campaign messaging should matter for how the negative messages influence voters' trust in government and sense of political efficacy. The few existing empirical studies, though, find mixed results. A 2005 experiment created

311. See *supra* text accompanying notes 213–14.

312. Fiorina & Abrams, *supra* note 43, at 583. But this result could be due to other correlates of polarization, including enhanced participation in politics.

313. Richard R. Lau et al., *The Effects of Negative Political Campaigns: A Meta-Analytic Reassessment*, 69 J. POL. 1176, 1185–86 (2007); Robert A. Jackson et al., *Examining the Possible Corrosive Impact of Negative Advertising on Citizens' Attitudes Toward Politics*, 62 POL. RES. Q. 55, 61–67 (2009).

314. Jackson et al., *supra* note 313, at 61, 63. Measurement of such concepts as political efficacy and approval of Congress now are standardized in the political-science literature. Political efficacy—also known as external political efficacy—typically is measured by asking people if they agree with such statements as “People like me don't have a say in what the government does,” and “Public officials don't care much what people like me think.” Hetherington, *supra* note 302, at 15–19. The study by Jackson et al. referenced here examined the impact of both external political efficacy, measured in the standard way, and of internal political efficacy, also measured in a standard way. See Jackson et al., *supra* note 313, at 59. Standard measures of internal political efficacy ask respondents to agree or disagree with such statements as “I consider myself to be well qualified to participate in politics,” and “I feel that I have a pretty good understanding of the important political issues facing our country.” Richard G. Niemi et al., *Measuring Internal Political Efficacy in the 1988 National Election Study*, 85 AM. POL. SCI. REV. 1407, 1408 (1991).

315. *Id.*

civil and uncivil versions of the same debate content.<sup>316</sup> In the uncivil version, the debaters rolled their eyes, interrupted each other, and sighed. Participants who saw the civil debate had increased trust in government and in Congress.<sup>317</sup> Those who saw the uncivil debate had decreased trust.<sup>318</sup>

However, a 2007 experiment created incivility somewhat differently; specifically, by adding two strong, pointed words, which included terms such as “dishonest,” “unprincipled,” and “heartless,” to “an otherwise civil negative message,” the researchers hoped to create an inflammatory and superfluous claim.<sup>319</sup> Although this study found that incivility directed at personal traits offended people, neither incivility directed at political positions nor incivility directed at personal traits lowered political trust or efficacy.<sup>320</sup>

Camera angle, as well as what is said, may play into how incivility is experienced and what its consequences are for political attitudes and behavior. Another 2007 study created four experimental conditions by crossing discursive civility and incivility with close-up, “in your face” camera shots versus medium-shot camera perspective.<sup>321</sup> Participants were randomly assigned to watch 20 minutes of mock-televised political discourse that covered four different issue disagreements.<sup>322</sup> Unsurprisingly, the uncivil discourse was significantly more emotionally arousing—as measured by skin conductance levels—and the uncivil exchange of political views that also featured tight close-ups was the most emotionally arousing of all.<sup>323</sup> Incivility made no difference to perceptions of the legitimacy of arguments supporting an opposing point of view to one’s own when the arguments were viewed from the medium camera perspective.<sup>324</sup> When the arguments were viewed up close and personal, however, viewers found uncivil arguments expressed by those with an opposing point of view significantly *less* legitimate than the same arguments presented in civil fashion.<sup>325</sup> In sum, incivility combined with in your face camera shots seems to undermine the idea of a “loyal,” i.e., legitimate opposition.

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316. Mutz & Reeves, *supra* note 139, at 4–5.

317. *Id.* at 9.

318. *Id.*

319. Brooks & Geer, *supra* note 139, at 5.

320. *Id.* at 10–12.

321. See Diana C. Mutz, *Effects of “In-Your-Face” Television Discourse on Perceptions of a Legitimate Opposition*, 101 AM. POL. SCI. REV. 621, 625–26 (2007).

322. *Id.* at 625.

323. *Id.* at 627–28.

324. *Id.*

325. *Id.* at 629–30; see also Richard Forgette & Jonathan S. Morris, *High-Conflict Television News and Public Opinion*, 59 POL. RES. Q. 447, 454–55 (2006) (finding that high-conflict media discourse on television decreases citizens’ evaluations of political institutions, their trust in leadership, and their support for both the Republican and Democratic political parties).

#### 4. *Effect on Cognition*

Many worry about the effects of outrage discourse on cognition—how it triggers the emotions of anger and disgust. Once mobilized, these emotions tend to be sticky, and may place people in a state of agitation that can crowd out other forms of analysis and weaken empathic impulses.

We will not canvass the rich literature on emotions here; indeed, we are deeply skeptical of general assertions about how human emotions operate insofar as they are used to advance specific social norm or behavioral claims.<sup>326</sup> We do note, however, that ample literature on human emotions indicates that disgust, in particular, is a comparatively extreme emotion that “sets it apart as especially volatile, consumptive of human energy, and potentially destructive of social peace.”<sup>327</sup> This is especially true for unambiguous expressions of disgust—that is, extreme and unnuanced indictments of others premised on disgust.<sup>328</sup>

Outrage discourse thus may be especially powerful, and especially dangerous, if aimed at vulnerable, innocent, or indiscriminate targets.<sup>329</sup> It also may be particularly divisive and corrosive of social adhesion.<sup>330</sup>

As we already have noted, the good or bad in the tenor of our discourse depends on the context: we need our anger, and our capacity to enlist even strong emotions like disgust into our reasoning and line-drawing processes.<sup>331</sup> But there is a reason people refer to a “blinding rage”—or worry about “anger management” more than we worry about “empathy management.” Anger and aggression are

326. See, e.g., Toni M. Massaro, *Show (Some) Emotions*, in THE PASSIONS OF LAW, 80, 83–89 (Susan A. Bandes ed., 1999) [hereinafter Massaro, *Show (Some) Emotions*]; Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 659 (1997). For more extended discussion and citations to the literature on how different positive and negative emotions arise in social life, how they operate in politics, and how emotion and cognition intertwine in decisionmaking, including political decisionmaking, see JERRY W. LEE & ROBIN STRYKER, NAT’L INST. FOR CIVIL DISCOURSE, RESEARCH BRIEF NO. 4, CLASSICAL RHETORIC, CONTEMPORARY SCIENCE AND MODERN CIVIL DISCOURSE (2011), available at [http://www.nicd.arizona.edu/sites/default/files/research\\_briefs/NICD\\_research\\_brief4.pdf](http://www.nicd.arizona.edu/sites/default/files/research_briefs/NICD_research_brief4.pdf).

327. Massaro, *Show (Some) Emotions*, *supra* note 326, at 98.

328. *Id.* at 99.

329. See generally MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 67–68 (2010); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 122–23 (2004); Martha C. Nussbaum, “Secret Sewers of Vice”: *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW, *supra* note 326, at 19, 19–62. For additional discussion, see Dan M. Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF LAW, *supra* note 326, at 63, 71 (arguing for limited use of disgust to advance progressive ends).

330. See Roger L. Conner & Patricia Jordan, Attitudes, Advocacy and Polarization: The New Iron Triangle of American Public Policy 2 (Mar. 16, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1487663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487663).

331. See *supra* notes 32–38 and accompanying text.

linked, although anger can also cause flinching, freezing, or other responses.<sup>332</sup> “Hot” emotions also trigger a host of automatic and endocrine changes designed to “mobilize bodily energy resources” to ready the body for action.<sup>333</sup>

Outrage discourse certainly is likely to affect the human brain and consequent behavior differently than a love sonnet. But we do not speculate further here on these effects, or how exactly they fit into the civil political-discourse debate, other than to note that if one aims at outraging listeners, one should consider seriously the potential adverse effects of this emotion on the ideal conditions of democratic engagement. Reasoned discussion and deliberation—whether in Congress, town-hall meetings, or on the street—require reflexivity and capacity to “take the role of the other.” Extreme incivility likely impedes the very processes that are essential for understanding and productively critiquing opposing points of view.

### III. MODEST PROPOSALS

We offer the foregoing civil-discourse criteria as modest “stop and think” factors for politicians, pundits, campaign strategists, and others engaged in political commentary and debate. We also suggest that “street corner” advocates *consider* these principles, though we do not promote any formal or other informal measures to constrain them if they reject them, as many surely will.

Most critically, we repeat: *We favor no new government-imposed regulations designed to enforce civility norms in any traditional or designated public forums.*

Rather, we encourage citizens to “vote with their feet” on issues of civility. To the extent that media are responding to audience ratings, media viewers and Internet users can register their support for programs and websites that curb the worst vitriol while allowing the fullest possible range of ideas by tuning them in (and tuning the others out).

Though it may be quixotic, we likewise encourage citizens to demand more from their political candidates than the pointed one-liners and put-downs that sometimes pass for political debate. If we want our politicians to engage in reasoned debate, we must take the time to listen to and process their reasons. We need to show them we want and can handle the “hard” arguments rather than just the “easy” conclusions.

We also encourage citizens to model the civil-discourse criteria themselves—at home, at work, and in other settings where they engage with like-

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332. See James R. Averill, *It's a Small World, but a Large Stage*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 143, 144 (Paul Ekman & Richard J. Davidson eds., 1994) [hereinafter *THE NATURE OF EMOTION*]; see also Glen Rein et al., *The Physiological and Psychological Effects of Compassion and Anger*, 8 *J. ADVANCEMENT MED.* 87, 99–102 (1995) (comparing the physiological effects of positive and negative emotions).

333. Jaak Panksepp, *The Clearest Physiological Distinctions Between Emotions Will Be Found Among the Circuits of the Brain*, in *THE NATURE OF EMOTION*, *supra* note 332, at 258, 258.



and non-like-minded people about politics. In emphasizing civil *discourse*, rather than civility tout court, we have pointed intentionally at the interactive, dynamic, and relational nature of political conversation. If enough people model civil discourse, in enough everyday settings while actively intervening discursively and behaviorally to encourage others to do the same, we may build stronger civil-discourse norms that diffuse across diverse settings, including formal political institutions and the media. We should never underestimate the potential for macro-level change inherent in the accumulation of micro-level discursive shifts, promoted and sustained through everyday *informal* positive and negative sanctions. When compounded exponentially over space and time, the power of a raised eyebrow of disappointment, and conversely, a smile of approval from a civil-discourse-practicing peer or significant other whose approval we seek, can be a fulcrum for meaningful change.

Above all, we advocate more research on and exploration of the underlying questions about the causes and consequences of incivility in our political discourse. Politics reflect values and normative commitments, such that empirical research alone cannot tell us what we should do. Yet empirical research combined with logical analysis *can* help us clarify our values and the means to help us achieve them.<sup>334</sup> Evidence should matter, especially in a liberal democracy that makes “reason” a cornerstone, although “facts” and “reason” are slippery things that can reflect cognitive biases. It may well be, as some recent scholarship argues,<sup>335</sup> that reason is developed strategically. Nonetheless, as Leon Wieseltier has said, “I wonder whether a democracy can hold such a pessimistic view of the citizen and still believe in meaningful debate.”<sup>336</sup>

Complexity in all of these respects plainly should be acknowledged. But the limits of our capacity for neutral fact-finding and reasoned analysis do not justify jettisoning these as goals.

### CONCLUSION

The call to civil political discourse is not inherently inconsistent with the First Amendment, with liberal democratic principles, or with the many ways in which modern culture is hardly civil. We thus encourage others to review and develop further the emerging data regarding the nature, causes, and consequences of incivility in political discourse.

With respect to the nature of incivility, we have shown that, contrary to what many assume, there is fairly substantial *consensus*, both among citizens, and between citizens and behavioral researchers, about the core of what is civil or

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334. This is essentially the same argument that Max Weber made almost 100 years ago in a lecture, converted to a still often-read essay, *Science as a Vocation*. Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 145–47 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946) (1919).

335. See, e.g., Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57, 58–61, 71–73 (2011).

336. Leon Wieseltier, *The Fear of Reason*, NEW REPUBLIC, July 14, 2011, at 36, 36.

uncivil in politics. Thus, identifying civil and uncivil political discourse is not impossible, even though we probably will never achieve complete consensus about precisely where to draw the line. Perceptions of incivility are *not* completely confounded with or determined by partisanship. At the same time, civility norms are socially constructed, context dependent, and sometimes used to marginalize further those who already have been denied access to the political conversation. Thus, the civil discourse we promote includes an expansive attitude toward political conversation, an inclusive political table, and increasing equality of access for meaningful participation. Moreover, it is not synonymous with politeness. Far from it.

Much of our discussion has focused not on political discourse between insiders and outsiders, or between elites and the disadvantaged or marginalized, but rather on the discourses of elites, whether political candidates, media talking heads, or those who purchase and craft political campaign advertising as they are talking *to* each other and *at* the rest of us through candidate debates, campaign advertising, and media talk shows. To the extent that objections to civility norms in political discourse are based on the reasonable concern that these can be constructed and used to maintain elite closure and limit inclusion, such objections are unlikely to apply to promoting civil political discourse for these kinds of actors in these kinds of contexts.

On one hand, social and behavioral researchers know a great deal about the cognitive, discursive, and institutional processes, including confirmation biases, outrage news, political polarization, current rules of electoral politics, and conditions of social and political marginalization that are relevant for empirical assessment of the causes and consequences of uncivil political discourse. On the other hand, much of this empirical work has been done in disciplinary niches—whether psychology, sociology, communication, political science, or other—that have lacked the systematic interconnectivity required to see how their research knowledge could be built upon, and their research agendas adapted, to provide more direct and conclusive answers to empirical questions underlying the civility debates. The National Institute for Civil Discourse hopes to galvanize and organize the needed, pinpointed, interdisciplinary research networks and agendas required to build a unified scholarly field focused around civil and uncivil political discourse.

Finally, although the currently available empirical literature is inconclusive on many specific points, it *does* indicate that some types of incivility in some contexts may be harmful to some aspects of democratic engagement and governance. For example, campaign mudslinging seems to suppress voter turnout, televised uncivil and “in your face” political debate seems to diminish the legitimacy of political actors whose views differ from those of the observer, and uncivil political discourse is perceived as offensive and may diminish political trust. Political polarization—which is correlated with decreased political civility—exacerbates the negative impact of divided control of Congress and the executive branch on federal government capacity for policymaking. At the same time—and contrary to the conventional wisdom of political operatives—the evidence suggests that attack advertising that is person- or trait-based, rather than issue-based, is

ineffective. At the very least, this weakens a campaign's practical arguments for "going negative" in the most personal of ways.

For all who care about the quality of American democracy, this research should matter. Indeed, it should matter enough for them to consider steps that might improve the way America "talks politics." In a country that prizes robust political debate, is ideologically pluralistic, and is ever seeking to improve the democratic project, these steps may be essential.

And as for the many thoughtful civil-discourse naysayers, we hope we have fairly captured their objections here and even met some of them. If not, then we must try harder to do so, and ask others who share our goals to assist us in mustering an abler defense.

All of our recommendations are offered in the spirit that animated the formation of the NICD. Out of tragic circumstances, the NICD founders sought to forge a better path. They did so based on something real that emerged in the very first days after the shootings: a collective, widely shared, and bipartisan desire for something more of our politics. That desire will always compete with our baser and partisan instincts, but the taste for more civil political discourse across political divides is as natural and longstanding as the taste for vitriol. We call on that aspect of our culture, of ourselves, here.<sup>337</sup>

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337. Anybody who knows both of us knows that one of us already models the civil-discourse ethics described herein (Robin, as described by Toni. Robin herself will tell you that she has plenty of lapses) and the other of us (Toni) is very much a civil-discourse work in progress.