

Money in Politics
Chautauqua Institute
7/17/13

- Introduction



- After the elevated philosophical thoughts of Michael Sandel and David Brooks the last two mornings, I am afraid I am going to lower the tone and be crass and talk about Money--and not just any money, but Money in Politics.
- The 2012 election was a watershed election in terms of the money spent, how it was spent, and where it came from. So this is a good time to take stock of where we are in the financing of our elections, and where we are going.
- 2012 was the first Presidential election since the Supreme Court's decision in *Citizens United*, where the Court held that "corporations are people too" as Mitt Romney put it. Actually, what the Court held is that Corporations have the same First Amendment rights to spend money in elections as individuals, which is slightly different, but has the same legal effect.

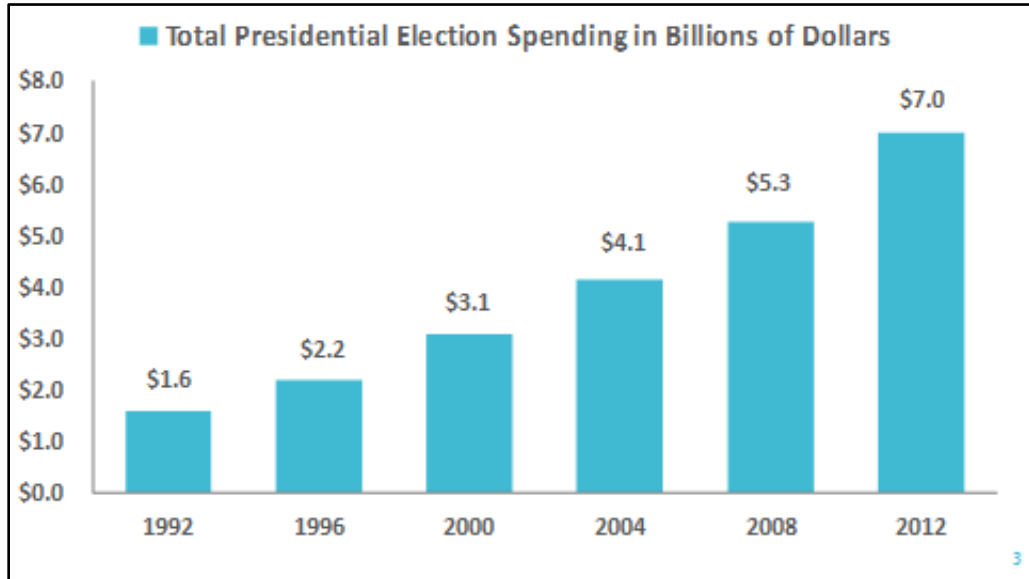
- It was the first Presidential election with Super PACs, a creation of another Court decision. Super Pacs can ACCEPT unlimited amounts of money from individuals, corporations, and unions, and SPEND unlimited amounts for or against federal candidates, so long as they are “independent” of those candidates.
- 2012 was the first federal election in which hundreds of millions of dollars of secret money was spent on political advertising by non-profit groups—the 501 c tax exempts—that do not have to publicly disclose their donors.
- Finally, it was also the first Presidential election since 1972 in which neither major party Presidential candidate participated in the public funding system.
- So, many firsts...
- Let’s start with the money...

2. [\$7 Billion Dollars]



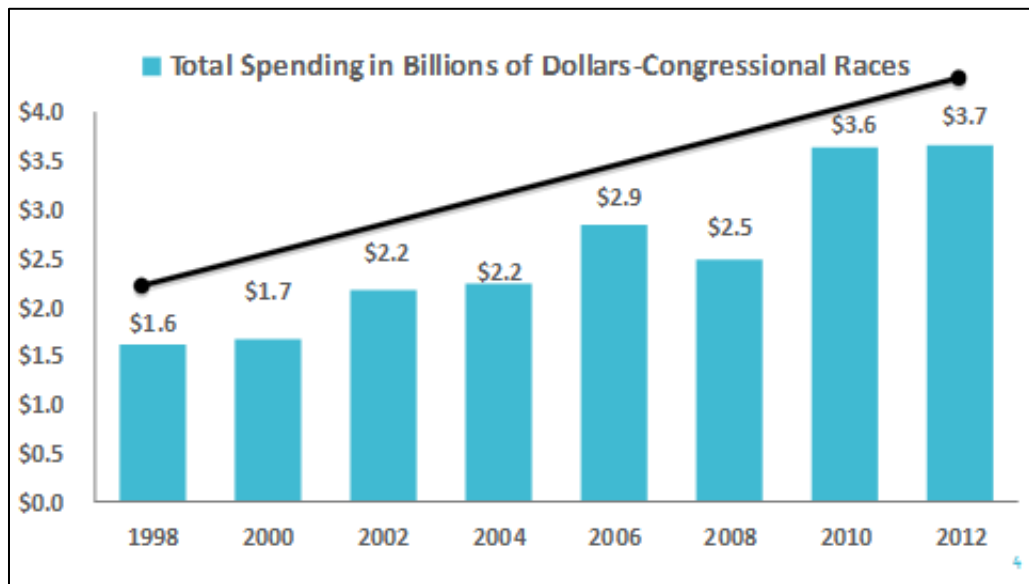
- There was a LOT of it. The Federal Election Commission reports that over \$7 Billion dollars was spent on Federal elections during the 2012 cycle

3. [Total PRESIDENTIAL Spending over the Years]



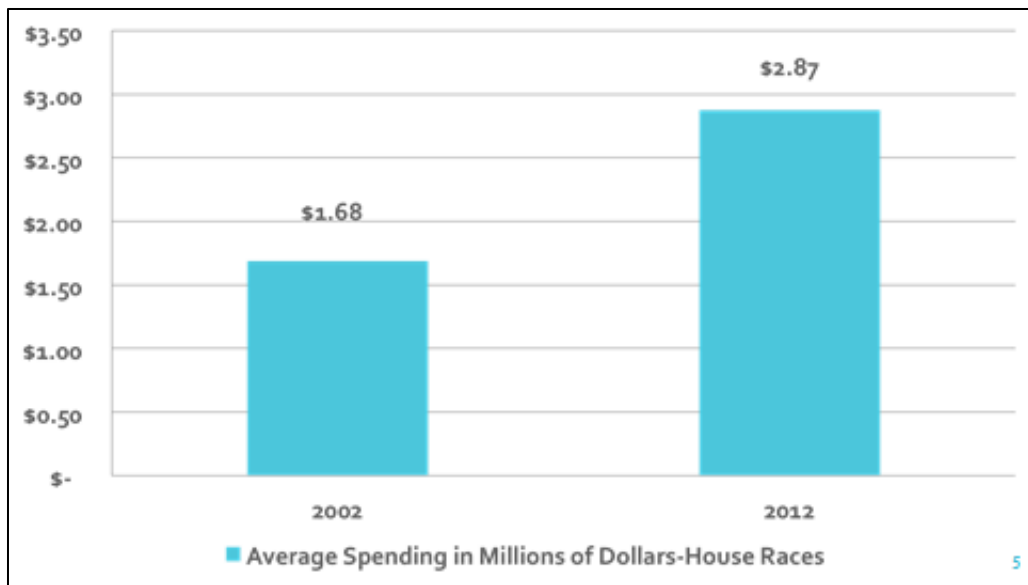
- That is a 337% increase in spending in 20 years, since 1992.
- Spending has risen about 35% in EACH Presidential election since 1992

4. [Total CONGRESSIONAL Spending over the years]



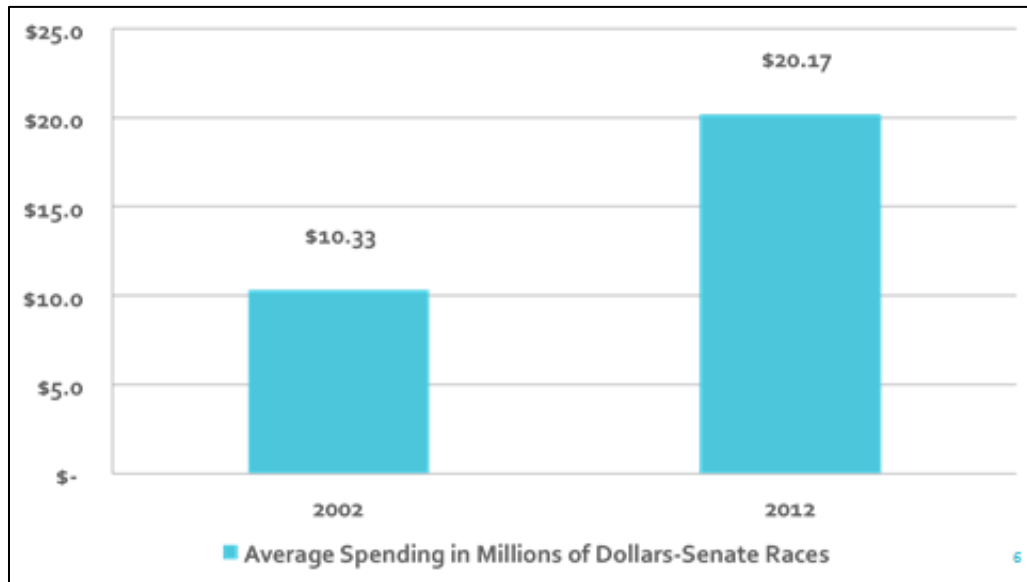
- Total spending in Congressional races has generally gone up by several hundred million dollars each election cycle.
- However, in 2010, the first Congressional election since *Citizens United* and SuperPacs, spending jumped dramatically-- by over a billion dollars.
- Spending in Congressional elections is now more than double what it was in 2000.

5. Average Spending in U.S. House Races



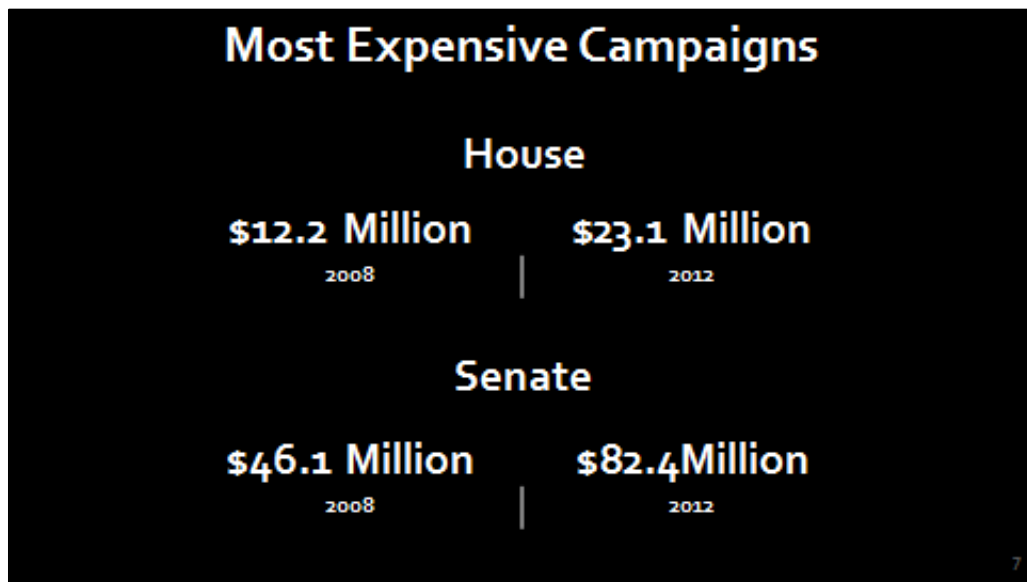
- The cost of the AVERAGE House race has risen 75% in the past decade.

6. [Average Spending in U.S. Senate Races]



- The cost for an average Senate race has DOUBLED in that same time

7. [Rising Cost of Congressional Races]



- Averages include uncontested and safe seats. The story told by contested races is even more dramatic: In just 4 years, the cost for the MOST expensive race in both the House and the Senate has MORE than doubled—we had a \$29 million House seat and an \$85 million Senate race in 2012.

- What is driving these enormous increases in the cost of elections? Why do our elections cost so much more on a per voter basis than any other democracy? There are many reasons, but one dwarfs the rest—the Supreme Court has declared that it is unconstitutional to limit campaign spending.
- After Richard Nixon’s 1972 reelection campaign, and as a result of the huge sums it raised and spent, and the Watergate scandal, Congress passed reform laws to limit the amount of spending in elections. Congress’s theory was the simple one that rising election costs created pressure for more fundraising, and large contributions, which had a corrupting effect on Members of Congress and the President.
- In the landmark *Buckley v. Valeo* decision, the Supreme Court in 1976 declared unconstitutional any limits on spending by party committees, candidates, independent spenders, and the use of a candidate’s own personal funds.

8. [Buckley v. Valeo Quote]

"The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise."

-*Buckley v. Valeo* (1976)

9

- In *Buckley*, the Supreme Court said that the government can only encourage candidates to VOLUNTARILY limit spending in RETURN for public funding, which is what the Presidential public funding system did from 1976 until last year. Otherwise, however, the Supreme Court held that the First Amendment does not allow legal limits on campaign spending. The court said the government may limit the size of contributions to candidates and parties to prevent corruption **9. [Buckley Corruption Quote]** but not the amount that may be spent

Congress may restrict contributions to candidates and political parties “to limit the actuality and appearance of corruption resulting from large individual financial contributions”

-*Buckley v. Valeo* (1976)

10

10. [Impact of *Buckley*]

- No overall limit on candidate expenditures
- No limits on self-funding candidates
- No limits on independent expenditures
- Contribution limits OK

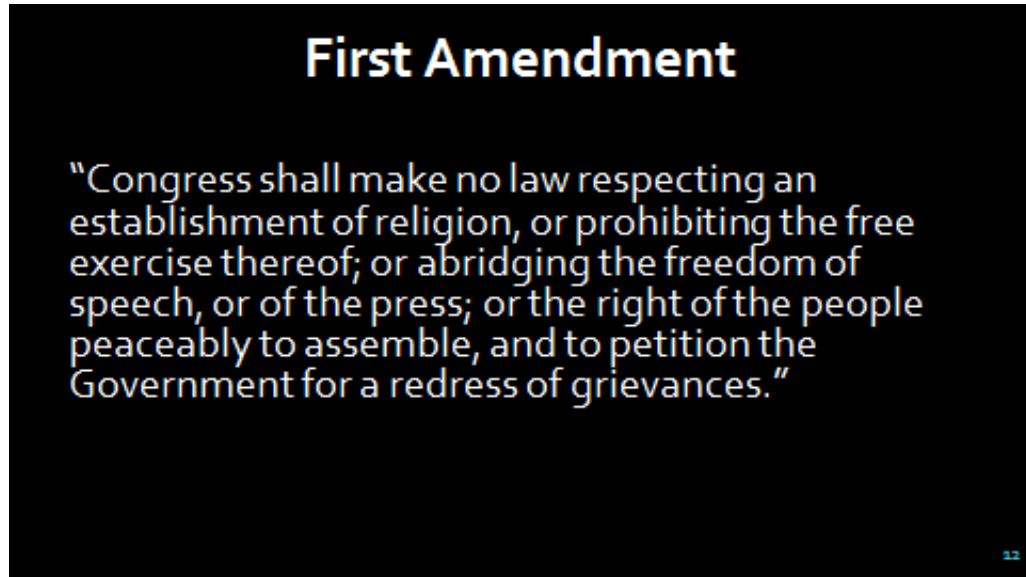
11

The result of the *Buckley* decision was:

- No overall limit on candidate expenditures
- No limits on self-funding candidates
- No limits on Independent Expenditures
- The Court did, however, agree that limits on the amount of contributions directly to candidates was acceptable

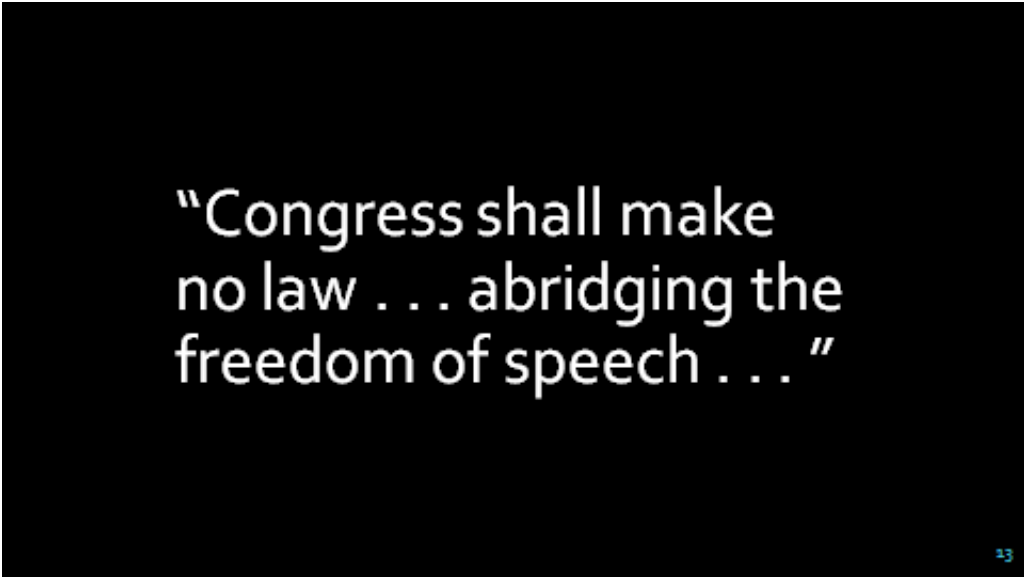
- So how did the Court reach this result?

11. [Full First Amendment Text]



- This is what the First Amendment says—but what does it mean?
- That is a question debated now for over 220 years
- The First Amendment was written to protect citizens when they criticize the government— no more arrests for “sedition” or seizing of printing presses for attacks on the government

12. [“Congress shall make no law abridging freedom of speech”]



“Congress shall make
no law . . . abridging the
freedom of speech . . . ”

- So what is speech?
- Speaking (obviously)
- But is “speech” the same as spending money in elections? Giving money to candidates? Giving money in return for meetings with officeholders? Giving money for an agreement to take (or not take) some official action—like voting in Congress? Corporations spending money to elect or defeat members of Congress? Spending money in campaigns secretly? The answers to these questions are less obvious, and have been at the center of legislative and court battles since the *Buckley* case in 1976.

13. [Corporate Money: Changing Interpretations]

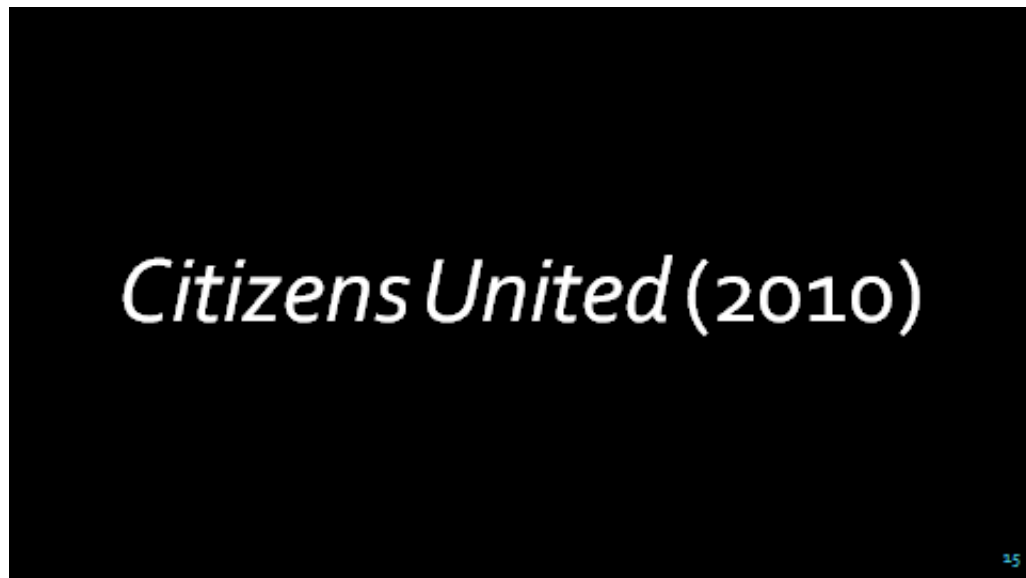
Corporate Money: Changing Interpretations

- Congress outlawed corporate contributions in 1907, after the scandal of huge Wall Street contributions to President Theodore Roosevelt's re-election in 1904.
- One robber baron is reported to have said "We bought the SOB—he just didn't stay bought."
- Theodore Roosevelt apparently decided that being a commodity was not an honorable position for a President. After his reelection he called on Congress to ban corporate contributions to candidates and parties, and establish public funding of Presidential elections. Congress agreed to the ban on corporate money, but not public funding of Presidential campaigns, in 1907.
- The right of the government to limit corporate expenditures in elections was upheld by the U.S. Supreme Court in 1990 in the *Austin v. Michigan Chamber of Commerce* .
- The majority opinion said that corporations had the potential to dominate political discourse and elections

because of their vast wealth that the wealth had been gained in the marketplace under the protection of favorable laws that carried with them both benefits and restrictions, and that consumers and shareholders had not provided the funds to corporations for purposes of political speech.

- Again in *McConnell v. FEC in 2003*, the Supreme Court upheld the prohibition on the spending of corporate money in federal elections, but in a close 5-4 vote.
- In 2010, the Supreme Court's interpretation of the First Amendment changed.

14. [Citizens United]



- *Citizens United*, decided in 2010 by a 5-4 vote, overturned decades of precedent, and the recent *McConnell* case.
- The change in the vote was because Justice Sandra Day O'Connor had retired, and been replaced by Justice Alito, who voted the other way. Justice O'Connor had served as a Republican leader in the Arizona legislature, so she

understood how legislatures work and the potential for corruption in campaign contributions and spending.

- In *Citizens United*, corporations were for the first time found to have the same first amendment political speech rights as individuals
- The Court declared a constitutional right to unlimited corporate and union spending in all elections in the country—federal, state, local, zoning commission, and dog catcher.
- The court said that the Government could only regulate political spending to prevent corruption and that so long as the spending was independent of candidates there was no possibility of corruption.
- The core holding of *Citizens United* was that ALL speakers must be afforded the same rights to communicate with voters--the majority opinion said the government cannot favor some speakers (individuals) over others (corporations)
- The only problem with that impressive sounding theory is that after *Citizens United* the Court almost immediately demonstrated in another case that it didn't really BELIEVE that was what the First Amendment required!
- The case was called *Bluman v FEC*. A group of non-citizens with work permits who lived in New York filed suit, saying that the laws prohibiting them from spending money in U.S. elections were unconstitutional , because *Citizens United* said that the government cannot not choose among political speakers, and thereby exclude some from speaking. They said 'we are taxpayers and U.S. residents

and we have jobs and a stake in what the government does. Some of us are Canadian, so we're BARELY foreign anyway'!

- In *Bluman v. FEC* the DC Circuit court ruled that it is permissible for the Government to prohibit certain sources of speech, such as foreign nationals. The court said that the ban on foreigners spending money in U.S. elections had a "long tradition" in law. The Supreme Court let this decision stand.

15. [Corporate and Foreign Money Slide]



- Corporate Money
- Foreign Money
- What is the Constitutional Difference?
- What does this mean to the Court's explanation in *Citizens United* that corporate political spending must be allowed because the government cannot choose amongst speakers, and favor some but not others? Especially since there was a "long tradition" of limiting BOTH corporate and foreign

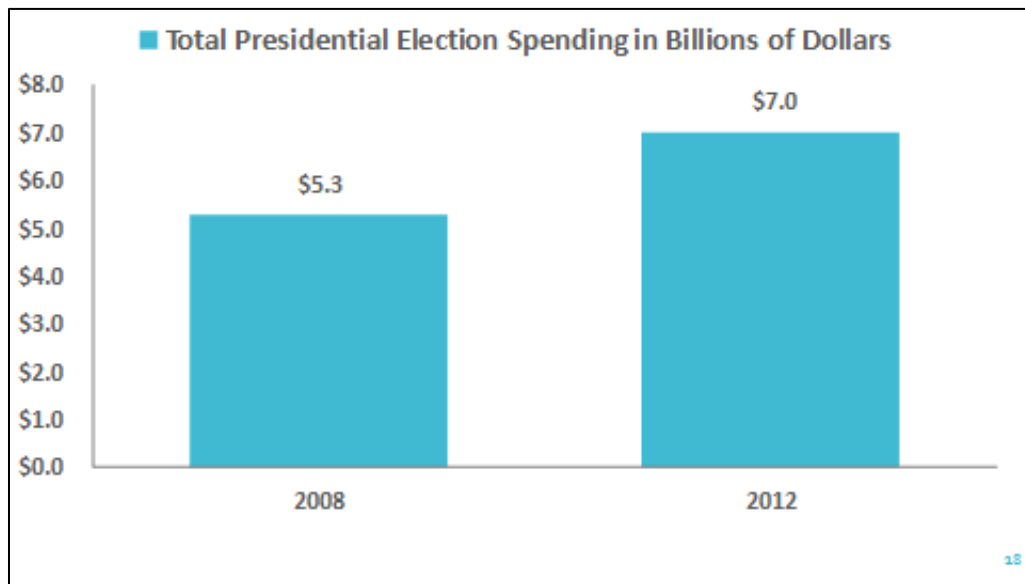
spending in U.S. elections before *Citizens United*? Well, it means that the government can still chose amongst speakers, and favor some over others—but in an odd reversal of constitutional doctrine it is now the Supreme Court (and not Congress) that gets to decide the public policy question of which of these non-citizens and non-voters can spend money in elections, and which cannot.

16. [Effects on the 2012 Election]



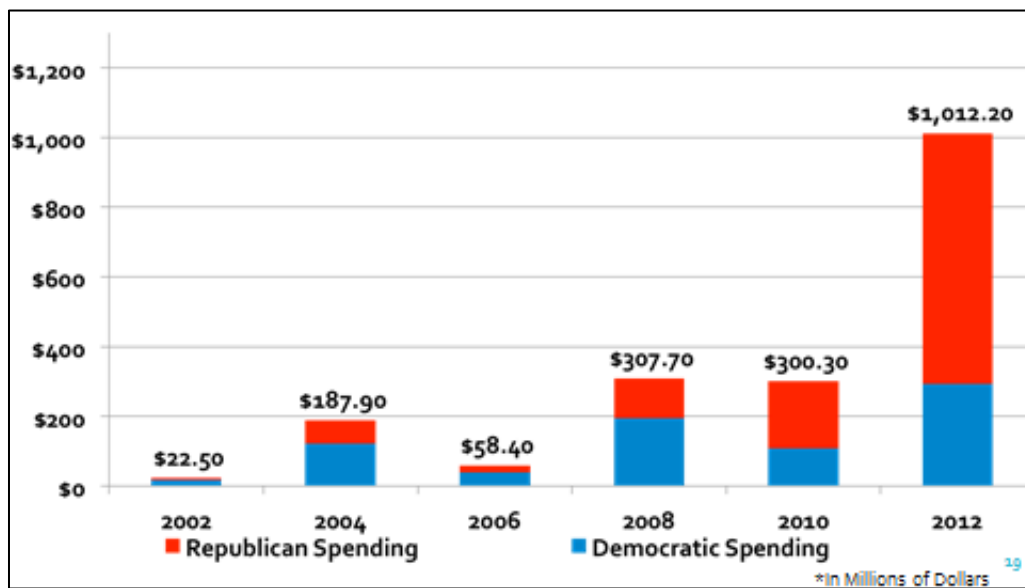
- How did *Citizens United* and its results affect the 2012 elections?

17. [Total election spending in election year graph]



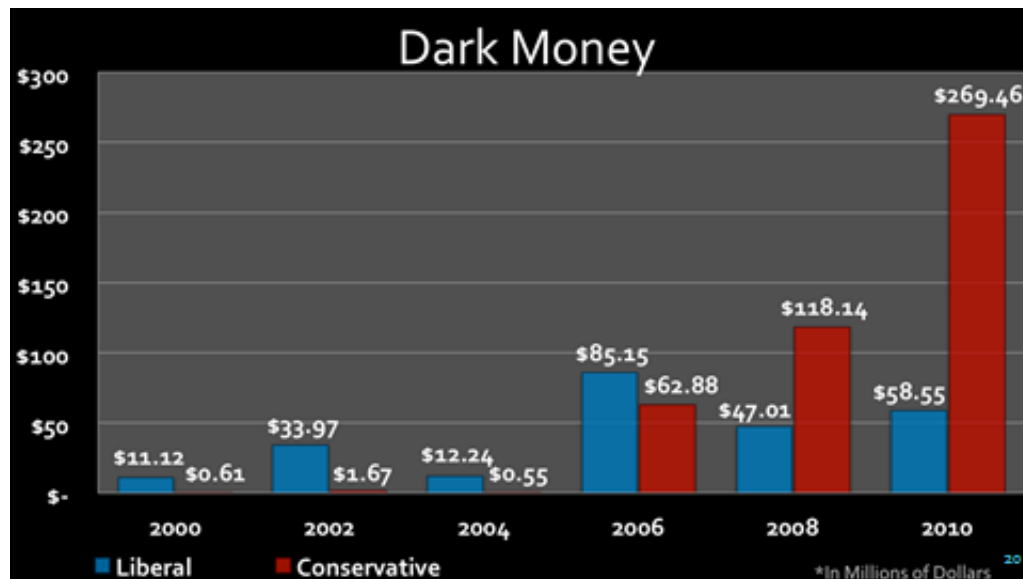
- We saw how election spending increased by almost \$2 billion 2012 over 2008, which was itself already higher than any other year
- About HALF of this increase was the result of new “outside” or “independent” spending, which rose A BILLION Dollars over the 2008 election.

18. [Total outside spending over the past 10 years]



- Two important developments drove that number. The first was *Citizens United* and the related creation of “SuperPacs” —federal political committees that can accept unlimited individual, corporate, and labor contributions, and spend unlimited amounts in federal elections for “independent “ advertising.
- The second development was the possibility of spending money in elections SECRETLY—without having to disclose where the money came from. Ever since the Watergate scandal, the law has required that the sources of funding for campaign advertising be disclosed. Until now...

19. [Dark Money Graph]



- More than \$300 million of the money spent in 2012 on TV ads was from what the press calls “dark money” groups—groups that do not disclose their donors.
- This was not supposed to happen...

20. [Kennedy Disclosure Slide]



- Justice Kennedy proclaimed in *Citizens United* that “a campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed until today.”
- Given all the secret money that followed, it is fair to ask “What was he smoking”?
- In his defense, he was reading the text of the law. The McCain-Feingold law requires that if someone runs an “electioneering communication”—a campaign ad—that they must disclose everyone who gave them more than \$1,000
- Second, he was apparently unaware that the Federal Election Commission had acted to gut this provision of the law just before *Citizens United*.
- That is the “FEC”—my former agency, one of the important results of the Watergate reforms, created to enforce the election laws on an independent basis, with three


Republican and three Democratic Commissioners, and four votes required to take any official action.

- Today it is reduced to yet another example of deep partisan and philosophical disagreement in Washington, usually deadlocked 3-3 with the Republican Commissioners opposed to enforcing the campaign finance laws passed by Congress because they do not agree with them.
- In the instance of the McCain-Feingold disclosure requirement, though, the three Republican Commissioners were able to pick up the vote of one Democratic Commissioner who was concerned about the effect of the disclosure requirements on UNIONS. The four Commissioners changed the disclosure standard so that it NOW does not require the disclosure of funders of over \$1,000 unless they gave for the PURPOSE of funding campaign ads. The three Republicans then made it worse by declaring that the purpose test is not met unless a donor gives to pay for a SPECIFIC advertisement—which they never do!
- The effect of this gutting of the disclosure provision is that the Supreme Court decided *Citizens United* assuming that all the new corporate campaign spending would be disclosed—and much of it is not, because corporations give funds to trade associations and other non-profits that run the ads in their own names—names like Americans for a Better Country, or Americans for a Better Tomorrow, Tomorrow, which then do not disclose their donors because they say none of the money was designated for specific ads

- This secrecy suits corporations because then they do not face criticism from stockholders and customers about their political spending. But it is NOT how the Court told us things would work...

21. [Kennedy Shareholder Slide]

"Shareholders can determine whether their corporation's political speech advances [its] interest in making profits...and citizens can see whether elected officials are 'in the pocket of so-called moneyed interests.'"



-Justice Kennedy, *Citizens United*

22

- EIGHT Justices agreed that the disclosure of the sources of funding for campaign spending deterred corruption and provided important information to voters about the interests of those paying for the advertising.
- Unfortunately, as a result of the systemic failure of the FEC to enforce the laws—one of the several realities of politics that the Supreme Court majority in *Citizens United* did not anticipate or understand—we do not now have the full disclosure that eight Justices said was so important to public confidence and understanding.
- Congress could fix this problem by passing a new disclosure law—but it has been deadlocked on this issue too, with

Republicans, who believe they currently benefit more than Democrats from this anonymous funding by billionaires and corporations, refusing to require the disclosure that the Supreme Court said we would have.

- In addition to not anticipating secret spending, the *Citizens United* decision had another collision with reality in 2012.
- The Supreme Court in *Citizens United* said that the spending by corporations and others would have to be INDEPENDENT of candidates and parties, and THEREFORE could not be corrupting.
- FIRST, it is not clear why they thought there is no danger of corruption when vast sums of money are spent independently to elect a candidate. Let's say that one individual, or one corporation, spent hundreds of millions to elect a Senator---or President. Wouldn't that officeholder be grateful? Wouldn't that officeholder's official actions be influenced—or at least appear to be—by what the benefactor wanted done? Isn't that “corruption or the appearance of corruption? But the current Supreme Court majority says NO—so long as the spending, no matter how large—is actually independent of the candidate.

- Second the court was simply wrong in thinking that all of this new spending would be 22. ["No corruption slide"]

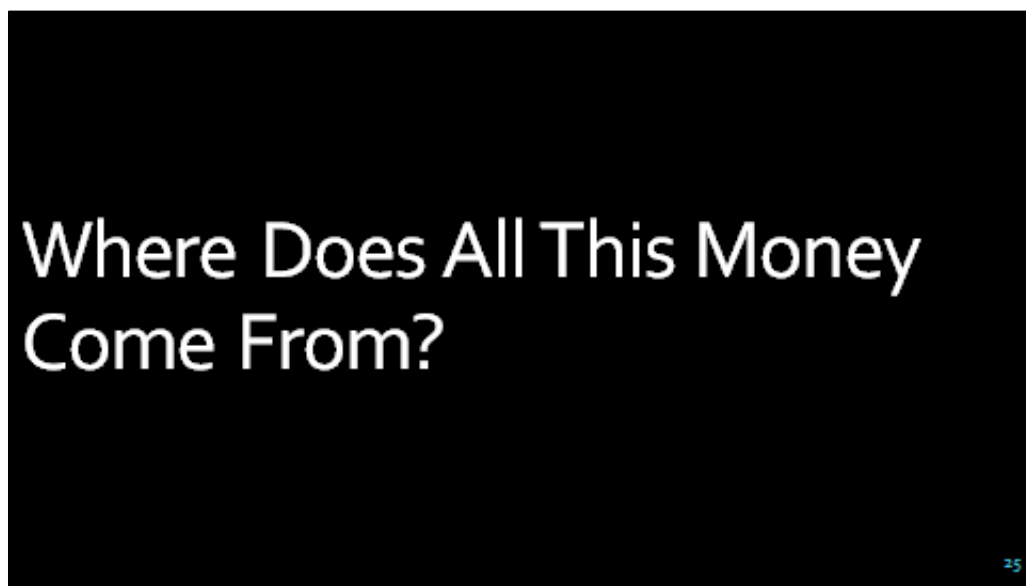


“totally”, “wholly”, “truly” independent of parties and candidates.

- Priorities USA, the Obama Super PAC, was run by 2 former White House aides-- and the President authorized administration officials to help raise money for the PAC
- Restore our Future (the Romney Super PAC) was run by former operatives from Governor Romney’s 2008 campaign. Governor Romney met with the Super PAC donors to thank them and both the campaign and the super PAC used some of the same consultants
- Newt Gingrich met with his Super PAC’s biggest donor, Las Vegas gaming mogul Sheldon Adelson, in a closed door meeting at the very time that Adelson was pumping over \$30 million into the supposedly independent Super PAC, which was itself headed by Gingrich’s former fundraiser.
- So “wholly independent” turned out not to be very “independent’—at least as you or I would define the word.

SuperPac ties like these to candidates make the donors confident that they are giving money with the candidates knowledge and approval, and that the candidates will be appropriately grateful after the election. This is exactly what the Court has previously said constitutes corruption or the appearance of corruption.

23. [Where does the money come from?]

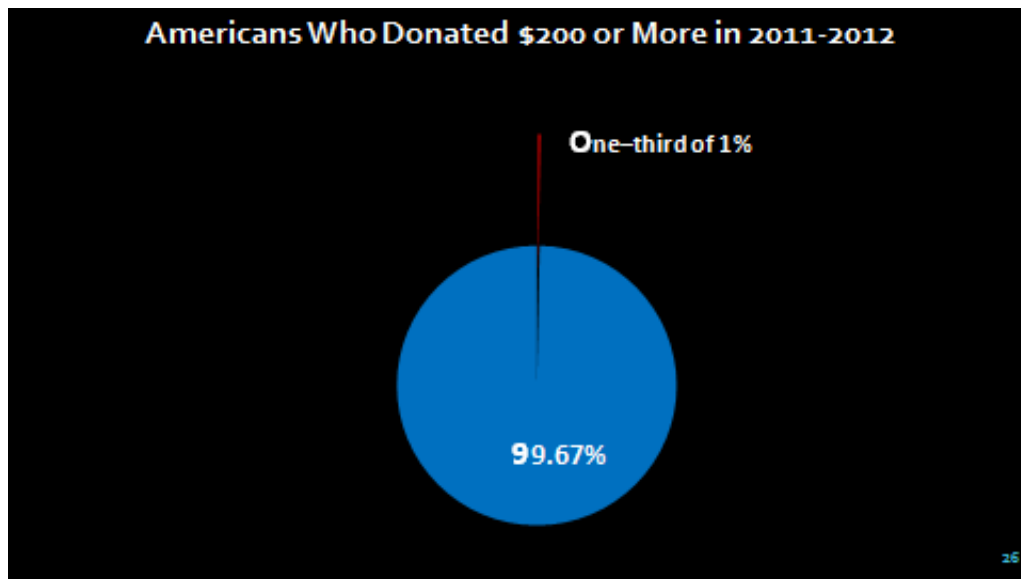


- Now that we've looked at how much money is being raised and spent on elections, and how it is being spent, let's look at where it is coming from.
- There has been a lot of talk about the "One percent" in recent years. But let's look at some numbers. The FEC publicly discloses the names of every American who contributes the MINIMUM reportable amount of \$200 to any candidate or political committee in a two year election cycle. These are not the major donors—the heavy hitters—these are average

Americans involved in the political funding process at the lowest recordable level.

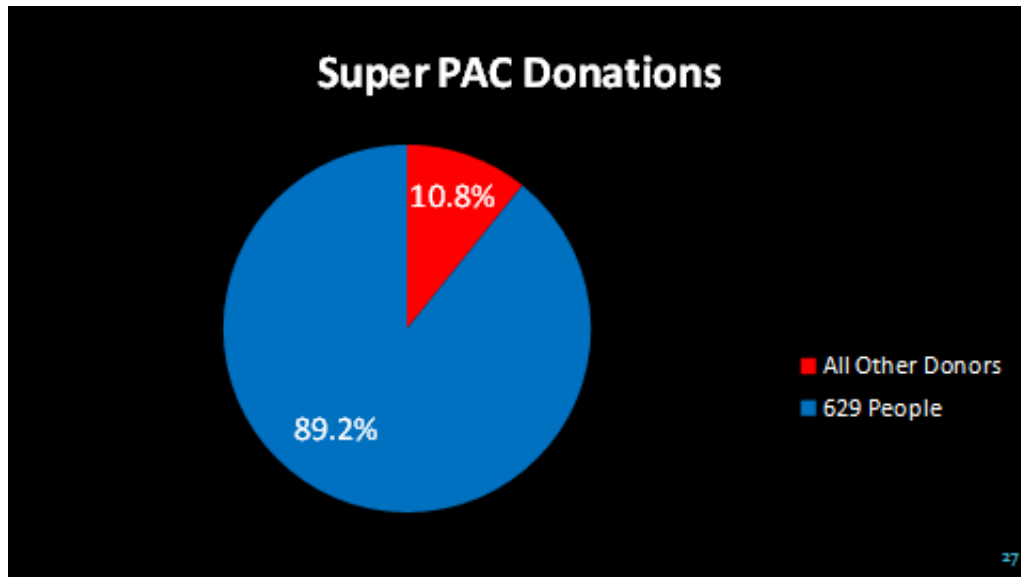
- What percentage of Americans do you think give at least \$200 to a candidate or a political group –ANY candidate or committee--over a two year election period?

24. [One-Third of One Percent CHART]



- The tiny red sliver represents the percentage of Americans who donated more than \$200 to federal candidates—One-Third of One Percent.

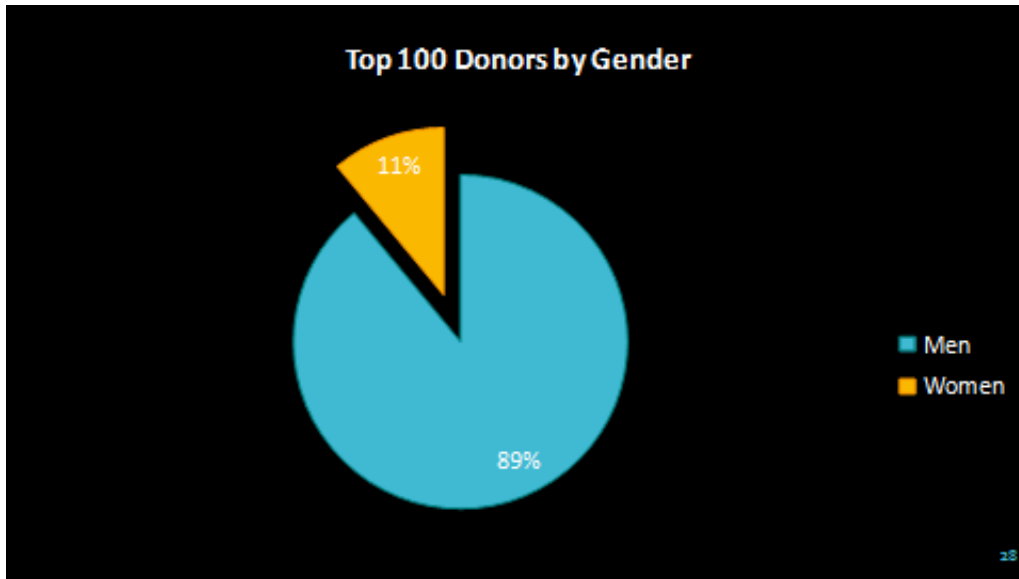
25. [Super PAC Donations Slide]



- Here is another interesting number: Just over 600 people gave almost 90% of all money spent by Super PACs—only 163 of them gave almost half of all the money. That is a small enough group of Americans to fit into one room. This is the one-percent of the one percent of the one percent....
- I recently spoke with a major Republican donor I had known through the McCain campaign. He has given and raised hundreds of thousands of dollars for federal candidates. He told me that he was worrying about what is happening with political fundraising. He said he feared it would soon be down to a “couple of guys in a room.” And his concern was that he would not be in that room! So if even the very rich are feeling left out by the Super Rich...how is the rest of our democracy feeling??

- And these donors are not only unrepresentative of America in terms their financial resources, but also their gender.

26. [Top Donor Gender Slide]



- As you can see, of the top 100 donors, only 11 are women.
- So that is WHO gives—an incredibly tiny slice of Americans. That is who members of Congress and Presidential candidates spend their time with, on the phone “dialing for dollars”, and in person at fundraising breakfasts, lunches, receptions, dinners, and resort events. So let’s talk for a moment about HOW all this money is raised, and the effect of that fundraising effort on our system of government, because the effort involved, and the effect, is significant.

27. [Presidential Fundraisers]



- Here are two numbers:
- *In this case, President Reagan's smaller number is the winner, because it is the numbers of fundraisers each candidate attended in their re-election year:*
- In 1984, President Reagan attended a grand total of 9 political fundraisers, and none of them were for his own campaign, because he was in the public funding system
- In 2012, President Obama attended 222 fundraisers for his re-election campaign—and there are only 365 days in a year! Even if you double up, that is an enormous amount of Presidential days—and most of them were in California, and Las Vegas, and Miami, and Chicago and New York—not Washington!
- Congressional Fundraising is-believe it or not—worse!

28. [Congressional Fundraising]

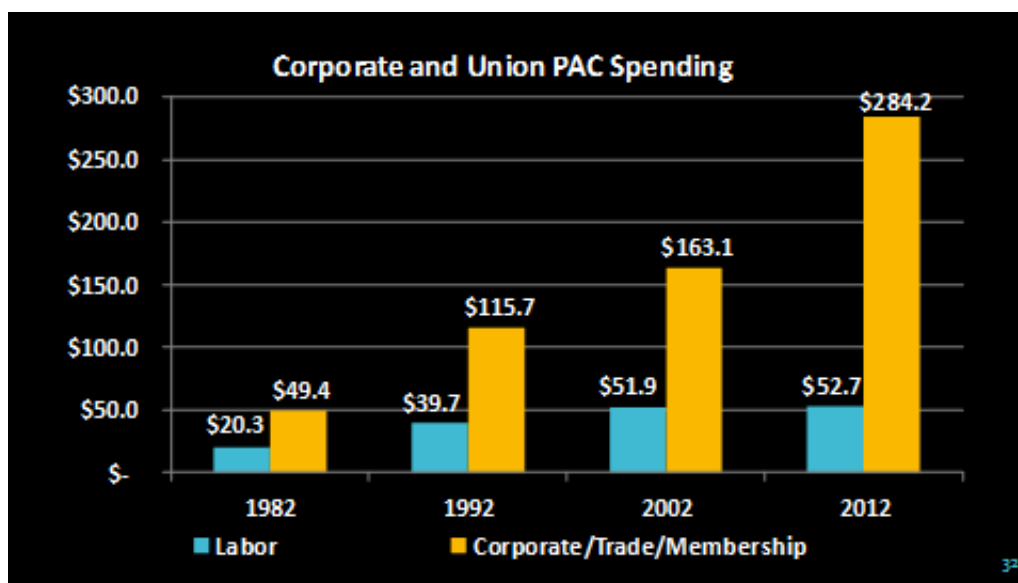
Time Spent	Task
4 Hours	Call Time
1-2 Hours	Constituent Visits
2 Hours	Committee/Floor
1 Hour	Strategic Outreach
1 Hour	Recharge time
Total: 10 Hours	

Four hours allocated to fundraising may even be a "low-balling figure so as not to scare the new Members too much" -Tom Perrillo

- This is from a briefing given by the Democratic Congressional Campaign Committee to newly elected members of Congress in December of 2012. Just think, they have arrived in Washington after a hard fought campaign, spent giving endless speeches and calling strangers to ask for money, ready to buckle down and address all those national problems they have been talking about for months, and this is what they are told their life in Congress will be like.
- Of the 10 hours that the average Congressman will spend working in a day, a minimum of four hours is spent raising money for re-election on the telephone—never mind receptions, dinners, and breakfasts . I asked a former Member of Congress recently if they thought this estimate of time spent fundraising by new members was accurate, and they said “Well, yes—for a SAFE seat. Much more, if they had a close election.”

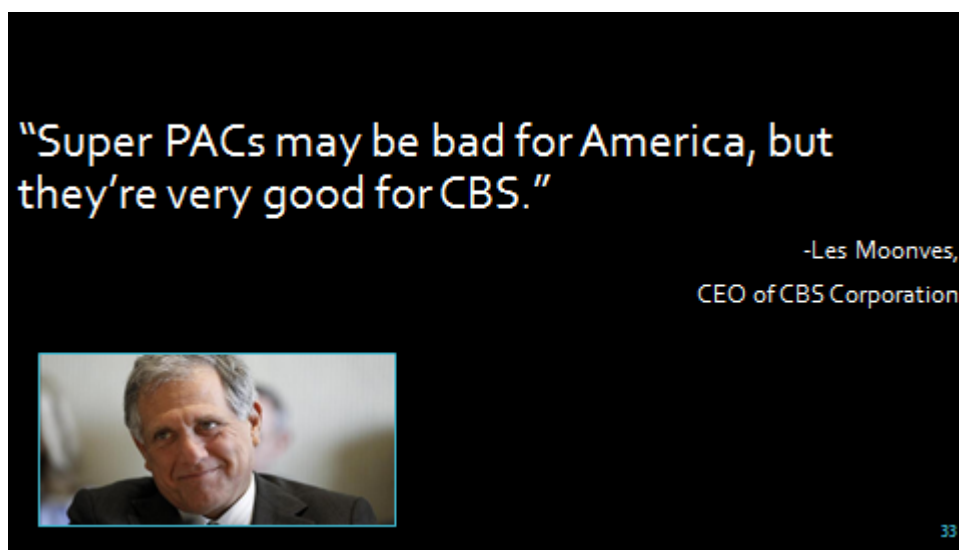
- Fundraising is now the single most important task for incumbents. It also affects what they do during those few hours when they are actually working, rather than fundraising.
- Members seek to be on committees that regulate business, like the Commerce and Banking Committees, because that enables them to raise funds from corporate PACS and employees who are affected by the decisions of those committees.
- Members of the House who became new committee chairs this year immediately saw a 74% increase in the money they were getting from industry PACs

29. [Corporate and Union PAC Spending Graph]



- The contributions from those corporate and trade association PACS to Members of Congress has been increasing steadily. These PACS almost NEVER give to challengers—they wait until the candidates have been elected and are Members so as not to waste their money—or anger incumbents. So one of the first things new Members of Congress do is hold PAC fundraisers—whether they have campaign debt or not—so that PACS will have an “opportunity” to support them.
- What are we to make of all of this information—the huge amount of money being raised and spent in our elections, the tiny percentage of Americans it is coming from, and the way in which the constant fundraising distorts the priorities and working lives of Members of Congress?
- Well, let’s START with the fact that a huge percentage of all of this money is being spent on television advertising.

30. [CBS Slide]



- And this is not just ANY advertising—it is not cheery “eat our breakfast cereal” and “buy our gleaming car” advertisements.


You've seen the political ads—they are negative attack ads, almost every one. Certainly if they are paid for by one of these allegedly independent outside groups they are, because their political consultants have told them that negative ads are by far the most effective way to win elections.

- These ads set out to undermine confidence in the candidate you THOUGHT you liked. They introduce doubt—maybe she really DOES like mass murderers, or lives to vote for higher taxes or toss the elderly out onto the streets. The goal is not to increase voter participation, but to suppress it—to sow doubt so that some percentage of the other candidate's supporters stay home on election day.
- It is also important to reflect on the motivation of those who fund these ads. Here, again, is what Justice Kennedy had to say in *Citizens United*.

31. [Justice Kennedy Quote Slide]

"Shareholders can determine whether their corporation's political speech advances [its] interest in making profits . . ."

-Justice Kennedy, *Citizens United*



34

- Now, I find the truth contained in this slide breathtaking. Justice Kennedy isn't suggesting that corporations will do what is best for the country, or even what is best for their shareholders as citizens, but rather only what is in the "profit making" interests of corporations.
- There is a reason for this—corporations legally exist ONLY to make profits. That is their duty to their shareholders. That is the job of their Board and officers—to maximize shareholder profits. They can be sued for failing to do that. And shareholders themselves have no say —most of the time they are not even informed how "their" corporations are spending "their" money, and in any case U.S. corporate law states that such decisions belong to the Board and officers, not the shareholders.
- So when a corporation decides to enter politics, the ONLY lawful reason for doing so, as Justice Kennedy acknowledges, is to support and oppose candidates in order to make more money.
- What that means, of course, is that from a corporate standpoint, it is not only permissible to seek to benefit the short term profit interests of the corporation, regardless of the potential harm to the long term interests of the country, but it is the DUTY of a corporation to do so.
- Spend money to preserve a tax preference or policy that benefits your corporation or harms your competitor? Oppose tax reform because it might increase your company's tax rate, even if reform would encourage general economic growth? Fight to keep the military buying an underperforming and un-

needed weapons system, or oppose the streamlining of military procurement to save costs? That is a corporation's DUTY under Justice Kennedy's theory, if it is going to spend money in elections.

- This sort of "regulatory capture" and "rent seeking" is what conservatives are talking about when they say "Washington has gotten too big and bloated." What they fail to see is that the current campaign finance system entrenches the status quo and makes change harder for everyone.

32. [Exxon Mobile Slide]



- Here is another breath-taking quote, but right in line with Justice Kennedy's one about corporate profit-making through political expenditures.
- Now I bet Mr. Raymond is a patriotic American citizen in private life. But the point he is making is that as a corporate decision-maker his job is not to think about what is good for the country, or its economy, or its citizens. His job is to think

about the short term interests of his corporation—in his case (and many others) a multinational corporation with unknown shareholders around the world whose shares are bought and sold on international stock exchanges by mutual funds and computer trading programs. There is nothing wrong with that—it is how modern finance and capitalism work—but it MUST raise the question whether we want such international behemoths deciding who will represent us in Washington and establish our country's policies.

- I have known plenty of corporate executives who did not agree PERSONALLY with some of the candidates their corporation supported. However, they are not making those decisions as individuals—as citizens concerned about the country's future-- as grandparents concerned about the world they will leave behind.
- Rather, as executives, they are concerned about the next profit announcement and what shareholders and investment advisors will think—many of those interested in what is good for some other country, not ours—if they even think about it in terms greater than corporate profits.
- That may be fine for corporations and their shareholders, but is it fine for our democracy, and the future of our country? That is the question that we—as individuals, and as citizens need to ask.

33. [Chris Murphy Quote]

"It's important for us to expose the ugliness of political fundraising . . . almost everybody does it here, and if we don't talk about how bad the system is, then we're never going to change it."

-Senator Chris Murphy (D-CT)

35

- Once we have asked that question, and understood what is happening to our system of government, then and only then will we have the will as a country to do something about it.
- Let me close by telling you about a meeting I was in recently where the head of a major Washington non-partisan foreign policy think tank was giving a briefing on the military and economic threats our country faces today. He covered everything from the various crisis in the Middle East to our relations with China.
- When he was finished he was asked which of these many challenges constituted the GREATEST threat to the United States. "Oh, that's easy" he replied—"our current campaign finance system. Because everything I have mentioned can actually be dealt with by intelligent U.S. responses—but with our current campaign system I have no faith we will get those responses." He continued, "Members of Congress are spending half their time in Washington on the phone "dialing

for dollars” or at fundraisers—and they are only in Washington two and a half days a week, because at least the leadership has fundraising trips to take every weekend. They have no time to talk to each other about policy, and they barely know the members in the other party because they are in Washington so little. Policy ends up being made by junior staff, and we didn’t elect them anyway. If we can fix our campaign finance system, everything else is possible.” I couldn’t have said it better myself.

Thank you.