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I. Citizen Sovereignty and the Contemporary Role of the Corporation

The U.S. multinational corporation enjoys a dominant position in contemporary American society. Whether playing its role as an employer of millions of Americans, as the largest donor to American elections,[1] as the largest single violator of environmental and labor statutes,[2] or as the intervenor and agitator in international politics,[3] any historian would be hard pressed to find a single entity that has had a greater impact on American society and economics than the modern corporation.

The sheer size of most multinational corporations is incomprehensible to most. The net income of some multinationals exceeds the Gross Domestic Product of most nation-states.[4] The multinationals and other large U.S. corporations also contribute more than all other groups in campaign donations each year in the United States.[5] Although political support is almost always directed towards incumbents,[6] the sacred foundation of most corporate welfare philosophies is an alliance with congressional Republicans. This sheer amount of wealth directed towards the influencing of elections and legislative issues has raised questions in the media and the public at large about the corrupting effects of corporate Political Action Committee (PAC) monies.[7]

The multinational corporation has also become the most pervasive polluter of both the human and natural environment. From Union Carbide Corporation's Bhopal disaster to WMX Technologies Corporation's lengthy history of environmental statutory violations[8] as well as Weyerhaeuser

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[1] *See* JOSHUA GOLDSTEIN, PACS IN PROFILE: SPENDING PATTERNS IN THE 1994 ELECTIONS 3 (1995)(stating that business PACs gave over $130 million to candidates and parties in 1993-94).

[2] *See generally* ERNEST CALLENBACH ET AL., ECOMANAGEMENT: THE ELMWOOD GUIDE TO ECOLOGICAL AUDITING AND SUSTAINABLE BUSINESS (1993).

[3] Peter F. Sisler, *U.S. Sees Worsening Abuses in Nigeria*, UPI, Mar. 6, 1996, *available in* LEXIS, Nexis Library, UPI file (defining the role of international oil corporations in internal political struggles).

[4] *See* Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219, 257 (1995).

[5] *See* GOLDSTEIN, *supra* note 1.

[6] *See id.* at 3 (stating that 77% of all business PAC donations were given to incumbents in the 1993-94 election year).

[7] *See* Miles Benson & Michael Shanahan, *Quest for Dollars Drives Presidential Politics*, NEWHOUSE NEWS SERVICE, Apr. 23, 1995, at 1. *See also* JAMIE B. RASKIN & JOHN BONIFAZ, THE WEALTH PRIMARY: CAMPAIGN FUNDRAISING AND THE CONSTITUTION (1994).

[8] *See generally* CHARLIE CRAY, WASTE MANAGEMENT, INC.: AN ENCYCLOPEDIA OF ENVIRONMENTAL CRIMES & OTHER MISDEEDS (3d ed. 1991)(for a comprehensive examination of alleged violations by WMX's predecessor, Waste Management Incorporated). *See also* Letter

Corporation's equally torrid history of environmental abuse,[9] the song remains the same — the continued emphasis on maximizing of short-term profit at the expense of ecological integrity and community well-being. Sustainable corporations, which are businesses that operate under the concept that non-renewable resources should be conserved and that balanced growth is desirable, still operate on the fringe of the market economy and are subject to the same cutthroat market competition as irresponsible corporations.[10]

Corporate ownership of the media has eviscerated one possible outlet for the disclosure and reporting of various corporate harms. The clash between corporate interests and the fair and balanced reporting of corporate harms emerged starkly in the recent "60 Minutes" debacle surrounding tobacco reporting.[11] These situations are bound to repeat themselves as large corporations seek to maximize the efficiency of the market world in which they operate.[12]

This Article does not promise to obliterate the mirrors being established by large corporations to deflect public criticism and to prevent corporate disclosure. Instead, this paper puts forth two simple propositions: Harmful corporations should be put out of business, and citizens must regain control over these unelected, unaccountable entities in order to preserve human and environmental health.

As recognized in this paper, harm is reflected in a variety of ways. There is "democratic" harm, which is the threat that corporate monies pose

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from the Community Environmental Legal Defense Fund (CELDF) to Delaware Attorney General Jane Brody, Esq. (Sept. 25, 1995)(on file with author)(demanding revocation of WMX Technologies' charter in Delaware).

[9] *See* Letter from the Community Environmental Legal Defense Fund; Program on Corporations, Law, and Democracy; and the Blue Mountains Biodiversity Project, to Washington Attorney General Christine Gregoire (Sept. 15, 1995)(on file with author)(demanding revocation of Weyerhaeuser's charter in Oregon).

[10] Among the notable examples of those corporations who subscribe to "sustainable" principles are Ben 'n Jerry's (ice cream), Patagonia (clothing), Seventh Generation (variety), the Body Shop (cosmetics/toiletries), and Working Assets (long distance telephone services). These corporations have several operating principles in common: substantial donations to nonprofit organizations, a management philosophy aimed specifically at sustainability, and progressive employer/employee relationships. *See Gerry Spence: Analysis: Good Things Big Corporations Can Do For Mankind* (CNBC broadcast, Mar. 16, 1996), *available in* WESTLAW, Allnewsplus File at 1996 WL 8021464.

[11] Verne Gay, *Off Camera: The Smoke Hasn't Cleared Yet in Tobacco Coverage: Fears and Legalities Still in the Air at CBS*, NEWSDAY, Feb. 12, 1996, at B2.

[12] This conclusion simply means that traditional corporations are established specifically to make a profit for the stockholders. Any other corporate undertaking is susceptible to shareholder suits which may force the corporation to emphasize profitability over community or other non-shareholder constituency concerns.

to the workings of our democracy.[13] There is "environmental" harm, which is the threat that corporations pose to the diversity and health of our natural world and the Earth's delicate web of ecosystems.[14] Finally, there is "human" harm, which covers corporate harm to human health and human physical and mental well-being. This includes corporate harm to clean air and clean water, as well as the corporate creation and imposition of low-paying, mind-numbing employment. This category also includes direct harm to human health from on-the-job injuries and unsafe working conditions.

Each category of corporate harms, as identified above, has been confronted with varying degrees of success by the "regulatory" state. For instance, to lessen the impact of "democratic" harms, the federal government created the Federal Election Commission (FEC).[15] State governments have established regulatory frameworks that attempt to control campaign finances, ethics, and electoral activity.[16] In an attempt to lessen "environmental harms," Congress created the Environmental Protection Agency (EPA) and state environmental protection agencies were also established. To divert "human" harms, Congress created the Occupational Safety and Health Administration (OSHA) which, along with the EPA, regulates corporate activities that cause "human" harms. Various state regulatory agencies have also emerged in an attempt to divert what this Article defines as "human" harms.[17]

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[13] This includes campaign contributions, corporate influence of referendum measures, corporate influence of elected representatives, corporate lobbyists, and others involved in the democratic process. Put simply, this category includes anything that interferes with the classical model of democracy — elected individuals representing the needs, wants and concerns of the natural persons within their constituency and the governmental system responding to the citizenry, regardless of class, color or wealth.

[14] This includes not only the "illegal" aspects of environmental pollution and degradation, but also activities such as the development of forest lands, farmland, and other unsustainable uses of land that subject the population to a loss of open space and wetlands and eliminates the diversity of wildlife species. Of course, all of these activities ultimately impact on human health and human well-being, but these types of harm are covered in the final category of "human" harms.

[15] The Federal Election Commission was created in 1974 by the Federal Election Campaign Act (FECA), which "imposed a variety of contribution and expenditure limits on federal candidates and political committees, strengthened requirements for public disclosure of campaign receipts and expenditures, extended public funding to presidential prenomination campaigns and nominating conventions . . . and created a bipartisan Federal Election Commission to administer election campaign laws." HERBERT E. ALEXANDER & BRIAN A. HAGGERTY, FINANCING THE 1984 ELECTION 1 (1987).

[16] *See, e.g.*, 25 PA. CONS. STAT. § 2621 (1994) (designating the Secretary of the Commonwealth as the primary agent for the administration of Pennsylvania electoral law).

[17] In Pennsylvania, for example, the Pennsylvania Unemployment Compensation Board and the Pennsylvania Workers' Compensation Agency were created.

The regulatory agencies and the regulations themselves have failed to control corporate harms. These agencies were predestined to fail for a number of reasons. First, corporate influence upon the agencies, through political pressure and corporate monies, is extensive. Second, regulatory officials frequently jump the line into corporate firms after spending several years in the regulatory agencies. Those officials who are antagonistic towards their corporate "partners" risk not being offered better-paying corporate employment after their governmental position terminates. Finally, corporate influence upon the legislative process gives corporate management the keys to the regulatory city by allowing owners and managers to change the rules under which the agencies operate.[18] If agency enforcement becomes too stringent, corporations can focus corporate monies and lobbyists' efforts toward cutting agency funding or amending the statutes under which the agencies operate in order to restrict the agencies' authority. The EPA has learned from the Republican-controlled Congress that this situation exists today.[19]

The conclusion that must be drawn from the above analysis, if these trends continue, is that our regulatory agencies are destined to fall short of their regulatory goals, and will fail in their efforts to divert democratic, environmental, and human-based harms. The second conclusion that must be reached is that stronger corporate influence yields less successful agency action. Thus, in the absence of a popular "movement" that is not dependent upon the corporation for its livelihood, the corporate presence and the resultant perpetuation of harm are destined to loom larger and larger over the peoples of the Earth.[20]

This Article proposes that there are tools available through which such a movement can emerge and grow strong enough to challenge the growing corporate stranglehold over human and natural affairs. Part One will explore the corporation's history, from its early days as a limited, publicly

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[18] It appears that a backlash from the regulatory enforcement allowed corporate interests to successfully lobby for takings legislation in various state legislatures, the U.S. House of Representatives, and the Senate. *See generally* Ann Eppard, *Shuster Wants to Give More Power to the States: Clean Water Act Needs to be Changed*, CHAMBERSBURG PUB. OPINION, Apr. 14, 1995, at B3 (for the proposed overhaul of the Clean Water Act).

[19] *See* Robert Moran, *In Pa., Pollution Fines are Falling*, PHILADELPHIA INQUIRER, Dec. 14, 1995, at A1 (stating that "[u]nder congressional budget proposals, the number of federal enforcement actions in Pennsylvania would be cut by up to one-half").

[20] This "corrosiveness" of corporate activity in the public arena logically expands as the corporation expands. The use of corporate power in a market-based economy must be controlled by an independent, free-from-influence governing body. Otherwise, the larger the corporate entity becomes, the more power over its own economic destiny it will seek. A market-based economy literally forces corporations to either "grow or die."

scrutinized entity, to its contemporary role as a threat to our democracy, economy, and environment. Part Two will explore the concept of corporate "chartering" and will review state laws that still empower the citizenry to control and oversee the activities of a corporation chartered in that state. Parts Three and Four will review Pennsylvania and Delaware statutory law and case law to show how both states' laws have the potential to support and strengthen a popular movement against the corporations. Finally, the conclusion will briefly illustrate several promising efforts that are being undertaken today to make this creative, sustainable future a reality.

II. Purchasing a Favorable Economic and Political Advantage: The History of Corporate Law in America

Corporations were not always the monolithic beasts that we find roaming the modern world's markets. After the Revolutionary War, Americans made a conscious and informed decision concerning the size and shape of future corporations. Having been exposed to wealthy, lawless English corporations, such as the English East India Trading Company and the Hudson's Bay Company,[21] Americans were intimately familiar with the damage caused by these corporations. The colonists specifically chose mechanisms by which they granted themselves ultimate control over the corporate form. They chose to view incorporation as a "privilege" rather than as an entitlement, and they chose to subject corporations to strict legislative controls under which each corporation was forced to receive a special legislative "charter" to enable it to carry on business as a corporation.[22]

These "special charters" were granted to corporations for "public or near public" purposes, such as the construction of "canals, bridges, or toll roads."[23] Under limitations allowing charters for the public good only, only 355 entities had achieved corporate status by 1800. In addition,

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[21] RICHARD L. GROSSMAN & FRANK T. ADAMS, TAKING CARE OF BUSINESS: CITIZENSHIP AND THE CHARTER OF INCORPORATION 6 (1993).

[22] THOMAS FROST, A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS 1 (1908); *see also* LARRY D. SODERQUIST & A.A. SOMMER, JR., UNDERSTANDING CORPORATION LAW 11 (1990) (stating that "[a]t the beginning of the nineteenth century, corporations were formed only by the special acts of state legislatures, or occasionally, Congress").

[23] ROBERT HAMILTON, THE LAW OF CORPORATIONS 6 (1991).

extensive strictures in state statutes and constitutions reserved a specific legislative ability to revise or repeal the original charter.[24]

In response to the Court's decision in *Dartmouth College*[25] that "a state could not unilaterally amend a corporate charter that it had previously granted . . . unless the charter itself permitted such modification,"[26] legislatures began placing repeal and amendment language directly within the charter agreement to maintain power over the corporate form.[27] This enabled legislatures to control corporate activities through their oversight of corporate responsibilities and duties.

Throughout this period, the legal doctrine of *quo warranto* played an important role in the curbing of corporate harms.[28] *Quo warranto* state statutes granted the power to the state Attorney General (and in some states to local prosecuting attorneys) to revoke the corporation's charter for the "abuse," "misuse," or "non-use" of charter-granted rights and duties.[29] This power was frequently exercised by state Attorneys General during this early period and into the 1960s.[30] Corporate charters were revoked for statutory violations, for non-payment of tax monies, for failing to file required corporate disclosure forms, for the playing of baseball on a holiday, for price-fixing, and for many other violations of statutory and common law.

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[24] An example of this legislative reservation of the right to amend or repeal charters is found in the state constitutions of Oklahoma and Mississippi. OKLA. CONST. art. IX, § 47 (1907); MISS. CONST. ANN. art. VII, § 178 (amended 1987).

[25] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). For an extended discussion of the Dartmouth College case, see R.N. Denham, Jr., *An Historical Development of the Contract Theory in the* Dartmouth College *Case*, 7 MICH. L. REV. 201 (1909); Hugh Evander Willis, *The* Dartmouth College *Case: Then and Now*, 19 ST. LOUIS U. L.J. 183 (1934); for an extensive list of pre-1976 works surrounding the *Dartmouth College* case, see Bruce Campbell, Dartmouth College *as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L.J. 643, 644 (1981).

[26] HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 20 (1991).

[27] *See generally* RICHARD L. GROSSMAN & FRANK T. ADAMS, *supra* note 21.

[28] In the law of corporations, *quo warranto* may be used to test whether a corporation was validly organized or whether it has the power to engage in the business in which it is involved. . . It is intended to prevent exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising such powers. BLACK'S LAW DICTIONARY 1256-57 (6th ed. 1990). *See also* 65 AM. JUR. 2D *Quo Warranto* § 1 (1995).

[29] *See, e.g.*, N.Y. BUS. CORP. LAW § 1101 (McKinney 1993) (stating that a corporation's charter may be revoked if the corporation commits a violation of any provision of law, engages in a persistently fraudulent or illegal transaction of business, or abuses its powers contrary to the public policy of the state).

[30] *See, e.g.*, in the State of New York, People v. Equity Gas Light Co., 36 N.E. 194 (N.Y. 1894); People v. Westchester Traction Co., 108 N.Y.S. 59 (N.Y. App. Div. 1908); People v. Abbott Maintenance Corp., Inc., 200 N.Y.S.2d 210 (N.Y. App. Div. 1960).

General incorporation statutes, while increasing access to incorporation, also diminished state control over corporate activities. These General Incorporation Acts turned the activity of incorporation into a relatively unencumbered right routinely dispensed by the states.[31] Today, an agency of the state is usually designated to summarily review the submitted Articles of Incorporation to ensure that the minimum required information is present.[32]

The period from 1900 to the 1960s was a period of massive growth for the corporate form. Corporations began to rapidly diversify into different product lines, and corporate wealth began to find its way, in sizeable quantity, into the arenas of political activity.[33] The two World Wars presented corporations, in partnership with the federal and state governments, with opportunities to consolidate and maximize horizontal control over their supplies of raw materials and the manufacturing and distribution sectors. Truly "multinational" corporations emerged during this time which were capable of maintaining business monopolies in several different countries. The DeBeers Diamond Company was one such example of a corporation that assumed active dominance in one specialized field and which successfully achieved worldwide dominance through its use of buy-outs and monopolization.[34] Other rising multinationals included I.B.M., General Motors, Exxon, Union Carbide, United States Steel, and Goodyear.

The 1960s era of consumer and citizen activism gave rise to the "regulatory" state, which signaled the beginning of the agency regulatory era.[35] State governments and the federal government began to expand by establishing regulatory agencies to respond to growing citizen and legislative concern about the environment, human health, and democracy. These agencies were created through expansive mandates and granted hefty budgets through which to implement these pronouncements. Broad, new statutes authorized extensive regulatory frameworks for these

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[31] MARK V. NADEL, CORPORATIONS AND POLITICAL ACCOUNTABILITY 210 (1976).

[32] *See, e.g.*, 15 PA. CONS. STAT. ANN. § 1301-1311 (West 1993)(for a representative section concerning state incorporation). If minimum information is present within the submitted Articles of Incorporation, the Secretary of State must file the Articles and issue a charter to the corporation.

[33] *See generally* LOUIS GALAMBOS, THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA 1880-1940 (1975).

[34] Carol J. Williams, *Gems: Diamond Deal Not Forever, Russia Seems to Say*, L.A. TIMES, Dec. 29, 1995, at A5.

[35] Thomas O. McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 ADMIN. L. REV. 399 (1987); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

agencies. These statutes included the Clean Water Act,[36] the Clean Air Act,[37] the National Environmental Policy Act,[38] various workplace safety acts,[39] consumer protection legislation, and advancements in labor law.

In hindsight, the naiveté of some of this legislation is extraordinary. For instance, the Clean Water Act demanded that "the discharge of pollutants into the navigable waters be eliminated by 1985."[40] The National Environmental Policy Act, while setting low procedural requirements for governmental agencies, embraced the message that the Act was intended to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings."[41]

The regulatory activism of the 1960s and the 1970s produced a wide variety of reporting requirements and duties to disclose through various pieces of legislation and related regulations. Agencies were also given a wide variety of enforcement mechanisms, including civil penalties, injunctions, fines, and permit revocation.[42] The citizen suits authorized by many of the major legislative acts, however, provided what has turned out to be one of the most productive mechanisms for the enforcement of the procedural and substantive provisions contained within the legislation.[43]

At least one commentator has cited citizen-suit provisions as the major component in carrying out the aims of environmental legislation.[44] However, many obstacles still confront those who seek to use these enforcement mechanisms, including questions of "standing," financial ability to seek representation, and a judicial bar on *pro se* representation of associations and nonprofit corporations.[45]

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[36] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1995).

[37] Air Pollution Prevention and Control (Clean Air Act), 42 U.S.C. §§ 7401-7671 (1995).

[38] National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (1995).

[39] *See,e.g.,* Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (1995).

[40] Clean Water Act, 33 U.S.C. § 1251(a).

[41] NEPA, 42 U.S.C. § 4331(b)(2).

[42] For examples of the assessment of civil penalties, see the Clean Air Act at § 7413(d) and the Clean Water Act at § 1319(d). For provisions providing for injunctive relief, see the Clean Water Act at § 1319(a) and OSHA at § 662. For permit revocation, see OSHA at § 655(b).

[43] *See* Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Clean Water Act, 33 U.S.C. § 1365 (1988); Solid Waste Disposal (Resource Conservation & Recovery) Act (RCRA), 42 U.S.C. § 6972 (1988); Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1988).

[44] *See generally* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1993).

[45] This contention was recently challenged by Jefferson United Association in the Third Circuit Court of Appeals, and on a petition for writ of certiorari filed with the United States Supreme Court. (Docket No. 95-3317 (filed February 17, 1996)). (Lower court decision rendered in Clairton Sportsmen's Club v. Pennsylvania Turnpike Commission, 882 F. Supp. 455 (W.D. Pa. 1995). The Supreme Court refused to hear the petition, contending that the Third Circuit's

The 1980s proved to be a fertile period for corporations. The supply-side economic theory of the Reagan administration produced fiscal windfalls for many corporations while limiting their exposure to agency regulators.[46] Several top regulatory officials, including Anne Burford-Gorsuch of the EPA and James Watt of the Department of the Interior, proved to the American public that enforcement actions of environmental and health regulations against corporations would be few.[47] The response by the citizenry to these two regulatory officials was reflective of its growing resentment towards cozy relations between government and corporations. Watt and Burford-Gorsuch were forced out of their positions by growing anti-business and anti-scandal sentiment.[48]

The 1990s have so far proven to be a bold, new world for the business establishment. Corporate downsizing has become routine with corporations laying off millions of employees while profits have reached all-time highs.[49] Corporations have increasingly sought to weaken the opposition to the concept of short-term growth at any cost by trading large cash contributions for positions on the boards of several large non-profit corporations, including The Audubon Society, The Nature Conservancy, and The Chesapeake Bay Foundation (CBF). It is difficult to understand how the original mission of some of these organizations can be completed when the principles of many board members are antithetical to the organization's message. For instance, CBF's Board includes Virginia Governor George Allen, who has proven to be among the environment's worst enemies.[50] WMX Technologies, the world's largest waste hauler, maintains board members on several environmentally-oriented organizations.[51] WMX Technologies has a long history of violations of environmental and labor regulations, and its management has proven to be a staunch advocate of monopolization and price fixing.[52] The Nature Conservancy's Board includes U.S. Representative Frederick Boucher, an

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refusal to hear the appeal was not an appealable action.

[46] The supply-side economic theory advanced by President Reagan's economists posited that economic growth could be stimulated if the regulatory burden was removed from corporations and corporate income taxes were drastically reduced. *See* ROBERT F. DURANT, THE ADMINISTRATIVE PRESIDENCY REVISITED: PUBLIC LANDS, THE BLM, AND THE REAGAN REVOLUTION 29 (1992).

[47] *Id.* at 29-77.

[48] Elizabeth Wharton, *Watt Resigns*, UNITED PRESS INT'L, Oct. 10, 1983, at 1.

[49] Carole Kleiman, *Equal Opportunity to Lose Jobs is Latest Occupational Hazard*, CHI. TRIB., Mar. 19, 1996, at 3.

[50] Cathryn McCue, *Green Bills Go Far (So Far)*, ROANOKE TIMES & WORLD NEWS, Mar. 18, 1996, at 1.

[51] *See* CRAY, *supra* note 8.

[52] *Id.* at 11.

ardent supporter of new highway construction in Virginia that forces the condemnation of hundreds of acres of agricultural and forest lands in that state.[53]

Overall, the 1980s and the early 1990s have produced corporations that possess greater savvy in the marketplace and a greater understanding of the roots of citizen opposition to their activities. Instead of reacting to the regulatory framework by building responsible corporations, corporate management has taken the easier route of weakening opposition from within. Whether by influencing regulatory agency behavior, by threatening legislative change, or by buying their way onto the boards of organizations whose original mission was to alter corporate behavior, corporations have assumed an artificial role as our unelected and unaccountable shadow government. To avoid this dismantling and evisceration of citizen sovereignty, it is essential that citizens rediscover the tools originally used to keep corporations politically subordinate to citizen control. This Article explores one such tool, corporate charter revocation, and its importance in beginning to reassert citizen control over the corporate form.[54]

III. Pennsylvania Constitutional Law: A Race to the Bottom

The story of Pennsylvania's four state constitutions and their amendments reflect the changing relationship between state government and corporations. The language of the early constitutions illustrates a willingness by the state government to maintain strict control over the corporate structure, while the language of subsequent amendments to the documents illustrates a coziness between the emerging business community and state government. The constitutions of 1776, 1790, 1838, and 1873 illustrate a history of strong governmental control over the corporate form and the corporate charter, eventually weakening with the amendment and

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[53] For an example of how these conflicts are inevitably resolved in favor of developmental interests, see New River Valley Greens v. United States Dep't of Transp., No. Civ. A. 95-1203-R 1996 U.S. Dist. LEXIS 16547 (W.D. Va. Oct. 1, 1996) in which highway construction over prime Agricultural and Forestal District (AFD) land was approved by the Court. The suit, filed by the Sierra Club, the New River Valley Greens, and the New River Environmental Coalition, was dismissed by the district court judge and is currently being appealed.

[54] Citizen control over corporations can be initiated in various ways: (1) through a grassroots electoral re-taking of state and local government and the construction of true grassroots agencies, (2) by judicial actions brought by citizen groups, and (3) by the drafting and passage of corporate codes that implement direct citizen control. The charter revocation remedy is intended to end the harmful effects of corporate activities in those situations that cannot wait for long-term legislative and judicial changes. Some of the legislative initiatives currently being pursued are presented in the final section of this paper.

outright repeal of key sections that granted state control over corporate charters and over harmful corporate activities. A contrasting analysis of these constitutional provisions will highlight the "race to the bottom" effects that have resulted.

A. The Revolutionaries: The 1776 and 1790 Pennsylvania Constitutions

The Pennsylvania state convention met on July 15, 1776 in the State House in Philadelphia and unanimously chose Benjamin Franklin to draft a state constitution. Although the constitution was never submitted to the people for ratification, it contained several provisions through which this early Pennsylvania government sought to exercise significant control over certain individuals or groups of individuals. For example, the fifth provision of the 1776 constitution provided the following:

> That government, is or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community: And that the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.[55]

The 1790 Constitution once again emphasized this proclamation for equal treatment by prohibiting the legislature from granting "any title of nobility or hereditary distinction."[56]

B. The 1857 Amendment to the Pennsylvania Constitution

The legislature amended the earlier constitutions in 1857 to include a provision governing the revocation or amendment of corporate charters. The new section, added as Section 26 of Article I, provided:

> The legislature shall have the power to alter, revoke, or annul any charter or incorporation hereafter conferred by or under any

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[55] PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, CONSTITUTIONS OF PENNSYLVANIA/CONSTITUTION OF THE UNITED STATES 235 (1967).

[56] *Id.* at 210.

> special or general law whenever in their opinion it may be injurious to the citizens of the commonwealth, in such manner, however, that no injustice shall be done to the corporators.[57]

Thus, in the period immediately following the United States Supreme Court's decision in *Dodge v. Woolsey*[58] upholding the contractual framework of interpretation introduced by *Dartmouth College v. Woodward*, the legislature sought to constitutionally validate its power to revoke corporate charters by placing this power directly into the constitution. Under the reasoning in these cases, the charter of incorporation was viewed as a contract between the State and the corporation and, thus, was immune from attempted legislative revocation or amendment. The addition of this constitutional provision reflected a growing movement in Pennsylvania and other states towards embedding these rights of revocation and amendment of the corporate charter into the state constitution itself.[59]

C. *The Constitution of 1874 and the 1966 Overhaul: Relaxing Corporate Standards*

Article XVI of the Constitution of 1874 dealt solely with the legislative control of corporate charters and the permissible corporate activities that were allowed under these provisions. Section 2 dealt with the relationship between corporate existence and the Pennsylvania Constitution. It provides:

> The General Assembly shall not . . . pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation thereafter hold its charter subject to the provisions of this Constitution.[60]

Section 3 extended eminent domain rights to property owned by corporations, by explicitly stating that "the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting

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[57] *Id.* at 148.

[58] Dodge v. Woolsey, 59 U.S. 331 (1855).

[59] M.M. MEREDITH, FORMATION AND REGULATION OF CORPORATIONS IN PENNSYLVANIA 12-13 (1890).

[60] PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, *supra* note 55, at 97.

them to private use."[61] Section 6 limited the powers of the corporations to own property, stating that:

> No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business.[62]

Finally, section 10 established broad sovereign power over the corporations and their charters. This section read:

> The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation, now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion, it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew, or extend the charter of more than one corporation.[63]

Although facing increasingly hostile court decisions favoring a more contractual interpretation of corporate rights and duties with the State, the legislature, through the adoption of the 1874 constitution, sought to retain broad powers over significant corporate activities.

Also, 1874 was a landmark year due to the enactment of The Corporation Act of 1874, which was a legislative response to the "gross abuses which arose from the unlimited privileges thus given" to the corporations through the special chartering process.[64] The Corporation Act expressly separated corporations into two categories: first class corporations, which were incorporated as "not-for-profit" corporations, and second class corporations, which were incorporated as "for-profit" corporations. The "for-profit" corporations were further divided into twenty subdivisions and there were different rules for the incorporation of each entity within the subdivision.[65]

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[61] *Id.* at 98.
[62] *Id.*
[63] *Id.* at 99.
[64] MEREDITH, *supra* note 57, at iv.
[65] *Id.*

The increase in incorporation that resulted from The Corporation Act caused the number of incorporated entities to rise from 20 incorporations per year to 468. As one commentator wrote in 1890:

> The rapidity with which corporations are created, the magnitude and multiplicity of the interests they embrace, the wealth and power to which they attain, and the powerful influence they exert on the material interests of our country, all conspire to make it the imperative duty of every intelligent citizen to acquaint himself with the laws which provide for their formation and regulation.[66]

Article XVI of the 1874 Constitution was repealed in 1966, and replaced by a four section document declaring that only "certain charters" would be subject to constitutional provisions. In addition, the latter document failed to accept the limiting language of the original document that provided that eminent domain could be specifically applied to corporations. Finally, it replaced the expansive language that dealt with revocation and amendment with the following section:

> All charters of private corporations and all present and future common or statutory law with respect to the formation or regulation of private corporations or prescribing powers, rights, duties or liabilities of private corporations or their officers, directors or shareholders may be revoked, amended, or repealed.[67]

Thus, the history of the constitutions adopted by the state of Pennsylvania reflects the general national trend towards a "regulatory" approach to enforcement of statutes and regulations against corporations and away from the early American approach of revocation and repeal of the corporate form itself. In this broad, expansive move towards a regulatory system designed to control corporate harms, the exercise of constitutional remedies against corporate lawbreaking inevitably lessened.[68] The cases decided by the Pennsylvania Supreme Court during this century, prior to the abdication of enforcement powers by the state, illustrate the magnitude of the enforcement powers granted the Attorney General by the citizens of Pennsylvania. Furthermore, the Pennsylvania Supreme Court, during this period, specifically outlined which situations

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[66] *Id.* at iii.
[67] PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, *supra* note 55, at 110.
[68] *See* Linzey, *supra* note 4, at 237-39.

and standards constituted "misuse" and "abuse" of corporate charter powers under the Pennsylvania statute.

IV. Pennsylvania and *Quo Warranto*

Forty-nine states possess *quo warranto* statutes.[69] The vast majority of these statutes share common language that grants power to the Attorney General to bring a charter revocation action against a corporation that has abused or misused its charter powers. Most of these state statutes, however, grant the Attorney General broad discretion to decide when and if to bring a charter revocation action.[70] Ironically, Delaware possesses one of the strongest corporate charter revocation statutes, which makes it mandatory for the Attorney General to bring charter revocation actions whenever a "proper party" presents the Attorney General with "clear and convincing evidence" that a corporation has abused its charter powers. Although the Pennsylvania statute grants considerably greater discretion to its Attorney General, an analysis of how it has been used is quite illuminative for future legal actions.

A. Pennsylvania's Quo Warranto Statute

Pennsylvania grants the power of *quo warranto* to the Attorney General of the state. The statute granting this power reads:

> Section 503. Actions to revoke corporate franchises.
>
> (a) General Rule. — The Attorney General may institute proceedings to revoke the articles and franchises of a corporation if it:
>
> (1) misused or failed to use its powers, privileges or franchises;
> (2) procured its articles by fraud; or
> (3) should not have been incorporated under the statutory authority relied upon.

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[69] For a complete listing of the states, excepting Alaska, that have *quo warranto* statutes in their statutory codes, see Linzey, *supra* note 4, at 223-23.

[70] *See, e.g.*, WASH. REV. CODE § 7.56.010 (1994).

> (b) Powers of court. — In every action or proceeding instituted under subsection (a), the court shall have power to wind up the affairs of and to dissolve the corporation in the manner provided in this part or as otherwise provided by law.[71]

In the period from 1905 to 1955, litigation was pursued by the Pennsylvania Attorney General that sought to revoke the charter of several Pennsylvania corporations. The first part of this section will provide a summary of Pennsylvania's corporate charter revocation powers as outlined by the cases that have been brought under the charter revocation statute. The *Yiddisher Kultur Farband* saga, which illustrates the Pennsylvania Supreme Court's interpretation of the charter revocation powers of the Attorney General, will be explored in the second part of this section.

1. Standards for Revocation Actions in Situations of Charter Misuse

The Pennsylvania Supreme Court has consistently upheld the power of the Attorney General to pursue a *quo warranto* suit to revoke a corporation's charter. In *Commonwealth ex rel. Woodruff v. American Baseball Club of Philadelphia*, the court stated that "it is important at its threshold to consider who brought the proceeding. It was initiated by the Attorney General, the chief law enforcement officer of the Commonwealth, and necessarily has behind it the approval of the State's highest executive officer, the Governor."[72] The court declared in *Commonwealth ex rel. Woods v. United States Annuity Society* that "[t]he power of the Attorney General to proceed by *quo warranto* to dissolve a corporation for sufficient cause is fundamental."[73]

The Pennsylvania Supreme Court has delineated the necessary standards for corporate charter revocation in several *quo warranto* actions. The court in *Commonwealth ex rel. Elkin v. Potter County Water Co.* stated that the suit must be "for the correction of a wrong committed against the general public by the corporation, in violation or abuse of its charter rights."[74] In the same case, the court stated that "a continued and persistent neglect of duty must be shown, or the verdict must be for the

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[71] 15 PA. CONS. STAT. ANN. § 503 (West 1993).
[72] 138 A. 497, 500 (Pa. 1927).
[73] 154 A. 24, 25 (Pa. 1931).
[74] 61 A. 1099, 1100 (Pa. 1905).

defendant."[75] The court also approved the trial court's jury instruction stating that a "substantial failure" to fulfill charter duties must be shown and that the failure must be a "willful, negligent, and substantial violation of the charter duties of this corporation."[76] The Court, in *Commonwealth ex rel. Woods v. United States Annuity Society*, stated that "[m]isuse or abuse of corporate privileges consists of any positive act in violation of the charter, and in derogation of public right, willfully done, or caused to be done, by those appointed to manage the general affairs of the corporation."[77] In *Commonwealth ex rel. Attorney General v. Monongahela Bridge Co.*, the Court declared that a "forfeiture will not be allowed, except under express limitation, or for a plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization."[78] Finally, in *Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia*, the Court stated that "[a] forfeiture of corporate franchises will not be declared except for substantial reasons."[79]

The Pennsylvania Supreme Court has also addressed the argument that a corporate charter revocation remedy is available to the state if another remedy has been established by statute as a punishment for the activities of the corporation. In *Commonwealth ex rel. Woodruff v. American Baseball Club of Philadelphia*, the Court ruled on the defendant's argument that "the writ of *quo warranto* [should] not lie against it because the sole penalty for its so doing is the payment of the sum of four dollars as provided [for] in the act."[80] The Court declared that a "charter is a grant of lawful privileges, not a warrant to violate any law,"[81] and therefore,

> that a penalty provided in a penal statute for those who refuse to enforce it d[oes] not mean that that is the exclusive 'remedy'; certainly it should not be that the presence in a penal statute of a

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[75] *Id.*

[76] *Id.* at 1101.

[77] 154 A. 24, 25 (Pa. 1931) (citing FRANK SAVIDGE, PENNSYLVANIA CORPORATIONS: A TREATISE UPON THE INCORPORATION AND REGULATION OF CORPORATIONS, THE POWERS AND DUTIES THEREOF, AND OF CORPORATE OFFICERS, § 149, at 159 (2d ed., 1926).

[78] 64 A. 909, 912 (Pa. 1906) (quoting JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES: EMBRACING MANDAMUS, QUO WARRANTO AND PROHIBITION § 649 (3d ed., 1896)).

[79] 194 A. 661, 669 (Pa. 1937) (citing Commonwealth v. Monongahela Bridge Co., 64 A. 909 (Pa. 1906); Commonwealth v. American Baseball Club, 138 A. 497 (Pa. 1927); Commonwealth *ex rel.* Schnader v. Neptune Club, 184 A. 542 (Pa 1936).

[80] 138 A. 497, 498 (Pa. 1927).

[81] *Id.* at 500.

penalty for individuals who break it should preclude the Attorney General from proceeding against a corporation, not by way of imposing a penalty, but with a view to prohibit the misuse of a franchise granted by the state.[82]

2. *The Saga of Yiddisher Kultur Farband: Quo Warranto* in a Nutshell

The litigation surrounding the Yiddisher Kultur Farband, also known as the Jewish Culture Association, offers a clear example of how the Pennsylvania Supreme Court has treated corporate charter revocation actions. The case, which involved three Supreme Court opinions, originated as an action filed by a private individual who sought to revoke the charter of the Jewish Culture Association (*Yiddisher I*).[83] The second case dealt solely with a jurisdictional issue raised when the same case was re-tried by the Attorney General and this case will not be discussed here since it does not relate to the charter revocation proceeding. The third opinion will be referred to as *Yiddisher II*.[84] This opinion discusses the charter revocation action brought by the Attorney General.

In *Yiddisher I*, the plaintiff filed a petition which alleged that the "incorporators, directors, and officers" of the Jewish Culture Association "willfully, maliciously, and corruptly perpetrated a fraud upon the court by misrepresenting the purposes of the corporation. . . ."[85] The petition alleged that the corporation was a "front" for a Communist organization, and that this constituted a "continuing fraud upon the court and a gross abuse of the corporation laws of the Commonwealth."[86] The purposes of the organization, as outlined by its charter, "were to encourage the study of Jewish literature, music, painting and sculpture" and "to assist and encourage Jewish writers, scientists, musicians, painters, sculptors and artists generally . . . ."[87] The Association argued that "only the Attorney General ha[d] the right to initiate *quo warranto* proceedings to dissolve [the] corporation."[88]

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[82] *Id.* at 501.
[83] Sherman v. Yiddisher Kultur Farband, 99 A. 2d 868 (Pa. 1953).
[84] Commonwealth *ex rel.* Truscott v. Yiddisher Kultur Farband, 116 A.2d 555 (Pa. 1955).
[85] *Sherman*, 99 A. 2d. at 868-69.
[86] *Id.* at 869.
[87] *Id.* at 870.
[88] *Id.* at 871.

The court agreed with the Association and stated that if the power to revoke was given to private citizens, "the same right would exist on the part of each and every citizen of the Commonwealth however irresponsible, however improperly motivated, he might be."[89] The court also stated that "[t]he present petitioners are merely informers without any peculiar interest of their own . . . ."[90] Finally, the majority concluded that if the "situation is one of public concern and a public wrong, [and] not a private injury," then "it is for the Commonwealth and for it alone, acting through the Attorney General, to apply for the issuance of a writ of *quo warranto*."[91]

In *Yiddisher II*, the Attorney General pursued a *quo warranto* proceeding against the Association and was successful in revoking its charter in a Court of Common Pleas. The defendant voluntarily surrendered the charter, after claiming that he was unable to retain an attorney for the defense of the Association.[92] The trial court also appointed a receiver for the assets of the corporation.[93] The defendant then appealed to the Pennsylvania Supreme Court on the issue of whether the trial court had abused its discretion in granting a receiver for the corporation's assets, instead of ordering immediate dissolution and asset distribution to its shareholders.

The court began its discussion by citing to *Yiddisher I*, in which the court had declared that "[a]ll corporations, whether for profit or nonprofit, are creatures of statute, which prescribes not only how they shall be formed but how they shall be dissolved."[94] The court then looked to the statute which governed dissolution,[95] which declared that if a corporation was dissolved by a *quo warranto* action, then the estate would "pass to and vest in the persons who at the time of such dissolution [were] the officers of such corporation," to be held in trust for the stockholders and creditors of the corporation.[96]

The other relevant statute recognized by the court was the Act of April 26, 1893, which gave the Courts of Common Pleas the discretion to appoint a receiver in *quo warranto* proceedings. The court pointed out that "[n]o

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[89] *Id.* at 870.
[90] *Sherman*, 99 A.2d at 870.
[91] *Id.*
[92] Commonwealth *ex rel.* Truscott v. Yiddisher Kultur Farband, 116 A.2d 555, 560 (Pa. 1955).
[93] *Id.* at 556.
[94] *Id.* at 560 (quoting Sherman v. Yiddisher Kultur Farband, 99 A.2d 868, 869 (Pa. 1953)).
[95] Act of April 4, 1872, P.L. 46, 15 P.S. § 503.
[96] *Truscott*, 116 A.2d at 560 (quoting Act of April 4, 1872, P.L. 46, 15 P.S. § 503).

party in interest asked for or desired a receiver" in the immediate case, and that therefore the Court of Common Pleas had clearly abused its discretion by appointing one.[97] The court supported its declaration of abuse of discretion by citing to the Attorney General's complaint which failed to mention the appointment of a receiver.[98] The complaint had requested as a sole remedy that

> it be adjudged that the defendant corporation has forfeited its charter, franchises and privileges, and that is has no longer power to exercise any corporate rights or privileges whatever, and that its officers and members be forbidden to act under its said incorporation or to do, or to claim to do, any acts, matters, or things thereunder; and that the said defendant corporation, and its officers and members, be henceforth altogether excluded from all rights, privileges and franchises, and that the charter of the aforesaid corporation be declared forfeit.[99]

Thus, the court found that the Court of Common Pleas abused its discretion by not declaring the charter immediately invalid and by failing to order the distribution of corporate assets to its shareholders.

3. *Other "Misuse" of Corporate Charter Litigation*

In *Commonwealth ex rel. Elkin v. Potter County Water Co.*, the Attorney General filed a *quo warranto* suit against a corporation whose charter stated that its purpose was to supply "water to the public in the borough of Austin, Potter County, Pa."[100] The complaint alleged that the company had "failed, neglected and refused to perform and carry out the purposes of its incorporation . . . " because it used the same transport pipes to carry water from a mill pond to extinguish fires as it used to provide public drinking water. The Attorney General alleged that the water was "impure, unwholesome, poisonous, and not fit for use."[101] The corporation motioned to quash the suit and argued that the availability of other

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[97] *Id.* at 561 (citing McDougall et al. v. Huntingdon and Broad Top R. & Coal Co., 143 A. 574 (Pa. 1928); Franklin National Bank et al. v. Kennerly Coal & Coke Co., 150 A. 902 (Pa. 1930), for the standard of review to be applied on appeal).

[98] *Id.* at 561.

[99] *Truscott*, 116 A.2d at 561.

[100] Commonwealth *ex rel.* Elkin v. Potter County Water Co., 61 A. 1099 (Pa. 1905).

[101] *Id.*

statutory remedies barred the use of *quo warranto*.[102] The trial court overruled the motion and after a trial on the merits, the jury returned a verdict for the Commonwealth. The defendant appealed to the Pennsylvania Supreme Court on the ground that the trial court was without jurisdiction and that the evidence supporting revocation was insufficient to support the verdict.

In analyzing the appeal, the court stated that it had "no doubt whatever as to the jurisdiction of the court to grant relief in this form."[103] Citing to the legislative act which granted the power to issue writs of *quo warranto* to the Courts of Common Pleas,[104] the court declared that the evidence was sufficient because it showed that the water furnished by the company was "at frequent times, injurious and unwholesome . . . and was contaminated with sewage . . . ."[105] Finally, after examining the jury instructions the court declared them sufficient because they stated that "it was not sufficient to show a single failure to furnish a sufficient supply of wholesome water . . . [and] that a continued and persistent neglect of duty must be shown" to effectuate a revocation of the defendant's charter.[106]

In *Commonwealth ex rel. Woodruff v. American Baseball Club of Philadelphia*,[107] the Attorney General filed a complaint which sought to revoke the charter of the defendant for playing baseball games on Sunday in violation of an act which prohibited performance of business on Sundays. The defendant corporation contended that the writ of *quo warranto* was not an available remedy because the "sole penalty for [the prohibited act was] the payment of the sum of four dollars as provided in the act."[108]

The court phrased the issue on appeal as whether *quo warranto* was the proper remedy for the illegal activity of the corporation. In answering in the affirmative, the court announced that the *quo warranto* writ was the proper remedy and it could "lop off that part which is not within the law," thereby prohibiting the defendant from playing baseball on Sundays.[109] The court declared, however, that "courts should act with extreme caution in proceedings which have for their object the forfeiture of corporate

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[102] *Id.*
[103] *Id.* at 1100.
[104] *See* Act of June 14, 1836 (P.L. 623).
[105] *Elkin*, 61 A. at 1100.
[106] *Id.*
[107] Commonwealth *ex rel* Woodruff v. American Baseball Club of Phila., 138 A. 497, 498 (Pa. 1927).
[108] *Id.*
[109] *Id.* at 500.

franchises."[110] The court commented on the defendant's argument that a criminal statute provided the "exclusive" remedy and stated that

> [t]here can be no doubt that a corporation may be proceeded against by *quo warranto* for a misuse or perversion of the franchise conferred upon it by the State, notwithstanding [that] its officers and agents may at the same time be amenable to the criminal law for offenses committed by them in the perversion of such franchise.[111]

The court also stated that a "penalty provided in a penal statute for those who refuse to enforce it [does] not mean that that is the exclusive 'remedy'" and that it should not "preclude the Attorney General from proceeding against a corporation . . . with a view to prohibit the misuse of a franchise granted by the State."[112]

In *Commonwealth ex rel. Woods v. United States Annuity Society*, the Attorney General sued to revoke the corporation's charter for issuing "old line insurance policies," for not holding lodge meetings, for allowing the president of the corporation to pay members of his family "excessive salaries," and for disregarding the loan policies established in the bylaws.[113] The Attorney General alleged that these policies were in violation of the corporation's charter powers and purposes, its bylaws, state statutes relating to trust funds, and "common business prudence."[114] The Court of Common Pleas entered a decree that revoked the franchise of the corporation and the defendant appealed to the Pennsylvania Supreme Court.

The court affirmed the judgment of the trial court and reiterated the factual findings of the Court of Common Pleas, specifically highlighting the activities of the president of the corporation, who had paid himself and his family high salaries. The court declared that the misconduct was "so manifest as to require the dissolution of the corporation."[115] The court stated that the "[m]isuse or abuse of corporate privileges consists of any positive act in violation of the charter" done by the management of the

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[110] *Id.* at 501 (citing Commonwealth v. Monongahela Bridge Co., 64 A. 909 (Pa. 1906)).

[111] *Id.* at 501 (citing State *ex rel.* Hadley v. Delmar Jockey Club, 92 S.W. 185, 98 S.W. 539 (Mo. 1906).

[112] *Woodruff*, 138 A. at 501.

[113] Commonwealth *ex rel.* Woods v. United States Annuity Society, 154 A. 24, 24-25 (Pa. 1931).

[114] *Id.* at 25.

[115] *Id.*

corporation.[116] Finally, the court explained that the courts should proceed with caution in corporate charter revocation cases, except where there exists a "total disregard of charter powers and public safety."[117]

In *Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata*, the Attorney General brought suit to dissolve the defendant corporation upon the ground that the defendant "had willfully violated the provisions of its charter and exceeded the powers therein given . . . and that it [was] guilty of waste of the corporate property."[118] The Seventh Day Baptists of Ephrata had been incorporated as a trust, in which the trustees had been granted the power to "manage the business of the said society" by leasing portions of land and using the proceeds to support the members of the society and for the support of the poor of the society.[119] The trustees had sold portions of the land to third parties and had "permitted valuable antique articles of personal property to be sold."[120] The Attorney General also alleged that there had been "no proper accounting for moneys thereby acquired" from the sales, nor had charity been dispensed to the members.[121] The trial court entered a judgment of revocation and the defendants appealed to the Pennsylvania Supreme Court.

The court affirmed the judgment of the trial court and stated that the "facts . . . disclose a long record of flagrant violation of the provisions of the corporate charter; the corporation has disregarded the purposes for which it was created, it has violated the condition upon which it was enabled to acquire and hold property . . . and there has been supine neglect to remedy the situation."[122] The court characterized the acts as "repeated and wilful" and declared that "[u]nder these circumstances we have no hesitation in affirming the judgment of ouster."[123] Finally, the Court stated that "where a continuous and deliberate waste is shown, and where the corporate purposes have been so disregarded that the public is completely deprived of the charitable benefits for which the corporation was created," the charter should be forfeited.[124]

Therefore, the Pennsylvania Supreme Court has ruled on all aspects of the corporate charter revocation statute and has expressed a willingness to

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[116] *Id.*
[117] *Id.*
[118] Commonwealth *ex rel.* Schnader v. Seventh Day Baptists of Ephrata, 176 A. 17, 18 (Pa. 1935).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 19.
[123] *Schnader,* 176 A. at 19.
[124] *Id.*

allow use of the statute to control corporate excesses. Next, this Article examines Delaware corporate charter revocation law, which mandates that the Attorney General of the state institute corporate charter revocation proceedings if petitioned by a proper party.

V. Delaware *Quo Warranto*

A. *The Wilmington City Railway Co.* Cases: *Quo Warranto* as a Fundamental Constitutional Power

The Delaware Constitution of 1897 explicitly preserved the right of the legislature, acting through the agency of the Attorney General, to revoke charter rights given to corporations in response to a "misuse," "abuse," or "non-use" of charter-granted powers. The 1897 constitution built upon the foundation of the 1831 constitution which outlined legislative powers of revocation. The Constitution provided:

> Section 2. No corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under general law, nor shall any existing corporate charter be amended, renewed or revived by special act, but only by or under general law; but the foregoing provisions shall not apply to municipal corporations, banks or corporations for charitable, penal, reformatory, or educational purposes, sustained in whole or in part by the State. The General Assembly shall, by general law, provide for the revocation or forfeiture of the charters of all corporations for the abuse, misuse, or non-use of their corporate powers, privileges or franchises. Any proceeding for such revocation or forfeiture shall be taken by the Attorney-General, as may be provided by law. No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly.[125]

The Delaware General Assembly codified these constitutional dictates into a statute that designates the Attorney General as the principal actor in corporate charter revocation proceedings. The statute provides that:

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[125] DEL. CONST. art. IX, § 1 (1994).

> (a) The Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises. The Attorney General shall, upon his own motion or upon the relation of a proper party, proceed for this purpose by complaint in the county in which the registered office of the corporation is located.
>
> (b) The Court of Chancery shall have power, by appointment of receivers or otherwise, to administer and wind up the affairs of any corporation whose charter shall be revoked or forfeited by any court under any section of this title or otherwise, and to make such orders and decrees with respect thereto as shall be just and equitable respecting its affairs and assets and the rights of its stockholders and creditors.[126]

Several principal Delaware Court of Chancery cases outline judicial interpretation of the "misuse" or "abuse" of corporate franchises and charter powers. The earliest Delaware case that addressed the concept of charter revocation under the 1831 constitution was *Wilmington City Ry. Co. v. Wilmington & B.S. Ry. Co.*,[127] in which the court addressed the argument by the Wilmington City Railway Company that the charter granted by the legislature to the Wilmington & Brandywine Springs Railway Company was a nullity because it physically interfered with the exclusive rights charter granted earlier to them. The court addressed this argument and declared that the:

> reserved power of revocation by the legislature contained in the Constitution of 1831 'became a part of all charters subsequently granted, as if expressed in the instrument itself,' and therefore became an essential element of the contract entered into between the state of Delaware and the Wilmington City Railway Company.[128]

Further, the court held that this reserved power of revocation meant that the legislature had the power to revoke at its pleasure and that the

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[126] DEL. CODE ANN. tit. 8, § 284(a) - (b) (1994).

[127] Wilmington City Ry. Co. v. Wilmington & B.S. Ry. Co., 46 A. 12 (Del. Ch. 1900).

[128] Wilmington City Ry. Co. v. People's Ry. Co., 47 A. 245, 247 (Del. Ch. 1900) (citing Wilmington City Ry. Co. v. Wilmington & B.S. Ry. Co., 46 A. 12 (1897)).

legislature had the power to recall "all rights, privileges, or franchise granted to a corporation, or any number less than all, or any single right, privilege, or franchise."[129] Finally, the court announced that the second charter was intended by the legislature to eliminate the exclusivity of the earlier granted charter, and that the legislature possessed the power to eviscerate the charter powers through this method.

In reviewing the 1897 constitution and deciding the issue of whether the same powers resided in the legislature as granted by the earlier constitution, the Chancery Court relied heavily on the *Wilmington City Ry. Co.* case of 1894. In *Wilmington City Railway Co. v. People's Railway Co.*, the Chancery Court addressed two key questions left unresolved by the earlier *Wilmington City* decision, the first being whether the reserved power of revocation by the legislature of charters granted under the constitution of 1831 existed under the present constitution.[130] The second question resolved by the court was whether "the general incorporation law passed in accordance with the provisions of the new constitution revoked the exclusive right" of the first railway company to operate within the boundaries established in its charter.[131]

Counsel for the Wilmington City Railway Company argued that Delaware had relinquished "by the Constitution of 1897 the reserved power of revocation by the legislature which formerly it possessed in the case of all charters granted under the Constitution of 1831."[132] In refuting this argument, the court explained the broad powers granted to the legislature by Delaware citizens. The court quoted Judge Cooley's conclusion that in the creation of a legislature "the people must be understood to have conferred the full and complete power, as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may see fit to impose."[133] The court summarized the general legislative powers as including "the power to revoke or amend a corporate charter" and stated that the only limitation on this power was the inhibition on the impairment of contracts contained in the U.S. Constitution.[134] This general legislative power of revocation, as reviewed in the first *Wilmington City* case, becomes "a part of all subsequent charters, as if written in the charters themselves ipsissimis

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[129] *People's Ry. Co.*, 47 A. at 247.
[130] *People's Ry. Co.*, 47 A. at 248.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 245 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 104 (6th ed. 1880)).
[134] *People's Ry. Co.*, 47 A. at 247.

verbis."[135] The court turned to a plain reading of the 1897 constitution which stated that the legislature could not "amend, renew, or revive" corporate charters and stated that the language did not "prohibit expressly their revocation."[136] Finally, the court turned to a discussion of the ancient roots of corporate charter revocation remedies and asked whether it was a plausible reading of the constitution, in light of this history, to hold that the legislature no longer possessed the power to revoke corporate charters. The court declared that it was a "plain and obvious" interpretation that the constitution intended to preserve the common law, in which "charters are forfeited for abuse, misuse, or nonuse by proceedings in quo warranto."[137] The Chancery Court further drew a parallel between the human death penalty and the corporate death penalty and stated that "forfeiture of corporate life is the judgment in case a corporation be convicted upon information in the nature of *quo warranto*," and that to interpret the constitution as an instrument that would convert the revocable charters into irrevocable ones would not be consistent with English common law or state jurisprudence.[138]

B. Judicially Defining Misuse and Abuse of Corporate Charter Powers: Delaware's Threshold for Revocation

In *Southerland ex rel. Snider v. Decimo Club, Inc.*, the Chancery Court was given another opportunity to review the scope of the corporate charter revocation statute.[139] In *Decimo Club*, the Attorney General sought to revoke and forfeit the charter of the defendant, a corporation incorporated under the not-for-profit provisions of Delaware law. The complaint alleged that the corporation was operated for the "personal pecuniary benefit and advantage of its organizer."[140] The membership of the club at the time of the suit consisted of 60,000 individuals with thirty-seven chapters. The Club had also incorporated the Decimo Trust, which allowed membership fees to be funneled directly to members of the Club who sat on the Board of Trustees. The Attorney General alleged that the Club had misused and abused its charter powers by engaging in a "for-profit" enterprise.

In discussing the remedy of charter revocation, the court stated that "[i]t was not the intention of the Legislature to allow the easy and liberal

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[135] *Id.* at 248.
[136] *Id.* at 249.
[137] *Id.*
[138] *Id.*
[139] Southerland *ex. rel.* Snider v. Decimo Club, Inc., 142 A. 786 (Del. Ch. 1928).
[140] *Id.* at 787.

provisions of the corporation and revenue statutes applicable to corporations organized not for profit to be enjoyed by corporations whose purpose is in fact to engage in business for profit."[141] The court declared that charter revocation must be exerted even though courts are "reluctant to pronounce a sentence of death upon a corporation for abuse of franchise [where there is a] clear case of abuse of corporate privileges."[142] Finally, the court declared that "courts will not hesitate to pass the sentence" when the corporation misuses or abuses "corporate powers, privileges and franchises."[143]

The Court of Chancery had an opportunity to further define the issue of what activities constitute abuse and misuse of corporate charter powers in *Young v. National Association for Advancement of White People, Inc.*, in which the Attorney General alleged that the corporation had abused their corporate franchise:

> by fomenting racial tension and hatred; by intimidating Delaware school boards, causing boycotts designed to bring about the closing of Delaware public schools, promoting meetings calculated to disturb the peace and incite to riot and by encouraging parents of white children to keep their children out of school in violation of the Delaware school laws.[144]

The Attorney General petitioned the court for injunctive relief that would restrain the defendant from exercising corporate powers prior to a hearing on revocation of its corporate charter. The central question, as phrased by the court, was whether "the facts now before the court disclose such threatened abuse of corporate privileges and franchises as to require preliminary injunctive relief for the State."[145] The court began its discussion by declaring that "[t]here is no question but that this Court will forfeit a corporate charter where the abuse of its privileges and franchises is clear."[146] The court then looked to the New York *North River Sugar* case, in which the questions posed by the New York Court of Appeals were whether the defendant corporation had "exceeded or abused its powers" and whether "that excess or abuse threaten[s] or harm[s] the

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[141] *Id.* at 792.
[142] *Id.* at 792-93.
[143] *Id.* at 793.
[144] Young v. National Ass'n for Advancement of White People, 109 A.2d 29, 30 (Del. Ch. 1954).
[145] *Id.* at 31.
[146] *Id.* (citing Southerland v. Decimo Club, 142 A. 786 (1928)).

public welfare."[147] The court concluded that "a sustained course of fraud, immorality or violations of statutory law" comprises the crux of the corporate charter revocation inquiry.[148] In application of this standard to the case at hand, the court queried whether any action was required "by this court now in order to prevent irreparable injury to the State."[149] In answering in the negative, the court ruled that even though the defendant "urged the use of boycott and participated actively in an effort to bring about violation of the laws of Delaware having to do with compulsory school attendance," it appeared that such activities "no longer constitute[d] a threat to school attendance."[150] Finally, the court concluded that there was "nothing in the record to support a charge of threatened violation of the laws concerning sedition or riot."[151]

The court had a final opportunity to interpret the corporate charter revocation powers of the Attorney General in *Craven v. Fifth Ward Republican Club, Inc.*, in which the Attorney General alleged that the defendant corporation had misused and abused its corporate powers by illegally selling alcoholic beverages.[152] Defendant corporation had been established as a nonprofit organization to "administer charitable aid and assistance to its members" and to "cultivate and inculcate in the members thereof, sound moral, and social principles."[153] The Attorney General further alleged that the operation of the defendant as a nonprofit corporation was a sham and that "the conduct of the defendant, as alleged, constitute[d] an abuse and misuse of its charter."[154]

The court stated that the president of the nonprofit corporation had been convicted four times in the past seven years for illegal liquor sales. The president, when questioned about the sales, had also refused to answer investigators concerning the crimes. On the president's contention that individual charges were solely against him, and could not be directed against the corporation, the court held that this was "a distinction without a difference" because "a corporation generally acts through agents and [the president] was admittedly its agent during most if not all of the period involved."[155] The court ruled that the four convictions in addition to a

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[147] *Young*, 109 A.2d at 31 (quoting People v. North River Sugar Ref. Co., 24 N.E. 834, 835 (1890)).

[148] *Young*, 109 A.2d at 31.

[149] *Id.* at 32.

[150] *Id.*

[151] *Id.*

[152] Craven v. Fifth Ward Republican Club, 146 A.2d 400 (Del. Ch. 1958).

[153] *Id.* at 400-01.

[154] *Id.* at 401.

[155] *Id.* at 402.

"self-incrimination plea of the defendant's president in connection with its current year's operation" was enough to "show the most fragmentary use of the corporation for the purposes stated in its charter."[156] The court declared that "[c]ontinued serious criminal violations by corporate agents in the course of the discharge of their duties could very well constitute the misuse of a charter."[157] Finally, the court held that a preliminary injunction would issue because the court held "ancillary discretionary power to act by way of injunction" under the charter revocation statute and because a balancing of the equities favored the plaintiff because the injunction sought only to "enjoin illegal activity."[158]

C. *Environmental Crimes Quo Warranto* and Mandamus: Forcing the Hand of the Delaware Attorney General

Presented with a "clear" case of environmental statutory wrongdoing by a "proper party," the Delaware Attorney General would be obligated to take action under the corporate charter revocation statute as it has been interpreted. If, for some reason, the Attorney General should refuse to carry out its fundamentally non-discretionary duty under the statute to bring revocation proceedings, a mandamus action must be brought to enforce this constitutional duty of the Attorney General.

Prior to bringing a mandamus action to enforce the non-discretionary duty of the Attorney General to initiate revocation proceedings, citizen organizations would be forced to exhaust administrative remedies. This would first be done through completing research on the legal history of the corporation. Examples abound of exhaustive research completed upon Union Carbide Corporation and WMX Technologies. Secondly, a letter detailing the environmental and labor statutory violations of the corporation must be sent to the Attorney General along with supporting materials. Examples of this mechanism are the letters sent from the Community Environmental Legal Defense Fund (CELDF) to the Attorneys General of West Virginia and Delaware, outlining the violation histories of CSX and WMX Technologies. Finally, a period of time must elapse to allow the Attorney General to initiate revocation proceedings. Afterwards, if the Attorney General refuses to take the administrative action, the citizen organization would use the researched compliance history in a lawsuit filed in the Superior Court of Kent County, the proper jurisdiction for a suit

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[156] *Id.*
[157] *Craven*, 146 A.2d at 402.
[158] *Id.* at 402.

brought to compel the Attorney General to bring revocation proceedings against the corporation.

Of course, many issues have been left unresolved by the century of litigation surrounding the corporate charter revocation statute. An interpretation of "a proper party" has never been offered by the Delaware courts, nor have the state courts decided the "standing" of litigants to bring a mandamus action when only a procedural injury has occurred. These inquiries and the forging of "new law" are destined to become the spearhead of citizen control over their communities and corporations. As environmental and health harms worsen, it is inevitable that corporate charter revocation law will begin playing a larger role in determining which entity controls our physical health, our fiscal health, and the health of the environment and the planet's ecosystems.

VI. Conclusion: Organizing Strategies for Reasserting Citizen Control

Several organizations and individuals have recognized the necessity of pursuing corporate harm at its source rather than confronting corporate deeds after they are completed. Richard Grossman and Ward Morehouse, of the Program on Corporations, Law and Democracy, travel the country to establish Democracy schools that teach corporate history and advocate the "re-thinking" of the structure of corporations. So far, their efforts have resulted in new organizations in California, Oregon, Wisconsin, and Maine. The Program established nine seminars on corporate history and on "Rethinking the Corporations" at the recent Public Interest Environmental Law Conference in Eugene, Oregon.

Bob Benson, a law professor at Loyola University, is currently working to assemble key pieces of legislation that will grant states greater powers over corporations. Many of these reforms deal with the internal structure of the corporate form itself, a theme exemplified by the Non-Shareholder Constituency legislation which allows the corporation to take other interests, besides the profit margin, into consideration when making economic decisions within the corporation.

The Community Environmental Legal Defense Fund (CELDF) is currently pursuing a judicial solution to the problems posed by corporations that consistently violate statutory and regulatory law. CELDF is currently involved in actions in Delaware, Pennsylvania, and Washington to revoke the charters of several major corporations. CELDF also provides grassroots activists with the information and access to legal services necessary to pursue these initiatives. Recently, CELD released its

Citizens' Guide to Corporate Charter Revocation, which is intended to assist other lawyers and activists.

It is these actions, brought in the name of a sovereign people, that must be supported and encouraged if the corporate yoke is to be thrown off and the task of building sustainable corporations is to begin. Only when there is sufficient community control over the corporate form, and a means to protect citizens against corporate abuse, will true rebuilding of citizen sovereignty begin.