

## Money in Politics

*[Presentation by the LWVVC Study Committee on Money in Politics at the December 1, 2015 Hot Topics Meeting. The committee was chaired by Carla Christianson who also gave this presentation]*

Let me begin with a quote that sums up the fears that some of share

“Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.

I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war. “

Sounds like a quote from a pundit or journalist written right now about our current election where it is expected that **10 billion dollars** will be spent on campaigns.

But actually it came from a successful corporate lawyer who represented railroads before becoming president of the United States: Abraham Lincoln wrote those words over 150 years ago.

But the story of concern about corporation being “enthroned” begins even further back in time. After the Revolutionary War a new government needed to be created. The founding fathers created a system without equal in any other country with checks and balances that had never existed before.

But they were not godlike men and the Constitution, as revered as it is, does have a few weaknesses. The Constitution was written by 55 gentlemen cleverly described by one historian as the most “well-bred, well-fed, well-read, and well-wed” of the country. These wealthy, privileged men had power and they were highly aware that their power had everything to do with how much property they owned, property that for most of them included other human beings; their slaves.

Slavery was a national enterprise. The north benefited from the system as well as the south but the economic and political center of gravity was the South. The majority of the new country's presidents and Supreme Court justices were Southerners. Twelve of our presidents owned slaves.

Slavery was so economically important that some have claimed, the defense of slavery, more than taxes, was pivotal to America's declaration of independence.

First it was The North that called for a revolution to leave the British Empire but the South resisted. That's because the South sold most of its slave-produced products to Britain and relied on the British Navy to protect the slave trade.

In 1772, a court case in England changed all of that. A British court ruled in the *Somerset's Case* that slavery did not exist in England and that a slave could become free by stepping on English soil. Fearing that the colonies could be declared English soil, Southern planters swung behind the Northern push for greater autonomy.

After the war there were challenges in reaching agreement on a new system of government. The reality is that the Framers disagreed about almost everything, and produced a Constitution that was filled with expedient compromises. As Jill Lepore, a professor of American history at Harvard University, pointed out in her book, *The Whites of Their Eyes: The Tea Party's Revolution and the Battle Over American History*, "Beginning even before it was over, the Revolution has been put to wildly varying political purposes."

The founding fathers understood what a threat democracy represented to their personal power. The kind of democracy they prized and wrote about so eloquently could only be practiced by people like them, certainly not by the rabble. Many of them wrote and spoke at length about the inability of the common people to be self-governing.

So the word "democracy." appears nowhere in the Constitution. What they created was a republic designed to protect property, not people.

The ideas presented in the constitution were not liked by everyone. At least half of the population was very much opposed to it. It took a lot of politicking to get the Constitution ratified in 1787 but only with the assurance that a Bill of Rights would be added to protect people from the abuses by the government.

The Constitution only mentions two entities: "We the People" and "the Government."  
The people are on one side of a line, and we are sovereign and have individual rights.

On the other side of the line is the government, which is accountable to "We the People" and has specific duties to perform to the satisfaction of the people.

We delegate some of our power to the government in order to perform tasks we want government to do. Rather than each of us pave the road in front our own houses, we pool tax dollars together and have a road system that benefits all of us.

In a representative democracy, this system should work just fine.

The problem is that the phrase "We the People." is not defined in the Constitution.

But reality was that when it came to who had a voice and vote in those things that effected their lives, only about 10% of the population were people with rights. You had to be an adult man with white skin and you had to own a certain amount of property as defined by the state in which you lived in order to have rights.

Ninety percent of the people:

- Immigrants,
- Indentured servants,
- Minors,
- Native Americans,
- Slaves.
- Women,
- And the poor

Basically were sub-humans.

The law didn't label people that way in so many words— but the net effect was clear. By allowing only wealthy, white males to be "persons," a class system was put in place.

Another word that appears nowhere in the Constitution is "corporation." In colonial times, corporations were tools of the king's oppression, chartered for the purpose of shoveling wealth back into Europe. British law forced the colonists to trade at a disadvantage with the East India Company- the mother of all British crown corporations,

Some of the colonies themselves, like the Virginia Corp and Massachusetts Bay Company, were corporations established by the king. Agents for these corporations were very powerful and could pass laws, levy taxes, and even raise armies to manage and control property and commerce.

They were not popular with the colonists. The American Revolution overthrew King George's sovereignty over the colonies and also the power of the first huge corporations. The people in this era understood that. Distrust of corporations ran so deep that Thomas Jefferson wrote "I hope that we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." Jefferson even tried to write a prohibition into the Constitution against monopolies but that idea was overruled.

Control of corporations was given to state legislatures where charters were written like laws. The states were very explicit about what a corporation could do:

- Individual stockholders were held personally liable for harms done by corporation,
- Most charters, only lasted for 10 or 15 years.
- Mergers, acquisitions and subsidiaries were unknown because Corporations could not own shares in other corporations.
- And corporations had to represent a clear benefit for the *public good*
- And they were prohibited from taking any part of the political process including any campaign contributions.
- If corporations violated any of these terms, their charters could and frequently were revoked by the state legislatures.

That sounds nothing like the corporations of today. What happened?

As time passed and more white men could participate in the political process as states began to loosen property requirements to obtain voting and citizenship rights and to loosen some restrictions on corporation.

The industrial revolution created a new generation of businesses. During and after the Civil War the number and size of corporations was exploding. Riches created from manufacturing war materials also enriched railroads used to ship those materials. Corporations, drawing money from their bulging coffers, started influencing legislators, bribing public officials, and employing lawyers to write new laws and file court cases challenging the existing laws that restricted corporate behavior.

It is worth noting that while more white men could vote, African Americans were still firmly denied any rights. In 1857 the Supreme Court decided in *Dred Scott v. Sanford* that “slaves are not citizens of any state and have no rights a court must respect”. This was the functional opposite of the ruling in England, the *Somerset Case* which 85 years earlier had outlawed slavery in England.

But just a few years later, slaves were freed by the 13<sup>th</sup> Amendment, the 14<sup>th</sup> Amendment was written to protect former slaves by prohibiting states from depriving and any person of life, liberty, or property without due process of the law – nor deny equal protection. It overturned the *Dred Scott* decision by granting citizenship to all humans born in the United States, regardless of color and the 15<sup>th</sup> amendment gave freed black males the right to vote

Remember the two entities. Corporations were a creation of the government, created by the state legislatures through charters. They still fell on the government side of the constitutional line with *duties accountable to the people*.

Lawyers realized that corporations could become even more profitable and powerful if they could acquire rights, which required them to cross the line and become “*persons*” under the law.

Perhaps the tool they sought could be the 14<sup>th</sup> Amendment. The phrase in the amendment says that “no state shall deprive any person of life, liberty, or property, without the due process of law; nor deny to any person . . . the equal protection of the laws..” is exactly the same wording as the Fifth Amendment, which protects people from that kind of abuse by the federal government. The intention was to protect newly freed African Americans from state tyranny.

However, it was the states that had created corporations and now lawyers began to claim corporations were persons therefore the 14<sup>th</sup> Amendment applied to them without success. In 1873 in the *Slaughter- House Cases*, the court stated corporations were still subject to state rules and that the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> amendments did not include them.

Well that settles it or did it?

An interesting thing happened in 1886 when the Supreme Court heard the case *Santa Clara County v. Southern Pacific Railroad*. This was simply a railroad case about taxes. No one gave arguments about personhood so no decision was rendered on the subject.

But a statement was recorded by the clerk of the court in the headnotes of the case attributed to the Chief Justice (Morrison Remick) Waite “The court does not wish to hear argument on the question whether the provision in the 14<sup>th</sup> Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”

While the headnote is not part of the Court's opinion and thus not precedent, two years later, the Court clearly affirmed the doctrine, holding, "Under the designation of 'person' there is no doubt that a private corporation is included" [in the Fourteenth Amendment].

Many similar cases followed.

Corporations acquired legal personhood at a time when all women, all Native Americans, and even most African American men were still denied the right to vote.

In 1875 Virginia Minor tried to register to vote but the registrar rejected her application to register to vote because she was a woman. Virginia, one of our heroic foremothers, protested all the way to The Supreme Court which readily accepted that Virginia was a citizen of the United States, but it held that the constitutionally protected privileges of citizenship did not include the right to vote. It would be 45 years before the 19<sup>th</sup> Amendment gave women the vote.

Of the hundreds of 14<sup>th</sup> Amendment cases heard in the Supreme Court in the first 50 years after its adoption, less than one-half of one percent were about protecting the African Americans it was written to protect, and more than 50% asked for benefits for corporations.

Those cases when former slaves did attempt to seek protection under the 14<sup>th</sup> Amendment the results in some cases created a narrowing of protections. In the infamous *Plessy v. Ferguson* (1896) decision, the Supreme Court, which held that as long as the separate facilities for the separate races were equal, segregation did not violate the 14<sup>th</sup> Amendment. It was a long time before *Brown v. Board of Education*, ruled against segregation in 1954.

Then in 1964 the 24<sup>th</sup> Amendment abolished poll taxes and The Voting Rights Act was passed in 1965 to ensure state and local governments do not pass laws or policies that deny American citizens the equal right to vote based on race gave more rights to African Americans.

But as mentioned earlier nothing seems to be ever fixed in stone.

- On June 25, 2013, the U.S. Supreme Court overturned a key provision of the Voting Rights Act, removing a critical tool to combat racial discrimination in voting. Under Section 5 of the landmark civil rights law, jurisdictions with a history of discrimination must seek pre-approval of changes in voting rules that could affect minorities. This process, known as “preclearance,” blocks discrimination before it occurs. In *Shelby County v. Holder*, the Court invalidated Section 4 — which determines the states and localities covered by Section 5 — arguing that current conditions require a new coverage formula.
- These decisions paved the way for a list of new voter suppression laws to resurface. Immediately The League began working hard to undo these new laws.
- Surprisingly, this was the same court that decided in favor of marriage equality in 2015.

The history of people acquiring and keeping rights has been like a long slow dance: moving forward and moving backward, sliding sideways.

The long history of corporations being regulated and acquiring rights is very similar. However, a corporation is not a real thing; it's a legal fiction, an abstraction.

And by law, it can only have one goal.

In 1919 the Dodge brothers, the 2<sup>nd</sup> largest shareholders in the Ford motor company, sued Henry Ford. Ford wanted to withhold dividends and to build cheaper, better cars and to pay better wages. This expansion he felt would actually grow the business. But the Dodge brothers were about to become competition and did not want cheaper cars around to compete with.

The Michigan Supreme Court sided with the Dodge brothers and ordered the Ford Motor Company to pay its shareholders a special dividend.

The Court made an offhand remark that is regularly repeated in corporate law today: “.... A business corporation is organized and carried on primarily for the profit of the stockholders.”

This ruling in essence said: The workers, the customers, the environment and the community were not to be part to the decisions – only profit and shareholder interests.

### **So now let us look at money in politics.**

In light of *Dodge V. Ford Motor Co.*, a corporation can only act to benefit the shareholders. You could assume money given for political reasons are given only to enhance profit.

Most historians have observed that money has always been part of the process. George Washington's successfully ran for the Virginia House of Burgesses. As a part of his campaign strategy he spent the equivalent of roughly \$8,000 in today's dollars, on alcohol to "treat" voters on Election Day.

The first federal campaign finance reform law dates back to 1867 when Congress made it illegal to show up at the naval yards to pressure workers for political contributions.

A patronage system had been set up for many years and the famous “to the victors belong the spoils attitude”, attributed to Andrew Jackson was overruled 1883 by the Pendleton Act which required that civil servants actually needed qualification other than just party affiliation to get a government job.

After being accused of fundraising improprieties, President Theodore Roosevelt called for a ban on all corporate contributions "for any political purpose." The Tillman Act 1907 bans direct corporate gifts to candidates, the exact thing Teddy was accused of.

And so begins the history of campaign finance, decisions that limit money in politics and the other decisions that reduce those or any limits on money in politics.

Various periods in history have been more or less favorable to the people or to the business community.

The period from 1890 to 1937, in which the United States Supreme Court, using a broad interpretation of due process, tended to strike down economic regulations of working conditions, wages or hours in favor of business. This time called the *Lochner* era was named for a case where the court invalidated a New York statute regarding workers hours. The *Lochner* era ended after President Franklin D. Roosevelt, fed up with the Supreme Court invalidating New Deal

policies, threatened to "pack" the court with new appointees. Since the 1930s, *Lochner* has been widely discredited as a product of a "bygone era". Robert Bork called *Lochner* "the symbol, indeed the quintessence, of judicial usurpation of power". In his confirmation hearings to become Chief Justice, John Roberts said, "You go to a case like the *Lochner* case, you can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law," concluding that the *Lochner* court substituted its own judgment for the legislature's findings.

While the Supreme Court was often striking down laws, Theodore Roosevelt used the Executive branch against powerful corporate trusts. Congress created a Bureau of Corporations to regulate big business, Roosevelt shocked the nation by taking on J. P. Morgan's Northern Securities Corporation with an anti-trust suit.

He filed suit against more than 40 major corporations during his presidency. In 1912, he ran for president again on the "New Nationalism" platform, calling for women's [suffrage](#), an end to child labor, pensions for the elderly, unemployment insurance, and increased regulation of the trusts. While Teddy failed to get elected others picked up his torch, and many of these ideas would later come to fruition.

From 1969 to 1972 Washington again expanded its regulatory power, new restrictions and requirements on business in areas of the environment, occupational safety and consumer protection were enacted.

After Watergate, which was not merely an exercise in criminal executive power, but was also a campaign-finance scandal. An unaccountable slush fund of millions of dollars was used to finance the break-in and all of the rest of the activities.

Almost all of the new legislation that emerged after Watergate, when public confidence in government reached a new low, concerned campaign finance; there already were laws against burglary, perjury, and obstruction of justice.

Once again the courts disliked the new laws because they favored business.

In 1976 the court used *Buckley v. Valeo* to strike down limits on "independent" expenditures. This decision established the controversial idea that spending money for political campaign purposes is a form of speech. **Money equals speech started here.**

You may have heard of corporations having 1<sup>st</sup> amendment rights. The news frequently refers to these decisions, however, many of the other rights in the Bill of Rights have been granted to businesses through decisions of the courts.

The rights written to protect people including the 5<sup>th</sup> Amendment right to due process, the 4<sup>th</sup> Amendment freedom from unreasonable search which has tied the hands of government inspectors from surprise checks to see if laws are being followed now requiring permission or a warrant in order to inspect, the right to jury trial and compensation for "government takings". Takings which can include future profits that have not been earned but which can amount to amounts larger than local

budgets. This has the effect of stopping local restrictions that could cost more than the tax payers can afford. Even freedom from double jeopardy has been invoked and granted to corporations.

A detailed list of the various acts passed to impose or take away limits on money in politics are on the **History of Campaign Finance** in the appendix

But the granddaddy of all decisions was *Citizens United v FEC*. Citizens United is a conservative advocacy group that accepts some corporate funding. They produced a 90 minute movie attacking Hillary Clinton and sought to air it as a pay for view shortly before the presidential elections. The question was - is a pay per view the same as an independent attack ad - which were prohibited at the time

However the Court refined the case in order to consider a much broader question: did a century of campaign finance law violate the first amendment? It held that corporations and Unions have a first amendment right to spend unlimited amounts independent of campaigns.

Under the decision, corporations and unions -- still can't give money directly to federal candidates, but they can spend unlimited sums in expenditures independent of campaigns.

Of concern to some, because of preexisting gaps in campaign disclosure laws, the money can be spent, in effect, anonymously. The entity spending the money -- say, Flawless Americans (**FA**) -- would have to register with the Federal Election Commission and report its activities, but **FA** would not have to disclose its donors. So Corporation A or Labor Union B could give unlimited sums to Flawless Americans to run ads going after Candidate C -- and the public would have no clue who was supporting the ads.

*Citizens United* using corporate personhood and the [1st Amendment](#), overruled much of the restrictions passed by legislation.

When the Supreme Court issues an opinion, it is the "law of the land." and serves as precedent for future cases. However, not all justices have agreed with these decisions in the first place and many Supreme Court decisions have been actively opposed by the people. Sometimes Court decisions have been reversed. For example: *Brown v. Board of Education* (1954) reversed the state sanctioned racial segregation in *Plessy v. Ferguson* (1896). Sometimes it took an amendment: for example *Dred Scott* which denied any rights to African Americans was overturned by the 14<sup>th</sup> Amendment.

### **Where are we today?**

More humans have rights today than would have in 1776 and corporations which had only obligations to we the people has become part of we the people with many of the same rights.

Human beings today are essentially the same as they were then but corporations have moved from creations of the state to super humans. They are a size unimaginable centuries ago.



If Wal-Mart were a country, its revenues would make it on par with the GDP of the 25th largest economy in the world by, surpassing 157 smaller countries.

Banks have become so large that they threatened global financial meltdown if they were not supported by taxpayers.

One way humans have increased their power is they have joined together with others. Humans have used groups such as churches, organizations such as the League of Women Voters, Common Cause, Move On, environmental groups and Occupy Wall Street to amplify their voices and their money. And labor has organized through unions. However, you are probably aware that unions have been under assault by some of the state legislation and they are losing power with decreased membership.

Nonunion businesses are working very hard to prevent organizing of their workers. Walmart has undertaken secret surveillance of employees suspected of wanting to form a union. Bloomberg Businessweek November 24, 2015, explains how the largest employer in the US is hiring an intelligence-gathering service from Lockheed Martin, contacting the FBI, staffing up its labor hotline, ranking stores by labor activity, and keeping tabs on employee activists.

Corporation are not just working against humans organizing, they have also increased their own power thru organizing. The chamber of commerce, think tanks, and international business round tables speak and work for them.

Lobbyist work for smaller organizations like the League as well as gigantic transnational corporations. But if you have larger pots of cash like those giant corporations, you have more and more effective lobbying activities. Often the lobbyist came through the revolving door – after a career in politics, a very lucrative job working for business, rewards those political connections formed while serving as a representative of the people. More money was spent on lobbying than on campaign finance in 2012. Again *Dodge v. Ford Motor Co.* serves as a reminder that corporations can only spend money for profit while organizations like the League and many others are trying to improve democracy or as corporations once were required to be, serving the common good.

Another corporate organizing tool is: The American Legislative Exchange Council, ALEC.

ALEC'S website says It is one of America's most dynamic public-private partnerships with nearly 300 corporate and private foundation members they have 2,000 members of legislatures,.

ALEC joins global corporations and state politicians at a 5 star resort, where they vote behind closed doors to try to rewrite state laws that govern human rights. These so-called "model bills" reach into almost every area of American life.

In ALEC's own words, corporations have "a VOICE and a VOTE" on specific changes to the laws working with ALEC.

But do the people actually have a vote that matters? Many times polls reflect the public has an overwhelming opinion and the legislatures vote the opposite way.

Our own Chuck O'Neal, former Environmental Chair and 1<sup>st</sup> VP of the state League, recently spoke in Tallahassee asking the committee just that question in regard to fracking? If the people are against fracking in Florida why are they, the legislature, not listening.

“Are we still a democracy or at least a representative democracy?” O'Neal queried, “In a representative democracy the representatives listen to the people. Over and over at these hearing the people have spoken out against fracking and yet we have not yet seen a bill against fracking in Florida”

In Texas too, voters were concerned about the environmental impacts of drilling and had enacted a fracking ban at the local level.

In response, the national co-chair of ALEC Rep. Phil King (R) sponsored a bill that bans local restrictions on fracking. When the Texas legislature passed it, it overturned the law the people wanted and blocked the voters in Texas from passing any other such bans.

Similar bills preempting local limitations on fracking have been proposed in the several states including Florida. The Tallahassee Democrat reported on Saturday, November 28, 2015 that 20 counties and nearly 40 cities in Florida have passed regulations banning fracking already.

We will have to wait to see if the people of Florida or the preemptive bill from ALEC wins this round.

Now we have looming in the near future the possibility of the TPP.

The 5,544-page Trans-Pacific Partnership is a trade and investment agreement involving 12 countries comprising nearly 40 percent of global output.

According to Ralph Nader “The TPP, along with the WTO [World Trade Organization] and NAFTA is the most brazen corporate power grab in American history,” “It allows corporations to bypass our three branches of government to impose enforceable sanctions by secret tribunals, tribunals that can declare our labor, consumer and environmental protections [to be] unlawful.

Jeffery Sachs, director of the Earth Institute, points out that the regulations in TPP surrender judicial power to a three-person trade tribunals in which *only* corporations are permitted to sue.

This is a huge discussion for another day. But it could be the next piece of the history we have been talking about. It is not just corporations taking the power that was meant for **people** it is now corporations taking power meant for **governments**.

The National League is asking us to look again at our position on campaign finance in light of the 1<sup>st</sup> amendment decisions regarding money in politics. It is asking what is corruption and what can we do about it.

The consensus questions will be in the January Voter or can be found here <http://www.lwvbae.org/league-news/study-money-in-politics-2015-2016/>

You will have the opportunity to join your League January 9<sup>th</sup> in reaching consensus on these issues. It is really an exciting process that I hope you will come and join in.

I leave you with the question. Is this a government of the people, by the people, for the people? Have all of the changes, laws and court cases since the beginnings of our great nation simply been a long string of events that have ultimately returned power to the same hands that held it from the start; the very wealthy elite?

Justice John Paul Stevens in his dissent of the *Citizens United* decision said that corporations "are not human beings" and "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires." He insists that "they are not themselves members of 'We the People' by whom and for whom our Constitution was established."

We want to know what you think! Your chance to voice your opinion is January 9<sup>th</sup>.

**Credit to** Jan Edwards and Doug Hammerstrom and The Women's International League for Peace and Freedom and The Program on Corporation Law and Democracy

### **Timeline of Personhood and Rights**

[http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/personhood\\_timeline.pdf](http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/personhood_timeline.pdf)

### **Links for the history of campaign finance:**

<http://forum.lwv.org/member-resources/article/history-campaign-finance-chart>

<http://www.motherjones.com/politics/2012/08/campaign-finance-timeline-dark-money>