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Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations

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ARTICLE

**Awakening a Sleeping Giant: Creating a
Quasi-Private Cause of Action for
Revoking Corporate Charters in
Response to Environmental
Violations**

BY THOMAS LINZEY*

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I. Introduction

Individuals who wish to carry on a business as a "corporation" have been subject to procedures which have evolved from colonial American "special chartering" to the present day process of incorporating according to applicable state general incorporation statutes. Through the process of "incorporation," corporate owners gain access to limited liability and the corporation is granted the judicial legal fiction of "personhood,"¹ which guarantees a corporation many of the

1. See *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886), where the Supreme Court refused to consider the proposition that a corporation was not a "person" for the purposes of the Fourteenth Amendment to the United States Constitution. *Id.* at 396.

same constitutional rights individuals are entitled to under United States law.² While the corporate entity does receive many benefits from its "personhood" status, it very often gains benefits above those of normal citizens. Although a corporation is held liable for all of its actions,³ corporations often violate federal and state environmental laws and continue to operate unscathed.⁴ Corporate liability for environmental violations, although extensive, does not harm many corporations as they are able to pass the totality of their overall costs on to the consumer.⁵ The power of the Attorney General of a state to revoke corporate charters, and thereby end the corporate life, may be the only effective deterrent for corporate polluters.

In early American history, the corporate existence was viewed as a "grant" of privilege from the state, and corporations were allowed to exist only to "perform a [public] service considered of general value."⁶ What was once the exclusive domain of colonial American legislatures, the power to grant charters to corporations, has fallen under the control and administration of state regulatory agencies designated specifically for that purpose.⁷ Thus, the granting of a corporate

2. Many rights granted to natural persons are not granted to corporations. For instance, a corporation cannot claim a Fifth Amendment privilege and refuse to produce incriminating documents. Nor can the corporation, in some cases, claim attorney-client privilege. See ZYGMUNT J.B. PLATER, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 335-36 (1992) (citing *Hale v. Henkel*, 201 U.S. 43 (1906); *U.S. v. Morton Salt*, 338 U.S. 632 (1950); and *Bellis v. U.S.*, 417 U.S. 85 (1974) for the bar on the use of the Fifth Amendment privilege; citing *People v. Keuffel & Esser Co.*, 227 Cal. Repr. 13 (1986) for the proposition that the defense of attorney-client privilege is barred from corporate use).

3. RALPH NADER ET AL., CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR FEDERAL CHARTERING OF GIANT CORPORATIONS 26, (1976).

4. See *infra* notes 145-49.

5. NADER ET AL., *supra* note 3, at 5.

6. *Id.* at 26.

7. See, e.g., 15 PA. CONS. STAT. ANN. §§ 1301-1311 (1988) for representative sections concerning state incorporation. The Secretary of State is the designated agency under Pennsylvania law for filing of the Articles of Incorporation. Under Pennsylvania law, valid incorporation requires an original corporate name (§ 1303), a lawful corporate purpose (§ 1301) and Articles of Incorporation, which must contain the address of the registered office, a statement as to whether the corporation is organized as a stock or non-stock corpora-

charter, once designated as a "special charter"⁸ and as a "creation [of] the state,"⁹ has disintegrated into merely an administrative process that exercises little, if any, substantive restraints on the activities of the corporation.¹⁰ The agency designated by statute to approve the charter, in most states, merely reviews the submitted articles of incorporation and determines whether "all the necessary information has been provided, [and whether] all the papers have been properly executed."¹¹ States also review the submitted articles to discover whether there is anything "in the articles of incorporation that violates state law or policy."¹²

Along with this move towards administrative informality in the arena of initial incorporation has come the inevitable shift in public opinion towards routine acceptance of a corporation's right to exist.¹³ The chartering of a corporation has

tion, the term for existence of the corporation, and a statement of voting rights and preferences if a stock company is being formed (§ 1306). The Articles must then be filed with the Secretary of State and a notice of incorporation must be published in a newspaper of general circulation (§ 1307). Finally, an initial meeting of incorporators and/or directors must be held to adopt bylaws for the corporation (§ 1310). The corporate existence begins upon the date of the filing of the Articles of Incorporation (§ 1309).

8. NADER ET AL., *supra* note 3, at 26.

9. JOHN DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE* 16 (1971).

10. Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

11. CAROLYN M. VELLA & JOHN J. MCGONAGLE, JR., *INCORPORATION: A GUIDE FOR SMALL BUSINESS OWNERS* 61 (1984). The permissiveness of these enabling-type statutes has come under attack by some commentators. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); and Alfred F. Conard, *An Overview of the Laws of Corporations*, 71 MICH. L. REV. 621, 631-33 (1973). But see ALFRED F. CONARD, *CORPORATIONS IN PERSPECTIVE* 11-16 (1976), stating that "[w]e should guard ourselves . . . against assuming that all of the liberality engendered by the 'race of laxity' entails social or economic evils." *Id.* at 12.

12. *Id.* See also WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* 208 (1993), which states that "[i]f the purpose is one for which the statute does not permit incorporation, the secretary of state or other state official may refuse to file the articles of incorporation." *Id.* (citing *Smith v. Director, Corp. & Securities Bureau*, 261 N.W.2d 228 (Mich. 1977)).

13. See generally Harvey L. Pitt and Karl A. Grokaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990).

become a routine exercise and has evolved from being perceived as a privilege by law and popular culture to being a mere formality finalized by the official filing of forms necessary for incorporation. Even in light of recent wide scale environmental and public health damage caused by the direct activities of large corporations,¹⁴ public scrutiny tends to be directed towards the levying of criminal and civil penalties rather than an attack aimed at the corporate "heart" itself. It seems that the public has forgotten that the states retain power over the corporate fiction, not only through the prosecution of criminal acts, but through direct control over the corporate charter itself and its authority to revoke the charter if the corporation abuses or misuses its charter privileges.

Forty-nine states and the District of Columbia still possess statutes that grant an agent of the state the power to revoke corporate charters.¹⁵ These statutes grant the Attor-

14. See generally Robert Manor, *Court: Olin Off Hook in Plant Cleanup; Consolidated Aluminum Corp. Facility*, AMERICAN METAL MARKET, Oct. 12, 1993, at 7; Paula Dittrick, *Panhandle Eastern Says Adverse Ruling Won't Affect Earnings; Environmental Cleanup*, THE OIL DAILY, June 4, 1993, at 5; Charles Seabrook, *Kaolin & Environment: Making a Disaster Out of a Mountain - Mining Firm Appeals Finding For Damages*, THE ATLANTA JOURNAL, Mar. 13, 1994, at 8; AMERICAN POLITICAL NETWORK, *Georgia: Strip Mining Firm Hit with Huge Penalty*, GREENWIRE, July 7, 1993; John Voskuhl, *Contaminated by Mistrust; Chemical Cleanup Brings Dayhoit Uncertainty, Not Relief*, THE COURIER-JOURNAL, Apr. 18, 1992 at 1A.

15. See, e.g., ALA. CODE § 6-6-590 (1994); ARIZ. REV. STAT. ANN. § 10-1430 (effective 1/1/96) (1994); ARK. CODE ANN. § 4-75-205 (Michie 1993); CAL. CIV. PROC. CODE § 803 (Deering 1994); CAL. BUS. & PROF. CODE § 18410 (Deering 1993); CAL. CORP. CODE § 1801 (Deering 1994); COLO. REV. STAT. § 7-114-301 (1994); CONN. GEN. STAT. § 35-36a (1993); DEL. CODE ANN. tit. 8, § 284 (1993); D.C. CODE ANN. § 29-419 (1995); FLA. STAT. ANN. § 607.1430 (West 1994); GA. CODE ANN. §§ 7-1-92, 14-4-160 (Michie 1994); HAW. REV. STAT. § 842-5 (1993); IDAHO CODE § 490.1430 (1994); ILL. REV. STAT. ch. 805, para. 20/1 (1994); IND. CODE ANN. § 23-1-47-1 (Burns 1994); IOWA CODE ANN. § 490.1430 (West 1995); KAN. STAT. ANN. § 17-6812 (1993); KY. REV. STAT. ANN. § 271B.14-300 (Baldwin 1993); LA. REV. STAT. ANN. § 12:163 (West 1993); ME. REV. STAT. ANN. tit. 13-A, § 1111 (West 1994); MD. CORPS. & ASS'NS CODE ANN. § 3-513 (1993); MASS. ANN. LAWS ch. 155, § 11 (Law. Co-op. 1994); MICH. COMP. LAWS § 600.4521 (1994); MINN. STAT. ANN. § 556.07 (West 1993); MISS. CODE ANN. §§ 11-39-1, 11-39-3 (1993); MO. REV. STAT. § 355.255 (1993); MONT. CODE ANN. § 35-6-102 (1994); NEB. REV. STAT. § 25-21,121 (1994); NEV. REV. STAT. ANN. § 598A.180 (Michie 1993); N.H. REV. STAT. ANN. § 293-A:14.30 (1994); N.J. REV. STAT. § 14A:12-6 (1993); N.M. STAT. ANN. § 53-16-13 (Michie 1994); N.Y. BUS. CORP.

ney General the discretion to initiate proceedings to revoke corporate charters whenever the corporation has breached one of the criterion established by the legislature in the statute.¹⁶ These statutes, widely used until the turn of the century to challenge the existence of corporations,¹⁷ have become surplusage in state statutory codes due to the refusal of state officers to exercise these powers in light of the increasing reliance by the populace and the state on the corporate structure for the provision of income and sustenance. Other reasons for this disfavor include the close relationship of corporations and the political functioning of the state and the emergence of the "regulatory state" which provides limited legal remedies for corporate abuses.¹⁸

LAW § 1101 (McKinney 1994); N.C. GEN. STAT. § 55-14-30 (1994); N.D. CENT. CODE § 10-19.1-118 (1994); OHIO REV. CODE ANN. § 2733.02 (Baldwin 1994); OKLA. STAT. tit. 15 § 567 (1994); OKLA. STAT. tit. 12, § 1532 (1994); OR. REV. STAT. § 30.580 (1993); PA. STAT. ANN. tit. 71, § 824 (1994); R.I. GEN. LAWS § 7-1.1-87 (1993); S.C. CODE ANN. § 33-14-300 (Law. Co-op. 1993); S.D. CODIFIED LAWS ANN. § 21-28-12 (1994); TENN. CODE ANN. § 48-24-301 (1994); TENN. CODE ANN. § 29-35-101 (1994); TEX. CORPS. & ASS'NS CODE ANN. § 3A-Art.7.01 (West 1994); UTAH CODE ANN. § 16-10a-1430 (1994); VT. STAT. ANN. tit. 11A, § 14.30 (1994); VA. CODE ANN. § 8.01-636 (Michie 1994); WASH. REV. CODE ANN. § 7.56.010 (West 1995); W. VA. CODE § 53-2-1 (1994); WIS. STAT. ANN. § 180.1430 (West 1994); WYO. STAT. § 17-16-1430 (1994).

16. See, e.g., N.Y. BUS. CORP. LAW § 1101 (McKinney 1994) which states that:

(a) The attorney general may bring an action for the dissolution of a corporation upon one or more of the following grounds: . . .

(2) That the corporation has exceeded the authority conferred upon it by law, or has violated any provision of law whereby it has forfeited its charter, or carried on, conducted, or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.

17. See, e.g., *People v. Equity Gaslight Co.*, 36 N.E. 194 (N.Y. 1894); *People v. Ulster & D.R. Co.*, 28 N.E. 635 (N.Y. 1891); *People v. The Broadway Railroad Company*, 26 N.E. 961 (N.Y. 1891); *People v. Buffalo Stone & Cement Co.*, 29 N.E. 947 (N.Y. 1892); *People v. North River Sugar Refining Co.*, 24 N.E. 834 (N.Y. 1890); *People v. Westchester Traction Co.*, 108 N.Y.S. 59 (App. Div. 1908); *People v. Abbott Maintenance Corp. and Instalment Department, Inc.*, 200 N.Y.S.2d 210 (Sup. Ct. 1960).

18. Edward Greer, *Administrative Law and Chronic Underregulation in The Modern State*, in *A LESS THAN PERFECT UNION* 213 (1988) (arguing that "[t]he mystery of the so-called crisis of administrative law is thus readily fath-

These unused statutes accomplish little if they are not exercised frequently by the state Attorney General to curb corporate abuses. A quasi-private cause of action, tailored to challenge the discretion exercised by the Attorney General in deciding not to bring a charter revocation action, is necessary to facilitate a process whereby communities can undertake direct challenges to the corporate existence. Communities often are affected by corporate environmental violations the most, and therefore, they would benefit greatly by reviving the use of revocation statutes and subsequently creating a private cause of action. By using the framework offered by this article, it is hoped that a gradual re-democratizing of the corporate community¹⁹ can begin to allow injured citizens to regain control of previously unaccountable corporations which violate environmental laws.²⁰

The difficulty of proving causation in meritorious environmental litigation directed at corporate activities²¹ provides another argument in favor of direct community authority over corporate charters. Many times, corporations remain unscathed by simply using defenses aimed exclusively at challenging the tenuous causation chain despite ac-

omable as a manifestation of the economic costs that society as presently constituted cannot bear" and that therefore the system is unable to effectively ameliorate corporate lawbreaking).

19. KEMPER SIMPSON, *BIG BUSINESS, EFFICIENCY, AND FASCISM: AN APPRAISAL OF THE EFFICIENCY OF LARGE CORPORATIONS AND OF THEIR THREAT TO DEMOCRACY* 62 (1941) (stating that "... american business, especially big business, would loudly deny any intention to destroy democracy. But in circumventing and limiting competition, it may do exactly that").

20. See ARTHUR MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* 15 (1968), stating that a corporation "can be validly termed a 'private' government" and that "[i]n a very real sense, corporate power is not responsible or accountable to anyone, except in a very broad and ambiguous way."

21. See William Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1720 (1992) (examining the proposition of defenses based on remote or intervening causation in hazardous substances cases); Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469 (1988) (examining the myriad of ways causation in hazardous substances cases may be proven through the differing levels of legal causation deemed applicable); *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 323 (1990) (discussing the insufficiency of the tort system to deter environmental wrongs).

tion through direct mechanisms, "citizen-suit" statutory provisions,²² or state environmental agencies that pursue civil and criminal penalties for enforcement.²³

Part II of this Article presents a brief history of the corporate charter from the early American colonial period to the present day while examining pertinent case law that has substantially developed the law governing the repeal and amendment of charters. Part III of the Article concentrates on the state law of New York, which grants discretion to the Attorney General to revoke corporate charters whenever certain key mandated standards of conduct are breached. This Part also explores the history of the charter revocation case law in New York, and examines the threshold activities established by statute and the judiciary which trigger corporate charter revocation. The focus is only on charter revocation statutes and does not include discussions of the various other methods of corporate accountability, including shareholder-derivative actions, *ultra vires* actions, and corporate criminal sanctions.²⁴ Part IV of this Article proposes a quasi-private cause

22. Citizen suit provisions are included in major federal environmental legislation to allow for private enforcement of non-discretionary duties assigned to agencies. See Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994) [hereinafter ESA]; Federal Water Pollution Control Act (Clean Water Act) § 505, 33 U.S.C. § 1365 (1988) [hereinafter CWA]; Solid Waste Disposal Act (Resource Conservation & Recovery Act) § 7002, 42 U.S.C. § 6972 (1988) [hereinafter RCRA]; Air Pollution Prevention Act (Clean Air Act) § 304, 42 U.S.C. § 7604 (1988 & Supp. V 1993) [hereinafter CAA]; Comprehensive Environmental Response, Compensation, and Liability Act § 310, 42 U.S.C. § 9659 (1988) [hereinafter CERCLA]. For a discussion of citizen suits brought under the various environmental laws that allow such an action, see MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1993).

23. See Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 338, 348-51 (1990) (discussion of evidentiary problems which frustrate efforts to prosecute environmental violators).

24. These actions, while allowing a certain constituency to have a degree of control over the corporation, are inadequate vehicles for controlling a multinational corporation that has consistently violated state law. I believe that these mechanisms offer too little control, and do little to curb persistently illegal major corporate abuses of state law and communities. Whether the suits are in the form of stockholder derivative suits, or for public nuisance, private nuisance, or statutory-based litigation, these remedies offer only piecemeal solutions to the systemic abuses associated with corporate accumulations of wealth.

of action where citizens could obtain judicial review of the Attorney General's decision not to bring a revocation action. Such an action may lead to revocation of corporate charters when the Attorney General is reluctant to prosecute. This Part also examines the hurdles that need to be overcome when seeking judicial review of the Attorney General's decision not to bring a revocation action. The New York judiciary's increasing willingness to grant mandamus to compel the exercise of prosecutorial discretion and the recognition of an "equitable" exception to the general rule of non-reviewability of prosecutorial discretion is explored. Also examined are the policy concerns supporting the non-reviewability of prosecutorial decisions, and a possible narrow exemption to the presumption of non-reviewability which avoids these policy concerns. The proposed exemption would concentrate upon the unique "two-step" nature of the charter revocation statute and conclude that judicial review should be exercised over Attorney General decisions made under this category of statutes. Finally, Part V of this article explores and proposes possible alternative corporate forms that would allow for greater community control of corporate activities.²⁵

25. One topic not directly addressed by this article is the defenses available to a corporation in defending a revocation action once the suit reaches the merits stage of the litigation. Several remedies are available to the corporation, including defenses based on the doctrines of waiver and estoppel. Both defensive arguments are based upon the implied or direct recognition by the state of the right of the corporation to exist.

To assert a waiver defense, the corporation would argue that a waiver by the state to prosecute can be implied and that the existence of a long delay in instituting proceedings to revoke a charter has barred the cause of action. The lead case explaining the elements of this defense is *State ex rel Mylrea v. Janesville Water-Power Co.*, 66 N.W. 512 (Wis. 1896), in which the court declared that "[t]he state may waive the right to bring an action on behalf of the public by mere delay in moving to institute proceedings while the corporation, in carrying out, in good faith, the purposes of the organization, expends large sums of money." *Id.* at 515. The court stated that waiver will not be a useful defense when there exists a "clear, willful misuse, abuse, or nonuse of the franchises sought to be forfeited, or a violation of law." *Id.* at 514.

To assert an estoppel defense, the corporation would argue that a bar to revocation exists if there is long acquiescence by the state to corporate acts. The lead case discussing this defense is *People ex rel Moloney v. Pullman's Palace-Car Co.*, 51 N.E. 664 (Ill. 1898), in which the court addressed the applicability of the defense. The court limited the role of this defensive argument, and

II. The History of the Corporate Charter and Its Relationship to Sovereign Authority

The corporate form of business and the large corporations that increasingly control our economy and our politics did not always possess the almost unlimited powers that serve as their primary attribute today. The transformation of the corporate business form in America from the status of a relatively insignificant association to that of a dominant conglomeration of capital was a laborious one. Prior to the colonization of America, the English Government had granted only a few "charters" of operation to businesses, two of which included the well-known East India Trading Company and the Hudson's Bay Company.²⁶ With the emergence of America as a source for natural resources and raw materials, Britain began chartering the American colonies to strengthen the English claim in the "new" continent.²⁷ These colonial charters, which controlled every activity of the colonial governments, restricted the powers of the colonies and limited their trading partners.²⁸ The charter creating Maryland, for example, "required that the colony's exports be shipped to or through England."²⁹

The American colonies, following the experience of the English monarchy, began granting "special charters" through the colonial assemblies which outlined the specific purpose of and restrictions placed upon those groups seeking incorporation.³⁰ Colonial law made no distinction between "public" or "private" corporations in that they both were chartered by the same method, through the direct vote of the legislature.³¹

stated that it is not applicable to "the state when acting as a sovereign." *Id.* at 676. The court also stated that "acquiescence is [not] to be inferred from the failure to invoke the aid of the courts at an early day." *Id.* at 677.

26. RICHARD T. GROSSMAN, *TAKING CARE OF BUSINESS: CITIZENSHIP AND THE CHARTER OF INCORPORATION* 6 (1993).

27. *Id.*

28. *Id.*

29. *Id.*

30. THOMAS FROST, *A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS* 1 (1908).

31. "Previous to the year 1837, charters could be procured only by special act of the legislature." FROST, *supra* note 30, at 1. See LARRY D. SODERQUIST,

The test for chartering was whether or not the corporation would perform a service for the "public good."³² In return, corporations were granted "the power to purchase and hold property collectively, and the right to sue or be sued collectively."³³ Most importantly, they were granted monopoly privileges in the field of the charter grant.³⁴

Corporations were thus utilized by the colonies for "public or near public" purposes such as "to build canals, bridges, or toll roads."³⁵ They were strictly established by the legislature through the special chartering process,³⁶ and were established for limited time periods.³⁷ Under these limitations, the number of corporations remained small; by 1800, only 355 corporations were incorporated in the United States.³⁸

Implicit in this special chartering process used by the state legislatures was the reserved legislative ability to revise or repeal the original charter.³⁹ The importance of restoration of the colonial economy following the Revolutionary War stimulated an increase in the granting of corporate charters.

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."). In 1811, New York passed a "general" corporation statute, that provided for the incorporation of certain selected types of businesses. In 1837, Connecticut passed the first all-purpose general incorporation statute. *Id.*

32. ASHBEL GREEN, A TREATISE ON THE DOCTRINE OF ULTRA VIRES BEING AN INVESTIGATION OF THE PRINCIPLES WHICH LIMIT THE CAPACITIES, POWERS, AND LIABILITIES OF THE CORPORATIONS 30 (1880). See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 12 (1991). "During the preclassical period, states such as Massachusetts, Connecticut, and New York relied heavily on corporate charters to encourage specific kinds of economic development, including turnpikes, bridges, and banks." *Id.*

33. See NADER ET AL., *supra* note 3, at 26.

34. *The Supreme Court, 1993 Terms Leading Case*, 108 HARV L. REV. 139, 154 (1994).

35. ROBERT HAMILTON, THE LAW OF CORPORATIONS 6 (1991). See SODERQUIST, *supra* note 31.

36. SODERQUIST, *supra* note 31, at 11.

37. *Id.* at 13.

38. MARK V. NADEL, CORPORATIONS AND POLITICAL ACCOUNTABILITY 209 (1976). Two hundred and nineteen of these early corporations were "turnpike, bridge, and canal companies; only six were manufacturing companies." *Id.*

39. Examples of legislatures reserving the right to amend or repeal charters are found in the state constitutions of Oklahoma and Mississippi. MISS. CONST. ANN. art. VII, § 178 (1993); OKL. CONST. art. IX, § 47 (1995).

Subsequently, there was a corresponding increase in judicial challenges to the state's legislative omnipotence over chartering powers.⁴⁰ The quest for corporate independence growing from the economic necessity of the time period precipitated the 1819 landmark case of *Trustees of Dartmouth College v. Woodward*,⁴¹ in which the Supreme Court held that a corporate charter "is a contract, the obligation of which cannot be impaired without violating the [C]onstitution of the United States."⁴²

Dartmouth College arose as a challenge to the New Hampshire legislature's attempt to revise the charter originally granted to Dartmouth College.⁴³ New Hampshire originally chartered Dartmouth in 1769 at the request of Reverend Wheelock, who had raised private donations to establish the college.⁴⁴ In 1815, the State attempted to revise the original charter after the Board of Trustees dismissed Wheelock from the Presidency following a "nasty fight" between the two.⁴⁵ The revision sought by the legislature would have provided for an increase in the number of Trustees and would have created a "Board of Overseers."⁴⁶ The Trustees refused to abide by the act of the legislature, and proceeded to challenge the legislative action in court, con-

40. See ABRAM CHAYES, *The Modern Corporation and the Rule of Law* in THE CORPORATION IN MODERN SOCIETY 35 (Edward Mason, ed. 1959) (stating that "[w]hat had been a rare, privileged entity existing at the will of the sovereign, exercised deliberately for great ends of policy, became in the course of hardly a half-century's development, from 1800 to 1850, a form of organization available almost of right to easily qualified people feeling the need for it."). See also ARTHUR SELWYN, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 50-51 (1976).

41. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

42. *Id.* at 650.

43. *Id.* at 626-27. For extended discussion of the *Dartmouth College* case, see generally, 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 L. REV. 183, 185 (1934). For an extensive list of pre-1976 works surrounding the *Dartmouth College* case, see Campbell, *infra* note 44, at n.3.

44. Bruce Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L.J. 643, 644 (1981).

45. *Id.*

46. *Dartmouth College*, 17 U.S. at 554.

tending that the attempted revision of the charter was a "forcible intrusion" that violated the "legal rights" granted to them in the original charter.⁴⁷ The Trustees also argued that "corporate franchises [could] only be forfeited by trial and judgment."⁴⁸

In its ruling, the Court laid the framework for weakening the common law principle of retention of sovereign power over state chartered corporations.⁴⁹ The reasoning in the opinion flowed directly from the Court's strict interpretation of contractual principles.⁵⁰ In response to the New Hampshire counsel's argument that the charter was not "a contract as is contemplated by the [C]onstitution . . . but . . . a grant of a public nature,"⁵¹ Chief Justice John Marshall, in the majority opinion, replied that the corporation "is no more a State instrument, than a natural person exercising the same powers would be."⁵² Marshall reasoned that the "constitution of our country has placed [corporate charters] beyond legislative control."⁵³ He proclaimed the necessity of inviolate contracts as a means for keeping the legislature from "violating the right to property."⁵⁴ Under what became known as the *Dartmouth College* doctrine, a charter of a private corporation is protected by the Contracts Clause of the Constitution,⁵⁵ and thus, legislatures are prohibited from revising or repealing charters once granted.⁵⁶

47. *Id.* at 555.

48. *Id.* at 560 (citing *King v. Pasmore*, 3 T.R. 199, 244 (1789)).

49. *Id.* at 554.

50. *Dartmouth College*, 17 U.S. at 595.

51. *Id.* at 603-04.

52. *Id.* at 636.

53. *Id.* at 625.

54. *Dartmouth College*, 17 U.S. at 628.

55. U.S. CONST. art. I, § 10, cl. 1.

56. For the majority's discussion of the doctrine, see 17 U.S. 518 at 625-54. See also GREEN *supra* note 32, at 786 (stating that "[w]ithout some just reason, the crown cannot revoke a charter of incorporation or withdraw any of the privileges contained therein."). Furthermore, "*Dartmouth College* held that a state could not unilaterally amend a corporate charter that it had previously granted, because the charter constituted a contract and could not be changed without the grantee's consent unless the charter itself permitted such modification." HOVENKAMP, *supra* note 32, at 20.

The implications of the *Dartmouth College* decision were far-reaching. No longer would the corporation created by the sovereign be subjected to arbitrary interference. The corporation, instead of being viewed as a functionary of the state, providing goods and services that the state could not, began to assume an existence of its own. This posed a great threat to the state's control of corporate abuses, since the judiciary seemed willing to acquiesce to this autonomous existence and to reinforce this new "paradigm" under the rubric of contractual principles.⁵⁷

The emergence of the Jacksonians⁵⁸ following the *Dartmouth College* case was in part a reaction to the public outcry against the monopolistic hold being exercised by private chartered corporations. The Jacksonians wanted the advantages of incorporation to be readily available.⁵⁹ The resulting general incorporation acts that swept across the United States during this period, "shifted [incorporation] from a privilege bounded by certain public purposes to a relatively unencumbered right routinely dispensed by the states."⁶⁰ Many states, while adopting these acts, continued to limit charter purposes and duration.⁶¹ The state courts played a central role in this "power struggle" as states sought to curb the abuses of corporations which were acting outside or in violation of the scope of their charters.⁶² Many states

57. Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1452 (1987).

58. The Jacksonians were a political party whose political philosophy was "the less [that] government interferes with private pursuits the better for the general prosperity . . . [The] government's real duty . . . is . . . to leave every citizen and every interest to reap rewards of virtue, industry, and prudence." JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1910 (11 vols., New York: Bureau of National Literature, 1911), III. 344 (Sept. 4, 1837).

59. See NADEL, *supra* note 38, at 210. "[A]s more and more charters were requested," the notion of the charter "as a privilege for public purpose . . . faded." *Id.*

60. *Id.*

61. See NADER ET AL., *supra* note 3, at 32.

62. See, e.g., *State ex rel. Winston, Atty Gen. v. Seattle Gas & Electric Co.*, 68 P. 946, *reh'g denied*, 70 P. 114 (Wash. 1902); *Wilmington City Ry. Co. v. People's Ry. Co.*, 47 A. 245 (Del. 1900); *Syllabus in State v. Standard Oil Co.*, 116 S.W. 902 (Mo. 1909); *State v. Miss. Cotton Oil Co.*, 30 So. 609 (Miss. 1901).

pursued *quo warranto* actions,⁶³ which allowed the state Attorney General to revoke corporate charters for misuse or nonuse.⁶⁴ These ancient writs previously had been used by the English King to correct an abuse of office or franchise,⁶⁵ and codifications of the writs found their way into colonial law. *Quo warranto* was used extensively by the states during the Jacksonian period to correct corporate and governmental abuses,⁶⁶ since direct amendment of charters by the legislatures had been virtually foreclosed by the *Dartmouth College* decision.⁶⁷

The 1855 landmark case of *Dodge v. Woolsey*,⁶⁸ while not a *quo warranto* proceeding, provided the U.S. Supreme Court with an opportunity to further define the extent of corporate powers and the charter's role in determining the activities in

63. *Quo Warranto* actions are demand[s] made by the state upon some individual or corporation to show by what right they exercise some franchise or privilege appertaining to the state which, according to the constitution and laws of the land, they cannot legally exercise except by virtue of grant or authority from the state. 65 AM. JUR. 2D *Quo Warranto* § 1 (1995) (citing *State v. Harris*, 3 Ark. 570 (1841); *State v. Perkins*, 28 P.2d 765 (Kan. 1934); *Redmond v. State*, 118 So. 360 (Miss. 1928)). A modern example of a *Quo Warranto* statute provides:

7.56.010. Against Whom Information may be Filed. An information may be filed against any person or corporation in the following cases: . . . (5) Or where any corporation do, or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law.

WASH. REV. CODE § 7.56.010 (1994). For cases construing this *Quo Warranto* statute in actions brought against corporations in the state of Washington, see *State ex rel. Johnson v. Lally*, 370 P.2d 971 (Wash. 1962); *State ex rel. Troy v. Lumbermen's Clinic*, 58 P.2d 812 (Wash. 1936); *State ex rel. Hamilton v. Standard Oil Co.*, 28 P.2d 790 (Wash. 1934); *State ex rel. Attorney General v. Seattle Gas & Electric Co.*, 68 P. 946, *reh'g denied*, 70 P. 114 (Wash. 1902).

64. JOSEPH JOYCE, ACTIONS BY AND AGAINST CORPORATIONS AT LAW AND IN EQUITY 631 (1910) (citing Syllabus in *State v. Standard Oil Co.*, 116 S.W. 902 (Mo. 1909); *State v. Miss. Cotton Oil Co.*, 30 So. 609 (Miss. 1901); *Gardner v. The State*, 95 P. 588 (Kan. 1908)).

65. See Statute of Ann, 9 Ann ch. 20; Statute of William & Mary, 5 W. & M. ch. 18.

66. See *supra*, notes 58-67 and accompanying text.

67. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

68. 59 U.S. (18 How.) 331 (1855).

which the corporation could engage.⁶⁹ In *Dodge*, the Court continued the progression begun by *Dartmouth College* toward the view that granting a charter to a corporation established a contractual relationship between that corporation and the state.⁷⁰ These cases upholding contractual principles at the expense of state sovereignty set the stage for the loosening of state control over corporations.

In *Dodge*, the Court held that a charter provision setting the rate of taxation constituted a binding contract between the state and the corporation.⁷¹ In addition, the Court held that the enforcement of these contractual limitations should be extended to those with an immediate financial interest, namely the stockholders.⁷² The Court specifically held that a stockholder could intervene in a corporation's activities when the corporation sought to apply its "capital to objects not contemplated by its charter."⁷³ In *Dodge*, a stockholder of the Commercial Branch Bank brought suit against the bank's directors for refusing to challenge a tax assessment made against the bank in violation of its original charter.⁷⁴ The original charter had established that the bank was only responsible for payment of a charter-set tax.⁷⁵ Woolsey, the stockholder, sued Dodge and other directors of the bank for refusing to "take any step to prevent the threatened injury" to the corporation.⁷⁶ Woolsey argued that the new tax assessment violated the "10th section of the 1st [A]rticle of the [C]onstitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts."⁷⁷

69. *Id.*

70. For later Supreme Court cases which cite to this proposition, see *Wright v. Sill*, 67 U.S. 544 (1862); *Salt Co. v. East Saginaw*, 80 U.S. 373 (1871); *Erie Railroad Co. v. Pennsylvania*, 88 U.S. 492 (1874); *Pollack v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).

71. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 339 (1855).

72. *Id.* at 342.

73. *Id.*

74. *Id.* at 335.

75. *Dodge*, 59 U.S. at 339.

76. *Id.* at 334.

77. *Id.* at 339.

In *Dodge*, the Supreme Court upheld the right of the shareholder to intervene, and declared that "a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied."⁷⁸ The Court distinguished between "error of judgments" and "breaches of duty," stating that the refusal to challenge the additional tax was a "breach of duty," and therefore actionable.⁷⁹ In the dissenting opinion, Justice Campbell supported the view that only the State has the power to challenge the actions and existence of the corporation. He stated that "[t]he allowance of this plea interposes this court between these corporations and the government and people of Ohio, to which they owe their existence, and by whose laws they derive all their faculties."⁸⁰ Finally, he noted that the United States itself is responsible for curbing corporate abuses, and argued that no one else is in a position to determine "when the public interests demand the suppression of bodies whose existence or modes of action are contrary to the well-being of the state."⁸¹

The decades following the *Dodge* case were punctuated by the capital accumulation of several corporations which began to pursue the emerging national market.⁸² The construction of a national transportation network, the completion of the first transcontinental rail line, the explosion of urban population, and the burgeoning power of the coal and oil industries contributed to the formation of the moniker of the

78. *Id.* at 342.

79. *Dodge*, 59 U.S. at 345.

80. *Dodge*, 59 U.S. at 373 (Campbell, J., dissenting).

81. *Id.* at 375.

82. See DAVID O. WHITTEN, THE EMERGENCE OF GIANT ENTERPRISE, 1860-1914: AMERICAN COMMERCIAL ENTERPRISE AND EXTRACTIVE INDUSTRIES 55 (1983). Whitten states that:

[t]he expansion of communications and transportation in the United States during the years 1860-1914 involved the evolution of big business and big government. The first giant business organizations in the United States were railroads. The first truly national monopoly was the telegraph, and one of the largest monopolies was the federal post office. These operations necessarily became giants to conform to the needs of a giant nation.

Id. at 55.

times, the monopolistic Trusts.⁸³ These Trusts sought to join independent producers to form one large monopoly which would be capable of setting prices and manipulating the market.⁸⁴ In 1874, the Standard Oil monopoly was formed; in 1884, a Cotton Oil Trust was founded; and in 1887 the Whiskey Trust, the Sugar Trust, and the Lead Trust were created.⁸⁵ People saw the Trusts as a threat to fair economic competition, and viewed the monopolistic price-fixing nature of the Trust's activities as contrary to free-market principles.⁸⁶ The states, prior to action by the federal government, enacted laws that prevented the formation of Trusts.⁸⁷ The federal government, under pressure from the general public, enacted the Sherman Anti-Trust Act,⁸⁸ which made the "Trust" business form illegal.⁸⁹ Prior to the Sherman Anti-Trust Act's enforcement, states attempted to strike down Trusts on their own.⁹⁰ In 1892, the Supreme Court of Ohio attempted to strike a death blow to the Standard Oil Trust.⁹¹ In deciding on a *quo warranto* action brought by the Ohio Attorney General, the court stated that the acts of Standard Oil

83. See SIMPSON, *supra* note 19, at 25-30 (discussing the successes and failures of Trusts, their penchant to continually acquire subsidiaries, and questioning whether government can control corporations which possess greater economic power than the government).

84. *Id.*

85. See NADER ET AL., *supra* note 3, at 39. See *Knight & Co. v. U.S.*, 156 U.S. 1 (1894) for a discussion of the Sugar Trust.

86. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTI-TRUST ACT* 70 (1981).

87. Martin J. Sklar, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making In The Formative Period, 1890-1914*, 35 N.Y.L. SCH. L. REV. 791 (1990).

88. Codified at 15 U.S.C. §§ 1-7 (1994). See R.L. Raymond, *The Federal Anti-Trust Act*, 23 HARV. L. REV. 353 (1910) (examining early cases involving the Sherman Anti-Trust Act). For contemporary discussions of the Sherman Act, see JACK HIGH, *A CENTURY OF THE SHERMAN ACT: AMERICAN ECONOMIC OPINION, 1890-1990* (1992); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 15 (1981). See also Colloquy, *Observing the Sherman Act Centennial: The Past and Future of Antitrust as Public Interest Law*, 35 N.Y.L. SCH. L. REV. 767 (1990); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989).

89. See LETWIN, *supra* note 86, at 70.

90. *Id.* at 69.

91. *State ex rel. Attorney v. Standard Oil Co.*, 30 N.E. 279 (Ohio 1892).

supporting the illegal Trust arrangement could be challenged by the state, since they were an "abuse of corporate power," "ultra vires" and against "public policy."⁹² The court further ruled that the Trust's charter was void as "organized for a purpose contrary to the policy of our laws," and that its activities must be conformable "to the purpose for which it was created by the laws of the state."⁹³ The autonomy of the courts and the extensive use of *quo warranto* actions by the state Attorney General which occurred during this period represented the last act of the consistent exercise of state sovereignty over the existence of corporations.⁹⁴ This occurred as corporations became increasingly visible "players" in state economies by providing employment opportunities and franchise tax revenues.⁹⁵

The next decades brought an even more formidable challenge to those attempting to curb corporate abuses. By targeting the growing amounts of incorporation fees as a means by which to raise state revenues, the states engaged in a "race to the bottom," in which they reduced their exercise of control over the corporate "existence" in an attempt to stimulate incorporations in their respective states.⁹⁶ Delaware soon captured the lead. By 1932, "more than one-third of the industrial corporations listed on the New York Stock Exchange" were incorporated in Delaware.⁹⁷ Finally, in 1963, in an attempt to fend off the efforts of other states to raid their incorporation coffers, Delaware enacted one of the most per-

92. *Id.* at 290.

93. *Id.* at 290. Ultimately, the court held that "in the opinion of the court, the defendant should be ousted from the power to make and perform the [Trust] agreement set forth in the petition." *Id.* at 291.

94. *See supra* note 63.

95. *See Case Comment, Law For Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 863, 895-97 (1969) [hereinafter *Law for Sale*] (stating that "[t]he revenue possibilities of the new [corporation] law became the dominant consideration" and that between 20-25% of Delaware's total state revenue was provided by incorporation fees between the years 1899-1933) (citing R. LARCOM, *THE DELAWARE CORPORATION* 9-10 (1937)).

96. *See Law For Sale, supra* note 95, at 863 (discussing Delaware's competition with New Jersey).

97. *See NADER, supra* note 3, at 58.

missive corporate statutes ever.⁹⁸ The legislature revised the General Corporation Law of Delaware to read that "the General Assembly of the State of Delaware declares it to be the public policy of the State to maintain a favorable business climate and to encourage corporations to make Delaware their domicile."⁹⁹ By 1971, franchise taxes comprised twenty three percent of the entire state revenue collections for Delaware.¹⁰⁰

While states such as Delaware were trying to attract corporations by becoming increasingly permissive with regard to corporate conduct and requirements, the idea of the federal "regulatory state" was developing.¹⁰¹ Under the "regulatory state" model, the government initiated programs through which it sought to control the conduct of private parties, such as corporations, in order to achieve governmentally determined goals.¹⁰² Legislation such as the Federal Water Pollution Control Act (Clean Water Act)¹⁰³ has attempted to regulate corporate impact on the environment by the use of a penalty and permit program with varying effectiveness.¹⁰⁴

State statutes,¹⁰⁵ authorized under federal laws,¹⁰⁶ deal with the management of the environment and the liability of the corporation for various abuses. State permit programs allow for criminal and civil penalties against a corporation for its violations, rather than merely noting the corporation's

98. See generally *Law For Sale*, *supra* note 95.

99. 54 Del. Laws 724 (1963). For extended discussion of Delaware's incorporation laws, see *Law for Sale*, *supra* note 95, at 861.

100. See NADER, *supra* note 3, at 65.

101. See Thomas O. McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 ADMIN. L. REV. 399 (1987) (in recognition of the 40th anniversary of the Administrative Procedure Act, describing regulatory reform in the United States from the pre-New Deal Era forward).

102. Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 409 (1990).

103. CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992).

104. Sunstein, *supra* note 102 (analysis of the effectiveness and paradoxical lack of effectiveness of federal regulations); See also Lucinda Vandervort, *Social Justice in the Modern Regulatory State: Duress, Necessity and the Consensual Model in Law*, 6 LAW & PHIL. 205 (1987).

105. See, e.g., N.Y. ENVTL. CONSERV. LAW §§ 15-1 to 15-173.

106. See *infra*, note 129 and accompanying text.

transgressions and waiting for the Attorney General to bring an action.¹⁰⁷

The economic and political control exerted by corporations forced a virtual withdrawal of charter revocation actions altogether, leaving the states with one feasible approach: a program of secondary interventions in which they were forced to curb corporate abuses "after the fact." Concern over the effects of this corporate economic and political invasion was voiced by Justice Rehnquist in *First National Bank of Boston v. Bellotti*,¹⁰⁸ when he stated that "the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed."¹⁰⁹

The decline in the use of *quo warranto* actions by the state Attorney General to dissolve the corporation was thus primarily caused by two factors: the increasing involvement of corporations in state economic and political affairs, and the rise of the "regulatory state" approach to monitoring corporate activity.¹¹⁰

107. For example, see generally N.Y. ENVTL. CONSERV. LAW § 71 (McKinney 1994). New York law provides various penalties for violation of its environmental conservation law. N.Y. Environmental Conservation Law in effect establishes the "regulatory state" by providing procedures, permits and enforcement for various environmental policies. *Id.* For example, New York has established a complex regulatory scheme for the enforcement of civil and criminal penalties for violation of its state federally authorized State Pollutant Discharge Elimination System permit program. N.Y. ENVTL. CONSERV. LAW §§ 71-1901 to 71-1943 (McKinney 1994). However it is the Attorney General's decision to pursue such criminal or civil actions; there is no state provision for citizens to enforce the state law. See e.g., N.Y. ENVTL. CONSERV. LAW § 71-1929 (McKinney 1994). Therefore, in the "regulatory state" citizens must rely on federal injunctive or penalty actions in federal court in order to have any impact on the polluting corporation. See e.g., CWA § 505, 33 U.S.C. § 1365 (1988 & Supp. IV 1992).

108. 435 U.S. 765 (1978).

109. *Bellotti*, 435 U.S. at 825-26 (Rehnquist, J., dissenting). Justice Rehnquist concluded that the Court should grant "considerable deference" to other legislatures who "have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible." *Id.* at 823.

110. See Greer, *supra* note 18, at 211 (stating that [g]overnment regulation emerged as a political response to problems associated with the capitalist market economy, yet in substantial measure it has failed to solve these problems" and that "the reality of regulation is but a pale shadow of what is proclaimed.").

III. New York and the Revocation of Corporate Charters

A. The New York Statute: Codifying *Quo Warranto*

Actions brought to revoke corporate charters for "misuse or non-use" were grounded in English common law.¹¹¹ The nature of the action was *quo warranto*.¹¹² This common law framework for bringing a corporate revocation action by the sovereign for "acts of omission or commission"¹¹³ was based on the idea that the sovereign responsible for conferring the privilege also retained the right to forfeit the franchise. Two of the recognized grounds for revocation of a corporation charter were "misuse" of the powers granted by the charter and "non-use" of the franchise.

Many state legislatures found it necessary to codify the common law process by which the state could initiate an action to revoke corporate charters.¹¹⁴ New York codified *quo warranto* in Section 1101 of the Business Corporations Law:

S. 1101. Attorney general's action for judicial dissolution

(a) The attorney general may bring an action for the dissolution of a corporation upon one or more of the following grounds:

(1) That the corporation procured its formation through fraudulent misrepresentation or concealment of a material fact.

(2) That the corporation has exceeded the authority conferred upon it by law, or has violated any provision of law whereby it has forfeited its charter, or carried on, con-

111. See Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 527-28 (1923) (explaining that *quo warranto* actions "date from the critical year of the thirteenth century," and were "invented to try the validity of the feudal franchises . . . solely as a royal weapon."). See also *Judicial Review of Administrative Action in Florida - Quo Warranto*, 2 MIAMI L.Q. 229, 232 (1948); *Quo Warranto*, 15 HASTINGS L.J. 222 (1963); Richard J. Maddigan, *Quo Warranto to Enforce a Corporate Duty Not to Pollute the Environment*, 1 ECOLOGY L.Q. 653, 662 (1971).

112. See *People v. Abbott Maintenance Corp.*, 200 N.Y.S.2d 210, 213-14 (Sup. Ct. 1960) for a detailed explanation of the writ of *quo warranto*.

113. 19 AM. JUR. 2D *Corporations* § 2789 (1993).

114. See *supra* note 15 for a list of states and their respective statutes which codify the state's revocation powers.

ducted, or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.

(b) An action under this section is triable by jury as a matter of right.

(c) The enumeration in paragraph (a) of grounds for dissolution shall not exclude actions or special proceedings by the attorney general or other state officials for the annulment or dissolution of a corporation for other causes as provided in this chapter or in any other statute of this state.¹¹⁵

This modern statute, set forth above, discards the procedural handicaps of the older codification, which stated that the legislature had the responsibility of formally requesting that a *quo warranto* action be brought.¹¹⁶ The current statute retains the common law standard for revocation of "misused" corporate charters through section 1101(a)(2), which allows a suit to be brought when a corporation either violated any provision of law or transacted its business in a persistently fraudulent or illegal manner.¹¹⁷ The "non-use" category of revocation was grounded in common law, and would probably find application under section 1101(a)(2), which states that a charter may be revoked if the corporation has abused its "powers contrary to the public policy of the state."¹¹⁸

The next sections of this paper analyze these "misuse" categories for charter revocation in the New York courts and explore the cases brought for "non-use" of charter powers. First, however, before engaging in case specific dialogue concerning these grounds for revocation, it is important to review the general limitations established by the New York courts in corporate charter actions.

115. N.Y. BUS. CORP. LAW § 1101 (McKinney 1993).

116. N.Y. BUS. CORP. LAW §§ 91, 92 (repealed).

117. N.Y. BUS. CORP. LAW § 1101(a)(2).

118. *Id.*

B. General Limitations on the Exercise of Revocation Powers under Section 1101

From 1890 until 1910, New York's revocation statute was actively litigated in the New York Court of Appeals and the New York Supreme Courts.¹¹⁹ The power of the state Attorney General to revoke the corporate charter is subject to certain general limitations.¹²⁰ The first general limitation was explained in the New York Court of Appeal's decision in *People v. Buffalo Stone and Cement Co.*,¹²¹ in which the court held that the Attorney General must bring the revocation action based on the requirements of the "public interest," which meant that he was barred from bringing an action merely to remedy private wrongs.¹²² In *Buffalo Stone*, the defendant corporation failed to file an annual report as mandated by New York corporate law and failed to pay in the amount of capital stock required under the corporation's charter.¹²³ The Attorney General was approached by various stockholders who requested that the corporation's franchise should be "forfeited" and "its charter annulled."¹²⁴ In reaching the conclusion to revoke the charter, the court reasoned that the duty established by the legislature in requiring an annual report and in mandating the fulfillment of charter responsibilities was a duty "which the corporation owe[d] to the public generally for the protection of all persons who may have occasion to deal with it."¹²⁵ Therefore, the omission or violation by the company "incurs the liability of forfeiture."¹²⁶ Since the Attorney General was the only entity mandated by law to determine what violated the public interest, the court declared it to be the only one authorized to bring a *quo warranto* suit.¹²⁷

119. See *supra* note 17 and accompanying text.

120. *Id.*

121. 29 N.E. 947 (N.Y. 1892).

122. *Id.* at 948.

123. *Id.* at 947.

124. *Id.*

125. *Buffalo Stone*, 29 N.E. at 948.

126. *Id.* at 949.

127. *Id.* at 947.

Despite the limitation that the suit be brought in the public interest, an environmental suit would not be barred because many environmental statutes, both federal and state, are enacted for public purposes.¹²⁸ For example, the Clean Water Act policy "to maintain the integrity of the Nation's waters" is clearly a public purpose.¹²⁹ In light of this provision and others like it in the various environmental statutes, if the Attorney General brought an action to revoke a corporate charter for violation of an environmental law, it would be unlikely that the court would bar the action for failure to bring the suit in the public interest.

"Standing" to challenge corporate charters is the second general limitation imposed by the courts on the power of charter revocation. In *In re Brooklyn Elevated Railroad Co.*,¹³⁰ the court held that "a private individual cannot set up the forfeiture or in any way challenge the corporate existence with its full vitality."¹³¹ In *Brooklyn Railroad*, the Brooklyn Elevated Railroad Company had failed to complete a railroad line in the time period established by their charter.¹³² In dismissing the action which sought dissolution of the corporation due to "non-use" of the charter, the court reasoned that only "[t]he state, which gave the corporate life, may take it

128. CWA § 101(a), 33 U.S.C. § 1251(a) (1988) ("The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters"); RCRA § 1003(a), 42 U.S.C. § 6902(a) (1988) ("The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources"); CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1) (1988) (The purposes of this subchapter are "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"); CERCLA § 102(a), 42 U.S.C. § 9602(a) (1988) (CERCLA requires the administrator of the EPA to identify "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment"); National Environmental Policy Act § 2, 42 U.S.C. § 4321 (1988) [hereinafter NEPA] (The purpose of NEPA is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man").

129. CWA § 101(a), 33 U.S.C. § 1251(a) (1988).

130. 26 N.E. 474 (N.Y. 1890).

131. *Id.*

132. *Id.*

away.”¹³³ The court stated that the authorities for the position that only the state may challenge the corporate existence are “numerous and uniform, both in this country and England.”¹³⁴

In summary, the courts have declared that the revocation proceeding must be pursued by the Attorney General in the “public interest”, and that private individuals have no “individual” standing under which to pursue corporate charter revocation.¹³⁵ The judicial reasoning behind this denial of individual standing to bring revocation actions centers on the plain language of section 1101, that it is the sovereign’s sole duty to determine what the public interest requires.¹³⁶ These two general limitations that surround the action to revoke a corporate charter are very closely related. Since the Attorney General is the only body that is legislatively empowered to initiate an investigation into whether the “public” interest demands charter revocation, it logically follows that individuals would be barred from entering this domain. Thus, the “standing” limitation thus directly derives from this legislatively mandated role of the Attorney General as sole enforcer.

The New York courts which have ruled in cases involving the charter revocation statute have upheld revocation on several grounds, including for “non-use” of the franchise granted by the charter and for “misuse” of the charter powers. It is important to examine both of these categories of judicially recognized revocation actions to explore the changing relationship between the courts and the corporation, from the early nineteenth century to present day and their relationship to environmental protection.

Misuse of charter powers seems the most relevant category for those seeking contemporary charter revocation actions since many corporations have a consistent history of violation of state and federal environmental laws. Environmental protection suits were virtually nonexistent until the latter quarter of the twentieth century, and thus, were never

133. *Id.* at 474.

134. *In re Brooklyn Elevated R.R. Co.*, 26 N.E. 474, 475 (N.Y. 1890).

135. *Id.* at 474.

136. *Id.*

litigated as a foundation for corporate charter revocations in New York courts or elsewhere.¹³⁷ With the advent of statutory frameworks developed in the Clean Water Act (CWA),¹³⁸ the Resource Conservation and Recovery Act (RCRA),¹³⁹ the Endangered Species Act (ESA),¹⁴⁰ the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),¹⁴¹ the National Environmental Policy Act (NEPA),¹⁴² the Clean Air Act (CAA)¹⁴³ and other "environmental" statutes, the standards under "misuse" cases in which the courts have previously granted revocation of corporate charters become of increasing relevance in any new litigation aimed at those corporations which have a history of consistently violating these and other state statutes.

Numerous large and small corporations have well-documented histories of continuous violations of federal and state environmental statutes.¹⁴⁴ The penalties assigned to these corporations and the permits they have received have not curtailed their continuous violations. A small sample of large corporate polluters that have consistently violated environmental statutes to the extent that it could be convincingly argued that they "misused" their corporate charters are: the forty billion dollar agricultural corporation Cargill;¹⁴⁵ General Electric;¹⁴⁶ and USX Corp.¹⁴⁷ There are also well-docu-

137. *Id.*

138. CWA §§ 101-607, 42 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

139. RCRA §§ 1002-11012, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

140. ESA §§ 2-18, 16 U.S.C. §§ 1531-1544 (1994).

141. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

142. NEPA §§ 2-209, 42 U.S.C. §§ 4321-4347 (1988 & Supp. V 1993).

143. CAA §§ 101-618, 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

144. *See infra* notes 145-49.

145. Cargill has three times as many Clean Air Act permit violations as the second place CAA violator in the same field of business. *America's Worst Toxic Polluters; Eight Companies with Poor Environmental Records* BUS. AND SOC'Y. REV., Jan. 1993, at 21 [hereinafter *America's Worst*]. Cargill was cited for CWA violations when it dumped 40,000 gallons of phosphoric acid in a Florida river, and on numerous occasions dumped thousands of pounds of animal sewage in Arkansas rivers, in both cases resulting in massive environmental damage. *Id.* Further, Cargill has been cited for over 2,000 OSHA violations. *Id.*

146. General Electric (G.E.) was cited for CWA violations when it dumped over 500,000 pounds of polychlorinated biphenyls (PCBs) into the Hudson River. *Id.* at 21. G.E. has been cited by the EPA as being a potentially liable

mented cases of smaller corporations that have violated environmental laws so often and so egregiously that they clearly "misused" their corporate charters. These corporations include the Stand Tank Cleaning Corp. and Marine Movements Inc., owned by the Frank family of New York,¹⁴⁸ and the K & L Plating Co. of Oakland.¹⁴⁹ The actions by the above corporations are just examples of continuous and se-

party in more Superfund sites than any other corporation in the country. *Id.* At G.E.'s Troy, New York manufacturing plant in the mid-1980's, G.E. had over 20 spills resulting in the release of thousands of pounds of hazardous chemicals into the Hudson River. *Upstate Residents' Water Worries Help Move G.E. to Accord*, NEW YORK TIMES, May 13, 1986, at B2. On several occasions, the city of Waterford, which uses the river for drinking water, had to pipe in its water from elsewhere due to the contamination. *Id.*

147. USX received the worst fine ever imposed by the Labor Department for health and safety violations. Betty Wong, *AT&T, Xerox Win 'Green' Awards, But Exxon Panned for Oil Mess*, THE REUTER BUS. REP., Mar. 28, 1990. USX, in 1990, received a dishonorable mention for its environmental record at the America's Corporate Conscience Awards. *Id.* USX has also paid over thirty million dollars in fines for its illegal dumping of waste water in Pittsburgh. *America's Worst*, *supra* note 145, at 21. In 1991 it was forced to shut down one of its facilities in Fairless, Pennsylvania for its repeated CAA violations. *Id.* USX's facility in Texas was responsible for a leak of hydrofluoric-acid which caused the evacuation of more than 3,000 people. *Id.*

148. In 1992, the Standard Tank Cleaning Corp., which is owned by the Frank family of New York City, was charged with violating RCRA for illegally storing 750,000 gallons of hazardous waste on a barge and for several CAA violations. *EPA Sues Two New York Area Companies for Violations of Waste, Air, Water Laws*, BNA ENVT'L. L. Update, Jan. 28, 1992. On the same day, Marine Movements, Inc. received a quarter of a million dollar fine for illegally transporting PCBs. *Id.* These corporations, according to the EPA, are considered "among the most persistent environmental violators in the New York City area" and in the region. *Id.* Other violations include criminal convictions against the family and corporations for illegally dumping sewage into the ocean. *Id.* An EPA spokesman stated that even with the present charges against the family and the corporations "we can continue to expect that type of behavior from them." *Id.*

149. The K & L Plating Company had an extensive 12 year rap-sheet of environmental violations. Todd Woody, *An Accident Waiting to Happen; For Years Regulators Went Easy on an Oakland Plating Shop Owner — Until a Worker Died on the Job*, AMERICAN LAW MEDIA, L.P. THE RECORDER, Oct. 17, 1994, at 1. The corporation was not closed down until its owner was convicted of manslaughter due to the death of one of his workers caused by cyanide gas at one of their facilities. *Id.* Regulators and state agencies on several occasions fined the corporation; the owner was even brought before the District Attorney (DA) on two occasions for the violations. *Id.* The corporation continued violating the health and environmental laws that it promised the DA it would obey. *Id.*

vere environmental statute violations by corporations that could easily be construed as "misuse" of their corporate charters.

C. Revocations Based on Non-Use of the Corporate Charter

One of the common law grounds for revocation of corporate charters was for "non-use" of the charter powers. Although not specifically mentioned in section 1101, this category of revocation would fall under the "abuse of powers contrary to the public policy of the state" language in section 1101(a)(2).¹⁵⁰ The contention that an "abuse" results from the "non-use" of the charter granted powers can be traced back to the colonial origins of *quo warranto* charter revocation actions.¹⁵¹ The immense monopolistic franchises that were granted charters and their subsequent failure to perform charter-assigned duties were seen by the courts as serious breaches of contractual obligations, and therefore, abuses of their charter powers.¹⁵²

The New York Court of Appeals has consistently upheld the common law premise that corporate charters may be revoked by the state for "non-use" of the charter powers.¹⁵³ In *People v. Broadway Railroad*,¹⁵⁴ the court held that where default is caused by the entire failure of the corporation to perform its franchise duties, forfeiture is an appropriate action.¹⁵⁵ In *Broadway Railroad*, the defendant had failed to fulfill the purpose of the charter, which required the defendant to complete the tracks located on the several streets and roads named on or before October 1, 1861.¹⁵⁶ The defendant

150. 1 JACKSON B. BATTLE ET AL., ENVIRONMENTAL DECISIONMAKING: NEPA AND THE ENDANGERED SPECIES ACT (2d ed. 1994).

151. *Id.*

152. JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION, § 647 (1874).

153. *People v. Ulster & D.R. Co.*, 28 N.E. 635 (N.Y. 1891); *People v. Broadway R.R. Co. of Brooklyn*, 26 N.E. 961 (N.Y. 1891); *People v. Equity Gaslight Co.*, 36 N.E. 194 (N.Y. 1894).

154. 26 N.E. 961 (N.Y. 1891).

155. *Id.*

156. *Id.*

had constructed the railroad line, then discontinued operations of the railroad and removed and destroyed the road.¹⁵⁷ The court ruled that this "non-use" constituted a forfeiture of the charter and pronounced that "[t]he power of the court to declare the franchises of the defendant forfeited for non-use is undoubted."¹⁵⁸ The court focused its reasoning on the magnitude of the public "wrong" and stated that the railroad company "should have discharged its duty to the public by using the charter privileges."¹⁵⁹

The court has also held that charter revocations could be maintained (based on a non-use of charter revocation theory) when a corporation's delayed exercise of charter powers would create a nuisance.¹⁶⁰ In *People v. Equity Gaslight Co.*,¹⁶¹ the court held that the complaint seeking a charter revocation remedy must outline a threat to the public safety and show that no other authority can remedy the nuisance. *Equity Gaslight* was factually similar to *Broadway Railroad*, in that the Equity Gaslight Company had delayed fulfillment of the terms within its charter, which required the corporation to lay gas lines within the city.¹⁶² The Gas company sought to tear up the streets and lay pipes within them.¹⁶³ The suit was brought in equity by the Attorney General "to restrain the commission of an alleged nuisance by a corporation, its contractor and officer."¹⁶⁴ Although not a *quo warranto* proceeding, in that the Attorney General was not directly bringing an action to revoke, the action was brought to abate a future nuisance through revocation of the corporate charter.¹⁶⁵ The action was similar to a *quo warranto* suit because the Attorney General argued that the non-use of the franchise to lay gas lines resulted in a "self-executing"

157. *Id.*

158. *Broadway R.R. Co. of Brooklyn*, 26 N.E. at 963.

159. *Id.* at 966.

160. *Equity Gaslight*, 36 N.E. 194.

161. *Id.*

162. *Broadway R.R. Co. of Brooklyn*, 26 N.E. at 963.

163. *Equity Gaslight*, 36 N.E. at 195.

164. *Id.* at 195.

165. *Id.*

forfeiture of the charter.¹⁶⁶ The Attorney General sought an injunction to prevent the corporation from laying the gas lines, an activity that would create a nuisance.¹⁶⁷ The court reasoned that “[i]t is familiar law that the People can maintain a suit in equity to abate a public nuisance . . . when the circumstances of the case show it involves the public safety or convenience.”¹⁶⁸ To establish a valid complaint, the court ruled that the future action must “affect or endanger the public safety or convenience, and require immediate judicial interposition.”¹⁶⁹ The second requirement outlined by the court was that the “nuisance must be clearly established.”¹⁷⁰ Third, the court stated that the judiciary would not interfere “where the obstruction . . . is of such a character that it may with equal facility be removed by other constituted authorities and public officers.”¹⁷¹ In applying the elements to the facts, the court found a failure of the third prong, and ruled that the suit must be dismissed because Brooklyn officials have ample power to “protect and maintain the streets,” and that therefore, “the People have abundant remedy without coming into a court of equity.”¹⁷²

The test applied in *Equity Gaslight* to the common law public nuisance action, outlined the several elements that the court examined in granting relief. More importantly, the *Equity Gaslight* test supplies valuable insight as to the analysis that the court may apply in future corporate charter revocation actions brought by the Attorney General under New York’s section 1101. Any argument under the third prong that the presence of state regulators would foreclose revocation actions for environmental violations could effectively be countered in cases where piecemeal enforcement actions of

166. *Id.*

167. *Equity Gaslight*, 36 N.E. at 195.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Equity Gaslight*, 36 N.E. at 195 (citing Attorney-General v. Bay State Brick Co., 115 Mass. 431, 438 (1874)).

172. *Id.* (ruling that “a court of equity will not interfere when the matter can be dealt with effectually by the local officials, to whom the state has delegated a portion of its authority”).

persistent corporate environmental abuses are deemed not "effective." In situations where a consistent history of violations is shown, this argument holds extra weight. The *Broadway Railroad* court's emphasis on the magnitude of the "public" wrong lends credence to the argument that piecemeal enforcement actions may not be an "effective" remedy where there exists a corporate "scheme" of wrongdoing and this scheme causes public harm of great magnitude.

D. Revocations Based on Misuse of the Corporate Charter for Violations of State Law

The New York appellate courts have also upheld the Attorney General's revocation power where the corporation has "misused" its charter by violating New York law.¹⁷³ Section 1101 declares that a charter may be revoked if the corporation has "violated any provision of law" or "carried on, conducted, or transacted its business in a persistently fraudulent or illegal manner."¹⁷⁴ The Attorney General has brought many "misuse" actions in the state courts.¹⁷⁵ These have included suits to enjoin fraudulent activities¹⁷⁶ and suits seeking corporate charter revocation for failure to file annual corporate financial reports as required by New York law.¹⁷⁷

In *People v. North River Sugar Refining Co.*,¹⁷⁸ the New York Court of Appeals held that a corporate charter could be revoked when the corporation violated the corporate law of New York.¹⁷⁹ In *North River Sugar Refining Co.*, the court grappled with a *quo warranto* suit brought to annul the charter of a sugar company involved in the Sugar Trust.¹⁸⁰ In that case, the North River Sugar Refining Company had en-

173. See *Queens County Business Alliance v. N.Y. State Racing Assoc., Inc.*, 454 N.Y.S.2d 544 (1982).

174. N.Y. BUS. CORP. LAW § 1101(a) (McKinney 1993).

175. *People v. Volunteer Rescue Army, Inc.*, 28 N.Y.S.2d 994 (App. Div. 1941); *Herring v. New York L.E. & W. R. Co.*, 12 N.E. 763 (N.Y. 1887).

176. See *State v. Cortelle Corp.*, 341 N.E.2d 223 (N.Y. 1975); *People v. Abbott Maintenance Corp.*, 201 N.Y.S.2d 895 (App. Div. 1960).

177. *People v. Buffalo Stone & Cement Co.*, 29 N.E. 947 (N.Y. 1892).

178. *People v. North River Sugar Refining Co.*, 24 N.E. 834 (N.Y. 1890).

179. *Id.* at 841.

180. *Id.* at 834, 121 N.Y. at 608.

tered into an agreement by which the company had allowed management to be controlled by the Sugar Trust, which was a conglomerate of sugar companies.¹⁸¹ In support of charter revocation, the State contended that the Trust combination was "injurious to trade and commerce"¹⁸² because the agreement suppressed competition and enhanced prices.¹⁸³ In seeking charter revocation, the Attorney General argued that corporate franchises are "granted in trust . . . upon the condition that for nonuser or misuser they may be reclaimed by the State in the appropriate judicial proceeding."¹⁸⁴ The court stated that "[t]he judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy."¹⁸⁵

In reaching its conclusion that charter revocation was an appropriate remedy, the court engaged in a two pronged analysis. First, the court asked whether the defendant corporation had "exceeded or abused its powers?"¹⁸⁶ Secondly, the court asked whether the "excess or abuse threaten[ed] or harm[ed] the public welfare?"¹⁸⁷ In deciding that revocation of the corporate charter was proper, the court stated that the actions of the directors could be imputed to the corporation. The court also noted that in making the "combination agreement" (the Trust monopolistic business form), the corporation had abused its powers both by circumventing the corporate form and by allowing the corporation to be managed by the Trust. In effect, the corporation is severed from its stockholders.¹⁸⁸ In finding an abuse of charter powers, the court stated that the charter embodied a contractual arrangement between the State and the corporation which was intended "to

181. *Id.* at 835, 121 N.Y. at 610.

182. *North River Sugar Refining Co.*, 121 N.Y. at 583 (this footnote, as well as footnotes 183-84, refers to the Statement of the Case portion which is published before the court's opinion in the New York Reporter only; the Statement of the Case is not published in the Northeastern Reporter at 24 N.E. 834).

183. *Id.* at 604.

184. *Id.* at 602.

185. *North River Sugar Refining Co.*, 24 N.E. at 834, 121 N.Y. at 608.

186. *Id.* at 835, 121 N.Y. at 609.

187. *Id.*

188. *Id.* at 838-39, 121 N.Y. at 619-21.

rebound to the . . . benefit" of the stockholders, but, that the Trust business arrangement violated this "contract."¹⁸⁹ On the second question, the court stated that corporate grants are "always assumed to have been made for the public benefit" and that the conduct of engaging in Trust activity "so far disappoint[s] the purpose of their creation," that it unfavorably affects the public interest.¹⁹⁰ In addition, the court stated that the Trust's impact on free competition was so "material and important as to justify a judgment of dissolution."¹⁹¹

Two other cases, namely, *State v. Cortelle Corp.*¹⁹² and *People v. Abbott Maintenance Corp.*,¹⁹³ decided by the appellate courts also upheld revocation actions for "misuse" of charter powers from corporate violations of state law. As in *North River Sugar Refining Co.*, the courts applied a similar two part test in determining the applicability of a charter revocation remedy.¹⁹⁴ *State v. Cortelle Corp.* involved the use of fraudulent practices to obtain ownership of real estate.¹⁹⁵ *People v. Abbott Maintenance Corp.* involved the corporation's use of fraudulent advertising.¹⁹⁶ Through these cases, the New York courts have expanded the authority of the Attorney General to pursue the revocation of charters, by declaring that section 1101 merely codifies the common law.¹⁹⁷ These decisions also make a violation of *any* law acceptable grounds for a charter revocation action.

In *Cortelle Corp.*, the court held that the "alleged fraudulent acts of the corporate defendants were actionable wrongs against the [S]tate"¹⁹⁸ which rightfully subjected the corpora-

189. *North River Sugar Refining Co.*, 24 N.E. at 839-40.

190. *Id.* at 840, 121 N.Y. at 623.

191. *Id.* at 841, 121 N.Y. at 625.

192. 341 N.E.2d 223 (N.Y. 1975).

193. 201 N.Y.S.2d 895 (App. Div. 1960).

194. See *Cortelle Corp.*, 341 N.E.2d at 225 (stating that an "abuse of power" must be shown, in addition to being a "wrong against the state"); *Abbott Maintenance Corp.*, 201 N.Y.S.2d at 898 (stating that revocation depends on the "public importance of the unlawful . . . practices").

195. *Cortelle Corp.*, 341 N.E.2d at 226.

196. *Abbott Maintenance Corp.*, 201 N.Y.S.2d 895.

197. *Cortelle Corp.*, 341 N.E.2d at 226.

198. *Id.* at 227.

tion to a revocation of its charter.¹⁹⁹ The defendants in *Cortelle Corp.* had approached owners of residences whose mortgages were on the verge of foreclosure.²⁰⁰ They then promised to reconvey title to the owners of the real estate if they would first agree to convey their house title to the corporation.²⁰¹ The fraud was completed when the corporation subsequently refused to reconvey the title or to return the fee that was charged for the fraudulent transaction.²⁰² In upholding revocation of the corporate charter under the authority of section 1101, the Court of Appeals declared that section 1101 of the Corporation Law of New York simply "codifie[d] [the Attorney General's] standing to vindicate the State's right and provide[d] for dissolution of the corporate abuser of the State's grant of corporate existence."²⁰³ Perhaps more importantly, the court also held that section 1101 did not create a "new" cause of action, which would have subjected the Attorney General's suit to a three year statute of limitations.²⁰⁴ Under New York law, any "new" cause of action is subjected to a three year statute of limitations.²⁰⁵ Therefore, the court held, the suit was subject to a six year statute of limitations, since the statute only serves to grant "standing" to the Attorney General to bring corporate dissolution actions.²⁰⁶

In the 1960 case, *Abbott Maintenance*, the court held that the Attorney General had the authority under section 91 (the older revocation statute) to bring a revocation suit for violations of any state law.²⁰⁷ In most of the previous charter revocation actions, the state judiciary had narrowly construed section 1101 to be applicable only to those statutes which di-

199. *Id.* at 226.

200. *Id.* at 224.

201. *Cortelle Corp.*, 341 N.E.2d at 224.

202. *Id.*

203. *Id.* at 226 (citing *People v. Santa Clara Lab. Co.*, 126 A.D. 616, 618 (N.Y. 1908)).

204. *Id.* at 225.

205. N.Y. CIV. PRAC. L. & R. § 214 (McKinney 1994) (establishing a three year statute of limitations for "an action to recover upon a liability, penalty, or forfeiture created or imposed by statute").

206. *Cortelle Corp.*, 341 N.E.2d at 226.

207. *People v. Abbott Maintenance Corp.*, 201 N.Y.S.2d 895 (App. Div. 1960).

rectly governed corporate activities and behavior.²⁰⁸ In *Abbott Maintenance*, the defendants had advertised part-time openings in floor waxing.²⁰⁹ When the applicants arrived, under the guise of employing the men as floor waxers, the corporation charged the men \$936 for a waxing machine worth \$103.²¹⁰ The court found that revocation was proper since the defendant was found in violation of New York Penal Law section 421 (concerning false and untrue advertising) and General Business Law section 396 (concerning unlawful selling practices).²¹¹ The court reasoned that the requirement under section 91 that there be "a violation of 'any provision of law'" must be "read more broadly than a mere violation of one or more of the list of statutory provisions which govern corporate organization and function."²¹² However, once the threshold question of whether there is "any violation of state law" is answered, the question of whether a charter will be revoked "depend[s] on the magnitude and public importance of the unlawful or improper practices complained of."²¹³

From this brief survey of relevant New York case law, the arguments supporting contemporary "misuse" of charter revocation actions in response to corporate environmental violations seem promising. The two-pronged analysis introduced in *North River Sugar Refining Co.* clearly favors an environmentally-based revocation action. The first prong, the abuse of corporate charter powers, would be apparent in environmental cases, because no charter can grant the corporation the power to violate state and federal environmental law. The second prong, the threat or harm to public welfare, would be satisfied in many suits brought to curb environmental abuses through charter revocation because environmental health-based harms have been recognized as clear risks by

208. See *Application of Bohlinger*, 106 N.Y.S.2d 953 (1951); *State by Lefkowitz v. Slowek*, 362 N.Y.S.2d 110 (1974); *Lawrence Aluminum Indus., Inc. v. Lefkowitz*, 196 N.Y.S.2d 844 (1960).

209. *Abbott Maintenance Corp.*, 201 N.Y.S. at 898.

210. *Id.*

211. *Id.*

212. *Cortelle Corp.*, 341 N.E.2d at 227.

213. *Id.*

the state legislatures and by the judiciary.²¹⁴ Proving the second prong of the analysis is the key to a suit brought by the Attorney General to revoke a corporate charter. The magnitude of the harm or threat to public welfare would become the determinative factor, as it was in *North River Sugar Refining Co.*²¹⁵ A corporation that has persistently violated state environmental laws would therefore, be more susceptible to such a challenge since there is a greater chance that the violations have caused severe public harm.

The judicial determination that revocation actions under section 1101 are subject to a six year statute of limitations by the *Cortelle Corp.* court also favors an environmentally-based revocation suit. The extension of the statute of limitations would grant the Attorney General greater leeway in showing the corporation's history of environmental abuses. Thus, the language in section 1101 that demands "persistent," "fraudulent" activities for charter revocation could be more easily satisfied by a six year history of lawbreaking, rather than a three year history. Although the older violations may be less credible, especially if the corporation has improved its environmental record, this still offers the Attorney General more freedom in the establishment of a "pattern" of conduct under his burden of proof in section 1101. Therefore, the longer statute of limitations would allow the Attorney General to use a greater body of supporting evidence in such an action.

Finally, the *Abbott Maintenance* court's broad reading of section 1101 to include violations of any law as a basis for revocation, grants the Attorney General even greater powers to seek revocation of corporate charters.²¹⁶ By opening sec-

214. See *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984); *Village of Wilsonville v. SCA Services, Inc.*, 426 N.E.2d 824 (Ill. 1981). See also, Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562 (1992) (discussing risk assessment methodologies applied to environmental contexts); Mark D. Seltzer, *Personal Injury Hazardous Waste Litigation: A Proposal For Tort Reform*, 10 B.C. ENVTL. AFF. L. REV. 797 (1982) (examining actions by private citizens for injuries due to environmental causes brought under prima facie tort theories).

215. *North River Sugar Refining Co.*, 24 N.E. at 834 (1890).

216. *People v. Abbott Maintenance Corp.*, 201 N.Y.S.2d 895, 898 (App. Div. 1960).

tion 1101's scope to violations of *any* state law as a basis for the section's "misuse" suits, the court opens the door for revocation suits based on environmental, labor, and civil rights statutory violations. In the right environmental case, in which there has been persistent illegal behavior resulting in great public harm, the Attorney General would have a substantial probability of success in bringing a contemporary charter revocation suit under section 1101 to address the environmental statutory violations.

E. The State Attorney General and Revocation of Corporate Charter Suits

Revocation actions brought by the New York Attorney General may prove successful under the "misuse" theory for violation of state laws. These suits, backed by the relatively well-developed supporting case law, provide the Attorney General with a solid footing from which to pursue revocation of charters in response to corporate environmental abuses.

As recognized in the prior section, certain corporations would be more susceptible to charter revocation actions than others. Corporations that have a persistent history of violations of environmental statutes resulting in great public harm would be prime targets for a revocation suit. If a corporation violated its permit for twenty years by dumping cyanide, copper, zinc, and nickel into a river, eventually killing all aquatic life within five miles, and consistently ignored enforcement actions, then that company would be susceptible to charter revocation.²¹⁷ Revoking a charter when the company is still solvent avoids the concerns encountered when the corporation pollutes and then files for bankruptcy.²¹⁸ Union

217. This scenario is based on PLATER, *supra* note 2, at 722-26 (summarizing the environmental compliance history of a Michigan company).

218. See Jonathan K. Van Patten, *Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy*, 35 S.D. L. REV. 220 (1990); Mark C. Carver, *Bankruptcy and Environmental Law; Conflicts in Policy*, 27 TENN. B.J. 14 (1991); Tamara Rice, *Bankruptcy and the Environmental Laws: The Resolvable Clash*, 29 TULSA L.J. 221 (1993); Debra Baker, *Bankruptcy - The Last Environmental Loophole?*, 34 S. TEX. L. REV. 379 (1993); Gary Claar, *The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims*, 18 WM. MITCHELL L. REV. 29 (1992).

Carbide Corporation exemplifies a corporation which would be susceptible to a charter revocation action. Between 1987 and mid-1994, Union Carbide operations were responsible for groundwater and drinking water contamination resulting from approximately 500 toxic chemical spills;²¹⁹ many of these spills involved the deadly chemical agent benzene.²²⁰

However, more often than not, the corporate charter revocation remedy would be used against small corporations, rather than corporations like Union Carbide. Judges and juries may not be convinced that the magnitude of the environmental harm outweighs the economic benefit offered by a corporation like Union Carbide, whose gross income ranks it among those of countries in terms of Gross Domestic Product. Revocation of smaller corporations' charters, whose number of employees remains in the single digits, may offer the Attorney General an excellent opportunity to accomplish two goals: removal of a source of environmental damage; and building a foundation of revocation case law to be used effectively against other corporations. The small corporation approach offers greater chances of success. The judge and jury are less apt to engage in an equity balancing between economic benefits and environmental harms, because the economic benefits of a smaller corporation may be *de minimis* as against the titan interests of a larger corporation. However, the two-pronged analysis applied in the *North Sugar Refining Co.* case and others decided by the New York courts, would perhaps apply in greater force to corporations such as Union Carbide, who fulfill the "persistently fraudulent or illegal" language of section 1101 through their consistent history of environmental violations.

219. GEORGE DRAFFAN, INSTITUTE ON TRADE POLICY, *Union Carbide Research Compendium* 24-78 (1994) (on file with author).

220. *Id.*

IV. Creating A Quasi-Private Cause of Action For Revocation of Corporate Charters

A. Necessity of an Action-Forcing Mechanism

Current economic and political realities as perceived by the states make it unlikely that any state Attorney General will initiate a *quo warranto* proceeding to revoke the corporate charter of a large corporation such as Union Carbide. Although the law is fairly clear on the interpretation of "misuse" and "abuse" of charter powers within the revocation context, it is unlikely that a state Attorney General will take steps to initiate a charter revocation action unless citizen groups encourage such an action. It is equally clear that if evidence is gathered by a citizen group that a large corporation is a major source of environmental degradation, the Attorney General should act.

The long list of violations occurring over several decades by large and small corporations alike validates the argument that regulatory enforcement fails in the face of a corporate "scheme" of wrongdoing. Many times state officials ignore the corporate violations or the corporation ignores the enforcement actions.²²¹ Even when an assessment of civil or criminal penalties is levied, the corporation many times remains undeterred in its illegal behavior, as a result of the corporation's ability to "externalize" the costs of compliance by passing the additional cost onto consumers.²²² In the face of an unwilling Attorney General, it is left to the public to attempt to curb these systematic corporate abuses. However, the initiation of a revocation action by a private individual as a collateral action to remedy these corporate injuries has been strongly discouraged by the courts, who cite section

221. See Greer, *supra* note 18, at 217 (stating that "[i]f neither the perpetrator nor the victim come forward, the government agency can investigate and discover on its own accord. But this too, is a rarity, with the norm being noninspection."). For evidence supporting the proposition that corporations many times ignore enforcement actions, see *supra* notes 145-49 and accompanying text. See also Draffan, *supra* note 219.

222. NADER ET AL., *supra* note 3, at 5.

1101 for exclusive enforcement by the Attorney General.²²³ New York courts have declared that the question of corporate existence "can be raised only by the sovereign power to which the corporation owes its life, in some proceeding for that purpose by or in behalf of the sovereignty itself."²²⁴

Citizens faced with corporations which have consistently abused their charters by violating state law have a variety of means by which to seek monetary or injunctive relief against the corporation, including shareholder suits, civil proceedings for damages or equitable remedies, and statutory citizen-suits. However, seeking a judicial remedy each time the corporation violates an environmental statute is not as effective as the alternative of charter revocation. By forcing citizens to seek "piecemeal" remedies for individual injuries, citizen groups are left without a remedy when faced with intransigent corporations which continue to violate environmental statutes, even after state and private enforcement actions have occurred.

Citizen lawsuits then become an inadequate remedy with which to battle a corporate "scheme" of wrongdoing as well as burdening the courts and taxing the limited resources of the citizen groups. In addition, corporations that have an international resource base can bankrupt citizen groups whose financial resources are limited. These suits may become protracted legal battles which solve nothing, as the environmental and health harms worsen. Too often, the citizen groups are unprepared and underfunded for such a daunting challenge. To make the situation worse, many corporations continue to violate state environmental laws even after the assessment of liability.²²⁵ They simply view the expense as a

223. See *Lorillard v. Clyde*, 37 N.E. 489, 492 (N.Y. 1894) (stating that it is "the duty of the attorney-general . . . to bring an action to annul the charter of a corporation."); In *Re Trustees of Congregational Church & Society of Cutchogue*, 30 N.E. 43, 44 (N.Y. 1892); In *Re Brooklyn El. Ry. Co.*, 26 N.E. 474 (N.Y. 1891).

224. In *Re Trustees of Congregational Church & Society of Cutchogue*, 30 N.E. 43, 44 (N.Y. 1892).

225. See PLATER, *supra* note 2, at 722-26.

cost of doing business, and thus the deterrent value sought by the imposition of liability is lost.²²⁶

Faced with a complacent Attorney General unwilling to bring these revocation suits, citizen-activists must seek an alternative remedy by forcing the Attorney General to institute a charter revocation action against the corporate violator. This path, while promising direct citizen-access to charter revocation, is strewn with legal landmines. Such a proceeding would be in the nature of a writ of mandamus to compel,²²⁷ by which the plaintiffs would attempt to force the Attorney General to institute the legal action mandated by law. This proceeding must be brought under the framework established by Article 78 of New York's Civil Practice Act.²²⁸ Other assorted problems may face individual litigants or organizations, such as "standing" and whether or not the administrative remedies have been exhausted.²²⁹ These, however, are not covered in this Section, which concentrates

226. For the theoretical explanation of why governments allow the operation of businesses with this irresponsible attitude, see Greer *supra* note 18, at 218 (stating that "[i]n short, most violations, in most contexts, continue to exist" because "[i]n every arena, as the political power of the regulated group increases, the likelihood of adverse governmental action declines. Such is the nature of a class society.").

227. See Vincent Alexander, Practice Commentaries to N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1994) (stating that "[m]andamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed.").

228. N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1994). This Article serves to codify the older writs, including mandamus to compel, mandamus to review, and the certiorari writs.

229. For the latest Supreme Court decision concerning "standing" of environmental plaintiffs, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in which the Court explained that:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) [which is] 'actual or imminent, not conjectural or hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of Third, it must be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'

Lujan, 504 U.S. 555, 560-61. For a brief discussion of the defense of non-exhaustion of administrative remedies, see PLATER, *supra* note 2, at 554 (stating

on the judicial review of the Attorney General's failure to enforce the charter revocation statute and the hurdles that will be encountered along that road.

The first hurdle to such citizen-initiated actions would be overcoming the presumption established by New York case law that decisions made under the purview of "prosecutorial discretion" are not subject to judicial review.²³⁰ The second hurdle, would be to alter the standard by which the judiciary would review the Attorney General's refusal to initiate the revocation process. New York case law sets forth a "substantial evidence" test which may be applied to the administrative decision of the Attorney General not to revoke the corporate charter.²³¹ Under this test, the court would simply review the record to determine whether the decision not to initiate revocation proceedings is supported by a substantial body of evidence. Although the hurdles to a quasi-private cause of action are substantial, such a mechanism under limited circumstances would further the public interest and grant those most affected by corporate environmental violations a permanent remedy through the courts.

The New York courts have recognized a category of administrative decisions which have been designated judicially unreviewable under the heading of "prosecutorial discretion."²³² The reasoning behind the creation and maintenance of this general threshold exemption from judicial review is

that "[t]hese arguments have not generally been successful defenses against environmental litigation."

230. This was selected as the first hurdle because it represents the most efficient argument that could be made by the defendants in a charter revocation case. For a judicial discussion of how the doctrine is used in suits brought to compel discretionary acts, see *Hassan v. Magistrates' Court of City of N.Y.*, 191 N.Y.S.2d 238, 241 (Sup. Ct. 1959); *Lewis v. Lefkowitz*, 223 N.Y.S.2d 221, 223 (Sup. Ct. 1961).

231. The "substantial evidence" and "arbitrary and capricious" standards of review are used by the New York courts in reviewing different types of appeals but generally have been applied in the same fashion in the review of agency decisions. See *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 313 N.E.2d 321, 325 (N.Y. 1974). The "substantial evidence" standard is generally viewed as being more favorable to the party challenging the agency's decision.

232. See *Hassan*, 191 N.Y.S.2d 238.

based on two concerns: the separation of powers doctrine and public policy considerations that militate against judicial review of prosecutorial decisions.²³³ In *Hassan v. Magistrates' Court of New York*,²³⁴ a New York trial court stated the separation of powers concern in ruling that "[e]ach function [of government] is separate and distinct. Each branch of Government is burdened with its own responsibility and the judicial branch under ordinary circumstances should not sit in judgment on the discretion lodged in the others."²³⁵ In commenting on the role of prosecutorial discretion, a New York Supreme Court stated that "[t]he discretion is, in its nature, a judicial act, from which there is no appeal, and over which courts have no control."²³⁶

Public policy considerations, however, seem to dominate the judicial conversation, outweighing separation of powers concerns. In *People v. Bunge Corp.*,²³⁷ a trial court held that whatever action taken by the Attorney General under a discretionary authorizing statute was not subject to judicial review.²³⁸ In *Bunge*, the New York Attorney General served, but did not file, charges against the defendant corporation for engaging in fraudulent business practices which included bribery and forgery.²³⁹ Defendant agreed to a consent judgment.²⁴⁰ The banks that had been swindled by the defendant corporation then brought an action in mandamus to force the Attorney General to reopen the suit.²⁴¹ In concluding not to override the discretion of the prosecutor, the court stated that "[i]t would be a vexatious practice for a court to substitute its judgment for that of the Attorney General by intervening to review the conduct of his high office or by dictating the manner in which he shall proceed to discharge the solemn respon-

233. *Id.*

234. *Id.*

235. *Id.*

236. *Lewis v. Lefkowitz*, 223 N.Y.S.2d 221, 223 (Sup. Ct. 1961).

237. *People v. Bunge Corp.*, 282 N.Y.S.2d 576 (Sup. Ct. 1967), *aff'd* 288 N.Y.S.2d 592 (App. Div. 1968), *aff'd* 250 N.E.2d 204 (N.Y. 1969).

238. *Id.* at 581.

239. *Id.* at 578.

240. *Id.* at 579.

241. *Bunge Corp.*, 282 N.Y.S.2d at 579.

sibilities imposed upon him.”²⁴² Later in the opinion, the court reasoned that mandamus action was unnecessary because other remedies were available to force the Attorney General to become more responsive to the protection of the “public interest,” including “his removal from office,” or “the election of a successor worthy of the high position.”²⁴³ The Court of Appeals upheld the judgment and commented on these policy considerations, stating that the “Attorney [G]eneral must be given the personal discretion to decide upon the remedies which he wishes to employ. To allow intervention by private individuals to further their own private aims might seriously jeopardize the purpose of the Attorney [G]eneral’s suit.”²⁴⁴

Although the presumption of nonreviewability will be difficult to overcome, exceptions to the presumption are supported by compelling policy reasons that have been advanced by several commentators.²⁴⁵ The possibility of the abuse of prosecutorial discretion in bringing suit and in failure to bring suits has convinced one commentator, Ruth Colker, that narrow exceptions should be allowed to the general presumption of judicial nonreviewability.²⁴⁶ Colker has argued that, in light of political considerations and biases which have become evident in the administrative decisionmaking process concerning whether or not to prosecute,²⁴⁷ judicial review is needed more when prosecutors decide *not* to prosecute than when they do decide to prosecute.²⁴⁸ Additionally, due to limited prosecutorial resources, prosecutors must use discretion in choosing which cases to prosecute, however, they should be deemed to be acting in “bad faith” when they make decisions inconsistent with their statutory mandate. In such a situation, judicial review may be appropriate.²⁴⁹

242. *Id.*

243. *Id.* at 582 (citing *People v. Ballard*, 32 N.E. 54, 59 (N.Y. 1891)).

244. *Bunge Corp.*, 250 N.E.2d at 208.

245. See *infra*, note 246 and note 250.

246. Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 909 (1989).

247. *Id.* at 880-82.

248. *Id.* at 882.

249. *Id.* at 909.

Another commentator, Cass Sunstein, proposes that the increase in federal mandamus litigation brought to force federal enforcement of certain statutes, is part of a movement "which has abandoned the traditional focus on private autonomy in favor of an effort to ensure the identification and implementation of the values set out in the governing statute."²⁵⁰ In reviewing the *Heckler v. Chaney*²⁵¹ decision, Sunstein outlines the problems inherent in granting judicial review of enforcement decisions, citing the lack of a formal record of decision to review, delays in agency decisionmaking, resource allocation concerns, and the cost of formalizing informal decisions.²⁵² However, the presumption against review is not reinforced or justified by administrative concerns.²⁵³ The increasing politicization of the administrative process and the reasoning behind the increase in mandamus litigation support the creation of an exception to the general presumption of nonreviewability of prosecutorial discretion.

The case history of the charter revocation statute bears out the hypotheses of Colker and Sunstein.²⁵⁴ The virtual disappearance of charter revocation actions by the 1920's conveniently coincides with the rise of corporate America as a primary employer of citizens and the consolidation of industrial capital through the emergence of quasi-monopolies.²⁵⁵ The impact that massive accumulations of wealth have on the political system is well-documented. It follows that a statute

250. Cass Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

251. 407 U.S. 821 (1985).

252. See Sunstein, *supra* note 250, at 672-73.

253. *Id.* at 673-74 (explaining that "[t]he courts have developed a number of techniques by which to review informal action" and that "[w]hile the frequently informal character of such decisions must be taken into account in conducting review, it does not justify a presumption against review").

254. See *supra*, note 246 and note 250.

255. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 175 (1990) (commenting that court decisions "encouraged and protected the interests of business and fortified the basis of American capitalism.").

directed at corporate "death" would be shelved in favor of large economic interests.²⁵⁶

Sunstein's analysis is mirrored by the history of the charter revocation statute in New York.²⁵⁷ A revival of the corporate charter revocation action provides a viable tool to control the "private autonomy" of corporations leading to the brink of ecological disaster. Sunstein's concern about ensuring the "implementation of the values set out in the governing statute" also is satisfied by this revival since the legislatively mandated standards for revocation would be enforced by these actions.²⁵⁸

The policy reasons of Colker and Sunstein bolster the argument in favor of the exception to judicial nonreviewability. Allowing judicial review would ensure that prosecutorial discretion is exercised in the absence of political pressures, providing a "check" on the vast discretionary power of the prosecutor. Such a "check" also would ensure that the legislature's grant of the Attorney General's discretion is not circumvented in favor of corporate "private autonomy."

1. Revocation Strategy - Under the "Equitable" Exception or a "Two-Step" Statute Exception?

In finding an action-forcing mechanism that would force the Attorney General to initiate a charter revocation action, citizen-litigants are faced with a choice of two possible strategies. First, they can argue that New York courts have created an "equitable" exception to the general rule of nonreviewability of prosecutorial discretion. Although New York courts have been reluctant to grant mandamus to compel prosecutorial action, they have occasionally ordered mandamus where the equitable concerns justify judicial intervention.²⁵⁹ This judicial approach can be categorized as

256. See Greer, *supra* note 18, at 211 (stating that "[t]he reality is that chronic underregulation (which in turn derives from the structure of the largely private political economy) is the real problem.").

257. See Sunstein, *supra* note 250, at 653.

258. *Id.*

259. See *Ciminera v. Sahm*, 164 N.Y.S.2d 810 (App. Div. 1957), *aff'd*, 151 N.E.2d 832 (N.Y. 1958); *Fried v. Fox*, 373 N.Y.S.2d 197 (App. Div. 1975).

an "equitable" exception to the general presumption of judicial nonreviewability.

A second strategy for obtaining judicial review of an official's discretionary action is to argue that the courts have already carved out a narrow exception to nonreviewability for certain types of statutes. These cases involve "two-step" license revocation statutes that force the prosecutor to find a threshold violation prior to the initiation of license revocation proceedings.²⁶⁰

a. Action-Forcing Under the "Equitable"
Exception to the General Presumption
Against Judicial Review of Prosecutorial
Discretion

A citizen-litigant seeking to force the Attorney General to bring a revocation action can argue that the New York courts have shown a willingness to override prosecutorial discretion by defining a category of "equitable" exceptions to the general presumption of judicial nonreviewability. In *Ciminera*,²⁶¹ the New York courts opened the door for judicial review of decisions that have been traditionally considered prosecutorial discretion matters by holding that a complaint seeking mandamus to compel prosecution was not insufficient as a matter of law.²⁶² In *Ciminera*, individuals sought to compel township officials to enforce an "Ordinance Relating to Sand Bank and Pit, Topsoil Removal and Other Excavations."²⁶³ The plaintiffs alleged damages resulting from this lack of enforcement, including the loss of township license revenues from those engaging in the activities covered by the Ordinance.²⁶⁴ The trial court agreed with the plaintiffs, and held that the complaint was sufficient as a matter of law.²⁶⁵ The court stated that they "can require, but cannot control, the exercise

260. See, e.g., *Freidus v. Guggenheimer*, 394 N.Y.S.2d 199 (App. Div. 1977).

261. *Ciminera*, 164 N.Y.S.2d 810.

262. *Id.*

263. *Id.*

264. *Ciminera*, 151 N.E.2d 832.

265. *Ciminera*, 164 N.Y.S.2d at 811.

of judgment or discretion" by the town officials.²⁶⁶ On appeal, the court was again petitioned by the defendants to dismiss the complaint as insufficient as a matter of law.²⁶⁷ In reaching its conclusion that the complaint was sufficient, the court reasoned that the plaintiffs fulfilled the legal requirements by including statements of "the validity of the ordinance, the alleged duty of the town officials to enforce the ordinance, and . . . specific instances of their refusal, neglect and failure to enforce" the ordinance.²⁶⁸ In the dissenting opinion, Judge Fuld agreed with the defendants that the decision to enforce the ordinance was a purely discretionary one.²⁶⁹ He declared that to mandate "officials to enforce . . . the town ordinance . . . would truly open up a Pandora's box of controversy and litigation."²⁷⁰

The holding in *Ciminera* was narrowly construed by the Appellate Division of the New York Supreme Court in *Fried v. Fox*.²⁷¹ In *Fried*, homeowners filed suit to compel various officials of the City of Yonkers "to enforce the zoning laws against certain property owners."²⁷² In *Ciminera*, the Court of Appeals sustained an Article 78 petition where illegal acts resulted in the "waste . . . of public . . . funds."²⁷³ In contrast, the *Fried* court did not find any waste of public funds or that the property owners committed any "illegal acts which [we]re so flagrant and numerous as to be injurious to the public welfare," and therefore, the complaint was dismissed.²⁷⁴

Both the *Ciminera* and *Fried* courts have intimated that the general presumption of nonreviewability stated by the court in *Hassan v. Magistrates' Court of the City of N.Y.*²⁷⁵ does not serve as a blanket prohibition of judicial review. The

266. *Id.*

267. *Ciminera*, 151 N.E.2d at 832.

268. *Id.*

269. *Id.* at 832 (Fuld, J., dissenting).

270. *Id.* at 833.

271. 373 N.Y.S.2d 197 (App. Div. 1975).

272. *Id.* at 198.

273. *Ciminera*, 151 N.E.2d at 832.

274. *Fried v. Fox*, 373 N.Y.S.2d at 199 (quoting *Cortellini v. City of Niagara Falls*, 14 N.Y.S.2d 924, 926 (App. Div. 1939)).

275. See *supra* notes 232-35 and accompanying text.

Fried court's characterization that reviewability is contingent upon the waste of public funds or the magnitude of the public injury raises interesting implications concerning litigation to force the Attorney General to bring a charter revocation action for environmental violations which are hazards to human health and the environment. A complaint which combines these court delineated factors with an allegation of the Attorney General's failure to bring an action in accord with section 1101 has a chance of success under the *Ciminera* and *Fried* analysis.

On the other hand, more recently, New York courts have been less lenient in granting this override of prosecutorial discretion in equitable cases, and have returned to the general rule of a presumption of judicial nonreviewability of prosecutorial discretion. In the 1971 case of *Posner v. Levitt*,²⁷⁶ the court held that mandamus was inappropriate to compel a county comptroller to institute litigation to test the legality of the state budget.²⁷⁷ In *Levitt*, the court declared that the duty was not a "ministerial" one, and that "the advisability of undertaking such litigation involves broad areas of judgment and discretion."²⁷⁸ Therefore, the court reasoned, the comptroller was under no statutory or constitutional duty to bring the action.²⁷⁹

Despite the court's refusal to review the comptroller's decision in the *Levitt* case, the situation there can be distinguished from an action to revoke a corporate charter. First, *Levitt* involved the refusal of the comptroller to bring a declaratory judgment action challenging the legality of the state budget.²⁸⁰ Questioning the legality of a state law "involves broad areas of judgment and discretion."²⁸¹ An Attorney General considering a revocation action, however, must first make a factual determination as to the threshold finding of a

276. 325 N.Y.S.2d 519 (App. Div. 1971).

277. *Id.* at 521.

278. *Id.*

279. *Id.*

280. *Posner v. Levitt*, 325 N.Y.S.2d 519, 520 (App. Div. 1971).

281. *Id.* at 521.

violation before bringing the action.²⁸² In this manner, the legal processes in each situation are distinguishable.

Should the citizen-litigant, applying the "equitable" strategy found in *Fried* and *Ciminera*, fail in her action for the reasons elucidated in *Levitt*, she may wish to attempt another approach which places the decision not to enforce the charter revocation statute under judicial scrutiny.

b. Action-Forcing Under the "Two-Step" Statute
Exception to the General Presumption
Against Judicial Review of Prosecutorial
Discretion

An alternative to a purely "equitable" exception to nonreviewability of Attorney General nonaction, would be to argue that courts have granted review in cases involving two-step license revocation statutes. This approach avoids public policy and separation of powers concerns inherent in the "equitable" exception. The theory is that section 1101 embodies legislative standards²⁸³ for the exercise of the charter revocation powers by the Attorney General. In essence, this approach will force a showing that once the mandated standards in section 1101 are breached, the Attorney General is legally obligated to bring an enforcement action to revoke a charter. The Attorney General is statutorily forced to make a threshold finding of a violation of state law before initiating charter revocation proceedings when there is a violation of "any provision of law" and the "transaction of business in a 'persistently fraudulent or illegal manner'" language in section 1101(a)(2) of the New York revocation statute. Most license revocation statutes establish this two-step dichotomy: first, a violation must be shown; second, the initiation of formal proceedings to enable a revocation of the license granted

282. See *infra* note 283 and accompanying text.

283. See N.Y. BUS. CORP. LAW § 1101(a) (McKinney 1993), which states that the "trigger" standards include the procurement of corporate formation through fraud, a violation of law, a transaction of corporate business in a persistently fraudulent or illegal manner, or an abuse of corporate powers contrary to public policy.

to the violator begins.²⁸⁴ Under the charter revocation statute this process holds true, especially in cases brought under the "misuse" category of revocation where a violation of state law must be shown prior to the initiation of a revocation action.

In *Freidus v. Guggenheimer*,²⁸⁵ the court held that the failure to revoke a license when statutory violations have occurred is judicially reviewable. In *Freidus*, the petitioner brought suit against the Department of Consumer Affairs for failing to revoke a newsstand operator's license when he violated regulations governing the operation of newsstands.²⁸⁶ The Department's regulations required the newsstand operators to work at the newsstand for eight hours per day, and prohibited them from holding other full-time employment.²⁸⁷ The plaintiff brought suit against the Department and sought mandamus to compel the Department to revoke the license of an operator who was in violation of both regulations.²⁸⁸

In reversing the lower court's refusal to issue a mandamus due to the discretionary nature of an enforcement action, the *Freidus* court declared that "[d]iscretionary power is not absolute; it is subject to the limitation that it cannot be exercised arbitrarily."²⁸⁹ In determining whether or not the action was arbitrary, the court looked to a previous revocation action and stated that the "[c]ommissioner's present position is totally at odds with the action she took against"²⁹⁰ a previous licensee, whose license had been revoked under similar circumstances.²⁹¹ Thus, in similar litigation brought under a "two-step" charter revocation statute, courts could look to

284. See, e.g., N.Y. ENVTL. CONSERV. LAW § 15-1739 (McKinney 1984) (concerning revocation of a license to use state waters for the production of power); N.Y. PUB. HEALTH LAW § 2897 (McKinney 1993) (revoking the license of a nursing home administrator); N.Y. EDUC. LAW § 6511 (McKinney 1985) (dealing with penalties for professional misconduct).

285. 394 N.Y.S.2d 199 (App. Div. 1977).

286. *Id.* at 199-200.

287. *Id.* at 199.

288. *Id.* at 200.

289. *Freidus v. Guggenheimer*, 394 N.Y.S.2d 199, 201 (App. Div. 1977).

290. *Id.* at 200.

291. *Id.*

prior actions of the Attorney General. The courts may be open to this approach, which would show the courts that Attorney General's have initiated charter revocation suits in the past, and the particular violations which were successfully litigated.

The court in *Freidus* looked to a similar factual scenario in which a license had been revoked. This illustrates that in charter revocation actions the court may look to similar factual situations in which a charter had been revoked in response to violations of state law.

Ten years prior to *Freidus*, a New York Supreme Court held differently when dealing with an apparently similar "two-step" license revocation statute in *Lewis v. Lefkowitz*.²⁹² In *Lewis*, the court held that a mandamus would not be granted to force the Attorney General to bring suit against a state-owned Port Authority.²⁹³ The plaintiff in *Lewis*, the Freethinkers of America, Inc., filed suit seeking an order to direct the Attorney General to cancel the leases for the construction and "maintenance of religious chapels at Idlewild International Airport in New York City."²⁹⁴ Plaintiffs brought the action under Chapter 301 of the Laws of 1950,²⁹⁵ which stated that the Port Authority was immune from any suit "other than suits, actions or proceedings [brought] by the attorney general of New York . . . [who was thereby] authorized to bring such suits, actions or proceedings *in his discretion*."²⁹⁶ In reaching its conclusion that a mandamus to compel was not appropriate, the court voiced public policy and separation of powers concerns. The court further declared that if the Attorney General "abuses the great power intrusted to him, a remedy may be found in his removal from office, or in the election of a successor worthy of the high position."²⁹⁷ The court focused on the possible infringement upon

292. 223 N.Y.S.2d 221 (App. Div. 1961).

293. *Id.*

294. *Id.*

295. N.Y. UNCONSOL. LAWS § 7105 (McKinney 1979).

296. *Lewis v. Lefkowitz*, 223 N.Y.S.2d 221, 222 (App. Div. 1961) (citing N.Y. UNCONSOL. LAWS § 7105 (McKinney 1979)) (emphasis in original).

297. *Lefkowitz*, 223 N.Y.S.2d at 223 (citing Ballard, 32 N.E. 54, 59); Hassan v. Magistrates' Court of City of N.Y., 191 N.Y.S.2d 238 (Sup. Ct. 1959).

sovereign power if the judiciary reviewed such a decision, stating that "[t]he clear policy of the . . . States [is] to have their highest law officers screen access to the courts or injunctions . . . only in those particular cases where in their discretion such action would seem warranted. Anything else would be an infringement of the basic principle of sovereign immunity."²⁹⁸

The result in *Lewis* is distinguishable from *Freidus*, and therefore would not impede a litigant's quest for judicial review of an Attorney General's decision not to bring a revocation action. Despite the governing statute's facial similarity to section 1101 and the similarity between *Lewis* and later suits brought to force the New York Attorney General to revoke a corporate charter, the *Lewis* case would not qualify for the same "two-step" license revocation exemption to the general presumption of nonreviewability outlined earlier in this paper. The crucial difference between the two actions lies in the authorizing statutes. The statute at issue in *Lewis* conspicuously lacks the legislative standards delineated in section 1101 to guide the discretion of the Attorney General. Not only does the *Lewis* statute lack these guidelines, its internal structure is also dissimilar to that of section 1101. The *Lewis* statute simply gives the Attorney General discretion to bring a suit whenever he decides that it is necessary to do so.²⁹⁹ In this respect, the statute is similar to § 701(a)(2) of the federal Administrative Procedure Act, which declares that an action "committed to agency discretion" is exempt from judicial review.³⁰⁰ Unlike the language found in section 1101, no threshold finding of a prior violation must be shown in order to proceed with the revocation of the leases granted by the Authority. This stands in stark relief to the legislative standards established by section 1101 that demand a threshold finding of a "violation of any law" or "persistently illegal or fraudulent conduct" prior to the initiation of revocation proceedings. Thus, the *Lewis* court, having determined that

298. *Lefkowitz*, 223 N.Y.S.2d at 238 (citing *Ballard*, 32 N.E. at 59).

299. *Id.* at 222.

300. Administrative Procedure Act § 701(a)(2), 5 U.S.C. § 701(a)(2) (1994) [hereinafter APA].

the statute does not guide the discretion of the Attorney General, relied on public policy concerns to support its judgment that the decisions of the Attorney General are exempt from judicial scrutiny.

Therefore, under *Freidus*, which represents analysis of a true "two-step" statute, courts should analyze prior agency action to determine whether present agency action is consistent. In addition, in considering whether to compel a public official to undertake an action under the "two-step" license revocation statutes, New York courts have assigned a large role to equitable considerations. In ruling on an action brought under Article 78 of New York's Civil Practice Act³⁰¹ which challenged a decision made by the New York State Urban Development Corporation, the New York Supreme Court declared that an administrative decision would be overruled "where the matter involved is one of great public interest, and granting the relief requested would benefit the general public."³⁰² In *Crane v. Anaconda Co.*,³⁰³ the New York Court of Appeals declared that in failing to prosecute cases, the exercise of mandamus to compel "lies in the discretion of the court in light of equitable principles" and "will be granted 'with caution so as to prevent abuse.'"³⁰⁴

A narrow exception to the general presumption of nonreviewability for "two-step" license revocation statutes would avoid the policy dilemmas raised by granting mandamus to compel prosecution for violations of ordinary statutes. First, the number of cases that would qualify for this special judicial treatment would be small, therefore countering the fear of a floodgate of litigation. Secondly, in response to Colker's concerns, a judicial "check" would be exercised over any political factors that would exert influence over the decision to initiate a corporate charter revocation action. Finally, recognition of the special nature of the "two-step" license rev-

301. See *supra* notes 121 and 124 and accompanying text.

302. *Albert Elia Bldg. Co. v. N.Y. State Urban Dev. Corp.*, 388 N.Y.S.2d 462, 466 (App. Div. 1976).

303. 346 N.E.2d 507 (N.Y. 1976).

304. *Id.* at 510 (citing *Matter of Coombs v. Edwards*, 21 N.E.2d 353, 354 (N.Y. 1939)).

ocation statutes would guarantee that the basic "values" of the statute would be carried out by the Attorney General. Section 1101 embodies these specific legislative values in mandating the grounds for charter revocation. The general presumption of nonreviewability which is presently used effectively whitewashes the legitimate legislative intent to establish standards for revocation of corporate charters.

For courts ruling on the reviewability of the Attorney General's failure to prosecute under charter revocation statutes, equitable considerations may tilt the balance towards granting judicial review of the Attorney General's decision not to initiate revocation proceedings, especially where serious environmental violations are at issue. Under section 1101's "persistently fraudulent or illegal" language, equitable considerations will inevitably play a large role, as they did in *Anaconda*, in achieving redress. The more egregious the environmental violations, the more likely that the courts will respond by granting review and by extending the line of case law that supports favorable judicial treatment of these two-step license revocation statutes. The New York courts have exhibited a willingness to carve out an exception for two-step license revocation statutes to the general presumption of judicial nonreviewability of prosecutorial discretion. The time may be ripe to extend this line of case law in the face of the continued environmental violations of many major corporations. By coupling the exemption of two-step license revocation statutes from the general presumption of nonreviewability with the excellent equitable grounds offered by such a proceeding, this type of suit has a good chance of success.

2. Standard of Review for Action-Forcing Corporate Charter Revocation Actions

If the litigant succeeds under the quasi-private cause of action theory by convincing the court that the Attorney General's decision not to prosecute is judicially reviewable, it then needs to be determined what standard of judicial review should be used to evaluate the Attorney General's decision not to initiate charter revocation proceedings. Under New

York's Article 78, an "arbitrary and capricious" standard is to be applied whenever an agency is not required to conduct a trial type hearing in making a determination.³⁰⁵ On the other hand, a "substantial evidence" test is applied under section 7803(4) whenever an administrative determination is made through a formal hearing process.³⁰⁶ Even if the Attorney General's decision were subject to the more stringent substantial evidence standard, which is generally viewed as being less deferential to the agency decisionmaker, the New York courts apply a "rationality" or "consistency" test, which essentially is based on settled law principles.³⁰⁷ As one New York court has noted, "[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard."³⁰⁸

The court emphasized a "settled law" approach in determining whether an administrative decision was supported by substantial evidence in *Casey v. Hartnett*.³⁰⁹ In *Casey*, the New York Commissioner of Labor appealed a determination by the Unemployment Insurance Appeal Board that the claimant was an independent contractor and, therefore, ineligible for unemployment insurance benefits. The court, in reviewing the denial of benefits by the agency, declared that the "Board's resolution of this question must be upheld if supported by substantial evidence."³¹⁰ The court also declared that if a decision is "based on essentially the same facts as a prior agency determination that came to a contrary conclusion, the agency must offer an explanation; its failure to do so renders its later decision arbitrary and capricious."³¹¹ In applying this standard, the court looked to *In re Field Delivery*

305. N.Y. CIV. PRAC. L. & R. § 7803(3) (McKinney 1994).

306. N.Y. CIV. PRAC. L. & R. § 7803(4), which states that questions may be raised concerning "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

307. See *infra* notes 313-25 and accompanying text.

308. *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 313 N.E.2d 321, 325 (N.Y. 1974).

309. 528 N.Y.S.2d 740 (App. Div. 1988).

310. *Id.* at 741 (citing *In re Schlicker*, 389 N.Y.S.2d 913 (1976)).

311. *Id.* at 741 (citing *In re Martin*, 512 N.E.2d 310 (N.Y. 1987); *In re Field Delivery Serv.*, 488 N.E.2d 1223 (N.Y. 1985)).

Services,³¹² which had similar facts, and in which the Board had come to an opposite conclusion as they had in the instant case. In dismissing the defendant's argument that only minor factual differences existed between the two cases, the court stated that "the existence of sufficient similar facts" requires "an explanation by the Board of why it reached a different result in this case."³¹³ The court in *Casey* specifically stated that it is applying a "substantial evidence" standard of review and then in fact it actually applied a consistency standard.

The standard adopted by the courts for review of administrative actions and non-actions has been interpreted by many New York courts as a "consistency" test, in which the courts have compared past agency actions with the challenged ones before the court.³¹⁴ In *Schwartz Landes Associates v. New York City Conciliation and Appeals Board*,³¹⁵ a supreme court held that the courts will override agency decisions when they are inconsistent with settled law.³¹⁶ In *Schwartz Landes*, the court reviewed the New York Conciliation and Appeals Board's decision to deny a license to a landlord who was seeking permission to refuse renewal leases to residents of a non-profit psychiatric rehabilitation center.³¹⁷ In granting the petitioner's request for reversal, the court stated that "[w]hile it is quite true that an administrative agency is accorded wide latitude and broad discretion in the contemplation of matters before it . . . a court will be compelled to . . . interfere if the opinion is not consistent with settled law."³¹⁸ The court looked to recent New York case

312. 488 N.E.2d 1223 (N.Y. 1985).

313. *Casey v. Hartnett*, 528 N.Y.S.2d 740, 741 (App. Div. 1988).

314. See *Casey*, 528 N.Y.S.2d 740; *Schwartz Landes Assoc. v. New York City Conciliation and Appeals Bd.*, 478 N.Y.S.2d 791, 793 (App. Div. 1984).

315. 478 N.Y.S.2d 791.

316. *Id.* at 793.

317. *Id.* at 792. Petitioner had initially offered renewal leases, but then "subsequently revoked the offer and filed an application with the respondent for permission to refuse to offer renewal leases." *Id.* This course of action was required under the Rent Stabilization Law, Administrative Code of City of New York, section YY51-1.0 et seq. *Id.*

318. *Id.* at 793 (citing *Kurcsics v. Merchants Mutual*, 403 N.E.2d 159 (N.Y. 1980)).

law³¹⁹ and determined that the prior decision was inconsistent with "settled law"; therefore, the court reversed the decision of the Conciliation and Appeals Board.³²⁰

In reviewing an agency's interpretation of the statute that it is responsible for administering, New York courts have applied a "rationality" or "consistency" standard for judicial review. In *Charles H. Greenthal Co. v. State Division of Housing Community Renewal*,³²¹ a supreme court reviewed an agency's formula for determining stabilized rent amounts. The supreme court upheld the agency's interpretation, declaring that "[i]t is settled law that an agency's interpretation and construction of its own regulations and the legislation under which it functions will be given special deference by the courts if that construction is not irrational or unreasonable."³²² In applying the standard of review to the facts, the court stated that the procedure was not "out of harmony nor inconsistent with the plain meaning of the statutory language."³²³ The court did not emphasize application of a "substantial evidence" test or an "arbitrary and capricious" standard; rather, the court applied the facts of the case to the controlling settled law to determine whether the agency's actions were consistent with the settled law. The court upheld the agency's action because it was not inconsistent or irrational according to settled law.³²⁴

Both the willingness of the New York courts to review the prosecutor's discretionary decision under two-step license revocation statutes and the favorable "consistency" standard of review by the New York courts could support mandamus litigation brought to compel the state Attorney General to revoke a corporation's charter. The "settled law" consistency test employed by the court in *Casey* and in *Schwartz Landes*,

319. The court looked to *Cale Dev. Co., Inc. v. New York City Conciliation and Appeals Bd.*, 463 N.Y.S.2d 814 (App. Div. 1983), *aff'd*, 463 N.E.2d 619 (N.Y. 1984); *Walter & Samuels v. New York City Conciliation and Appeals Bd.*, 439 N.Y.S.2d 390 (App. Div. 1981), *appeal dismissed*, 432 N.E.2d 141 (N.Y. 1981).

320. *Schwartz Landes*, 478 N.Y.S.2d at 794.

321. 484 N.Y.S.2d 445 (Sup. Ct. 1984).

322. *Id.* at 448-49 (citing *Albano v. Kirby*, 330 N.E.2d 615 (N.Y. 1975)).

323. *Id.* at 449.

324. *Greenthal*, 484 N.Y.S.2d at 445.

in which the court reviewed the agency's decision based on their prior adjudications of cases with similar factual scenarios, favors a suit brought to revoke a charter. The "settled law" of corporate charter revocation actions is extensive, and the standard for such revocation action has been clearly enunciated by the New York judiciary during the second half of the nineteenth century and the early twentieth century.³²⁵ The willingness of the New York courts to analyze cases on the basis of the "settled law" in the area would allow citizen litigants to argue that the Attorney General's decision not to initiate a suit to revoke a charter is inconsistent with the case law developed under the New York revocation statutes. This interpretation adds "teeth" to the "consistency" standard of judicial review by directing the reviewing court in a charter revocation case to a favorable body of case law which contradicts the Attorney General's decision not to initiate proceedings directed at revoking a corporate charter.

V. Conclusion - The Tool of Charter Revocation

A corporate charter revocation action may be perceived as unreasonable and undesirable by many individuals. The perception that corporate charter revocation is unreasonable is influenced by huge corporate advertising budgets, a trickle of charitable contributions made by corporations, and small amounts of corporate monies that are given for "community reinvestment." In reality, the harms created by large corporations far outweigh the benefits that are produced by them.

Those commentators who urge corporate "accountability" instead of dismantling the corporation which has an extensive history of environmental lawbreaking, have convinced themselves that regulatory control offers sufficient enforcement capability. In making this assumption, they ignore several pieces of evidence, including the documented histories of those corporations who treat environmental regulatory penalties as simply a cost of "doing business" and the effect that corporate monies have in the political realm.

325. See *infra*, notes 17, 119-20, 13-36 and accompanying text.

Along these lines of corporate "accountability," there have been many proposals in recent years to re-assert community control over large corporations. Director's Duty statutes, perhaps the most widely accepted "reform" statutes, have been codified by a multitude of state legislatures.³²⁶ These statutes expressly redefine "corporate management's duty" by allowing the directors to consider the "interests of various nonshareholder constituencies."³²⁷ By codifying this expanded version of the duty of the corporation's management, the statutes immunize the directors from suit by the traditional constituency—the stockholders. Some statutes even allow directors to "decline to take action that would be immediately profitable to shareholders in order to pursue possible longer-term benefits."³²⁸ However, one commentator believes that the statutes do not offer the "vehicle" for a "radically different understanding of corporate law" since they do not impose "affirmative obligations on management."³²⁹ Thus, these statutes do not provide the necessary incentive for the corporation to discontinue violating environmental laws. The threat of charter revocation may provide enough pressure on corporations to encourage them to stop polluting and to allow community involvement in corporate decision making.

326. See David Millon, *Redefining Corporate Law*, IND. L. REV. 223 (1991) (citing IND. CODE ANN. § 23-1-35-1(d) (West 1991) and citing to the twenty-seven other states that have similar statutes codifying directors duties).

327. Millon, *supra* note 326, at 225 (describing "employees, creditors, suppliers, consumers, and local communities" as examples of nonshareholder constituencies). See also Roberta S. Karmel, *The Duty of Directors to Non-Shareholder Constituencies in Control Transactions - A Comparison of U.S. and U.K. Law*, 25 WAKE FOREST L. REV. 61, 66-75 (1990); George Dent, Jr., *The Revolution in Corporate Governance, the Monitoring Board and the Director's Duty of Care*, 61 B.U. L. REV. 623, 630-34 (1981).

328. Millon, *supra* note 326, at 243 (citing CONN. GEN. STAT. ANN. § 33-313(e) (West Supp. 1990); HAW. REV. STAT. § 415-35(b) (Supp. 1990); IDAHO CODE § 30-1602 (1989); IOWA CODE ANN. § 490.1108 (West 1990); KY. REV. STAT. ANN. § 271B.12-210(4) (Michie/Bobbs-Merrill 1990); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 1990); MINN. STAT. ANN. § 302A.251(5) (West Supp. 1989); N.M. STAT. ANN. § 53-11-35(D) (Supp. 1989); N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 1991); OR. REV. STAT. § 60.357(5) (1989)).

329. Millon, *supra* note 326, at 276.

The corporate "accountability" movement does not offer solace to those communities and individuals who have lost their health and their community solidarity while relying on traditional regulatory enforcement mechanisms to protect them from corporate environmental abuses. There is no time to bargain with corporations while wide-scale environmental degradation continues to occur at an accelerated pace, and while corporations accrue monetary benefits from the harms that they produce. Corporate charter revocations could be used as an alternative method to protect citizens from corporate environmental violations.³³⁰

Corporate charter revocation is but one alternative method that can be used to encourage greater corporate responsibility. Future experimentation in several areas is necessary to discover a combination of workable solutions to corporate abuses of environmental regulations. These areas of experimentation could include the rechartering of corporations, downsizing corporations, the prohibition on electoral spending by corporations, and the encouragement of alternative arrangements, including worker and community-owned cooperatives. Lastly, it is crucial to engage in a national debate concerning the relationships among private property, public property, wealth, our political processes, and the impact of the corporate form on the natural environment.

330. See, e.g., CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* 120 (1975) (stating that society must determine what "internal configurations of authority and information flow would best" encourage greater corporate responsibility).