
ANTITRUST ANALYSIS: A ROADMAP FOR ELECTION REFORM UNDER THE FIRST AMENDMENT

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I. INTRODUCTION

The presidential elections of recent years have involved both a significant degree of voter dissatisfaction with candidate choice¹ and increased campaign spending.² In the context of a marketplace of products, these conditions could be characterized as an allocative inefficiency³ and explained by an absence of competition.⁴

The First Amendment theory of the marketplace of ideas was most notably articulated in *Abrams v. United States*.⁵ A dissenting Justice Holmes wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by the free trade of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁶

Many scholars have used this language in arguing that the dynamics of the marketplace of ideas are the same as those found in product markets.⁷

Using similar reasoning, this comment describes some of the economic concepts that have been used in applying the antitrust laws to our product markets. Next, this comment applies these economic principles to the presidential election process, an area typically subject to First Amendment scrutiny. In light of the applicability of these principles, this comment proposes measures to reform our election process and make it a more vigorous marketplace. Finally, because our antitrust law provides an analytical construct that explains the dynamics of presidential elections, this comment concludes that the analysis used in our antitrust law should be analogously employed to reform our election process and scrutinize election legislation under the First Amendment.

II. ECONOMIC CONCEPTS UNDERLYING OUR ANTITRUST LAW

Generally, our antitrust law represents a value judgment that higher output and lower prices are

¹ See Frank Newport, *Bush and Gore Evenly Matched on Issues*, GALLUP ORGANIZATION, at <http://www.gallup.com/poll/releases/pr001027.asp> (Jan. 27, 2001) (finding that 35% of registered voters surveyed and 22% of independent voters surveyed felt that there was no candidate running who would make a good president); see also Frank Newport, *Bush and Gore Maintain Leads for Their Party's Nomination*, GALLUP ORGANIZATION, at <http://www.gallup.com/poll/releases/pr000113.asp> (Jan. 27, 2001) (finding that 28% of adults surveyed for the 2000 election and 40% for the 1996 election were unsatisfied with the respective Democratic and Republican presidential nominees); Keating Holland, *Poll: Gore, Bush Still Lead in Support for Presidential Nomination*, CNN.COM, at <http://www.cnn.000/ALLPOLITICS/stories/01/12/voter.poll/> (Jan. 27, 2001) (finding 31% of American adults surveyed would be unsatisfied with a decision to make Al Gore and George W. Bush the presidential nominees of their respective parties).

² Ruth Marcus, *Costliest Race Nears End; Bush, Gore Running Close: U.S. Campaigns Fuel \$3 Billion in Spending*, WASH. POST, Nov. 6, 2000, at A1 [hereinafter Marcus] (noting that campaign spending has been steadily rising for decades).

³ PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* 7 (5th ed. 1997) [hereinafter *ANTITRUST ANALYSIS*] (explaining that allocative efficiency occurs when market forces drive resources away from the production of goods that consumers value less and towards the production of goods that consumers value more).

⁴ See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *MICROECONOMICS* 173 (1998) [hereinafter *SAMUELSON & NORDHAUS*].

⁵ 250 U.S. 616 (1919).

⁶ *Id.* at 630 (Holmes, J., dissenting).

⁷ See Aaron Director, *The Parity of the Economic Marketplace*, 7 J.L. & ECON. 1, 6–10 (1964) (asserting that the dichotomy of treatment between property and discussion is mistaken); see also Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 42 (1992) (arguing that First Amendment analysis should be carried over into the analysis employed under the Takings Clause); R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 4 (1977) (asserting that the markets for ideas and goods should not receive different treatment).

socially more desirable than lower output and higher prices.⁸ Antitrust law rests on the assumption that the best way to generate these results is to preserve competition in our marketplaces.⁹ To this end, antitrust analysis is dominated by economic theory.¹⁰ Economic theory focuses on three variables to assess the competitiveness of a given marketplace: (1) the number of sellers and buyers; (2) the level of available information regarding price and quality of the product; and (3) the ease of entry into the market.¹¹

A. Characteristics of a Competitive Marketplace

A market is perfectly competitive when it has: (1) a large number of producers and consumers; (2) a high level of information available to producers and consumers; and (3) low entry and exit barriers.¹²

1. Price Competition

When all three of these characteristics are present, they force producers to engage in price competition.¹³ Given a large number of producers, one firm is not able to raise its price unilaterally without the risk that consumers will take their business elsewhere.¹⁴ This risk is increased when

there is a high level of price information because a consumer who is aware of lower pricing producers is more willing to change producers in the event of a price increase.¹⁵ Low entry barriers also increase this risk, as potential entrants—firms not currently in the market—can enter the market more easily and attract away consumers by selling at a lower price.¹⁶ Because a producer cannot increase profits by raising prices, price competition disciplines producers to maximize profits by producing more output at a lower cost and selling to consumers at a lower price.¹⁷

2. Non-price Competition

These three conditions also force producers to engage in non-price competition.¹⁸ A high number of producers forces individual producers to respond to consumer preferences or risk losing consumers to a competitor that is more responsive.¹⁹ Non-price product information provides consumers with a basis upon which to make consumption decisions in the absence of price considerations.²⁰ A high level of non-price product information also increases non-price competition because consumers who are aware of more responsive producers are more likely to change producers, if they find their current producer unre-

⁸ 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 117 (2d ed. 1997) [hereinafter AREEDA & HOVENKAMP] (explaining that the economic model used in antitrust law is based on the assumption that high output and lower prices are socially better than low output and high prices).

⁹ *Id.* at 4 (noting that the general goal of antitrust law is to promote competition).

¹⁰ *Id.* at 118.

¹¹ *See, e.g.*, ANTITRUST ANALYSIS, *supra* note 3, at 5–6 (explaining that in a competitive market sellers and buyers are numerous, consumers effectively communicate their subjective preferences through the consumption decisions they make at fully known prices, producers know all relevant prices and input combinations, and there are no artificial barriers to production).

¹² *See id.* Low entry and exit barriers allow producers to enter the market, compete for consumer business and exit the market easily.

¹³ *See id.* at 7 (explaining that competition generates productive efficiency because it creates a dynamic whereby low cost producers are able to displace high cost producers by selling at a lower price).

¹⁴ *Id.* at 6, 14 (noting that the existence of numerous producers prevents individual firms from impacting price).

¹⁵ *Id.*; *see also* SAMUELSON & NORDHAUS, *supra* note 4, at 200–01, 274 (explaining that the invisible hand theory, which results in maximization of total social utility, assumes that buyers and sellers have full information about the price of goods and services they buy and sell).

¹⁶ *See* ANTITRUST ANALYSIS, *supra* note 3, at 18 (explaining that firms will enter the market and force competitive performance if entry barriers are low); *see also* SAMUELSON & NORDHAUS, *supra* note 4, at 160 (explaining how high entry barriers reduce the pressure to vigorously compete).

¹⁷ *See* ANTITRUST ANALYSIS, *supra* note 3, at 6–7 (indicating that competitive forces generate not only productive efficiency but also allocative efficiency whereby resources flow away from the production of goods that are valued less by consumers and toward the production of goods that are valued more by consumers); *see also* SAMUELSON & NORDHAUS, *supra* note 4, at 35 (noting that perfect competition results in an efficient allocation of resources).

¹⁸ *See* ANTITRUST ANALYSIS, *supra* note 3, at 6 (noting that consumers articulate their subjective preferences through the transactions they make); *see also* SAMUELSON & NORDHAUS, *supra* note 4, at 46 (noting that consumers consider other factors besides price in making consumption decisions).

¹⁹ ANTITRUST ANALYSIS, *supra* note 3, at 8 (noting that perfect competition caters to consumer tastes); *see also* SAMUELSON & NORDHAUS, *supra* note 4, at 138 (emphasizing that firms in a perfectly competitive market produce an identical product).

²⁰ *See* ANTITRUST ANALYSIS, *supra* note 3, at 9 (noting that consumer decisions reflect their preferences in addition to their income); *see also* SAMUELSON & NORDHAUS, *supra* note 4, at 46 (explaining that in addition to price, consumers also consider information regarding the availability of related goods in making their consumption decisions).

sponsive to their preferences.²¹ Finally, low entry barriers discipline the market by making it more readily accessible to potential entrants who can provide competition against unresponsive producers.²² Non-price competition disciplines producers to maximize profits by responding to consumer preferences.²³

Ultimately, economic theory dictates that the existence of a high number of producers, a high level of information and low entry barriers preserve a highly competitive marketplace where output is maximized, costs and prices are minimized, and productive resources are expended based on consumer preference.²⁴

B. Characteristics of an Oligopolistic Marketplace

A market tends to look more like oligopoly and less like perfect competition to the extent that the following conditions exist: (1) a small number of producers; (2) an imbalance of product information favoring producers over consumers; and (3) high entry barriers for producers.²⁵

²¹ See SAMUELSON & NORDHAUS, *supra* note 4, at 46 (explaining that information regarding the availability of substitutes affects the demand for a given product); see also *id.* at 138 (noting that perfectly competitive producers produce identical products).

²² ANTITRUST ANALYSIS, *supra* note 3, at 18; see also SAMUELSON & NORDHAUS, *supra* note 4, at 160.

²³ ANTITRUST ANALYSIS, *supra* note 3, at 8.

²⁴ *Id.* at 6, 14, 18; see also SAMUELSON & NORDHAUS, *supra* note 4, at 46, 138, 160, 200–01.

²⁵ SAMUELSON & NORDHAUS, *supra* note 4, at 170–71 (identifying a small number of firms, the existence of interdependence and strategic interaction among these firms, and high barriers to entry as the three factors present in an imperfectly competitive marketplace); see also ANTITRUST ANALYSIS, *supra* note 3, at 254–55 (describing the elements of a successful oligopoly to consist of: (1) a small number of firms; (2) ability of firms to agree and monitor each other's prices; and (3) ability to exclude potential entrants from competing in the market).

²⁶ See SAMUELSON & NORDHAUS, *supra* note 4, at 171 (explaining that oligopoly can result in prices above marginal cost); see also ANTITRUST ANALYSIS, *supra* note 3, at 16 (explaining that an oligopolistic market falls short of monopoly because there is no single firm with sufficient market power, but it still results in poor market performance relative to a competitive market because of the aggregate behavior of the few firms competing).

²⁷ ANTITRUST ANALYSIS, *supra* note 3, at 16 (noting that an oligopolist may be sufficiently large to unilaterally increase price); see also *id.* at 255 (explaining that when a few firms dominate most of the market share, the benefit from raising product price may outweigh the loss of sales to competitors even in the absence of cooperation among the

1. Price Competition

The existence of one or more of these conditions decreases the incentive for producers to compete with each other on price.²⁶ When a small number of producers control the productive resources available in a given marketplace, the risk is reduced that consumers will respond to a unilateral price increase by taking their business elsewhere.²⁷ Furthermore, to the extent that the number of producers has been reduced, it is easier for a given producer to monitor the behavior of its rivals.²⁸ Using this increased price information, an individual producer can reduce the risk of losing consumers to a lower pricing producer by either expressly or tacitly mimicking the pricing behavior of rivals.²⁹ This denies consumers the opportunity to switch to a lower pricing firm.³⁰ In addition, high entry barriers lessen the disciplining effect of potential entrants on current producers because they reduce the likelihood that a potential entrant will enter the market and offer a lower price.³¹ To the extent that these conditions exist, producers are not disciplined to compete on

firms); SAMUELSON & NORDHAUS, *supra* note 4, at 171 (noting that when there are a small number of firms occupying a market they must command a sizeable fraction of market share to survive). This risk is reduced because the choice of viable producers is smaller.

²⁸ SAMUELSON & NORDHAUS, *supra* note 4, at 171–72 (explaining that when there are a small number of firms occupying a given market, each individual firm monitors its rival behavior and makes decisions accordingly); see also ANTITRUST ANALYSIS, *supra* note 3, at 255 (noting that, as the number of firms increases, the difficulty of detecting cheating and enforcing a coordinated response also increases).

²⁹ SAMUELSON & NORDHAUS, *supra* note 4, at 172 (describing “collusion” as where two or more firms cooperate by jointly setting their prices or outputs); see also *id.* at 173 (explaining that when oligopolists collude, the market will result in a price and output monopoly); ANTITRUST ANALYSIS, *supra* note 3, at 253 (explaining that in oligopoly, a firm contemplating a price increase recognizes that it is in the interest of the other firms to follow the increase because, if they follow, all firms will reap the benefits of a higher price; but if they do not, the lead firm will quickly return to the original price thus foreclosing the benefit of the higher price for all).

³⁰ SAMUELSON & NORDHAUS, *supra* note 4, at 172–73; see also ANTITRUST ANALYSIS, *supra* note 3, at 253–54 (explaining that an oligopolist can insulate itself from the risk of losing customers by communicating an intention to raise prices in advance thereby giving it the opportunity to rescind the price increase if it is not followed by the other firms).

³¹ See SAMUELSON & NORDHAUS, *supra* note 4, at 171 (explaining that high entry barriers operate to ensure that the number of firms in a given market remains low); see also ANTITRUST ANALYSIS, *supra* note 3, at 259–60 (explaining that the ability of oligopolists to sustain monopoly profits is contin-

price.³² As a result, producers maximize profits by decreasing output and raising prices, not by reducing cost.³³

2. Non-price Competition

To the extent that these three conditions enable producers to sustain a supra-competitive price, producers have a heightened incentive to engage in non-price competition.³⁴ By engaging in non-price competition and responding to consumer preference, producers are able to increase sales at the supra-competitive price without reducing that price.³⁵ Thus, producers in an oligopolistic marketplace maximize profits by vigorously engaging in non-price competition.³⁶

Overall, unlike those in a perfectly competitive market, conditions creating an oligopolistic marketplace insulate producers from the discipline of competition. The result is reduced output, higher costs³⁷ and use of productive resources in a manner that will respond to consumer preference.³⁸

gent on fringe firms' inability to profitably expand and the existence of high entry barriers).

³² See SAMUELSON & NORDHAUS, *supra* note 4, at 171 (noting that imperfect competition generates prices above marginal cost—the level where prices would be in a perfectly competitive market).

³³ *Id.* at 173 (depicting graphically that producers in an oligopolistic market produce less output and sell at a higher price than producers in a perfectly competitive market).

³⁴ AREEDA & HOVENKAMP, *supra* note 8, at 177 (explaining that oligopolists are more likely to engage in non-price competition because it is a way to increase business without affecting the pricing structure); see also ANTITRUST ANALYSIS, *supra* note 3, at 258–59 (explaining that while oligopolists could collude on non-price factors, they have a strong incentive to increase market share in a manner that will not affect the price).

³⁵ *Id.*

³⁶ *Id.*

³⁷ SAMUELSON & NORDHAUS, *supra* note 4, at 173.

³⁸ AREEDA & HOVENKAMP, *supra* note 8, at 177.

³⁹ See Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 308 (1991) [hereinafter Blair & Harrison] (explaining that while oligopoly leads to collusion on the selling side, oligopsony results in collusion on the buying side); see also James Murphy Dowd, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 B.U. L. REV. 1075, 1084 (1996) [hereinafter Dowd] (noting that oligopsony is a buyer side manifestation of oligopoly); AREEDA & HOVENKAMP, *supra* note 8, at 299 (describing monopsony—the extreme form of oligopsony—

C. Characteristics of an Oligopsonistic Marketplace

An oligopsonistic marketplace is the inverse of an oligopolistic marketplace.³⁹ It is characterized by: (1) a small number of consumers; (2) imbalance of product information in favor of consumers; and (3) high entry barriers for consumers.⁴⁰

1. Price Competition

The existence of these conditions decreases the incentive for consumers to offer producers a competitive purchase price.⁴¹ When there is a small number of consumers controlling the consumption resources, the risk that producers will respond to a unilateral price decrease by taking their business elsewhere is reduced.⁴² Furthermore, to the extent that the number of consumers has been reduced, it is easier for a given consumer to monitor the behavior of its consumer rivals.⁴³ With a higher level of price information,

as a market where there is only one buyer).

⁴⁰ See Blair & Harrison, *supra* note 39, at 308; see also Dowd, *supra* note 39, at 1084–85; AREEDA & HOVENKAMP, *supra* note 8, at 299.

⁴¹ See Blair & Harrison, *supra* note 39, at 308 (noting that oligopsony can lead buyers to depress the prices they offer to sellers by colluding with each other); see also Dowd, *supra* note 39, at 1088–89 (depicting graphically how oligopsonists force prices below competitive levels); AREEDA & HOVENKAMP, *supra* note 8, at 299 (explaining that a monopsonist can reduce its purchase price by scaling back its purchases).

⁴² See Blair & Harrison, *supra* note 39, at 308–09 (noting that oligopsonists can operate to collectively deny their sellers access to a higher price); see also Dowd, *supra* note 39, at 1084–85 (describing oligopsony as involving a limited amount of buyers controlling a significant amount of market share); AREEDA & HOVENKAMP, *supra* note 8, at 299. The risk of losing sellers to other buyers is reduced because fewer viable consumers are available for doing business.

⁴³ See Blair & Harrison, *supra* note 39, at 308 (explaining that the same dynamics that lead oligopolists to collude on the selling side of the market can operate on the buying side of the market to result in buyer collusion); see also Dowd, *supra* note 39, at 1085 (noting that a necessary element of oligopsony is the ability to police the pricing behavior of other buyers to prevent cheating). See generally SAMUELSON & NORDHAUS, *supra* note 4, at 171 (explaining that when there are only a few firms in a given market, they become interdependent and consider the behavior of rivals in making business decisions).

consumers can reduce the risk of losing producers to a consumer offering a higher price by mimicking the pricing behavior of rivals.⁴⁴ This forecloses producers from the opportunity to switch to a higher pricing firm.⁴⁵ Additionally, high barriers to entry reduce the likelihood that a potential consumer entrant will enter the market, increase the demand for the producers' product and thereby, raise the product's purchase price.⁴⁶ To the extent that these conditions exist, consumers are not disciplined to compete for producer business on price.⁴⁷ As a result, consumers can maximize their welfare by decreasing consumption and reducing purchase prices.⁴⁸

2. Non-price Competition

The conditions of an oligopsonistic marketplace also result in less vigorous non-price competition among consumers.⁴⁹ A high concentration of consumption resources among a small number of consumers reduces the risk that a consumer that is unresponsive to producer preference will lose producer business.⁵⁰ Imperfect, non-price

product information insulates consumers from competition because producers who are unaware of a more responsive consumer are less likely to change consumers if they find their current consumer unresponsive.⁵¹ Moreover, high barriers to entry enable consumers to be less responsive because they make it more difficult and less likely that potential consumer entrants will enter the market.⁵² High barriers also limit the demand for the producers' product and thereby, enhance consumers' unresponsiveness to producer preference.⁵³ To the extent that these conditions exist, oligopsonistic consumers do not have to respond to producer preference to maximize their welfare.

Unlike those in a perfectly competitive market, the conditions creating an oligopsonistic marketplace insulate consumers from the discipline of competition.⁵⁴ This results in reduced consumption, reduced costs and prices,⁵⁵ and use of consumption resources in a manner that is not responsive to producer preference.⁵⁶

Oligopsony raises antitrust concerns primarily when it occurs in an input market such as labor.⁵⁷ When an input market is oligopsonistic and the

⁴⁴ See Blair & Harrison, *supra* note 39, at 308; see also Dowd, *supra* note 39, at 1084. See generally SAMUELSON & NORDHAUS, *supra* note 4, at 171-73.

⁴⁵ See Blair & Harrison, *supra* note 39, at 308-09 (noting that oligopsonists can operate to collectively deny their sellers access to a higher price); see also Dowd, *supra* note 39, at 1084-85 (describing oligopsony as involving a limited amount of buyers controlling a significant amount of market share); AREEDA & HOVENKAMP, *supra* note 8, at 299. See generally SAMUELSON & NORDHAUS, *supra* note 4, at 274 (stating that imperfect information can result in market failure).

⁴⁶ See Blair & Harrison, *supra* note 39, at 308 (noting that oligopsonists reduce the price of their purchases by reducing the quantity purchased); see also Dowd, *supra* note 39, at 1086 (indicating that an oligopsonist must offer a higher price in order to increase the quantity provided by its suppliers); AREEDA & HOVENKAMP, *supra* note 8, at 299 (noting that a monopsonist reduces prices by scaling back purchases). See generally SAMUELSON & NORDHAUS, *supra* note 4, at 160 (noting that barriers to entry reduce the pressure to compete).

⁴⁷ See Blair & Harrison, *supra* note 39, at 308; see also Dowd, *supra* note 39, at 1084-85; AREEDA & HOVENKAMP, *supra* note 8, at 299.

⁴⁸ See Blair & Harrison, *supra* note 39, at 316; see also Dowd, *supra* note 39, at 1084-85; AREEDA & HOVENKAMP, *supra* note 8, at 299.

⁴⁹ See Blair & Harrison, *supra* note 39, at 320 (noting that oligopsonists can exercise their market power to obtain other advantages besides a lower price).

⁵⁰ See Blair & Harrison, *supra* note 39, at 308, 320 (noting that oligopsonists can operate to collectively deny their sellers access to a higher price); see also Dowd, *supra* note 39, at 1084-85 (describing oligopsony as involving a limited amount of buyers controlling a significant amount of market

share); AREEDA & HOVENKAMP, *supra* note 8, at 299-300 (explaining that monopsony power is market power on the buying side of the market).

⁵¹ See SAMUELSON & NORDHAUS, *supra* note 4, at 274 (indicating that a lack of information regarding the quality of goods can result in market failure).

⁵² See *id.* at 160 (noting that high entry barriers reduce the pressure to compete).

⁵³ See Blair & Harrison, *supra* note 39, at 320 (noting that oligopsonists can exercise their market power to obtain other advantages besides a lower price); see also Dowd, *supra* note 39, at 1084-85 (suggesting that an oligopsonist's market power is derived from its significant market share); AREEDA & HOVENKAMP, *supra* note 8, at 299 (suggesting that a monopsonist's market power is based on its ability to scale back purchases offered to the sellers). See generally SAMUELSON & NORDHAUS, *supra* note 4, at 160 (noting that barriers to entry reduce the pressure to compete).

⁵⁴ See Blair & Harrison, *supra* note 39, at 308; see also Dowd, *supra* note 39, at 1084-85; AREEDA & HOVENKAMP, *supra* note 8, at 299; SAMUELSON & NORDHAUS, *supra* note 4, at 160, 274.

⁵⁵ See Blair & Harrison, *supra* note 39, at 308; see also Dowd, *supra* note 39, at 1084-85; AREEDA & HOVENKAMP, *supra* note 8, at 299.

⁵⁶ See Blair & Harrison, *supra* note 39, at 320 (noting that oligopsonists can exercise their market power to obtain other advantages besides a lower price).

⁵⁷ See Blair & Harrison, *supra* note 39, at 308 (explaining that when oligopsonists purchase less input, the quantity of the final good which they produce is also reduced); see, e.g., *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (holding that a sugar refiners price fixing of sugar beets was subject to the prohibitions of the Sher-

consumers of that input use that input to produce a final product that is sold in a market that is oligopolistic, the non-competitive forces of oligopsony in the input market and oligopoly in the final product market combine to make prices in the final product highly supra-competitive.⁵⁸

III. APPLICATION TO THE PRESIDENTIAL ELECTION PROCESS

In applying the economic concepts discussed above to the presidential election process, there are two markets involved.⁵⁹ First, there is the market for presidential candidates. In this market, the producers are the various political parties and the consumers are registered voters.⁶⁰ From the inverse perspective, the market for presidential candidates is also the market for votes.⁶¹ The producers are the registered voters and the consumers are the presidential candidates of the various po-

man Antitrust Act); *see also* Dowd, *supra* note 39, at 1093–94 (emphasizing that oligopsony creates the threat of collusion, which is an antitrust concern within input markets); AREEDA & HOVENKAMP, *supra* note 8, at 300–01 (explaining how lower prices upstream can result in higher prices downstream).

⁵⁸ *See* Blair & Harrison, *supra* note 39, at 308; *see also* AREEDA & HOVENKAMP, *supra* note 8, at 300. To elaborate on the labor example, if a oligopsonic consumer of labor uses that labor to produce a final good that it will sell in an oligopolistic market, the prices in the final product market will be driven up by both oligopsony in the labor market and oligopoly in the final product market.

⁵⁹ *See generally* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21 (1979) (concluding that an aggregate blanket license of copyrighted musical compositions, which gives the licensee unlimited access to thousands of individual compositions, is a separate product from a license to use one individual composition).

⁶⁰ *See* FEDERAL ELECTION COMMISSION, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS (2000), available at <http://fecweb1.fec.gov/pubrec/2000presgeresults.htm> (last visited Jan. 18, 2001) [hereinafter 2000 PRESIDENTIAL ELECTION RESULTS] (listing the amount of votes each candidate received by state). *See generally* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890–93 (1987) [hereinafter Farber & Frickey] (explaining that under the economic theory of legislation, the behavior of legislators, who are motivated solely by a desire to be reelected, can be explained by reference to two economic models—one of which assumes that legislators attempt to increase their likelihood of reelection by maximizing their appeal to voters).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See generally* SAMUELSON & NORDHAUS, *supra* note 4, at 115–22 (discussing the relationship between production and cost).

⁶⁴ *See generally* Farber & Frickey, *supra* note 60, at 890–93 (explaining that under the economic theory of legislation, the behavior of legislators, who are motivated solely by a de-

litical parties.⁶² The focus of this comment will be the latter perspective, because it provides a means to analyze the producers' cost⁶³ in the second market: the market for political influence over the elected president.⁶⁴ In this market, the producers are the political parties and the consumers are the various entities that make campaign contributions.⁶⁵ In light of this second market, the market for votes can be seen as an input market.⁶⁶ Both markets clear once every four years when citizens vote.⁶⁷

In the context of the market for votes, the means of exchange between voters and presidential candidates is the exercise of a vote, rather than an exchange of money.⁶⁸ Thus, there is no price competition in this market.⁶⁹ Because there is no monetary price associated with the "consumption" of a vote,⁷⁰ monetary considerations are not a mechanism upon which political parties and voters can make exchange decisions.⁷¹ Thus,

sire to be reelected, can be explained by reference to two economic models—one of which assumes that legislators attempt to maximize their chance of reelection by maximizing financial backing, publicity and endorsement from special interest groups).

⁶⁵ *See* FEDERAL ELECTION COMMISSION, TRANSACTION QUERY (BY CANDIDATE), at <http://herndon1.sdrdc.com/fecimg/norcansca.html> (last visited Mar. 5, 2001) [hereinafter TRANSACTION QUERY] (searching by candidate name gives donation transactions by committee, candidate committee and individual); *see also* Marcus, *supra* note 2, at A12 (identifying donors who have given more than one million dollars in soft money during the 2000 campaign cycle); CENTER FOR RESPONSIVE POLITICS, TOP DONORS TO POLITICAL CANDIDATES AND PARTIES REVEALED (2000), at http://www.opensecrets.org/pressreleases/oct18_00_release.html (last visited Feb. 4, 2001) [hereinafter TOP DONORS] (assessing top individual, organizational and business sector donors). *See generally* Farber & Frickey, *supra* note 60, at 890–93 (1987).

⁶⁶ *See generally* Broad. Music, Inc., 441 U.S. at 22 (describing licenses for individual musical compositions as raw materials in producing an aggregate blanket license).

⁶⁷ *See* U.S. CONST. art II, § 1, cl. 1. This perspective highlights the reason why a re-vote in Florida would have been inappropriate. A re-vote would have constituted a second clearing of the market.

⁶⁸ *See generally* SAMUELSON & NORDHAUS, *supra* note 4, at 32 (comparing money as a means of exchange and barter exchange, whereby goods are directly exchanged for goods); *id.* at 436 (defining "barter" as "the direct exchange of one good for another without using anything as money or as a medium of exchange"); BLACK'S LAW DICTIONARY 145 (7th ed. 1999) (defining "barter" as "the exchange of one commodity for another without the use of money").

⁶⁹ *Id.*

⁷⁰ 18 U.S.C. § 597 (1994) (mandating that those who make expenditures to persons to influence their voting will be subject to imprisonment for up to two years).

⁷¹ *See generally* SAMUELSON & NORDHAUS, *supra* note 4, at 436; BLACK'S LAW DICTIONARY 145 (7th ed. 1999) (defining

the market for votes is capable of being disciplined only by non-price competition.⁷² In this regard, money is not the resource directly used by presidential candidates to consume votes.⁷³ Presidential candidates cannot pay citizens for their votes.⁷⁴ Instead, the resource candidates use to attract votes—the consumption resource—is sufficiently disseminated ideas and information. Voters offer their votes in exchange for a candidate's pledge to pursue certain policies once elected president.⁷⁵

In the market for votes, every registered voter offers the same amount of input: one vote.⁷⁶ It can be "sold" to a political party on Election Day⁷⁷ or not sold at all.⁷⁸ Thus, there is a high exit barrier for voters in the market for votes because the productive resources that constitute a vote have zero transferability to a different use.⁷⁹ This conclusion is bolstered by the existence of bribery laws, which prohibit the exchange of votes for money.⁸⁰

A. Assessing the Competitiveness of the Marketplace for Votes

1. Number of "Consumers" in the Market

In the 2000 presidential election, the two most obvious consumers of votes were George W. Bush and Al Gore representing, respectively, the Republican and Democratic parties. However, an additional fourteen presidential candidates appeared on the general election ballot.⁸¹ Thus, examining the number of consumers by itself, it appears there were at least a moderate number of consumers in the market for votes.⁸²

2. Level of Available Information

As stated earlier, there is no price competition in the market for votes.⁸³ Therefore, analyzing the level of non-price information available to voters is crucial, as it provides the only basis upon which

barter).

⁷² See generally ANTITRUST ANALYSIS, *supra* note 3, at 6, 8, 18 (noting that perfect competition caters to consumer tastes and that consumers articulate their subjective preferences through the transactions they make); SAMUELSON & NORDHAUS, *supra* note 4, at 46 (explaining that in addition to price, consumers also consider information regarding the availability of related goods in making their consumption decisions).

⁷³ See generally SAMUELSON & NORDHAUS, *supra* note 4, at 436; BLACK'S LAW DICTIONARY 145 (7th ed. 1999) (defining barter).

⁷⁴ 18 U.S.C. § 597.

⁷⁵ See, e.g., UNIVERSITY OF COLORADO AT BOULDER COLLEGE REPUBLICANS, REPUBLICAN PARTY PLATFORM (2000), available at <http://ucsub.colorado.edu/~curepub/platform.html> (last visited Mar. 5, 2001) (organizing the Republican Party Platform by topic); ASSOCIATION OF STATE GREEN PARTIES, GREEN PARTY PLATFORM (2000), available at <http://www.gp.org/platform/gpp2000.html> (last visited Apr. 7, 2001) (organizing the Green Party Platform by topic).

⁷⁶ See *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (concluding that the conception of political equality stands for the proposition of "one person, one vote").

⁷⁷ See generally Blair & Harrison, *supra* note 39, at 313 (identifying perishability as a product characteristic enhancing the likelihood of collusive oligopsony).

⁷⁸ See generally *id.* at 316–20 (explaining how a monopsonist facing an all-or-nothing supply curve can fully exploit its monopsony power).

⁷⁹ See generally *id.* at 314 (using professional athletes as an example to demonstrate that supply curves for resources with low transferability are inelastic); SAMUELSON & NORDHAUS, *supra* note 4, at 128–29 (explaining the concept of opportu-

nity cost and how, in a well-functioning market, price equals opportunity cost).

⁸⁰ 18 U.S.C. § 597.

⁸¹ FEDERAL ELECTION COMMISSION, ADDRESSES AND PARTY DESIGNATIONS OF 2000 PRESIDENTIAL CANDIDATES ON THE GENERAL ELECTION BALLOTS (2000), at <http://fecweb1.fec.gov/pubrec/2000presgeresults.htm> (last visited Jan. 26, 2001) (listing Cathy Gordon Brown, running as an independent; Harry Browne, running for the Libertarian Party; Patrick J. Buchanan, running for the Reform Party, Freedom Party, Buchanan Reform Party, Citizens First Party, Independence Party and Right To Life Party; Earl F. Dodge, running for the Prohibition Party; John S. Hagelin, running for the Natural Law Party, Independence Party and Reform Party; James E. Harris, Jr., running for the Social Workers Campaign and Socialist Workers Party; Denny Lane, running for the Vermont Grassroots Party; David McReynolds, running for the Socialist Party USA and Liberty Union Party; Monica Moorehead, running for the Workers World Party; Ralph Nader, running for the Green Party, Green Independent Party, United Citizens Party and Progressive Party; Howard Phillips, running for the Constitution Party, Constitutional Party, American Independent Party, American Constitution Party, Concerned Citizen Party, Independent American Party and U.S. Taxpayers Party; L. Neil Smith, running for the Libertarian Party; Randall Venson, running independently; and Louie G. Youngkeit, running unaffiliated).

⁸² See also Dowd, *supra* note 39, at 1084–85; Blair & Harrison, *supra* note 39, at 315–16 (stating that a small number of firms are a factor contributing to oligopsony). See generally ANTITRUST ANALYSIS, *supra* note 3, at 5–6 (identifying numerous firms as a factor contributing to a perfectly competitive marketplace).

⁸³ See *supra* notes 65–70 and accompanying text.

voters can make decisions regarding where to offer their votes in an election.⁸⁴

In *Buckley v. Valeo*,⁸⁵ the Supreme Court concluded that, due to the electorate's increasing dependence on television, radio and other forms of mass media for news and information, "virtually every means of communicating ideas in today's mass society requires the expenditure of money."⁸⁶ Thus, one can measure the level of non-price information available to voters about the different presidential candidates by assessing each candidate's access to mass media. In accordance with *Buckley*, because mass media costs money, a given presidential candidate's access to money is a surrogate for the level of information available to voters concerning that candidate.

Buckley bridges the relationship between money and votes. While money cannot be used directly to consume votes, it is the means by which presidential candidates access mass media and engage in non-price competition with each other. Thus, money is still indirectly the resource used by presidential candidates to consume votes. This conclusion is critical because money is a limited resource. Economic theory is a tool used to maximize the utility derived from limited resources.⁸⁷ As soon as money becomes a surrogate for a certain type of speech, economic principles should control the regulation of that speech.

In the 2000 presidential election, the Republican Party candidate, George W. Bush, raised \$191.6 million and received an additional \$67.6 million in federal election campaign funds.⁸⁸ Thus, he had access to a total of \$259.2 million with which to disseminate non-price information

about his candidacy to the voters.⁸⁹ Al Gore, the Democratic Party candidate, raised \$132.6 million and received \$83 million in federal election campaign funds for a combined total of \$215.6 million.⁹⁰

The next closest candidate in terms of campaign funds was Pat Buchanan. He raised \$42.7 million and received \$16.6 million in federal election campaign funds, totaling just \$59.3 million.⁹¹ Buchanan's entire campaign budget was less than the amount both major party candidates (George Bush and Al Gore) received from the federal government.⁹² Buchanan's total was less than one-fourth of George W. Bush's total and less than one-third of Al Gore's total.⁹³

The next two most successful candidates in raising campaign funds, Ralph Nader and Harry Browne, only had access to a combined \$11.1 million for their presidential campaigns.⁹⁴ Al Gore had more than this amount of money on hand after the presidential election had ended.⁹⁵

Although the number is slightly inflated because it does not consider the level of campaign funds accessed by the other nine candidates, if these five candidates were the only consumers in the market, then the top two consumers (George W. Bush and Al Gore) had access to 87% of the total available consumption resources.⁹⁶

The televised presidential debates offer candidates an additional opportunity to access mass media and disseminate candidate information because they are funded independently from the money raised by individual campaigns.⁹⁷ Unfortunately, because the Commission on Presidential Debates ("CPD")⁹⁸ requires that participating can-

⁸⁴ *See id.*

⁸⁵ 424 U.S. 1 (1976).

⁸⁶ *Id.* at 19.

⁸⁷ SAMUELSON & NORDHAUS, *supra* note 4, at 4–5 (explaining that the essence of economics is recognizing the existence of scarcity and determining how to organize society in a manner that optimizes the effective use of resources to satisfy people's almost limitless wants and needs).

⁸⁸ CENTER FOR RESPONSIVE POLITICS, 2000 PRESIDENTIAL RACE: TOTAL RAISED AND SPENT, *available at* <http://www.opensecrets.org/2000elect/index/allcands.htm> (last visited Apr. 7, 2001) [hereinafter TOTAL RAISED AND SPENT].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ FEC Candidate Debates Rule, 11 C.F.R. § 110.13(a) (2000) (mandating that the debate staging organization cannot endorse, support or oppose individual candidates).

⁹⁸ *See* COMMISSION ON PRESIDENTIAL DEBATES, ABOUT CPD: COMMISSION HISTORY, *available at* <http://www.debates.org/pages/history.html> (last visited Feb. 16, 2001) [hereinafter COMMISSION HISTORY] (describing the CPD as a nonpartisan, nonprofit, tax-exempt corporation that finances the debates entirely through private contributions); COMMISSION ON PRESIDENTIAL DEBATES, NONPARTISAN CANDIDATE SELECTION CRITERIA FOR 2000 GENERAL ELECTION DEBATE PARTICIPATION (2000), *available at* <http://www.debates.org/pages/candsel.html> (last visited Feb. 15, 2001) [hereinafter CANDIDATE SELECTION CRITERIA] (explaining that the goal of the debates is to afford the members of the public an opportunity to sharpen their views, in a focused debate format, of those candidates who have sufficient electoral support to be realistically considered the principal competitors for the presidential office).

didates have poll numbers showing at least 15% support nationally, only George W. Bush and Al Gore had the opportunity to participate in the debates.⁹⁹ Thus, instead of acting as a mechanism to narrow the information gap between major and minor parties, the presidential debates have been used to widen it.

While it appears initially that there are numerous consumers of votes, by factoring in the level of available information, it appears the market for votes is highly concentrated.¹⁰⁰ The number of consumers retaining a viable amount of consumption resources in the market is extremely limited.¹⁰¹

3. Barriers To Entry

Significant entry barriers to the market for votes have obstructed both potential consumer entrants and smaller current consumers from meaningfully competing with and disciplining the two major party candidates.¹⁰²

a. Product Loyalty and Product Differentiation

After campaigning for months, representing

the Green Party in his third consecutive presidential election,¹⁰³ and giving a detailed speech about the Green Party's platform at his post-election 2000 news conference, Ralph Nader was asked, "Did you in fact cost Al Gore the election . . . Did the 3 percent you got [in Florida] disenfranchise the 48 percent of the population who voted for Mr. Gore?"¹⁰⁴ In response, Mr. Nader said, "I do think Al Gore cost me the election."¹⁰⁵ Using economic theory, this exchange can be explained by the concept of product differentiation. Product differentiation occurs when established producers (or in this case consumers) possess an advantage over potential entrants and smaller incumbent firms as a result of accumulated goodwill.¹⁰⁶ The effect of this goodwill is to make similar products less-than-perfect substitutes.¹⁰⁷ In the context of the market for votes, there is no doubt that Al Gore and Ralph Nader are not perfect substitutes, in the sense that they would run a presidential term differently. However, the implication of the journalist's question that Ralph Nader is not a viable presidential candidate, is less about the merits of his candidacy and more about product differentiation.¹⁰⁸

A substantial percentage of the voting popula-

⁹⁹ See Leigh Strobe, *Third Parties Locked Out*, 1, at <http://www.gopatgo2000.org/library/default.asp?id=148> (last visited Nov. 3, 2000) (noting that Pat Buchanan and Ralph Nader did not share the debate stage with George W. Bush and Al Gore); see also BUCHANAN-FOSTER PRESIDENTIAL CAMPAIGN, DEBATE THE DEBATES, at <http://www.gopatgo2000.org/library/> (last visited Nov. 3, 2000) (noting that the three way debates between Bill Clinton, George Bush and Ross Perot in 1992 had an average viewership of 90 million people, whereas the 1996 debates between Clinton and Dole had an average viewership of 42 million); cf. Dalia Sussman, *Debate Over Debates*, ABCNEWS.COM, at <http://abcnews.go.com/sections/politics/DailyNews/poll000727.html> (last visited Jan. 27, 2001) (finding that 44% of adults sampled felt that Ralph Nader and Pat Buchanan should not be excluded from the debates by the "bipartisan" CPD). See generally Brief for Appellants at 10–12, *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58 (D.D.C. 2000), appeal docketed, (No. 1:00CV1775) (D.C. Cir. Sept. 14, 2000), available at <http://www.gopatgo2000.org/library/brief.htm> (last visited Nov. 3, 2000) (arguing that selection criteria which deny eligibility to federally funded third party candidates are inconsistent with the statutory exemption given by the FEC to nonpartisan activities designed to encourage voting).

¹⁰⁰ See, e.g., *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 571, 578 (1967) (holding that the market for liquid bleach was oligopolistic where Clorox had \$12 million in assets and of the remaining two hundred producers only eight had assets in excess of \$1 million).

¹⁰¹ See, e.g., *id.*

¹⁰² See generally ANTITRUST ANALYSIS, *supra* note 3, at 5–6 (identifying low entry barriers as a factor contributing to a

perfectly competitive marketplace); Blair & Harrison, *supra* note 39, at 315–16 (identifying high entry barriers as a factor contributing to oligopsony); Dowd, *supra* note 39, at 1084–85 (identifying high entry barriers as a factor contributing to oligopsony).

¹⁰³ Arati Bhattacharya, *Nader Makes Third Bid for Presidency*, THE BATTALION VIA UNIVERSITY WIRE, Nov. 3, 2000 at 1 (noting that in addition to running in 1996, Ralph Nader was a write-in candidate in the 1992 presidential election).

¹⁰⁴ Ralph Nader, *Excerpts from Address at C-Span Post-Election News Conference*, C-SPAN.ORG, at <http://www.c-span.org/search/index.asp> (last visited Feb. 15, 2001); see also Shailagh Murray, *Election 2000: Nader's Cause Could Pay for His Spoiler Role, Consumer Advocate Would Make Enemies if Bush Wins Election*, WALL ST. J., Nov. 9, 2000, at A17 [hereinafter Murray].

¹⁰⁵ Murray, *supra* note 104, at A17.

¹⁰⁶ ANTITRUST ANALYSIS, *supra* note 3, at 19 (explaining that in order to overcome loyalty to current firms, an incumbent will have to bear a higher promotional cost); see also SAMUELSON & NORDHAUS, *supra* note 4, at 161 (explaining that advertising can create product awareness and loyalty to well-known brands).

¹⁰⁷ SAMUELSON & NORDHAUS, *supra* note 4, at 453, 161 (noting that a market consisting of a large number of differentiated products serves to discourage potential entrants because the demand for each of the individual differentiated products will be too small to sustain an entrant intending to compete solely on that product).

¹⁰⁸ See generally ANTITRUST ANALYSIS, *supra* note 3, at 19; SAMUELSON & NORDHAUS, *supra* note 4, at 161 (explaining that advertising can create product awareness and loyalty to well-known brands).

tion is strongly attached to one of the two major parties.¹⁰⁹ This represents accumulated goodwill towards those parties.¹¹⁰ While the voters represented in these figures will not necessarily always vote for their respective party's presidential candidate, it is arguable that they tend to vote according to their expressed political affiliation. Due to the magnitude of these numbers, overcoming the goodwill bestowed on the Democratic and Republican Parties constitutes a substantial entry barrier for other prospective presidential candidates.¹¹¹

Moreover, the burden associated with overcoming this entry barrier is even greater in the market for votes because there is no price competition. In the typical product market, product differentiation barriers are overcome through a combination of escalated product promotion and price competition.¹¹² Because price is not a mechanism by which presidential candidates can attract voters, the promotional element—the information element—bears all of the weight in overcoming this substantial entry barrier.¹¹³ Product differentiation constitutes a significant entry barrier for presidential candidates seeking to compete in the market for votes.

b. *Ballot Access*

Ballot access restrictions imposed by state law have also served as a barrier to entry in the market for votes. Most states provide automatic ballot access to parties that received a certain percentage or number of votes in the previous general elec-

tion.¹¹⁴ Because the two major parties traditionally satisfy these requirements, the restrictions effectively give them automatic general election ballot access while excluding the other candidates.¹¹⁵ Candidates outside the two dominant political parties often fail to meet the requirements for automatic ballot access.¹¹⁶ Consequently, minor party candidates must use their already limited resources to gain ballot access by way of a nominating petition.¹¹⁷ Typically, a nominating petition scheme requires that candidates solicit a pre-determined number of signatures from registered voters offering support to the candidate.¹¹⁸ This process is made more difficult by procedural restrictions also imposed by state law. For example, in some states, persons voting in a major political party primary are prohibited from signing a petition declaring support for another presidential candidate.¹¹⁹ These restrictions undermine the legitimacy of minor party candidates as viable voting consumers by making it disproportionately difficult for them to gain ballot access and further entrenching the two major party candidates.

c. *Access to Debates*

The Commission of Presidential Debates has created an additional barrier to entry by requiring that presidential candidates have at least 15% support from the national electorate before being allowed to participate in the presidential debates.¹²⁰ As stated earlier, information is *the* critical variable when assessing non-price competition among the

¹⁰⁹ NATIONAL ELECTION STUDIES, THE NES GUIDE TO PUBLIC OPINION AND ELECTION BEHAVIOR: PARTY IDENTIFICATION 7-POINT SCALE 1952-1958, available at http://www.umich.edu/~nes/nesguide/toptable/tab2a_1.htm (last visited Mar. 12, 2001) (graphing the results of surveys conducted at two-year intervals from 1954 to 1998 that assess the degree of attachment those surveyed have to different political parties) (noting that 19% of those sampled were strong Democrats and 10% of those sampled were strong Republicans in 1998); see also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 299 (1999) (depicting the results of surveys conducted at two-year intervals from 1972 to 1994 that assesses the degree of attachment those surveyed have to different parties).

¹¹⁰ See generally ANTITRUST ANALYSIS, *supra* note 3, at 19.

¹¹¹ See generally *id.*

¹¹² *Id.* at 19.

¹¹³ See *supra* notes 65-70 and accompanying text.

¹¹⁴ E.g., ARIZ. REV. STAT. ANN. § 16-804 (West 2000) (requiring 5% of vote in previous election for automatic ballot access); ARK. CODE ANN. § 7-1-101(16)(A) (Michie 2000) (requiring 3%); see also Bradley A. Smith, *Judicial Protection of Bal-*

lot-Access Rights: Third Parties Need Not Apply, 28 HARV. J. ON LEGIS. 167, 175 (1991) [hereinafter Smith] (citing ballot access restrictions).

¹¹⁵ Smith, *supra* note 114, at 175-76 (1991).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., TEX. ELEC. CODE ANN. § 181.006 (Vernon 1990); see also Smith, *supra* note 114, at 177. In the context of a product market, this practice would be condemned as an illegal boycott or tying arrangement. See, e.g., *Klor's, Inc. v. Broadway Hale Stores*, 359 U.S. 207 (1959) (holding a department store chain liable for an illegal boycott when it conditioned its purchase of appliances on the producers' promise not to sell its appliances to a small single store retailer); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 461-62 (1992) (defining an illegal tie as "an agreement by a party to sell one product but only on condition that the buyer . . . agrees that he will not purchase that product from another supplier").

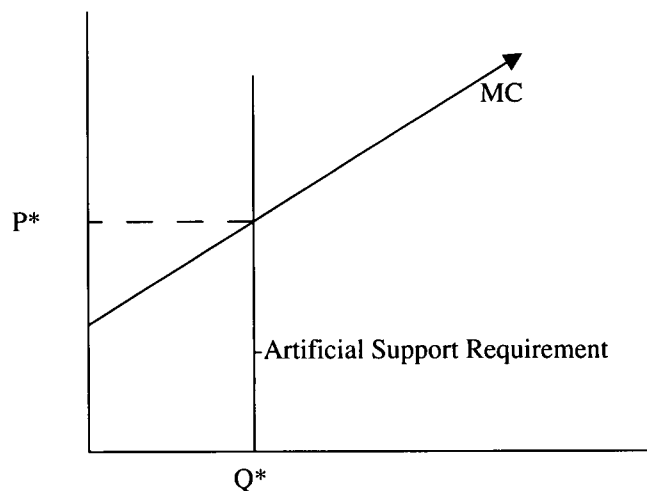
¹²⁰ CANDIDATE SELECTION CRITERIA, *supra* note 98.

presidential candidates in the market for votes because it is the basis upon which voters (who face no pricing mechanism) make their voting decisions.¹²¹ By denying voters access to information about minor candidates, who might otherwise appear in the presidential debates, the CPD makes it more difficult for minor party candidates to engage the major parties in non-price competition.¹²² Because non-price competition is the only means for presidential candidates to compete in the market for votes, the exclusion of minor candidates from the presidential debates essentially prevents them from entering the market at all.¹²³ In the context of a product market, this entry barrier would be similar to a high capital outlay requirement that is necessary for efficient entry.¹²⁴

Figure 1 depicts this barrier graphically. The vertical axis measures different amounts of money. The horizontal axis depicts quantity of votes. Curve MC depicts a hypothetical marginal cost curve.¹²⁵ At any given point on the curve, MC represents the additional information dissemination cost that will be incurred by a hypothetical presidential candidate in acquiring one additional vote.¹²⁶ By requiring a "nonpartisan" candidate to earn at least 15% support before being allowed to participate in the presidential debates, that candidate must expend a dollar amount equivalent to P^* where Q^* is the number of votes constituting a 15% support level.

In the market for votes, there are a small number of consumers controlling a majority of the consumption resources¹²⁷ and high entry barriers.¹²⁸ Therefore, this market resembles an oligopsonistic marketplace.¹²⁹ Based on this conclusion, economic theory mandates that consumption resources will not be responsive to pro-

Figure 1



ducer (voter) preference,¹³⁰ and if the final product market is oligopolistic, prices in that market will be excessively high.¹³¹

B. Assessing the Competitiveness of the Marketplace for Political Influence Over the President

In the market for political influence over the elected president, the product being sold is a contingent interest in influence over a winning presidential candidate. The interest is contingent because it only comes to fruition if the candidate supported actually gets elected.¹³² This is an important point because vote accumulation is an essential element to winning an election.¹³³ Thus, while the consumers in this market are the people and organizations that contribute to political campaigns,¹³⁴ the producers must necessarily be the same presidential candidates that were consumers

¹²¹ See *supra* notes 65–70 and accompanying text.

¹²² See generally *id.*

¹²³ See generally *id.*

¹²⁴ See ANTITRUST ANALYSIS, *supra* note 3, at 18–19 (defining capital requirements as an entry barrier resulting from the combination of expensive start-up costs and slow acceptance by consumers).

¹²⁵ See generally SAMUELSON & NORDHAUS, *supra* note 4, at 115–22 (discussing the relationship between production and cost).

¹²⁶ *Id.* at 116–17 (defining marginal cost as the additional cost of producing one extra unit of output).

¹²⁷ See generally TOTAL RAISED AND SPENT, *supra* note 88 (showing that Al Gore and George W. Bush had access to a disproportionate amount of campaign money relative to other candidates).

¹²⁸ See, e.g., CANDIDATE SELECTION CRITERIA, *supra* note

98.

¹²⁹ See Blair & Harrison, *supra* note 39, at 308; see also Dowd, *supra* note 39, at 1084–85; AREEDA & HOVENKAMP, *supra* note 8, at 299.

¹³⁰ See Blair & Harrison, *supra* note 39, at 320–21 (noting that oligopsonists can exercise their market power to obtain other advantages besides a lower price).

¹³¹ See Blair & Harrison, *supra* note 39, at 308; see also AREEDA & HOVENKAMP, *supra* note 8, at 300.

¹³² See TOTAL RAISED AND SPENT, *supra* note 88 (demonstrating that many candidates received campaign contributions, however, only George W. Bush became president).

¹³³ See U.S. CONST. amend. XII (stating that the person with the greatest number of electoral votes shall be president).

¹³⁴ See TRANSACTION QUERY, *supra* note 65; see also Marcus, *supra* note 2, at A12 (identifying donors who have given

in the market for votes.¹³⁵ They are the only ones who have gained access to votes.¹³⁶ This realization allows two additional conclusions that help to clarify the relationship between the market for votes and the market for political influence.

First, it is the accumulation of votes supporting an identifiable candidate that change votes from an input into a final product.¹³⁷ The distinction between what is offered by voters in the market for votes and what is exchanged in the market for political influence is similar to the distinction between the whole and the sum of its parts.¹³⁸ By combining votes and attaching them to an identifiable candidate, the new product created is a consensus.¹³⁹ The political momentum associated with that consensus is what is sold to campaign contributors.

Second, due to a constant stream of surveys and polling data, the success of various consumers in the market for votes is fairly transparent to consumers in the market for political influence.¹⁴⁰ Therefore, the same dynamics that cause the market for votes to be oligopsonistic also cause the market for political influence to be oligopolistic.¹⁴¹ The same forces that prevent minor party presidential candidates and potential entrants

from attracting voters in the market for votes¹⁴² also prevent presidential candidates from selling an interest in a winning presidential candidate in the market for political influence.¹⁴³ If a given producer cannot accumulate votes in the input market there is no winning candidate to sell in the output market.¹⁴⁴

Finally, there is an additional entry barrier to the market for political influence. As mentioned earlier, the 15% national support requirement creates an artificial entry barrier in the form of an escalated capital requirement.¹⁴⁵ Similarly, the fact that consumers in the market for political influence have a demand for winning presidential candidates creates a similar but much larger capital requirement.¹⁴⁶ Figure 2 portrays this burden graphically. MC is a hypothetical marginal cost curve. Q is the minimum number of votes necessary to win the election under an Electoral College regime.¹⁴⁷ Q' is the minimum number of votes necessary to win under a popular vote regime.¹⁴⁸ Assuming that all points on MC represent the additional information dissemination cost of acquiring one more vote, P and P' represent the corresponding cost of acquiring a sufficient amount of votes.

more than one million dollars in soft money during the 2000 campaign cycle); TOP DONORS, *supra* note 65 (assessing top individual, organizational and business sector donors).

¹³⁵ See ANTITRUST ANALYSIS, *supra* note 3, at 18 (explaining that where current firms control an essential raw material, new entry is impossible).

¹³⁶ See 2000 PRESIDENTIAL ELECTION RESULTS, *supra* note 60 (listing the amount of votes each candidate received by state); see also ANTITRUST ANALYSIS, *supra* note 3, at 18.

¹³⁷ See, e.g., *Broad. Music, Inc.*, 441 U.S. at 21 (concluding that an aggregate blanket license of copyrighted musical compositions, which gives the licensee unlimited access to thousands of individual compositions, is a separate product from a license to use one individual composition); *id.* at 22 (describing licenses for individual musical compositions as raw materials in producing aggregate blanket license).

¹³⁸ See *id.* at 21–22.

¹³⁹ See *id.* at 21.

¹⁴⁰ See, e.g., Keating Holland, *Poll: Gore, Bush Still Lead in Support for Presidential Nomination*, CNN.COM, at <http://www.cnn.com/000/ALLPOLITICS/stories/01/12/voter.poll/> (last visited Jan. 27, 2001) (comparing voter satisfaction if Al Gore or Bill Bradley received the Democrat presidential nomination and if George W. Bush or John McCain received the Republican nomination).

¹⁴¹ See ANTITRUST ANALYSIS, *supra* note 3, at 18 (explain-

ing how blocked access to raw materials can serve as a barrier to entry into the final product market).

¹⁴² See, e.g., CANDIDATE SELECTION CRITERIA, *supra* note 98.

¹⁴³ See ANTITRUST ANALYSIS, *supra* note 3, at 18.

¹⁴⁴ *Id.*

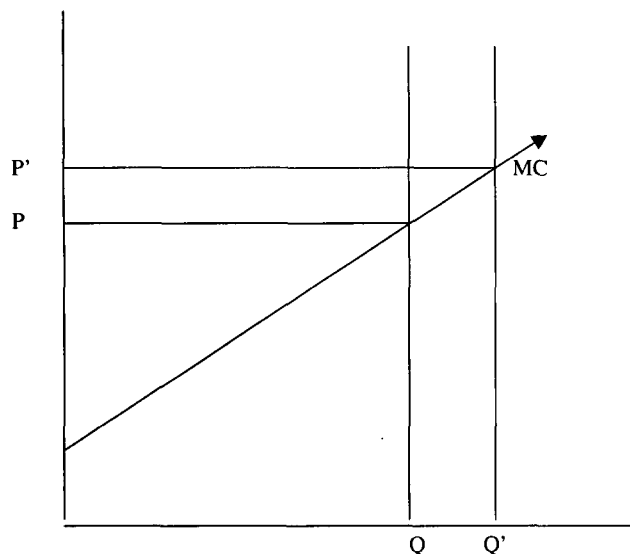
¹⁴⁵ See CANDIDATE SELECTION CRITERIA, *supra* note 98; see also ANTITRUST ANALYSIS, *supra* note 3, at 18–19.

¹⁴⁶ See generally ANTITRUST ANALYSIS, *supra* note 3, at 19 (defining capital requirements as an entry barrier resulting from the combination of expensive start-up costs and slow acceptance by consumers).

¹⁴⁷ See Thomas M. Durbin, *The Anachronistic Electoral College*, 39 Fed. B. News & J. 510 (1992) [hereinafter Durbin] (explaining that it is possible for a candidate to win the electoral college vote but lose the popular vote). See generally U.S. CONST. amend. XII (mandating that the president be elected under an electoral college system); FEDERAL ELECTION COMMISSION, DISTRIBUTION OF ELECTORAL VOTES (2000), available at <http://www.fec.gov/pages/elevote.htm> (last visited Jan. 26, 2001) (listing the distribution of electoral votes by state for the periods 1981–1990 and 1991–2000).

¹⁴⁸ See Durbin, *supra* note 147, at 510 (explaining that it is possible for a candidate to win the electoral college vote, but lose the popular vote).

Figure 2



Ultimately, because there are a small number of producers controlling votes¹⁴⁹ and high producer entry barriers,¹⁵⁰ the market for political influence is oligopolistic.¹⁵¹

Based on the application of economic theory to the presidential election process, it appears that the market for votes is oligopsonistic and the market for political influence is oligopolistic. Economic theory further predicts that resources will not be responsive to voter preference in the market for votes¹⁵² and prices will rise to supra-competitive levels in the market for political influence.¹⁵³ Because these conditions have been shown to exist,¹⁵⁴ economic theory is a useful tool in explaining the current status of our presidential election process.¹⁵⁵ Thus, economic analysis—as it is applied under our antitrust laws to our product markets—should be employed, by analogy, to our marketplace of ideas to reform the presidential election process and scrutinize election legislation under the First Amendment.

¹⁴⁹ See generally TOTAL RAISED AND SPENT, *supra* note 88 (demonstrating that George W. Bush and Al Gore had access to a disproportionate amount of campaign money relative to other candidates); ANTITRUST ANALYSIS, *supra* note 3, at 18 (explaining that where current firms control an essential raw material new entry is impossible).

¹⁵⁰ See, e.g., CANDIDATE SELECTION CRITERIA, *supra* note 98.

¹⁵¹ See *supra* note 25.

¹⁵² See generally Blair & Harrison, *supra* note 39, at 320 (noting that oligopsonists can exercise their market power to obtain other advantages besides a lower price). Economic theory also suggests that resources will be responsive to contributor preference in the market for political influence.

¹⁵³ See generally Blair & Harrison, *supra* note 39, at 308;

IV. REFORM

Based on the preceding reasoning, antitrust analysis and economic theory can be used by both the judiciary and legislature to reform the presidential election process.

A. Ballot Access Restrictions

Several states have adopted laws that prohibit voters who participate in a political party primary from signing nominating petitions that would enable third party candidates to gain general election ballot access.¹⁵⁶ For example, in Texas, nominating petitions must be accompanied by the following language: “I have not voted in a primary election or participated in a convention of another party during this voting year, and I understand that I become ineligible to do so by signing this petition.”¹⁵⁷ Using the analysis suggested by this article, this restriction and other ones like it should be invalidated by the First Amendment because they are inconsistent with the theory of the marketplace of ideas.

In *Klor's, Inc. v. Broadway-Hale Stores*,¹⁵⁸ an antitrust case, an agreement between Broadway-Hale, the owner of a chain of department stores, and several appliance producers was challenged as violating the Sherman Antitrust Act.¹⁵⁹ The Supreme Court found that Broadway-Hale had used its “monopolistic buying power” to induce an agreement that prohibited the appliance manufacturers from selling its products to Klor's, a single store retailer that competed with Broadway-Hale in San Francisco.¹⁶⁰ The Court held that the agreement deprived the appliance producers of their freedom to sell to Klor's and was an illegal concerted refusal to deal.¹⁶¹

AREEDA & HOVENKAMP, *supra* note 8, at 300.

¹⁵⁴ See *supra* notes 1–2 and accompanying text.

¹⁵⁵ See Farber & Frickey, *supra* note 60, at 895 (noting that the ultimate test of an economic model is its predictive ability).

¹⁵⁶ See, e.g., TEX. ELEC. CODE ANN. § 181.006 (Vernon 1990); see also Smith, *supra* note 114, at 176.

¹⁵⁷ TEX. ELEC. CODE ANN. § 181.006(f).

¹⁵⁸ 359 U.S. 207 (1959).

¹⁵⁹ *Id.* at 208.

¹⁶⁰ *Id.* at 209; see also Blair & Harrison, *supra* note 39, at 320–21 (identifying *Klor's* as an example of how a monopolist can use its buying power to impose non-price restrictions).

¹⁶¹ *Id.* at 213.

The Texas law restricting ballot access is analogous to the agreement invalidated in *Klor's*. Presidential candidates are essentially buyers of votes.¹⁶² As shown earlier, the Republican and Democratic Party candidates possess a predominant share of the consumption resources in the market for votes.¹⁶³ Like the agreement in *Klor's*, the Texas law enables Republicans and Democrats to use their buying power to restrict the voters' decisions regarding the party candidates with which they will deal.¹⁶⁴ The law forces the producers of votes to boycott third-party nominating petitions or lose the opportunity to participate in the selection of buyers (or presidential candidates) who will represent the Republicans and Democrats in the general election. Employing the reasoning found in *Klor's* by analogy, courts should invalidate the Texas law restricting ballot access and those like it because these laws are inconsistent with the First Amendment theory of the marketplace of ideas.¹⁶⁵

B. The CPD's Fifteen Percent National Support Requirement

Under the reasoning suggested by this article, the CPD's 15% national support requirement also fails to comply with the First Amendment. This restriction is analogous to the one imposed in *Allied Tube & Conduit Corp. v. Indian Head Inc.*¹⁶⁶ In that case, the National Fire Protection Association, a private voluntary organization, published fire safety standards that were extremely influential and often routinely adopted into law.¹⁶⁷ The plaintiff submitted its polyvinyl conduit for the association's approval as a safe alternative to steel conduit.¹⁶⁸ When approval was before the association, the steel interests recruited 230 people to vote against the plaintiff's proposed alternative to steel conduit.¹⁶⁹ Plaintiff sued under Section 1 of the Sherman Antitrust Act alleging that the steel

interests had conspired to prevent inclusion of the polyvinyl conduit within the safety standards.¹⁷⁰

The Court in *Allied Tube* began its analysis by defining the relevant context of standard setting as a private association.¹⁷¹ The Court then noted that there was "no doubt" that the members of such associations have incentives to restrain competition.¹⁷² In responding to the argument that the association's activity was "quasi-legislative" and therefore immune from antitrust scrutiny, the court relied on the fact that association members eligible to vote were not accountable to the public and were also personally interested in the outcome of the association's votes.¹⁷³ The Court held that the association could not "bias the [standard-setting] process by, as in this case, stacking the private standard-setting body with decision-makers sharing economic interest in restraining competition."¹⁷⁴

The facts surrounding the CPD are the same as those in *Allied Tube*. The CPD is a private, voluntary, bi-partisan organization that has created standards for participation in the presidential debates.¹⁷⁵ As in *Allied Tube*, failure to meet the approval of the commission results in exclusion from the presidential debates and *de facto* inability to compete in the market for votes.¹⁷⁶ By analogy to the reasoning found in *Allied Tube*, the CPD's 15% national support requirement should be invalidated under the First Amendment as inconsistent with the theory of the marketplace of ideas.

C. Campaign Finance Reform

Ideally, the election process serves as a forum in which different ideas compete for the electorate's approval. Using the economic tools discussed in this article, this can best be accomplished by fixing the amount of money that various presidential candidates use in their campaigns.¹⁷⁷ By fixing

¹⁶² See 2000 PRESIDENTIAL ELECTION RESULTS, *supra* note 60 (listing the amount of votes each candidate received by state).

¹⁶³ TOTAL RAISED AND SPENT, *supra* note 88.

¹⁶⁴ See *Klor's, Inc.*, 359 U.S. at 213; see also TEX. ELEC. CODE ANN. § 181.006(f).

¹⁶⁵ TEX. ELEC. CODE ANN. § 181.006(f).

¹⁶⁶ 486 U.S. 492 (1988).

¹⁶⁷ *Id.* at 495.

¹⁶⁸ *Id.* at 496.

¹⁶⁹ *Id.* at 496-97.

¹⁷⁰ *Id.* at 497-98.

¹⁷¹ *Id.* at 500.

¹⁷² *Id.*

¹⁷³ *Id.* at 501-02.

¹⁷⁴ *Id.* at 511.

¹⁷⁵ COMMISSION HISTORY, *supra* note 98.

¹⁷⁶ COMMISSION ON PRESIDENTIAL DEBATES, DEBATE HISTORY, available at <http://www.debates.org/pages/debhis.html> (last visited Mar. 11, 2001) (showing that the winning presidential candidate has been a debate participant in every presidential election since 1956).

¹⁷⁷ See, e.g., *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) (concluding that the NCAA's hori-

this amount at a level attainable by multiple candidates, more candidates will be able to compete meaningfully in the market for votes.¹⁷⁸ Furthermore, these presidential candidates will be forced to compete on the merits of their ideas.¹⁷⁹ This will cause the market for votes to behave more like a competitive market where output is maximized, costs are minimized and productive resources are expended based on actual voter preference.¹⁸⁰ It will discipline candidates to expand the number of votes they consume by becoming more efficient—reducing the cost per vote.¹⁸¹ In the context of non-price competition, a firm does this by responding to consumer preference.¹⁸²

Figure 3 articulates these ideas graphically. Holding campaign expenditures equal and assuming that the level of information dissemination is equal,¹⁸³ an idea offered by a presidential candidate that tracks voter preference more closely will solicit more votes than a less appealing idea offered by another candidate. Figure 3 demonstrates:

By fixing campaign expenditures at P^* presidential candidates can expand voter consumption only by increasing their efficiency.¹⁸⁴ Holding everything else equal, the ideas offered by the presidential candidate with MC' cost curve are more popular than the ideas advocated by the candidate with MC cost curve.¹⁸⁵ This mechanism ensures that the candidate with the most popular ideas wins the election.¹⁸⁶

It can be argued that this proposal is contrary to the Supreme Court's holding in *Buckley v. Valeo*.¹⁸⁷ There the Court said, "the concept that government may restrict the speech of some elements of our society in order to enhance the rela-

zonal price fixing restraints were essential elements in ensuring the availability of its product and widening consumer choice and therefore, may actually enhance market-wide competition).

¹⁷⁸ See, e.g., *id.*

¹⁷⁹ ANTITRUST ANALYSIS, *supra* note 3, at 8 (noting that perfect competition caters to consumer tastes).

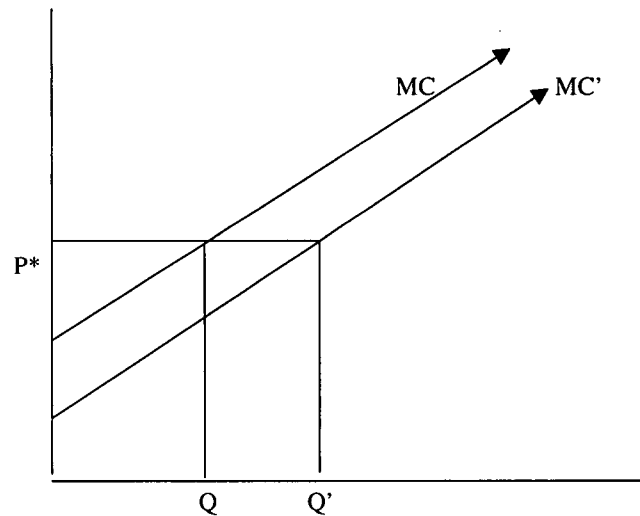
¹⁸⁰ See *id.* at 7 (indicating that competitive forces generate not only productive efficiency but also allocative efficiency, whereby resources flow away from the production of goods that are valued less by consumers and toward the production of goods that are valued more by consumers); see also SAMUELSON & NORDHAUS, *supra* note 4, at 36 (noting that perfect competition results in an efficient allocation of resources).

¹⁸¹ See ANTITRUST ANALYSIS, *supra* note 3, at 6–7.

¹⁸² *Id.* at 8.

¹⁸³ Each candidate has an equally effective way of disseminating his policies to the voters.

Figure 3



tive voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information."¹⁸⁸ There is no doubt that this is the current law. However, an analogous rule existed in antitrust law until it was overruled.

In *United States v. Arnold, Schwinn & Co.*,¹⁸⁹ the issue was whether a vertical non-price restraint whereby a manufacturer gave its distributors exclusive selling territories violated the Sherman Antitrust Act.¹⁹⁰ The manufacturer argued that its distribution plan enabled it to compete more effectively with its competitors by promoting sales, increasing the stability of its dealer outlets, and augmenting profits.¹⁹¹ Accepting these justifications as true, the Court still held that the challenged arrangement was a *per se*¹⁹² violation of § 1 of the Sherman Act because it decreased in-

¹⁸⁴ See generally SAMUELSON & NORDHAUS, *supra* note 4, at 138 (emphasizing that in a perfectly competitive marketplace individual firms are price-takers); ANTITRUST ANALYSIS, *supra* note 3, at 21 (noting that the survival of the perfect competitor depends on its ability to utilize the lowest cost production function). In this context, a candidate's efficiency is increased when he or she is able to gather more votes for the same amount of money.

¹⁸⁵ See generally *supra* note 179.

¹⁸⁶ *Id.*

¹⁸⁷ 424 U.S. 1, 55 (1976) (holding that the ceiling placed on overall campaign expenditures by § 608(c) of the Federal Election Campaign Act violated the First Amendment).

¹⁸⁸ *Id.* at 48–49.

¹⁸⁹ 388 U.S. 365 (1967).

¹⁹⁰ *Id.* at 367.

¹⁹¹ *Id.* at 374–75.

¹⁹² Restrictions are *per se* illegal when they have a high propensity for anticompetitive effect and low propensity for

trabrand competition—competition between the exclusive dealers selling the same brand.¹⁹³

Similarly, in *Albrecht v. Herald Co.*,¹⁹⁴ the issue was whether a vertical maximum price restraint violated the antitrust laws.¹⁹⁵ The U.S. Court of Appeals for the Eighth Circuit had held that the restraint was necessary to prevent the manufacturer's dealers from reaping supra-competitive prices within their exclusive territories.¹⁹⁶ In dicta, the Supreme Court said that this justification would be insufficient to save the restraint from *per se* illegality because of the foreclosure of intrabrand competition.¹⁹⁷

These cases represent the quantitative approach to antitrust law where the general rule is that more competition is better.¹⁹⁸ These cases were overruled in favor of a qualitative approach to antitrust analysis, which focuses less on preserving *all* competition and more on preserving that competition which is most beneficial to consumers.¹⁹⁹

Continental T.V., Inc. v. GTE Sylvania Inc.,²⁰⁰ overruled *Schwinn*²⁰¹ and *State Oil Co. v. Khan*²⁰² overruled *Albrecht*.²⁰³ These cases involved vertical

non-price²⁰⁴ and price restraints,²⁰⁵ respectively. In upholding both arrangements, the Supreme Court noted that vertical restraints reduce the quantity of intrabrand competition.²⁰⁶ However, the Court also recognized the countervailing benefits offered by the restraints to interbrand competition.²⁰⁷ In both cases, the Court concluded that since *qualitatively*, interbrand competition offered a greater benefit to consumers, the loss accruing from the quantitative decrease in intrabrand competition could be outweighed by the increase in interbrand competition.²⁰⁸

Incorporating this wisdom into First Amendment analysis of the election process by analogy, a ceiling on campaign expenditures is justified. Fixing the amount of campaign expenditures certainly will reduce the quantity of information disseminated from the two major parties; however, by equalizing resources to enable additional presidential candidates from outside the two major political parties to speak, individual candidates will be forced to respond to voter preference.²⁰⁹ This should raise the quality of the overall marketplace of ideas.²¹⁰

pro-competitive benefit. *N. Pac. R.R. Co. v. United States*, 356 U.S. 1, 5 (1958). But the *per se* rule is only employed "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982). The Court has been reluctant to apply the rule to restraints "where the economic impact . . . is not immediately obvious." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986).

¹⁹³ *Arnold, Schwinn & Co.*, 388 U.S. at 375, 382.

¹⁹⁴ 390 U.S. 145 (1968).

¹⁹⁵ *Id.* at 147–48.

¹⁹⁶ *Id.* at 153.

¹⁹⁷ *Id.* at 151–54 (suggesting that the restraint at issue potentially injured the public because it foreclosed competition within a single product).

¹⁹⁸ Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 148 (1997) (citing *Albrecht* and *Schwinn*, as cases where the Supreme Court sided with the Populists); *see id.* at 155–56 (explaining that under the Populist view, the antitrust laws were intended to protect the process of competition even if that meant prohibiting practices that were efficient).

¹⁹⁹ *See id.* at 153–54 (explaining that under the Chicago School's approach to antitrust law, the purpose of the Sherman Act is to maximize consumer welfare); *see also id.* at 147 (stating "[w]here antitrust law is concerned, the only dispute is over just how complete the Chicago victory has been."); AREEDA & HOVENKAMP, *supra* note 8, at 116 (explaining that the Populist's antitrust goals have the problem of incoherence while the neoclassical model provides a set of coherent answers to the most central questions of antitrust policy).

²⁰⁰ 433 U.S. 36 (1977).

²⁰¹ *Id.* at 58 (stating that the *per se* rule articulated in

Schwinn is overruled).

²⁰² 522 U.S. 3 (1997).

²⁰³ *Id.* at 7 (concluding that *Albrecht* should be overruled).

²⁰⁴ *Continental T.V., Inc.*, 433 U.S. at 40.

²⁰⁵ *State Oil Co.*, 522 U.S. at 8.

²⁰⁶ *Continental T.V., Inc.*, 433 U.S. at 54 (concluding that vertical restrictions reduce intrabrand competition because they restrict the number of producers competing for the business of a fixed number of consumers); *State Oil Co.*, 522 U.S. at 14 (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341–42 (1987)).

²⁰⁷ *Continental T.V., Inc.*, 433 U.S. at 54 (noting that vertical restrictions encourage interbrand competition by allowing manufacturers to acquire greater efficiencies in their product distribution); *State Oil Co.*, 522 U.S. at 14 (quoting *324 Liquor Corp.*, 479 U.S. at 341–42).

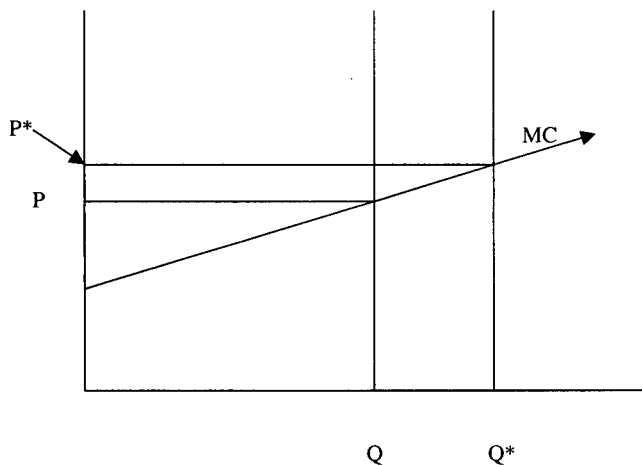
²⁰⁸ *Continental T.V., Inc.*, 433 U.S. at 58–59 (concluding that the *per se* analysis, whereby a finding of reduced intrabrand competition was sufficient to sustain antitrust liability, is overruled in favor of a rule of reason test that will consider the benefits to interbrand competition in assessing liability); *State Oil Co.*, 522 U.S. at 15 (emphasizing that the primary purpose of antitrust law is to protect interbrand competition).

²⁰⁹ *See* ANTITRUST ANALYSIS, *supra* note 3, at 8 (noting that a perfectly competitive marketplace caters to consumer preference).

²¹⁰ *See, e.g., NCAA*, 468 U.S. at 101 (concluding that the NCAA's horizontal price fixing restraints were essential elements in ensuring the availability of its product and widening consumer choice and therefore, may actually enhance market-wide competition). *But cf. Buckley*, 424 U.S. at 56–57 (noting that the equalization of campaign expenditures may

Since there is no pricing mechanism in the market for votes, it is difficult to ascertain the appropriate expenditure level at which presidential campaign spending should be fixed. One possible limit is where a hypothetical marginal cost curve allows a presidential candidate to accumulate enough votes to win the election. This will provide a corresponding expenditure level or ceiling for campaign spending. Figure 4 demonstrates:

Figure 4



serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked name recognition before the start of the campaign); due to the name recognition associated with the two major parties, making an upward adjustment of minor party expenditure levels may speed the

As Figure 4 demonstrates, this level will be different depending on whether the election takes place in an Electoral College (Q) or popular vote regime (Q^*).²¹¹

V. CONCLUSION

Economic theory is a tool used to derive a maximum amount of social utility from a fixed amount of resources. Because mass media is a fixed resource, the more reliant the election process becomes on the availability of mass media, the more appropriately economic theory can be applied in reforming that process. Antitrust jurisprudence embodies our experience with incorporating economic theory into legal analysis. Therefore, it provides a helpful resource in developing a framework to resolve issues related to the election process under the First Amendment. By analogy, this framework should be used to reform the presidential election process and restore vigor to our marketplace of ideas.

transition from the current system of campaign funding to the proposed system.

²¹¹ See Durbin, *supra* note 147, at 510 (noting the possibility of electing a president who lost the popular vote but won the electoral vote).

