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An Economic View of Campaign Finance Spending Under the First Amendment

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COMMENTS

AN ECONOMIC VIEW OF CAMPAIGN FINANCE SPENDING UNDER THE FIRST AMENDMENT

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INTRODUCTION TO THE CAMPAIGN FINANCE DEBATE

Major elections roll around every two years, and with them the issue of campaign finance. While courts are in a rough consensus on what sorts of campaign finance restrictions are permissible, many jurists, commentators, and political activists seem unsatisfied with that consensus, suggesting that a new approach may be called for. Central to the permissibility of campaign finance restrictions is the extent to which campaign expenditures and donations are protected political speech under the First Amendment. Courts now hold that expenditures are protected speech, but that contributions are not. However, there are many calls to make the treatment of the two consistent by ruling either that both are speech or neither one is.

Economic theories of advertising suggest that political advertising is likely to be the sort of advertising that has specific informational (as opposed to mere recognition-building) content. On this ground, political campaigns have a strong claim to the status of political speech and to First Amendment protection. Courts have recognized that the presence of a substantive message is a key determinant of whether something counts as speech under the First Amendment. In particular, theories about the presence or absence of an overall substantive

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message in advertising seem to have been important in the Court's historical treatment of commercial speech as a whole.

Purely economic arguments agree with the legal ones, in that the more candidates tend to have informational advertising, the more likely it is that unlimited campaign spending is economically efficient.

THE LAW OF CAMPAIGN FINANCE

Since *Buckley v Valeo*,[1] courts have consistently ruled that limits on individuals' campaign contributions are generally permissible while limits on candidates' total campaign expenditures, or on independent issue-related advertising, are not. The logic behind disallowing expenditure limits is that political campaigns (whether of candidates for office or of independent groups concerned with particular issues) constitute political speech and therefore enjoy "exacting" First Amendment protection.[2] Contributions, on the other hand, only tenuously raise speech issues, and contribution restrictions are generally upheld on the grounds that they are narrowly tailored to combat corruption.[3]

While final rulings have consistently upheld these expenditure and contribution principles from *Buckley*,[4] there have been numerous concurring and dissenting opinions expressing dissatisfaction with them. In general, these opinions have found the classification of expenditures as speech but contributions as non-speech to be artificial. However, some would classify both expenditures and contributions as speech and thus entitled to strict First Amendment protection,[5] while others would classify both expenditures and contributions as non-speech, subjecting them to greater limitations.[6]

With so much judicial dissatisfaction, the *Buckley* principles may be ripe for revision. Indeed, in the Supreme Court's most recent look at the issue, a majority of the Justices indicated at least a possible willingness to overrule *Buckley*.[7] Legislatures have also been reluctant to accept the principles of *Buckley*. Several

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1. 424 US 1 (1976).

2. Id at 14-23, 44.

3. See id at 23-29.

4. Some Supreme Court decisions affirming, but refining, *Buckley* are: *Nixon v Shrink Mo Gov't PAC*, 528 US 377, 120 S Ct 897 (2000) (affirming contribution limits); *Colorado Republican Fed Campaign Comm v FEC*, 518 US 604, 608 (1996) (affirming prohibition of limits on independent party expenditures); *FEC v Massachusetts Citizens for Life, Inc*, 479 US 238, 263-64 (1986) (affirming prohibition on independent expenditure limits as applied to corporations); *FEC v National Conservative PAC*, 470 US 480, 501 (1985) (affirming prohibition of independent expenditure limits); *California Med Assn v FEC*, 453 US 182, 200-01 (1981) (no equal protection violation if contribution limits imposed on individuals but not unions or corporations).

5. See, for example, *Nixon v Shrink Mo Gov't PAC*, 120 S Ct 897, 916-27 (Thomas dissenting).

6. See, for example, id at 910 (Stevens concurring); id at 910-11 (Breyer concurring).

7. See id at 914 (Breyer joined by Ginsburg concurring); id at 916 (Kennedy dissenting); id at 916 (Thomas joined by Scalia dissenting).

states purport to limit campaign expenditures in spite of its holding.[8] This can only add to the pressure to revisit *Buckley*.

LEGAL ACADEMIC CRITICISM OF *BUCKLEY*

Academics have also expressed dissatisfaction with *Buckley*, and as their criticisms mount so does the likelihood that the decision will be overruled. Stephen Gottlieb, for instance, points out that *Buckley* explicitly rejects equality of political participation as a First Amendment goal but implicitly embraces it by upholding contribution limits.[9] Although *Buckley* purports to define the First Amendment as establishing a system of negative rights protecting individuals from outside interference with their speech, its upholding of contribution limits is said to acknowledge that the Amendment also embraces a system of positive rights to equal participation in the political system.[10] Although the stated rationale for contribution limits is fighting corruption, Gottlieb argues that the ultimate purpose of fighting corruption is to allow equal access to the political process.[11] Gottlieb seems to ignore the possibility that if the ideal contemplated by the First Amendment is one of somewhat unequal political access, corruption in favor of an egalitarian end is as much to be feared as elitist corruption.

William P. Marshall, noting that "[t]he *Buckley* opinion has satisfied virtually no one," also points out the inconsistency of *Buckley*'s treatment of the equality issue[12] and adds that the distinction between expenditures and contributions is problematic for several reasons. First, the *Buckley* Court started out by describing both contributions and expenditures as subject to the First Amendment, but later seemed to abandon this position.[13] Second, the Court underestimated the expressive content of contributions. Contributions do express messages from donors and they create indirect speech by the donors, so they should be equally entitled to First Amendment protection as speech; beyond that, they embody political association and should enjoy some First Amendment protection simply for that reason.[14] Third, the anticorruption rationale for allowing contribution limits is belied by the disallowance of independent expenditure limits. Since corruption appears to be virtually as possible through independent expenditures as

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8. See *The Book of the States: 2000-01* 211-27 (Council of State Governments 2000) (Vermont and New Jersey laws purport to limit spending even without public financing).

9. Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 Hofstra L Rev 213, 229 (Fall 1989).

10. See id.

11. See id.

12. William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw U L Rev 335, 349 (Winter 2000).

13. Id at 350, citing *Buckley*, 424 US at 14 (perhaps referring to the following text in footnote 93: "The Act's contribution and expenditure limits operate in an area of the most fundamental First Amendment activities.").

14. Marshall, 94 Nw U L Rev at 350-51.

through direct contributions, the anticorruption rationale used to uphold contribution limits could also be used to uphold limits on independent expenditures.[15] (This criticism interacts with the first. To the extent that the anticorruption rationale cannot sustain limits on contributions, contributions must be pushed into an unprotected category in order to uphold their limitation.) Fourth, expenditures and contributions are so linked in practice that any arguments that apply to one should apply to the other. If expenditures are protected because they are necessary for political speech, then contributions should be protected because they are necessary for expenditures. On the other side, if contributions should be limited to fight corruption, then limiting expenditures might also be valid on the grounds that it would reduce the demand for contributions.[16]

Burt Neuborne concurs in criticizing both the rejection of an equality rationale and the expenditure-contribution distinction, and tacks on the criticism that a one-to-one correlation of money to speech does not exist at high expenditure levels.[17] Neuborne's implicit theory seems to be one of saturation, in which there is some amount of campaigning after which the public becomes completely aware of a candidate's message and expenditures serve no further informational purpose.[18] Laurence Tribe writes, "While this [expenditure-contribution] distinction has always seemed problematic, it should by now have become clear that it is ripe for complete reassessment by the Court."[19] Tribe argues that the anticorruption rationale applies equally to expenditures and contributions[20] and that since the same First Amendment balancing applies to both, they should both be limitable.[21]

On the other side of the issue, Federal Election Commissioner Bradley A. Smith calls *Buckley* "one of the most widely scorned decisions in the recent history of the Court."[22] Smith notes three criticisms of *Buckley* from the pro-spending-limit literature: its basic equation of money and speech, its narrow

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15. Id at 351.

16. Id at 351.

17. Burt Neuborne, Buckley*'s Analytical Flaws*, 6 J L & Policy 111, 115-17 (1997).

18. Neuborne offers no explicit model behind this theory, but one that might support it is discussed in Ethan Fenn, *The Policy Effects of Campaign Spending Limits* 12-13 (2001) (unpublished PhD dissertation draft, University of Chicago) (on file with author). In a variant of an Exogenous Mixed Model, there may be a fixed set of voters reachable by informative advertising. Once all those voters are reached, all expenditures must be directed toward the remaining voters, who are only amenable to persuasive advertising with no informational content. As discussed below, the informational advertising correlates strongly with speech, while the persuasive advertising does not.

19. Laurence H. Tribe, *American Constitutional Law* 1145 (Foundation 2d ed 1988). The second edition of *American Constitutional Law* was a single volume. Only the first volume of a two-volume third edition has appeared, and it does not cover the section quoted.

20. Id at 1145 n 16, citing Ray Forrester, *The New Constitutional Right to Buy Elections*, 69 ABA J 1078, 1080 (Aug 1983).

21. Tribe, *Constitutional Law* at 1145 n 17, citing *FEC v National Conservative PAC*, 470 US at 519-20 (Marshall dissenting) (cited in note 19).

22. Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo L J 45, 46 (Oct 1997).

definition of corruption as a quid pro quo exchange, and its rejection of a First Amendment egalitarian purpose.[23] However, he argues that "the most doctrinally suspect portion of the decision is that upholding contribution limits."[24] Smith criticizes the upholding of contribution limits for three reasons: First, contributions constitute indirect speech by donors; such indirect speech is usually protected in other contexts, such as when attorneys speak for their clients or spokespersons speak for corporations.[25] Second, there is little evidence of corruption to justify contribution limits; rather, studies show that the most important determinants of legislative behavior are personal ideology, party affiliation, and constituent interests.[26] Finally, there is insufficient tailoring of the contribution limits to whatever corruption may exist, and the most narrowly tailored alternative is required by the strict scrutiny standard applicable to campaign speech.[27] Disclosure of contributors is a more narrowly tailored alternative to fighting corruption, since voters can then determine which candidates are accepting quid pro quo contributions and vote against them.[28]

AN ECONOMIC APPROACH TO CAMPAIGN ADVERTISING

THE GENERAL ECONOMICS OF ADVERTISING

Economic theory naturally has a good deal to say about advertising. Economic theories of advertising can be applied to the particular case of political campaign advertising and used to answer the question of whether there is any substantive political speech within campaign advertising that merits First Amendment protection.

The classic economic literature on advertising argues that advertised products and services fall into two basic categories: information goods and experience goods. Information goods are those about which a consumer can, by simply being told about the good's characteristics, acquire a sufficient understanding to decide whether to purchase the good. A good example is a personal computer. Advertising can tell a consumer a computer's hard drive capacity, CPU

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23. Id at 47.

24. Id at 63.

25. Id at 57-58.

26. Id at 58-59. Smith, in note 92, cites Stephanie D. Moussali, *Campaign Finance Reform: The Case for Deregulation* 6 (James Madison Institute 1990); Frank J. Sorauf, *Money in American Elections* 316 (Scott Foresman 1988); Janet Grenzke, *PACs and the Congressional Supermarket: The Currency is Complex*, 33 Am J Pol Sci 1, 1 (1989); Larry Sabato, *Real and Imagined Corruption in Campaign Financing*, in A. James Reichley, ed, *Elections American Style* 155, 160 (Brookings 1987); W.P. Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 35 W Pol Q 478, 479 (1982); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 Hofstra L Rev 301 (1989) (criticizing the previous studies).

27. Smith, 86 Geo L J at 61 n 109, citing cases (cited in note 22).

28. Id at 61.

speed, memory, monitor size, included peripherals, and other technical specifications; there is little else that the consumer needs to know in order to decide whether or not to buy the computer. Experience goods, on the other hand, must actually be used by the consumer before he acquires an understanding of their characteristics.[29] A typical example would be a can of soda. Consumers will decide whether or not to buy it based solely on its taste, but a consumer cannot determine the soda's taste until he has actually drunk the soda. In reality, most goods have some particular characteristics that can be communicated verbally and other characteristics that must be experienced. For instance, one can describe verbally a car's engine capacity and type, horsepower, and gas mileage, but not the firmness of its suspension and handling. However, the division into distinct groups of goods still serves as a useful first approximation and as an aid to understanding the factors behind the spectrum of experience and information characteristics.

Advertising for each of the two types of goods is thought to operate by very different processes. For information goods, advertising can convey the characteristics of the good that are necessary for consumers to make purchasing decisions. In other words, it conveys a factual message about the product, allowing consumers to make informed decisions based on that message. For experience goods, however, advertising cannot convey such a message. Advertising is thought to be effective for experience goods for two reasons: First, it jogs the memory of consumers that have used the good before. Second, consumers surmise that, if they try the good, dislike it, and purchase no more of it, the good's producer will lose money on its advertising. The producer would thus only advertise a product of high quality. Nevertheless, the advertising itself contains no substantive information.[30]

THE LEGAL SIGNIFICANCE OF THE ECONOMICS OF ADVERTISING

Courts have not yet applied the economics of advertising to the First Amendment context. However, courts and commentators have seen its importance in other areas, and there are several strains of First Amendment law that suggest that it should apply here as well.

The biggest area of law to see an application of the economics of advertising is the law of false advertising and unfair competition, where economic arguments can be applied to suggest what sorts of goods are most likely to be the objects of false advertising.[31] The argument runs as follows: For information goods, the characteristics described in a good's advertising can be observed by

29. See Phillip Nelson, *Information and Consumer Behavior*, 78 J Pol Econ 311, 312 (1970).

30. See Phillip Nelson, *Advertising as Information*, 82 J Pol Econ 729 (1974).

31. For this entire argument, see generally Edmund W. Kitch and Harvey S. Perlman, *Intellectual Property and Unfair Competition* 57-64 (Foundation 5th ed 1998).

consumers before they make a purchase. False advertisements can thus be disproved before they garner any sales, and firms should thus have little incentive to run them. One should thus be skeptical ex ante about false advertising or unfair competition claims about such goods.

A similar argument can be made about experience goods that tend to be purchased repeatedly. A false advertisement might generate one sale per customer, but after that initial purchase, the customer will see that the claim was false and make no more purchases. One should thus be almost, but not quite, as skeptical of false advertising claims for repeat-purchase experience goods as for information goods.

On the other hand, if an experience good is not the type that is purchased repeatedly (or is such that a consumer might not discover its characteristics even after a purchase—this subclass is sometimes called "credence goods"), a false advertisement may generate only the one sale per customer that the advertiser is seeking in the first place. It is inconsequential if the falsity of the advertisement is discovered after purchase because the advertiser would have made no more sales anyway. One should thus be more credulous about false advertising claims for single-purchase experience goods.

One case utilizing this reasoning was *Dr. Seuss Enterprises, LP v Penguin Books USA, Inc.*[32] The plaintiff produced the popular, wholesome children's book *The Cat in the Hat*, and sued for trademark infringement when the defendant published a parody in a similar style. The parody was titled *The Cat Not in the Hat! A Parody by Dr. Juice* and dramatized the crimes popularly attributed to O.J. Simpson.[33] In determining the likelihood that consumers would be confused by the parody, the court looked at (among many other factors) the status of books as information or experience goods. It concluded that because books are an intermediate case, in which consumers typically ascertain some, but not all, of a book's contents before reading it, the level of confusion arising from the similar appearance of the books was indeterminate.[34]

In *California Dental Assn v FTC*, the Federal Trade Commission challenged on antitrust grounds the advertising restrictions that the California Dental Association placed on its member dentists.[35] In evaluating whether the challenged advertising restrictions were anticompetitive, the Ninth Circuit had to consider one of the association's proffered justifications for the restrictions: that they helped prevent misleading advertising. The court looked at dentistry's information and experience good characteristics in determining the likelihood that false advertising would be a problem in the dental industry. It concluded that dentistry was a repeat-purchase experience good. Such goods normally are thought

32. 924 F Supp 1559 (SD Cal 1996).
33. Id at 1561-62.
34. Id at 1571.
35. 224 F3d 942, 944-45 (9th Cir 2000).

to be minimally susceptible to false advertising because a firm will lose customers if an initial purchase reveals the firm's advertising to be false. In this case, however, the court found that, since patients tend to be more loyal to dentists than customers in other industries are, the possibility of attracting repeat business might induce some false advertising. The theory of information and experience goods thus had an uncertain implication for the validity of the dental association's restrictions, but looking at all other factors, the court found the restrictions to be pro-competitive and upheld them.[36]

In the First Amendment context, courts have not looked to the economics of advertising for guidance, but they have looked at other factors that suggest that the degree of informational content in purported speech is important to determining the level of First Amendment protection. One such instance is the "particularized message" criterion enunciated in *Spence v Washington*.[37] In that famous case, Spence was prosecuted for displaying upside down in his window a U.S. flag to which he had affixed a peace symbol made of adhesive tape.[38] Spence intended to protest the invasion of Cambodia and the killings at Kent State University,[39] and the Court found that the timing and context of his display made that intent clear to those who viewed the flag.[40] The Court found that a "particularized message" was present and that this classified the flag display as speech rather than conduct.[41]

Looking to the economics of advertising, it is clear that advertising for information goods will contain more of a "particularized message" than will advertising for experience goods. Information good advertising can convey specific statements about the product's characteristics, while experience good advertising cannot. By definition, it is impossible to give a specific description of an experience good's relevant characteristics, so advertisements for such a good must necessarily consist of general images conveying only the fact that the product's producer is advertising. Advertising for information goods should thus be more eligible for First Amendment protection under the "particularized message" criterion.

Another area where courts have recognized informational content as critical in distinguishing speech from non-speech is the treatment of commercial speech. When the Supreme Court first decided that advertising was not entitled to First Amendment protection, a major part of its logic was the belief that advertising had no informational content. The case that first explicitly excluded commercial advertising from the First Amendment was *Valentine v Chrestensen*,[42]

36. This entire line of reasoning is discussed in *California Dental Assn*, 224 F3d at 953.
37. 418 US 405, 410-11 (1974).
38. Id at 406.
39. Id at 408.
40. Id at 410-11.
41. Id.
42. 316 US 52, 54 (1942).

which upheld a New York City ordinance prohibiting the distribution of commercial handbills but allowing distribution of political handbills. Chrestensen brought a touring exhibition based on a working submarine to New York City and attempted to dock the submarine at a city pier. The city refused permission, so he docked outside the city and began circulating advertising handbills within the city. When city authorities forbade this based on the ordinance, Chrestensen began circulating revised handbills containing on one side the original advertisement and on the other side a political protest against the city's refusal to allow the submarine to dock. Chrestensen won at trial and on appeal to the Second Circuit. In overruling the Second Circuit, the Supreme Court stated:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[43]

The Court thus set up a dichotomy between speech containing information or opinion and commercial speech. Implicitly, commercial speech then contains neither information nor opinion.

By contrast, consider the case where the Court reversed itself, extending First Amendment protection to commercial speech. In *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc*,[44] a consumer advocacy group sued the state pharmacy board over the board's policy of prohibiting price advertising by pharmacists. The grounds for the suit were that the prohibition against price advertising discouraged price competition, thereby raising prices for consumers. The Court sided with the consumer group, making a broad holding that extended First Amendment protection to commercial advertising. Part of the Court's reasoning was that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."[45] The belief in advertising's informational content has thus been critical in the Court's assessment of its First Amendment merit.

INFLUENCE OF ECONOMIC VIEWS OF ADVERTISING ON THE COURTS

It should be noted here that the Supreme Court's historical views about advertising have parallelled views in the economic literature. In the 1940s, the dominant economic theory of advertising was that it simply acted by a more or

43. Id at 54.
44. 425 US 748 (1976).
45. Id at 765.

less mysterious mechanism to alter consumers' underlying tastes in favor of the advertised product. No information was thought to be at issue; there was a direct spur of demand for the goods. On the other hand, by the 1970s, Nelson's (and similar) theories were in circulation, holding that commercial advertising does contain a message. (The message is explicitly about the product's characteristics for information goods and implicitly about the advertiser's confidence in the product for experience goods.) It is even possible to trace with some specificity how this economic reasoning has influenced courts.

In the 1940s, the dominant economic view of advertising was that put forth by Edward Chamberlin.[46] As the title *The Theory of Monopolistic Competition* suggests, Chamberlin's main argument was that cases of pure competition or pure monopoly are rare. Most firms can, like classical monopolists, raise (or respectively, lower) their prices without driving their sales to zero (or respectively, infinity). However, most firms also have competitors producing close (though not perfect) substitutes, so that they are forced, like classical perfect competitors, to produce and price at a point where they make zero profit.

Advertising enters Chamberlin's theory as one thing that differentiates products—that is, it affects the degree to which consumers consider one product a substitute for another. Chamberlin gives lip service to the idea that one way advertising does this is through substantive information, but emphasizes the alternative approach that advertising is mere psychological manipulation. He explicitly allows that advertising may work either by information or by manipulation:

> Selling costs are defined as costs incurred in order to alter the position or shape of the demand curve for a product. . . . Let us take advertising as typical of these expenditures and inquire how its results are brought about. The explanation may be related to the two factors of (1) imperfect knowledge and (2) the possibility of altering people's wants by advertising or selling appeal.[47]

Indeed, his exposition of the informative advertising process is quite laudatory:

> Buyers often do not know or are but dimly aware of the *existence* of sellers other than those with whom they habitually trade or of goods other than those they habitually consume; they are ill-informed of comparative prices for the same thing sold by different merchants; they are ignorant of the qualities of goods, in themselves, compared with other goods, and compared with the prices asked. Advertising increases a seller's market by spreading information (or misinformation) on the basis of which buyers' chices as to the means of satisfying their wants are altered. . . . Quality competition, like price competition, is stimulated by the possibility of informing a large number of potential buyers, through advertising, of quality changes or of existing attributes of a product of which they were not aware. If the

46. Edward Chamberlin, *The Theory of Monopolistic Competition* (Harvard 1939) (update of 1933 edition).

47. Id at 117-18 (emphasis in original).

> information is truthful, wants are more effectively satisfied; if not, they are less effectively satisfied. In either case, the satisfaction of *existing* wants is sought with different information at the disposal of the buyer, as to the means whereby it may be done.[48]

Chamberlin's view of the second advertising technique—altering tastes—is far less complimentary:

> Advertising affects demands, in the second place, by altering the wants themselves. . . . [S]elling methods which play upon the buyer's susceptibilities, which use against him laws of psychology with which he is unfamiliar and therefore against which he cannot defend himself, which frighten or flatter or disarm him—all of these have nothing to do with his knowledge. They are not informative; they are manipulative. They create a new scheme of wants by rearranging his motives.[49]

That Chamberlin considers the manipulative element of advertising more important than the informative is evident from several things. For one, he lumps all forms of advertising into the scheme of product differentiation by which firms acquire partial monopoly power and gouge consumers.[50] For another, many of his examples of allegedly manipulative advertising are, in fact, informative. For instance, Chamberlin argues that "the merchant located in the outskirts who advertises urging people to come to him because he is 'out of the high rent district' is adapting not himself, but his customers. He is giving them less, not more, convenience, and trying to divert their attention from it."[51] Although Chamberlin classes this as manipulative, the fact that a store can charge lower prices because it has lower rent costs would seem to be a matter of information, and a valuable one at that. Another example of Chamberlin's miscategorization will resonate with the legal reader: Chamberlin's argument against trademarks. Chamberlin devotes an entire appendix to the contention that trademarks are simply a means of enforcing monopolies, contravening the (then and now) prevailing view that they serve the valuable substantive function of informing con-

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48. Id at 118-19 (emphasis in original).

49. Id at 119-20. In the 1939, but not the 1933, edition, the following footnote is appended to the end of the cited passage:

> Cf. the following: "The buyer's brain is the board upon which the game is played. The faculties of the brain are the men. The salesman moves or guides these faculties as he would chess men or checkers on a board. In order to understand the ground upon which your battle must be fought, and the mental elements which you must combat, persuade, move, push or attract, you must understand the various faculties of the mind." (W. W. Atkinson, *The Psychology of Salesmanship*, p. 70.) "In undertaking to psychologize about the conduct of the buyer, let it be understood that we purpose to catalogue the sensations, ideas and feelings animating him and to discover the springs of his action . . . we seek merely to give a complete description and explanation of the buyer's conduct and explain how to manipulate it." (H. D. Kitson, *The Mind of the Buyer*, p. 8.)

Id at 120 (ellipsis and citations in original).

50. Id at 71-73.

51. Id at 125.

sumers about the source (and therefore the quality) of goods.[52]

Furthermore, there are some concrete indications that Chamberlin's theory entered into the Supreme Court's original distinction of commercial from noncommercial speech in *Valentine v Chrestensen*.[53] That opinion does not cite any source for its reasoning. Its only citations are to the statute at issue and the procedural history of the case, which suggests that the Court may have been looking to the opinions below for guidance. As noted above, the District Court found for Chrestensen in his suit over enforcement of a handbill ordinance preventing his advertising;[54] the Second Circuit affirmed the decision, but with a sharp dissent from Judge Jerome Frank.[55] The Supreme Court, in reversing the Second Circuit, agreed with Judge Frank's dissent.

It is quite likely that Frank was aware of Chamberlin's work. One would expect that as a former chairman of the Securities and Exchange Commission, Frank would be generally conversant in economic matters. He indeed displayed such general conversance in his opinions,[56] but he also gave signs that he was specifically familiar with Chamberlin's theory. In *Standard Brands, Inc v Smidler*, Frank wrote:

> The public today is displaying a revived, lively interest in "free enterprise." That revived interest, one may hope, will not prevent a discriminating consideration of socially desirable monopolies or partial monopolies, an adequate cognizance of what, with increasing understanding, many modern economists call "imperfect competition" or "monopolistic competition."[57]

Earlier, in *Eastern Wine Corp v Winslow-Warren*, Frank had written: "Some economists have recently aided clear thinking on the subject by dropping the black-and-white distinction between competition and monopoly and talking of 'monopolistic competition.'"[58] Although Chamberlin is not cited by name, Frank was obviously at least familiar with the general theory of monopolistic competition. It should also be noted that both *Standard Brands* and *Eastern Wine* were trademark cases and that in each Frank gave an anti-trademark argument similar to the one in Chamberlin's aforementioned appendix.[59] Frank was thus also familiar with the particular application of monopolistic competition theory to advertising.

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52. Id at 218-22. Chamberlin discusses the prevailing views in his day. For the prevailing views in our day, see, for example, Kitch and Perlman, *Intellectual Property and Competition* at 170-72 (cited in note 31).

53. 316 US at 54.

54. Id.

55. *Chrestensen v Valentine*, 122 F2d 511, 517 (2d Cir 1941).

56. See, for example, *Eastern Wine Corp v Winslow-Warren, Ltd*, 137 F2d 955 (2d Cir 1943); *Standard Brands, Inc v Smidler*, 151 F2d 34, 37-43 (2d Cir 1945) (Frank concurring).

57. 151 F2d at 42 (Frank concurring).

58. 137 F2d at 959 n 7.

59. Compare *Standard Brands*, 151 F2d at 38-43 (Frank concurring) and *Eastern Wine*, 137 F2d at 957-60, with Chamberlin, *The Theory of Monopolistic Competition* at 218-22 (cited in note 46).

It is similarly possible to trace (at least roughly) the economic influences on the Court in *Virginia State Bd of Pharmacy*.[60] That case invalidated Virginia's ban on price advertising by pharmacists for prescription drugs. The only source relied on by the Court with respect to the economic effects of the advertising ban was *Prescription Drug Price Disclosures: Staff Report to the Federal Trade Commission*,[61] which relied for its theory of the economic benefits of advertising on George Stigler's article *The Economics of Information*.[62] Stigler's argument is that price advertisements benefit consumers by reducing the number of visits they have to make to stores in order to find the lowest prices. Prices are also lowered because high-priced stores cannot hold on to customers with knowledge of lower prices elsewhere. Stigler's argument can be seen as a special case of Nelson's, where the characteristic being advertised is the good's price. At least with respect to this price characteristic, any good is an information good.

THE APPLICATION TO POLITICAL ADVERTISING

If political candidates are subject to the same classifications as are other goods, then which type of good a candidate is may affect whether political campaigns are political speech. If candidates are information goods, then one would expect political advertising to contain substantive messages about candidates' positions. On the other hand, if candidates are experience goods, then political advertising is at best fluff, at worst brainwashing or vote buying, and in any event not speech worthy of First Amendment protection.

A logical look at the nature of politics would suggest that political candidates are information goods. Their positions are defined by particular points on commonly understood policy spectra, such as, whether certain well-known practices should be legal or illegal, how large the government budget should be, or how the budget should be divided among familiar priorities. The usual logic of experience good advertising does not apply to politicians. Since they typically do not spend their own money on campaigns, they do not stand to lose anything if voters choose them and later come to dislike them. The one economic study to apply this classification system to political advertising does, indeed, implicitly classify politicians as information goods.[63]

THE ECONOMICS OF CAMPAIGN SPENDING LIMITS

Economic arguments support the legal position that the more candidates operate like information goods, the less campaign spending should be limited.

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60. 425 US 748 (1976).

61. United States Bureau of Consumer Protection (1975).

62. George Stigler, *The Economics of Information*, 69 J Pol Econ 213 (1961). Citations to Stigler in *Prescription Drug Price Disclosures* are on pp. 81-84 of the report.

63. See Phillip Nelson, *Political Information*, 19 J L & Econ 315 (1976).

Nelson's general model holds that a consumer will buy an information good if and only if that consumer is inclined to prefer that good's characteristics by his underlying preferences and if the consumer is informed of the good's characteristics by advertising.[64] The number of customers is then the number of "potential customers" who are inclined to prefer the good, multiplied by the fraction of those customers that encounter sufficient advertising to be informed.[65] This implies that a product's revenue will be described by a mathematical function of the form:

$$R = Q \cdot P \cdot N \cdot I \tag{1}$$

where R is revenue, P is price per unit, Q is unit sales per customer, N is the number of potential customers (that is, those whose preferences would incline them to buy the product if they were informed of it), and I is the fraction of potential customers that are informed.[66] In an election context, since a voter can expend only one vote on a candidate (that is, $P \cdot Q = 1$, with the possible exception of the home city of this journal), this equation would translate to:

$$R = N \cdot I \tag{2}$$

where R is the candidate's vote total. Since a candidate's underlying approval (indicated by N, the number of voters who are inclined to support him) and the effects of his advertising (indicated by I) enter this vote-generating function in a multiplicative way, they are mathematically complimentary. That is, greater underlying approval adds to the effect of campaign advertising. Other things being equal, donors' dollars will thus go further for the more approved candidate and that candidate's donors will have an incentive to give more.

On the other hand, purchasing an experience good requires only that a consumer receive enough advertising messages to be persuaded that the advertiser would not be wasting his advertising dollar on an inferior product. Any advertiser could potentially meet this criterion for any given consumer, so that any consumer in the market is a potential customer of any given advertiser. An advertiser's revenue is then given by the product price, multiplied by the average quantity per consumer, multiplied by the total number of consumers in the market, multiplied by the fraction of consumers reached by the advertising:

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64. See Nelson, *Advertising as Information*, 82 J Pol Econ at 735 (cited in note 30).

65. See id.

66. See id. The equation given here is of the same form as Nelson's, but some of the variables are given different names for ease of exposition.

$$R = Q \cdot P \cdot N_0 \cdot I \tag{3}$$

where N_0 is the total number of consumers in the market. In a voting context, one can again make the substitution $P \cdot Q = 1$, which now yields the simple equation:

$$R = N_0 \cdot I \tag{4}$$

That is, votes are simply a fixed multiple of the effect of advertising. Here, there is no complementarity between advertising and underlying approval. Donors to the more approved candidate will thus get no more "bang for their buck" and have no added incentive to donate. There then is no reason to expect that the candidate with the more approved policy will garner the most donations.[67]

One can now see how the legal and economic arguments agree. The legal argument posits that if political advertising is the sort that tends to contain information, it has stronger status as political speech. It is thus more constitutionally suspect to limit campaign advertising. Economically, if political advertising is informative, the advertising is complementary with the underlying approval of the candidate. The candidate that has more underlying support also tends to get the most donations, and there is less economic sense in limiting campaign expenditures.

CONCLUSION

People naturally fear corruption in politics. An instinctual mistrust arises when one sees substantial amounts of money changing hands and a politician is involved. In the context of advertising, this may create an impression that political campaigns are qualitatively different from other sorts of advertising, demanding unique analytical tools and raising unique legal concerns. Political advertisements, however, must compete for the public's attention on the same airwaves and newsprint as advertisements for peanut butter, automobiles, and insurance. The logical treatment, then, may be to analyze campaign advertising with the same economic tools that one brings to bear on advertising as a whole.

When one does this, political advertising looks much less nefarious than it first appears. In the classic framework of information goods and experience goods, political candidates would seem to be squarely in the former category: political platforms describe points on well-known policy spectra and a verbal description can convey all the knowledge a voter needs to have about a candi-

67. For a fuller elaboration of the complementarity argument, see Fenn, *The Policy Effects of Campaign Spending Limits* (cited in note 18).

date. It is reasonable to expect, then, that campaign advertising will in fact convey that information. Rather than being mere attention getters or some mysterious form of mind control, political advertisements should be expected to convey substantive information about candidates' positions on the issues.

Courts and commentators have already found that this characteristic of information goods has legal implications in some areas, e.g., information goods are less susceptible to claims of false advertising because a false ad about an observable characteristic is easily disproven and discounted. Certain themes of First Amendment law suggest that the economics of advertising should have some bearing there as well. A standard distinction between speech and conduct is the presence of a "particularized message," and relevant First Amendment analyses of commercial and non-commercial speech have long been tied to prevailing views of the economic mechanics of advertising. If the economics of advertising have any relevance for the First Amendment, the tendency for substantive information in political ads calls for strong First Amendment protection and limited scope for campaign finance restrictions.

The pure economics of the situation mirror the legal analysis. To the extent political candidates are information goods, their advertising expenditures will be complementary to their underlying approval. Donors will thus have greater incentives to give to the more approved candidate, and large amounts of fundraising will only reinforce the "pure democratic" outcome. On the other hand, if candidates are experience goods, there should be no such correlation between donations and underlying approval and funding restrictions might be necessary to preserve majority rule. This crisp parallel between the legal and economic facets of campaign advertising lends further support to the economics of advertising as an analytical tool for understanding campaign finance. The conclusion of such an analysis is that campaign spending merits strong First Amendment protection.