

CORPORATE RESPONSIBILITY AND STATE FALSE CLAIMS ACTS:
EVALUATING THE USE OF QUI TAM PROCEEDINGS TO
REVOKE THE CHARTERS OF CORPORATE POLLUTERS

by
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This Comment examines the use of qui tam proceedings by whistleblowers to obtain standing to request corporate dissolution for environmental crimes. While many commentators have examined the revival of corporate charter revocation as a way to attack repeat environmental offenders, few have examined how a qui tam proceeding may create standing for a whistleblower by allowing the whistleblower to step into the shoes of a state attorney general reluctant to bring a corporate charter revocation proceeding.

The author first examines the history of charter revocation in the United States, including why many modern environmentalists argue for its re-emergence. Looking at current roadblocks facing activist citizens who bring charter revocation petitions, the author analyzes whether a new strategy—using state false claims acts or “whistleblower” statutes—may offer an alternate path for such petitions. Due to problematic standing requirements, citizens have so far been unsuccessful; however, in light of a recent Supreme Court decision, this strategy could prove useful to overcome current bars to the courthouse door.

Tracing how false claims act statutes could work hand in hand with charter revocation in the environmental fraud context, the Comment then looks to Delaware and California as models for attempting the new approach of using a statutorily defined and protected whistleblower to “stand in the shoes” of an attorney general who is pressured to ignore repeat environmental offenders for political and economic considerations. While setbacks include potentially large costs to the plaintiff, a reluctant judiciary, and increased complexity in an already difficult prosecutorial environment, plaintiffs may still be attracted by the potential of a large share in the government’s recovery in a qui tam proceeding. The Comment concludes that while the idea is novel, and case law on the issue is sparse, the increasing number of states adopting greater qui tam provisions provides hope to concerned citizens frustrated with the current prosecutorial environment.

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I. INTRODUCTION

The judgment sought against the defendant is one of corporate death. The state, which created, asks us to destroy, and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is, indeed, less than that of the humblest citizen¹

In the midst of growing corporate distrust amongst many Americans, an increasing number of activist scholars are revisiting the controversial idea of revoking a corporation's charter for violation of environmental laws. The American public originally thought of corporations as public institutions that were chartered to carry out specific activities in the interests of society, and the idea of charter revocation itself is hardly new. When a corporation acted outside of its charter, the state could revoke it.² While handing down a death sentence to corporations may seem a novel and drastic measure today, a death penalty currently exists for some corporate crimes, even if not framed as such. For example, the financial injury of a large fine, the cost of a criminal defense, or the negative publicity from reaction to public reports of potential criminal acts or liability can weaken an entity's competitive position and "increase the cost of doing business to the point of bankruptcy or even

¹ *People v. N. River Sugar Refining Co.*, 24 N.E. 834, 834 (N.Y. 1890).

² Gil Yaron, *Awakening Sleeping Beauty: Reviving Lost Remedies and Discourses to Revoke Corporate Charters* (2000) (unpublished LL.M. thesis, University of British Columbia, on file with University of British Columbia).

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liquidation.”³ The Environmental Protection Agency (EPA) could also impose enough fines and/or cleanup costs upon a corporation to effectively put it out of business.⁴ The problem is that federal and state executive branches rarely pursue such options. When it comes to corporate polluters, public debate and discussion tends to center on the illegal or unethical acts themselves, rather than the corporation’s relation to the public in the first place.

Few commentators have examined the role qui tam proceedings may play in a corporate death penalty for environmental harms. In states that do not specifically allow citizens to directly go to court to revoke a corporate charter, the state attorney general must file the petition, and therefore has a great degree of discretion whether to bring such actions or not. In the face of reluctant attorneys general, scholars have suggested using writs of mandamus to force the attorneys general to file revocation petitions when a corporation repeatedly acts illegally, and thus outside of its chartered purposes.⁵ Few have examined whether private citizens can bring a charter revocation action without asking for writs of mandamus.

Statutory qui tam provisions provide such an opportunity. At least since the time of the Civil War, the federal government has encouraged private citizens to expose fraud against the government by bringing a lawsuit against the wrongdoer and sharing in the recovery, known as a “qui tam proceeding.”⁶ Qui tam provisions effectually privatize government legal remedies by allowing private citizens to act as “private attorneys general” in the effort to prosecute government procurement and program fraud.⁷ After the government investigates the claim, it may decide to join the private plaintiff’s (referred to as a relator) qui tam lawsuit. If the government does not join suit, a relator may proceed without any governmental participation. This right to continue the lawsuit in the name of the government offers a promising avenue to citizens frustrated with what many see as a modern lack of prosecutorial vigor.⁸

³ Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 945 (2005).

⁴ *Id.* at 945 n.70.

⁵ See, e.g., Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219 (1995).

⁶ U.S. Dep’t of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, available at <http://www.usdoj.gov/usao/pae/Documents/fcprocess2.pdf#search=%22qui%20tam%20proceedings%22>.

⁷ Jonathan T. Broliier, Note, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, n. 77 (2006) available at <http://moritzlaw.osu.edu/lawjournal/issues/volume67/number3/broliier.pdf> (taking the position that reforms are needed to encourage the DOJ to dismiss more “unfounded” qui tam actions).

⁸ Dessen, Moses & Rossitto, Attorneys at Law, Information about Whistle-Blower/Qui Tam Claims, <http://www.dms-lawyer.com/area/quitam.shtml>.

This Comment will confine its analysis to the possible advantages of using qui tam provisions to petition to revoke a corporate charter for repeated environmental harms. Part II examines the relevant background for revoking corporate charters, noting specific roadblocks plaintiffs have encountered in the modern era, such as standing and other threshold jurisdictional requirements. Part III analyzes the development of state false claims act case law against the backdrop of equitable remedies in states where charter revocation is still available. Part IV examines the connections between environmental crimes and false claims against the government, applying qui tam law specifically to “environmental fraud.” Part V considers Delaware law, since the corporate law of Delaware governs over half of the Fortune 500 companies and “half of all U.S. firms traded on the New York Stock Exchange and NASDAQ.”⁹ The Part then considers California, since California False Claims Act case law has a greater amount of precedent than most states and thus sheds light on various judicial concerns that may arise. Part VI addresses some of the fiscal limitations and strategic disadvantages of taking such an approach, though this Comment will not consider the broad spectrum of civil procedure issues raised when a qui tam relator stands in place of the government.

This Comment concludes that while qui tam proceedings help open up the courts to vindicate the public interest, qui tam plaintiffs concerned with environmental harms must first allege corporate fraud in the environmental context before they can request charter revocation without the state attorney general. While plaintiffs pursuing writs of mandamus to force an attorney general to bring a revocation action can allege purely environmental harms, a qui tam plaintiff must allege that the corporation defrauded the government by misappropriating state or federally provided cleanup funds, for example.

An aggrieved person under qui tam could recover part of a penalty imposed by a judge to compensate her for injuries she has suffered, and then seek revocation of the corporate charter to stop unlawful activity and redress both her and the public’s injuries. Change would remain difficult under the qui tam approach, as a lack of sufficient litigation resources and a reluctant judiciary can prevent ultimate success. Nevertheless, if a whistleblower is willing to come forth with information that a company has defrauded a state or the federal government in the environmental context, qui tam proceedings, at the very least, can offer a unique foundation upon which courts may hear cases to request the remedy of charter revocation. At the very least, this will raise public awareness about the proper relationship between a corporation and the state.

⁹ DIV. OF CORPS., DEL. DEP’T OF STATE, 2006 ANNUAL REPORT (2006), *available at* http://corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf.

II. CHARTER REVOCATION IN HISTORICAL CONTEXT AND THE NEED FOR REVIVAL

Since corporations continue to pollute, despite the threat of civil and criminal penalties, revoking corporate charters of polluters may be necessary to deter future corporate pollution. This Part will first discuss the history of charter revocation and its evolution through American legal history. Next, the Part will examine current legal dynamics of charter revocation. Finally, this Part will examine the effectiveness of using writs of mandamus to force state attorneys general to petition a court to revoke corporate charters, suggesting that an alternative strategy is needed to overcome standing problems and the discretion of attorneys general.

A. *A Brief Early Historical Trajectory*

The states have always had the legal authority to revoke the charters of corporations violating the law.¹⁰ Although mostly ignored, charter revocation survives on the books as a legal remedy against corporate power.¹¹ In the nineteenth century, states routinely revoked the charters of corporations that undermined democratic authority by acting outside of the powers given to them in the corporate charter.¹² This action, taken by the attorney general of the state, is called the exercise of “quo warranto”, which literally means, “by what authority” do you exercise these powers?¹³ By the 1870s, nineteen states had amended their constitutions to subject corporate charters to alteration or revocation.¹⁴

Even in colonial days, an order of the legislature was necessary to charter a corporation. For the founding fathers, specially chartered corporations were created only for “public purposes,” which included turnpike construction, bridge building, and other works to serve the public.¹⁵ As the Supreme Court stated in 1819, a corporation at law “[b]eing the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”¹⁶ This limitation resulted in a very low number of incorporations. By 1900, only 300 corporations had been

¹⁰ ROBERT BENSON, CHALLENGING CORPORATE RULE: THE PETITION TO REVOKE UNOCAL’S CHARTER AS A GUIDE TO CITIZEN ACTION 1 (1999).

¹¹ 65 AM JUR. 2d *Quo Warranto* § 5. See, e.g., IDAHO CODE ANN. § 30-1-1430 (2006); DEL. CODE ANN. tit. 8, § 284(b) (2001).

¹² RICHARD L. GROSSMAN & FRANK T. ADAMS, TAKING CARE OF BUSINESS: CITIZENSHIP AND THE CHARTER OF INCORPORATION 7–17 (1993).

¹³ BLACK’S LAW DICTIONARY 1285 (8th ed. 2004).

¹⁴ GROSSMAN & ADAMS, *supra* note 12, at 13.

¹⁵ Robert Lekachman, *Taming the Giant Corporation*, 92 POL. SCI. Q. 153, 153–54 (1977) (book review); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 603–604 (1819).

¹⁶ *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636 (1819).

formed.¹⁷ If one of these limited corporations caused harm to public interests or went beyond its mandate, the state could revoke the corporate charter.¹⁸

Historically, state attorneys general frequently exercised their power to revoke corporate charters. For example, in 1890, a court dissolved The Sugar Trust (corporations combined to control sugar prices), and Standard Oil later met a similar fate.¹⁹ Charters of small and large corporations alike were subject to revocation. At least until the early twentieth century, the quo warranto power remained a strong tool to dissolve a corporation that had not obeyed the law or had violated the public trust.²⁰

B. Moving Towards the Modern Status Quo

In 1886, the system began to drastically change when the Supreme Court declared a corporation was a legal “person” in the watershed case of *County of Santa Clara v. Southern Pacific Railroad Co.*²¹ This marked the beginning of the modern concept of the corporation as a company without obligations to advance the public good. Attorneys general stopped initiating proceedings to dissolve egregious corporate actors. Many theorized that the effect of the rise of the regulatory system slowly removed enforcement power from the attorney general and placed it into the hands of the state regulatory agencies, which led to lax enforcement. Others have blamed state governments for engaging in a “race to the bottom”²² to encourage corporations to charter in their

¹⁷ Charlie Cray & Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. SOC. JUST. 305, 315 (2005).

¹⁸ *Id.* at 314.

¹⁹ See Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 339 (2007) (discussing the breakup of The Sugar Trust), *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 81–82 (1911) (breaking up Rockefeller’s Standard Oil Monopoly under the Sherman Act). See also, Charlie Cray, *Chartering a New Course: Revoking Corporations’ Right to Exist*, MULTINATIONAL MONITOR, Oct./Nov. 2002, <http://multinationalmonitor.org/mm2002/02oct-nov/oct-nov02corp1.html>; RALPH W. HIDY & MURIEL E. HIDY, *PIONEERING IN BIG BUSINESS, 1882–1911: HISTORY OF STANDARD OIL COMPANY (NEW JERSEY)* (1955). Ohio successfully sued Standard Oil, compelling the dissolution of the trust in 1892. Standard Oil fought this decree, in essence separating off only Standard Oil of Ohio without relinquishing control of that company. In 1899, the Standard Oil Trust was legally reborn as a holding company—a corporation known as the Standard Oil Company of New Jersey. Eventually, the U.S. Justice Department sued Standard Oil of New Jersey under the Sherman Antitrust Act of 1890.

²⁰ For an in-depth discussion of the theoretical, doctrinal, and political justifications of reintroducing revocation of corporate charters, with an extensive analysis of the common law tradition and quo warranto, see generally Yaron, *supra* note 2.

²¹ 118 U.S. 394 (1886).

²² Linzey, *supra* note 5, at 237.

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states.²³ “In an age of railroads and steel, of oil and manufacturing, corporations became powerful and, increasingly, national institutions. And as corporate lawyers evaded existing limits on the size and scope of corporations by forming holding companies and trusts, state corporate law was about to hit a crisis point.”²⁴ Although a state could still initiate a quo warranto proceeding against a corporation if a violation of the corporate charter existed and it was causing injury to the public interest, the increase of corporate presence in the political arena likely had the effect of silencing outraged state attorneys general.²⁵ No matter what the cause, attorneys general do not aggressively pursue revocation of corporate charters in modern times.

Since the people (via legislatures) continue to attach “strings” to the privilege of doing business in the corporate form, when those conditions are violated, the people of the state may “yank those strings and pull the charters from offending companies.”²⁶ The lack of enforcement of environmental laws, along with current corporate culture, reflects the failure of deterrence factors under the status quo. As the situation stands,

[F]irst, and perhaps foremost, there is an expectation that detection and prosecution is unlikely, and punishment will not be severe; second, there is a corporate culture that ignores wrongdoing or fails to take responsibility for it; third, there is an invincibility that accompanies the use of corporate legal and political influence to shape the law; and fourth, there is a governmental reluctance to harm the economy.²⁷

Since many corporations see illegal pollution as simply a cost of doing business, in order to give new teeth to the regulatory system, advocates of citizen rights should explore charter revocation.

All fifty states still have corporate charter revocation statutes that allow for revocation when the corporation has “misused” or “abused” the powers granted to the corporation within the charter.²⁸ For example, in

²³ Justice Brandeis described this phenomenon in *Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933) (Brandeis, J. dissenting).

²⁴ Cray & Drutman, *supra* note 17, at 314.

²⁵ Linzey, *supra* note 5, at 237.

²⁶ BENSON, *supra* note 10, at 1.

²⁷ Ramirez, *supra* note 3, at 962.

²⁸ See, e.g., ALA. CODE § 6-6-590 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 10-1430 (2006); ARK. CODE ANN. § 4-75-205 (2001); CAL. CIV. PROC. CODE § 803 (West 2007); CAL. CORP. CODE § 1801 (West 2007); COLO. REV. STAT. § 7-114-301 (2007); CONN. GEN. STAT. § 35-36a (West 2005); DEL. CODE ANN. tit. 8, § 284 (2001); D.C. CODE § 29-420 (LexisNexis 2001); FLA. STAT. ANN. § 607.1430 (West 2007); GA. CODE ANN. §§ 7-1-92, 14-4-160 (2006); HAW. REV. STAT. § 842-5 (1993); IDAHO CODE ANN. § 30-1-1430 (2006); 805 ILL. COMP. STAT. ANN. § 20/1 (West 2004); IND. CODE ANN. § 23-1-47-1 (LexisNexis 2007); IOWA CODE ANN. § 490.1430 (1999); KAN. STAT. ANN. § 17-6812 (1995); KY. REV. STAT. ANN. § 271B.14-300 (LexisNexis 2003); LA. REV. STAT. ANN. § 12:163 (West 2007); ME. REV. STAT. ANN. tit. 13-C § 1430 (2005); MD. CODE ANN., CORPS. & ASS'NS § 3-513 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 155, § 11 (2005); MICH. COMP. LAWS SERV. § 600.4521 (LexisNexis 2004); MINN. STAT. ANN. §

1998, the attorney general of New York invoked his authority to put the Council for Tobacco Research, incorporated in New York, out of business.²⁹ Most of the state laws leave the decision to request revocation of a corporation's charter to the attorney general.³⁰ Others, like California and Delaware, require the attorney general to initiate revocation proceedings when requested to do so, and when presented with reasons why the corporation abused its charter powers.³¹ A few states, such as Alabama, allow private citizens to file charter revocation lawsuits directly.³² Since such direct citizen provisions are rare, they will not be the focus of this Comment.

Since citizens and states previously brought actions to revoke corporate charters for harming the public and betraying its trust, it is a small leap to apply the same laws to corporate polluters. Many states require corporations to file a "compliance history" report each time the corporation requests an additional permit, or applies for some other type of assistance or permission from the state. Additionally, corporations that have broken federal laws and regulations may have a list of violations with various federal agencies, including the Environmental Protection Agency (EPA) and the National Labor Relations Board (NLRB). Some of this information is available on the Internet, and thus cooperative networking may assist potential plaintiffs in their search for environmental violations

556.07 (West 2000); MISS. CODE ANN. §§ 11-39-1, 11-39-3 (West 1999); MO. ANN. STAT. § 355.726 (West 2001); MONT. CODE ANN. § 35-6-102 (2007); NEB. REV. STAT. § 25-21,121 (1995); NEV. REV. STAT. § 598A.180 (2005); N.H. REV. STAT. ANN. § 293-A:14.30 (LexisNexis 1999); N.J. STAT. ANN. § 14A:12-6 (West 2003); N.M. STAT. § 53-16-13 (2001); N.Y. BUS. CORP. LAW § 1101 (McKinney 2003); N.C. GEN. STAT. § 55-14-30 (2005); N.D. CENT. CODE § 10-19.1-118 (2007); OHIO REV. CODE ANN. § 2733.02 (West 2006); OK. STAT. ANN. tit. 15 § 567 (West 2006); OK. STAT. ANN. tit. 12, § 1532 (West 1993); OR. REV. STAT. § 30.580 (2005); 71 PA. CONS. STAT. § 824 (2007); R.I. GEN. LAWS § 7-1.1-87 (1999); S.C. CODE ANN. § 33-14-300 (2004); S.D. CODIFIED LAWS § 21-28-12 (2004); TENN. CODE ANN. § 48-24-301 (2002); TENN. CODE ANN. § 29-35-101 (2000); TEX. BUS. CORP. ACT ANN. art. 7.01 (Vernon 2003); UTAH CODE ANN. § 16-10a-1430 (2005); VT. STAT. ANN. tit. 11A, § 14.30 (2007); VA. CODE ANN. § 8.01-636 (2007); WASH. REV. CODE ANN. § 7.56.010 (West 2007); W. VA. CODE ANN. § 53-2-1 (LexisNexis 2007); WIS. STAT. ANN. § 180.1430 (West 2006); WYO. STAT. ANN. § 17-16-1430 (2007).

²⁹ N.Y. BUS. CORP. LAW § 1101 (McKinney 2003). *See also* Tobacco Industry Records, Council for Tobacco Research Administrative History, http://www.rny.nysed.gov/a/research/res_topics_bus_tobacco_adminctr.shtml. Interestingly, the former Attorney General, and now former Governor of New York, Eliot Spitzer, has backed down from many of his earlier aggressive stances.

³⁰ *See, e.g.*, IDAHO CODE ANN. § 30-1-1430 (2006); ARIZ. REV. STAT. ANN. § 10-1430(A); COLO. REV. STAT. § 7-114-301; FLA. STAT. § 607.1430; KY. REV. STAT. ANN. § 271B.14-300; NEB. REV. STAT. § 21-20,162(4); OR. REV. STAT. § 60.661(4).

³¹ DEL. CODE ANN. tit. 8, § 284(b) (2001); CAL. CORP. CODE § 1801 (West 2007).

³² ALA. CODE § 6-6-591(a)(1) (LexisNexis 2005). For more analysis on citizen-filed charter revocation, *see* THOMAS LINZEY, CMTY. ENVTL. LEGAL DEF. FUND, A CITIZEN'S GUIDE TO CORPORATE CHARTER REVOCATION UNDER STATE LAW (1996), <http://www.celdf.org/ProgramAreas/CorporationsDemocracy/CorporationsDemocracyInex/tabid/108/ctl/Edit/mid/429/CorporationsDemocracy/ACitizensGuidetoCorporateCharter/tabid/104/Default.aspx>.

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to sue those accountable.³³ Other starting points might include the EPA's database of violations and state agency files on illegal activity. Repeated violations may mean that a corporation's charter must be revoked to prevent harm against the public.

C. Current Roadblocks to Charter Revocation

There are various downsides of using the traditional quo warranto power to revoke charters. While individual citizens may have standing to sue for environmental violations, charter revocation statutes almost exclusively vest the power to dissolve a corporation in the hands of the attorney general. Therefore, except for the limited instances where charter revocation statutes specifically allow citizen suits, it will be difficult for most plaintiffs to get past the courthouse door if the attorney general decides not to go after a corporation.

While various commentators focus on writs of mandamus to force the attorney general to use the quo warranto authority,³⁴ this is a long, risky, and very difficult process. Without an express statutory grant of standing that cannot be constitutionally challenged, interested parties have little clout to come to the state attorney general and tell her to protect the public interest. As the court in *International Association of Firefighters, Local 55 v. City of Oakland* noted, a "proper case" would require a plaintiff with "an individual right distinct in kind from the right of the general public enforceable by an action in the nature of quo warranto."³⁵ Without a statutorily delineated party with an individual right and whose standing has been clearly endorsed by the Supreme Court, a citizen pursuing a writ of mandamus has little chance of success.

First, before bringing a mandamus action to enforce the non-discretionary duty of the attorney general to initiate revocation proceedings, citizen plaintiffs must exhaust administrative remedies. Due to the nature of the administrative process, such exhaustion would be time-consuming and costly. A plaintiff must then send a letter to the attorney general, detailing the environmental statutory violations of the corporation, along with supporting materials.³⁶ A period of time needs to elapse to allow the attorney general to initiate revocation proceedings. Afterwards, if the attorney general refuses to take the administrative action, the citizen organization may use the researched compliance

³³ Environmental Resources Information Network (ERIN), The Activist's Guide to Resources for Research Corporations, <http://www.celdf.org/ProgramAreas/CorporationsDemocracy/CorporationsDemocracyIndex/tabid/108/ctl/Edit/mid/429/CorporationsDemocracy/GuidetoResourcesforResearchingCorporations/tabid/103/Default.aspx>. See also generally, Linzey, *supra* note 32 (providing suggestions for finding compliance histories and state records of violations).

³⁴ LINZEY, *supra* note 32.

³⁵ Int'l Ass'n of Firefighters, *Local 55 v. City of Oakland*, 174 Cal. App. 3d 687, 697 (Dist. Ct. App. 1985).

³⁶ *Id.*

history in a suit to compel the attorney general to bring revocation proceedings against the corporation.³⁷

This process is long and arduous, and more importantly, cannot guarantee success. Furthermore, charter revocation statutes often use language such as “the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped.”³⁸ Thus, the problem with a writ of mandamus is that the attorney general always retains discretion to judge whether he or she has “reason to believe” a corporation is acting outside of its charter. Courts will continue to give that discretion considerable deference, as they have in the past.³⁹ To overcome this high level of deference, citizen groups would have to show that the attorney general acted completely arbitrarily, capriciously, and unreasonably.⁴⁰ For all of the above reasons, few plaintiffs will be willing to commit the resources necessary to go through this process when it may not even result in the initiation of a lawsuit.

D. *Lessons from the Petition Against Unocal*

A petition filed by Loyola Law School professor Robert Benson demonstrates some of the obstacles litigants are bound to encounter when petitioning to revoke a charter. Benson, along with various activist groups, sought to revoke Unocal’s corporate charter in the mid-1990s.⁴¹ While this petition ultimately floundered, it brought charter revocation back into the national consciousness. Even more important for purposes here, the petition focused on environmental harms caused by Unocal, providing a glimpse of the uphill battle citizen groups face against corporate polluters.

Incorporated in Santa Paula, California in 1890, Union Oil Company of California (Unocal) later became “the principle operating subsidiary of Unocal Corp., a holding company incorporated in Delaware.”⁴² Benson and a coalition of more than thirty public interest organizations filed a petition calling on then-Attorney General of California, Dan Lungren, to revoke the charter for various infractions, including environmental statute violations and international human rights violations.⁴³ The

³⁷ *Id.*

³⁸ CAL. CIV. PROC. CODE § 803 (West 2007).

³⁹ *See, e.g., City of Campbell v. Mosk*, 197 Cal. App. 2d 640, 647 (Dist. Ct. App. 1961) (holding that “the abuse of discretion by the attorney-general in refusing the [requested] leave is extreme and clearly indefensible”).

⁴⁰ *Int’l Ass’n of Firefighters*, 174 Cal. App. 3d at 697.

⁴¹ *See generally* BENSON, *supra* note 10.

⁴² David Brinkerhoff, *Green Group Asks Calif. Official to Dissolve Unocal*, REUTERS, Sept 10, 1998. The company agreed to a merger with Chevron in 2005. The Unocal-Chevron merger was accepted on July 19, 2005 and completed on August 10, 2005. EDGAR Online, Unocal Corp. – UCL Unscheduled Material Events (8-K) Exhibit 99.1 (July 29, 2005), <http://sec.edgar-online.com/2005/07/29/0000950123-05-009140/Section5.asp>.

⁴³ Benson submitted the petition under CAL. CIV. PROC. CODE § 803 (West 1980)

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petition cited Unocal's responsibility for the 1969 oil blowout in the Santa Barbara Channel, its potential responsibility for eighty-two "Superfund' or similar toxic sites," as well as hundreds of other environmental and employee-safety violations.⁴⁴ The petition alleged that Unocal defrauded the public out of hundreds of millions of dollars by underpaying oil royalties due from leases on public lands, yet did not make a claim under the California False Claims Act (presumably for lack of a whistleblower within the organization).⁴⁵ Benson's likelihood of persuading the attorney general to his cause was unlikely, and he knew it.⁴⁶ In California, the state has only invoked the power of charter revocation once in modern times. In 1976, Attorney General Evelle Younger asked a court to dissolve a private water company for allegedly delivering impure water to its customers.⁴⁷ The water company eventually settled the case, agreeing to sell its assets to a public water company and go out of business.⁴⁸ It seems Benson was attempting to make a breakthrough in California jurisprudence: "Our fundamental goal here [was] to change the public discourse and the media perception of the power of corporations versus people, to float the idea that people are sovereign over corporations."⁴⁹

The attorney general's office rejected the Unocal petition five days after it was filed. In 2003, the petition filers regrouped and worked to introduce a "Corporate Three Strikes" bill in the California State Senate.⁵⁰ If passed, the bill would have required the attorney general to revoke the charter of any corporation convicted of three major felonies, defined as those that resulted in human death or incurred a fine of \$1 million or more, within a ten-year period.⁵¹ Predictably, this bill failed to pass.

and CAL. CORP. CODE § 1801 (West 1980). BENSON, *supra* note 10, at 34, 58–59. *See also* Nancy Rivera Brooks, *Group Wants Union Oil's Charter Revoked*, L.A. TIMES, Sept. 11, 1998, at D2.

⁴⁴ BENSON, *supra* note 10, at 36. *See also* Brooks, *supra* note 43.

⁴⁵ BENSON, *supra* note 10, at 114–19.

⁴⁶ Russell Mokhiber, *The Death Penalty for Corporations Comes of Age* (Nov. 1, 1998), <http://www.corpwatch.org/article.php?id=1810>.

⁴⁷ *Citizens Utils. Co. of Cal. v. Superior Court*, 56 Cal. App. 3d 399 (Ct. App. 1976).

⁴⁸ CHRISTOPHER L. AVERY, *BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE* (Amnesty Int'l U.K. 2000), *available at* <http://198.170.85.29/Chapter2.htm#2.10>.

⁴⁹ Mokhiber, *supra* note 46.

⁵⁰ For an analysis of this bill, see Calif. Senate Judiciary Comm., SB335 Senate Bill—Bill Analysis (2003), *available at* http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0301-0350/sb_335_cfa_20030430_111247_sen_comm.html (the full text of the bill, as amended, is available at the California State Assembly website at <http://www.assembly.ca.gov/acs/acsframeset2text.htm>).

⁵¹ S. B. 335 § 40003(a), Reg. Sess. (Cal. 2003) *available at* <http://www.assembly.ca.gov/acs/acsframeset2text.htm>. S.B. 335 § 40003(a)(2)(B) states: "Felony crime' means a crime that would be classified as a felony under section 17 of the Penal Code if the crime were committed in California, or a federal crime that is classified as a class A, B, C, D, or E felony, as defined in section 3559 of

While the result of Benson's crusade against Unocal is disheartening, the attempt left open an interesting question about the role of false claims in a charter revocation suit. If the group had focused on the alleged fraud against the state for cleanup of pollution and had someone within Unocal to call foul for the public, then things would have come out more successfully. Armed with evidence of environmental crimes involving fraudulent claims made to the government, as Benson might have been, a qui tam plaintiff can sue a corporation and request charter revocation as an equitable remedy, potentially without a need for the attorney general at all. A qui tam suit could have solved standing problems and cleared other hurdles, such as establishing injury in fact and meeting redressability thresholds.

III. FALSE CLAIMS ACT LAW: A NEW APPROACH TO CHARTER REVOCATION

An examination of state qui tam actions, as codified in false claims act statutes, shows that they can open new legal avenues to citizen action groups. The qui tam strategy, however, has problems of its own. Perhaps most obviously, suits under state false claims acts require someone inside the corporation with unique and damning knowledge to come forward. This whistleblower would have to reveal violations that are not the subject of any ongoing suit or penalties, and usually must be the "original source" of the information to go forward with the lawsuit.⁵² This Part first provides a brief historical trajectory of qui tam provisions. Next, this Part discusses some of the limitations of qui tam suits. Finally, this Part explains why qui tam provisions can solve the requirement of standing to bring charter revocation suits, and why they are therefore an attractive approach for pursuing charter revocation without writs of mandamus. In order to obtain standing to revoke a corporate charter for environmental harms, a qui tam relator must allege that the corporation has defrauded the state or federal government as part of its environmental crimes. This approach can succeed, and the United States Supreme Court validated such a strategy in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*.⁵³

Title 18 of the United States Code."

⁵² On March 27, 2007, the U.S. Supreme Court held, in *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007), that Stone, a government contractor, needed direct and independent knowledge of the information on which his false claims act allegations were based. The direct information required is the information on which the relator bases his or her allegations, and not the information on which publicly disclosed allegations that triggered a public-disclosure bar were based. Justice Scalia's opinion also held that an action originally brought by a private person, whom the attorney general later joins, only becomes an action brought by the attorney general after the private person has been ousted.

⁵³ 529 U.S. 765 (2000).

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A. *A Brief Historical Trajectory of Qui Tam Law*

Qui tam and charter revocation are similar in that they were both somehow “lost” in American jurisprudence for some time, albeit for different reasons.⁵⁴ The term “[q]ui tam” comes from the full Latin expression “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means, one “who pursues this action on our Lord the King’s behalf as well as his own.”⁵⁵ Black’s defines qui tam as “[a]n action brought [by an informer,] under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.”⁵⁶ Attempting to curb fraud against the government, Congress passed a law during the Civil War creating incentives for private individuals to report government fraud that might otherwise go unnoticed. President Lincoln signed the False Claims Act (FCA) on March 2, 1863.⁵⁷ Also known as the “Informer’s Act” or “Lincoln’s Law,” the original FCA prohibited various acts designed to fraudulently obtain money from the government.⁵⁸ “Under the 1863 FCA, private individuals known as ‘relators’ could pursue this remedy through a ‘qui tam’ action, and the informer was entitled to half the total recovery.”⁵⁹

In 1986, Congress amended the FCA to “promote incentives for whistleblowing insiders [and also to] prevent opportunistic plaintiffs.”⁶⁰ Under the original FCA, the relator was entitled to half of the total recovery. Although the most recent incarnation of the FCA reduced this percentage, a relator still stands to recover substantial amounts of money.⁶¹ According to the nonprofit group Taxpayers Against Fraud, the 1986 amendments brought a dramatic increase in the number of qui tam actions filed and the amounts recovered by relators.⁶² Whether wanting to fill their own treasuries or legitimately wanting to reduce fraud against the state, after monitoring the amount of success in the federal program, a growing minority of states passed similar statutes (often taking the FCA as a model). At least twelve states have adopted qui tam statutes to

⁵⁴ Interestingly enough, environmental concerns helped spark renewed interest in qui tam law. See, e.g., Robert W. Fischer Jr., Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. REV. 778, 779 (1973).

⁵⁵ *Stevens*, 529 U.S. at 768 n.1.

⁵⁶ BLACK’S LAW DICTIONARY, *supra* note 13, at 1282.

⁵⁷ Joel M. Androphy & Mark A. Corro, *Whistleblower and Federal Qui Tam Litigation—Suing the Corporation for Fraud*, 45 S. TEX. L. REV. 23, 26 (2003). The FCA is now codified at 31 U.S.C. §§ 3729–3732 (2000).

⁵⁸ *U.S. ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998).

⁵⁹ Androphy & Corro, *supra* note 57, at 26.

⁶⁰ *Id.* at 27.

⁶¹ *Id.*

⁶² See, e.g., Taxpayers Against Fraud, The False Claims Act Legal Center: Statistics, <http://www.taf.org/statistics.html> (noting that in FY 2003, DOJ recovered \$1.48 billion in qui tam cases accepted by DOJ, and \$85.04 million in qui tam cases declined by DOJ).

encourage individuals to report fraudulent dealings with the state governments.⁶³ Some are broad provisions that address any fraudulent deals with the state, while a few are limited to Medicaid or other state provided health care services.⁶⁴

Since nearly every state false claim statute differs in some minor way from the federal FCA, the states act as mini-laboratories in which to study statutory variations. States that include qui tam provisions in false claims statutes include: California, Delaware, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Mexico, Tennessee, Texas, Virginia, and the District of Columbia.⁶⁵ Many of the state false claims statutes were fairly recently passed; state legislatures passed or amended six to include qui tam authority in the last six years.⁶⁶ According to an empirical study of state false claims acts, "Every statute grants a political subdivision of the jurisdiction the authority to monitor the relator's case even if that political subdivision opts not to intervene as co-plaintiff."⁶⁷

State statutes provide for procedures similar to the federal FCA. The state files qui tam complaints "under seal and the action is stayed, remaining secret, while the attorney general investigates and decides whether to intervene."⁶⁸ All of the statutes have a jurisdictional bar provision, forbidding the relator from going forward if the whistleblower information is already public. In addition, all of the statutes have some sort of "original source" provision, allowing relators to proceed (even if the information in the complaint is public) as long as the relator was the "original source" of the information.⁶⁹ Presently, the majority of qui tam cases filed under the thirteen statutes are healthcare-related, which may reveal a priority of the states to curb this particular kind of fraud.⁷⁰

⁶³ Androphy & Corroero, *supra* note 57, at 85.

⁶⁴ *Id.*

⁶⁵ See CAL. GOV'T. CODE §§ 12650–12656 (West 2005); DEL. CODE ANN. tit. 6, §§ 1201–1205 (2005); FLA. STAT. ANN. §§ 68.081–68.087 (West 2005); HAW. REV. STAT. § 661 (West 2006); 740 ILL. COMP. STAT. ANN. §§ 175/1–175/8 (West 2002); LA. REV. STAT. ANN. §§ 46:439.1–46:439.4 (West 2007); MASS. GEN. LAWS ANN. ch. 12, §§ 5A–5O (West 2007); NEV. REV. STAT. §§ 357.010–357.250 (2005); N.M. STAT. §§ 27-14-1 to 27-14-15 (Supp. 2006); TENN. CODE ANN. §§ 71-5-181 to 71-5-185 (2004); TEX. HUM. RES. CODE ANN. §§ 36.001–36.117 (Vernon 2001); VA. CODE ANN. § 8.01-216.3 (2007); D.C. CODE § 2-308.14 (LexisNexis 2005).

⁶⁶ James F. Barger, Jr. et al., *States, Statutes and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 479–80 (2005).

⁶⁷ *Id.*

⁶⁸ Barger, Jr. et al., *supra* note 66, at 479–80.

⁶⁹ *Id.*

⁷⁰ See Healthcare Financial Management, Whistle-Blower Settlements Bring in \$3.5 Billion (Apr. 2000), http://findarticles.com/p/articles/mi_m3257/is_4_54/ai_61909407 ("Almost half of the qui tam filings and more than half of the qui tam recoveries involve healthcare fraud."); see also U.S. DEP'T OF JUSTICE, HEALTH CARE FRAUD REPORT FISCAL YEAR 1998, available at <http://www.usdoj.gov/dag/pubdoc/health98.htm>; Civil Div., U.S. Dep't of Justice, Fraud Statistics—Health & Human Services, October 1, 1986–September 30, 2007, <http://www.taf.org/statistics.htm> (follow "here" hyperlink under "One

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B. Nature and Limitations of Qui Tam

By definition, qui tam rights have never existed without statutory authorization. As a result, courts have had to develop criteria to determine whether a given statute in fact authorizes qui tam enforcement. “Traditionally, the requirements for enforcement by a citizen in a qui tam action have been that the statute exacts a penalty, that part of the penalty be paid to the informer and that in some way, the informer be authorized to bring suit to recover the penalty.”⁷¹

Without a specific state qui tam law providing for collection of penalties by the relator, jurisdiction will be wanting. For example, in *Sanders v. Pacific Gas & Electric Co.*, the court refused to allow citizens to bring a qui tam suit under the California Coastal Conservation Act.⁷² The problem was that “[t]he Coastal Act clearly exacts a penalty . . . and . . . authorizes the informer to bring suit ‘for the recovery’ of the penalty. Nowhere, however, does it clearly provide that the penalty, or any portion thereof, be paid to the informer.”⁷³ Unless statutes make express provisions for a payment of the penalties to the party authorized to bring the action, it is impracticable to attempt to bring qui tam actions to stop corporate polluters. As the court noted in the case of *Bass Anglers Sportsman’s Society of America v. Scholze Tannery, Inc.*, “[t]he fact that someone is entitled by statute to share in some penalty or forfeiture does not necessarily also give such person the right to bring an original action to recover such penalty or forfeiture.”⁷⁴ Accordingly, there must be express or implied statutory authority in order to initiate a suit without the attorney general—the very purpose behind using qui tam to revoke corporate charters.⁷⁵

Furthermore, since courts cannot enforce criminal statutes by civil proceedings,⁷⁶ a qui tam claim based solely on criminal environmental violations would be barred. As the *Bass Anglers* court stated, “[W]here the only ground for seeking injunctive relief is that a criminal violation has occurred, the Courts will not interfere by an injunction since resort to the extraordinary remedy of injunction should not be used for the sole purpose of enforcing the criminal laws.”⁷⁷ The court further noted that “[t]his reluctance by the Courts to enjoin the commission of a crime is subject to the following three exceptions: 1) national emergencies, 2)

Click Statistics Sheet”); Androphy & Corroero, *supra* note 57, at 85–87.

⁷¹ Fischer, *supra* note 54, at 780.

⁷² 53 Cal. App. 3d 661 (Ct. App. 1975).

⁷³ *Id.* at 671.

⁷⁴ 329 F. Supp. 339, 344 (E.D. Tenn. 1971).

⁷⁵ *Id.* at 344–45.

⁷⁶ *United States v. Claflin*, 97 U.S. 546 (1878). *See also Helvering v. Mitchell*, 303 U.S. 391 (1938); *United States v. Regan*, 232 U.S. 37 (1914).

⁷⁷ *Bass Anglers Sportsman’s Soc’y of America*, 329 F. Supp. at 346.

widespread public nuisance, and 3) where a specific statutory grant or power exists.”⁷⁸ Qui tam fits the third exception.

Qui tam suits are fundamentally different from citizen provisions in environmental legislation.⁷⁹ As Valerie Park, a Stanford law student, noted: “Unlike a typical citizen suit provision authorizing a private individual to ‘commence a civil action on his own behalf,’ a *qui tam* provision . . . authorizes a person to ‘bring a civil action . . . for the person *and* for the United States Government.”⁸⁰ In other words, a citizen suit can redress a societal harm. Qui tam, on the other hand, only involves redress of a direct injury to the government.

C. *Qui Tam and Environmental Fraud: The Stevens Case and its Implications*

The Supreme Court addressed the constitutional validity of qui tam in the environmental context in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, a recent case dealing with the exception of a specific statutory grant.⁸¹ In an opinion written by Justice Scalia, the Court held that private individuals who sue pursuant to the qui tam provisions of the federal FCA satisfy Article III standing requirements in order to remedy the injury suffered by the United States.⁸² More applicable to corporate polluter charter revocation, the injury asserted here was fraud against the sovereign related to environmental management.⁸³ Jonathan Stevens, a former employee of the Vermont Agency of Natural Resources, alleged that Vermont submitted false claims to the EPA in connection with various federal grant programs administered by the EPA.⁸⁴ Vermont allegedly had overstated the amount of time spent by its employees on federally funded projects, thus inducing the government to disburse more grant money than Vermont was entitled to receive.⁸⁵

The Court first found an adequate basis for Stevens’s suit in an assignment theory of relator standing.⁸⁶ The Court applied that doctrine granting an assignee of a claim the right to assert the injury suffered by the assignor, declaring, “[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”⁸⁷ The Court next recognized the tradition of qui tam in the American legal system, particularly noting its use immediately before and after the

⁷⁸ *Id.*

⁷⁹ Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1065 (1991).

⁸⁰ *Id.* (quoting 33 U.S.C. § 3730(b)(1) (1988), 33 U.S.C. § 1365(a) (1988)).

⁸¹ 529 U.S. 765 (2000).

⁸² *Id.* at 777–78.

⁸³ *Id.* at 771–74.

⁸⁴ *Id.* at 770–72.

⁸⁵ *Id.*

⁸⁶ *Id.* at 773.

⁸⁷ *Id.*

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framing of the Constitution.⁸⁸ After this opinion, if a relator sues under a state False Claims Act statute, thereby effecting a partial assignment of the damages claim, then standing problems for concerned citizen groups are easier to overcome (assuming a relator is found who may join the group).⁸⁹ At the very least, the relator has standing to bring the action against the corporation on her own, assuming the relator meets the statutory requirements.

Unfortunately, the Court avoided the issue of whether *qui tam* suits under other constitutional provisions are valid. The majority stated in a footnote that it expressed no view on whether *qui tam* suits violate the Appointments Clause or the Take Care Clause of Article II of the Constitution.⁹⁰ The dissent, led by Justice Stevens, at least asserted that the historical support for *qui tam* evidenced in the majority opinion would also be sufficient to find that the statute is constitutional under Article II.⁹¹ A North Carolina district court ruled that the provisions in the FCA that permit a relator to proceed when the government does not intervene do not violate the Constitution.⁹²

The implications of the *Stevens* case have direct applicability to the states, since state false claims acts are modeled on the federal law and federal decisions are persuasive on the meaning of the Act.⁹³ Most state court decisions now mirror the Supreme Court case.⁹⁴ State law is the heart of corporate law, and state *qui tam* statutes cover activity unreachable under the federal FCA statute. When no federal dollars are at issue, the federal FCA is inapplicable. Thus, the state *qui tam* statutes vindicate the rights of state taxpayers that otherwise would remain obscured under the federal system.

IV. FALSE CLAIMS AND ENVIRONMENTAL FRAUD

When a corporation has made false claims to the state, such as in the course of acquiring insurance for federal Resource Conservation and Recovery Act (RCRA) cleanup plans⁹⁵ or other certification for compliance with environmental regulations, permits founded on such falsehoods are fraudulent by definition. As a result, the corporation will have enriched itself under a false contract. For example, Eureka

⁸⁸ *Id.* at 774.

⁸⁹ *See, e.g.,* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) (discussing group standing requirements).

⁹⁰ *Stevens*, 529 U.S. at 778 n.8.

⁹¹ *Id.* at 801.

⁹² *U.S. ex rel. Phillips v. Pediatric Services of America, Inc.*, 123 F. Supp. 2d 990 (W.D. N.C. 2000).

⁹³ *See, e.g.,* Etcheverry v. Tri-Ag Serv., Inc., 22 Cal. 4th 316, 320 (2000).

⁹⁴ *State ex rel. Harris v. PricewaterhouseCoopers, LLP*, 39 Cal. 4th 1220 (2006) (holding that a *qui tam* relator had standing).

⁹⁵ 42 U.S.C. §§ 6901-6922(k). The Resource Conservation and Recovery Act, enacted in 1976, aims to clean up spilled or improperly stored wastes.

Laboratories Inc. (ELI), a laboratory that analyzed soil, air, and water samples for private clients, purposely defrauded the EPA from 1991–1993.⁹⁶ While analyzing environmental samples for the evaluation and remediation of Superfund hazardous waste sites, ELI conspired with certain corporations to manipulate tests to reduce potential Superfund liability for hazardous waste polluters.⁹⁷ The district court estimated the total loss to the government from ELI's fraudulent activities at approximately \$4.6 million.⁹⁸ Similar fraud, when directed against a state environmental protection agency for example, may provide an opportunity for a whistleblower to bring suit without a standing problem.

Qui tam liability can also attach to far less dramatic environmental crimes, and many case examples provide guidance for potential qui tam relators. In *Shaw v. AAA Engineering & Drafting, Inc.*, the court stated that permitting FCA liability based on a false certification of compliance to the EPA, whether express or implied, is consistent with the legislative history of the 1986 Amendments to the federal FCA.⁹⁹ The court stated that the 1986 Amendments had removed language that made the government's knowledge of a contractor's wrongdoing an automatic defense to a FCA action.¹⁰⁰ While acknowledging that on occasion the government's knowledge of such wrongdoing is so extensive that the contractor could not, as a matter of law, possess the requisite state of mind for liability under the FCA, the court concluded that such extensive government knowledge was not present in the case before it.¹⁰¹ Thus, the court held that defendant knowingly submitted false records in support of its claims for payment.¹⁰² In this instance, there was sufficient evidence that AAA submitted invoices for full payment while knowing that it had failed to comply with the contractual requirement to perform silver recovery in accordance with EPA rules.¹⁰³ This case has important implications, as many companies performing cleanup plans may have fraudulent claims that would expose them to qui tam liability (particularly when state funds are directly apportioned to assist in the cleanup), and then charter revocation petitions.

Once a relator blows the whistle on potential fraud, as in *Stevens*, the judge must consider the requested equitable remedies. A balance of the equities is vital to the relator's charter revocation case, as it forces society to balance the usefulness of the corporation with the harm it has caused. Such balancing is what states should have been doing all along, and courts have the power to balance the equities under their jurisdictions.

⁹⁶ *United States v. Eureka Labs., Inc.*, 103 F.3d 908, 910 (9th Cir. 1996).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 213 F.3d 519, 531 (10th Cir. 2000).

¹⁰⁰ *Id.* at 534.

¹⁰¹ *Id.* at 534–35.

¹⁰² *Id.*

¹⁰³ *Id.*

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“Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”¹⁰⁴ At least in the federal context, courts found in the past that the “irreparable harm” standard for issuing injunctions applies under the False Claims Act.¹⁰⁵ The problem looming in the background, however, is that more conservative courts view charter revocation as a drastic measure that may poison any fair balancing of the equities. Accordingly, citizen groups must do a better job of educating the public and the judiciary about charter revocation doctrine, as well as the history of our governments. The state legislators, like Congress when it passed the FCA Amendments, believed a healthy tension between the attorney general and relators was ultimately good for the taxpayers and public. By design, qui tam relators could push fraud theories that the attorney general felt uncomfortable or unable to pursue.

Unocal might have come out differently had Benson approached the situation using qui tam. One of the biggest claims in the petition to revoke Unocal’s charter was its continual degradation of Avila Beach, where Unocal had maintained a leaking oil pipeline for years. Studies found contaminated soil up to just two and a half feet below the surface.¹⁰⁶ Unocal had been involved in an ongoing cleanup plan with the state, part of which California funded out of its coffers. The *Unocal* complaint alleged that the company inadequately cleaned up its own contamination, and that Unocal was lying about certain recovery efforts.¹⁰⁷ If an insider relator had made such a complaint under the California False Claims Act (CFCA), such crimes may have been the evidence that the attorney general needed to successfully revoke the corporation’s charter before it caused so much harm. Additionally, if the government refused to bring suit, the relator could request the equitable relief of charter revocation after proving fraud (via a record of repeated violations), and demonstrating the corporation is operating outside authority granted it by the state. By failing to pursue qui tam claims related to Unocal’s environmental problems, Benson missed a chance to request charter revocation and make a breakthrough. The key states in which to make such a breakthrough are Delaware and California, and it is useful to explain how charter revocation suits might work in the two states.

¹⁰⁴ Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

¹⁰⁵ See, e.g., Bedrossian v. Nw. Mem’l Hosp., 409 F.3d 840, 845 (7th Cir. 2005) (“[T]he traditional function of equity has been to arrive at a ‘nice adjustment and reconciliation’ between the competing claims[.]” (quoting *Romero-Barcelo*, 456 U.S. at 312)).

¹⁰⁶ BENSON, *supra* note 10, at 73.

¹⁰⁷ *Id.*

V. APPLICATION TO DELAWARE AND CALIFORNIA

This Part will apply the specific qui tam law of Delaware and California to the states' charter revocation laws, providing guidance on how successful false claims suits could allow for charter revocation. As mentioned earlier, in states without laws expressly providing that citizens may initiate charter revocation proceedings, no common method exists for private individuals to invoke the quo warranto power. Fewer major companies incorporate in states with charter revocation statutes that empower private citizens to initiate revocation proceedings.¹⁰⁸ In states with greater numbers of corporations, such as Delaware and California, private plaintiffs must use qui tam in order to request charter revocation. Delaware is the most relevant state to examine because of the number of companies incorporated there. California, in addition to having many corporations, has developed extensive case law on its qui tam provisions.¹⁰⁹ While both Delaware and California law will allow qui tam relators to bring suit against corporate polluters who also defraud the government, California law provides that the loser may have to pay the other side's attorney fees, which may chill many potential qui tam relators.

A. *Into the Lion's Den: Delaware*

Surveying relevant Delaware case law, Thomas Linzey concluded that, "[p]resented with a 'clear' case of environmental statutory wrongdoing by a 'proper party,' the Delaware attorney general would be obligated to take action under the corporate charter revocation statute as it has been interpreted."¹¹⁰ The problem is, as he himself notes, "[a]n interpretation of 'a proper party' has never been offered by the Delaware courts, nor have the state courts decided the 'standing' of litigants to bring a mandamus action when only a procedural injury has occurred."¹¹¹ Using qui tam to pursue corporate polluters under the Delaware False Claims and Reporting Act (DFCRA) solves this problem of "a proper party" because the qui tam relator becomes a "proper party" by statutory mandate.¹¹² The DFCRA effectually defines the relator as a "proper party"¹¹³ because the *Stevens* case settled the issue of statutory qui tam standing.

¹⁰⁸ E.g., ALA. CODE § 6-6-591(a)(1) (LexisNexis 2005). As of 2007, Birmingham, Alabama has one Fortune 500 public company, Regions Financial Corporation. See Fortune 500 2007: States—Alabama, <http://money.cnn.com/magazines/fortune/fortune500/2007/states/AL.html>.

¹⁰⁹ This is mostly because the law was enacted earlier than in most other states. CAL. GOV'T CODE § 12650 (West 2005).

¹¹⁰ Thomas Linzey, *Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation in Pennsylvania and Delaware*, 6 DICK. J. ENVT'L. L. & POL'Y 31, 61 (1997).

¹¹¹ *Id.* at 62.

¹¹² DEL CODE ANN. tit. 6., §§ 1201–1209 (2005).

¹¹³ *Id.* § 1203.

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Citizens can then get into court, standing in the shoes of the government of Delaware, and request charter revocation.¹¹⁴

The DFCRA covers any false or fraudulent claim for payment or approval made to the government, and thus covers fraud in the environmental context, such as misleading the government about cleanup costs under a governmentally supervised cleanup plan.¹¹⁵ Business entities violating the DFCRA may be liable for: (1) a civil penalty of \$5,500 to \$11,000 per violation; (2) three times the amount of actual damages sustained by the government; and (3) costs of the civil action brought to recover the penalty and damages, including payment of reasonable attorneys' fees and costs.¹¹⁶ However, the court may reduce the assessment of damages to no less than two times the amount of damages sustained by the state or political subdivision if the violator (1) provides all the information known to that person/entity within thirty days after first obtaining the information; (2) fully cooperates with the investigation; and (3) at that time has had no civil, administrative, or criminal action commenced against him.¹¹⁷

Either the attorney general or any "affected person, entity or organization," referred to as a "private party" in the statutes, may bring a civil action against a defendant for a violation of the DFCRA.¹¹⁸ This includes employees and former employees of a person liable under the DFCRA or a labor organization.¹¹⁹ This may raise the possibility that a disgruntled former employer could effectively "blackmail" a corporation using *qui tam*, but civil procedure rules about good faith can help placate such concerns.¹²⁰ A relator cannot bring an action more than six years after the date on which the violation was committed or "[m]ore than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official."¹²¹ The statute bars suit ten years after the date of the first violation, although if the fraud were part of an ongoing cleanup plan, the statute of limitations would not apply.¹²²

If Delaware does not join the fraud action initially, the relator has the right to individually conduct the action.¹²³ Subsequently, the state can no longer participate in the litigation unless granted leave by the court to intervene at a later time.¹²⁴ A court may consider permitting the state to

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 1201.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 1203.

¹¹⁹ 3 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 8:76.51 (May 2007).

¹²⁰ Parties may be sanctioned for violating the "good faith" requirements of Federal Rule of Civil Procedure 11.

¹²¹ DEL CODE ANN. tit. 6, § 1209.

¹²² *Id.*

¹²³ *Id.* § 1203.

¹²⁴ *Id.* § 1204.

intervene later only upon a showing of good cause.¹²⁵ This is key for qui tam relators, because it means the state could not interfere for political reasons and try to settle the case early on.

Once a qui tam relator alleges fraud against the government, the Delaware Court of Chancery has jurisdiction to receive a petition for charter revocation for repeated environmental harms to “revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises.”¹²⁶ The Court of Chancery has power to “administer and wind up the affairs of any corporation whose charter shall be revoked or forfeited by any court . . . and to make such orders and decrees with respect thereto as shall be just and equitable respecting its affairs and assets.”¹²⁷ In proceedings for forfeiture of corporate charters, courts generally look for a sustained course of fraud, immorality, or violations of statutory law before deciding that there has been an abuse of charter privileges.¹²⁸ Relators would be best off choosing cases wisely, only going after repeat offenders. Ideally, the court would grant injunctive relief, which would also freeze the assets of the corporation during litigation and prevent the corporation from re-chartering in the event that the court orders dissolution. These actions are essential to the revocation lawsuit because without them, the suit will only force the corporation to transfer its assets into other holding corporations.

For example, in *Young v. National Ass’n for Advancement of White People*, the most prominent Delaware charter revocation case, the court held that action by the attorney general to have the charter of a non-profit corporation revoked was not a “prosecution.”¹²⁹ The court refused to grant a preliminary injunction while the case was pending, declaring that courts will not grant preliminary injunctive relief when activities of a corporation are in excess of powers granted in its charter, but present no threat of irreparable injury to the welfare of the state.¹³⁰ Thus, a preliminary injunction requires showing immediate harm to the public by the corporation, such as ongoing pollution and environmental fraud. If citizen groups immediately need a preliminary injunction against a polluter, they should pursue preliminary injunctions under the relevant environmental statutory schemes for polluters, as those statutes specifically provide for such injunctions. At the very least, the DFCRA provides a way for qui tam relators to have standing to bring charter revocation suits for repeated environmental harms once the plaintiff alleges fraud against Delaware.

¹²⁵ *Id.*

¹²⁶ DEL. CODE ANN. tit. 8, § 284(a) (2001).

¹²⁷ *Id.* § 284(b).

¹²⁸ *Young v. Nat’l Ass’n for Advancement of White People*, 109 A.2d 29 (Del. Ch. 1954). *See also*, *Southerland v. Decimo Club*, 142 A. 786 (Del. Ch. 1928).

¹²⁹ *Young*, 109 A.2d at 30.

¹³⁰ *Id.* at 31–32.

B. California and Twenty Years of Experience

Although California has a developed case law on its qui tam provisions, it will play a secondary role to Delaware, for the simple fact that it has fewer companies incorporated under its laws. Nevertheless, California law offers promise. The strong good faith dismissal requirements and intervenor laws make California more attractive to environmental groups; however, the possibility of paying attorney fees in an unsuccessful suit may chill this idea and send citizen groups back to Delaware.

The CFCA is similar to Delaware's FCRA, in that it provides that "[a]ny person" who, among other things, "[k]nowingly presents or causes to be presented to . . . the state or . . . any political subdivision thereof, a false claim for payment or approval" shall be liable to the state or to the political subdivision for three times the amount of damages the state or political subdivision sustained as a result.¹³¹ In certain circumstances, where the person submitting the false claim reported it promptly and cooperated in the investigation, the court may assess less than three times the damages (though no less than two times the damages), and no civil penalty.¹³² Where a "person" has submitted a false claim upon state funds in violation of the CFCA, the attorney general may sue that person to recover the damages and penalties provided by the statute.¹³³ As in Delaware, a qui tam plaintiff may initiate a false claims suit for and in the name of the state or the political subdivision whose funds are involved.¹³⁴

The California qui tam plaintiff must immediately notify the attorney general of the suit and disclose to him all material evidence and information the plaintiff possesses (similar to citizen suit provisions under the Clean Water Act).¹³⁵ If the qui tam complaint involves only state funds, the attorney general may, within the sixty-day period or extensions thereof, elect to intervene and proceed with the action. If the state declines to proceed, the qui tam plaintiff shall have the right to conduct the action.¹³⁶ If the state intervenes, it may assume control of the action, but the qui tam plaintiff may remain as a party.¹³⁷ If the attorney general does not proceed with the action, the qui tam plaintiff may receive between twenty-five and fifty percent of the proceeds.¹³⁸ The CFCA's remedies are cumulative to any others provided by statute or common law. Thus, if California fines a corporation under an environmental statute while there is ongoing fraud against California, the relator could recover her share of the fraud claim, but has no share of

¹³¹ CAL. GOV'T CODE §§ 12651(a)(1)–(3), (8) (West 2005).

¹³² *Id.* § 12651(b).

¹³³ *Id.* § 12652(a)(1).

¹³⁴ *Id.* § 12652(c)(1), (3).

¹³⁵ 33 U.S.C. § 1365(a), (c)(3)(d) (2000).

¹³⁶ CAL. GOV'T CODE § 12652(c)(4)–(8).

¹³⁷ *Id.* § 12652(e)(1).

¹³⁸ *Id.* § 12652(g)(3).

other statutory claims.¹³⁹ Since CFCA provisions “shall be liberally construed and applied to promote the public interest,”¹⁴⁰ such underlying policy should encourage California courts to allow relators to request charter revocation as an equitable remedy after proof of fraud and repeated environmental crimes.

Before applying the CFCA to charter revocation, it is useful to note that corporations are often sued in California, and small businesses are certainly used to seeing their charters revoked under the California Code of Civil Procedure section 803 and Corporations Code section 1801. For example, the state revoked the charters of 58,000 small corporations in fiscal year 2001–2002 alone “for failure to pay taxes or file proper statements.”¹⁴¹ The California Supreme Court, in *People ex rel. Attorney-General v. Dashaway Ass’n*, laid out two “great classes” of forfeiture of a charter:

- (1) Cases of perversion; as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In such cases, unless the perversion is such as to amount to an injury to the public . . . it will not work a forfeiture.
- (2) Cases of usurpation; as where a corporation exercises a power which it has no right to exercise.¹⁴²

While this suit did not involve *qui tam*, it shows that once a *qui tam* suit is filed, the relator can request charter revocation, because the corporation has gone beyond its statutorily limited purposes. The existence of other available remedies does not affect the revocation authority of Code of Civil Procedure section 803 and Corporations Code section 4690.¹⁴³ Thus, the fact that environmental statutes such as the Clean Air Act already prohibit pollution does not mean that charters cannot be revoked for continual violations of the Act.¹⁴⁴ In approaching its duty to act against a particularly reckless corporation, the California office of the attorney general has been applying a two-step test: “[W]e consider initially whether there exists a substantial question of law or fact which requires judicial resolution, and . . . whether the proposed action . . . would serve the overall public interest.”¹⁴⁵ If the attorney general makes an initial decision not to participate in a *qui tam* action, a court need only consider granting leave to intervene if it believes that the relator will not

¹³⁹ *Id.* § 12655(a).

¹⁴⁰ *Id.* § 12655(c).

¹⁴¹ Cray & Drutman, *supra* note 17, at 323.

¹⁴² 84 Cal. 114, 119 (1890).

¹⁴³ *Citizens Utils. Co. of Cal. v. Superior Court*, 56 Cal. App. 3d 399, 404–06 (Ct. App. 1976).

¹⁴⁴ The Clean Air Act also says, “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).” 42 U.S.C. § 7604(e) (2000).

¹⁴⁵ 81 Op. Cal. Att’y Gen. 98 (1998).

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adequately represent the state's (or political subdivision) interest in recovering money or property.¹⁴⁶

One particular benefit of pursuing charter revocation under *qui tam* in California is that even if the attorney general intervenes and thus controls the suit, a dismissal would require valid, supporting reasons that the public could see and politically scrutinize. The legislative history of Government Code section 12652(e) supports the conclusion that a good faith dismissal must be reasonable, based on a sufficient investigation, not be arbitrary, and not based on improper considerations.¹⁴⁷ A lengthy analysis prepared by the Center for Law in the Public Interest explains,

Subsections (e)(2)(A) and (e)(2)(B) allow the person who initiated the action to formally object to any proposed settlements or motions to dismiss. For example, a *qui tam* plaintiff may raise objections that the settlement or dismissal is unreasonable in light of existing evidence, that the . . . political subdivision has not fully investigated the allegations, or that the . . . political subdivision's decision to settle or dismiss the action was based on arbitrary and improper considerations.¹⁴⁸

These subsections are designed to ensure that the *qui tam* plaintiff's role in the false claims action shall have some "teeth," an important element.¹⁴⁹

Plaintiffs must be careful not to bring a frivolous claim just to generate publicity or awareness. Unlike other states, California awards attorney fees to the loser in a *qui tam* action, and the attorney fees for a large corporation could be astronomical for the typical citizen group or relator. If the state or the *qui tam* plaintiff proceeds with the action, "the court may award to the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment."¹⁵⁰ The mere possibility that an unsuccessful relator would have to pay a corporation's attorney's fees, possibly bankrupting her, is probably enough to outweigh any benefits for suing in California.¹⁵¹

¹⁴⁶ See CAL. GOV'T CODE § 12652(f)(2)(A) (West 2005).

¹⁴⁷ See CTR. FOR LAW IN THE PUB. INTEREST, CALIFORNIA FALSE CLAIMS ACT SECTION-BY-SECTION ANALYSIS, *reprinted in* 2 JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS, at app. 1.2 (2 Supp. 2007).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ CAL. GOV'T CODE § 12652(g)(9).

¹⁵¹ If a relator is a member of a non-profit environmental group and the group satisfies group standing requirements, then that environmental group could be relatively judgment proof.

VI. DEFICIENCIES

Deficiencies in the qui tam approach complicate the hypothesized scenario above and may cause citizen groups to shy away from qui tam suits. First, private plaintiffs who use qui tam provisions to request charter revocation without the involvement of the attorney general do so without the benefit of state funds. As Professor Benson learned from the suit against Unocal, proceeding without the help of the attorney general is daunting. Fighting a corporation, especially trying to kill it, puts the relator against all the might and resources of the corporation. As Benson said, it would be “a cynical message that the attorney general, abdicating his responsibility to protect the public, will nevertheless allow them to go into the lion’s den themselves, armed with sticks.”¹⁵² Accordingly, plaintiffs without sufficient litigation funds may rather use qui tam solely as a bargaining chip to put political pressure on the attorney general to bring a charter revocation suit. Even if an attorney general does decide to bring a charter revocation suit against a corporation, thus backing the relator’s action with state resources, a plaintiff still may be lacking funds. Only California has fulltime personnel dedicated to qui tam cases, and only the District of Columbia and Illinois have allocated specific funds to investigate and pursue qui tam actions.¹⁵³ On the other hand, despite a lack of initial funds at the outset of trial, top environmental and corporate litigators may want a part of the action because a successful relator can take home a considerable share of a potentially large recovery.¹⁵⁴ The possibility of having to pay attorney’s fees in California,¹⁵⁵ however, may lead environmental groups to choose the long process of a writ of mandamus, rather than risk paying corporate attorney fees in a qui tam action.

Second, as James Barger comments, “most of the significant [qui tam] recoveries in the states . . . resulted from [their] ability to join federal law enforcement efforts and global settlements.”¹⁵⁶ Further, “[t]his raises the question whether the state [qui tam laws] bring anything new . . . or whether the states are simply [passing laws] to maximize ‘piling on’ or piggy-backing opportunities.”¹⁵⁷ If state false claim recoveries against large corporations have only come about as a result of joining federal cases, qui tam cases to revoke corporate charters might not be successful, since federal law does not touch incorporation in a state. If indeed attorneys general have only been piggybacking to take a piece of the pie for states, even under this cynical view, there still

¹⁵² BENSON, *supra* note 10, at 65.

¹⁵³ Barger, Jr. et al, *supra* note 66, at 485.

¹⁵⁴ *Id.*, at 466–77.

¹⁵⁵ As mentioned *infra*, Part V.B.

¹⁵⁶ Barger, Jr. et al, *supra* note 66, at 485. *See also, e.g.*, TEX. HUM. RES. CODE ANN. §§ 36.001–36.117 (Vernon 2001) (allowing the state to join as relators in federal cases).

¹⁵⁷ Barger, Jr. et al, *supra* note 66, at 485.

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may be hope that attorneys general would pool their resources to help citizen groups hurt corporate polluters in the pocketbook (if only for a share in the recovery).

Third, state false claims statutes create challenges in resolving what is already a complex prosecutorial environment. For example, it is more difficult for a defendant faced with multiple prosecuting entities to reach a comprehensive resolution to a nationwide regulatory problem. This complication poses problems for all players: government contractors who need to anticipate and resolve liability for business purposes, and federal and state regulators who seek to coordinate their investigations.¹⁵⁸ Depending on the type of environmental harm alleged, a charter revocation action could run into express or implied federal preemption issues, mostly in the CERCLA context.¹⁵⁹ Courts have yet to agree whether CERCLA preempts corporate dissolution law.¹⁶⁰ Although CERCLA contains a preemption clause intended to specify its relationship with other laws, this clause addresses only state laws that impose stricter standards than those contained in CERCLA, and does not address state laws that, like dissolution laws, remove liability from a party otherwise liable under CERCLA.

Additionally, courts maintain discretion both in the preliminary hearing stage and at trial to determine if charter revocation would be an equitable remedy. The protection of jobs is inherent in the public interest factor. A court, rightly so in its discretion, may consider resulting lost jobs and affected economies when making its decision whether to revoke the charter. The whole point of bringing a false claims action and requesting charter revocation as a remedy is to get a court to perform such balancing. If a corporation gets to this stage, the harm caused by the corporation likely outweighs the benefits to the citizens of the state.

VII. CONCLUSION

The shortcomings of using the *qui tam* approach to petition a court to revoke a corporate charter should not overshadow the success plaintiffs have had against large companies under false claims act litigation, particularly at the federal level. Despite the fact that plaintiffs have gone up against huge medical care providers in the past, countless plaintiffs have prevailed.¹⁶¹ When potentially large sums of money are recoverable under the false claims act statutes, plaintiffs somehow find the resources and dedication to continue fighting. Further economic

¹⁵⁸ *Id.* at 486.

¹⁵⁹ 42 U.S.C. § 9614(a) (2000).

¹⁶⁰ See Audrey J. Anderson, Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131, 132 (1989).

¹⁶¹ In 2003, the largest health care fraud case in American history was settled, involving a total of \$1.7 billion. Press Release, U.S. Dep't of Justice, Largest Health Care Fraud Case in U.S. History Settled; HCA Investigation Nets Record Total of \$1.7 Billion (June 26, 2003), http://www.usdoj.gov/opa/pr/2003/June/03_civ_386.htm.

analysis of past successful lawsuits in which the government did not join would be informative.

A whistleblower with proof of fraudulent claims can pull the rug out from under corporate polluters with long histories of environmental violations. State codified *qui tam* case law is rare, as this revival of a lost remedy is just developing. It will be interesting to see new state variations on *qui tam* laws emerge, and whether citizen groups will pursue new corporate charter revocation actions.¹⁶² While a whistleblower with a successful claim for fraud in the environmental context may be hard to find, he or she would provide a unique opportunity for environmentalists to get their pleas for charter revocation into court. Such a dramatic course may finally return to citizens the power to check corporate dominance, a power that is inherent to a government by the people and for the people. As the maxim goes, “[t]he life of a corporation is, indeed, less than that of the humblest citizen.”¹⁶³ When the legislative and judicial system has turned this maxim on its head, it is for the humblest citizen to turn it back upright.

¹⁶² Visiting internet sites such as the ReclaimDemocracy.Org campaign—<http://www.reclaimdemocracy.org/personhood>, Ratical—<http://www.ratical.org/corporations>, and Third World Traveler—http://www.thirdworldtraveler.com/Controlling_Corporations/NewCourse_CorpsRights.html, leaves the impression that the fight is only getting started.

¹⁶³ *People v. N. River Sugar Refining Co.*, 24 N.E. 834, 834 (N.Y. 1890).