Introduction

Advertising is a pervasive presence in the modern American political campaign. Mass political advertising, which includes television, radio, billboards, newspapers, direct mail, pamphlets, etc., “absorbs about 45 percent of a typical campaign budget.”¹ Televised advertising in particular is a dominant presence in many campaigns.² The 2010 midterm election saw a 36% increase from 2008 in the number of television ads aired, and a 61% increase in cost.³ Even as media technology—like digital video recording—allows television watchers to avoid ads altogether, this aspect of the modern campaign shows no signs of abating.

The prevalence of political advertising raises a problem for political theorists. Clearly, in a large representative democracy like the United States, mass media communication will be crucial for informing voters about politics. But 30-second advertisements are not the only possible form of mass media communication. Many political theorists are inclined to dismiss advertisements as harmful to democratic decision-making.⁴ In the media, such criticisms often focus on tone. It is routine for journalists to report that this year is the nastiest year ever in political advertising.⁵

This past campaign season, there was an added element to the reformers' criticism: Because of the Citizens United decision by the Supreme Court, which overturned limits on independent corporate campaign expenditures, many feared a

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fresh outpouring of corporate money into the ad wars. The 2010 election did see an increase, and a sharp one in the case of House races, in the proportion of ads run by interest groups—among which the biggest spenders tended to be Republican-supporting, corporate-funded entities like the Chamber of Commerce and Crossroads GPS. Interest groups also dramatically increased their use of “express advocacy” language, directly encouraging support for or opposition to candidates. Whether this spending was effective in swaying votes awaits definitive academic study.

This thesis seeks to explain what is objectionable about corporate spending on political advertising. A couple definitions are in order. First, I consider only for-profit corporations (though I will usually drop the modifier for the sake of brevity). These are the corporations whose influence reformers tend to worry about, and there are principled reasons for focusing on them as opposed to non-profits which take the corporate form. Second, I designate as “corporate political advertising” those messages which are funded in large part by contributions from corporate treasuries. Corporations themselves often do not directly run advertisements; most of their media spending is funneled through independent organizations of various forms.

8 Ibid., 5.
9 Ibid., 7.
10 Ibid., 15.
11 Before Citizens United, corporations used political action committees which received limited contributions from employees. Now they may directly fund political activity through their general treasuries.
12 Ibid., 23.
In short, I argue that deliberative democratic theory provides a useful account, perhaps even the best account, of the need to regulate corporate political advertising. Deliberative democracy holds that collective political outcomes are legitimate by virtue of the process that produces them—a process of public deliberation between political equals who seek to justify their views to one another. In various ways, I will argue, corporate political advertising undermines deliberative ideals: ideals about inclusivity, equality, civility, provisionality (i.e. continuing debate even after decisions have been made), and reason-giving. I argue that corporations are uniquely objectionable as political actors in the eyes of deliberative theory. They are self-interested, whereas deliberative theory holds out hope for public-spiritedness among citizens discussing how to order their collective lives. They are unaccountable and often anonymous as advertisers, whereas deliberative theory requires a reciprocal, public exchange of views. They have vast resources at their disposal, whereas deliberative theory aims for a public discourse in which the quality of arguments, not the wealth that stands behind them, determines political outcomes.

These are just the most important of the arguments I put forward. I use both political theory and political science, recognizing that democratic theory in particular must be attuned to how the world works. I hope not to sacrifice some idealism about how the world could work.

The basic structure of this thesis is as follows:

First, in Chapter I, I explain why two common frameworks for justifying
campaign finance reform are inadequate, especially for the case of corporate political advertising. Neither opposition to corruption nor opposition to political inequality suffice to explain, on their own, what might be problematic about corporate political advertising. This chapter motivates the search for alternative grounds.

Chapter II begins with a discussion of deliberative democracy and its basic ideals. In particular, it singles out the ideal of reason-giving—citizens discussing the moral principles behind their political preferences. Crucially, this ideal puts some restriction on the sorts of principles that may be offered: Private self-interest, since it cannot rationally be adopted by one's interlocutors in the course of a public exchange of views, is not a properly deliberative reason or principle. Then I address the implications of these deliberative ideals for the political campaign. I argue that a deliberative campaign must be a site of persuasion for at least some citizens, but I also identify other possible functions of a deliberative campaign: most importantly, the accurate translation of individuals' dispositions into votes. A deliberative campaign will protect citizens from irrelevant influences that could corrupt their decision-making, in addition to exposing them to potentially vote-altering ideas and arguments.

Chapter III demonstrates how corporate political advertising violates the deliberative ideals and the proper deliberative functions of the campaign, as identified in Chapter II. Some of the problems with corporate political advertising may also be present in non-corporate advertising. The main argument, however, is
specific to corporate advertising: The deliberative ideal—a public exchange of mutually accessible arguments—is subverted by corporate political advertising, which is fundamentally and irremediably self-interested.

Chapter IV considers the case of disclosure and disclaimer requirements as applied to corporate political advertising and seen in the light of deliberative theory. The need for strong source-disclosure laws is almost uncontested,\(^{13}\) and I will seek to show that the rationale for these laws should be a deliberative one. A reason-giving and reason-evaluating process of decision-making is one of the main goals of deliberative theory. I explain why public identification of the sponsors of corporate political advertising is necessary for reasoned evaluation of the arguments presented in such ads.

Chapter V replies to some objections to the application of deliberative-democratic norms to the case of corporate political advertising. First, I will consider the objection that government ought not regulate or in any way seek to manipulate voters' decision-making processes. The government, that is, must remain neutral as to how citizens deliberate and vote. Second, I will consider the objection that, in the marketplace of ideas, one must be prepared to encounter speech one does not like or want, and that the proper response is to ignore it, not regulate it.

In sum, this thesis elaborates an unconventional rationale for a particular form of campaign finance regulation. It discusses the problems with the usual

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rationales, explains a particular theory of democracy and its implications for the political campaign, and applies that theory to the case of corporate political advertising. The practical import of this argument is that the Supreme Court, in striking down limits on political advertising by for-profit corporations, overlooked a normatively attractive theory that supports such limits.

At the outset, it is necessary to explain why this thesis will focus only on corporate political advertising—advertising heavily funded by for-profit corporations. Both parties and candidates run advertising, as do ideological groups like the National Rifle Association. And even if restrictions on corporate electoral advocacy were reinstated, wealthy individuals, including corporate managers, could contribute to the production of political advertisements.

There are several reasons to focus on corporations, some practical and some theoretical. First, although some of my objections to corporate advertising will apply also to union-sponsored advertising, insofar as unions are inherently self-interested organizations, I focus on corporations because they are most immediately relevant. In 2008, before *Citizens United*, the two biggest non-party spenders were unions. In 2010, after *Citizens United*, those two unions fell to fifth and sixth, behind the Chamber of Commerce, a business association, and three conservative, likely corporate-funded groups. Particularly without new

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disclosure laws that actually achieve public identification of corporate funders,\textsuperscript{16} corporate election spending seems destined to rise further. While some corporations remain wary of direct political involvement, fearful of a public backlash, they are already giving money to “business coalitions and conservative political groups ‘that are going to fight their battles for them and not come back to them.’”\textsuperscript{17} Thus, while the Supreme Court may strike down other campaign finance regulations, for the time being it is most relevant to address corporate political spending.

Second, there is reason to think that the case against corporate political influence may be stronger than the case against, say, the influence of wealthy individuals. Regulation of corporate political speech “would not interfere with any individual speaker's self-realization attempts.”\textsuperscript{18} If free speech is prized because self-expression has intrinsic value to the individual, i.e. because it secures their autonomy, this rationale seems not to apply to corporations. For, quite simply, “Corporations do not have a 'self' to be actualized or affirmed.”\textsuperscript{19} But their employees, shareholders, and managers do.

Third, to preview an argument in Chapter III, corporations, unlike

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\textsuperscript{16} The DISCLOSE Act, which narrowly failed to pass in 2010, would have required that independent advertisements identify on screen the top five donors to the sponsoring organization. DISCLOSE Act of 2010, S. 3295, 111th Cong., §214 (2010). This may have decreased corporations' ability to funnel funds through seemingly non-corporate groups.


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individuals, cannot have genuinely public-spirited reasons for supporting particular candidates or policies. They are (and must be, legally speaking) concerned only with private profit. Corporations seek to influence the political sphere because doing so is economically valuable to them. Individuals, of course, may be economically self-interested as well. But I will distinguish self-interested individuals from self-interested corporations, arguing that the latter are unique in being inherently incapable of giving authentic, publicly acceptable reasons for their preferences.

Another issue worth addressing at the outset is why this thesis focuses on advertising when there are other, perhaps even more effective ways for corporations to influence politics, e.g. lobbying. The reason is simple: Public communications should be a prime concern of deliberative democrats, who are interested in two basic issues—the quality of public discourse and the quality of citizen decision-making. The characteristics of political advertising directly affect the quality of public discourse and ads seek to influence voters as they make decisions.

The main goal of this thesis is to apply deliberative theory to a particular political problem—to show how it can support the widespread intuition that corporate political advertising undermines public discourse and decision-making.

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Chapter I

The Inadequacy of Corruption and Inequality Rationales

In this chapter, I examine two common targets of campaign finance regulation: corruption and inequality. I argue that concerns about corruption and inequality are derivative of, or subsidiary to, more deliberative concerns about the quality of citizen decision-making and the quality of the public discourse. Conceiving of reform in terms of anti-corruption or anti-inequality objectives does not capture what reformers find objectionable about corporate political influence generally, nor what they find objectionable about corporate political advertising in particular. Rather, the real concern of reformers must be with defects in citizens' decision-making capacities and in the public discourse in which they obtain information and evaluate arguments.

Of course, if corruption and inequality are truly inadequate grounds for reform, it might be suggested that we should abandon reform altogether, rather than seek a more workable foundation in the theory of deliberative democracy. This thesis thus might be seen as an internal critique of reformers, incapable of speaking to those who lack their intuitions about the objectionability of corporate political influence. But, to the extent that opponents of campaign finance reform aim primarily at the corruption and inequality rationales, it is a useful rejoinder to them as well. While my argument takes for granted the “considered conviction” that corporate influence in American elections should be limited in some way, it

Consistent majorities (62% in 2011) have reported believing that major corporations should have less “influence” (not specifically political influence). Gallup, “In U.S., Majority Still Wants Less Corporate Influence,” accessed February 25, 2011, http://www.gallup.com/poll/145871/majority-wants-less-corporate-influence.aspx. Seventy-six percent believe there should
also strives to present the principles of deliberative democracy in an attractive light and to make them applicable to a “real world” problem. The goal is to demonstrate the plausibility of both the deliberative principles and the anti-corporate conviction, and to elaborate the connection between the two. Thus we can arrive at a stable point where an attractive theory of democracy is aligned with a widespread political judgment.\textsuperscript{23}

I deal first with the corruption-based rationale for campaign finance reform. Section 1.1 demonstrates the theoretical problems with corruption as a foundation for campaign regulation. While the concept of corruption implies a problematic relationship between a money source and a political figure, the root concern of reformers seems to be economic inequality—the fact that different potential sources of campaign money have different capacities to contribute to candidates and to spend independently on their behalf.

Section 1.2 describes some of the empirical problems with the corruption rationale as applied specifically to corporate political advertising. First, most advertising is run by candidates themselves. Second, there is little evidence of a link between contributions (of which an ad is surely one) and political favors. Third, advertising is targeted at the public, not at politicians.

Section 1.3 completes the journey from corruption to inequality, arguing that, if “corruption” is defined not as \textit{quid pro quo} but as corruption of political...
institutions or of the public itself, the corruption rationale becomes essentially indistinguishable from an inequality rationale—a concern about unequal opportunities to influence politics.

Finally, Section 1.4 shows that concerns about political inequality, in turn, depend on pessimism about the capacity of citizens to make reasoned political decisions. The additional opportunities for political influence available to the well-off would be worth little if citizens always based their decisions on the quality of reasons and arguments, and were never influenced by, say, frequency of repetition. Deliberative democracy, as I show in Chapter II, is a theory focused precisely on the quality of citizen decision-making and the quality of the public discourse. Deliberative theory can supplement the egalitarians' arguments in a productive way.

First, we must clear the way for the introduction of deliberative democracy by showing how two alternative foundations for campaign finance reform are inadequate on their own. While this chapter's arguments are not always limited to corporate political advertising, they help to motivate the search for deliberative principles which, as I argue in later chapters, can be applied fruitfully to that particular issue.

Section 1.1: Theoretical Problems with the Corruption Rationale

The existence or appearance of corruption has been perhaps the primary target of campaign finance reform in the United States; the Supreme Court has
relied primarily on this rationale for reform since the 1976 case *Buckley v. Valeo.*\(^{24}\) The Court's opinion in *Buckley* affirmed that “the primary interest” served by the Federal Election Campaign Act was “the prevention of corruption... spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.”\(^{25}\) Campaign finance reform could be justified, then, only insofar as it limited the exchange of money for political favors—or, at least, the appearance that money was being exchanged for political favors. Until *Citizens United,* this corruption rationale justified restrictions on independent corporate expenditures.

The appeal of a corruption-based rationale for campaign finance reform is clear. Corruption seems, from the point of view of democratic theory, to be something of an easy case. Consider bribery, the “paradigm case” of corruption.\(^{26}\) The wrongness of bribery is so intuitive that it is tempting to build the case for campaign finance reform by starting from shared opposition to bribery.\(^{27}\) Bribery's evil lies in its perversion of political accountability; instead of serving the public interest with an eye towards garnering more votes, bribed politicians serve private interests on whom they depend for contributions, gifts, and the like.\(^{28}\) Lawrence Lessig argues for campaign finance reform by analogy, scaling up from bribery (a disease of individual legislators) to institutional corruption (a disease of legislatures). The current system, Lessig argues, sways the legislature from the

\(^{24}\) *Buckley v. Valeo,* 424 U.S. 1, 26 (1976).

\(^{25}\) *Buckley,* 424 U.S. at 25.


public interest and towards “venal” interests by creating a dependency on sources of support other than the public itself.\textsuperscript{29}

It is not my purpose to argue that corruption of either the individual or the institutional variety should not be a concern of campaign finance regulation. Rather I will argue that this concern derives from a still more basic concern about equality, and that corruption itself is therefore not the best foundation for regulation of corporate political influence.

The connection between corruption and equality can be seen by imagining a world in which every individual and group has an \textit{equal ability to contribute} to political campaigns.\textsuperscript{30} Now suppose that people contribute to politicians’ campaigns in the fashion found objectionable by anti-corruption reformers: They exchange contributions for votes, punishing and rewarding political actors according to their conformity with the donors’ “special” or “venal” interests. Despite the background of equality, anti-corruption reformers would still object that political action in this world derives from payments, not from, say, conceptions of the public good or assessments of citizens' preferences.\textsuperscript{31}

But it seems that, while political actors might be said to make decisions in this way when contributors' capacities are unequal, an equalized opportunity to contribute largely eliminates this problem.\textsuperscript{32} Lawrence Lessig, for his part,

\textsuperscript{29} Ibid., 15-16.

\textsuperscript{30} David A. Strauss, “Corruption, Equality, and Campaign Finance Reform,” \textit{Columbia Law Review} 94 (1994): 1371. While Strauss speaks only of campaign contributions, I use the term “contribute” more loosely so that it encompasses independent expenditures on behalf of candidates, which are of course a campaign contribution of a sort.

\textsuperscript{31} Strauss, “Corruption and Equality,” 1372.

\textsuperscript{32} Ibid., 1373.
explicitly concedes this point. He considers a “democracy voucher” system, in which citizens would allocate a fixed amount of government-provided money to any candidate in their home district. In such a system, “It is conceivable—assuming many contingencies—that a dependence upon contributors could in effect be the same as a dependence upon voters.” Assuming opportunities to contribute are equal, as under a voucher system, the legislator who formerly appeared to be responding to monetary incentives is found to be responding to voters, and contributing money is another way of casting a vote. This argument suggests that, in the case of corporations, reformers' root objection is to their disproportionate resources—the fact that they exacerbate inequalities in the ability to influence politics.

Thus, under certain admittedly far-fetched conditions, contributions may not be objectionable at all: They may just be another way for citizens to register their political preferences, as they do at the ballot box, in the hopes of being represented accurately. This suggests that the analogy with bribery may be unable to do as much work, on its own, as Lessig and other anti-corruption reformers would like it to do. One needs to distinguish between contributions that improve democratic representation and contributions that corrupt. The inequality rationale provides one way of making that distinction: “Corruption,” if we must

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33 For a pro-voucher argument, see Bruce Ackerman and Ian Ayres, Voting with Dollars (New Haven: Yale University Press, 2002).
37 Thompson, “Two Concepts of Corruption,” 1045.
call it that, occurs when wealthy interests have an unequal ability to influence political outcomes.

Section 1.2: Empirical Problems with the Corruption Rationale

Aside from these theoretical concerns, which apply broadly to campaign finance reform, corruption seems ill-suited to explain what reformers find problematic about unregulated corporate political advertising. There are three main reasons for this disconnect.

First, the bulk of political advertising is run by candidates and parties, who, of course, cannot bribe or corrupt themselves (at least not in any straightforward way).\(^38\) In 2000, candidates accounted for about 61% of spending on media buys, parties for 24%, and independent groups for just 15%.\(^39\) This division of labor seems largely unchanged ten years later. While interest groups sponsored many more advertisements during the height of the 2010 campaign compared with the same period in 2008, advertising by candidates also increased substantially and continued to account for over 60% of total media spending.\(^40\) For the time being, at least, advertisements are primarily run by candidates.

Second, even when political advertising is run by outside groups like unions, corporations, or ideological groups, the link between an advertisement and a political action is likely to be quite tenuous. One study concluded that “the

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38 For a breakdown of party, candidate, and group spending, see Fowler and Ridout, “Advertising Trends in 2010,” 4.
evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party.’’

Of course, independent advertising is not exactly the same as a direct campaign contribution to a candidate; perhaps politicians appreciate the extra effort involved in producing advertising, and reward the producers with political favors. Still, independent advertising undoubtedly seems to be a type of campaign contribution, even if a more valued type. And there is little evidence that contributions affect politicians' actions.

While there is a “correlation between the roll-call votes of incumbents and the interests of their PAC contributors,’’ it could be that “donors contribute to those candidates who are believed to favor their positions, not the other way around.’’

Moreover, “[s]tudies that do attempt to control for ideological and constituent preferences find no evidence of any quid pro quo manifest in the roll-call votes of members of Congress.’’ Whether or not contributions are more influential on “stealth' issues” that few people besides the contributor care about, it seems that simple quid pro quo corruption is not as powerful or pervasive as campaign finance reformers often assume.

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44 Milyo, Primo, and Groseclose, “Corporate PAC Contributions,” 80.
46 However, some research has suggested that contributors receive differential access to less formal government assistance. In other words, contributions can get one's voice heard when bills are written, amendments added, strategies debated, provisions negotiated, etc. Richard L.
The third reason that corruption is an inadequate framework for evaluating corporate political advertising is that advertising is directed at the general public, not at politicians. This distinction roughly corresponds to the difference between “electoral” and “legislative” strategies: An electoral strategy involves aiding candidates who seem likely to support policies the contributor favors, while a legislative strategy involves contributing to the candidate most likely to win, so as to influence the policies that candidate eventually pursues.\(^\text{47}\) Daniel Hays Lowenstein says that “economic interest contributors,” by which he seems to mean corporate interests, “tend to follow a legislative strategy.”\(^\text{48}\) But other scholars have noted that electoral strategies are also a prominent part of the landscape, and they might become more prominent now that the Supreme Court has given corporations unlimited warrant to spend on elections. The appeal of electoral strategies is that, if successful, they obviate the “need to use money to try to persuade a lawmaker to vote against his/her conscience or constituency.”\(^\text{49}\) Spending funds on political advertising is a prime example of an electoral strategy.

It is noteworthy that the *quid pro quo* conception of corruption is unable to...
address a special type of electoral strategy: attempts to influence the outcomes of initiatives and referenda. As the Supreme Court explained in *First National Bank of Boston v. Bellotti*, “The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.”

After all, there is nobody to be corrupted in an issue election. If *quid pro quo* corruption is the framework for thinking about campaign finance reform, it becomes hard to justify concerns about the influence of money in issue elections. Yet it hardly makes sense that we would regulate campaign finance in candidate elections, but not issue elections. The problem for the corruption framework, it seems, is that electoral strategies target the public, not politicians. We need a framework that can explain “corruption” of the public.

**Section 1.3: From Corruption to Inequality**

If we tried to redefine corruption as corruption of the public, which might better describe what happens in issue elections, we would lose the essence of the concept. The concept of corruption involves a tainted relationship between contributors and politicians. Instead, concern about “corruption” of the public via an electoral strategy “appears to be a larger concern about equality in the political process.” Anti-corruption reformers are fundamentally concerned about the fact that wealthy individuals and groups can turn economic power into political

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“Corrupt” politicians are those who are “disproportionately beholden to a minority of powerful contributors,” rather than accountable to the majority will or their own conception of the common good. But this is another way of saying that “unequal outlays of political money create inequality in political representation”—a problem that could be solved, however unlikely this might be, by attacking either economic inequality or the ability to translate wealth into political power. The anti-corruption reformers are actually worried about the political ramifications of economic inequality.

Rather than assuming a world of equalized capacity to contribute and pointing out that concerns about corruption would disappear, Elizabeth Garrett approaches from the other side, arguing that not even the most stringent corruption-focused reform will significantly “change the ability of the wealthy to influence public opinion, the policy agenda, and legislative outcomes in a world where economic resources are unequally distributed.” Banned from making contributions, wealthy individuals and groups may simply divert their money into other uses, e.g. lobbying budgets. If lobbyists are regulated too, perhaps the wealthy will purchase media outlets, and perhaps reformers would argue for restrictions on those as well. My point is not that any of these particular reforms would be good or bad. The point is that all of these efforts would be aimed at

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53 Ibid.
58 In fact, in Section 5.3, I briefly address the issue of media ownership and endorse some sort of
attacking the influence of wealth on the political process: The corruption rationale becomes an inequality rationale. Corruption cannot serve as a stand-alone foundation for regulation of corporate political advertising.

**Section 1.4: From Equality to Deliberation**

Next to corruption, inequality is probably the most prominent rationale for campaign finance regulation. Many have argued that reform must address the wide gap in political influence between ordinary citizens and the wealthy, whether individuals or corporations. These reformers believe that economic inequalities should not be allowed to translate into political inequalities, or at least they should not be allowed to do so to a great extent. The U.S. Supreme Court famously rebuked this line of argument in *Buckley v. Valeo*, declaring, “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”

The Court ruled out the possibility of limiting the expenditures of wealthy individuals and groups in order to bring their political influence more closely into line with that of most Americans. (This left alive the possibility of raising the ability of most Americans to influence the political process, e.g. through public financing arrangements in which the government matches the contributions of

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60 *Buckley*, 424 U.S. at 48-49. A later Court, however, spoke of “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.” *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).
small donors.)

Like corruption, equality has immediate plausibility as a rationale for campaign finance regulation. Equality in formal democratic procedures, like voting, is clearly required of any real democracy. But stopping there would ignore the apparent unfairness of allowing wealthy political actors to drown out poor ones; the concern is that wealth might play a significant role in determining election outcomes. To combat this danger, Ronald Dworkin endorses the principle of equal opportunity of political influence: “[E]ach citizen must have a fair and reasonably equal opportunity not only to hear the views of others as these are published or broadcast, but to command attention for his own views.” Everyone is entitled to have a “chance at persuasion,” even if most are ultimately unsuccessful or if most never even take the opportunity. The foundation for this requirement is the more general egalitarian norm that irrelevant factors ought not affect one's ability to attain desirable positions; reformers believe that wealth is irrelevant to the position of “active citizen.” Because the wealthy cannot claim to be better citizens—more deserving of being heard—they ought not have more opportunities for influence.

My purpose here is not to show that concern for political equality is inappropriate. In fact, in Chapter II and Chapter III, I explain how deliberative theory incorporates the principle of equal opportunity for influence and how this principle applies to corporate political advertising. Here I only want to complicate

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61 Dworkin, “Curse of American Politics.”
62 Ibid.
matters for those who would ground campaign finance reform on a purely egalitarian impulse. Their arguments make certain assumptions which need to be fully articulated and defended.

First and foremost, the concern about economic inequalities translating into political inequalities requires a pessimistic view of citizens' decision-making criteria and capacities. Consider two citizens: one engaged, informed, and attentive; the other unengaged, uninformed, inattentive. For the first citizen, money in politics can do little harm. It might expose her to a greater volume of political appeals, but if we assume that this voter bases her decisions on the strength of arguments, the added volume actually gives her more raw material, quite possibly enhancing her decision-making process. We can raise no alarm so long as all citizens make political decisions the way this citizen does.

But now consider the other citizen. Reformers have the impulse that this citizen ends up “choosing on the basis of commercials made possible by money,” and that this is a bad thing from the perspective of democracy. For advertisements supposedly do not provide citizens with information they can use to make decisions. (Chapter IV will challenge the validity of this assumption in circumstances where advertising sponsors are prominently identified.) The reformers' objection rests, then, on their assessment of the quality of a certain kind of communication and a certain kind of decision-procedure. When they say they

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65 Ortiz, “Democratic Paradox,” 902.
66 Ibid.
67 Ibid., 903.
want equality of opportunity to persuade, they assume that many citizens are “civic slackers” (uninformed, inattentive, etc.) and assume the inferiority of that mode of democratic participation.\footnote{Ibid., 904.} In other words, campaign reformers must “eschew pluralism among different conceptions of how people should vote.”\footnote{Ibid., 913.}

It is important to notice how the egalitarians' concerns are rooted in empirical assumptions. They worry that wealthy interests will be more prominent and influential in public debate than is warranted by the public's pre-existing support for their views.\footnote{Daniel Winik, “Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United,” \textit{Yale Law Journal} 120 (2010): 635.} A small handful of people with particular views, and a lot of money with which to spread them, could end up swaying the public only because wealth gave them an opportunity that would have been denied to the non-wealthy. This assumes, of course, that some people are actually swayed. “If corporate-funded expression convinces no one, then it distorts nothing.”\footnote{Winik, “Citizens Informed,” 635.} But the strong suspicion of Ronald Dworkin and other egalitarian reformers is that the public is generally incapable of the reasoned decision-making that would prevent them from being persuaded by the most prominent (which is to say, most well-funded) public expressions. And these reformers believe that ideas should gain influence by virtue of their quality, not because of the wealth backing them and the megaphone that wealth provides.\footnote{David Cole, “First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance,” \textit{Yale Law and Policy Review} 9 (1991): 237.} Thus, ideals and assumptions about citizen decision-making and public discourse play a central role in the egalitarians'
arguments.

I do not mean to suggest that egalitarians have been loath to recognize this. I mean only to insist that reformers, and particularly those who are concerned with political advertising, should be explicit: Their ultimate complaint is about voter behavior—not the spending of wealthy political actors. In order to gain unequal political influence through advertising, the wealthy must count on a certain type of voter. Civic slackers provide the necessary foundation for a public discourse in which wealth, rather than argumentative quality, wins the day. Deliberative democracy, the theory I introduce and apply in the next three chapters, is fundamentally concerned with the quality of citizen decision-making and the quality of the public discourse. It is well-suited to defend the egalitarians' implicit normative assumptions about the harms of civic slackerhood and the virtues of a public debate that runs on reasoned arguments.

**Conclusion**

This chapter has argued that the two most prominent justifications for campaign finance regulation—fighting corruption and ensuring political equality—do not adequately explain, on their own, what is objectionable about an unregulated campaign environment. Another element is needed, a deliberative element which can make explicit and defend certain underlying assumptions: that citizens should be well-informed and capable of reasoned decision-making, not civic slackers; that the public discourse should be a realm of reason-giving and
argumentation, not a shouting match where the wealthiest get the loudest voice and the most influence.
Chapter II

Deliberative Democracy and the Role of the Campaign

The previous chapter argued, first, that concerns about corruption collapse into concerns about inequality. Second, it argued that concerns about inequality rest on (1) a pessimistic assessment of citizens' capacity to make reasoned political decisions, and (2) the assumption that political discourse should run on reasons and arguments, not irrelevant factors like wealth. In sum, egalitarian reformers fear that, under unregulated conditions of economic inequality, political discourse will come to be dominated by the wealthy. This is undesirable because citizens will then make decisions based on inappropriate, irrelevant factors. Therefore, if one wants to subvert the translation of economic inequality into political inequality, one needs criteria for judging the quality of citizen decision-making. This, in turn, requires a normative distinction between high-quality and low-quality political discourse—between the sort of discourse that encourages normatively defensible modes of decision-making, and the sort that does not.

Because so much political debate takes place during campaigns, and because the elections which end campaigns so deeply influence government policies, we can narrow our focus from the generalized public discourse to the political campaign specifically. In the next chapter I will narrow the focus even further by applying deliberative ideals to corporate political advertising. This chapter asks: On the deliberative theory of democracy, what is the campaign for, what makes it high-quality, and how should voters engage with it?
Deliberative theory has distinctive answers to these questions. I will not try to demonstrate the superiority of deliberative democracy over other conceptions of democracy. My goal is simply to apply deliberative theory to the political campaign, and then, in Chapter III, to corporate political advertising. A fruitful side effect of this discussion will be to explain why so many people, including so many democratic theorists, tend to balk at corporate political influence: They implicitly hold deliberative assumptions about how democracy should work.

Section 2.1 will introduce the idea of deliberative democracy, at least the version of that theory which I will employ. This theory focuses on enhancing the legitimacy of collective decisions by improving the process by which decisions are made. This process involves the public exchange of views between citizens, subject to conditions or constraints which make this exchange more fair and more respectful.

Section 2.2 will identify conditions on how the deliberating body (the whole citizenry, in this case) must be composed, i.e. how its members must be situated with respect to one another before fair deliberation can begin. Those conditions are inclusivity and equality: Deliberation must include every voice that wants to be heard, and, relatedly, deliberators must have roughly equal opportunities to make themselves heard and to persuade others.

Section 2.3 describes the conditions that are placed on the actual conduct of deliberation. The overarching theme here is reciprocity: Deliberators treat one
another in a way that recognizes and respects the equal moral status of all. The
two subsidiary ideals which seem most relevant for the campaign context are
civility and provisionality. Civility prescribes not only politeness and consensus-
building, but a deeper moral attitude of reciprocity: Deliberators treat each other
as moral agents, not as obstacles to be overcome or opponents to be beaten.
Provisionality, meanwhile, requires that deliberators treat their own views as
tentative and fallible, recognizing that no individual holds a monopoly on truth.
They enter deliberation with an open mind, receptive to the arguments of others.
And even after political decisions have been made, they engage with each other
about the merits of those decisions, which remain open to revision.

Section 2.4 explains perhaps the most important deliberative condition, the
reason-giving requirement—the ultimate hope of which is that citizens will base
their political decisions on reasons and arguments, and that exchanging reasons
and arguments will enhance the legitimacy of political outcomes. Crucially, the
reason-giving requirement entails that certain arguments—self-interested
arguments—cannot serve as a legitimate basis for democratic decisions. True
deliberation is an exchange of publicly accessible principles that could
theoretically be adopted by others, which an individual's private self-interest
cannot.

Section 2.5 lays the groundwork for Chapter III's application of
deliberative ideals to corporate political advertising by discussing the implications
of those ideals for the political campaign. While it might seem that deliberative
democracy requires persuasion to be the sole purpose of the campaign season, in fact persuasion might be just one of the appropriate functions of the campaign. While I maintain that persuasion can have a role in a well-functioning campaign, I add two other deliberative functions. First, even those who are not open to persuasion may still interact in such a way as to promote mutual understanding—increased understanding of others' views and their own. The possibility of citizens using the campaign to understand themselves better also underlies the third function of the deliberative campaign, which I call the translation function: The campaign should encourage the accurate translation of pre-existing political dispositions into votes, i.e. votes for the “right” person or cause. By excluding irrelevant factors from consideration and preserving those that are essential to reasoned decision-making, a deliberative campaign can perform this translation function.

Section 2.1: What is Deliberative Democracy?

Deliberative democracy demands that citizens talk to one another, exchanging their views on matters of public concern, and it asserts that this sort of public deliberation provides legitimacy to collective political decisions. Deliberative democracy is a conception of democracy that affirms the importance of mutually justifying collective decisions, rather than simply tallying up votes or poll responses and letting the results stand. Deliberative democrats argue that

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citizens are owed reasons if they are to accept as legitimate collective decisions that run contrary to their own views. To appeal to the force of numbers, to the will of the majority alone, would not respect citizens as “autonomous agents who take part in the governance of their own society.” Of course, expressions of majority will are essential to democratic politics. But the insight of deliberative democrats has been to point out that the justifiability of democratic decisions is increased when citizens and officials offer each other reasons for adopting particular policies. Even if a citizen does not get her way, she has reason to endorse a process in which her moral and political views have been carefully considered and reflected upon by her peers and her representatives, rather than a process in which they were, for lack of popularity, never really given a chance to take hold.

Deliberative democrats believe that the “aggregative” conception of democracy, in which citizens' opinions are taken as given and the key issue is figuring out the best way to tally them in order to produce a collective decision, does not evince adequate respect for citizens as the authors of the laws by which they are ruled. Both aggregative and deliberative theorists seem to agree that “no man is called upon to obey a law unless he himself, equally with his fellows, has shared in making it.” This seems the very definition of self-government. Deliberative theorists simply have a broader conception of what it means to share in making the laws: It involves a discussion with one's fellow citizens about the merits of laws and the representatives who would make them.

74 Gutmann and Thompson, *Why Deliberative Democracy?*, 3.
76 My own focus will be on the expressive or intrinsic benefits of deliberation: how deliberation
Deliberative democracy's stipulations about how collective decisions ought to be made are certainly demanding. Deliberative democracy requires citizens “to approach their deliberations with an almost heroic degree of sincerity, openness, impartiality, tolerance, persistence, and enthusiasm.” The hope is that deliberations under these conditions will produce reasoned decision-making. As I argued in Chapter I, when reformers worry about campaign spending, much of which goes towards advertising, they are worried not about inequality per se, but about the reasoning capacities of voters—their ability to sort through advertisements and find the truth, their ability to resist appeals that do not match their political interests and values.

In addition to reasoned decision-making, deliberative democrats aim for a high-quality public discourse. Public discourse needs to operate under conditions that help citizens make decisions in a reasonable way. This should not be misunderstood as placing constraints on the ultimate decisions which citizens may make. Deliberative democracy is a “second-order” theory, i.e. a theory about how decisions are made. We now turn to the conditions which deliberative democrats believe contribute to reasoned discourse and decision-making, and thus enhance the legitimacy of political outcomes.

under proper conditions treats citizens with respect and, in doing so, enhances the legitimacy of political decisions. Some deliberative theorists have an “epistemic” conception of deliberation: They believe that public deliberation will help citizens and their representatives reach better decisions than they otherwise would. See David Estlund, “Beyond Fairness and Deliberation,” in Deliberative Democracy: Essays on Reason and Politics, ed. James Bohman and William Rehg (Cambridge: The MIT Press, 1997), 195.
78 Gutmann and Thompson, Why Deliberative Democracy?, 13.
Section 2.2: Setting Up a High-Quality Discourse

The first two deliberative ideals I discuss—inclusivity and equality—both place demands on how the deliberating body is to be composed. They specify how deliberators should be situated relative to one another before they begin to exchange their views. The next section focuses on the actual conduct of deliberation that the theory prescribes. These distinctions—between different types of deliberative ideal, and different specific ideals—are fairly arbitrary and are used primarily for analytical clarity. In other words, the ideals are all deeply related.

A. Inclusivity

The first issue to be addressed in identifying the conditions of high-quality public deliberation is who, exactly, should take part. In short, deliberative democrats argue for an all-inclusive public discourse.\(^79\) Inclusivity is needed because the laws that are ultimately made will bind everyone, and must therefore be justifiable to everyone. Only if everyone participates in the deliberative process can they recognize the outputs of that process as legitimate.

The need for inclusivity stems from the existence of “reasonable pluralism.”\(^80\) Reasonable pluralism is the fact that “good-faith efforts at the exercise of practical reason... do not converge on a particular philosophy of life.”\(^81\) There is no consensus on moral values and their political implications; people disagree on the substance of values, and when they do not, they often disagree on

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their source—for instance, whether it is religious or secular. Moreover, this lack of moral consensus is not a mere historical happenstance, but a “permanent feature of the public culture of democracy.”\textsuperscript{82} If the government grants citizens the basic democratic rights and liberties, e.g. freedom of speech and conscience, deep and irreconcilable philosophical differences will inevitably emerge. Crucially, these differences are reasonable; different conclusions can emerge from different people who are all engaged earnestly in a search for terms of social cooperation that others might accept. In light of this fact, democracy cannot countenance the exclusion of people from political participation based on the views they hold.

Given the fact of reasonable pluralism, deliberative theorists need an account of how democracy can produce terms of cooperation by which citizens will agree to be governed—terms that they will recognize as legitimate even if they disagree with certain outcomes and policies. At a minimum, inclusivity would seem to be a necessary condition. To recognize the laws that bind them as legitimate, citizens must feel that the governmental framework that produced those laws took their interests into account. For proponents of aggregative democracy, in which citizens' preferences are taken as given and tallied to produce collective decisions, equal voting rights satisfy the demand of inclusivity. Voting is conceived as the primary citizen input to the governing process, and must therefore be fully inclusive. For deliberative theorists, who think that public deliberative processes should be the primary input, those processes must include as many voices as wish to be heard.

This is an expression of the basic ideal of mutual respect, which courses throughout deliberative theory: Public deliberation needs to be open to the full diversity of views because, if it were not, it would fail to evince respect for all citizens and for the fact that they have reasonable disagreements. A deliberative process, even when it issues in a decision, “institutionalizes the admission that there were also reasons not to desire the solution finally adopted.” These reasons did not carry the day, but the minority recognizes the decision as legitimate because it resulted from a process in which their views were heard—and heard not merely in the sense of counting votes, but actually listened to and considered by their fellow citizens. Thus, with regards to the political campaign, the norm of inclusivity demands a wide-ranging conversation on the issues of the day among all citizens who care to have their voices heard.

B. Equality of Opportunity to Persuade

Another, related condition of high-quality public deliberation is rough equality of opportunity to make one's views heard and to persuade others. Deliberative theorists want democracy to run on reasons and arguments, and fear that vastly unequal resources might distort deliberation by enabling the ideas of some citizens to get a fuller hearing than those of others.

This is essentially the same concern about “drowning out” which anti-inequality reformers like Ronald Dworkin express. Connecting this fear to the deliberative ideal helps to make explicit what these theorists often leave implicit:

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Inequalities in the opportunity to persuade are objectionable because a debate cannot be fairly conducted between people with very different capacities to make arguments and distribute them to their fellow citizens. Those who advocate equal opportunity for persuasion, like Dworkin, are identifying a precondition for fair democratic deliberation.

The intimate connection between egalitarians and deliberative democrats can be seen by considering Edward B. Foley's proposal for a regime of “equal dollars per voter”—a government-voucher system in which everyone, wealthy and poor, can contribute the same amount to political campaigns. In order for citizens to have “equal input in the electoral process,” Foley says, they must have “equal opportunity to participate in the argumentative stage of the process”—the process of public deliberation in which citizens try to persuade each other. Economic inequality would be unobjectionable from the perspective of political equality if it were not feared that, in this public discussion, the wealthy could have an unfair advantage in persuading voters to agree with them. Again, the egalitarians seem implicitly to hold a deliberative ideal about the proper conditions of persuasion, about fair terms of public debate.

Why does deliberation need to be conducted among citizens with an equal opportunity to make their voices heard? For theorists like John Rawls and Joshua Cohen, this requirement derives from the notion of the “fair value” of political liberty. Rawls distinguishes between formal liberties and the worth of those

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liberties for citizens.\textsuperscript{86} For Rawls, the need for rough equality of opportunity to influence politics derives from the original position, his idealized thought experiment involving rational beings, ignorant of their social positions and personal qualities, who choose the terms of cooperation that will govern their society.\textsuperscript{87} Rawls believes that the parties to the original position would not be satisfied with merely formal liberties, e.g. the guarantee of freedom of speech. They would want to know that they will have the ability actually to exercise that freedom. Rawls does not speak explicitly about public deliberation, but believes that the fair value of political liberty requires “roughly equal access” to the “public facility” which “govern[s] the political process.”\textsuperscript{88} One key assumption here is that this “public facility has limited space.”\textsuperscript{89} The public discourse is not infinitely expansive, and it can be dominated by a relative few.

Joshua Cohen explicitly connects the fair value of political liberty to deliberative democracy. In an ideal deliberative procedure, Cohen says, it is necessary not only that citizens possess the formal right to participate, but that they “are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to deliberation.”\textsuperscript{90} In order for citizens to regard themselves as the authors of the laws that bind them, and thus to regard the laws as legitimate, their ability to influence the content of those laws

\textsuperscript{86} Rawls, \textit{Political Liberalism}, 326.
\textsuperscript{87} Ibid., 327.
\textsuperscript{88} Ibid., 328.
\textsuperscript{89} Ibid.
needs to be real, not formal.

Consider a deliberative forum of the sort proposed by Bruce Ackerman and James S. Fishkin, one where citizens publicly gather to discuss and debate political issues before an election.\(^91\) Citizens would hardly tolerate it if the terms of this deliberative engagement distinguished in any way between wealthy and poor. The idea that the wealthy should be able to pay for more speaking time, for instance, would never be endorsed. If we would not allow inequalities in the opportunity to persuade in this new deliberative procedure, it seems clear that equal opportunity to persuade is part of the ideal deliberative procedure.\(^92\) The real equality of citizens in the ideal deliberative procedure expresses respect for citizens' equal ability to contribute to political discourse and thus lends legitimacy to the laws that issue from that procedure. With regards to the political campaign, then, deliberative theory suggests it is important not only for all interested citizens to have a voice, to be included in the public exchange of opinions, but also for them to have a relatively equal voice. Achieving these two ideals—inclusivity and equality—lays the foundation for a fair and mutually respectful deliberation before the exchange of views even begins.

\(^{91}\) Bruce Ackerman and James S. Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004), 3.

\(^{92}\) There may be imperfectly deliberative procedures in which participants, while generally aiming at a mutually justifiable decision, do not follow some of the norms of deliberative democracy, like equal opportunity to persuade. A family discussion might be like this, but, in families, there are differences in status and authority that seem anathema to democratic politics.
Section 2.3: Reciprocity and the Terms of Engagement

We now turn to the actual conduct of deliberation. Here the main theme of deliberative theory is reciprocity. Citizens stand in a relationship with one another that places certain requirements on their behavior and attitudes. Most basically, they owe one another explanations of, and justifications for, their political views. In deliberation, citizens are accountable to one another and respectful of one another. The theme of reciprocity encompasses two specific ideals which seem particularly relevant for the political campaign: civility and provisionality.

A. Civility

Deliberative democrats seek a more civil process of political decision-making. Some maintain that deliberative engagement can contribute to the appreciation that disagreements are less intractable than they might have appeared, and that some opposing claims have merit. In order for that prediction to come true, actual deliberations must be civil. For one has trouble even understanding, let alone seeing merit in, the views of those one is demonizing (or being demonized by). For this reason, deliberators should practice “economy of moral disagreement”: Citizens should try to minimize their differences and find common ground wherever possible. Thus, deliberative democrats not only believe that certain features of an ideal deliberation (e.g. inclusivity and equality) embody mutual respect, they also explicitly recommend that deliberators treat each other in a particularly respectful way.

93 Gutmann and Thompson, Why Deliberative Democracy?, 11.
94 Ibid., 7.
But the deliberative concept of civility goes beyond politeness. Amy Gutmann and Dennis Thompson argue that “citizens [must] affirm the moral status of their own positions and acknowledge the moral status of their opponents' positions.” This connects civility to the broader theme of reciprocity: A civil dialogue is one in which each deliberator recognizes and treats others as moral agents whose views are worthy of respect. Affirming the moral status of one's own positions is essentially a requirement of sincerity. It entails being consistent in one's statements, aligning words with actions, and following all the implications of stated principles. Affirming the moral status of opponents' positions is essentially a requirement of magnanimity. It entails giving sincere moral reasons for rejecting the arguments of others, not only making sincere moral arguments of one's own. Citizens must treat the views of others as morally serious, not cynical or repugnant; they must remain genuinely open to persuasion, recognizing their own fallibility; and they must search for convergence in responding to others' views. While these stipulations about deliberative behavior might seem rather mundane, they stem from deep commitments in the theory of deliberative democracy. Citizens will “learn how to take each other seriously as moral agents,” thereby enhancing the legitimacy of their collective decisions, if they engage in civil dialogue.

In the context of the campaign, the ideal of civility argues for a focus on

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95 Ibid., 81.
96 Ibid., 81-82.
97 Ibid., 83.
98 Ibid., 83-86.
99 Ibid., 80.
moral principles and substantive political issues. Such a campaign, more than one focused on personal character, symbolism, or other superficialities, respects the moral status of citizens—their right to be ruled by principles which have been aired in public, debated by people with relatively equal political voices, and approved through a fair vote.

B. Provisionality

The ideal of provisionality—which says that, while decisions eventually must be made, debate should always continue on their merits—is closely related to the ideal of civility and the broader theme of reciprocity. Citizens who treat their own views and the decisions that flow from them as provisional treat one another with respect. They recognize that others might possess some political wisdom and remain open to dialogue and to persuasion.

Deliberation serves a dynamic purpose, correcting errors both individual and collective. It will ideally provide new understandings, correct misapprehensions, and perhaps even change citizens' views through its collective give-and-take.100 This notion of provisionality—the idea that no individual or group, even a political majority, can put its conclusions beyond the reach of further deliberation—has the appeal of recognizing that we are, as J.S. Mill warned us, fallible creatures.101 Only by engaging with other citizens in a free exchange of ideas can we be reasonably assured of good and fair outcomes.

Even apart from outcomes, treating one's views as provisional and testing

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100 Ibid., 12.
them against others is an expression of respect, and thus enhances political legitimacy. It is not only a way of reaching better decisions in the end, but of showing respect to those who disagree with those outcomes. “True public dialogue is ongoing and has no finality... but only a series of provisional resting points where action becomes possible prior to further debate.”

Like the requirements of civility seen above, provisionality “has implications not only for the way citizens should treat their opponents but also for the way they regard their own views.” Citizens must be open to new factual evidence and new moral arguments from their opponents, and must see their own views as open to legitimate criticism. A deliberative citizen must possess “a willingness to revise [his] own preferences and convictions.” Even after a decision has been made, citizens and representatives express mutual respect by continuing to justify that decision to all the people whom it binds.

Applied to the political campaign, the ideal of provisionality further supports the superiority of a campaign focused on moral principles and public issues. For these ultimately bind citizens, and thus will be enduringly relevant even after a provisional decision—the election of candidates—has been made. Focusing on personal foibles and symbolic gestures can help win the election itself, but those subjects cannot serve as the basis for ongoing public deliberation after the election is held. In Chapter III, I will argue that corporate political

103 Gutmann and Thompson, Why Deliberative Democracy?, 111.
104 Cohen, “Deliberation and Democratic Legitimacy,” 75.
105 Gutmann and Thompson, Why Deliberative Democracy?, 157.
advertising, because of its instrumental, election-focused nature, cannot satisfy the ideal of provisionality.

In this section and the last, I have identified four specific deliberative ideals—inclusivity, equality, civility, and provisionality. The first two ideals place demands on the composition of the deliberating body before deliberation actually begins. The ideal deliberative procedure would include all citizens with views to be heard, and, relatedly, would give them an equal opportunity to make their arguments and persuade their fellows.

The latter two ideals—civility and provisionality—place demands on interactions between deliberators. Deliberation should be a civil process in which citizens recognize the moral status of their fellows, make and respond to arguments in a respectful way, and feel bound to justify themselves to those who would be ruled by their preferred outcomes. Collective decisions should be considered provisional and should be continuously subject to debate, in deference to the fact of human fallibility and as an expression of respect for those who disagree with the decisions. The overarching theme behind these ideals is reciprocity: the idea that each deliberator has obligations to his or her fellow citizens, is accountable to them, and must recognize and respect their fundamental moral worth.

**Section 2.4: Reason-Giving and Self-Interest**

The reason-giving requirement is the deliberative condition that, in my
view, underlies all the others. Deliberation needs to be inclusive, equal, civil, and provisional because all citizens are capable of giving and receiving reasons, of making principled arguments that could be acceptable to others. The idea that democracy recognizes “no force except that of the better argument” is critical to justifying the requirements that (1) deliberation exclude no one who is capable of making and understanding arguments, (2) citizens are not only formally but actually equal (or roughly equal) in their ability to contribute their own reasons and arguments to the public discourse, (3) arguments are conducted on civil terms with citizens recognizing each other as moral agents capable of reasoned argument, and (4) decisions are provisional, always subject to challenge from new arguments and evidence.

Deliberative democrats maintain that citizens should be ruled by reasons that they can, at a minimum, understand. The hope for consensus—for actual agreement rather than “mere” understanding—seems inconsistent with the fact of reasonable pluralism. Consensus will be unlikely, if not impossible, if deliberators “bring to the discussion genuinely distinctive viewpoints and some degree of cognitive independence.” It is enough for deliberation to seek the most justifiable and legitimate courses of action given the fact of pluralism; it seems too ambitious, even for a normative theory, to aim at nation-wide convergence on values and their political implications. Majority rule and a deliberative process

are both necessary and sufficient for political legitimacy because, under these conditions, collective decisions result from “free confrontation among various
points of view.”\textsuperscript{109} The notion that deliberation will produce rule by consensus is unnecessary; even citizens in the minority can regard themselves as bound by
laws of their own making if they have had an equal chance to shape those laws by
engaging with their fellow citizens in a civil public discussion.

Even if deliberation does not aim at consensus, it still sets limits on the
kind of reasons and arguments that are acceptable in the public discourse. One of
the central hopes of deliberative democrats is that deliberation will enhance the
\textit{public-spiritedness} of the reasons that citizens offer one another.\textsuperscript{110} Where the
public and its leaders are in the habit of trading moral reasons and justifications,
rather than explanations based on political power (e.g. the majority sides with us),
they might become more likely to engage questions of common rather than
private interest.\textsuperscript{111}

Sometimes deliberative theorists are a little ambiguous when explaining
the constraints on reason-giving which they think should bind true deliberators.
Joshua Cohen argues that the need for public-spiritedness springs directly from
the assumption that deliberators aim at “decisions that are acceptable to all who
share the commitment to deliberation.”\textsuperscript{112} And John Rawls maintains that “the
knowledge and ways of reasoning that ground our affirming the principles of

\textsuperscript{110} Cohen, “Deliberation and Democratic Legitimacy,” 76-77.
\textsuperscript{111} Gutmann and Thompson, \textit{Why Deliberative Democracy?}, 11. See also Cohen, “Deliberation
and Democratic Legitimacy,” 76-77.
\textsuperscript{112} Cohen, “Deliberation and Democratic Legitimacy,” 75.
justice and their application... are to rest on the plain truths now widely accepted, or available, to citizens generally.”

By “acceptable” and “available” I do not take Cohen or Rawls to mean that deliberation can or should result in consensus, but only that the reasons presented in deliberation should be *of the type* that others could adopt themselves. Private self-interest is thus often disqualified as an acceptable reason or principle in deliberative discourse; laws made on the basis of someone's private self-interest could never be justified to all whom they bind.

Of course, people will always act from a mix of motivations, and among these will usually be some sort of self-interestedness. Deliberation does not require the disappearance of this motivation; it only requires that positions and laws not be justified to others on that basis. If something cannot be justified in a publicly accessible way, it cannot be justified deliberatively. Naturally, deliberators might be insincere in their appeals to the common good; such appeals might be mere rationalizations for their ultimately self-interested motivations.

Crucially, however, justifying positions in a deliberative context could help “shape the content of preferences and convictions” as people discover that their positions have no grounds which others could be expected to accept. Through deliberation, “citizens transform their preferences according to public-minded ends, and reason together about the nature of those ends and the best means to realize them.”

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114 Cohen, “Deliberation and Democratic Legitimacy,” 77.
115 Ibid., 76.
116 Ibid., 76-77.
For example, while a poor person might advocate the public-spirited principle of equality of opportunity only because it serves her own private interests, it seems that by engaging in sincere deliberation she could be induced to consider her values, their implications and justifications, in a way that would transform her self-interested motives into more public-spirited ones. Someone who is not genuinely open to such a transformation, who engages in public deliberation only to maximize her own interests, uses public-spirited principles merely as tools to get what she wants.

In Chapter III, the fact that citizens can have public-spirited principles (as well as private interests) and can possibly be made more public-spirited through deliberation will be crucial in distinguishing them from corporations. I take corporations to be incapable of the sort of public-spirited transformation which deliberative democrats believe citizens to be capable of. Corporations are required to be self-interested by their fiduciary duty to shareholders. This hardly prevents them from producing superficially public-spirited arguments for their preferred electoral results. But I argue that, on the whole, they cannot be considered true deliberators because they cannot be motivated by anything other than self-interest; they cannot sincerely offer reasons and justifications which citizens could accept and adopt.

The other features of deliberative democracy— inclusivity, equality, civility, and provisionality— will also be applied to the case of corporate political advertising in Chapter III. First, however, it must be determined whether
deliberative ideals have a proper place in the political campaign.

Section 2.5: The Functions of the Political Campaign

Chapter I argued that corruption and inequality rationales do not adequately speak to the case of political campaigns and corporate political advertising. We need a critique of the decision-making processes of voters and a standard for the public discourse which informs their decision-making, if we are to understood what might be wrong with corporate political advertising. Above I elaborated the ideals of deliberative democracy, but some doubt whether deliberative ideals are well-suited for the political campaign. In this section, I will present and respond to the recent arguments of James A. Gardner, who believes that the political campaign should not be, and really cannot be, a deliberative forum where informed views are exchanged and citizens' minds are changed. I conclude that Gardner's view, which focuses on the idea that a deliberative campaign would serve a persuasive function (i.e. citizens and candidates deliberate in order to persuade each other), is overly narrow. The campaign could serve multiple functions: persuasion, mutual understanding, and accurate translation of pre-existing political dispositions into actual votes. Regulation can be justified in the interest of improving the campaign's performance of these essential deliberative-democratic functions.

According to Gardner, most of the widespread public dissatisfaction with the way campaigns are currently conducted stems from the sense that they fail to
live up to the “deliberative ideal.” He believes that this ideal requires a central role for persuasion: In deliberations between equal, civil, and reason-giving citizens, many participants ought to change their minds about policies and candidates. But Gardner does not rightly understand the importance of persuasion in deliberative theory. His assumption that deliberation aims at consensus leads him to give persuasion a more central place in deliberative theory than is strictly necessary.

Gardner considers the idea of consensus the “most problematic feature of deliberative democracy.” In Gardner's view, deliberative democrats are committed to the idea that governmental action is legitimate “only when a society has either achieved actual consensus... or after society members have made some extraordinary effort to achieve it.” Such a standard would clearly require a lot of persuasion to take place. Thus, Gardner says, deliberative democrats have “redefined [governance] to mean collective action implemented through persuasion rather than control,” i.e. the control of the majority over the minority. In order to be distinct from majoritarianism, he argues, deliberative democracy “must embrace a strong consensus requirement.” If that is true, then deliberative theorists who have rejected the goal of consensus are not actually deliberative theorists.

But Gardner misses a key distinguishing feature of deliberative

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118 Gardner, What Are Campaigns For?, 45.
120 Ibid., 432.
121 Ibid.
122 Ibid., 432-433.
democracy: The will of the majority is not a legitimate basis for collective action simply because it is the majority's will, but rather is legitimate only (or especially) when the majority's arguments and reasons have been tested against all possible alternatives in a free and equal public discussion. In this sense deliberative democracy entails what Gardner approvingly calls “governance preceded by discussion,” rather than governance by discussion—a formulation which Gardner interprets as requiring consensus and widespread persuasion. In abandoning consensus and the all-important role for persuasion which consensus would entail, deliberative democracy does not become simple majoritarianism. Deliberation should end “not in consensus but in a clarification of conflict and structuring of disagreement, which sets the stage for a decision by non-deliberative methods, such as aggregation or negotiation among cooperative antagonists.” Thus can deliberative democrats decrease their emphasis on persuasion and consensus while still remaining deliberative democrats.

Gardner also makes an empirical case against persuasion as a proper function of the campaign. Citing social scientific and psychological research, he argues that humans are not constructed in a way conducive to campaign-based persuasion. Gardner seems to define persuasion not as an alteration in vote intention, but as a change in underlying political belief. If that is the definition

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125 Ibid., 432.
127 Gardner, *What Are Campaigns For?*, 86.
128 Ibid., 5.
of persuasion, he is right to note that people bring pre-existing beliefs into the campaign season, and these are rarely altered by speeches, debates, conventions, or advertising.\textsuperscript{129} This seems to me, however, an excessively stringent definition of persuasion as it relates to the campaign. A political campaign ends with the selection of representatives, or, in the case of initiatives and referenda, the selection of policies. It seems natural, then, to say that the relevant sort of persuasion is a change in vote intention—a change in a voter's understanding of which candidates and policies will best reflect his or her underlying political dispositions.

These views sometimes do change during the campaign. One study found that, in the 2000 presidential election, American voters had about an 8\% chance of changing their vote intentions during the last month of the campaign.\textsuperscript{130} This figure is large enough, of course, to make a difference in a close race. Moreover, the campaign does not begin only a month before the election, and, as the author of the study notes, vote intentions “should firm as the campaign progresses.”\textsuperscript{131} Another study of the 2000 election, which began observing vote intentions in the spring and continued throughout the campaign, found that “nearly 45\% changed their minds as to their vote preference... at some point during the campaign.”\textsuperscript{132} Even though deep political beliefs change gradually, if at all, the campaign season

\textsuperscript{129} Ibid., 86.
\textsuperscript{131} Blais, “Voters Change Their Minds,” 801.
is not a perfect picture of opinion stability.

So deliberative democrats could identify persuasion as one function of the campaign, and a psychologically feasible one, even if they do not, as Gardner believes they must, endorse the goals of consensus and widespread persuasion. Gardner goes awry by assuming that the campaign should serve the same function for all citizens. Persuasion might be just one suitable function of a campaign, appropriate for those voters who bring to the campaign truly provisional views. The social science literature suggests that at least some people are open to persuasion (in the sense of changing vote intentions) during the course of the campaign. Deliberative democracy undoubtedly prefers provisionality to rigid dogmatism. But it can accommodate the reality that many if not most people have rather hardened political views and allegiances. For such people the campaign can serve a function other than persuasion. And, if persuasion is to take place at all, deliberative theory demands that it take place under certain conditions—the conditions outlined earlier in this chapter, which, as Chapter III will argue, are unfulfilled if not contradicted by corporate political advertising.

But what about those who are not open to persuasion? First, deliberative democracy requires an attempt at mutual understanding. Tallying up preferences does not make such an attempt. It treats citizens as islands or atoms, not as members of a community who should justify their positions to one another so that ultimately, when someone's position is embodied in law, everyone can understand and legitimate that law. There is some empirical evidence that deliberation leads
to mutual understanding: Diana C. Mutz found that exposure to political disagreements, which will be common in deliberative forums, increases awareness of opposing points of view.\textsuperscript{133}

The second function of the deliberative campaign for those who are not open to persuasion is translation of pre-existing political dispositions into votes. This function is a negative or protective one: The job of the campaign is to inform people about their choices so that they can bring their opinions into line with the “right” vote decision—right for them, that is.

It may seem curious that both persuasion and translation, which seem mirror opposites, should be aspirations of the deliberative campaign. Persuasion's conformity with deliberative theory is fairly clear, but translation's is less so. Translation is fundamentally concerned with not letting anything irrelevant disrupt the campaign's flow of information and arguments to voters, because irrelevant factors will upset the process of translating dispositions into votes.\textsuperscript{134}

This is a “deliberative” concern in that it sets standards for public discourse with the aim of improving voter decision-making.

The standards that the translation function suggests will be familiar from this chapter's earlier discussion of deliberative ideals. Campaigns only have “minimal effects” on voters (that is, they only translate well) under certain conditions: when the major candidates are relatively “balanced in financial

\textsuperscript{133} Diana C. Mutz, \textit{Hearing the Other Side} (New York: Cambridge University Press, 2006), 73.

\textsuperscript{134} This is drawn from Dennis F. Thompson's notion of “electoral corruption,” which “occurs insofar as private power employs influences that are less relevant to the choice between candidates and drives out influences that are more relevant.” Thompson, “Two Concepts of Corruption,” 1047.
resources and political skill,” and when the campaign is focused on the “fundamentals” of economic performance, ideology, and partisan identification.\(^\text{135}\)

The first criterion, balance, echoes equality of opportunity to persuade. The second criterion, focus on the fundamentals, echoes the notion (derived from ideals of civility and provisionality) that the campaign should focus on substantive issues.

Recent social-scientific research has borne out the conclusion that balance and focus are necessary for translation. The key concept in this literature is framing; a frame is simply a way of looking at an issue, an emphasis or perspective. Dennis Chong and James N. Druckman conclude, “Competing frames [i.e. balance] make alternative positions equally accessible, which increases the likelihood people will be able to identify and choose the side that is consistent with their ideological values.”\(^\text{136}\) An imbalance in the available perspectives could, then, lead to some disruption of the translation of values into votes. With regard to focus, David A.M. Peterson concludes that “how well campaigns work depends on how the campaign is conducted. An emphasis on candidate character will make it and not what policies the candidate will enact if elected the dominant determinant of voters’ choices.”\(^\text{137}\) If the purpose of the campaign is to translate political dispositions into votes, the campaign itself needs

\(^{135}\) Ibid., 1052.


to focus on those issues that are important to the translation process. When these
two conditions (balance and focus on the fundamentals) hold, campaigns can
perform their translation role quite predictably and ably.138

Thus we can identify at least two possible targets of campaign finance
regulation: forces that would upset the balance of views presented to the public,
and forces that would divert the focus of the campaign away from the
fundamentals. For without balance and focus, the campaign cannot do its job
reliably. It becomes unpredictable, subject to irrelevant factors like a candidate's
wealth, or rhetorical gaffes, or personal foibles.

Again, the reason this translation function may be called “deliberative” is
that it is concerned with what is relevant and valuable to democratic discourse.
Citizens should base their votes on reasons and arguments, not irrelevant factors.
Some citizens will be persuaded to new positions by the reasons and arguments
presented during the campaign, while others will have their political dispositions
translated into the vote choices that are right for them. The key for both
persuasion and translation is that the discourse be conditioned in such a way as to
enable reasoned decision-making.

Thus, this section has argued that, from the perspective of deliberative
democracy, the functions of the political campaign include: persuasion, of at least
some voters; mutual understanding, as a means to increased legitimacy; and
accurate translation of existing political dispositions into votes. The first two
goals can be achieved through deliberation itself. Translation, with its balance and

focus requirements, protects deliberation from irrelevant factors.

**Conclusion**

By identifying five important features of deliberative democracy (inclusivity, equality, civility, provisionality, and the reason-giving requirement), this chapter has prepared the way for the application of deliberative ideals to the case of corporate political advertising. Deliberation-minded campaign regulation would aim at these ideals because they secure the conditions under which legitimate persuasion takes place, mutual understanding is increased, and irrelevant factors do not intrude on the translation of dispositions into votes.

Of course, a non-deliberative democrat might not endorse these ideals or campaign functions. Again, my argument hinges on the plausibility of deliberative democracy itself, which to some extent I take for granted. However, as the next chapter will show, the deliberative framework does an excellent job of explaining what is objectionable about corporate political advertising.
Chapter III

Deliberative Democracy and Corporate Political Advertising

“[T]he First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare.”

In this chapter, I apply the deliberative ideals identified in Chapter II to the case of corporate political advertising. Such advertising is a form of public political communication, and thus can either meet or fail deliberative conditions—contribute to or detract from public deliberation. If corporate political advertising does not comport with the deliberative ideals of inclusivity, equality, civility, provisionality, and reason-giving, it should be restricted and replaced by more deliberative forms of public communication. Its prominence in the political campaign, which is likely to increase after Citizens United, would be objectionable from the perspective of deliberative theory.

I should concede at the outset that political advertising can have beneficial effects. Some researchers have found that even negative ads, which are often maligned, can inform voters about candidates and may even mobilize people to vote. Perhaps more detrimentally, in view of the translation function, political advertisements seem to be effective at changing political outcomes: Airing more ads than one's opponent can lead to advantages at the polls. Other researchers

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139 Meiklejohn, Free Speech, 104.
have found that ads do not inform voters much, but do persuade them—a particularly troubling possibility.¹⁴² The literature on the effects of political advertising is still young, inconclusive, and evolving.

In Chapter IV, which discusses disclosure and disclaimer rules, I will proceed with the goal of reaping deliberative benefits—or avoiding deliberative harms—from corporate political advertising. That chapter will take *Citizens United*, which endorsed disclosure requirements but rejected spending limitations, as a given. But in this chapter, I will take a more critical, idealistic angle. Even if ads can be helpful in certain respects, they are surely not the only form of political communication that can, say, provide information. While Chapter IV will try to work within the current law, this chapter asks if corporate political advertising is theoretically compatible with deliberative democracy. Should we restrict corporate political advertising in the hope of making some room for more deliberative forms of campaigning? This chapter argues that we should. The most important argument in this chapter is that, because corporations are inherently and irremediably self-interested, they cannot engage in a respectful, reciprocal exchange of views on public matters. They cannot offer publicly accessible justifications for their positions, and thus they cannot truly deliberate.

I begin, in Section 3.1, by discussing the nature of the corporate form and the problem of identifying who is the actual speaker when a corporation sponsors advertising. I argue that proposals to enhance shareholder control over political

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spending, which are attractive for some reasons, may actually exacerbate my primary concern about corporate self-interestedness. For it seems likely that the interest of the corporation will be the only common value among a majority of shareholders. Under a regime of shareholder authorization, corporate political speech would even more assuredly reflect self-interested motivations.

In the succeeding sections, I apply the deliberative ideals introduced in Chapter II. In Section 3.2, I combine the intertwined ideals of inclusivity and equality, building off the discussion of balance from Section 2.5. I argue that corporate political advertising violates egalitarian norms because a corporation's ability to spread its views can dwarf pre-existing public support for those ideas. Non-corporate voices can thus be relatively excluded from the public discourse, while opportunities for political influence become unequally available as between corporations and ordinary citizens.

In Section 3.3, I apply the ideals of civility and provisionality, both of which stem from the broader deliberative commitment to a reciprocal exchange of views. I argue that the civility norm—according to which citizens recognize and respect the moral status of others—is not satisfied by corporate political speech. Corporations do not stand in an accountable, reciprocal relationship with other citizens, particularly when it is so unclear (as it is under current law) who actually is speaking when a corporation sponsors an advertisement.

Corporate political advertising also fails the ideal of provisionality, which asks citizens to see their own positions as tentative and to continue engaging on
public questions even after a collective decision has been made. In order to meet this demand, campaign advertising needs to focus on substantive issues and principles, because only these can serve as the basis for ongoing deliberation after the election. I argue that corporations seem particularly unlikely to meet the demand of provisionality.

In Section 3.4, I argue that corporate political advertising fails the reason-giving requirement of deliberative democracy. I maintain that for-profit corporations cannot have, as deliberative democracy requires, mutually accessible (or “public”) reasons. Because of their fiduciary obligation to make profits, for-profit corporations will always be self-interested and incapable of becoming more public-spirited through deliberation.

Finally, Section 3.5 considers the policy implications of this chapter's arguments. The egalitarian/inclusionary norms argue for public financing, but without some limit on corporate spending, such a scheme seems likely to fail. As Section 3.4 disarms the assumption that corporations have something valuable to contribute to democratic discourse, there seems to be little reason why the limit should not be quite low, if not absolute.

Section 3.1: Who Speaks for Corporations?

It is important first to identify who, exactly, is speaking when a corporation engages in political speech. The various possible answers to this question have ramifications for my argument.
At present, the rules of corporate law treat decisions to spend corporate money on political campaigns as “ordinary business decisions.”\(^\text{143}\) That means that corporate executives may spend money on politics without “shareholder input, a role for independent directors, or disclosure [to their shareholders].”\(^\text{144}\) Often, decisions to fund political speech are delegated to top management.\(^\text{145}\)

These facts seem to exacerbate concerns about inclusivity and equality. I will argue in Section 3.2 that a corporation's level of influence often will not be proportional to the level of public support for its views, and that this is problematic from the perspective of inclusivity and equality. Here we may note that even within the corporation itself, the managers' views may not be representative. Corporate executives may use, at their sole discretion, money accumulated through association with other people. The public will then be exposed to the messages of an executive or small group of executives—yet these messages will effectively be funded by many other people, including people who disapprove of the messages.\(^\text{146}\)

On the other hand, the fact that corporate political speech often originates from just a handful of top executives might seem to mitigate concerns about self-interestedness—about corporations' alleged inability to give “public” reasons in deliberation. Shareholder advocates worry about the possible discrepancy between the views of shareholders and those of executives.\(^\text{147}\) Such a discrepancy

\(^\text{144}\) Bebchuk and Jackson, “Who Decides?,” 84.
\(^\text{145}\) Ibid., 88.
\(^\text{146}\) Ibid., 90.
\(^\text{147}\) Ibid., 90-92.
could, of course, stem from differences of opinion regarding the interests of the corporation. But more likely, it seems, such a discrepancy will stem from differences of political opinion and ideology. Perhaps, then, “corporate” speech represents not the self-interest of the corporation, but the political preferences of the executives themselves. In that case, my argument that corporate speech is inherently self-interested might seem not to apply. The proximate motivation of the executives' decision is not corporate self-interest.

But such a scenario, even aside from the concerns about shareholder rights that it raises, would exacerbate problems of unaccountability and non-reciprocity. Currently corporate executives are able to speak for themselves, using other people's money, without being identified as the sources of their speech. Protests and boycotts, which are the only recourse for non-shareholding citizens looking to hold corporations accountable, would be ill-advised under these circumstances. For the real speaker would be some unknown CEO, not the corporation itself. If we revised corporate law rules so that corporate political spending requires shareholder approval, we would enable accountability—people could sensibly identify, respond to, and punish the corporation as a speaker—but at the same time we would ensure that the motivation behind any corporate political speech would be self-interested. For only self-interested motives—motives about the

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148 Ibid., 90.
149 Of course, the CEO will be interested in the success of the corporation, and so protests and boycotts might indirectly hold him or her accountable to the public. But remember that this discussion was initiated by the possibility that corporate executives might sponsor political advertising because it advances their own agendas, not those of their corporations.
150 Such a system has been in place in the United Kingdom for more than a decade, during which time corporate political spending seems to have declined. Bebchuk and Jackson, “Who Decides?,” 97-98.
good of the corporation itself—could be expected to gain the approval of a wide swath of shareholders. Interest in the corporation's well-being is what the shareholders share.

Thus, we have two rather unpalatable choices. If we leave corporate law rules as they are, corporate managers, generally unknown to the public, will be virtually unaccountable in their use of other people's money for their own personal political ends. But if we revise corporate law rules to give shareholders more control, it becomes very likely, if not certain, that any corporate political speech will reflect the only interests common to a large enough proportion of corporate shareholders—the private ends of the corporation. If corporate self-interest is a particularly objectionable contribution to deliberation, as argued in Section 3.4, proposals for increased shareholder rights would trade one problem for another.

Section 3.2: Inclusivity and Equality

For our purposes in this chapter, it will be helpful to combine inclusivity and equality into one concept. Inclusivity requires that everyone who wants to be heard on a question of public concern can be heard. Equality requires that, in the ensuing public deliberation, citizens not have significantly unequal opportunities to persuade others. Combined, these two ideals embody the notion of an equal voice. In aggregative democracy, that ideal is fulfilled by equal voting rights: an equal ability to affect the outcome of an election. But in deliberative democracy,
equal voice means equal access to public forums. In current political campaigns, the staggering volume of advertising creates a public forum in which ideas and arguments are exchanged and through which political outcomes are influenced.

But in another sense this forum is not entirely public—it is highly exclusive and unequal. Obviously it costs a great deal of money to sponsor an advertisement, whether on television, in a newspaper, on the radio, or on a billboard. Most individuals do not possess the kind of resources that would enable them to spread their views through advertisements. Clearly, then, the forum of political advertising cannot be inclusive of all views. But this would be fairly unproblematic if citizens could, on an equal basis, combine with like-minded fellows in expressing their shared views. Truly marginal views, like socialist ones, would still be absent from political advertising, at least from prominent advertising. But if every individual could contribute equally to groups that run advertising, the diversity of views heard in the public advertising forum would reflect, more or less, the diversity of views in society. The influence of a particular position in the public forum would be proportional to the level of support it already possessed.

The idea of proportionality might seem to conflict with the idea of balance, which was introduced in the previous chapter as a condition necessary for campaigns to serve the translation function. After all, if the influence of a particular view is proportional to its level of public support, a campaign might become quite unbalanced, for the public might already be overwhelmingly
committed to a certain position or candidate. But deliberative democracy and the ideal of balance are not hostile to the majority will. They simply require that the majority be challenged in an open forum, and that it justify its will to those who would be bound by it. The ultimate goal is for the best reasons and arguments to win the day. If this puts an extra persuasive burden on the minority, which of course believes that it has the best reasons and arguments, it is no more of a burden than would be created by the simplest and most ideal deliberative situation: a small roomful of people openly debating the merits of a case. 

Thus balance and proportionality can be understood as complementary concepts. While proportionality concerns the relationship between existing public support and ensuing public influence, balance expresses the hope that, in a pluralist society, no position will so dominate all others in terms of existing public support as to put itself beyond challenge. (Other features of deliberative democracy, like provisionality and reason-giving, also guard against that possibility.) Together, proportionality and balance lead to a key objection to corporate political advertising: It gives some individuals the ability to influence public debate to a far greater degree than the existing public acceptance of their ideas warrants. It gives them, in essence, a head start in the race to persuasion. By striving towards the ideals of inclusivity, equality, proportionality, and balance, deliberative processes can enable factors besides wealth—most notably, the quality of arguments—to “be deployed more regularly and more effectively.”\textsuperscript{151}

The empirical evidence seems to support this argument, which follows

\textsuperscript{151} Thompson, “Two Concepts of Corruption,” 1058.
Dennis Thompson's suggestion that campaign regulation should target forces that upset the balance of resources available to opposing sides in a campaign.\textsuperscript{152} Research in political psychology has suggested that political advertising is more persuasive when people are exposed only to one side's messages. On the other hand, exposure to both sides of an issue seems to depress the effectiveness or persuasiveness of each side's messaging. For instance, Dennis Chong and James N. Druckman found that exposing people to competition between different “frames” (ways of looking at an issue) resulted in “conscious processing of information and integration of opposing viewpoints.”\textsuperscript{153} Exposed to different narratives, the subjects in Chong and Druckman's experiment seem to have deliberated about which frame fit their own views.\textsuperscript{154} They also expressed more moderate views than those who were exposed to one-sided frames.\textsuperscript{155} Relative balance in the advertising resources available to opposing sides seems likely, then, to have normatively salutary effects on the ability of citizens to reason about politics. They evaluate different arguments, figuring out their own views and deciding which message bests approximates them.

Moreover, engaging in a discussion with mixed perspectives seems to eliminate the effects of one-sided framing, while homogenous discussions do not.\textsuperscript{156} If one thinks that framing effects are undesirable, which is a disputable but

\textsuperscript{152} Ibid., 1053.
\textsuperscript{154} Chong and Druckman, “Framing Public Opinion,” 651.
\textsuperscript{155} Ibid., 652.
no less intuitive assumption, it seems that deliberative conditions mitigate framing effects both during and after exposure to messages. This argument provides a further rejoinder to James A. Gardner, who believes, as we saw, that deliberative democrats must prefer a campaign dominated by persuasion. The problem instead might be too much persuasion—or rather, persuasion enabled by non-deliberative conditions, like exclusivity and inequality. The deliberative ideals of inclusivity and equality, understood as paths to a high-quality discourse and reasoned decision-making, thus find at least some empirical support. The call for a deliberative campaign is not merely a metaphysical argument about the respect due to citizens.

This argument has clear implications for campaign regulation and corporate political advertising: It argues for equalization of effective voice, for a balance of resources on opposing sides, and for some attempts to mitigate or limit corporate political spending on the grounds that it violates the goals of proportionality and balance. Because they have so many resources, corporations can upset the balance of the campaign; because their resource endowments are not proportional to public support for their political ideas, their disruption of balance is particularly objectionable.¹⁵⁷

How specifically should corporate political spending be mitigated or limited? Dennis Thompson focuses on raising the “floor” of candidate resources, i.e. providing public funding and free media access so as to ensure that all

¹⁵⁷ Of course, the same complaint might be lodged against wealthy individual contributors. The arguments of the next two sections, however, are specific to corporations.
candidates can respond to the messages of their opponents, restoring balance to the campaign.\textsuperscript{158} But such regulations could be effectively weakened if there is not also some way to “offset” the amount that wealthy outside interests, including corporations, can contribute and spend.\textsuperscript{159} Without limiting their contributions and expenditures, it seems that the only way to mitigate the ability of wealthy interests to out-spend opponents who take public financing is to create a matching system of some kind. The government could match small individual contributions according to some fixed ratio that would enable candidates who take only such contributions to compete with those who do not.\textsuperscript{160} Or the government could match large contributions or expenditures on behalf of one candidate by giving the opposing candidate an equivalent dollar amount. But matching systems could prove unworkable, since the costs to the government would be fairly unrestrained. There might be no practical choice but to impose a cap on corporations' ability to spend their capital on political campaigns.

Section 3.3: Non-Reciprocity in Corporate Political Advertising

This section and the next deal more closely with the nature of corporate political advertising, as opposed to corporate political spending or influence generally. In this section, I assess how well corporate political advertising comports with the ideal of reciprocal deliberation: the idea that deliberators

\textsuperscript{158} Thompson, “Two Concepts of Corruption,” 1056-1060.
should interact in such a way as to respect the moral status of their fellow citizens. This norm of reciprocity has at least two parts, as I have interpreted it: (1) the ideal of civility, which requires a respectful exchange in which each deliberator honors the fact that others have legitimate moral views; and (2) the ideal of provisionality, which demands an ongoing process of mutual justification even after decisions are made, out of respect for the fact that legitimate perspectives exist on the losing side of the issue. In this section, I conclude that corporate political advertising does not fit well with either the civility or provisionality ideals, for it is fundamentally non-reciprocal and unaccountable.

A. Civility

We saw in Chapter II that the deliberative ideal of civility is multi-faceted. Most concretely, it prescribes a certain way of talking to one another—we should economize on our disagreements and seek common ground. More broadly, though, it asks citizens to take a certain attitude towards their own positions and those of others: Civility requires justifying oneself in sincere moral terms and responding to others as if they were also sincere moral agents. Implicit here is a norm of reciprocity: Citizens should treat one another with respect, listen to each other's views, and be held accountable to one another.

The first practical implication of these ideals is that they call for a substantive and positive campaign. They demand that deliberators view each other as moral agents—not as enemies to be slain, but as co-citizens with respectable views who should be reasoned with. The charge of “negativity” is frequently
leveled against political advertisements. The most recent election was found to be the “most negative in recent history” by political scientists who sorted
advertisements into three categories: positive (about the candidate), negative
(about his or her opponent), and contrast (distinguishing the two candidates).\footnote{Fowler and Ridout, “Advertising Trends in 2010,” 10.}
Moreover, interest groups—many of which are heavily corporate-funded—relied on negative advertising (87% of all interest group advertisements), whereas candidates ran a mix of positive, negative, and contrast ads.\footnote{Ibid., 11.}

Of course, a “negative” ad by this definition need not be uncivil in tone. One could argue sincerely and civilly against an opponent's position. But there can be little doubt that most opponent-focused advertisements are indeed negative in tone. The sponsors of political advertisements generally do not economize on their disagreements.

The deeper problem with political advertising, from the civility/reciprocity perspective, is that running an ad is a fundamentally non-reciprocal act. Between sponsor and viewer there cannot be mutual recognition of one another's moral positions. There is no opportunity for the viewers of ads to respond to their messages, to carry on a conversation with the sponsors. There can be no mutual understanding in such a forum. The only understanding that advertisements promote is one-way: the viewers' understanding of the sponsor's message.\footnote{The “one-way” terminology is borrowed from Richard F. Fenno, Jr., Home Style (Longman: New York, 2003), 238.} Thus, the ideal of civility is not merely an admonition about tone, but a more subtle concern about whether the nature of public communication is generally respectful
and reciprocal. Communicative exchanges in which a listener can become a speaker (and the speaker become the listener) are more reciprocal than one-way “exchanges” like political advertisements. Only the former type of discourse respects the fact that everyone in the exchange has views, reasons, and arguments. It thus fulfills the deliberative ideal of civility.

While this is a general concern about political advertising (indeed, about all mass political communication), it seems particularly acute when one considers corporate political advertising. Candidates can mitigate the non-reciprocal nature of advertising by emphasizing their openness to citizen input. For instance, in the video announcement of his Senate candidacy, Rep. Chris Murphy (D-CT) said: “Think of this as me knocking on your door. If you send me a question or a comment, I'll respond—to every single one. Because the only way we do this is together.” Although the advertisement itself is not really a conversation, it encourages conversation with the sponsor. Murphy respects the ideal of representation as a two-way street: a dialogue between constituent and representative in which each makes known his or her beliefs and values.

A corporation could never sensibly run such an ad. The corporation does not stand in an accountable or reciprocal relationship with the citizen/viewer in the way a candidate or party does. As a pioneer of independent advertising (of which corporate advertising is one type) boasted, “[A] group like ours could lie

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through its teeth and the candidate it helps stays clean.\textsuperscript{165} Candidates are accountable and therefore try harder to avoid looking nasty; corporations and other independent actors are unaccountable (or not as accountable) and therefore get away with more. Corporations do not represent people, and they do not want to. Their interests will stay the same regardless of citizen input,\textsuperscript{166} whereas politicians are expected to respond to citizens and, if not change their views, at least justify themselves. Thus, not only are candidates more likely than corporations to run positive ads, but their ads seem more likely to embody the deliberative ideal of reciprocity between communicators.

Another civility-related concern has to do with the possibility of ad wars initiated by negative attacks, which corporate-funded interest groups seem more likely to run. Some consider the ability to answer opponents' attacks a benefit of political advertising.\textsuperscript{167} But this can also be a deliberation-subverting aspect of it. An ad war, with its “cycle of charges and countercharges,” risks “turning the focus of the campaign from more relevant issues to less relevant issues.”\textsuperscript{168} The initial attacker sets the agenda, and in many cases it will be in someone's interest to divert the focus of the campaign away from the fundamentals—for the fundamentals will always favor one electoral outcome over another.\textsuperscript{169}


\textsuperscript{166} This is barring a massive, nation-wide, prolonged boycott—assuming the target corporation is the kind that could be effectively boycotted.

\textsuperscript{167} Franz et al., \textit{Campaign Advertising}, 142.

\textsuperscript{168} Thompson, “Two Concepts of Corruption,” 1063.

attacking an opponent on a non-fundamental issue, like personal character or associations, the attacker puts the opponent in a very tough position. On the one hand, if the opponent does not respond, the campaign becomes unbalanced because the attack sinks in unchallenged. On the other hand, if the campaign becomes a “cycle of charges and countercharges,” and if those charges concern irrelevancies like personal character and associations, the campaign loses its focus on the fundamentals. In neither case is the translation function well served. Thus, relying on political actors to neutralize uncivil attacks seems to be no solution.

B. Provisionality

The deliberative ideal of provisionality also has implications for the content of political advertising: It should focus on the fundamentals, that is, on the issues by which a candidate, once elected, will be judged in an ongoing process of mutual justification. In general, this means that issue-based appeals are more deliberative than other sorts of appeals.

Attacks on opponents' character are always suspect from the standpoint of provisionality. For, when an election takes place, the losing candidate drops out of the picture. It would make little sense to continue a public deliberation about her personal character. The attacks on her character therefore become doubly irrelevant: They were already irrelevant during the campaign, a distraction from the translation of dispositions into votes, and they are irrelevant after the campaign because only the winner remains.

Ads directed against an opponent's stances on the issues may be better

170 The infamous “swift boat” ads from 2004 might be an example of this.
suited to the ideal of provisionality since they can tell us something, indirectly at least, about the candidate running (or being helped by) the ads. But still, once a candidate has been defeated, her stances on the issues cannot really be the subject of public deliberation. It would be ideal, then, if positive, issue-focused ads were much more common. This is, of course, a truism. But my argument for this truism is, I believe, novel: Such ads provide the basis for an ongoing evaluation of the winning candidate's performance in office, thus recognizing the provisionality of the decision on Election Day. (Positive, character-focused ads may be somewhat helpful too, e.g. if the winner does something to upset the personal narrative put forward during the campaign.)

Corporate political advertising seems unlikely to meet these standards. As noted earlier, interest groups tend to run negative ads. And corporations seem to have little incentive to run issue-focused ads. Again, the basic problem is that they lack accountability—their relationship with voters is non-reciprocal. Corporations' only goal is victory at the polls; they need not concern themselves with laying the foundation for a governing agenda. Of course, corporations might be “accountable” to the public in some sense; surely they have an interest in not alienating their customers and voters. As argued in the next chapter, however, current disclosure and disclaimer laws are inadequate to the task of informing the public when an ad is corporate-funded. Moreover, even an ideal regime of disclosure and disclaimer requirements might not solve the accountability problem. It would probably require a massive boycott to significantly punish

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corporations for their political speech, whereas it takes only a minor shift in voter intentions to punish a candidate or a party. Without some mechanism for holding corporations accountable, it should be no surprise that the content of their advertising is less than ideal.

Section 3.4: Corporate Reason-Giving and Self-Interest

In Section 2.4, I identified the most important feature of deliberative theory as its reason-giving requirement. Deliberative democracy calls on citizens to exchange the reasons and arguments underlying their positions—not simply to hold those positions and vote accordingly. The ultimate goal of this requirement is reasoned decision-making: Deliberative democrats hope that collective decisions will be made after being tested and approved in a free, open, public discourse in which the power of ideas exceeds all other forces. This is what it means for decisions to be “made in a deliberative way.”

In order for collective decisions to be understood and legitimated by everyone they bind, they must be mutually accessible. “[O]utcomes are democratically legitimate,” Joshua Cohen writes, “if and only if they could be the object of a free and reasoned agreement among equals.” This notion of legitimacy gives rise to the idea of public reasons—reasons that one could plausibly expect fellow citizens to understand and even, possibly, to endorse. Classic deliberative theory has therefore excluded self-interest from the set of

173 Ibid., 73. Emphasis added.
reasons permissible in true deliberation. Deliberations are “oriented around discussing [the] common good rather than competing for the private good of each.” Deliberation is conceived as a moral discourse, and deliberative theorists believe that a moral discourse involves appealing to commonly shared values. “Because it would be good for me” cannot be a commonly shared value.

Of course, such private sentiments are often powerful motivators. One deliberative response to the fact of self-interestedness is to suggest that participation in deliberations will induce more public-spiritedness among citizens, as they are forced to justify their positions in ways that could be understood and possibly accepted by all. Deliberative theorists believe that the self-interested can learn the value of public-spirited principles by engaging in deliberation. A self-interested rationalizer—someone who cynically couches his own selfish motives in the most appealing public principles—will not be open to this sort of transformation. Self-interested rationalizers seek their own ends by whatever means are available and engage in deliberation only with that goal in mind. Those who try to use public principles to advance their personal interests without opening themselves to the possibility of genuine public-spiritedness are not adequate deliberators. They ask their fellow citizens to accept public reasons without themselves being moved, or even being susceptible to being moved, by public reasons offered by others.

Of course, we cannot regulate what is in people's minds, prohibiting them

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175 Young, “Communication and the Other,” 121.
from public deliberation because we think they are too selfish and are never going to change. But, crucially, we may be able to do this with corporations. For-profit corporations have the fiduciary duty to be self-interested profit-seekers, and cannot change that fact about themselves. Unlike individuals, they are not even capable of sincerely public-spirited reason-giving. The motivations and principles of individuals can be transformed by participating in deliberation; those of corporations cannot.

Here it might be objected that advertisements are very poorly suited for the expression of public-spirited principles, whoever the sponsor may be. The motivation behind running an advertisement is to win an election, and securing agreement with public-spirited principles is only a means to that end. Still, I think an important distinction can be drawn between corporations and individuals. Individuals can act from a mix of motivations. People who run ads may do so with the aim of winning, but they want to win (or can want to win) for public-spirited reasons, e.g. to implement their vision of the common good. When corporations sponsor ads, they do so with the aim of winning so that their private interests can be advanced. They seek to change the public values that citizens endorse, or at least change citizens' understanding of the public values they already endorse, without being open to any change in their own values. Thus corporate political advertising fails to embody the reciprocity involved in truly

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177 It might be said that individuals have something like fiduciary duties. A parent could be said to have an obligation to provide the best possible education for a child without regard to the fair public distribution of education. But here the obligation is primarily a moral one, not a legal one, and the point still stands that individuals will be more susceptible to deliberation-induced public-spiritedness than corporations.
deliberative exchanges, in which citizens listen to the arguments of others, recognize their own fallibility, and remain open to persuasion.

Even deliberative theorists who argue for the accommodation of self-interestedness, like Jane Mansbridge, cannot justify the particular way that corporations express their interests in political advertising. Mansbridge et al.'s first argument for allowing statements of self-interest to play a role in deliberation is that they can "serve as information regarding [the] common good." The common good is, after all, simply the aggregation of individual goods. But corporations do not generally run ads simply explaining what would be good for them; they probably intuit that such ads would not be particularly persuasive. Even setting aside the content of corporate-sponsored ads, the fact that corporations generally try to avoid disclosure of their participation, for instance by hiding behind innocuous-sounding front groups, suggests that Mansbridge et al.'s informational argument does not apply to the corporate case.

Mansbridge et al.'s second argument for including self-interested reasons in deliberation is that selfish interests "have a self-evident, primordial claim to be counted in [the] common good," for "each individual's self-interest is a constituent part of that common good." But self-interest cannot be admitted into deliberation without qualification—not without abandoning a recognizable deliberative theory, anyway. Consider Mansbridge's example of a deliberation that takes self-interest into account. An academic department is given one new faculty

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178 Mansbridge et al., “The Place of Self-Interest,” 73.
180 Mansbridge et al., “The Place of Self-Interest,” 75.
position, and the department head has to allocate the position among different subfields.\footnote{Jane Mansbridge, “Practice-Thought-Practice,” in Deepening Democracy, eds. Archon Fung and Erik Olin Wright (London: Verso, 2003), 181.} If the greater good of the department is not dispositive, it could be appropriate to ask what would be in the interest of each subfield. The subfield with the strongest claim on the new faculty member would “win,” but the losers, according to Mansbridge, would have to be compensated in some way—by “either giving the [losing subfields] some other good or promising them the next available free position.”\footnote{Mansbridge, “Practice-Thought-Practice,” 181.} But this bargain assumes that the winners and losers “want to reach an accommodation that is fair,” and not simply \textit{beat} one another.\footnote{Mansbridge et al., “The Place of Self-Interest,” 78.} It presumes a certain degree of public-spiritedness.

Corporate political advertising cannot embody even this limited public-spiritedness—it is entirely about winning. The winners in the subfield example had to recognize that the overall good of the department required them to lose something: the next available position. If they initially thought that they could indefinitely get what was good for them, deliberation with the other subfields would have changed their minds. Again, this sort of openness and reciprocity does not characterize corporations who try to influence voters' opinions. They try to get what they want without being threatened by a deliberation-induced transformation of what, exactly, they do want.

A recent controversy illustrates the centrality of self-interest to reformers’ concerns about corporate political influence. In the summer of 2010, the \textit{New Yorker} ran an exposé on Charles and David Koch—the brothers who head Koch
Industries, a conglomeration of oil, gas, chemical, manufacturing, and other holdings. Through various foundations and committees, the Koch brothers and their company have spent untold millions on lobbyists, think tanks, advocacy groups, and donations to candidates. Under *Citizens United*, they will be able to spend corporate treasury funds on political advertising. The Kochs are known to be libertarian ideologues, but what many commentators find objectionable about their political influence is not simply their use of wealth to advance their political preferences. It is their use of wealth to advance their corporate interests.

For instance, Jane Mayer, the *New Yorker* reporter, quoted several critics who maintained that, by funding anti-environmentalist foundations and politicians, the Kochs were helping their own profit margins. A blogger for the liberal Center for American Progress argued in the same vein that the Kochs’ opposition to environmentalist policies is “purely a matter of self-interest.” Of course, as I have recognized, human motivations are usually mixed; the Kochs may be motivated both by corporate self-interest and political ideology. But the critics’ emphasis on the former suggests that they think, at the very least, there is something especially objectionable about the political influence of self-interested people, groups, and arguments. Deliberative theory provides an explanation for

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185 Mayer quotes a 2004 report by the National Committee for Responsive Philanthropy, which said that Koch-funded foundations “give money to nonprofit organizations that do research and advocacy on issues that impact the profit margin of Koch Industries.”

this intuition. Pointing to corporations' fiduciary duty to promote their own interests, deliberative democrats suggest that corporations cannot properly deliberate.\textsuperscript{187} They cannot participate in a sincere public exchange about the common good.

This line of argument directly contradicts the prevailing view of the U.S. Supreme Court. In \textit{Bellotti}, the Court said that political speech “is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”\textsuperscript{188} The \textit{Citizens United} Court also rejected the ideal of proportionality, maintaining that it is irrelevant if a corporation's spending has “little or no correlation to the public’s support for the corporation’s political ideas.”\textsuperscript{189} After all, the Court said, “All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.”\textsuperscript{190} But these arguments miss the distinction that I have drawn between the reason-giving capacities of corporations and those of other speakers. In fact, the Court acknowledged that corporations are interested in “advising voters on which persons or entities are hostile to their interests.”\textsuperscript{191} My difference with the Court is that I believe irremediable self-interest has no place in political deliberation. In the case of individuals, it would be far too difficult and intrusive to try to discern the private interests behind their public arguments. But with corporations, the presence of such private interests is

\begin{footnotesize}
\textsuperscript{188} \textit{Bellotti}, 435 U.S. at 777.
\textsuperscript{189} \textit{Austin}, 494 U.S. at 660.
\textsuperscript{190} \textit{Citizens United}, 130 S. Ct. at 905.
\textsuperscript{191} Ibid., at 907.
\end{footnotesize}
obvious and, indeed, intrinsic.

This argument should not be construed to mean that corporate interests may not be expressed and accounted for in democratic politics. The implication of my argument is simply that corporate interests need to be channeled through safeguards and filters in order to be properly deliberative. Consider an employee of a major health insurance company. The company's interest lies in opposition to a single-payer system of health insurance, which would put it out of business. The employee, who does not want to lose her job, can effectively represent her own individual self-interest and the corporation's self-interest by voting and through other modes of political participation. She may associate with like-minded individuals to pool funds and run advertisements that spread their message to the public. But this is crucially different from the corporation running ads on its own, using its treasury funds.

With the individual, there are mediators that make her expression of self-interest and corporate interest more deliberative. The employee has a multitude of interests which she weighs (including interests as a health care consumer), while the corporation has only its fiduciary duties and profit motive. The employee uses her own money, not money gained through association with people who may not share her political views, and therefore her ability to spread her views and persuade others correlates more strongly with the existing level of public support for those views. By engaging in public deliberation with others, the employee can become a more public-spirited reason-giver, whereas the corporation cannot. Of
course, certain deliberative objections might still apply to this sort of speech even when it is channeled through individuals. Advertising still might not a particularly deliberative form of communication, since it is fundamentally one-way. It might not provide a reasonable probability that the sponsor's views, rather than only the listener's or viewer's, will be altered. But these concerns seem less easily regulated, less administrable, than the concerns about corporate self-interest.

Finally, it is worth noting that my argument here is different from the usual arguments levied against political advertising from a (generally implicit) deliberative point of view. Some have said that political advertising fails to provide the kind of arguments which should constitute public political discourse: Its appeals are too shallow, too manipulative, and often downright false. These are certainly valid concerns, but I have focused on the unique deliberative failures of corporations—their inability to offer genuinely public-spirited arguments.

Section 3.5: Policy Implications

What policies are suggested by the foregoing arguments? The answer to that question depends on whether or not one takes current Supreme Court doctrine as given. If we take it as given, a shareholder-authorization provision seems a good way of making the status quo less objectionable. If we are to have corporate political speech, it seems preferable for it to be genuine corporate speech, rather than individual speech that takes advantage of the corporate form, further

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exacerbating inequality of opportunities for political influence. Perhaps shareholders could also restrain overall levels of corporate spending. At present, corporate political expenditures need to pass a rather easy test: Do a handful of executives perceive this spending to be in their interest, whether corporate or personal? Shareholder authorization would require passage of a seemingly tougher test: Is this spending really in the interest of the corporation as a whole?

Within the bounds of current constitutional doctrine, the next possibility is to strengthen disclosure and disclaimer rules. In the next chapter, I argue that making an advertisement's corporate sponsorship as plain as possible will help voters evaluate the arguments on offer in the ad—thus promoting the deliberative ideal of reasoned decision-making. Would that outcome neutralize the objectionability of corporate political advertising? Would shareholder rights plus a strong disclosure and disclaimer regime suffice to align corporate political advertising with deliberative ideals?

I think the answer must be “no” unless we also assume a generous system of public financing (and perhaps subsidized media access\textsuperscript{193}) for candidates who do not benefit from corporate assistance of any kind. Such a system would approximate the deliberative ideal of equal opportunity for persuasion, as derived from the notion of a public debate in which reason—not wealth—wins the day. Earlier in this chapter I noted two caveats to this argument. First, an effective public-financing system might require a cap on corporate spending, lest corporations (and possibly other wealthy actors) drive up the cost of elections to

\textsuperscript{193} Thompson, “Two Concepts of Corruption,” 1057.
the point that the system becomes either practically or politically impossible for the government to finance. Second, while public financing ensures the ability to respond to negative ads, the ensuing “cycle of charges and countercharges” could drain the substance from the campaign, distracting from the fundamentals that assist in the translation of dispositions into votes.\textsuperscript{194} The increased ability to respond, a boon for balance, would have to be weighed against the possibility of failing to focus on the fundamentals. One way to reconcile this might be to restrict corporate political advertising. Corporate political advertising obviously contributes to a balance problem, but also to a focus problem insofar as corporations, unaccountable as they are, lack incentives to address substantive issues. In other words, tight limits on corporate spending might be needed to fulfill the translation function of campaigns.

Finally, we might seek some way of making the content of political advertising more public-spirited—less negative, more focused on the fundamentals, less rooted in self-interest whether political or corporate. There is no place, of course, for direct governmental oversight of the content of political advertising. We can only hope to change the incentives of political actors in a neutral way. One possibility would be to require advertisements to be longer, a “content-neutral” but perhaps content-enhancing change. Perhaps voters would find two-minute messages on, say, the personal evils of a political opponent so distasteful that sponsors would have an incentive to run more substantive and positive advertisements. A longer format could provide time for giving reasons

\textsuperscript{194} Ibid., 1063.
and making arguments, rather than just making assertions and encouraging actions (vote, call, donate, etc.).

Finally, since it is the case that candidates tend to run more positive advertisements than interest groups, redirecting campaign spending from the latter to the former could have salutary effects. If there must be corporate money in politics, it would be better for it to be funneled through candidates rather than spent independently. The candidates, who are well-known to voters and easily held accountable at the ballot box, have incentives which corporations lack to run advertising which is positive (because some voters might punish excessive negativity) and substantive (because candidates need to lay the ground for their governing agenda).

Conclusion

Limits of some sort on independent corporate advertising seem justified by the ideal of a public deliberation in which advocates can be held accountable for what they say and in which they present public-spirited arguments that could be accepted by others. Under Citizens United, corporate political advertising seems unlikely to meet these ideals. Its sponsors may be shrouded in secrecy, unaccountable to voters or even to shareholders. They may use corporate funds to express their own personal views, raising concerns about the equality and inclusivity of the public discourse. If we try to increase accountability by

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requiring shareholder authorization, we run into further deliberative concerns. Shareholders likely will be able to agree only on the goal of promoting corporate interests. This will exacerbate the natural tendency of corporate political advertising to be driven by such private interests. And these interests will be expressed without the counterbalancing possibility that, through deliberation, the corporation might come to develop more public-spirited reasons. To ask a corporation to develop public-spiritedness is to ask too much of it. We can have the ideal of a public-spirited deliberation, or we can have corporate-funded political advertising, but we cannot have both.

This is all theoretical, of course. Given current constitutional doctrines and political conditions, it is very unlikely that substantive restrictions on corporate political spending will gain any traction. This chapter's argument still seems worth making, as it grounds a common political intuition in democratic theory and contributes to a generally thin literature of applied deliberative theory. In the next chapter I try to show how deliberative theory remains relevant even after *Citizens United*. Without assuming major political or legal changes, deliberative theory still has something to tell us about corporate political advertising.
Chapter IV

Deliberation and Source Transparency

This chapter applies the theory of deliberative democracy to a type of campaign finance regulation towards which the Supreme Court and political actors are still generally favorable: disclosure and disclaimer rules. It thus shows the continued relevance of deliberative theory post-

Citizens United.

Disclosure regulations require political actors (candidates, parties, independent groups) to provide a government agency with an accounting of the money they have contributed to and spent on political campaigns. The government then makes this information available to the public, for instance in searchable online databases. 197 Disclaimer regulations, meanwhile, apply specifically to campaign communications, and require that sponsors identify themselves within their communications. This chapter argues that deliberative theory requires strong disclosure and disclaimer rules for political advertising that is significantly funded by for-profit corporations. By identifying corporate sponsors, these regulations will improve citizen decision-making because citizens will be able to apply the intuition that corporations are fundamentally self-interested and to discount corporate-funded arguments as they see appropriate.

In the existing literature, disclosure and disclaimer laws are usually justified as means to improving voter competence. Voter competence is understood in terms of the ability to translate one's political preferences, opinions, values, and dispositions into votes that accurately reflect these factors. The voter

competence rationale assumes that the primary function of the campaign is translation. As argued in Chapter II, the translation function is consistent with deliberative democracy because, while it de-emphasizes persuasion, it calls for a campaign that meets certain deliberative conditions for high-quality public discourse and reasoned decision-making—rough balance in resources and a focus on the fundamentals. These conditions are deliberative because they are concerned with ensuring that collective decisions flow from reasons and arguments, not from factors thought to be irrelevant, like wealth. In this chapter, I argue that the promotion of reasoned decision-making (i.e. voter competence) requires strong disclosure and disclaimer regulations—or what I will call, for short, source transparency.

Using heuristics, or shortcuts, is thought to be one way in which voters behave competently despite lacking much detailed political knowledge.\(^{198}\) In this chapter, I accept heuristics as a second-best means to voter competence; it would obviously be preferable from a deliberative perspective if voters did not have to rely on shortcuts like party identification or interest-group preferences, but rather substantively learned about the candidates and the issues. But there is nothing inconsistent about pursuing, at once, “idealistic reforms that seek to re-make the rationally ignorant into model citizen-legislators,”\(^{199}\) and more practical reforms that bring voters a little closer to this ultimate ideal. Moreover, the heuristic most relevant to our topic—information about the sponsors of advertising—can be

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\(^{199}\) Kang, “Democratizing Direct Democracy,” 1160.
understood in a deliberative light. Source transparency is a way for voters to assess the reasons and arguments presented in political advertisements.

Finally, I argue that, even apart from the voting context and the translation function, source transparency performs important deliberative functions. Anonymity does not respect the fact that speakers' identities may be important for assessing the quality of their arguments. Moreover, anonymity does not embody the mutual respect and reciprocity of true deliberation, for it prevents citizens from responding to speakers with whom they disagree. Anonymity exacerbates the one-way nature of political advertising, which I noted in Chapter III.

This chapter begins, in Section 4.1, by identifying three possible purposes of disclosure and disclaimer regulations, and explaining why I focus on the goal of increasing voter competence. Section 4.2 briefly discusses the social science on voting shortcuts, which provides the empirical basis for believing that source transparency can increase voter competence.

Section 4.3 argues that source transparency, at least when it comes to corporate-funded ads, is useful to voters for an apparently deliberative reason: Transparency allows voters to assess the motivations, and thus the quality of the reasons, underlying corporate political advertisements. I suggest that one reason why source transparency increases voter competence is because it allows voters to discount arguments which seem to stem from self-interested motives, e.g. if they are put forward by a corporation.

Section 4.4 argues that source transparency is an essential aspect of public
deliberation even *without* considering its beneficial effects on voter competence. Transparency is needed for an honest public discussion to take place. It provides citizens not only with the information they need to vote, but with the ability to respond to speakers with whom they disagree. Transparency can thus increase the accountability of corporate political speakers, even if corporations, by their nature, will tend not to be as responsive to the public as politicians.

Finally, Section 4.5 suggests some policy implications of the arguments presented in this chapter. Most importantly, regulations are needed to ensure that corporate-funded advertising is actually identified as such.

**Section 4.1: The Purposes of Disclosure and Disclaimer Regimes**

The literature on disclosure and disclaimers identifies three possible purposes for these regulations: enforcement of other campaign finance laws (e.g. contribution and expenditure limits); aiding the fight against corruption; and providing useful information to voters.\(^{200}\)

The first of these, enforcement, is a valid and important purpose; without disclosure, it would be impossible to determine when a substantive limit had been breached.\(^{201}\) But as the Supreme Court has recently ruled that limits on independent corporate expenditures are unconstitutional, while blessing disclosure and disclaimer requirements,\(^{202}\) it will be useful to ask whether disclosure and


\(^{202}\) *Citizens United*, 130 S. Ct. at 882-886.
disclaimer regimes have independent foundations.

The second stated purpose of disclosure and disclaimer rules, combating corruption, is not a tenable independent rationale. The Supreme Court in *Buckley* identified this purpose thusly: “[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” However, Louis Brandeis' famous statement that “[s]unlight is said to be the best of disinfectants” notwithstanding, there is little empirical evidence that disclosure deters potentially corrupting relationships between wealthy interests and political actors. Moreover, the objections raised in Chapter I to the idea that corruption can independently ground campaign finance regulation apply here. Concerns about corruption are really about unequal political influence. And egalitarian concerns rest, as also argued in Chapter I, on assumptions about how voters should (and do) make decisions and about the sort of factors that should influence public discourse.

The third stated purpose of disclosure and disclaimer regimes is to improve voters' decision-making ability. In the traditional voter competence model, voters who are provided with information about the source of a campaign communication will be able to use their feelings about the source to decide how its views should affect their voting calculus. The standard for whether a voter

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203 *Buckley*, 424 U.S. at 67.
has used source information appropriately, or whether the voter has voted “correctly” using the information, is whether his or her ultimate vote choice “is the same as the choice which would have been made under conditions of full information.”

This statement of the criterion for correct vote choice calls attention to the fact that disclosure and disclaimer regimes are not understood to provide merely one additional morsel of information to an already well-informed and attentive citizenry. They are understood to provide helpful information to “civic slackers”—voters who are poorly informed, inattentive to politics, and lacking in motivation to learn much about candidates and policies. As Elizabeth Garrett notes, “If all voters are highly motivated when it comes to politics and willing to become sophisticated participants, then the structure and amount of information may be relatively unimportant.” Well-informed voters could assess the important issues for themselves, not rely on cues from outside sources. Disclosure and disclaimer requirements may not be necessary (or in any case would be significantly less important) in a country populated by such voters, who would evaluate campaign messages on the quality of their substantive arguments, investigate their factual claims using reliable sources, and disregard as untrustworthy any messages whose sponsors were not straightforwardly identified.

208 Ortiz, “Democratic Paradox,” 913.
210 Ibid., 676.
Of course, we do not live in such a country. Americans' collective knowledge about politics and public issues has been more or less stable over the last half-century, and remains at a disappointingly low absolute level.\textsuperscript{211} Scholars of public opinion speak of citizens' “rational ignorance”—that is, given the few personal rewards involved in political participation, most citizens do not spend a great deal of time learning about or participating in politics.\textsuperscript{212} To do so would limit the resources they could spend on activities they value more: spending time with family, working, enjoying and entertaining themselves.

According to Garrett, a proponent of the voter competence rationale for disclosure and disclaimer regulations, rationally ignorant voters “should be the primary target of campaign finance reform.”\textsuperscript{213} The social science literature does provide support for the idea that source transparency can help voters make the same decisions they would have made if they had full information. Before discussing the theoretical foundations of disclosure and disclaimer regimes, it will be useful to explain precisely the mechanism by which these regulations are believed to increase voter competence.

\textbf{Section 4.2: Heuristics, Disclaimers, and the Vote Choice}

One of the most important lines of recent research on political behavior has concerned the ability of low-information voters to use shortcuts, or heuristics,


\textsuperscript{212} Kang, “Democratizing Direct Democracy,” 1153.

\textsuperscript{213} Garrett, “Future of Campaign Finance,” 677.
to cast their votes with a high degree of competence.▼ Studies have shown that political knowledge need not be highly detailed—derived from a comprehensive examination of campaign materials, media reports, and policy studies. Voters learn about politicians and policies, about who will best represent them and who deserves their vote, through much less demanding and time-intensive cues. In short, “It is wrong to conclude that people who lack detailed political information cannot make reasoned choices.”▼

Voters use many different cues in order to learn about politics, the most important of which is party identification. “[T]he typical voter refers to the heuristic cue of party identification to figure out which candidate is most likely to match her values and share her interests.”▼ Of course, other cues abound: Voters may use a candidate's personal demographics or character, the country's economic performance, the statements of political elites, and their own opinions about various social groups to inform their decisions—all without gaining detailed knowledge about candidates and policies.▼

Another important cue, most relevant to our discussion of corporate political advertising, is provided by information about the sponsors of particular causes or messages. A study by political scientist Arthur Lupia suggested the power of these interest-group cues. Conducting an exit poll during an election on

▼ Lupia and McCubbins, The Democratic Dilemma, 37.
complicated insurance-related ballot initiatives in California, Lupia compared the voting behavior of three groups: voters who knew details about the substance of the initiatives, voters who did not know much about the initiatives but who knew the preferences of the insurance industry, and voters who neither knew much about the initiatives nor knew the insurance industry's preferences. Voters in the first two groups exhibited almost identical voting patterns, while voters in the third group, ignorant about details and lacking even the interest-group cue, made very different choices. Lupia concluded that those voters who possessed only the interest-group cue “used their knowledge of insurance industry preferences to emulate the behavior of those respondents who had relatively high levels of factual knowledge.” Despite their low levels of information, these voters were “competent” in the sense that they accurately represented their interests (or what their interests would have been under conditions of full information).

If interest-group preferences can be used effectively as a heuristic, publicly identifying interest-group advertising sponsors will provide useful information to voters. Crucially, though, the goal of promoting voter competence requires disclaimers as well as disclosure. A simple disclosure regime “produces mountains of political finance information that must be exhaustively

220 Molly J. Walker Wilson notes that “voters often make incorrect choices... when they rely on cues supplied by sources that are politically motivated,” and she therefore worries about elite manipulation of heuristics. But the government would presumably apply disclosure and disclaimer laws impartially, not from political motivations. Identifying the sponsors behind advertising is simply informational, and would seem not to raise the same concerns about manipulation. See Molly J. Walker Wilson, “Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence,” *Cardozo Law Review* 31 (2009-2010): 745.
mined and analyzed to reveal significant patterns of giving and spending." Even assuming well-constructed searchable online databases, it is unlikely that a significant portion of the electorate will ever use them. The least-motivated and least-informed, whose competence reform is supposed to address, will probably be the least likely to do so.

Of course, the media might be relied upon to make campaign finance information known to the public. But a study of state disclosure regimes found that stronger requirements do not significantly increase the volume of news articles about campaign finance. Moreover, media outlets (particularly opinion-oriented outlets) “may selectively publish or emphasize certain contributor information to further their particular agendas.” It seems appropriate, then, to cut out the middle-man and bring campaign finance information directly to voters in a standardized format. Making the relevant cue more accessible by placing it within campaign communications is a necessary response to limitations on the competence-enhancing capacity of disclosure-only laws.

**Section 4.3: Interest-Group Cues as Reason-Givers**

The idea that interest-group cues, like an ad's corporate sponsorship, provide information which voters can use to make better judgments requires theoretical scrutiny. This section argues that the process by which voter

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221 Briffault, “Campaign Finance Reform 2.0,” 288.
competence is improved fits well with the deliberative ideal of reason-giving communications. Voters use information about sponsorship to assess the arguments being offered in advertising, screening out messages from sponsors whose motives, reasons, and arguments they deem untrustworthy.

The key concept here is source credibility: Source disclosure within a communication “enabl[es] the voter to decide immediately whether [the message] is credible and worth consideration.” Experimental psychology research has found that “a high credibility source is typically more influential than a low credibility communicator when identification is made before the appeal,” but when source identification follows the message, credibility has “no systematic effect” on the persuasiveness of the message. Delaying the revelation that a message comes from a low-credibility source “has consistently been shown to facilitate persuasion.” Furthermore, revealing the source of a message has been shown to induce recipients “to reach reasoned conclusions about the information they learn,” because the realization that a message is meant to persuade them makes them “more likely to think of counterarguments and deliberate about what is being said.”

This research suggests that voters may discount political advertisements from sources they think untrustworthy. The mechanism here seems to be more

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deliberative than the traditional voter competence theorists suggest. It must be remembered that advertisements contain messages, appeals, or arguments which are meant to be persuasive. Knowing the source of an advertisement may help the voter determine if its arguments should be persuasive or not. It is not merely that the voter's feelings about the sponsor translate into feelings about the sponsor's ultimate position.\textsuperscript{229} In between, there must be an assessment of the credibility of the arguments that the sponsor employs.

This credibility assessment may be linked to voters' assessment of the sponsor's motivations. This possibility is most relevant for our discussion of corporate political advertising. When advertising is shown to stem from corporate interests, it seems to become less persuasive. For instance, increased media spending in opposition to an initiative that would have raised the cigarette tax was actually correlated with increased support for the cigarette tax.\textsuperscript{230} It seems that voters learned of the tobacco companies' financial involvement (these companies were heavy spenders against the cigarette tax initiative) and became more likely to vote against those companies' interests.\textsuperscript{231} In this case, it seems incomplete to say that source transparency revealed the tobacco companies' position on the cigarette tax, and that voters then used their feelings about the tobacco companies to determine their own stances on the tax. We have to add another dimension to that analysis: the persuasiveness of an ad's arguments or reasons, which may be affected by the identification of its sponsor.

\textsuperscript{229} See Garrett, “Voting with Cues,” 1027.
\textsuperscript{231} Bowler and Donovan, \textit{Demanding Choices}, 161.
Advertisements sponsored by corporate interests, like tobacco companies, are not likely to be straightforward in their messages. They will probably not say, “Oppose Proposition 99 because it will hurt tobacco companies.” They are likely to be much more evasive. The tobacco companies opposing California's Proposition 99, for instance, argued that the cigarette tax would increase smuggling by youth gangs.\footnote{Kenneth Reich, “Ads Against Tax Hike on Cigarettes Challenged,” \textit{Los Angeles Times}, September 8, 1988, accessed January 8, 2011, http://articles.latimes.com/1988-09-08/news/mn-2127_1_cigarette-tax.} Knowing that this argument came from companies with a significant financial stake in low cigarette taxes, rather than a public-interest group concerned with crime prevention, most likely helped voters discount the argument. In other words, knowledge of the source allowed voters to assess the credibility of the argument itself. It did not simply allow them to use their feelings about the source to determine their own positions. It seems reasonable to suggest that the psychological mechanism underlying the decreased persuasiveness of the tobacco companies' advertisements was that voters understood that the messages were motivated by those companies' corporate self-interest, rather than genuine concern for public safety.

In this way, source transparency can enhance the ability of voters to assess whether a message is backed by good deliberative reasons, that is, public-spirited reasons, or whether the reasons on offer are mere rationalizations for private motivations. Seen in this light, source transparency increases the deliberative capacities of voters by enabling them to access the motivations underlying an advertisement and to decide whether the sponsor's reasons and arguments are
acceptable to them.

If corporate-sponsorship cues are to fulfill their deliberative function as reason-givers, our disclosure and disclaimer laws need to be much stronger than they currently are. Despite the fact that disclosure and disclaimer requirements are already on the books,\textsuperscript{233} it does not seem that real source transparency, at least with regards to interest groups and corporations, has been achieved. Many corporate-funded groups adopt generic, feel-good names that seem designed precisely to avoid actual accountability for their messages.\textsuperscript{234} The rise of these “veiled political actors” (VPAs) makes current disclaimer requirements, as applied to these groups, practically meaningless—the regulations are “not sufficiently aggressive at piercing VPAs to provide information about the real parties-in-interest.”\textsuperscript{235}

Such front organizations are probably effective at changing voters' attitudes from what they would be under a true regime of source transparency. After discovering that more than two-thirds of surveyed voters said they would be more likely to vote for an anti-tobacco proposition given the tobacco industry's opposition, while a similar majority had indifferent or positive reactions to the hypothetical group “Californians Against Regulatory Excess,” the tobacco industry formed a committee with that name.\textsuperscript{236} To indicate that an ad is sponsored

\begin{footnotes}
\textsuperscript{234} Garrett and Smith, “Veiled Political Actors,” 306.
\textsuperscript{235} Ibid., 324.
\end{footnotes}
by groups like “Californians Against Regulatory Excess” reveals nothing about the actual sponsors and funders of the ad. It is impossible for voters to assess the sponsor's reasons and motivations, and thus to properly discount its messages, if necessary, when the true sponsor is hidden. VPAs “can spend millions of dollars influencing the public without being accountable for their efforts,” avoiding any scrutiny of their motives.\textsuperscript{237} It may be quite difficult to construct a legal remedy to this problem; VPAs create “structures resembling Russian matryoshka dolls, where each layer is removed only to find another layer obscuring the real source of money.”\textsuperscript{238}

VPAs can be effective simply by virtue of suggesting that their positions have more support than they do. Interest groups often adopt names that suggest broad grassroots support, even when they are funded by a handful of wealthy interests.\textsuperscript{239} The virtue of source transparency is that voters might be interested to know “that a group that sounds as though thousands of Americans... have bankrolled a movement is really controlled and funded by one multi-millionaire with his own, possibly idiosyncratic vision of reform.”\textsuperscript{240} The mere revelation that an innocuous-sounding group apparently made up of concerned citizens is actually backed by a few corporations or wealthy individuals could serve as a useful cue, helping voters to judge the credibility of the group's arguments. As

\textsuperscript{238} Garrett and Smith, “Veiled Political Actors,” 296.
\textsuperscript{239} High-spending examples from the 2010 midterms include Crossroads Grassroots Policy Strategies, American Action Network, and 60 Plus Association. Franz, \textit{“Citizens United Election,”} 5.
\textsuperscript{240} Garrett and Smith, “Veiled Political Actors,” 325.
David B. Magleby says, “voters infer different agendas from 'pharmaceutical and drug companies' than from the 'United Seniors Association,'” a VPA active in the 2002 midterms.  

Even if an ad's corporate sponsor is not known or particularly distrusted, disclosure of the mere fact that the sponsor is a corporation seems likely to affect the perceived trustworthiness, and consequently the persuasiveness, of the advertisement. As Justice Byron White put it, transparency in advertising should ensure that voters can “recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals.” Such sponsorship cues help voters assess the quality of the arguments put forward in political advertising, and thus promote reasoned decision-making and voter competence.

**Section 4.4: The Deliberative Virtues of Source Transparency**

So far this chapter has explained how source transparency can help voters make better decisions and how the process by which it does so seems to conform with deliberative ideals and models of decision-making. In short, transparency has instrumental value—it helps achieve democratically desirable outcomes. Now I return to expressive or intrinsic values, arguing that source transparency embodies deliberative ideals.

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The proponents of voter competence as an object of campaign finance regulation argue in terms of enhancing the decision-making capabilities of voters considered as individuals. By focusing on the voter competence rationale, the proponents of strong disclosure and disclaimer rules ignore the question of whether source transparency is essential to public deliberation regardless of its effects on voter behavior. Does anonymity have a legitimate place in public deliberation? Does it respect the ideal of an equal, inclusive, civil dialogue?

In this section I answer these questions in the negative. Two reasons are offered. First, consistent with the argument of the previous section, I argue that anonymity does not respect the fact that a speaker's identity may be essential to deliberation on the quality of the speaker's argument. Second, I argue that information about speakers' identities may be useful not only in the voting context, but in public discourse itself: Transparency enables citizens to engage with arguments that have been offered for public consideration and to respond to speakers with whom they disagree.

A. Speaker Identity and Argumentative Quality

On a certain view of the matter, the identity of the messenger might seem utterly irrelevant to the quality of the message, that is, its arguments and reasons. In fact, it might seem that anonymity compels us to focus on the message itself, to assess its logic and force. Perhaps it should not matter who advocates for a particular view; what matters is whether their reasons for doing so are attractive. The Supreme Court endorsed this idea in *Bellotti*: “The inherent worth of the
speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”

Some scholars have also argued for what we might call speaker-indifference. C. Edwin Baker says, “If the importance of speech lies in its provision of information, analysis, or argument to the audience, ... then the source of the speech is irrelevant.”

The heuristics research cited above suggested that speaker identity may be relevant to actual voters. In this section I argue that, from a normative perspective, voters are right to take speaker identity into account: The worth of an argument is indeed affected by the identity of its proponent. In fact, a message’s meaning itself may be affected by the identity of the messenger. This is obviously true in private life. As Stanley Fish writes:

Suppose I receive an anonymous note asserting that I have been betrayed by a friend. I will not know what to make of it—is it a cruel joke, a slander, a warning, a test? But if I manage to identify the note’s author—it’s a friend or an enemy or a known gossip—I will be able to reason about its meaning because I will know what kind of person composed it and what motives that person might have had.

In political life, this argument seems to apply with equal strength. An argument for universal health care means something different, and may be more persuasive to some, when it comes from a Republican; the same is true when a Democrat argues for welfare reform. An attack on a political candidate might ring less true when it is revealed to originate with his opponents’ personal friends, rather than

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243 Bellotti, 435 U.S. at 777.
an independent group of concerned citizens. An appeal against malpractice reform might not be so persuasive when it comes from trial lawyers; an appeal against a gas tax might not be so compelling when it is funded by oil companies. The identity of the source provides context, assisting the message's recipients in determining whether the message should be taken at face value or whether less-than-pure reasons underlie it.

Thus, whether or not source transparency is a competence-enhancing heuristic, transparency seems like a prerequisite for an honest and respectful exchange of views. Whether or not any voters' minds are actually changed by information about an ad's sponsors, it is necessary information to have in order for voters to evaluate the ad's arguments. Providing this information puts sponsor and voter on an equal footing. Voters are respected as decision-makers when they are provided with all the information they could use to make a decision, when no information that is properly relevant to their choice is hidden from them. Disclosure and disclaimer laws “send[] a powerful signal to voters and others that democratic institutions are intentionally designed to empower voters by providing them the data necessary to make good judgments in the voting booth.”

Voters deserve full and honest information, whether or not their votes are actually altered by the additional information.

B. Speaker Identity and Deliberative Exchanges

Source transparency is also valuable outside of the voting context. This is a blind spot in the voter competence literature, and focusing on deliberation helps

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It is important to understand the motivations and reasons underlying speech not only because this makes one more informed as a voter, but because it makes one more competent as a deliberator in the interpersonal sense. It enables one to respond to arguments that are offered in the public discourse; it promotes mutual understanding as well as honest debate between individuals and groups. Under current law, it takes a great deal of effort to identify the ultimate sponsors and funders of interest-group advertising. Engaging with those sponsors, debating them or challenging them, becomes that much more difficult.

The ideal of a public deliberation assumes a certain reciprocity or accountability between deliberators. Each participant is both a speaker and a listener. One has a right to make one's views heard, but also an obligation to remain open to opposing views. Anonymous political advertising disregards this ideal. Advertising is by nature a one-way form of communication, as noted in Chapter III. There is a clear separation between speaker and listener/viewer, and the two roles are not reversed, at least not within the advertising forum itself. I suggested in Chapter III that corporations are more unaccountable than candidates—they have no incentive to become anything other than speakers, to become listeners. This problem will be particularly acute when corporations cannot even be identified as the ultimate sources of advertising.

Consider an advertisement by a hypothetical interest group, Citizens for Oil Independence (COI). This group, as will come as no surprise, is largely a front
for domestic oil companies. Perhaps a COI ad would show a family deciding that the high price of gasoline makes their planned road trip to the Grand Canyon prohibitively expensive. The first benefit of a strong disclosure and disclaimer regime, as discussed in the previous sections, is enhancing voter competence by enabling voters to discount this message as a self-interested rationalization that obscures corporate interests. Moreover, as argued in the previous subsection, voters have an interest in information about the true backers of COI whether or not this information affects their vote choices; it is information that affects the meaning and import of the advertisement. Finally, the argument here is that, by knowing COI's true origins, individuals and other interest groups can respond directly to speakers with whom they may disagree. The message of this self-interested group can be challenged not only within the minds of individuals, but by other political actors engaged in deliberation.

Here the value of transparency lies not with its promotion of voter competence, but its contribution to an intrinsically valuable give-and-take over political ideas. This is the sort of exchange which deliberative democracy aspires to: a public debate over the merits of arguments. If the identity of the speaker is tied to the meaning and merit of its arguments, as the previous subsection argued, then only transparency enables this sort of public debate. Deliberative democrats hope that, in this debate, citizens will gain a better understanding of each other's views and their own. But the views of corporations cannot be understood, let alone challenged, if their contributions to the discourse are effectively
anonymous. Requiring transparency in advertising helps to turn a one-way mode of communication into a two-way public exchange.

If corporations knew they could be identified and challenged in the public discourse, perhaps some would stop running advertisements altogether. The literature speaks of this potential consequence as a “chilling effect” on speech.\textsuperscript{247} However, this chilling effect is possible only because disclosure of the efforts of distrusted groups is “so directly linked to voter competence.”\textsuperscript{248} That is, because the identification of oil companies as the sponsors of an advertisement is likely to be relevant to voters, the companies want to avoid that identification at all costs. This situation presents a dilemma to those who think that the First Amendment provides that “no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from [the people].”\textsuperscript{249} On the one hand, disclaimer requirements might discourage certain speakers from presenting their opinions; on the other hand, the identity of those speakers is “relevant information” in making a full appraisal of the quality of their arguments.

The balance, in my view, should be struck in favor of transparency. If corporate interests do not think their communications could possibly be persuasive under a regime of transparency, then their hypothetical contributions to the marketplace of ideas could not have been very valuable. The Supreme Court worried in \textit{Buckley} that disclosure might cause a “reduction in the free circulation

\textsuperscript{247} Mayer, “Disclosures about Disclosure,” 271. See also Garrett and Smith, “Veiled Political Actors,” 304.
\textsuperscript{248} Garrett, “Future of Campaign Finance,” 686.
\textsuperscript{249} Meiklejohn, \textit{Free Speech}, 88.
of ideas,” but ideas themselves are not fully or accurately expressed when the identity of their proponents is hidden. Transparency is needed so that the ideas expressed in political advertising may be fully understood and so that citizens and other political actors can engage with the actual sponsors of advertising.

Section 4.5: Policy Implications

I have spoken throughout this chapter of “stronger” disclosure and disclaimer requirements, and it is worth elaborating what exactly that means.

One policy implication of my argument is that in-ad disclaimers should be present from start to finish in some form, which they need not be under current law. The psychological research cited in Section 4.3 suggests that delaying the identification of a communication's source increases the persuasiveness of the message, perhaps because recipients who know that a message is meant to be persuasive are more likely to challenge it. This creates an incentive for low-credibility messengers (corporations foremost among them) to, first, avoid identification, and second, when that is impossible, delay it. Because identifying “notorious economic groups may increase voter competence, often in ways that the economic groups will not like,” laws must take account of the psychological literature and be designed to maximize the accessibility and effectiveness of sponsorship cues.

250 Buckley, 424 U.S. at 71.
251 For radio advertisements, spoken disclaimers could be placed at beginning and end.
Second, as suggested above, every effort should be made to uncover “veiled political actors”—so that their real identities can be used as cues, so that voters can fully assess their arguments, and so that others can engage in public discourse with them. It will be the task of experts on legislation and regulation to devise ways to identify the real interests (often corporate interests) behind interest-group political advertising.

Third, it seems that disclosure and disclaimer rules are particularly appropriate in the case of corporations. Lloyd Hitoshi Mayer, expressing skepticism about the value of source information as a heuristic, argues that voters will not recognize most advertising sponsors, anyway.255 But this seems irrelevant to the case of corporations, whose profit-seeking motives should become clear from the mere fact of their corporate status. Corporate sponsors need not be household names so long as they are identifiable as corporations.

Individuals, on the other hand, are not likely to be widely recognized, and it is also unlikely that their motivations could be surmised, as those of little-known corporations may be. For this reason, there is a consensus in the literature that disclosure and disclaimer laws, in order to meet their voter competence objective, need only uncover the activities of well-known actors, which is likely to mean corporations and prominent independent groups like the NRA and the AFL-CIO.256 “[E]ven wealthy individuals who solely fund [political advertisements] may not be known to most voters,” and so disclosure of their

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names “by themselves may not provide a useful cue.”

But there are some exceptions to this rule; sometimes it seems possible to provide helpful cues even in the absence of voter recognition of the contributors themselves. First, in the case of wealthy individual donors, it may be useful to disclose, along with their identities, their occupations or employers. Mayer himself notes the case of Don Blankenship, head of the A.T. Massey Coal Company, who spent over half a million dollars supporting a candidate for election to the West Virginia Supreme Court. Knowing about Blankenship's occupational background “might have helped to inform voters.” Although Blankenship himself may not have been a household name, knowledge of his occupation or employer could serve as a useful heuristic for judging the political messages produced with his financial support. Furthermore, including employment information in disclaimers that identify the top financial backers of an advertisement would help to overcome the difficulty presented by the fact that “notorious groups... that fear a negative voter reaction will use any exemption [for individual contributions] to send their financial support through individuals.”

The DISCLOSE Act, which failed to pass in 2010, would have required disclaimers identifying advertisements' top individual donors where applicable, though it would not have required mentioning their employment information. Stronger disclosure requirements for wealthy individuals, including employment

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258 Ibid., 283.
259 Ibid.
information, could be an acceptable substitute for actual spending limits, which raise more serious concerns in the case of individuals as opposed to corporations.

There may also be an exception to the idea that identification of the biggest donors exhausts the possible heuristics that will be useful to voters. There could be a requirement that interest groups disclose the proportion of their finances that comes from small donors, however defined. Voters might decide that a message backed by many small donors is more likely to be honest and public-spirited than a message backed only by a handful of very wealthy donors. Thus, while the identities of individual contributors may be irrelevant to voters, the fact that a group has many such contributors may affect voters' interpretation of its advertising. We might call this the “grassroots cue.”

Finally, in state elections, the presence of out-of-state interests backing a particular initiative or candidate may serve as a cue regarding the trustworthiness of their advertising, indicating that their message “is not necessarily in the best interests of the state or its citizens.” For instance, in California Pro-Life Council v. Getman, the state cited a focus group which found that telling voters that a proposition was supported mostly by out-of-state interests caused many voters to swing into opposition. Thus, even if voters do not know an individual or group by name, simply knowing that they are from out-of-state might help the voters better judge the quality of their reasons and arguments. Perhaps interest groups active in state elections should be required to disclose the proportion of

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their funds which comes from out of state. We could call this, of course, the “outsider cue.”

This chapter has now identified many changes that could be made to strengthen disclosure and disclaimer requirements, bringing them closer into line with the voter competence rationale. First, identifying disclaimers should be present throughout advertisements, or at least at the beginning as well as the end. Second, regulations should provide for the identification of ultimate sponsors and funders, breaking down the convoluted structures used by “veiled political actors.” Third, disclosure and disclaimer requirements should be limited to the best-known and most high-spending groups, with the following caveats: (1) including employment information may enable voters to better assess advertising sponsored by wealthy individuals; (2) the grassroots cue may help voters judge whether an ad's motivation is public-spirited or self-interested; and (3) the identification of out-of-state sponsors may serve as a heuristic in state elections. Whether these regulations will be sufficient to mitigate corporate political influence, or whether they need to be supplemented by public financing and substantive limits on corporate spending, are questions about which I remain agnostic here. The policy proposals of this chapter are meant to describe what may be done within the limits set by current constitutional doctrine and political conditions.
Conclusion

All of these policy recommendations stem from a greater appreciation of the importance of increasing voter competence through the provision of helpful cues. I have argued that this goal is easily understood through the lens of deliberative theory. Although deliberative democrats would prefer that voters conduct a thorough inquiry into political issues and candidates, there is nothing unacceptable about heuristics as a realistic alternative. If voters' ability to reason about politics and make informed political choices can be increased through heuristics, deliberative democrats should welcome that development.

Moreover, as Section 4.3 argued, the process by which voters use source transparency to make better political decisions should be understood as a deliberative process in which they evaluate the quality of reasons and arguments. Armed with information about an ad's sponsors, voters can ask themselves whether the ad's arguments are most likely public-spirited or self-interested. This is highly compatible with deliberative democracy's notion of public reason and its ideal of collective decisions based on the strength of arguments, not irrelevant factors like wealth.

Furthermore, as argued in Section 4.4, source transparency may be required even if it does not change voter behavior. It may be intrinsically valuable. First, knowing the source of an argument or idea is essential to understanding its meaning, assessing its validity, and incorporating it into one's own worldview. An ideal deliberative discourse should provide voters with all of
the tools appropriate for decision-making, whether the use of those tools changes their behavior or not. Second, source transparency enables a public exchange of views between advertising sponsors and other political actors who want to engage with them. Anonymity exacerbates the one-way nature of advertising, whereas transparency adds a deliberative element to it: the possibility that ads will serve as starting-points for a public discussion between proponents of different views.

This chapter has provided a theoretical framework for disclosure and disclaimer laws inspired by deliberative democracy. It has dug beneath the Supreme Court's recognition of a “governmental interest in providing information to the electorate”\textsuperscript{265} and specified the ways in which certain information may be useful to voters and necessary for the promotion of an honest, open discourse. Finally, this chapter has showed how deliberative democracy remains relevant even when we stay within the tight confines of current constitutional doctrine.

\textsuperscript{265} \textit{Citizens United}, 130 S. Ct. at 914.
Chapter V

Some Criticisms Considered

I have argued so far that corporate political advertising does not accord with the ideals of deliberative theory. Corporations are self-interested, unaccountable, and often anonymous when they contribute to the public discourse. Moreover, they have such resources at their disposal, resources without any relationship to public support for their political ideas, that the possibility of their drowning out alternative views is real. Without some regulation of corporate political advertising, self-interested actors could thus come to dominate an important arena of political discourse. Deliberative democrats cannot countenance that possibility.

In this final chapter, I put forward and respond to three likely objections to my arguments in favor of a deliberative campaign and restricted corporate political advertising.

First, in Section 5.1, I consider what I call the laissez faire argument: the idea that government must not interfere with the terms and conditions of public debate, that this task properly falls only to citizens. I identify three faulty notions on which I take this view to rest: a dichotomy between governmental and popular control of the discourse; an assumption about the possibility of government neutrality; and the idea that campaign regulation is disrespectful of citizens who fail to live up to reformers' standards.

Then, in Section 5.2, I consider a related view: the argument that citizens
should take responsibility for avoiding speech that they find objectionable. Proponents of this view would encourage voters who do not want to be influenced by corporate political advertising to simply ignore it. I find that this response is unhelpful because the people most likely to take affirmative steps to avoid political advertising are probably not those who would be influenced by it in the first place.

Finally, Section 5.3 deals with the question of whether corporations can be distinguished from other types of organizations whose full political participation seems unobjectionable. I argue that corporations are unique in that their capacity to participate does not correlate in any way with levels of public support for their views. This section also briefly considers the ramifications of my argument for media corporations.

This chapter is not meant to be an exhaustive review of the possible problems with my argument. It simply responds to a few of the most serious challenges.

**Section 5.1: The Laissez Faire Argument**

I have argued in terms of deliberative theory for a more reasoned decision-making process—one characterized by the exchange of mutually accessible reasons, which corporations seem unable to supply, and by strong disclosure and disclaimer rules, which help voters assess the quality of the arguments put forward in corporate political advertising. But one might think that democracy
requires pluralism on the question of how citizens make political decisions.\textsuperscript{266}  
Government regulation affecting how citizens may properly cast their votes might seem the very antithesis of democracy.

This view, which I call “laissez faire” because it rejects governmental interference in what it sees as rightfully unencumbered exchanges between free persons, has received powerful endorsements from current members of the Supreme Court. Justice Clarence Thomas has argued that the Constitution “leaves it entirely up to citizens and candidates to determine who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade.”\textsuperscript{267}  
Justice Samuel Alito has written, in an opinion for the Court, “Leveling electoral opportunities means making and implementing judgments about which [candidate] strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers [this power] upon voters, not Congress....”\textsuperscript{268}  
This laissez faire argument has a long history on the Court. It can be found in \textit{Buckley}, which held that “the people... must retain control of the quantity and range of debate on public issues in a political campaign.”\textsuperscript{269}  
Perhaps the most direct statement was in \textit{Cohen v. California}, where the Court said that the First Amendment “is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us....”\textsuperscript{270}

\begin{itemize}
\item \textsuperscript{266} Ortiz, “Democratic Paradox,” 913.
\item \textsuperscript{267} Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 420 (2000).
\item \textsuperscript{268} Davis v. Federal Election Commission, 554 U.S. 724, 742 (2008).
\item \textsuperscript{269} \textit{Buckley}, 424 U.S. at 57.
\item \textsuperscript{270} Cohen v. California, 403 U.S. 15, 24 (1971).
\end{itemize}
There are three problems with this intuitively plausible and powerful criticism of campaign regulation. The first is that it suggests we have only two options: either governmental control or popular control of the “arena of public discussion.” The second problem is the assumption that government can be neutral when it comes to the character of the political campaign. The final problem is the notion, sometimes expressed by laissez faire advocates, that holding citizens to reformers' standards (including deliberative standards) is disrespectful of citizens' free choices.

A. The False Choice Between Governmental and Popular Control

The first problem with the laissez faire argument against campaign finance regulation is the assumption that, so long as the government's hands are kept off, the people will control the marketplace of ideas. Owen M. Fiss and Jack M. Balkin both connect this assumption to the archetypal image of speakers on street corners.  

So long as the police do not arrest the street corner speaker, his free speech rights are secure. And, in bygone eras, speaking on a street corner may even have been a good way of getting one's voice heard. But clearly, given modern media, street corner speakers no longer have effective voices. Those with access to media owned by private parties, like newspapers and television stations, will have a much more effective right to free speech than those who do

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272 Balkin, “Realism about Pluralism,” 407; Fiss, “Social Structure,” 1410. Fiss and Balkin wrote before the advent of the Internet, which is of course more inclusive than traditional media. But access to large audiences, and thus an effective political voice, is still rare, and often controlled by major media corporations.
not. Opportunities to speak are not infinite, as the street corner image implies. Not everyone can get their say in the newspaper or on television: Many people cannot afford the costs, the public's attention span is limited, and these media do not have enough space for a fully inclusive public discourse.273 Our political life is characterized by scarce communicative resources, not the unlimited ability (assuming governmental non-interference) of the street corner speakers of yore.

On the laissez faire view, which requires only governmental non-interference, this is no problem at all. But the consequences of the laissez faire view are extreme and unpalatable. Governmental non-interference “does not leave a vacuum with no power, no resources, and no advantages, but rather some existing distribution of power, resources and advantages.”274 The formal right to speak means very little without state intervention of some sort. Jack Balkin provides the example of parks and streets, which the state makes available for public demonstrations. Public forums like these are important because they provide an opportunity for effective public speech to those who cannot purchase access to a major media outlet or property rights to, say, land adjacent to City Hall.275 In this context, we seem to recognize that “expressive liberty is not simply the right to make noises in the air directed to no one in particular.”276 Yet this is the only liberty guaranteed by the overly formal right to governmental non-interference.

275 Balkin, “Realism about Pluralism” 400.
276 Ibid., 401.
Owen Fiss, meanwhile, puts an emphasis not on effective liberty but on the quality of public discourse. It is not just that an unregulated free speech marketplace would not ensure an effective voice for many, but also that, as a consequence, the public discourse may not be “sufficiently rich to permit true collective self-determination.” Here Fiss echoes deliberative theory's ideal of inclusivity: Public debate needs to feature a real diversity of voices.

That the right to free speech is an instrumental right (because it aims at the goal of a robust public discourse) may seem controversial. One could say that the right to free speech is grounded on the idea of autonomous, individual self-actualization—that this right is intrinsic to human beings, not goal-oriented. But notice that, if that is the case, the argument for extending the right of free speech to corporations would be quite weak—corporations do not have minds or souls or selves that can be actualized. This probably explains why even laissez faire theorists, who defend corporate speech rights, “assume[] that the protection of autonomy will produce a debate on issues of public importance that is... 'uninhibited, robust, and wide-open.'” These theorists have to argue that full corporate speech rights are compatible with this kind of public discourse.

However, once a rich public discourse is recognized as the primary goal of freedom of speech, it should become clear that the government is not the only threat to that goal—and thus not the only potential enemy of free speech. As Fiss

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277 Fiss, “Social Structure,” 1411.
279 The ramifications of this claim are considered in Section 5.3.
says, “A corporation operating on private capital can be as much a threat to the richness of public debate as a government agency, for each is subject to constraints that limit what it says or what it will allow others to say.” It is not only media corporations that pose this threat, but any corporation that can afford to buy up space in the media, leaving little behind for most citizens. Unregulated public debate could thus come to be dominated by the already powerful. This is the concern motivating egalitarian theorists like Ronald Dworkin, obviously, but it is also the concern motivating deliberative theorists—concern for the quality of public discourse and the closely related quality of citizen decision-making.

Understood in this light, governmental action designed to enhance the quality of public discourse can be seen not as oppressive, as the laissez faire advocates see it, but as liberating. The key question will always be whether the regulation actually does enhance public debate, or whether it stifles it. That question cannot be settled in the abstract, of course, but only through experience and experimentation.

**B. The Impossibility of Government Neutrality**

Another flawed assumption underlying the laissez-faire argument is that it is possible for the government to remain neutral in its treatment of the political campaign. Cass Sunstein draws an unflattering connection between this assumption and the *Lochner*-era style of judicial reasoning. In the *Lochner* era, regulation of markets “was seen as interference with an otherwise law-free and

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282 Fiss, “Why the State?,” 787.
unobjectionable status quo.” As the Supreme Court came around to the view that, in fact, property rights are created by law, not by nature, taking from some to give to others became more legitimate. But *Buckley* returned to *Lochner* with its declaration that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” Here once again was the idea that governments are only neutral when they stay out; otherwise they risk interfering with some naturally occurring state of affairs. On the contrary, Sunstein argues, “a system of unlimited campaign expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence.” The laissez-faire argument assumes that citizens can make political decisions without any structure determining *how* they make those decisions. But governmental refusal to structure is itself a substantive decision about what will in fact structure voter decision-making.

An analogy might help illustrate this argument. C. Edwin Baker offers the job application as an example of a campaign-like institution that is legally regulated to “support the integrity and the effective and fair functioning” of its process. Job applicants’ speech is, of course, limited only to what the employer considers relevant to the job. When tests are administered or interviews offered, applicants are given the same or roughly the same amounts of time. The goal of

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284 *Buckley*, 424 U.S. at 49.
these regulations is to select the best person for the job, and to make the process as fair as possible to all applicants. The employer has the right to regulate this process because hiring the best candidates is, after all, essential to the employer's self-governance.

The analogy to the democratic campaign is an easy one: The institutions of the political campaign are like the job interview, resume drop, cover letter, etc. They can be regulated by the employer (the citizenry) in order to enhance their quality and ensure that they fulfill their functions. An employer who refused to regulate its application process would open the door to favoritism, nepotism, and other evils. Perhaps in some sense it would also increase the “freedom” of applicants and their evaluators, but it would still be making a substantive decision about the values it wants to promote. Similarly with the political campaign: The decision to regulate or not to regulate is a decision about what values the government wants to promote, and the government cannot remain neutral among competing visions or interests in making that decision.

C. Are Deliberative Standards Disrespectful?

Deliberative theory asks voters to engage with each other sincerely, openly, respectfully, public-spiritedly, etc. It thus might be said to disapprove of voters who fail to meet these standards. Daniel R. Ortiz thinks we should be very careful about “disrespecting the ways some voters make choices.” For democracy presupposes the equality of citizens, yet many campaign reformers'
arguments seem to suggest that one way of voting is more valuable than another and ought to be encouraged while another is discouraged. To protect democracy as they see it, then, reformers might be violating it. Ortiz calls this a “democratic paradox.”

To elaborate on this alleged paradox, Ortiz presents several analogies to the case of campaign finance: property qualifications, pauper exclusions, poll taxes, race- and gender-based disenfranchisement, and literacy tests. Each of these measures was once justified by proponents as a way of promoting “independent, informed choices.” These policies diluted or excluded the votes of people who were expected to vote in certain unfavored ways, whether because they were uninformed, unintelligent, or dependent on others. In so restricting the franchise, these measures were thought to preserve equality among the engaged and informed, just as campaign finance reform “is thought to maintain equality of influence among engaged voters by preventing some from directing the vote of others who are susceptible to mass advertising.”

If the analogy to poll taxes and the like is uncomfortable, a more friendly analogy for campaign reformers is vote trafficking. It seems that when A sells his vote to B, the real victim is a third party, C, whose voting power is diluted because B's voting power has been doubled. So long as A and B vote independently of one another, C cannot complain; but when there is collusion between them, they deprive C of the expected value of his vote. This might

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289 Ibid., 893.
290 Ibid., 906.
291 Ibid., 907.
292 Ibid., 911-2.
seem rather like what goes on when citizens make uninformed political choices based on campaign advertisements: The engaged voter's power is diluted when unengaged voters stop making independent judgments.293

The fact that vote trafficking is still illegal demonstrates that independent judgment, as a goal, remains important to us. The problem with restrictions on the franchise, we understand now, is not that independent political judgment is unimportant. The problem is that historically excluded groups were perfectly capable of exercising it.294 The question, then, is whether voters who are susceptible to advertisements surrender their independent political judgment. In order to work, the analogy to vote trafficking depends upon, first, the descriptive assumption that some voters really are civic slackers; and second, the normative assumption that civic slackerhood is an inferior mode of decision-making.295 In other words, campaign reformers must “eschew pluralism among different conceptions of how people should vote.”296

Both the descriptive and the normative assumption seem quite plausible. In fact, the more controversial of the two might be the descriptive: While voter incompetence was once widely accepted, recent work on heuristics has at least cast some doubt on the matter. (Though the use of heuristics certainly has its critics.297)

Here I will focus on the normative assumption: Is it permissible to assume

293 Ibid., 913.
294 Ibid., 896.
295 Ibid., 913.
296 Ibid.
that civic slackers should be reformed, that their political behavior is less desirable? First, it should be noted that even optimists about heuristics are committed to distinguishing between different voting behaviors—voters are “better” when they use shortcuts than when they do not. And not all shortcuts are created equal. Nobody would be satisfied if the most common shortcut used to evaluate a candidate were his or her attractiveness.

What Daniel R. Ortiz and others really seem to find problematic is the idea of embodying these judgments in law. There is always a hesitance about using the law to make people “better.” But no system of election laws can fail to advantage voters who behave one way over those who behave differently. A system that allows campaign advertising to take the place of other forms of communication privileges voters who enjoy and respond to advertising. A system that provides frequent candidate debates will disproportionately engage a different set of voters. Holding elections on a weekday is convenient for one set of voters, inconvenient for another. The question we must inevitably weigh is: Which voters, or which type of political behavior, do we want to facilitate and encourage?

Deliberative democracy, as we have seen, asks voters to be engaged and informed about politics; to know where they stand and to discuss their positions in open forums; to treat their own attitudes as provisional and to engage civilly with others; and to present public-spirited reasons and arguments which others could plausibly accept as their own. A deliberatively engaged public could be attractive for a variety of reasons. Outcome-oriented thinkers will look for objectively better

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298 Fiss, “Why the State?,” 788.
political decisions or greater equality in representation. More abstractly-minded theorists might think that humans are fundamentally political animals who find meaning in the world of collective decision-making, or that a pluralistic society requires dialogue as the only means to cooperation.\textsuperscript{299}

For me, the appeal of the deliberative vision is that it expresses an optimistic view of voters' innate capacities. Ortiz sees it the other way: Regulating campaigns with an eye towards their deliberative quality is disrespectful of voters who do not meet the deliberative standard. Ortiz might be right that it is disrespectful of some citizens' current behavior. But the deliberative democrat believes that every citizen can engage in reasoned decision-making, given the right institutional framework and incentives. Deliberation-minded regulation sends the message that all voters can and should be reflective and informed, without singling out any individuals as insufficiently deliberative. Thus, while the main goal of this section was to neutralize the idea that campaign regulation violates a democratic standard, i.e. the laissez faire principle, it also seems to me that deliberation-minded regulation is appealing on its own terms.

**Section 5.2: The Hardy Listener Argument**

The idea that freedom of speech means freedom from government interference gives rise to another potential argument against regulation of corporate political advertising: It does not respect citizens' own responsibility for

\textsuperscript{299} For this last idea, see Bruce Ackerman, “Why Dialogue?,” *The Journal of Philosophy* 86 (1989): 10.
what they see and hear. This is a corollary of governmental non-intervention: The people themselves are charged with determining the content and terms of public discussion. When confronted with speech that offends or harms them, they do not look towards government, but simply turn away from the speech. On this view, citizens should be what I call hardy listeners.

A well-known Supreme Court case, *Cohen v. California*, illustrates the appeal of this view. Cohen was arrested when he appeared in the Los Angeles County Courthouse wearing a jacket that bore the words: “Fuck the Draft.” He was charged with disturbing the peace. The Supreme Court reversed his conviction, explaining that the First Amendment “must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.”

One consequence of this principle is that citizens must be hardy listeners: “To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance.” However unproductive this tumult might be for the public discourse, the proper response is not government regulation, but for unwilling or offended citizens to “avoid further bombardment of their sensibilities simply by averting their eyes.”

This principle might seem to apply easily to the case of political advertising. When confronted with a television or radio commercial, citizens can simply turn off the device and ignore the message. They ought not appeal to

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300 *Cohen*, 403 U.S. at 23. Emphasis added.
301 Ibid., at 24-5.
302 Ibid., at 21.
government to regulate the discourse, but regulate it themselves. If the sponsors of political advertisements discover that people ignore them, they will presumably cease sponsoring such advertisements.

The problem with the application of the Cohen argument to the case of political advertising is suggested by another line of Court precedents, which distinguish the home from the public sphere and limit the ability of speakers to address a “captive audience.” In public (e.g. in a courthouse), one must expect to encounter a certain amount of unwanted speech. To give citizens veto power over what they see and hear in public would have a disastrous effect on public discourse, reducing its vibrancy to the level thought suitable by the most easily offended among us. But the home is different: There citizens should have a degree of autonomy regarding what is said and heard. The Court in Rowan v. Post Office Dept. held, for example, that to require homeowners to receive unsolicited, unwanted mailers would “license a form of trespass.”303 The Court has even recognized that a “captive audience” can exist outside the home. For instance, in Lehman v. City of Shaker Heights, the Court held that a public transit car was not a public forum because the audience was captive—unable to avoid advertising messages even if they wanted to.304 Therefore a political candidate could be prevented from advertising there, presumably in the interest of preserving some standard of public discourse.

My point is not to make a doctrinal argument, but to show how these cases

raise important questions: Are people watching TV or listening to the radio a captive audience? Should we advise recipients of unwanted political advertisements to simply turn away? Answering these questions fully would require empirical evidence on how people actually respond to unwanted political advertisements. Absent such evidence, I suggest that demanding that people either receive certain messages or ignore them may not be reasonable in the case of modern political advertising.

The law at issue in *Rowan* provided a procedure by which homeowners could avoid unwanted mailers of a sexually provocative nature. An analogous law applying to the case of political advertising would give homeowners the ability to avoid political advertisements if they, say, petitioned their television provider. The problem with such a law, which is the same problem with demanding that people simply change the channel, is that the only people who would avail themselves of this procedure would be those least in need of doing so. The people who would go through the trouble of insulating themselves from political advertisements would likely belong to one of two groups: those who are completely indifferent towards politics, and those who are highly engaged and wish to avoid what they see as objectionable appeals. But the real targets of campaign finance regulation, the people whom reformers worry about, are the modestly engaged. Reformers are concerned about those who vote (unlike the completely indifferent), but who are not informed enough to understand the issues and how their dispositions should be translated into votes (unlike the highly engaged).
Indeed, there is evidence that the less-informed and less-engaged are most susceptible to political advertising. One study found, for instance, that political advertising is not only persuasive in the sense of altering vote choices, but that this effect is “higher among those individuals sufficiently aware to be exposed to campaign communication but not so aware that they either hold strong prior beliefs or can resist messages contrary to those beliefs.”\textsuperscript{305} Another study found that the “moderately engaged,” those who expressed an initial candidate preference but were not closely following the campaign, were the most susceptible to persuasive appeals in political advertising.\textsuperscript{306} Finally, other studies have found that high-information voters are less likely to be affected by different ways of framing an issue.\textsuperscript{307} In light of this evidence, my concern about telling people to change the channel (or, even more demandingly, to contact their provider) is that the people most likely to do so are those who would be least influenced by political advertising in the first place. Those who already have the mental tools to resist political advertising seem more likely also to take conscious action to avoid it.

\textbf{Section 5.3: Can Corporations Be Distinguished from Other Associations?}

In the Introduction, I explained that one reason to focus on corporate political speech is that the case against it seems stronger than the case against the

\textsuperscript{305} Huber and Arceneaux, “Persuasive Effects,” 978.
\textsuperscript{307} See, e.g., Chong and Druckman, “Framing Public Opinion,” 649.
speech of wealthy individuals. To the extent that freedom of speech is important to individuals because self-expression is intrinsically valuable to them, it would seem not to protect corporations, which do not, as I said in Section 5.1, “have minds or souls or selves that can be actualized.” This argument is so common and so plausible that I have mentioned it in passing without considering its potentially troublesome ramifications.308

It is obviously true that corporations lack literal consciences and minds and so forth. But the idea that only individual persons who possess these things deserve freedom of speech risks sweeping too broadly. An association of individuals who all agree on a political principle—say, the National Rifle Association—surely deserves full freedom of speech. One might say that this is because the group approximates an individual's unity of purpose. But corporations might meet such a standard under a regime of shareholder authorization. And yet such a scenario is precisely what I have found most objectionable—for the corporation would, in all likelihood, unite around the common purpose of promoting its own profit-maximizing interests.

There has to be another way of distinguishing organizations like the NRA and the NAACP—as well as non-profit corporations like Citizens United itself—from for-profit corporations. One amicus brief, filed on behalf of the Family

308 Judicial dissenters from pro-corporate speech decisions have used this argument prominently. Justice Stevens wrote in his Citizens United dissent: “[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires.” Citizens United, 130 S. Ct. at 972 (J. Stevens, concurring in part and dissenting in part). Justice White wrote in his Bellotti dissent: “[C]orporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech.” Bellotti, 435 U.S. at 807 (J. White, dissenting).
Research Council in *FEC v. Wisconsin Right to Life*, suggests a plausible distinction: Whereas non-profits get their support from individuals who are interested in supporting a particular cause, for-profit corporations do not, and therefore their political spending bears no relationship to existing public support for their ideas.\(^{309}\) Groups like the Family Research Council can legitimately complain, when restrictions are placed on their spending, that this “effectively silences people of modest means who band together to amplify their ideas in the political marketplace.”\(^{310}\) For-profit corporations cannot so complain, it seems.

Admittedly, this distinction would not fare well under the framework set out in *Citizens United*, which rejects regulations based on the identity of the speaker.\(^{311}\) My argument requires consideration of speakers’ identities, and thus requires a retreat from this aspect of *Citizens United*. As Joshua Cohen points out, speaker-indifference makes sense “if you think of political speech as a source of information for voter/judges, and of all agents as equally good (and bad) sources of information.”\(^{312}\) But the deliberative perspective that he and I advocate requires “thinking of citizens as speakers,”\(^{313}\) and the characteristics of individual speakers differ fundamentally (so I have argued) from the characteristics of corporate speakers. Corporations do not provide equally good information compared with individuals—not if one thinks that the most relevant information for collective


\(^{310}\) Brief of Family Research Council, at 20.


\(^{313}\) Ibid.
decision-making is what various actors consider to be the common or public good. It becomes clear that this normative perspective may be embodied in law once we recognize that some normative perspective must be. It is a controversial and substantive perspective, of course, but so is the aggregative perspective, the laissez-faire perspective, and so on.

Notice that this argument does not rely on the mere fact that the corporation is a creature of the state, and thus not a “real” person. I have not followed then-Justice William Rehnquist in arguing that corporate activities may be regulated if they are not “necessarily incidental to the purposes for which the [state] permitted these corporations to be organized or admitted within its boundaries.”[^14] It may very well be that political spending is necessary for certain corporations to realize the purposes for which they were organized; in any case I am sure that many corporations would so argue. The relevant consideration is not the fact that corporations are state-chartered; it is the nature of their charters, their fiduciary duty to seek their own profitability above all else, that makes them regulable political speakers.

This argument helpfully resolves an important conundrum in current thinking about campaign finance reform. Many have wondered why media corporations are not subject to governmental regulation aimed at limiting corporate influence over political outcomes.[^15] Why should News Corporation and Time Warner, both for-profit corporations, be exempt from restrictions on

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[^14]: Bellotti, 435 U.S. at 828 (J. Rehnquist, dissenting).
Deliberative theory would seem to reject exceptions for media corporations. To understand why, we must inquire into the motives of such corporations. Richard L. Hasen suggests that “media owners try to maximize profits, political influence, or some combination of these two goals.” If their motivations are primarily profit-oriented, they are susceptible to the objection that self-interest has no place in deliberative processes founded on the ideal of public reason. If the owners’ motivations are primarily political, e.g. a conservative owner wants to use his outlets to promote conservative causes, the objection is more explicitly egalitarian but nevertheless essentially deliberative. It is based on the ideal of equal opportunity for persuasion, which derives from the notion of a fair public debate. Two important ideals of deliberative theory—reason-giving and equality—together suggest that media corporations should be treated no differently from other corporations. Perhaps the solution is to create a sort of editorial firewall between the corporate ownership and the writers, producers, editors, etc., who generate content in political media.

Thus, while corporations can be distinguished from other associations whose free speech rights seem unassailable, there do not seem to be sound distinctions to be made between for-profit corporations.

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317 This seems like a better policy than trying to bar corporate-owned media from campaign advocacy. Media statements stopping short of advocacy may still affect citizens’ political decisions. An editorial firewall seems more administrable and less intrusive than constant bureaucratic judgments about whether media speech constitutes campaign advocacy.
Conclusion

This chapter has responded to two important possible criticisms of my argument: that it violates the principle of governmental non-interference, and that it relieves citizens of a responsibility that is properly theirs—to regulate the terms and conditions of public discourse. I also clarified the distinction between corporations and other associations, and addressed the consequences of my argument for media corporations. This is surely not an exhaustive response to the possible arguments that might be leveled against my view. But, particularly by responding to the laissez faire argument, I have stopped taking deliberative theory for granted, as I have done for most of this thesis, and have defended it from a powerful rival view.
Conclusion

This thesis has argued that deliberative democratic theory best explains and justifies the common intuition that there is something wrong with for-profit corporations having an unrestricted voice in the public discourse. It has not defended deliberative democracy per se. But it has suggested, perhaps, that deliberative theory becomes more credible by virtue of its accordance with the common anti-corporate intuition.

One practical import of this argument is that it provides the tools to start rethinking the Supreme Court's jurisprudence on campaign finance reform. The Court has only recognized and utilized the corruption rationale, which, as argued in Chapter I, collapses into an inequality rationale. Yet the Court has rejected egalitarian rationales for campaign finance regulation. Deliberative democracy provides theoretical support to a sort of procedural egalitarianism—equality not in substantive outcomes, but in the opportunity to persuade. It also goes beyond that common egalitarian prescription, by insisting on a civil public discourse in which arguments, reasons, and principles take center stage. Deliberative democrats believe that these are the building blocks of legitimate collective decisions; factors like wealth and status should be irrelevant to citizen decision-making. The concept of public reason aims to neutralize deliberatively irrelevant considerations like private self-interest, so that citizen decision-making relies on reasons and arguments which are mutually accessible and which can form the basis of a productive discussion.
Among the innovations of this thesis is its discussion of public reason as applied to corporations. While many critics of corporate political speech have noted the “primacy of the profit motive,” and while Joshua Cohen has mentioned corporations' inability to be true deliberators, Chapter III elaborated this argument in more detail. The problem is not simply that corporations will tend to be self-interested, for the same might be true of individuals. The problem is that corporations are bound by their nature and structure to be self-interested, while individuals are not. Corporate political advertising cannot be truly deliberative for this reason.

Chapter IV's argument that disclosure and disclaimer requirements can best be understood as providing voters with the tools they need to evaluate speakers' reasons, motivations, and arguments is also novel. Voter competence is usually understood in terms of increasing voter information, but this seems incomplete. Source transparency is useful not just because it informs voters of a certain group's stance on an issue, but because it increases voters' ability to assess the quality of the arguments presented in the group's messaging. Moreover, disclosure and disclaimer laws enable citizens to respond to and engage with the actual sponsors of political advertising. The need for these regulations is particularly acute in the case of corporate-funded political advertising. For corporations are often “veiled political actors,” and the revelation that they have sponsored a particular message seems quite likely to affect citizens' assessments

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of the message. Most citizens will recognize that ad-sponsoring corporations are self-interested, not public-spirited.

Finally, Chapter II contributed a new take on the functions of the political campaign, inspired by deliberative theory. I incorporated the idea of translation—which might seem more minimalist than, say, persuasion—into the theory of deliberative democracy. Whereas other deliberative theorists have seemed to assume that a deliberative campaign must be a forum of persuasion, I have suggested that the campaign's function in a deliberative democracy might also be protective—shielding people from irrelevant factors that disturb the translation of dispositions into votes. In fact, I assumed throughout this argument that persuasion will often be undesirable. Some of my policy prescriptions—rough balance in campaign resources achieved through public financing, strong disclosure and disclaimer laws—would probably decrease the persuasiveness of political advertising, and perhaps not only corporate political advertising. The ultimate goal of deliberative democracy is not simply a campaign filled with persuasion, but a campaign conducted under certain conditions, conditions under which some attempts at persuasion might flourish while others fail. The hope is that a deliberative campaign would feature persuasion among those who are genuinely convinced by some opponent's argument, but not among those responding to self-interested appeals made possible by accumulated wealth.

For deliberative democrats, this thesis has contributed a new application of their theory, showing how it might be applied to the political campaign, to
corporate political advertising, and to disclosure and disclaimer laws. For non-deliberative democrats, I have presented something of a challenge by suggesting that objections to corporate political advertising can best be couched in deliberative terms.
Bibliography


