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Article

Lessons Learned: Political Advertising and Political Law

Kenneth Goldstein,[†] David A. Schweidel,^{††} and Mike Wittenwyler^{†††}

INTRODUCTION

For pundits and politicians, the thirty-second television spot has become the bogeyman of American elections—blamed for almost every ill in our political environment, everything from the cost of running for office, to the influence of lobbyists, to the inability of legislators to solve long-term policy problems, to voter apathy.¹

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The fact that television advertisements garner this significant amount of attention is not necessarily surprising or unwarranted. Television advertisements are the most visible form of paid political communications and are also the topic of more than their fair share of media stories.² Thirty-second spots are also, by far, the single largest source of campaign expenditures, comprising between 40 and 50 percent of a campaign's budget.³ In fact, over the last few years, expenditures on political advertising have reached record-breaking highs, with \$2.2 billion spent in 2006, \$2.1 billion spent in 2008, and \$2.4 billion spent in 2010.⁴ To put these numbers into some more context, in 2010, direct mail garnered \$1 billion in spending, radio a little over \$250 million, and the Internet just under \$200 million.⁵ Put another way, in the age of new media, traditional forms of advertising—television, radio, and snail mail—attracted 18 times more spending than the Internet. In short, “[a] campaign’s ads reveal the success of its fundraising, or lack thereof; float the messages it believes will win with voters; and shows who and where those voters are.”⁶

Much of the attention to television advertising comes from critics of the way elections are financed, and television advertising is often at the heart of legal and regulatory disputes over what is permitted in political speech. Political advertising was the most prominent issue in three of the most important campaign finance cases of the last forty years: *Buckley v. Valeo*,⁷ *McConnell v. FEC*,⁸ and *Citizens United v. FEC*.⁹ And political

1. MICHAEL M. FRANZ ET AL., CAMPAIGN ADVERTISING AND AMERICAN DEMOCRACY 2–5 (2007).

2. *See id.* at 1.

3. We rely upon data collected by Kantar Media CMAG, a commercial firm that tracks political advertising. These data are at the level of the individual ad airing and allow us to know which sponsor, at what time, in which media market, on which television station, and during which program, each spot aired. These data are available to scholars through the University of Wisconsin Advertising Project. U. WIS. ADVERTISING PROJECT, <http://wiscadproject.wisc.edu> (last visited Apr. 25, 2012). Full methodological details on coding of the data are also available on the Wisconsin Advertising Project web site. *Id.*

4. Kim Geiger, *Television Advertising in 2012 Election Could Top \$3 Billion*, L.A. TIMES POLITICS NOW (Oct. 6, 2011, 2:05 PM), <http://www.latimes.com/news/politics/la-pn-2012-ads-could-top-3-billion-20111006,0,3667624.story>.

5. *See* U. WIS. ADVERTISING PROJECT, *supra* note 3.

6. Ken Goldstein & Elizabeth Wilner, *The Strategy Behind Political Ads*, POLITICO (Jan. 13, 2012, 4:34 AM), <http://www.politico.com/news/stories/0112/71390.html>.

7. 424 U.S. 1 (1976) (per curiam).

8. 540 U.S. 93 (2003).

advertising was at the heart of the Bipartisan Campaign Reform Act of 2002 (known as BCRA or McCain-Feingold).¹⁰

These cases not only established new legal standards, they generated heated debates among politicians, journalists, attorneys, legal scholars, and advocacy groups on the limits of free speech in competitive elections and the democratic process.

The *Citizens United* decision in 2010 represented a significant change to the federal campaign finance law and the regulation of political advertising and political speech.¹¹ As such, the decision has become a lightning rod for criticism by those who believe it hurt democracy and will lead to the demise of competitive elections. Critics say it weakens political candidates and parties, hands more power to unaccountable and independent groups, cloaks more political fundraising in a veil of secrecy, and ultimately favors moneyed interests over the average voter.¹²

Our aim in this Article is to explore these claims and to see if they hold up against the evidence in recent elections. Using a comprehensive database on the content and targeting of all political advertising aired in federal and state races in the 2002, 2006, and 2010 midterm elections, we examine the nature of political advertising and look at how the ad wars were fought in the 2002 election (before implementation of BCRA), in the 2006 election (after implementation of BCRA and the *McConnell* decision), and the 2010 election (after the *Citizens United* decision).¹³

Tad Devine, a senior strategist to Senator John Kerry's 2004 presidential campaign, once commented that, "advertising is reality."¹⁴ That is to say, advertising decisions reveal truths about fundraising, targeting, and messaging. Candidates may

9. 130 S. Ct. 876 (2010).

10. Pub. L. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431-455, 18 U.S.C. § 607, 36 U.S.C. §§ 510-11, 47 U.S.C. § 315 (2006)).

11. *Citizens United*, 130 S. Ct. at 888 (stating that the decision would overturn portions of *McConnell*).

12. Elizabeth Kennedy, *Citizens United Turns Two: Democracy Is Not a Game*, HUFFINGTON POST (Jan. 19, 2012), http://www.huffingtonpost.com/elizabeth-kennedy/citizens-united-turns-two_b_1216013.html; Jesse Lee, *President Obama on Citizens United: "Imagine the Power This Will Give Special Interests Over Politicians,"* WHITE HOUSE BLOG (July 26, 2010, 3:07 PM), <http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit>.

13. See U. WIS. ADVERTISING PROJECT, *supra* note 3.

14. Interview with Tad Devine, Senior Strategist, John Kerry 2004 Presidential Campaign (Mar. 8, 2012).

say they want to avoid political advertising, address the issues on their merits, and engage in long-form debate, but political advertising is their primary means of communicating with voters. If they are not up on the air, voters are just not going to know about them. This is why, despite the vocal criticism of political advertising by journalists, campaign finance reformists, and even ordinary voters,¹⁵ political advertising persists as the primary means of political speech.

Because the lion's share of political money goes to spot political advertising, understanding its use can tell us much about the state of American political speech. We examine here how the composition, targeting, and tone of political advertising has changed over the last three midterm contests and discover what the data mean for political competition and political parties.

In Part I, we describe the critical legal and practical differences between the key campaign finance laws, regulations, and cases, including BCRA,¹⁶ *McConnell*,¹⁷ *FEC v. Wisconsin Right to Life*,¹⁸ and *Citizens United*.¹⁹

Part II addresses how regulation has affected political parties. We look particularly at whether there are more group-sponsored advertisements and fewer party-sponsored advertisements. This analysis supports the view that political parties are declining in influence.

In Part III, we examine how the volume and timing of political advertising has changed in response to the new regulations. This analysis contradicts the view that the latest changes in election law have weakened political speech.

Part IV analyzes the placement and targeting of advertising and how television advertising is reaching an increasingly wide swath of viewers. This analysis contradicts the view that political speech is becoming less diverse.

Part V looks at the party affiliation of existing and new advertisers and explores whether the new laws on political advertising favor one party over another. In addition, we look for signs of undue influence by single groups in the new environ-

15. See Kennedy, *supra* note 12; Lee, *supra* note 12.

16. Pub. L. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431-455, 18 U.S.C. § 607, 36 U.S.C. §§ 510-511, 47 U.S.C. § 315 (2006)).

17. 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

18. 551 U.S. 449 (2007).

19. *Citizens United*, 130 S. Ct. at 876.

ment. The evidence so far suggests that the new election-funding environment gives no unique advantage to any given party, but certainly advantages outside groups at the expense of the parties.

Finally, in Part VI, we address how the new regulations affect the diversity of political speech. We look at whether the new rules have led to more monochromatic political speech or not.

I. POLITICAL SPEECH AS A WATER BALLOON

While the regulations affecting political speech may change, one thing remains the same: there will always be money in the political system. It can be said that money acts much like water in an unbreakable balloon—no matter how much you squeeze it into one section of the balloon to confine it, water finds its way to another section. Despite multiple efforts to reduce or limit the amount of money in politics—whether through new laws, regulations, or lawsuits—money remains in the system and continues to influence the political process. Regardless of the “reform,” it does not leave.

A. EXPRESS ADVOCACY AND ISSUE ADVOCACY

In *Buckley v. Valeo*, the U.S. Supreme Court held that the government can regulate only those political communications that expressly advocate a candidate’s election or defeat.²⁰ That is, under *Buckley*, the First Amendment precludes any regulation of political speech that does *not* “in express terms advocate the election or defeat of a clearly identified candidate.”²¹ In subjecting only “express advocacy” to regulation, the *Buckley* Court concluded, in effect, that many forms of political communication would remain wholly unregulated.²²

Communication that does not expressly advocate the election or defeat of a clearly identified candidate—generally called issue advocacy—had not, prior to enactment of BCRA and the holding in *McConnell*, been subject to *any* federal campaign finance regulation.²³ By definition, issue-advocacy communications avoid any explicit discussion of an identified candidate’s

20. 424 U.S. 1, 79–80 (1976).

21. *Id.* at 45.

22. In restricting the extent of regulation to express advocacy, the Court noted that “[f]unds spent to propagate one’s views on issues without expressly calling for a candidate’s election or defeat are thus not covered.” *Id.* at 44.

23. *McConnell v. FEC*, 540 U.S. 93, 126–28 (2003).

election or defeat and, instead, provide information on an issue or policy question associated with a public official or candidate—often, though not always, as part of a grassroots lobbying effort and, sometimes, in the period immediately before an election.²⁴

Many organizations long have engaged in some form of issue advocacy about issues that affect them and about the positions that candidates take on issues. While, by definition, these issue-advocacy messages avoid any explicit mention of a candidate's election or defeat, many of these communications draw attention to a policy question associated with a public official and refer directly to a public official—who may or may not be a candidate—by name. The format and content of an issue advocacy communication are virtually limitless.

In *McConnell*, the U.S. Supreme Court upheld BCRA's federal "electioneering communication" standard against a facial challenge.²⁵ The challenged standard empowered Congress to regulate certain types of broadcast issue advocacy aimed at federal elections occurring within a specified number of days of an election.²⁶ BCRA's federal electioneering communication standard did not, however, replace the express advocacy/issue advocacy distinction; rather, it refined that distinction—but only for federal candidates, only for specified time periods, and only for broadcast advertising.²⁷ That is, neither the *McConnell* decision nor the new federal electioneering communication law changed this fundamental distinction between express advocacy and issue advocacy. That distinction remains integral to state and federal law.

In *Wisconsin Right to Life*—which involved an as-applied challenge to the same BCRA provisions facially challenged in *McConnell*—the Court further narrowed the range of permissible federal regulation of broadcast advocacy.²⁸ The Court

24. *See id.* at 128.

25. 540 U.S. at 194.

26. BCRA expanded the scope of regulated communication to certain forms of broadcast (but not print, telephonic, websites, or e-mail) issue advocacy within thirty days of a federal primary election or sixty days of a federal general election. *See* 2 U.S.C. §§ 434(f)(3), 441b (2006). Moreover, the registration and reporting threshold under BCRA for electioneering communications is \$10,000. *See id.* § 434(f)(1).

27. *McConnell*, 540 U.S. at 132–34.

28. *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007).

adopted a narrow definition of “express advocacy”²⁹ and held that the FEC could not constitutionally prohibit the use of corporate funds to finance issue advocacy advertisements during pre-federal-election periods.³⁰ After *Wisconsin Right to Life*, then, the range of broadcast advocacy subject to federal regulation was limited to express advocacy and any communication that fit the Court’s extremely narrow conception of “the functional equivalent of express advocacy.”³¹

B. *CITIZENS UNITED V. FEC*

In *Citizens United*, the U.S. Supreme Court held that prohibitions on corporate sponsorship of independent expenditures are unconstitutional.³² The Court made clear that any attempt to restrict or limit political speech by any speaker—individuals, corporations, labor organizations, or tribes—would be highly disfavored.³³ Accordingly, post-*Citizens United*, federal and state laws can no longer prohibit organizations from sponsoring or funding independent expenditures.

The Court’s decision in *Citizens United* builds on the First Amendment principles set forth in *Wisconsin Right to Life* and reaffirms the government’s inability to restrict or limit spending on issue advocacy at any time, including the time period before an election.³⁴ Just like a campaign finance regulation on independent expenditures, any electioneering communication or issue-advocacy regulation must be carefully crafted in a manner that permits speech regardless of the identity of the speaker.³⁵

29. *Id.* at 469–70 (including only communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”).

30. *Id.* at 465.

31. *Id.* at 482, 457.

32. 130 S. Ct. 876, 913 (2010). Independent expenditures are express advocacy communications sponsored by a third-party organization such as a political action committee (PAC). As independent communications, they cannot be coordinated in any way with a candidate or a candidate’s agent. 2 U.S.C. § 431 (2006). Under federal campaign finance law and the laws in about half the states, corporations were prohibited, prior to *Citizens United*, from sponsoring independent expenditure communications, and are still prohibited from making campaign contributions. NAT’L CONF. OF STATE LEGISLATURES, STATE LAWS AFFECTED BY *CITIZENS UNITED* (2010), available at <http://www.ncsl.org/legislatures-elections/elections-campaigns/citizens-united-and-the-states.aspx#laws> (last updated Jan. 4, 2011).

33. See 130 S. Ct. at 881–85.

34. See *Wis. Right to Life*, 551 U.S. at 481–82.

35. See *Citizens United*, 130 S. Ct. at 913.

While *Citizens United* makes it very difficult for government to prohibit or at all limit the content or source of political speech, the Court was equally clear that disclaimer and disclosure requirements are permissible.³⁶ The right to speak about candidates, public officials, and public policy is virtually beyond regulation, but the public has the right to evaluate that speech based, in part, on the disclosure of its source.³⁷ However, any disclosure requirements first must be imposed—if at all—by state or federal law.³⁸

Citizens United only addressed corporate spending on independent expenditures and *not* corporate contributions to candidates and other political committees. In those jurisdictions where direct corporate campaign *contributions* are prohibited, they will remain prohibited. *Citizens United* does nothing to upset those bans and, instead, suggests that such prohibitions will continue to be upheld.³⁹

In the two years since the Supreme Court's holding in *Citizens United*, independent political speakers continue to gain greater freedoms,⁴⁰ provided that the speech is independent, but not coordinated.⁴¹ Moreover, contribution restrictions have continued to be upheld, further enhancing the role of independent speakers and spending on their communications.⁴² While the U.S. Supreme Court will likely have more opportunities to revisit these issues,⁴³ independent political speech continues for now to be the area of political spending toward which money is being pushed.

36. *See id.* at 914.

37. *See id.* at 914–16.

38. *See id.*

39. *See id.* at 901–02, 908 (“[The Court has] sustained limits on direct contributions in order to ensure against the reality or appearance of corruption.”).

40. *See, e.g.,* *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (striking down federal contribution limits as applied to organizations only engaged in independent political speech).

41. *See, e.g.,* *Cao v. FEC*, 619 F.3d 410, 430–31 (5th Cir. 2010) (upholding federal contribution limits and coordination restrictions).

42. *See, e.g.,* *Bluman v. FEC*, 800 F. Supp. 2d 281, 288–90 (D.D.C. 2011) (upholding prohibition on contributions by foreign nationals), *aff'd mem.*, 132 S. Ct. 1087 (2012).

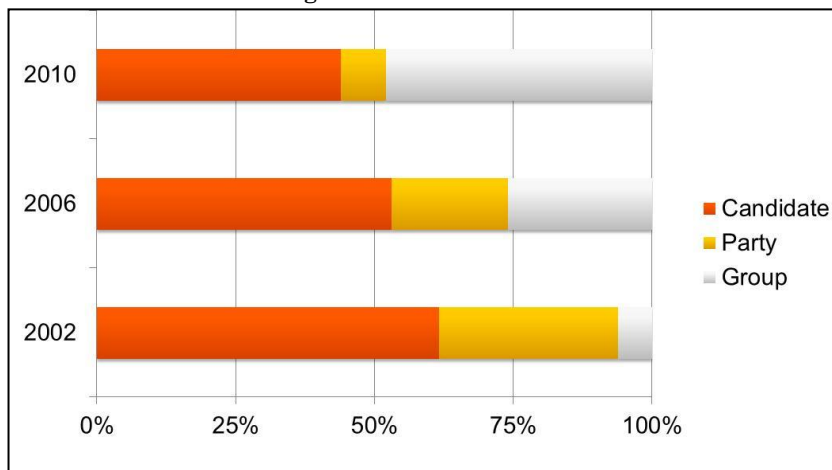
43. *See, e.g.,* *Wagner v. FEC*, No. 11-1841 (JEB), 2012 WL 1255145 (D.D.C. Apr. 16, 2012) (challenging prohibition on federal contractor contributions); *United States v. Danielczyk* 791 F. Supp. 2d 513, 518 (E.D. Va. 2011) (motion for reconsideration denied) (striking down federal prohibition on corporate campaign contributions); *W. Tradition P'ship v. Attorney General*, No. DA 11-0081, 2011 WL 6888567, at *15 (Mont. Dec. 30, 2011) (upholding Montana's right to prohibit corporate spending on independent expenditures).

II. POLITICAL PARTIES AS A DIMINISHING FORCE

The total amount spent on advertising for state and federal elections was \$2.2 billion in 2006, \$2.1 billion in 2008, and \$2.4 billion in 2010.⁴⁴ This includes advertisements on national, cable, broadcast, and spot television. It does not include local spot cable, which accounts for a growing amount of expenditures, but is still a smaller proportion of overall political advertising spending—about 15 percent.⁴⁵

As Figure 1 illustrates, overall spending in federal races in the 2002, 2006, and 2010 mid-term elections reveals that the proportion candidates comprise of political advertising has gone down slightly, from 60% of total campaign advertising spending in 2002, to 50% in 2006, to about 45% in 2010.⁴⁶ The proportion of ad dollars spent by parties in elections has decreased significantly, from about 35% in 2002, to 25% in 2006, to 15% in 2010.⁴⁷ By contrast, the proportion of ad dollars spent by outside groups has gone up significantly, from about 10% in 2002, to 25% in 2006, to 50% in 2010.⁴⁸

Figure 1
Share of Advertising Spending for 2002, 2006, and 2010
Congressional Elections⁴⁹



44. See Geiger, *supra* note 4.

45. See *id.*

46. See *infra* Figure 1.

47. See *id.*

48. See *id.*

49. U. WIS. ADVERTISING PROJECT, *supra* note 3.

Notably, these three midterm elections spanned a period of significant change in campaign finance law. In 2002, Congress had passed BCRA, but had not yet implemented it.⁵⁰ The 2006 elections, by contrast, were subject to BCRA rules.⁵¹ And the 2010 elections were governed by the rules laid out in *Citizens United*.⁵²

The data in Figure 1 can best be explained by those changes in the law. The political parties lost spending strength during this period because BCRA negatively affected their ability to raise money.⁵³ The decision in *Citizens United*, by comparison, strengthened the ability of outside groups to raise and spend more money.⁵⁴

This would appear to confirm the criticism that recent changes in election law have weakened political parties and strengthened outside groups. It should be noted, however, that the trend of weakening political parties began before *Citizens United*, and party losses in spending power may well have more to do with the declining confidence major political funders have in political parties as a means of winning elections.⁵⁵ It is also not entirely clear that weakening political parties also results in diminished political involvement and diversity. In fact, the ruling has appeared to increase that diversity by making it harder for political parties to dominate particular forums and by making it comparatively easier for entities other than traditional political parties to finance advertisements. One of the core features of the post-*Citizens United* world is decentralized

50. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 402, 116 Stat. 91, 112–13 (making Nov. 6, 2002 BCRA's earliest effective date, one day after the U.S. general elections).

51. See *id.*

52. See *Citizens United v. FEC*, 130 S. Ct. 876, 876, 917 (2010) (declaring unconstitutional certain prohibitions on corporate and union political expenditures, on Jan. 21, 2010, before the 2010 U.S. elections).

53. MICHAEL J. MALBIN, THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 60–67 (2006).

54. See R. SAM GARRETT, CONG. RESEARCH SERV., R41054, CAMPAIGN FINANCE AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS 2 (2010), available at <http://fpc.state.gov/documents/organization/137016.pdf> (noting that, after *Citizens United*, corporations “can fund unlimited express advocacy issue messages” and “appear to be free to fund electioneering communications from their treasuries at any time”).

55. See *The Party's (Largely) Over*, ECONOMIST, Oct. 23, 2010, at 71, 71–72, available at <http://www.economist.com/node/17306082> (suggesting that the decline of a strong party base diminishes political parties' power to push through legislation—especially controversial reforms—and award donors influence).

management of political speech. This would rebut the criticism that the *Citizens United* ruling has reduced the diversity of voices in the political marketplace. In fact, the ruling has appeared to increase that diversity.

III. THE TIMING OF ADVERTISING

Both BCRA and *Citizens United* influenced the timing of advertisement placement, as well as the proportion of expenditures spent on advertising.

Generally, there is always more money spent on advertising at the end of a campaign than at the beginning.⁵⁶ This is because most political professionals believe that advertising at the end of a campaign has a greater effect on voting patterns than advertising at the beginning of a campaign.⁵⁷ But with so much more money spent on advertising by campaigns, parties, and groups, there is simply not enough television time or inventory to go around over the last two weeks of a campaign. That means everyone buying television time has to spread out the advertisements over the course of a campaign. Consider Figure 2. In 2002, the proportion of advertising expenditures on television advertising was about 20% during the last week of a campaign.⁵⁸ In 2006, the proportion was a little more than 15% in the last week of a campaign, and by 2010, this proportion was just over 10%.⁵⁹

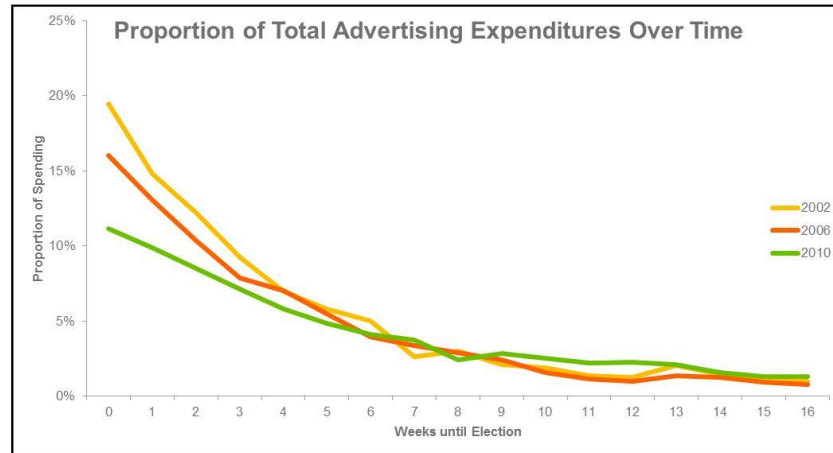
56. See JUDITH S. TRENT ET AL., *POLITICAL CAMPAIGN COMMUNICATION: PRINCIPLES AND PRACTICES* 352–53 (7th ed. 2011) (explaining that most campaigns begin buying ad time near Election Day and work their way backward as funds allow, believing that voter exposure will have the greatest impact just before the election).

57. See *id.*

58. See *infra* Figure 2.

59. See *id.*

Figure 2
Proportion of Total Advertising Expenditures Over Time⁶⁰



Despite these common challenges, those who buy television time exhibit differences in strategies.

As Figure 3 illustrates, candidate spending mirrored the overall trend of less concentrated spending in the final weeks of a campaign.⁶¹ In 2002, candidates spent about 20% of their advertising budget on television advertising in the last week of the campaign.⁶² In 2006, candidates spent about 18%, and by 2010, that proportion was down to about 15%.⁶³

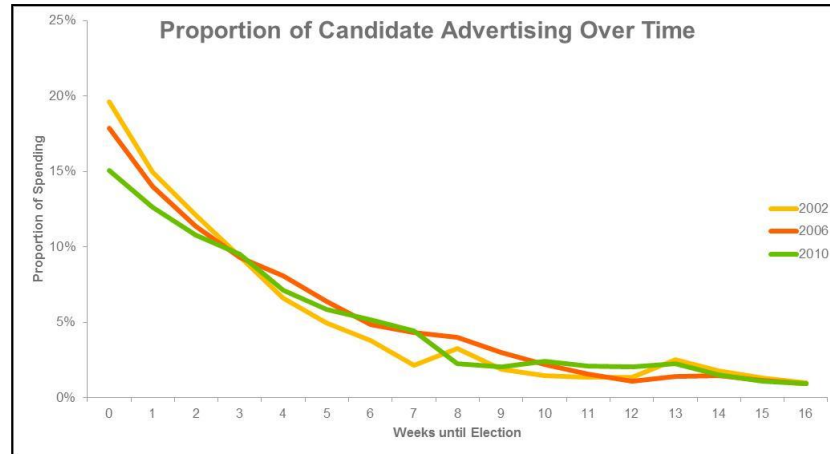
60. U. WIS. ADVERTISING PROJECT, *supra* note 3.

61. *See infra* Figure 3.

62. *See id.*

63. *See id.*

Figure 3
Proportion of Candidate Advertising Over Time⁶⁴



This decline in candidate expenditures immediately prior to elections differs from the traditional model. Traditionally, candidates plan their advertising budget beginning with election day and moving backwards.⁶⁵ Generally, they create an advertising budget and allocate a certain amount of money over the course of the campaign, based on how many advertisements they want to air at the end of the campaign.⁶⁶ This strategy allows for an additional concentration of advertisements at the end of the elections.

Parties are beginning to follow this model of back-budgeting as well. But in contrast to candidate spending, the proportion of spending by parties on television advertising has increased since both BCRA and *Citizens United*. In 2002, parties spent about 20% of their advertising expenditures on television ads in the last week of the campaign.⁶⁷ In 2006, this proportion was up to 25%, and by 2010, it was almost 30% of their advertising expenditures.⁶⁸

64. U. WIS. ADVERTISING PROJECT, *supra* note 3.

65. *See* TRENT ET AL., *supra* note 56.

66. *See id.*

67. *See infra* Figure 4.

68. *See id.*

Figure 4
Proportion of Party Advertising Over Time⁶⁹

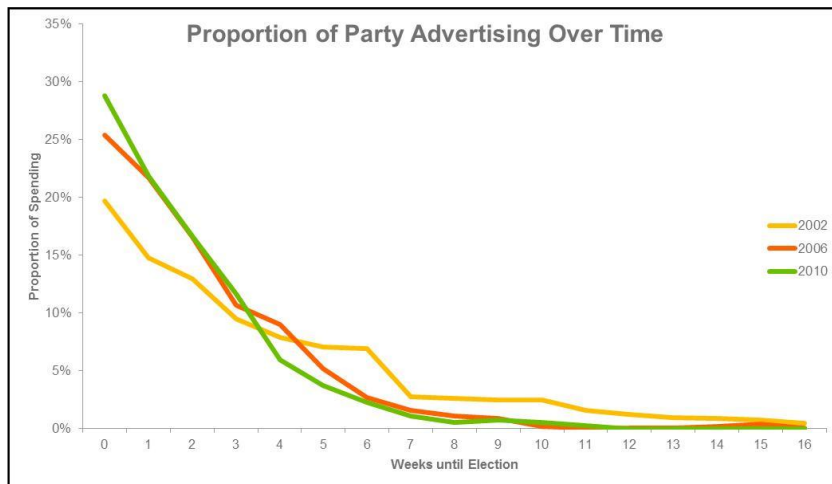


Figure 5 shows that interest groups, buoyed by *Citizens United*, have followed a different approach. Overall, the proportion of interest group advertising in the very last weeks of a campaign has actually become less concentrated. In 2002, interest groups spent about 17% of their advertising budget on television advertisements at the end of a campaign.⁷⁰ After BCRA, in 2006, that proportion dropped to about 4%.⁷¹ It picked back up a little bit in 2010, when the proportion of spending was about 5%.⁷² In addition, in the last few weeks of the 2006 and 2008 campaigns, interest group spending was relatively flat, as there was a much more consistent focus.⁷³ By contrast, in 2002, advertising did not really pick up at all until the last two or three weeks of a campaign.⁷⁴

69. U. WIS. ADVERTISING PROJECT, *supra* note 3.

70. *See infra* Figure 5.

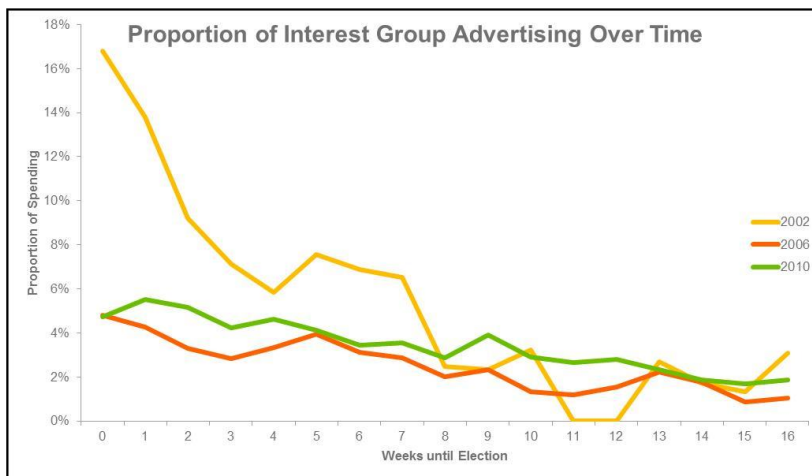
71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

Figure 5
Proportion of Interest Group Advertising Over Time⁷⁵



These trends largely stem from interest-group political strategy. Early on in a campaign, interest groups may try to get their messages across to as broad an audience as possible. For example, in the 2010 campaign, groups began researching races early to determine which ones would be competitive and where advertising dollars could be most effective in swinging a district to a favored candidate.⁷⁶ Later in the race, the groups analyzed the effect of that early money, and recommitted to higher amounts in races which had proven to be competitive, while abandoning those races which had not.⁷⁷

75. U. WIS. ADVERTISING PROJECT, *supra* note 3.

76. See, e.g., Michael Luo & Griff Palmer, *Outside Groups on the Right Flexed Muscles in House Races*, N.Y. TIMES, Nov. 4, 2010, at P6 (“In many cases, the Republican-oriented groups got involved in the races early on, battering Democratic candidates with negative advertisements, helping to set the tone in those districts, even if Democratic candidates and their allies were eventually able to outspend them.”).

77. See, e.g., Mark Hosenball, *Pro-Republican Groups Spend Big on Key Races*, REUTERS, Oct. 27, 2010, available at <http://www.reuters.com/article/2010/10/27/us-usa-elections-finance-idUSTRE69Q5RV20101027> (reporting that 2010 Republican senatorial candidate Christine O’Donnell received only \$300,000 from outside, pro-Tea Party groups in the waning weeks of the campaign while her opponent received “no additional support from independent pro-Democratic groups—a reflection of the assessment that O’Donnell’s consistently poor polling numbers suggest she will probably lose on [Election Day]”).

Different interest groups can also share this type of information among themselves. They can then divide up the labor and decide which group should advertise in which race.⁷⁸ Such collaboration would be illegal if the interest groups were coordinating along with the candidates.⁷⁹ These groups are, however, still allowed to work among themselves.

These data suggest that while *Citizens United* has strengthened independent groups, they have deployed this strength in a way that could actually prove to make elections more competitive and democracy more vibrant. By devoting early advertising dollars to relatively unproven candidates, the outside groups can identify political contests which are surprisingly competitive, and even provide a leg-up to candidates who would otherwise struggle to gain a voice. This is true both in the general election and the primary election, where insurgent candidates are often opposed by political parties.⁸⁰ So while this confirms the criticism that *Citizens United* has strengthened independent groups at the expense of political parties, it would appear that this exchange of power has strengthened the political process, based on the access of candidates to early advertising dollars, a critical seedcorn.

IV. ADVERTISEMENT PLACEMENT AND TARGETING

Another trend in television political advertising is that the ads themselves are much less concentrated among programs and reach a much broader viewership. Before BCRA and *Citizens United*, more than 50% of advertising dollars bought time

78. See, e.g., Jim Rutenberg, *Pro-Republican Groups Prepare Big Push at End of Races*, N.Y. TIMES, Oct. 24, 2010, at A1 (describing how many conservative interest groups worked together in the 2010 campaign by “trading information through weekly strategy sessions and regular conference calls . . . [and] divid[ing] up races to avoid duplication . . . and to ensure that their money is spread around to put Democrats on the defensive in as many districts and states as possible”).

79. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (overturning the BCRA’s ban on independent expenditures, but noting that “[b]y definition, an independent expenditure is political speech presented to the electorate that is *not coordinated with a candidate*” (emphasis added)).

80. See SUSAN J. CARROLL, *WOMEN AS CANDIDATES IN AMERICAN POLITICS* 25 (2d ed. 1994) (“Because victories on the part of insurgent candidates may further weaken party leaders’ control over future nominations, party leaders would prefer to avoid such occurrences.”).

during only the top twenty television programs.⁸¹ Now, the top twenty programs receive only about 25% of the ad buy.⁸²

This trend is the result of two factors. First, ad buyers are more strategic about how they purchase ads, focusing on programs where they are likely to reach their intended audiences. Second, with the increase in television advertising, campaigns and groups can afford to spend on a broader array of programs.

Neither of these explanations supports the criticisms of *Citizens United*. The more targeted approach employed by both major parties reflects a more efficient approach to their advertising budget. Political advertising used to use a carpet-bombing approach, with a goal of covering as wide an area as possible with political messaging.⁸³ Campaigns and buyers are now shifting to a rifle-shot approach, focused on reaching targeted audiences with specific messages.

The 2004 Bush campaign recognized the value of this approach when research showed Republican-leaning voters were not watching television shows in the same ratio that all voters were.⁸⁴ Republicans decided to spend more on programs watched by Republicans, aiming to generate enthusiasm for their candidate and to avoid pouring money into programs that were viewed largely by Democratic voters.⁸⁵

This approach, which was employed by the Obama campaign in 2008,⁸⁶ can spread political speech across a broader spectrum of the population by reaching niche audiences. Rather than concentrating political advertising dollars within a few major networks, the new micro-targeting strategies make more media relevant to the political process.

There are two countervailing trends here. On the one hand, the increased micro-targeting of political speech makes it likely that political speech will only reach certain well-defined and narrow audiences. This increased targeting, done by both the Bush campaign in 2004 and the Obama campaign in 2008,

81. See U. WIS. ADVERTISING PROJECT, *supra* note 3.

82. See *id.*

83. See, e.g., Katharine Q. Seelye, *How to Sell a Candidate to a Porsche-Driving, Leno-Loving Nascar Fan*, N.Y. TIMES, Dec. 6, 2004, at A18 (“[P]residential campaigns have generally relied on the reach of broadcast television to try to influence the widest possible audience.”).

84. *Id.*

85. *Id.*

86. See Jim Rutenberg, *Obama Aims TV Ads at Younger Voters*, THE CAUCUS (Oct. 8, 2008, 7:22 PM), <http://thecaucus.blogs.nytimes.com/2008/10/08/obama-aims-tv-ads-at-younger-voters/>.

however, is in addition to the more broad targeting of advertising in general. In other words, while there is more rifle-shot targeting with TV advertising, there is still more shotgun targeting as well. While the trend of micro-targeting and strategic shift is not a direct outgrowth of *Citizens United*, it is clear that its impact is consistent with the overall trend stemming from the ruling: greater participation and greater fundraising with fewer centralized controls means political dollars can reach a variety of audiences. This would support the view that far from closing out the political process, the post-*Citizens United* world appears to be opening it up.

V. SPENDING ADVANTAGES

Some critics of *Citizens United*, including President Barack Obama, have argued that one of the primary flaws of the ruling is the way it permits corporate dollars in the political fundraising process.⁸⁷ The argument is that those dollars will overwhelm the contributions of ordinary citizens and thereby create a one-sided political marketplace, with only one side holding the megaphone.⁸⁸ With the assumption that corporations overwhelmingly favor Republican candidates, the critics say that the ruling therefore favors Republicans.⁸⁹

But the data do not support this claim. Those outside groups that are getting more-involved in political speech are not uniform in their ideology, far from it. For example, in 2010, after *Citizens United*, the proportion of issue ad spending by the ten highest sponsors accounted for a smaller fraction of total issue ad spending than in 2002.⁹⁰

Interestingly, there has been a relative balance between the overall amount in political spending in the midterm elections, both before and after *Citizens United*.⁹¹ In the top Senate

87. See, e.g., Lee, *supra* note 12.

88. See, e.g., *id.*

89. See, e.g., Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 ("Now a . . . conservative majority has distorted the political system to ensure that Republican candidates will be at an enormous advantage in future elections.").

90. See U. WIS. ADVERTISING PROJECT, *supra* note 3.

91. Democratic or Republican ad spending includes candidate and party spending as well as groups airing ads on behalf of the candidates of a particular party. For example, ads aired by American Crossroads would be counted in the Republican bucket. For a breakdown of interest group spending by party, see *2010 Interest Group Spending Tracker*, WASH. POST, <http://www.washingtonpost.com>

races in 2002, the Democrats spent more than Republicans in New Jersey and North Carolina. Republicans spent more in Tennessee.⁹² Aside from these exceptions, both parties spent about the same amount on television advertising.⁹³

In the 2006 Senate races, the Democrats spent more on advertising than the Republicans in the Maryland and Florida races.⁹⁴ Aside from these exceptions, parties spent about the same amount in the rest of the races.⁹⁵

In the 2010 Senate races, Democrats outspent Republicans in Florida, while Republicans outspent Democrats in Connecticut, Wisconsin, and Montana.⁹⁶ These were the only exceptions.

Combining both the House and Senate races in 2010, the Democrats actually outspent the Republicans.⁹⁷ However, Republican groups outspent Democratic groups.⁹⁸

So while some may argue that *Citizens United* privileges one party over another, our data suggest that more interest group advertising promotes a healthy and fair division between the parties.

Consider the 2010 midterm elections. Over the summer of 2010, House Republicans had a slight advantage over House Democrats in advertising spending.⁹⁹ But as election day approached, Democratic candidates and the Democratic party were spending much more money on political advertising than Republicans.¹⁰⁰ At the same time, Republican interest groups, like Crossroads, Seniors Past 60, and American Action Network, became much more active than their Democratic counterparts in these Congressional races.¹⁰¹

The combined effect of these expenditures was to give the Democrats an overall advantage in spending, but that advantage was fairly slight.¹⁰² The relative parity in spending was largely because of the increased activity of outside groups.

.com/wp-srv/politics/campaign/2010/spending/committee_list.html (last visited Apr. 25, 2012).

92. See U. WIS. ADVERTISING PROJECT, *supra* note 3.

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.*

While this trend may not hold, the example makes clear that dollars from outside groups have actually reduced the money gap between the two major parties and have resulted in an evening-out in access to political speech.

VI. CONTROL OVER MESSAGES

Critics of *Citizens United* often say that the ruling will allow major political funders to avoid campaign contribution limits by simply giving unlimited sums to outside groups. These groups, in turn, will be able to spend liberally to support a given candidate.

This analysis runs counter to yet another criticism of *Citizens United*—that the ruling weakened control of candidates over their own election messaging. If outside groups were able to echo and reinforce a candidate's messaging, as the critics say,¹⁰³ they cannot also undermine candidates' control over their messaging. One could be true, but both can't be.

As it turns out, candidates and political parties have far less control over political speech in the post-*Citizens United* world than they once did. Much to the frustration of campaign managers, outside groups generally advertise on issues that candidates are not even discussing.

For example, in the 2002 Senate race, Democratic candidates spent close to \$4 million on advertising focused on jobs.¹⁰⁴ Issue groups spent just over \$1 million on job issues.¹⁰⁵

In that same race, Republican candidates spent less than \$1 million on ads focused on taxes.¹⁰⁶ Issue groups spent close to \$5 million on advertising about taxes.¹⁰⁷ Clearly, the data show that candidates and issue groups can focus on different issues, even in the same election.

103. See *supra* note 12 and accompanying text.

104. See *infra* Figure 6.

105. See *id.*

106. See *infra* Figure 7.

107. See *id.*

Figure 6
Democratic Spending by Issue Focus and Sponsor, 2002 Elections¹⁰⁸



Figure 7
Republican Spending by Issue Focus and Sponsor, 2002 Elections¹⁰⁹



This happens to have clear impacts. While candidates may prefer to focus on certain campaign themes and tactics, outside groups—prevented by law from cooperating or coordinating with specific candidates—may choose other themes and tactics. Take the 2004 presidential election. In overall spending, the Democrats spent more than the Republicans. The Kerry campaign, plus the Democratic National Committee, plus MoveOn.org, and all other Democratic groups combined spent more than the Bush campaign plus the Republican National Committee, plus the fairly small number of Republican groups that were active in that year.¹¹⁰

Yet because the Bush campaign's funding was primarily concentrated within the official candidate and party's apparatus, it was able to deliver a more coordinated and strategic

108. U. WIS. ADVERTISING PROJECT, *supra* note 3.

109. *Id.*

110. *See id.*

suite of political messages, with a special focus on defining Kerry negatively.

By contrast, the Democratic-leaning outside groups, which held more money and power than their Republican counterparts, did not follow a coherent approach to their political messages. Most of these groups were focused on attacking the incumbent, which proved to energize Democratic voters but not win over independents. The Kerry campaign alone sought to paint a positive picture of their candidate, but those messages were overwhelmed by the anti-Kerry and even the anti-Bush messages being placed by other major advertisers. The end result was that the election was defined by the relative popularity of the incumbent President Bush, and not by the appeal of the challenger, Kerry. The lack of coordination on the Kerry side ended up undermining the funding advantage it enjoyed.

In this case, the effect—the political victory by the less well-funded candidate—would tend to support the view that outside groups' spending can undermine the power of candidates and political parties. Interest groups may promote advertising that does not reflect a campaign's messaging priorities. That is because interest groups exist to reflect the preferences of their donors, not the candidates themselves. In the post-*Citizens United* environment, an issue or theme has greater potential to be promoted even where a candidate might prefer not to raise that issue. This would suggest that meaningful political speech is in fact more open and more accessible than it once was. While the results may be messy for individual campaigns, they do auger well for political speech.

CONCLUSIONS

The Supreme Court's decision in *Citizens United* was rightly seen as a break in campaign finance law and regulation of political speech. It attempted to resolve some of the most complex issues related to the regulatory treatment of political speech. Perhaps not surprisingly, critics concluded that the ruling would result in several negative outcomes.

But in the realm of political speech that is most observable and most impactful—television advertisements—the changes have not been as those critics had feared. While political parties and candidates have indeed lost power over political speech due to the rising power of outside funding groups, these groups have greatly added to the diversity of political speech. The timing and substance of their advertisements have differed from

the major parties and the candidates, giving the groups a chance to champion a candidate or an issue which would otherwise be ignored or overlooked. The reach of the advertising of these outside groups has extended well beyond the traditional viewership of political ads, drawing in more of the viewing population. And the political loyalties of these outside independent groups are far from one-sided, and both major political parties can claim to have significantly well-funded outside groups pushing in their direction.

These trends are unmistakable based on a review of the patterns of political television advertising from before and since *Citizens United*. While they are subject to change, it is clear that the fears of the critics have, at least so far, proven unfounded. Whether or not one agrees with the legal reasoning of *Citizens United*, the outcome has not been what many quickly concluded it would be. This proves, yet again, the value of analyzing the way political speech actually expresses itself in each campaign season.