

## **League of Women Voters Presentation Notes**

Before starting, provide a short introduction: How I became committed to this effort (a personal story: how I became involved or an example: how corporations negatively impacted your community or state, e.g., nullified a local or state law/regulation designed to benefit the public.

### **Slide 1:**

Following the Introduction:

- This presentation will cover the three topics shown on the slide.
- We suggest that the increasing power of corporations is threatening our democracy and undermining the ability of We the People to determine who represents us and our laws.
- The presentation then moves on to a short review of how this situation arose, focusing on decisions by the Supreme Court.
- Finally we turn to consideration of the grounds and means to bring corporate power under control.

### **Slide 2:**

- Through a combination of wealth and Supreme Court decisions, corporations have come to dominate our political system.
- It was not always like this. Corporate charters are granted by state governments. Importantly, in early America, the privilege to incorporate was granted in order to achieve a specific benefit for the general public. Early corporations were strictly controlled. These charters were for strictly limited durations – anywhere from 3 to 50 years – and for strictly defined purposes. The purpose for which incorporation was granted was spelled out in the charter. Typical examples would be building and maintaining roads, canals or bridges; running a ferry service or establishing schools, churches or hospitals. Importantly, the charters could be – and often were – revoked if the corporation violated its terms or ceased to act in the public interest.
- Clearly none of this is the case today. Corporations are now virtually unrestricted in the types of enterprise they can engage in. Corporation are now multi-purpose organizations and the mandate to benefit the general welfare – the original justification for granting corporate charters -- has in effect been eliminated.
- Most charters today are not limited in terms of years of duration. This means that non-renewal is no longer an option. Even when corporations repeated abuse their

charters, states have proven unable to revoke them. This is a reflection of the power corporations have amassed through a combination of wealth and Supreme Court decisions.

- The bottom line? We are now powerless to control corporations. Instead corporations have ever-increasing power in our elections, over our elected officials and, through them, on the laws under which we must live.

### **Slide 3:**

- Corporations are influencing our political life through the four avenues shown on the slide; through elections, laws, agency budgets and the legal system. Incorporation, particularly together with unlimited life-spans, enables corporations to amass huge amounts of wealth and resources. This wealth and resources can now be dedicated, without limit, to electing those favorable to corporate interests and goals.
- Corporations, together with their lobbies and associations have huge staffs of lawyers. Many bills are drafted by these corporate lawyers. The investor-State Dispute Settlement (ISDS) provisions of the Trans Pacific Partnership allow corporations to sue nations on behalf of their investors. This gives corporations the power to annul national legislation or be compensated. Two examples: Germany is being sued for \$4.7 billion due to their decision to phase out nuclear power. Philip Morris is suing Australia over its regulations requiring cigarettes to be sold in plain packaging with health warnings. A particularly worrisome feature is that suits under the TPP are decided by three appointed lawyers in an arbitration, not through a country's court system.
- Within the United States, corporations have played a role in preventing regulations that would benefit the public and in reducing budgets of agencies that are supposed to regulate them. The ability to do this is, to a large extent, a result of their wealth, through which they influence our elected officials. However, the courts, particularly the Supreme Court, has played a crucial role by granting corporations the rights designed for human beings that are enshrined in our Constitution.
- Prior to turning to a review of the Supreme Court's role in empowering corporations, we provide a few slides to illustrate the above points.

### **Slide 4:**

- The spike in the green line shows the impact of the Supreme Court's decisions that money is speech and corporate free speech can not be limited. The green line shows contributions to 501(c) (4) organizations. These groups are a major avenue used by corporations to contribute to campaigns because they do not have to reveal the source of their money. This enables corporations to hide their donations to "friendly" candidates. These groups were intended to be "Social Welfare" organizations and are tax exempt.

However, such organizations are now being exploited to benefit not the public but corporations.

**Slide 5:**

- Here are two examples to illustrate how excessive corporate influence in our government can harm the general welfare.
- Both Pharmaceutical companies and medical Insurance companies played significant roles in forming the final Affordable Care Act provisions. Insurance companies prevented inclusion of a national insurance option. National insurance is the means by which most developed countries hold down healthcare costs through negotiations with medical providers, including physicians and hospitals. Pharmaceutical companies prevented the Federal government from negotiating drug costs under the Affordable Care Act. The result of this for consumers is shown in the table. United States costs for both medications and procedures is ten or even a hundred times more than in European nations.
- Coal corporations have been preventing regulations of greenhouse gas emissions for decades. They fund organizations and experts to deny the scientific evidence. They also contend, against the evidence, that technologies to reduce their emissions are too expensive or not proven. The Endangerment finding of 2009 determined that greenhouse gases threaten public health and welfare and therefore can be regulated under the Clean Air Act. This has not stopped coal interests from continuing to fight against carbon dioxide regulations. Peabody Coal has already filed in the courts to try to prevent the Clean Power Plan from going into effect. Peabody and other fossil fuel industries can be expected to use the Courts, their influence over elected officials and PR campaigns in this effort. For example, there is already a bill in Congress that would let states opt out of the Renewable energy part of the Clean Power Plan.

**Slide 6:**

Here is one example of what has happened to regulatory agencies.

- The budget of the Occupational Safety and Health Administration (OSHA) has been cut every year from 2001 through 2008 when adjusted for inflation. As a result OSHA's staff has fallen by a third. It had fewer inspectors in 2011 than in 1981 although the number of workplaces doubled over that period. As shown on the slide, the number of inspectors per workplace fell by half between 1981 and 2011. Between 1980 and 2005 the number of inspections per worker fell by almost two thirds.
- The ability of regulatory agencies to supervise corporations has been hampered not only by budget cuts but also as a result of the "Personhood" rights corporations have been granted by the Supreme Court. The fact that corporations have been given the right to protection against search and seizure has had the result that regulatory agencies must

get warrants to inspect premises. This allows corporations sufficient warning to enable them to hide violations, including illegal discharges of pollutants and unsafe working and product preparation conditions.

- We now turn to a more detailed look at the Supreme Court decisions that have given corporations such rights.

**Slide 7:**

- The presentation now turns to the Supreme Court's role in bringing us to the current situation where corporations have the power to thwart our ability to provide for the General Welfare. In particular our ability to regulate and control corporations - to determine their role in our society -- has been eroded by a series a Supreme Court decisions.
- The process started by hamstringing state governments' ability to regulate corporations.. The 14<sup>th</sup> Amendment was passed after the Civil war. Its purpose was to insure that former slaves would enjoy the constitutional rights guaranteed to all citizens through the first 10 Amendments. The Supreme Court announced that the 14th Amendment applied to corporations. This meant that states had to treat corporations as if they were people, granting them the rights designed for people under the Constitution. As mentioned previously, states authorize incorporation. As the governmental body that creates corporations, states are the agency that sets the rules under which corporations can operate. With this Supreme Court decision state's ability to perform this function was severely limited.
- As shown on the slide, in addition to the 14<sup>th</sup> Amendment, three additional Constitutional Amendments have been used to solidify and extend the power of corporations to defy and avoid regulation by state government: the First, Fourth, and Fifth.
- The First Amendment says, "...government shall make no law... abridging the freedom of speech"
- The Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches & seizures, shall not be violated."
- The Fifth Amendment states, ". . . nor shall private property be taken for public use, without just compensation."
- One other important contributor to the problem is a 1919 decision specifying shareholder wealth maximization as the goal of corporations.
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We now look at key decisions for each of these points.

**Slide 8:**

- The 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments were all passed following the Civil War. They were all clearly designed to protect African Americans. This was, initially, clearly understood by the Supreme Court as you can see in the above Supreme Court decision.
- The 14<sup>th</sup> Amendment plays a critical role in our inability to regulate corporations. This Amendment prohibits states from making any laws that infringe on the rights and protections citizens enjoy under the Constitution. As mentioned previously, states grant corporations their charters. Thus corporations are creations of the states and states are the governmental agency that should be able to determine the rules that apply to corporations, their rights, privileges and purposes., and the limits to their powers. However, once corporations became persons under the 15<sup>th</sup> Amendment, states can no longer treat them differently than citizens— human beings. The First 10 Amendments to the Constitution were designed to protect citizens is states must treat corporations as person they must grant them the protections of these Amendments.

**Slide 9:**

- It did not take long for the Supreme Court to declare that corporations were people under the 14<sup>th</sup> Amendment.
- Railroad barons first succeeded in getting the Court to state that corporations were to be considered as persons under the 14<sup>th</sup> Amendment in the Santa Clara versus Southern Railroad case.
- Not only was no “strong reason” given for this. No reason was given at all. As indicated, the first of the quotes shown is not even from a decision. It was drafted by a court reporter with railroad connections and included in what are called Headnotes. The Headnote purports to refer to a statement made by the Chief Justice prior to hearing the case.
- Since granting “personhood” to corporations was not part of the Santa Clara decision, others heavily connected to railroads managed to have it inserted into a subsequent decision. Again absolutely no argument to support this claim was given whatsoever.
- Granting “personhood” under the 14<sup>th</sup> Amendment opened a Pandora’s box. Prior to this Supreme Court announcement, states had had the authority and ability to determine what corporations could and could not do. With these announcements by the Supreme Court, state governments were forced to treat them as citizens. Corporations became entitled to the protections of citizens under the first 10 Amendments, making it significantly more difficult for states to regulate them.

### **Slide 10:**

- However, as indicated in this slide, treating corporations as citizens under the first 10 Amendments has been open to legal controversy from early on.
- The double negative in Justice Brown's decision means that a corporation is entitled to immunity from "unreasonable" searches.
- Justice Harlan clearly thought that corporations were not entitled to such immunity. He makes the important point that corporations are not people within the meaning of the 4<sup>th</sup> Amendment.
- Harlan went on to say that if the decision stood, the power of the government, by its representatives, to look into the books, records, and papers of a corporation -- its own creation -- would be greatly curtailed or destroyed. Thus government would not be in a position in order to ascertain whether the corporation was defying the law.
- Justice Harlan was insightful about the problems that would arise if corporations were granted protection from searches. Among others, the protection from search has been used to prevent searches needed to investigate illegal discharges of pollutants under the clean water act as well as violations of health and safety regulations. In particular, it has been used to require search warrants and advance notice, giving offenders opportunity to hide their violations such as dumping of toxics or exceeding discharge limits.

### **Slide 11:**

- An important step in considering the problem of corporations is to get firmly in mind the critical differences between real people and corporations. Corporations do not breathe air, drink water, eat, get sick or die. They can not be sent to jail and they do not go to grade school or college. Consequently, corporations have only a limited interest in healthy food, clean water and air, ethics, quality health and education systems or decent prisons. Our Constitution, the agreement we as people made about how we are to be governed enshrines the goal of promoting the General Welfare. Wealth maximization can only properly be pursued to the extent that it fosters this over-riding goal.
- A 1919 Court decision, declared that shareholder wealth maximization is the only legitimate goal of corporations. While understandable from the point of view of shareholders, this contrasts starkly with the original reasons for granting corporate charters. Moreover, this Supreme Court mandate, renders it crucial to regulate corporate behavior. Left to itself wealth maximization will frequently run counter to most other aspects of our welfare. If providing unsafe products, polluting the air and water, skimping on safety measures or breaking the law result in greater wealth accumulation, that is what corporations will do.

- In Dodge v. Ford, Ford was actually trying to pay his workers more and to sell his cars at a lower price, objectives that can certainly be considered as meeting the criteria of improving the general welfare. These actions might well also have benefited most shareholders in the long run as the proposed actions were likely to result in a substantially increased sales. Those who would not benefit were the owners intending to start a rival company – Dodge.
- In sum, this Supreme Court decision, together with the ruling on the 14<sup>th</sup> Amendment, hamstringing State ability to regulate corporations places corporations in a legal environment which encourages them to act in ways that will undermine rather than promote, the general welfare.

**Slide 12:**

- The Fifth Amendment says that if property is taken by the government, the government must pay for it: there can be no “taking” without just compensation.
- Until 1922 a “taking” meant exactly that: land or other property was confiscated or condemned, for example, as when a home is condemned to build a road. With this decision, property owners are also owed compensation if a regulation completely prevents them from using their property for its intended economic use.
- Starting in the 1970s there was a concerted effort to reduce government regulations. In 1971 Lewis Powell sent a confidential memo to the US Chamber of Commerce stating, “An activist-minded Supreme Court ... may be the most important instrument for social, economic and political change.” The idea was to use the Takings clause to prevent federal and state regulation of business and property.
- The idea was that if businesses and property owners must be compensated whenever a regulation reduces the value of their holdings, regulation becomes cost-prohibitive. Virtually all regulation can be considered to in some way, reduce value of a property because the property owner is being prohibited from doing something he/she could do previously. Florida and Oregon adopted legislation requiring compensation in the case of regulatory rulings. And indeed the legislation had the intended effect. It effectively brought regulation to a standstill. Both of these states are now struggling to undo the resulting damage, including outrage by citizens who came to realize that they no longer had any say in development decisions because regulations they had voted for and passed were being voided.
- When Powell became a Supreme Court Justice. a case was heard contesting a Massachusetts statute prohibiting banks and other specified business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question...other than one materially affecting any of the property, business

or assets of the corporation." Powell gave the decision overturning the regulation. This First National Bank of Boston versus Bellotti laid the foundation for Citizens United.

**Slide 13:**

- This is one of the most well-known results of the Activist-minded Supreme Court.
- A corporation is able to avoid state and federal regulation of political expenditures and there is no limit to the amount it can be spend on political campaigns. This essentially opens the door for legalized bribery of politicians through campaign contributions.
- This decision extended the decisions of First National Bank of Boston versus Bellotti, Buckley v Valeo. The Supreme Court further expanded individual spending limits in McCutcheon v FEC in 2014.
- While Citizen's United has focused attention on the 1<sup>st</sup> Amendment rights that have been granted to corporations, we hope the preceding slides have shown that the problems caused by granting corporations rights as persons under the Constitution go well beyond those of 1<sup>st</sup> Amendment rights.
- We now turn to look at how this situation can be addressed.

**Slide 14:**

- Democracy is derived from the Greek word for "the people rule." In a democracy such as ours the ultimate legitimacy of all government resides with us: the "We the People" of our Constitution. We are sovereign. There is no higher authority above us as far as political life is concerned.
- We delegate authority to our governments and elect representatives. Various types of nonprofit and for-profit corporations are created by the States as a form of public policy or economic policy tool.
- Corporations and governments then should serve the people rather than the government and electoral process being driven by corporates with their Supreme Court mandated focus on wealth maximization.

**Slide 15:**

- There is no reason for us, the "We the People" who drafted out Constitution, to continue to let corporations dominate our electoral system, draft the laws under which we live or prevent and undo environmental, health and safety regulations established by our representatives in Congress. We the People are sovereign. We have the power, if we



will exercise it, to rein in corporations, to bring them back under our authority so that they once more help take us where we want to go.

**Slide 16:**

- It took a long time but women overturned a Supreme Court decision that said they were not entitled to vote under the Constitution. The same can be done with the Supreme Court decisions granting Constitutional rights to corporations. As shown, the Constitution provides two ways to propose Amendments. Either or both can be tried.
- Given the long history of the Supreme Court's decisions granting corporations rights under the Constitution together with forcing states to treat corporations as people under the 14<sup>th</sup> Amendment, "undoing" Citizens United is not enough. The foundation that enables corporations to undermine our democratic processes and democratically passed legislation is their standing as "people" under the Constitution. To regain our sovereignty, it will be necessary to clarify that Constitutional rights and protections are reserved for people, not corporations.

**Slide 17:**

So these are our conclusions.

- Corporations are very different from human beings. Since they never die, we must regain the power to revoke their charters if they are not serving our goals
- Wealth accumulation is a part of improving our lives but it must be harnessed to that end and prevented from harming the General Welfare.
- Corporations are artificial entities created by our government, our instrument for improving our society and lives. They must not be allowed to take over the rights we wrote into the Constitution for our protection in order to harm our political system and society.
- We can end this abuse if we have the will.