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ESSAY

MILWAUKEE RADIO PUBLIC FILE DATA, 1998-2011: AN EMPIRICAL ANALYSIS OF ISSUE ADVERTISING AFTER THE BCRA AND *CITIZENS UNITED*

Christopher Terry & Mitchell Bard***

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I. INTRODUCTION

In 2010, when the U.S. Supreme Court issued its controversial 5-4 decision in *Citizens United v. Federal Election Commission*¹ holding that federal law limiting independent political expenditures by corporations, unions and other organizations violated their First Amendment rights, the reaction was polarized and passionate. Conservatives applauded the protection of free speech rights, while others agreed with the argument in Justice John Paul Stevens's dissent² that the unfettered influence of corporate money threatened the nation's democratic system.³ But these arguments were largely theoretical.

In rejecting one of the several rationales offered by the government to support a limitation on corporate spending, the Court argued there was no evidence that corporate and other outside spending on behalf of candidates leads to corruption.⁴ Justice Anthony Kennedy, writing for the majority, said not only did "few if any contributions to candidates . . . involve *quid pro quo* arrangements"⁵ but that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."⁶

The legal literature that followed the ruling mainly focused on the decision itself, assessing the merits of the legal arguments, including each side's interpretation of the idea of money as speech, and some addressed the potential policy implications.⁷ But these articles largely

1. 558 U.S. 310 (2010).

2. *Id.* at 929 (Stevens, J., dissenting).

3. President Barack Obama, in his State of the Union address just days after the decision was announced, with the justices of the U.S. Supreme Court seated in the gallery, said the ruling "will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. . . . I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. . . . They should be decided by the American people." President Barak Obama, Remarks at the State of the Union Address (Jan. 27, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>). See also Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2366 n.8 (2010).

4. *Citizens United*, 558 U.S. at 391.

5. *Id.* at 908.

6. *Id.* at 909.

7. For a sample of law review articles addressing the legal and policy aspects of *Citizens United*, see, e.g., *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365 (2009-2010); Breanne Gilpatrick, *Removing Corporate Campaign Finance, Restrictions in Citizens United v. Federal Election Commission*, 34 HARV. J.L. & PUB. POL'Y 405 (2011); Elizabeth Elices, *Citizens United and the Future of FCC Content Regulation*, 33 HASTINGS COMM. & ENT. L.J. 51 (2010); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); David Axelman, *Citizens United: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, 65 U. MIAMI L. REV. 293 (2010); Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243 (2010);

overlooked the majority's important contention regarding corruption.

Two years later, the Court was offered an opportunity to revisit its position on the potentially corruptive influence of corporate money when it agreed to hear an appeal in *American Tradition Partnership, Inc. v. Bullock*.⁸ In that case, the Montana Supreme Court upheld⁹ the state's Corrupt Practices Act,¹⁰ despite the Supreme Court's holding in *Citizens United*, based on the empirical record of a demonstrable history of the corrupting influence of corporate spending in the state. Rather than revisit *Citizens United*, the same five justices in the majority on that decision joined an unsigned, 195-word, per curiam decision in *American Tradition Partnership*, without allowing the parties to brief or argue the case. The Court reversed the Montana Supreme Court: "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."¹¹

By not giving a full hearing in *American Tradition Partnership*, the Court opted not to allow Montana to provide an empirical basis to challenge the contention that unlimited/unregulated corporate spending had an actual corrupting influence on politics. In fact, Justice Steven Breyer's dissent—joined by Justice Ruth Ginsburg, Justice Sonia Sotomayor and Justice Elena Kagan¹²—centered on the corruption question, quoting Justice Stevens's dissent in *Citizens United* that "technically independent expenditures can be corrupting in much the same way as direct contributions."¹³ Justice Breyer also noted that the record before the Montana Supreme Court indicated "that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption."¹⁴

This missed opportunity is indicative of a larger problem that surrounds the *Citizens United* case: one of empirical evidence. The vast majority of the scholarly literature examining the decision has not looked at any sort of evidence as to the effects of *Citizens United* on political advertising.

It is our contention that this gap in the literature, a lack of empirical evidence on how *Citizens United* has affected the amount and nature of spending on political advertising, is significant because this information

Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649 (2011).

8. 132 S. Ct. 2490 (2012).

9. *W. Tradition P'ship v. Attorney Gen.*, 271 P.3d 1 (2011).

10. MONT. CODE ANN. § 13-35-227(1) (2011).

11. *Am. Tradition P'ship*, 271 132 S. Ct. at 2491.

12. *Id.* at 2491-92 (Breyer, J., dissenting).

13. *Id.* at 2491 (quoting *Citizens United* at 967 (Stevens, J., dissenting in part and concurring in part)).

14. *Id.*

would go a long way toward settling the debate on the case's impact on political speech. Now that three years have gone by since the ruling in *Citizens United*, it is possible to start assessing empirically what the case's effect has been on political spending.

As such, in this Article we attempt to address the absence of empirical evidence in the examination of *Citizens United*. We also approach the question in a way that combines the different backgrounds of the authors, using a variety of practical, legal and policy methodologies.

In Part II, we lay out the state of the law on campaign finance and the legal responsibilities of radio stations. Our questions and method are described in Parts III and IV. Part V and Part VI present our results and discussion, which track how the adoption of the Bipartisan Campaign Reform Act of 2002 (BCRA)¹⁵ and the decision in *Citizens United* seems to have had a measurable impact, especially with regard to the number and percentage of issue ads that clearly identify a candidate for office. In our conclusion, Part VII, we offer our thoughts for future study in this area.

II. RADIO, ADVERTISING AND THE LAW

A. *Political Advertising and the Law*

Political advertising in broadcasting is divided into two major categories: campaign advertising and non-candidate political advertising (often called "issue ads"). Campaign advertising originates with the official campaign of a legally qualified candidate and is governed by rules contained within sections 312/315 of the Communications Act of 1934 (Communications Act).¹⁶ Provisions of the Communications Act require broadcasters to carry campaign advertisements from candidates for federal office, provide equal access to advertising by opposing candidates, and make advertisements available at the lowest unit rate, which is the lowest price a station charges its commercial customers.

Issue ads cover advertising that discusses a political issue but does not originate with the official campaign of a candidate for office.¹⁷ Issue ads are not given the same protections under federal law as campaign advertisements with regard to access and rate. Stations are not required to sell these advertisements, and they are not even legally responsible

15. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

16. 47 U.S.C. § 151.

17. See Bipartisan Campaign Reform Act of 2002, § 201, Pub. L. No. 107-155, 116 Stat. 89.

for the content of those they sell and air.

Federal law relating to issue ads has been subject to change in the last two decades, as the BCRA added additional limitations on this kind of spending, many of which were removed by the *Citizens United* decision.

Licensed broadcast stations are required to keep information on all political advertising for a period of two years.¹⁸ As public file data on political advertising includes pricing information, typically, stations remove material periodically, to keep information in line with this two-year requirement.¹⁹

B. *The Three Stages of Regulation of Political Advertising*

Over the course of the last fifteen years, there have essentially been three eras during which different standards applied to issue ads. The passage of the BCRA²⁰ made it illegal for corporations, unions and other organizations to fund issue ads that refer to a clearly identified candidate (in a federal election).²¹ But in 2010 *Citizens United* removed this prohibition, allowing corporations, unions and other organizations to fund issue ads.²²

C. *Issue Ads and Identifying Candidates*

One of the provisions of the BCRA that was invalidated by *Citizens United* is the prohibition on “electioneering communications.” Specifically, the BCRA prevented issue ads from identifying federal candidates in spots within thirty days of a primary contest or sixty days of a general election.²³

D. *Political Advertising on the Radio*

Radio and television broadcasters are required by law to maintain political advertising information in their public files.²⁴ Even though this data is relatively easy to access, historically the actual interest in these

18. 47 C.F.R. § 73.3527(e)(5).

19. Stations will routinely purge political material from a public file because these materials include information on the pricing structures of advertisements.

20. 2 U.S.C. § 431. The law went into effect on November 6, 2002, so the first election year in which the BCRA was a factor was 2003.

21. See Bipartisan Campaign Reform Act of 2002, § 203, Pub. L. No. 107-155, 116 Stat. 91.

22. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 392 (2010).

23. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

24. 47 C.F.R. § 73-3527.

numbers has been quite limited. The 2012 presidential election cycle, which brought with it a hotly contested Republican primary and media attention on the money being spent by the candidates, has, for the first time, focused attention on advertising on broadcast television.²⁵ As the perception emerged that the amounts of money being spent by outside groups—that is, entities other than the candidates themselves or those working directly with the candidates—on election-related advertising increased dramatically in the wake of *Citizens United*, media organizations like Gannett have started doing direct research on political spending,²⁶ while advocacy groups like ProPublica, through its Free the Files initiative,²⁷ and Free Press²⁸ use their websites and social media to organize people to collect data from their local broadcast stations. Even the Federal Communications Commission has promulgated new rules requiring broadcast television stations in the top fifty markets make public file information available online as of August 2, 2012.²⁹

With so much focus on television, advertising on broadcast radio has gone largely ignored.³⁰ We believe this oversight to be an important one. Radio's ability to target specific demographic groups at the local level reveals the strategies behind political spending in a way an examination of television, with the mass appeal approach of its programming, cannot. Radio, as a medium, is a major source for citizens to access political information. More than 235 million Americans accessed radio at least once a week in 2009,³¹ and radio is a hotbed of discussion of

25. See, e.g., Deborah Jordan Brooks & Michael Murov, *Assessing Accountability in a Post-Citizens United Era The Effects of Attack Ad Sponsorship by Unknown Independent Groups*, 40 AM POL. RES. 383–418 (2012); Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PRO PUBLICA (Aug. 24, 2012), <http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare>; Kim Geiger, *Television Advertising in 2012 Election Could Top \$3 Billion*, L.A. TIMES (Oct. 6, 2011), <http://articles.latimes.com/2011/oct/06/news/la-pn-2012-ads-could-top-3-billion-20111006>.

26. Ben Jones, *Wisconsin Gov. Scott Walker Never Stopped Running* USA TODAY (May 27, 2012, 10:21 AM), <http://www.usatoday.com/news/politics/story/2012-05-27/wisconsin-governor-scott-walker-recall/55226482/1> (last visited Apr. 30, 2013).

27. See FREE THE FILES PROPUBLICA: JOURNALISM IN THE PUBLIC INTEREST, available at <http://www.propublica.org/series/free-the-files> (last visited Apr. 30, 2013).

28. See *Inspecting Broadcasters' Public and Political Files: A Handy How-To Guide*, FREE PRESS, <http://www.freepress.net/inspecting-broadcasters-public-and-political-files>.

29. Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 77 Fed. Reg. 27631-01 (May 11, 2012) (codified at 47 C.F.R. pt. 73).

30. But see Christopher R. Terry & Mitchell T. Bard, *Citizens United, Issue Ads, and Radio: An Empirical Analysis*, 20 COMM.LAW CONSPECTUS 307 (2012).

31. Pew Research Center's Project For Excellence In Journalism, *Understanding The Participatory News Consumer*, JOURNALISM.ORG (Mar. 1, 2010), http://www.journalism.org/analysis_report/understanding_participatory_news_consumer.

political issues.³² As a result, radio is a major recipient of spending on political races.

With all of this in mind, this study—along the lines of earlier research³³—looks at non-candidate political advertising on broadcast radio in Milwaukee, Wisconsin to assess the effects of *Citizens United*. We chose Milwaukee because of its proximity to the authors but more importantly because we were able to obtain public record issue-ad data covering a far longer period than the two years required by federal law. Access to this rare data set, which covers from before the passage of the BCRA to after the Supreme Court's decision in *Citizens United*, allowed us to empirically examine how issue ad purchases changed during this period in one mid-size American media market.

III. RESEARCH QUESTIONS

The majority's holding in *Citizens United* made assumptions about the effects of corporate money on corruption, influence and advertising without considering empirical evidence. The Court then chose not to hear arguments in the case of the Montana campaign finance statute, which would have included historical and empirical data on the effects of corporate political spending in that state.

We argue that to ignore evidence is a mistake, no matter where the data takes the argument. With three years elapsed since *Citizens United*, it is possible to directly test the impact of the decision on corporate political spending. We seek to do just that, in the context of radio in one media market.

In light of the restrictions placed on corporations, unions, and other organizations by the BCRA, some of which were then removed by *Citizens United*, we expect to find changes based on the state of the law through three eras when looking at radio issue ads on six Milwaukee stations between 1998 and 2011—Era 1: before the BCRA; Era 2: after the BCRA but before *Citizens United*; Era 3: after *Citizens United*). These changes may be in light of the restrictions placed by the BCRA on corporations, unions, and other organizations, although some were removed by the decision in *Citizens United*.

Specifically, if those who agree with Justice Stevens's dissent in *Citizens United* are correct, the data should show that the number of groups running issue ads, the number of spots, and the amount spent on this kind of advertising will have decreased in the years after the

32. One study indicated that in 2008, approximately 60% of news and talk radio content was election related. PEW PROJECT FOR EXCELLENCE IN JOURNALISM, *Radio, THE STATE OF THE NEW MEDIA*, <http://stateofthemediamedia.org/2009/a-year-in-the-news/radio/>

33. Terry & Bard, *supra* note 30.

passage of the BCRA, but then increase after the Court's ruling in *Citizens United*. Similarly, based on Justice Kennedy's holding in *Citizens United*, the percentage of issue ads identifying a candidate should decrease in the years after the passage of the BCRA, but then increase after *Citizens United*.

Further, we want to look broadly at the nature of the issue ads and the groups running them. Specifically, we wish to ascertain if there are any patterns regarding ideology, subject matter or other defining characteristics of the advertising.

IV. METHOD

During our earlier research, we were able to obtain access to archived public file data for a 4-year time period between 2006 and 2010.³⁴ Initially, our focus was to compare data from even-numbered years during this window of time, developing a project which used empirical evidence to compare issue advertising buys from 2008 (pre-*Citizens United*) and 2010 (post-*Citizens United*).³⁵

Using professional contacts, we approached the management of a cluster of 6 Milwaukee radio stations that were included in the earlier study a second time and secured permission to review the entire archive of public file data. Our review unearthed a complete archive of public file data for the six stations that stretched back to 1998. After substantial work in the archive, we were able to collect all of the files on non-candidate political advertising.³⁶ Among the materials we examined were station rate cards, internal memos on company procedures for handling non-candidate advertising, National Association of Broadcasters disclosure forms, scripts for many of the commercials and copies of the checks used to pay for commercials, as well as invoices which detailed the number of advertisements purchased, the amount paid for the advertisements and when the spots were actually aired. Sales logs discovered in the archive were compared to the advertising files we collected, demonstrating that the older information remained intact. As such, we believe our data accurately represents the non-candidate advertising that appeared on the 6 radio stations for the years reported in this study.

We also believe the data generated from this archive to be one of a kind. Stations do not typically retain public file data for longer than two years, and, in any case, are not required to allow the public to access

34. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

35. Terry & Bard, *supra* note 30.

36. The *Citizens United* decision has not affected the longstanding regulation of on-air political advertising by candidates, so our focus was on non-candidate advertising.

material outside of the 2-year window, even if the paperwork is still available.

Although the archive includes data from 6 of 36 commercial radio stations in Milwaukee,³⁷ the 2 AM and 4 FM stations from which we captured data represent a cross-section of radio programming options available in the market, targeting a variety of demographic groups, and ranging from niche and popular music formats to a highly rated news-talk station.³⁸ At the beginning of the period of study, the 6 stations were owned by 3 different entities, each operating separately. However, summer 2001, Clear Channel Communications merged the 6 stations into a single operation under the company's ownership.

Finally, with all of the information in the public file for this period sorted and checked, we counted and compiled the ads, organizing them by year, number and amount of spending, as well as whether the spot mentioned a candidate by name.

The data in the archive we assembled represents non-candidate political advertising during a span of 13 years and includes purchases by 138 groups, political parties or individuals, covering 17,079 individual advertisements and \$2,444,047 in spending.

V. RESULTS

The number of advertisers, total spots run, and amount of money spent on advertising at the six Milwaukee radio stations varied from year to year. We were especially interested in ascertaining if there was any correlation between these figures and the three eras of federal campaign finance law. While the data reflect some changes from Era 1 (pre-BCRA) to Era 2 (post-BCRA to *Citizens United*), the correlation was stronger from Era 2 to Era 3 (post-*Citizens United*). However, the number of candidate mentions tracked closely throughout the three eras with the state of federal campaign finance law.

37. According to Arbitron, Milwaukee-Racine is the 38th largest media market in the country, serving 1,481,300 people. *Arbitron Radio Market Rankings: Fall 2012*, ARBITRON, <http://www.arbitron.com/home/mm001050.asp> (last visited Feb. 5, 2013).

38. The 6 stations (and their current formats) are: WISN-AM (news/talk), WKKV-FM (rap/hip hop), WMIL-FM (country), WRIT-FM (oldies), WRNW (Top 40/CHR) and WOKY (classic country). During the study period WRIT maintained the call letters WZTR-FM, WRNW was identified as WQBW (classic rock) and WLTQ (soft rock). WOKY also changed formats twice during the study period (from nostalgia to oldies to classic country).

Table 1: Summary of Findings: Advertisers, Spots and Money

Year	Groups	Ads	\$
1998	11	704	110010
1999	1	130	13650
2000	2	49	7870
2001	0	0	0
2002	0	0	0
2003	0	0	0
2004	26	5359	982411
2005	6	379	63705
2006	13	1206	168461
2007	8	1077	173075
2008	11	1283	129092
2009	15	2578	130700
2010	19	958	137749
2011	23	3356	526324
Totals	135	17079	2443047

A. Amount of Advertisers, Spots, and Dollars

The volume of advertising at the 6 stations in 2011, the first full year after the *Citizens United* ruling, was higher in the number of groups buying spots, the number of advertisements, and the amount of money spent on advertising than any other year except 2004, during which the presidential race drew a high-profile, non-candidate campaign against one of the candidates (the “Swift Boat” advertisements—funded outside of the George W. Bush campaign—questioning the Vietnam War record of Democratic presidential candidate John Kerry³⁹). The political environment in Wisconsin in 2011 was unusual, in that while there were no statewide races for governor or U.S. Senate, there was a series of nationally watched, divisive elections with ties to the Wisconsin protests relating to the governor’s efforts to strip collective bargaining rights from state workers.⁴⁰

39. See, e.g., Albert L. May, *Swift Boat Vets in 2004: Press Coverage of an Independent Campaign*, 4 FIRST AMEND. L. REV. 66, 67 (2005); G. Mitchell Reyes, *The Swift Boat Veterans for Truth, the Politics of Realism, and the Manipulation of Vietnam Remembrance in the 2004 Presidential Election*, 9 RHETORIC & PUB. AFFAIRS 571 (2006).

40. There were 6 recall elections for Wisconsin state senators in 2011, 2 of which involved races for seats substantially located in the Milwaukee radio market, as well as a statewide race for a state supreme court justice seat featuring an incumbent supporter of the governor’s policies and a challenger opposing them. Monica Davey, *Republicans Hold on to*

In 2011, 23 different entities purchased issue ads at the 6 stations. That figure was up from 19 the year before (the first year in which *Citizens United* was a factor), 15 in 2009, 11 in 2008, 8 in 2007, 13 in 2006 (which included races for governor and U.S. senate), and only 6 in 2005. Similarly, 3356 spots were purchased in 2011, the most in any year during the period of study except for 2004 (when 5359 commercials ran). The 2011 figure is far more than the 958 the year before, 2578 in 2010 (which included governor and U.S. senate races), 2578 in 2009, 1283 in 2008 (which included the presidential contest), 1077 in 2007, 1206 in 2006 (again, even in the presence of elections for governor and U.S. Senate), and only 379 in 2005.

This pattern was even more pronounced with the amount of money spent on issue ads each year. Again, more money was spent in 2011 (\$526,324) than in any year during the period of study other than 2004 (\$982,411). But the 2011 expenditure was a marked increase from the previous years: \$137,749 in 2010 (again, races for governor and U.S. Senate), \$130,700 in 2009, \$129,092 in 2008 (presidential election), \$173,075 in 2007, \$168,461 in 2006 (again, contests for governor and U.S. Senate), and \$63,705 in 2005. There was very little variation between 2005 and 2010, with the expenditures in 2011, the first year fully affected by *Citizens United*, exploding to more than double the figures of the previous 6 years.

B. Candidate Mentions

The correlation between the three eras of federal campaign finance law and the percentage of issue ads that mentioned a candidate by name was quite strong. The percentage went down in the years after the passage of the BCRA before spiking after *Citizens United*.

Table 2: Issue Ads that Discuss Candidates by Name

Year	# of Ads	# of Ads Mentioning Candidate by Name	% of Ads Mentioning Candidate by Name
1998	704	227	32.24
1999	130	0	0
2000	49	0	0
2001	0	0	0
2002	0	0	0
2003	0	0	0
2004	5359	665	12.4
2005	379	22	5.8
2006	1206	276	22.89
2007	1077	0	0
2008	1283	31	2.41
2009	2578	179	6.94
2010	958	118	12.31
2011	3356	1837	54.73

In 1998, the first year of the period of study, more than 32% of all issue ads identified a candidate. When issue advertising returned to the stations (after the stations declined to accept them between 2001 and 2003, see below), with the BCRA now in place, the percentages dropped to 12.4% in 2004 (even with the Swift Boat campaign), 5.8% in 2005, 22.89% in 2006, 0% in 2007, 2.41% in 2008, and 6.94% in 2009. The proportion of issue ads naming candidates ticked up in the first year affected by *Citizens United*, 2010, to 12.31%, before exploding in 2011 to 54%, the highest percentage by far during the period of study, far more than the next highest total, 32% in the pre-BCRA year of 1998.

So there is a close correlation between the percentage of issue ads that mentioned candidates and the era of federal campaign finance law, which is not surprising given that while the BCRA was in effect, electioneering communications were not allowed within 30 days of a primary or 60 days of a general election. The issue ads identifying candidates during Era 2 would have had to air outside of these windows.

C. The Data for 2001 Through 2003

One of the curious findings in the data was the lack of any issue advertising at any of the six stations for 2001 through 2003. Initially, we believed that the information for these years might have been missing from the public file—not unlikely possibility given that the stations are

only required to retain this paperwork for two years. During our extensive search we uncovered several documents that explained the absence of issue advertising during this period. In 2000, with four legally qualified candidates for President of the United States, and the corresponding requirement for room to accommodate them, a rate card indicated that at least two of the stations did not offer non-candidate political advertisers space during the election cycle. Likewise, in years 2001 through 2003, the rate cards and station memoranda we discovered indicated that at least some of the stations were not accepting any non-candidate political advertising. In each of the years where no issue ads were sold, the stations did sell advertising directly to the official campaigns of candidates, ranging from local county judges to the school board and Wisconsin governor. But the stations apparently had opted—unlike candidate advertisements, which they are required to carry—not to make time available for issues ads, an option available to them under federal law.

This period in which the stations opted not to carry issue ads straddles the first two eras of federal campaign finance regulation, as the BCRA went into effect in November 2002, after Election Day. This gap, followed by the unusual activity in 2004 (the Swift Boat advertisements), makes it harder to fully ascertain the progression in issue ad data from Era 1 to Era 2.

D. Nature of the Advertisements

We also thought it would be useful to look at what kind of content appeared in the issue ads, and what kind of groups were behind them. The advertisements themselves varied widely, covering a range of topics like abortion, legalizing gambling, mandates for ethanol use, tort reform, school choice, lead paint, and advocacy both for and against voter identification legislation. Other issue ads discussed economic issues, including employment, the minimum wage, union membership, regulation and taxes.

Election year advertisements included commercials soliciting general support for Democratic, Libertarian and Republican Party platforms. Candidates who were the subject of commercials sought elected positions ranging from the local school board to representatives in both state and federal legislative bodies, the state governor and the U.S. president. A variety of advertisements were also designed to encourage various groups, including minorities, to vote.

Groups purchasing advertisements also varied greatly and included political parties, unions, corporations, business associations, individuals and even an obscure political organization that purchased a single advertisement. Advocacy groups included both state and national anti-

abortion groups, a variety of groups promoting gun ownership rights and concealed carry legislation, conservative organizations urging the U.S. Senate to confirm the nomination of Samuel Alito to the U.S. Supreme Court, and advertisements both in favor of and opposed to plans involving federal stimulus spending on high-speed rail in Wisconsin.

Media organizations also used issue ads during this period, including campaigns against the so-called “performance tax”⁴¹ and advocating for additional competition between cable system providers.

Other than the years in which the stations implemented blanket bans on non-candidate issue ads, access does not seem to have been an issue for groups willing to spend money on advertising. We found only three instances during the period of study in which a request for airtime for an issue ad was denied, and in one of those cases the station had granted the request initially, but rescinded the offer after reviewing the audio that was recorded for the spot. A second request for airtime was refused during one of the blackout periods coming within 30 days of a primary, and in the third case the cluster refused to sell time to an individual who wanted to run an attack commercial against a candidate in a race for a local school board seat.

Additionally surprising was the range of rates being charged to issue groups. While some groups paid premium rates to ensure their ads were guaranteed to run at their scheduled times, as late as 2011, groups or individuals could have bought ads during overnight and other non-peak audience periods on one of the music stations for as little as \$5 each for a 30-second commercial. This rate for advertising came with some significant strings, including immediate pre-emptibility by the station, as well as obviously less desirable demographics and ratings, but the fact remained that the option to purchase ads and get a message out was available for a very low price, especially on the music stations in the cluster.

VI. DISCUSSION

While the effects from Era 2 to Era 3 (post-BCRA passage to post-*Citizens United*) were stronger than those from Era 1 to Era 2 (pre-BCRA passage to post-BCRA passage), what emerges from the data is a real sense the state of federal campaign finance reform law correlated closely with the number of groups advertising on the 6 Milwaukee radio

41. A bill known as the Performance Rights Act, proposed in both the U.S. Senate and House of Representatives, would have amended the Copyright Act to require radio stations to pay royalties to artists for the music they play, something the stations do not have to do currently. Performance Rights Act, H.R. 848, 111th Cong. (2d Sess. 2009).

stations, as well as the number of spots and the amount of money spent on issue ads at those stations. Even starker was the link between the state of the law and the number of spots that mentioned candidates by name, with more than half of all issue ads doing so in 2011 after the Court's ruling in *Citizens United*.

A. *The Nature of 2011*

Because of the protests in response to the governor's labor and budget proposals and the recall elections for state senate seats that followed, as well as the battle for a state supreme court seat that became a proxy fight over the governor's policies, there is no doubt that 2011 was unusual as election years go in Wisconsin.⁴² These races were spread out over the year and engendered passionate support on both sides. There is no way to determine with certainty how much the unusual nature of the year's political events affected the volume and nature of issue ads purchased at the 6 Milwaukee radio stations.

It is important to note that, at the same time, the results of this study cannot be easily dismissed because of the unusual election schedule of 2011. Of the 6 state senate recalls in 2011, only 2 involved candidates in or near the Milwaukee radio market. While the recalls and state supreme court contest generated issue ads, there were no statewide races for governor or U.S. Senate or any other statewide elections in 2011,⁴³ and they are not enough alone to account for the nearly unprecedented number of groups running near-record numbers of advertisements and spending nearly unmatched amounts of money on issue ads. Similarly, the unusual nature of 2011 is not enough to explain the spike in issue ads identifying candidates that year. In fact, nearly all of the advertisements related to the state supreme court election were purchased by non-candidate groups. The candidates themselves spent very little on advertising.

It is also important to consider that to the extent 2011 was an unusually combative year in Wisconsin politics, without the changes in federal campaign finance law brought about by *Citizens United*, interested parties would not have been able to act on their passion in the same ways. That is, had the BCRA been in place in 2011 unaffected by

42. Even though there were no federal races in Wisconsin, prior to *Citizens United*, federal campaign finance law prevented non-profit companies organized under 501(c)3 of the tax code from "interven[ing] in any political campaign on behalf of any candidate for public office." *Campaign Finance law Quick Reference for Reports*, FEDERAL ELECTIONS COMMISSION, http://www.fec.gov/press/bkgnd/bcra_overview.shtml.

43. Unlike 2011, other election years featured high-profile, contested races without generating the same number and amount of advertising buys, including 2006 and 2010 (statewide contests for governor and U.S. Senate) and 2008 (a presidential race).

Citizens United, it would have been virtually impossible for groups to mention a candidate in more than 54% of issue ads (as they did), because such identifications would have not been allowed within 30 days of a primary and 60 days of a general election.⁴⁴ The impact of 2011, no matter how much of an outlier in Wisconsin political history, must be examined through the prism of the changes in federal campaign finance law.

B. Behind the 2009 Data

The 2009 numbers seem to have been inflated by the campaigns by media companies to advocate on industry-related issues. One group—the National Association of Broadcasters—was responsible for 1391 of the 2578 issue ads that year, as it campaigned against the so-called performance tax. Another organization spent more than \$100,000 running more than 600 advertisements advocating for legislation allowing for additional competition between cable system providers in the state. So if you remove these campaigns from the 2009 totals, that year better fits in with the other pre-Citizen United numbers.

C. Issue Ads Identifying Candidates

The state of federal campaign finance law closely tracked the percentage of issue ads that identified individuals running for office. Notably, issue ads that mentioned candidates prior to the BCRA's regulation of electioneering communications tended to advocate on behalf of a candidate. One example was the National Rifle Association's positive endorsement of Republican Paul Ryan's 1998 campaign in a race for a U.S House of Representatives seat in Wisconsin.

During the years in which the BCRA was in effect, non-candidate political advertising that mentioned candidates occurred less frequently and always ran outside of the window in which names could not be used (30 days before primaries and 60 days before general elections). While 2004 was the year with the largest number of issue ads overall at the 6 stations, just 12.4% of the spots mentioned a candidate by name, and, in every case, these ads were run outside the BCRA's mandated 30/60 day restriction window. There were relatively few mentions of candidates in issue ads in 2008 and 2009. In 2009, the last year in which these BCRA provisions applied, just 6.94% of issue ads named a candidate.

While a noticeable jump was evident in 2010 following the *Citizens*

44. Even though the BCRA's rules on electioneering communications only applied to federal elections, the six Milwaukee stations enforced the 30- and 60-day windows for all races, state and federal alike, in an effort to keep its policies simple and easy to follow.

United decision, it was in 2011 that the real changes to the nature of non-candidate issue advertising became visible. In 2010, the year in which *Citizens United* removed the restrictions, the percentage of ads naming a candidate nearly doubled. In 2011, a year that was marked by local elections and recalls in the state of Wisconsin, the percentage of issue ads mentioning a candidate by name skyrocketed to more than 54%, almost all of which were run within the 30/60 day window of the elections. This finding presents strong support for a conclusion, based on the data, that the *Citizens United* decision changed the nature of this type of advertising.

The nature of the candidate identifications was also telling. While these issue ads included a variety of outside groups that were advertising negatively against Democratic presidential candidate John Kerry in the summer of 2004, in 2006 nearly half of the advertisements that mentioned a candidate included a teacher's union support for Hilary Clinton's early bid to become the Democratic Party's presidential candidate in 2008. Therefore, during the period the BCRA's rules on electioneering communications were in effect, their mentions made up a smaller percentage of overall issue ads. In 2011, in the midst of a very contentious race for a seat on the Wisconsin Supreme Court, and during the first in a series of recall elections launched against Republican state senators who had supported Governor Scott Walker's legislation to repeal the collective bargaining rights for state employees, issue advertising increased dramatically compared with the previous few years, with attack advertisements making up a substantial portion of the commercials the stations carried.

D. Demographics

Digging deeper into the nature of the individual radio stations and the issue ads that ran on their airwaves provides more support for a connection between federal campaign finance law and the issue ad activity at the 6 Milwaukee stations during our period of study.

With an eye on demographics, not surprisingly, the highly rated conservative news/talk station WISN-AM in the cluster drew the largest percentage of advertising—36.3% of the total number of spots—and a substantial portion of the spending—39.6% of the total amount of dollars spent on issue ads—during the study period. While the station primarily targets programming to attract white males ages 35-64, a variety of outside groups were interested in purchasing advertising that was then embedded within politically orientated programming.

In 2 years, 2005 and 2010, the station cleared more than 50% of all issue advertising run by the cluster. Spending on the station was also high, with WISN responsible for 83.8% of all non-candidate issue

advertising dollars in 2005 and 63.8% in 2010. The rates charged for advertising on WISN were the highest in the cluster for every year except one, so that the station billed 74.1% of total spending despite running only 27% of the issue ads.

A larger surprise was the dynamic we discovered among the results involving the WKKV-FM. The station carries an urban format (*i.e.*, rap/hip hop) that targets a younger (ages 18-35) African-American demographic. On the surface, at the local level, WISN and WKKV could not have programming or audience demographics that are more diametrically opposed. But in 1998, 2000, 2004, 2006, 2008 and 2010, issue advertisers used WKKV to try to specifically target a young, African-American audience. Notably, in 2008, the station ran 59.7% of all issue ads, almost all of which were targeted at voter registration and get-out-the-vote initiatives in the local African-American community. In 2010, when WKKV ran 28.3% of all issue ads, both liberal- and conservative-leaning groups targeted advertising directly at the young, African-American audience of the station.

Table 3: WISN and WKKV

Station	Year	Number of spots	% of spots	\$	% of spending
WISN	1998	154	21.9	21175	19.2
	1999	0	0	0	0
	2000	0	0	0	0
	2004	1203	22.4	240595	24.4
	2005	260	68.6	53380	83.8
	2006	479	39.7	61996	36.8
	2007	1077	100	173075	100
	2008	268	20.9	35420	27.4
	2009	695	27	96870	74.1
	2010	502	52.4	87944	63.8
	2011	1570	46.8	196274	37.3
	Total	6208	36.3	966729	39.6
WKKV	1998	162	23	32560	29.6
	1999	0	0	0	0
	2000	49	100	7870	100
	2004	1450	28	227060	23.1
	2005	0	0	0	0
	2006	319	26.5	36790	21.8
	2007	0	0	0	0
	2008	766	59.7	56467	43.74
	2009	54	2.1	10710	8.2

Station	Year	Number of spots	% of spots	\$	% of spending
	2010	271	28.3	27225	19.8
	2011	74	2.2	7894	1.4
	Total	3145	18.4	406576	16.6

The difference in the content of the ads between WISN and WKKV was also telling. Issue ads targeting the WKKV audience were designed to get voters to the polls or support a political ideology in general terms. On the other music stations within the cluster, issue ads covered more specific questions, including taxes, abortion and cable competition, as well as even soliciting support for a federal contract in the manufacture of jet engines. Only in 2011 did country music station WMIL-FM and oldies station WRIT-FM see a substantial number of issue ads dealing with candidates, and in almost every case, those ads dealt with the recall elections happening at the time. Issue ads run on these stations in pre-*Citizens United* election cycles failed to exhibit this level of candidate identification, even when there were statewide races for president, U.S. Senate and governor.

On WISN, the news-talk audience was exposed to the most directly political messages of the 6 stations, including issue ads that named and, with increasing frequency, attacked candidates. Although groups supporting both Democratic and Republican candidates for office ran issue ads on the conservative news-talk station, the data suggests that groups supporting conservative candidates were dominant by a large margin.

As the hotbed of political talk in Milwaukee radio, and as the site of the most spending on issue ads in the market, WISN presents itself as an especially concentrated laboratory for examining how the purchasers of issue ads that would be the most likely to take advantage of the loosening of federal campaign finance law were affected by the changes in the rules across the three eras under study. Such an analysis of WISN offers clear support for the contention that the behavior of issue advertisers correlated strongly with swings in the regulations, at least from the era with the BCRA in effect to the period after *Citizens United*.⁴⁵

When looking at the number of issue ads run on WISN and the amount of money the station collected for those spots, the correlation is apparent between Era 2 and Era 3, especially when accounting for the outlier nature of 2004. In 2005, only 260 issue ads appeared on the

45. The stations' decision not to accept issue ads between 2001 and 2003, and WISN's lack of issue ads in 1999 and 2000, make it far harder to ascertain the impact the passage of the BCRA had on issue advertising at the six stations.

station. The number was higher in subsequent years (479 in 2006, 1077 in 2007, 268 in 2008, 695 in 2009 and 502 in 2010), before exploding in the first full year after *Citizens United*, 2011, when 1570 issue ads appeared on WISN. Again, there is no way to know how much of the spike was due to the unusual nature of the recalls and state supreme court contest in 2011, but the loosening of the restrictions of federal campaign law provided an environment in which these types of commercials could run. Without the changes in the law brought about by *Citizens United*, many of the issue ads, especially those identifying a candidate within 30 days of a primary or 60 days of a general election, run in 2011 would not have been permissible under federal law and/or the station's policies.

VII. CONCLUSION

The data we present in this study suggest that radio was—and continues to be—used by outside groups to broadcast political messages to specific demographic groups at the local level. This is not a surprising finding, as this kind of niche targeting is one of radio's strengths as an advertising medium. But what is telling is the apparent effect the changes in federal campaign finance law had on how issue advertisers were able to conduct their radio campaigns.

Although this study does not present a complete picture of issue advertising on radio in Milwaukee over this extended period of time, the ability to access public file data for more than a decade was, as far as we can determine, unique. More importantly, as we believe empirical evidence to be an important element in the continuing debate over the regulation of issue advertising, the data set we have assembled could be used as a baseline for further research. While the nature of the study makes it impossible to isolate a causal effect between the development of campaign finance law—from the pre-BCRA era, to the period in which the BCRA was in effect, to the present, in which the *Citizens United* decision gutted key elements of the BCRA—and the changes in issue advertising at the Milwaukee radio stations, the correlation, especially from the second era to the third one, between the two factors is worthy of attention and consideration.

What bears discussion is the relationship of the study to the *Citizens United* and *Montana* case decisions, namely the matter of the evidence. The data we present here provides a clear correlation between changes to issue advertising on these radio stations and the changes in the rules governing these kinds of spots since *Citizens United*, especially in terms of the number of groups purchasing ads, the number of ads being run, the amount of money spent, and, most importantly, the number of ads

being run that directly name or attack a candidate.

Future research is needed to examine issue ad buys in years unaffected by the Wisconsin recalls (both 2011 and 2012 would fall into this category). Such data will help isolate the unique nature of this period and make it easier to determine how much of the spike in the volume of issue ads—and the identification of candidates—is resulting from post-*Citizens United* changes in campaign finance law. But based on the data presented in this study, it seems apparent that, at least to some extent, these changes have had a real impact on political issue advertising in the Milwaukee radio market.

