IS SCALIAN STANDING THE LATEST SIGHTING OF THE *LOCHNER*-ESS MONSTER?: USING GLOBAL WARMING TO EXPLORE THE MYTH OF THE CORPORATE PERSON

BY

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Global climate change challenges classic economic assumptions that accompany most environmental cases. No longer can we assume that resources are unlimited and that economic growth will improve the quality of life for most people. The risks posed by climate change threaten basic human needs such as water, food, health, and a place to live. On the other hand, for corporations, the regulation of greenhouse gases poses the threat of reduced profits. This risk motivates corporations to avoid regulation regardless of the risks to humanity. These divergent interests are one reason that corporations should not be considered individuals in the standing analysis.

This Comment challenges the legal assumption that a corporation is analogous to an individual in the standing analysis. The second part breaks down three assumptions in Justice Scalia's approach to standing and discusses why environmental injuries rarely fit this paradigm. The third part argues that a corporation is not analogous to an individual by focusing on the difference in interests and the difference in political power between corporations and humans in the context of global warming. The fourth part reviews the legal consequences of assuming that a corporation is an individual in the standing analysis. Finally, the fifth part returns to the Lochner era, a time when the Court used a constitutional principle to protect economic interests (the right to contract) over human interests (healthy work environments) and suggests that by failing to distinguish between human individuals and corporate individuals, standing has turned constitutional protection into a myth.

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I. INTRODUCTION

Across the nation, people are walking out their front doors and noticing that something is different. It may be that there are no snow banks on the side of the road like they remember from their youth.[1] Maybe their tulips are coming up in the middle of February, or their lilacs are blooming earlier.[2] Maybe they are preparing for another record breaking summer of heat

[1] George Raine, *Ski Resorts Fight Global Warming*, S.F. CHRON., Oct. 27, 2006, at D1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/27/SKI.TMP; James Cove, *Concern of Europe "Snow Crisis,"* BBC NEWS, Dec. 17, 2006, http://news.bbc.co.uk/2/hi/europe/6185345.stm (last visited Jan. 27, 2008) (reporting that in response to global warming concerns and poor snow conditions in Europe banks are refusing to offer loans to resorts at elevations lower than 1500 meters).

[2] *See, e.g.*, Jane Beitler, *Seeing Climate Through the Lives of Plants*, *in* NASA: Supporting Earth System Science 2006 (NASA Earth System Science Data and Services ed., 2006), http://nasadaacs.eos.nasa.gov/articles/2006/2006_climate.html (last visited Jan. 27, 2008) (explaining the study of phenology—the study of periodic plant and animal life cycle events, and summarizing data finding that spring is coming sooner and fall is coming later); Project Budburst, http://www.windows.ucas.edu/citizen_science/budburst (last visited Jan. 27, 2008) (enlisting "citizen scientists" to observe and record phonological data in their neighborhoods with intent that by recording timing of budding, leafing, and flowering of different species scientists can learn more about climate change); S. Funakoshi et al., USA Nat'l Phenology Network, Japan First and Full Bloom Lilac Phenology Data, 1996–2006 (2006), http://www.uwm.edu/Dept/Geography/npn/data/index.html (last visited Jan. 27, 2008) (providing data organized in excel spreadsheets for comparing lilac blooming dates across the nation).

waves,[3] or worrying about widespread forest fires.[4] Whatever the spark, people are noticing changes, and they are calling for action.[5]

In response to this call, many states across the nation have taken steps to address global warming.[6] In addition to taking action within their own borders, states are also forming regional coalitions for addressing climate change.[7] This state-level action stands in marked contrast to the approach

[3] Juliet Eilperin, *More Frequent Heat Waves Linked to Global Warming: U.S. and European Researchers Call Long Hot Spells Likely*, WASH. POST, Aug. 4, 2006, at A03 (briefly describing various scientists' reports of unusually warm weather around the world including the fact that 2006 was the hottest year on record); Seth Borenstein, *Scientists: Get Used to Killer Heat Waves, Blame Global Warming*, S.F. GATE, July 28, 2006, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/07/28/state/n161357D82.DTL (last visited Jan. 27, 2008) ("In Fresno, the morgue is full of victims from a California heat wave. A combination of heat and power outages killed a dozen people in Missouri . . . . Get used to it.").

[4] *See* Anthony Leroy Westerling et. al., *Warming and Earlier Spring Increases Western U.S. Forest Wildfire Activity*, SCIENCEXPRESS (2006), *available at* http://www.sciencemag.org/cgi/rapidpdf/1128834v1.pdf (compiling a comprehensive database of wildfires in western United States forests since 1970 and comparing it to hydro-climatic and land surface data, concluding that wildfires increased suddenly and dramatically in the mid 1980s in areas associated with warmer spring and summer temperatures and earlier spring melts).

[5] *See, e.g.*, ASSOCIATED PRESS, *New Hampshire Residents Call for Action on Global Warming*, BOSTON.COM, Apr. 15, 2007 *available at* http://www.boston.com/news/local/new_hampshire/articles/2007/04/15/nh_residents_call_for_action_on_global_warming/ ("New Hampshire residents took to the streets and their town squares during the weekend to urge Congress to do more to stop warming."); Dan Grossman & Matt Baker, Op-Ed., *On Earth Day, Make a Promise*, DENVER POST, Apr. 22, 2007, *available at* http://test.denverpost.com/opinion/ci_5707944 (detailing regional initiatives led by Western states and calling for Colorado to take further action); Allen Cooperman, *Evangelical Angers Peers with Call to Action on Global Warming*, WASH. POST, Mar. 3, 2007, at A04 (discussing religious leaders' call for National Association of Evangelicals to "silence or fire" an official who wants them to take global warming seriously); *Evangelical "Call to Action" on Warming*, MSNBC, Feb. 8, 2006, http://www.msnbc.msn.com/id/11234904/ (last visited Jan. 27, 2008) ("[D]ozens of evangelical Christian leaders on Wednesday issued a 'call to action' on global warming"); Union of Concerned Scientists, *World Scientists' Call for Action*, *available at* http://www.ucsusa.org/ucs/about/1997-world-scientists-call-for-action.html (last visited Jan. 27, 2008) (Set forth by the Union of Concerned Scientists and signed by more than 1500 scientists from 63 countries including 110 Nobel Laureates and 60 U.S. National Medal of Science winners, the document urges all government leaders to take action to protect the environment—"There is only one responsible choice—to act now.").

[6] Pew Ctr., *Global Climate Change: What's Being Done in the States*, http://www.pewclimate.org/what_s_being_done/in_the_states (last visited Jan. 27, 2008) (compiling State actions for addressing climate change); BARRY G. RABE, PEW CTR. ON CLIMATE CHANGE, GREENHOUSE & STATEHOUSE: THE EVOLVING STATE GOVERNMENT ROLE IN CLIMATE CHANGE 11-39 (2002), *available at* http://www.pewclimate.org/docUploads/states_greenhouse.pdf (providing overview of state actions and case study of nine state approaches to climate change); *See* Mekaela Mahoney, *State and Local Governments Take the Reins in Combating Global Warming*, 38 URB. LAW. 585 (2006) (surveying the approaches that various states and cities have taken to fight against global warming).

[7] PEW CTR. ON CLIMATE CHANGE, CLIMATE CHANGE 101: STATE ACTION 1 (2006), *available at* http://www.pewclimate.org/docUploads/101_States.pdf (part of a series of reports on State responses to global climate change) [hereinafter CLIMATE CHANGE 101: STATE ACTION]; PEW CTR. ON GLOBAL CLIMATE CHANGE, LEARNING FROM STATE ACTION ON CLIMATE CHANGE: MARCH 2007 UPDATE 3 (2007), *available at* http://www.pewclimate.org/docUploads/States%20Brief%20Template%20_March%202007_jgph.pdf [hereinafter LEARNING FROM STATE ACTION UPDATE]. In

taken by the federal government. In 2003, one scholar noted that the divergence between federal government and state government responses to global warming was like "liv[ing] in two different countries. At the federal level, all policy makers oppose all efforts to control GHG emissions. . . . In contrast, policy initiatives at the state level generally take the opposite approach, encouraging GHG mitigation actions, whether big or small, at every turn."[8] Little has changed between 2003 and 2007, and the tension between action and inaction is increasingly making its way into the courts.[9]

The causes of action for the various suits range from nuisance to NEPA.[10] The impetus, however, is an increasing awareness that "business as usual" poses serious threats to humanity.[11] Regardless of the actual legal issue in the case, global warming litigation can be categorized into two thematic camps. The first camp could be called the "plea for action" camp. These suits are generally brought by public interest groups or individuals demanding that various parties—usually federal government agencies—*do something* about global warming. These suits range from requesting the EPA to regulate carbon dioxide emissions from new automobiles[12] to requesting various agencies to include global warming as a factor in their NEPA

fact, over half of the states are involved in at least one regional climate change initiative, some of which extend across the border to Canada. For example, seven Northeastern and Mid-Atlantic states agreed to a "cap-and-trade" system for reducing carbon dioxide emissions from power plants in the region. The Western Governor's Association launched an initiative for increasing energy efficiency and expanding the use of renewable energy resources. Arizona and New Mexico entered into the Southwest Climate Change Initiative, the West Coast Governor's Global Warming Initiative (Washington Oregon and California) are also cooperating to reduce their emissions and to expand the market for efficient and renewable energy use. Six New England states signed an agreement with Eastern Canadian Premiers that includes short and long-term goals for reducing greenhouse gas emissions. Finally, states from the Midwest (North and South Dakota, Minnesota, Iowa, and Wisconsin) entered into a regional effort with the Canadian Province of Manitoba to develop alternative energy sources.

8 David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 53–54 (2003). *See generally* Robert B. McKinstry, Jr., *Local Solutions for Global Problems: The Debate Over the Causes and Effects of Climate Change and Emerging Mitigation Strategies for States, Localities and Private Parties*, 12 PENN. ST. ENVTL. L. REV. 1 (2004).

9 *See generally* JUSTIN R. PIDOT, GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES (2006), *available at* http://www.law.georgetown.edu/gelpi/current_research/documents/GWL_Report.pdf (summarizing current global warming litigation).

10 *Id.* at 1 (grouping varieties of global warming litigation).

11 Kenneth Berlin, *Arresting Climate Change*, AM. LAW INST.-AM. BAR ASS'N CONTINUING LEGAL EDUC. 79, 82 (2006) ("According to the International Energy Agency (IEA), global emissions of greenhouse gases will leap by 52% above current levels by 2030 if developed world energy and environmental policies remain unchanged.").

12 Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007) (reviewing EPA denial of a petition for rulemaking for regulating carbon dioxide emissions from new highway vehicles).

analyses.[13] A few nuisance claims that have been brought could also be put in this category.[14]

The second category of suits can be placed in the "leave me alone" or the "business as usual" camp. These claims are brought by corporations or associations challenging regulations imposed on them. Only a few of these exist—but they are instructive for the dynamic they reveal. To date, these suits have been brought by auto manufacturers and dealers to challenge state laws in states that have adopted greenhouse gas emission standards for automobiles.[15] The corporations argue that the state regulations are preempted by federal statutes. The irony, of course, is that the "preempting" statutes are the same statutes being litigated in the "do something" camp because the regulating agencies have not interpreted the "preempting" statutes strictly enough to effectively address global warming.

Regardless of the underlying claim, every global warming suit has one issue in common: the petitioners must establish standing for a federal court to hear the case. Global warming litigation offers a unique opportunity to discover and evaluate the validity of some assumptions in the Supreme Court's current standing analysis.

Standing in the global warming context is unique because it challenges the classic assumptions that accompany most environmental cases. Most

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[13] *See, e.g.*, Border Power Plant Working Group v. Dep't of Energy, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (challenging environmental assessment of effect of building electricity lines to connect power plants in Mexico with grid in California because assessment did not consider effects of additional carbon dioxide emissions); Friends of the Earth v. Watson, No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005) (holding that plaintiffs have standing to challenge failure to include global warming in NEPA when considering environmental side effects of international loans); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir 2007) (challenging failure to consider impacts of 2006 CAFE standards on global warming under NEPA); Natural Res. Def. Council v. Mineta, No. 04 Civ. 5380 (VM)(RLE), 2005 WL 1075355 (S.D.N.Y. May 3, 2005) (challenging the National Highway Transportation Safety Administration's special treatment of cars with flex fuel capability under the CAFE standards).

[14] *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (discussing states' and public interest groups' actions against the largest coal fired power plants claiming their carbon dioxide emissions are a public nuisance). California also filed a nuisance suit against General Motors. The brief is available at: ag.ca.gov/newsalerts/cms06/06-82_0a.pdf.

[15] *See, e.g.*, Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160 (E.D. Cal. 2006) (auto dealers and manufacturers challenging California standards regulating greenhouse gas emissions from autos); Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse, No. 2:05-CV-302, 2:05-CV-304, 2006 WL 3469622 (D.Vt. Nov. 30, 2006) (auto dealers and manufacturers challenging Vermont law adopting California emission standards); Lincoln Dodge, Inc. v. Sullivan, No. 1:06-CV-00070 (D.R.I. filed Feb. 13, 2006) (challenging Rhode Island adoption of auto emission standards for greenhouse gases). *See also* Engine Mfrs. v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (overruling a district court decision that certain California regulations requiring fleet purchasers to purchase a certain percentage of "zero emission vehicles" were protected by the market participant doctrine). *See generally* Steven G. Davison, *Regulation of Emission of Greenhouse Gases and Hazardous Air Pollutants from Motor Vehicles*, 1 PITT. J. ENVTL. & PUB. HEALTH L. 1 (2006); Sara A. Colangelo, Comment, *The Politics of Preemption: An Application of Preemption Jurisprudence and Policy to California Assembly Bill 1493*, 37 ENVTL. L. 175 (2007) (discussing California's adoption of automobile air emission standards for greenhouse gases).

importantly, the reality of global warming challenges the assumption that individuals and corporations are analogous. In fact, in the context of global warming, the interests of humanity and the interests of corporations (particularly those involved in the energy industry) are diametrically opposed. The risks posed by global warming threaten basic human needs—water, food, health, and a place to live. These risks mandate immediate regulatory action. On the other hand, for corporations, regulations pose a risk of reduced profits. This risk motivates corporations to avoid regulation and continue business as usual, regardless of the risks to humanity.

This Comment uses the current global warming debate as a factual backdrop to argue that corporations should not be considered persons or individuals in the standing analysis and that personifying corporations in the standing analysis has led to a regulatory environment that disproportionately protects the rights of corporations over the public interest. I first summarize the Court's current approach to standing, focusing on what I call "Scalian Standing"—the view that standing should be used as a tool to limit the authority of the judiciary. I also explain why suits brought by environmental groups generally fail this analysis. Second, I use the political history of global warming regulation (or lack of it) to argue that a corporation is not equivalent to a person. Most importantly, the size and power of many corporations dramatically affect their political power and their ability to enact laws in their *favor*. This dynamic challenges the assumption that a regulated entity should always have standing. Third, I discuss the consequences of pairing Scalian Standing with the assumption that a corporation is a person. In conclusion, I argue that combining Scalian Standing and corporate personhood gives constitutional protection to a myth, and that, at the very least, we should begin talking about whether a corporation should be analogous to a person in the standing analysis.

II. WHAT IS SCALIAN STANDING?

Standing is the scourge of every public interest environmental lawyer. Often it seems to be an exercise in the well-pleaded complaint—Did you buy an airline ticket to show proof of actual plans to visit endangered species?[16] Did you articulate the fact that you hike in the exact acreage threatened by a logging plan?[17] Beneath the formalistic questions regarding injury, causation and redressability lies a fundamental question—what issues can the court hear? In other words, what are the limits of the "case" or "controversy" requirement?

I suggest that two underlying philosophies about the purpose of standing are competing for dominance in the Supreme Court today. One philosophy views standing as a tool to ensure that the dispute before the

[16] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–64 (1992) (denying plaintiffs standing, in part, because they lacked definite plans to return to view endangered species).

[17] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886–89 (1990) (holding the plaintiffs could not defeat a summary judgment motion because they alleged no specific facts showing an intent to use the exact land affected by a "land withdrawal review program").

court can and should be resolved through the judiciary.[18] This view believes that Congress has the authority to create causes of action. The competing philosophy, championed by Justice Scalia, views standing as a tool to enforce the separation of powers and specifically to limit the authority of the judiciary.[19] These competing philosophies are prevalent in the Supreme Court's recent opinion, *Massachusetts v. EPA*.[20]

The majority opinion (relying heavily on Justice Kennedy's concurring opinion from *Lujan v. Defenders of Wildlife*[21]) explained that the "case" or "controversy" requirement confines federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[22] Because the dispute in *Massachusetts* turned on "the proper construction of a congressional statute," and had been authorized by Congress, it was a question "eminently suitable to resolution in federal court."[23] The key to this philosophy is that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[24] At bottom, standing ensures that the petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination."[25]

The dissent, on the other hand, would have dismissed the case for lack of standing. Among other problems, the dissent concluded that the petitioner's injury was not particularized—it did not affect the petitioner in a "personal and individual way."[26] "Global warming is a phenomenon 'harmful to humanity at large'" and the redress sought by the petitioners did not "'directly and tangibly benefit' [them] in a manner distinct . . . [from] 'the public at large.'"[27] Furthermore, the causation and redressability prongs were too problematic, essentially because "the realities [of global warming] make it pure conjecture to suppose that EPA regulation of new automobile

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[18] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"); Flast v. Cohen, 392 U.S. 83, 99–100 (1968) ("[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. . . . A proper party is demanded so that federal courts will not be asked to define ill defined controversies over constitutional issues." (internal quotation marks omitted)).

[19] Lujan v. Defenders of Wildlife, 504 U.S. at 560 (explaining that standing is a "landmark" setting apart "cases" and "controversies" that fall within the admissible sphere of judicial authority under Article III).

[20] 127 U.S. 1438 (2007).

[21] 504 U.S. at 579–81.

[22] 127 S. Ct. at 1452 (citing Flast v. Cohen, 392 U.S. at 95).

[23] *Id.* at 1453.

[24] *Id.* (Kennedy, J., concurring) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 580).

[25] *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

[26] *Id.* at 1467 (Roberts, C.J., dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 560).

[27] *Id.* (Roberts, C.J., dissenting).

emissions will *likely* prevent the loss of Massachusetts coastal land."[28] In other words, Congress cannot give rise to a case or controversy by creating a statutory cause of action. This limitation ensures that courts will not "serve as a convenient forum for policy debates."[29] The central assumption is that "[t]he limitation of the judicial power to cases and controversies is crucial in maintaining the tripartite allocation of power set forth in the Constitution."[30] The dissent's dramatic opening statement emphasizes its commitment to using standing as a tool to enforce the separation of powers.

> Global warming may be a "crisis," even "the most pressing environmental problem of our time." . . . Indeed it may ultimately affect nearly everyone on the planet . . . and it may be that governments have done too little to address it.
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> . . . [Nevertheless] redress of grievances of the sort at issue here "is the function of Congress and the Chief Executive," not the federal courts.[31]

This Comment focuses on the judicial philosophy articulated by the dissent. I call this philosophy "Scalian Standing," based on Justice Scalia's consistent articulation of the view that "the judicial doctrine of standing is a crucial and inseparable element" of the separation of powers.[32] In 1983, concerned with the broad standing analysis applied through the 1970s, Justice Scalia (then Judge) wrote an article that called for a "return to the original understanding" of the role of the judiciary.[33] The article argues that in our government, the judiciary is a counter-majoritarian force.[34] Thus, the

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[28] *Id.* at 1470.

[29] *Id.*

[30] *Id.* (citing DaimlerChrysler Corp. v. Cuno, 126 S.Ct. 1854, 1860–62 (2006)).

[31] *Id.* at 1463–64 (Roberts, C.J., dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 576).

[32] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983); *see also* JOHN D. ECHEVERRIA & JON T. ZEIDLER, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW 2 (1999) (explaining the Court's change in philosophy toward standing as "the result of an unusually focused and determined effort at jurisprudential reform, spearheaded by U.S. Supreme Court Justice Antonin Scalia. . . . Since his appointment to the Court in 1986, Justice Scalia has demonstrated an extraordinary commitment to this issue by authoring the majority opinion in *all* [as of 1999] of the Court's major environmental standing cases. Through these decisions, Justice Scalia has substantially revised the Court's standing doctrine to match his own views").

[33] Scalia, *supra* note 32, at 897.

[34] *Id.* at 896 ("Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely . . . to be enforcing the political prejudices of their own class."). This view can be seen in Court decisions as well. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. at 1463–64 (Roberts, C.J., dissenting) (redress of broad ranging injuries "'is the function of Congress and the Chief Executive,' not the federal courts" (citing Lujan v. Defenders of Wildlife, 504 U.S. at 576)); Raines v. Byrd, 521 U.S. 811, 829 (1997) (writing for the majority, Rehnquist holds that two individual Congress members did not have standing to challenge the Line Item Veto Act because "the irreplaceable value of the power [of federal courts] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action" (citing United States v. Richardson, 418 U.S. 166, 192 (1974))); U.S. v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (characterizing

judiciary should "[protect] individuals and minorities against impositions of the majority" and it should *not* prescribe "how the other two branches should function in order to serve the interest of *the majority itself*."[35] Under this view, Congress cannot "convert generalized benefits into legal rights" because the federal courts have no authority to hear these generalized complaints.[36] The proper role of the federal courts is "solely, to decide on the rights of individuals."[37]

Focusing on the counter-majoritarian role of the courts, Scalian Standing includes three general assumptions about the constitutional limits of a "case or controversy." These three assumptions are: 1) the role of the courts is to decide on the rights of individuals, not to "inquire on how the executive officers perform [discretionary] duties";[38] 2) an "injury" must be a violation of a legal wrong, not a failure to receive "benefits" that a statute would have conferred if enforced;[39] and 3) the object of regulation always has standing because it is a "classic case of the law bearing down upon an individual."[40] The underlying theme running through each of these three assumptions is that shared injuries ("generalized grievances") should be addressed politically through the elected branches.[41]

A. Environmental Injuries Do Not Fit the Scalian Standing Paradigm

Environmental injuries do not fare well under Scalian Standing. First, most environmental standards have been codified—the Clean Air Act, the Clean Water Act, and so on. As a rule, these federal statutes now "occupy the field" of nuisance, the original cause of action for environmental injuries.[42]

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the decision of the majority as inscribing "the counter-majoritarian preferences of the society's law-trained elite" into basic law).

[35] Scalia, *supra* note 32, at 894.

[36] *Id.* at 886.

[37] *Id.* at 896 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

[38] *Id.* at 883 (citing Marbury v. Madison, 5 U.S. (1 Cranch) at 170).

[39] *Id.* at 894 (maligning "increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*. Such a failure harms the plaintiff, by depriving him, as a citizen of governmental acts which the Constitution and laws require. But that harm alone is, so to speak a *majoritarian one*.").

[40] *Id.* at 894 ("Thus, when an individual who is the very *object* of the law's requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself and the court will not pause to inquire whether the grievance is a 'generalized' one.").

[41] *But see* Brief for Americans for the Environment as Amicus Curiae Supporting Petitioners, Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167 (1999) (No. 98-822), 1999 WL 311758, at 1–2 ("[Justice Scalia's] decisions are based, at least in part, on the mistaken idea that environmental and other majoritarian interests neither need nor deserve access to the courts because, simply by virtue of their numbers, their concerns will be addressed appropriately through the political process. In fact, as a result of free rider problems and the high costs of collective political action, effective expression of the broad public interest in environmental protection faces major obstacles in the American political system.").

[42] *Compare* Illinois v. Milwaukee (*Milwaukee I*), 406 U.S. 91, 104 (1972) (applying federal common law of nuisance to a claim brought by Illinois against the City of Milwaukee for

As a result, most environmental injuries must be addressed through these statutes, often with a legal claim challenging either an agency's failure to protect the environmental resource, or failure to enforce an environmental statute.[43] This dynamic tolls the death knell from the perspective of Scalian Standing because it appears that environmental plaintiffs are "complaining of an agency's unlawful *failure* to impose a requirement or prohibition on someone else."[44] In other words, before plaintiffs in an environmental case even begin to explain their injury, they are on the wrong side of two Scalian assumptions: 1) they question the decision made by an executive officer—often questioning the exercise of discretion; and 2) they complain about a failure to receive the "benefits" of an environmental statute.

The assumption that a clean environment is a "benefit" provided by Congress through environmental statutes is an assumption, not a truth. There is a strong argument to be made that citizen suit provisions in statutes are simply a statutory replacement for an individual's previous cause of action through nuisance.[45] Under common law, an environmental harm can give rise to a legal injury, as illustrated by classic claims like nuisance and trespass. Global warming litigation is interesting because it is a blast from the past, a new environmental injury not covered by a statute or a regulatory body,[46] reminding us of the correlation between environmental injuries and nuisance.[47] Moreover, comparing the potentially devastating consequences

discharging raw sewage into Lake Michigan), *with* Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 325–26 (1981) (holding that comprehensive 1972 Amendments to the Clean Water Act, which prohibited any discharge into navigable waters without a permit, provided ample opportunity for injured parties to seek redress and so preempted the common law of nuisance).

[43] For example, in *Milwaukee II*, the Court held that the citizen suit provision in the Clean Water Act provided sufficient redress for injured parties and preempted the nuisance claim. 451 U.S. at 329. In other words, for redress, Illinois should have used the statutory channels of regulation, resorting to judicial protection of her rights only after the regulatory channels had been exhausted.

[44] Scalia, *supra* note 32, at 894 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974)).

[45] For a good articulation of how environmental laws grew from recognized legal injuries and an argument for using those roots to explore "harm" in the environmental context, see Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 898–900 (2006). For a related argument, see Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 547 (2007) (tracing the evolution of environmental law from common law to the rise of federal statutes and the regulatory regime and arguing that common law has been unnecessarily weakened by these developments).

[46] Currently carbon dioxide is *not* regulated by any statute and the EPA previously asserted that it had no authority to regulate it. *See* Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922, 52925–29 (Sept. 8, 2003) (concluding that the Clean Air Act does not authorize the EPA to issue mandatory regulations addressing climate change).

[47] *See, e.g.*, Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 306–19 (2005) (tracing the history of federal common law of nuisance and concluding that the Clean Air Act likely occupies the field but that the state common law of the source state may apply to global warming injuries); Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 2 (2007) (using global warming nuisance suits as one example that a rebirth of common law is occurring in the wake of federal regulatory failure to adequately protect against environmental harms); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-based Climate Change Litigation*, 28

of global warming[48] to the impunity with which carbon dioxide is poured into the atmosphere by large-scale polluters[49] brings to mind the very definition of a public nuisance: "an unreasonable interference with a right common to the general public."[50] Grassroots organizations and individuals have recently brought nuisance suits against large-scale polluters alleging that their emissions are a nuisance.[51] Not surprisingly, courts have typically found that the plaintiffs do not have standing, or that it is a political question.[52]

The second reason environmental injuries do not fare well under Scalian Standing is that they are difficult to monetize. The loss of intangible benefits—birds in spring, the spiritual relief of an open skyline, a virgin forest, or a healthy garden—cannot be assigned a dollar value. Second, environmental injuries are widely shared—the extent of injury is generally felt in the aggregate. For example, it is not just the loss of a fishing hole, the poisoning of a well, or the contraction of cancer. Many times it is the loss of a lake, or of clean drinking water, or the security of living a healthy life without fear of your environment. Parsing an environmental harm down to an "individual and particularized" injury minimizes the actual harm that occurred. These injuries are shared, and their real loss is felt in the

COLUM. J. ENVTL. L. 1, 3 (2003) (suggesting use of tort litigation to address global climate change).

[48] Some predict that global warming will affect the availability of drinking water and food, displace many people, and increase instances of disease. *See* WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 7–12 (2007), *available at* http://www.ipcc-wg2.org/index.html [hereinafter WG2 2007]; *see also* Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231 (2007); Marguerite E. Middaugh, Comment, *Linking Global Warming to Inuit Human Rights*, 8 SAN DIEGO INT'L L.J. 179 (2006–2007).

[49] For example, the end use of the world's largest oil and gas business, ExxonMobil, produced enough carbon dioxide that if it were a country it would have ranked as the sixth largest polluter in the world. UNION OF CONCERNED SCIENTISTS, SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE 4 (2007), *available at* http://www.ucsusa.org/assets/documents/global_warming/exxon_report.pdf.

[50] RESTATEMENT (SECOND) OF TORTS § 821B (1979). For those whose land will be affected by rising sea levels or increased flooding, a private nuisance (an unreasonable interference with the use and enjoyment of land) also seems applicable. *See id.* § 822.

[51] *See, e.g.*, Korsinsky v. US EPA, 192 Fed. App'x 71 (2d Cir. 2006) (concerning a pro se litigant filing a common law nuisance suit against the State of New York for injuries developed due to global warming and seeking injunction of future emissions); Comer v. Nationwide Mutual Ins. Co., No. 1:05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006) (concerning fourteen plaintiffs who brought a nuisance suit against oil and gas companies for contributing to damage to plaintiffs' property during Hurricane Katrina); Connecticut v. Am. Electric Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (concerning plaintiffs who brought a nuisance suit against electric utility companies for contributing to global warming).

[52] *See, e.g.*, *Connecticut*, 406 F. Supp. 2d at 274 (holding that the nuisance claim against the largest electric utilities is non-justiciable because it is a political question); *Korsinsky*, 192 Fed. App'x at 71 (holding that a pro se litigant claiming an injury from global warming does not have standing). *But see Comer*, 2006 WL 1066645, at *4 (allowing a nuisance suit against oil and coal companies for contributing to property damage caused by Hurricane Katrina through greenhouse gas emissions to proceed, but including warning that factual proof would be difficult and decision to proceed would be evaluated under Rule 11).

aggregate, however, the collective nature of these injuries characterizes them as "generalized grievances." Scalian Standing views these collective harms as injuries to the majority and, conscious of the unelected status of the judiciary, remains reluctant to use the courts to protect the majority.

The final reason that environmental injuries do not fit the Scalian paradigm is the subject of the rest of this Comment—the characterization of a corporation as a person. By characterizing a corporation as a person, Scalian Standing consistently views regulated entities as "minorities" subject to the collective will of the majority.[53] According to the Supreme Court, corporations are "persons" under the Constitution.[54] This characterization means that ExxonMobil, Chevron, Duke Energy, and Ford have the same legal rights as individuals. They can petition Congress, the Executive Branch (both the President and the agencies) and they can petition the federal courts to redress their grievances.[55] They have free speech rights, due process rights, and equal protection rights. The legal characterization of a corporation as a "person" means that the corporation is now the "ultimate legal actor, endowed with most of the rights of individual citizens, yet with control over more resources than any individual."[56]

Under Scalian Standing, a corporation will almost always be able to obtain judicial review more easily than a party representing the public interest because a corporation will almost always be 1) an individual 2) that is the object of regulation 3) suffering from a monetary injury. In contrast, the public interest will generally be represented by 1) a group 2) that desires the "benefits" of regulation, 3) suffering an environmental injury shared by the community. Thus, under Scalian Standing, corporations have virtually automatic standing to challenge regulations. In contrast, a public interest group seeking to protect the interests of the community from an environmental harm will find it very difficult under the Scalian approach to satisfy the standing requirements.

III. A CORPORATION IS NOT ANALOGOUS TO A PERSON: THE DIVERGENT INTERESTS OF CORPORATIONS AND PEOPLE IN THE CONTEXT OF GLOBAL WARMING

Scalian Standing falsely assumes that all individuals are (more or less) created equal—and have equal bargaining power in the political process. If this were true, it would be a fair assumption that courts should not intervene to protect the will of the majority. Common sense, however, suggests that a corporation is not analogous to a "person" in every instance. First, corporations and people have different interests and constraints. Second,

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53 Scalia, *supra* note 32, at 895.

54 Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 297 (1990) ("[T]he Court [has] extended constitutional protection to corporations under numerous provisions so that today corporations have, with isolated exceptions, the same constitutional status as natural persons.").

55 *Id.*

56 Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 98–99 (2005).

the size and power of large corporations distinguish them from people. Third, corporations can facilitate enactment of laws in their *favor*, challenging the Scalian assumption that by granting standing to the "object of the law's requirement" courts are protecting "individuals and minorities against impositions of the majority."[57] The differences between corporations and people are illustrated by looking at the political dynamics surrounding global warming.

A. Corporations and People Have Different Interests and Constraints

In the global warming context, the interests of corporations involved in the fossil fuel industries and the interests of humanity are diametrically opposed. On the one hand, the interests of humanity require that we immediately curtail our greenhouse gas emissions. Although we will still experience some greenhouse effects even if we immediately reduce our emissions,[58] the severity of the effects can be reduced.[59] However, if the energy industries continue "business as usual," greenhouse gas emissions will leap by fifty-two percent above current levels by 2030.[60] Unfortunately, the most effective way to limit greenhouse gases is to burn less fossil fuel—which would affect the profits of some of the largest corporations in the world.

Global warming is symbolic because it challenges our economic assumptions by illustrating that resources are not infinite and that humans can affect the Earth's ecosystems on a large scale. It also marks the end of an era where we could assume that economic growth benefits more people than it harms. In the context of global warming and carbon dioxide regulation, continued corporate growth without regulation means continued economic growth for a few at the expense of humanity. In other words, it represents the diverging interests of corporate "persons" and "the people" of the United States.

1. The Human Rights Implications of Global Warming

Global warming is a human rights issue. The potential consequences of unabated global warming affect basic human survival needs, including drinking water, food, a place to live, and health. Moreover, these consequences are not limited to a discrete area. Global climate change affects every corner of the globe and every living organism.[61] The most

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57 Scalia, *supra* note 32, at 894.

58 WG2 2007, *supra* note 48, at 20.

59 *Id.*

60 Berlin, *supra* note 11, at 82.

61 "Natural systems at risk include glaciers, coral reefs, and atolls, mangroves, boreal and tropical forests, polar and alpine ecosystems, prairie wetlands and remnant native grasslands. . . . [C]limate change will increase existing risks of extinction of some more vulnerable species." WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2001: IMPACTS, ADAPTION AND VULNERABILITY 4–5 (2001) [hereinafter WG2 Summary 2001], *available at* http://www.grida.no/climate/ipcc_tar/.

recent study released by the Intergovernmental Panel on Climate Change (IPCC)[62] on April 13, 2007[63] reports that climate change has been observed and changes have been recorded in ecosystems and hydrological systems and in the earlier timing of biological events like leaf-unfolding, bird migration, and egg laying.[64] These changes in the natural system "are linked to anthropogenic warming"[65] and they have profound impacts and consequences for humans. Moreover, the temperature increase is likely to exceed the resilience of many ecosystems, resulting in decreased biodiversity, as well as a loss of ecosystem goods and services like water and food supply, within this century.[66]

Climate change affects drinking water supplies.[67] Every continent will experience water security problems within the next fifty years.[68] In Africa, between 75 and 250 million people will suffer water stress by 2020,[69] and by 2050 more than one billion people will experience water scarcity in Asia alone.[70] Climate change also affects food availability and hunger.[71] The IPCC projects "increases in malnutrition and consequent disorders, with implications for child growth and development."[72] Although some areas will experience a longer growing season, this marginal benefit will be outweighed by risks of drought, severe weather events, water scarcity, desertification, salinisation, and regional shifts.[73] Areas that depend on

62 The IPCC was established by the World Meteorological Organization and the United Nations Environment Programme to provide independent scientific advice on climate change. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Foreword to* 16 YEARS OF SCIENTIFIC ASSESSMENT IN SUPPORT OF THE CLIMATE CONVENTION (2004), *available at* http://www.ipcc.ch/pdf/10th-anniversary/anniversary-brochure.pdf. Its first report provided the basis for negotiating the United Nations Framework Convention on Climate Change (UNFCCC), a treaty that the United States signed and ratified. *Id.* Its role is "to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human induced climate change." *Id.* Its work is based on peer reviewed, scientific, technical literature. *Id.*

63 WG2 2007, *supra* note 48, at 8.

64 *Id.*

65 *Id.* at 9. The IPCC concluded with "high confidence" that observed changes in the physical and biological systems are due to anthropogenic emissions (about 8 out of 10 chance). *Id.*

66 *Id.* at 11.

67 For arguments that drinking water is a human right, see, e.g., James Salzman, *Thirst: A Short History of Drinking Water*, 18 YALE J.L. & HUMAN. 94, 117–18 (Supp. 2006) (reviewing historical treatment of drinking water and finding a "universal norm of access to drinking water by right in times of need"); Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 20 HARV. L. REV. 1067, 1069 (2007) (arguing "that justiciability based on an explicit right to water is preferable to a merely implied right to water").

68 WG2 2007, *supra* note 48, at 13–15.

69 *Id.* at 13.

70 *Id.*

71 For arguments that food is a human right, see U.N. Econ. & Soc. Council, Comm'n on Human Rights, Report by the Special Rapporteur on the Right to Food, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002) (*prepared by* Jean Zeigler).

72 WG2 2007, *supra* note 48, at 12.

73 *Id.* at 11–14.

subsistence farming and fishing, like Asia[74] and Africa,[75] will experience hunger and malnutrition.[76] More developed regions like Europe, North America, Australia, and New Zealand will be able to adapt by importing foods, but even in these developed economies, poor communities are not likely to have access to adaptive responses.[77]

Climate change impacts where people can live. Coastlines will be exposed to increasing risks from flooding and erosion.[78] "Many millions more people are projected to be flooded every year due to sea level rise."[79] One only need to think of Hurricane Katrina to understand the implications of the IPCC's projection that "densely-populated and low-lying areas where adaptive capacity is relatively low, and which already face other challenges such as tropical storms or local coastal subsidence, are especially at risk."[80] The risks of flooding are not limited to coastlines. Heavy weather events will also contribute to flooding in Europe, Latin America, and the Arctic.[81]

Climate change affects life. In 2003, a heat wave in Europe killed 35,000 people.[82] These types of events are projected to increase in frequency and intensity.[83] The IPCC report warns that climate change will result in "increased deaths, disease and injury due to heat waves, floods, storms, fires and droughts."[84] In addition to increased malnutrition, climate change will also increase the prevalence of cardio-respiratory disease, and alter the distribution of infectious disease vectors.[85] For example, in Asia, "[e]ndemic morbidity and mortality due to diarrheal disease primarily associated with floods and droughts" will increase, as will the rate and intensity of cholera in South Asia.[86]

The human rights implications of climate change have been brought to life by the plight of the Inuit,[87] who are experiencing the effects of climate change at twice the rate of the rest of the world.[88] In March 2007, the Inter-

74 *Id.* at 13.

75 *Id.*

76 *Id.*

77 *Id.* at 13–15.

78 *Id.* at 12.

79 *Id.*

80 *Id.*

81 *Id.* at 14.

82 Janet Larsen, *Record Heat Wave in Europe Takes 35,000 Lives*, EARTH POLICY INSTITUTE ECO-ECONOMY UPDATES, Oct. 9, 2003, http://www.earth-policy.org/Updates/Update29.htm (last visited Jan. 27, 2008).

83 WG2 2007, *supra* note 48, at 14.

84 *Id.* at 12.

85 *Id.*

86 *Id.* at 13.

87 *See* Press Release, Ctr. for Int'l Envtl. Law & Earth Justice, Nobel Prize Nominee Testifies About Global Warming (Mar. 1, 2007), *available at* http://www.ciel.org/Publications/IACHR_WC_Mar07.pdf (publishing Inuit leader Sheila Watt-Cloutier's testimony before the Inter-American Commission on Human Rights); Aminzadeh, *supra* note 48, at 239–40 (discussing the Inuit claim that U.S. climate change policy violates their human rights); Middaugh, *supra* note 48, at 180.

88 ARCTIC CLIMATE IMPACT ASSESSMENT, IMPACTS OF A WARMING CLIMATE: HIGHLIGHTS 3 (2004), *available at* http://amap.no/acia/ (scroll to the bottom of the page; then follow "ACIA

American Commission on Human Rights heard testimony about the impact of global warming on the Inuit and other vulnerable communities.[89]

The fundamental character of these impacts is important. These are basic needs for survival, not interests or desires. The character of these needs gives the first hint that we may be viewing a *Lochner*-ess monster. By assuming that corporations are individuals and assuming that the courts can only hear the complaints of individuals, Scalian Standing allows corporations to use the courts to protect their economic interests at the expense of the health and welfare of human individuals.

B. Corporate Interests and Global Warming

Carbon dioxide is the "inevitable by-product" of burning carbon-based compounds—fossil fuels.[90] Thus, "the only way to deal with global warming is to move quickly away from fossil fuels."[91] As one government official commented in 1977, "[i]f CO_2 proves to be the problem people think it is, we'll have to restructure our entire fossil fuel program."[92] In other words, addressing global warming will curtail and limit the profits of some of the largest and most powerful industries in the United States.

The nature of the interests affected by addressing climate change—the power of the oil companies and the national reliance on burning hydrocarbons to support our industrialized lifestyles—is important because it affects power dynamics, and suggests that the political realm has an incentive to ignore global climate change as a problem. Thus, the argument that global warming is more appropriately addressed by the majoritarian branches of government (those "that are accountable to the People"[93]) becomes unduly simplistic. In the global warming experience, fossil fuel corporations have used their disproportionate size and power to sway public opinion and avoid regulation for over twenty years.

Highlights" hyperlink).

[89] Press Release, Ctr. for Int'l Envtl. Law & Earth Justice, Global Warming and Human Rights Gets Hearing on the World Stage (Mar. 2007), http://www.ciel.org/Climate/IACHR_Inuit_5Mar07.html.

[90] William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 11 (2003) (using global warming as one example to challenge the conventional wisdom that "overregulation" is the result of overlapping regulatory regimes and arguing instead that overlapping regulatory jurisdiction can create regulatory gaps).

[91] Bill McKibben, *Global Warming: Get Up! Stand Up! How to Build a Mass Movement to Halt Climate Change*, ONEARTH, Spring 2007, at 22, 24; *see also* Ari Bessendorf, *Games in the Hothouse: Theoretical Dimensions in Climate Change*, 28 SUFFOLK TRANSNAT'L L. REV. 325, 330–46 (2005) (characterizing climate change as a "prisoner's dilemma" complicated by international political tensions and energy needs, and suggesting that any solution for climate change will require fundamental restructuring of global energy needs).

[92] SPENCER WEART, THE DISCOVERY OF GLOBAL WARMING (2007), *available at* http://www.aip.org/history/climate/pdf/Govt.pdf (citing *CO_2 Pollution May Change the Fuel Mix*, BUSINESS WEEK, Aug. 8, 1977, at 25 (quoting Phillip White, head of Energy Research & Development Administration's fossil fuel division)).

[93] Connecticut v. Amer. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

1. The Size and Power of Corporations

Sheer size and power distinguish corporations from people.[94] The modern multinational corporation is "as large and well organized, as in control of resources and potential instruments of coercion or power over individuals as are most local governments."[95] The power of fossil fuel corporations is well illustrated by looking at last year's largest publicly traded corporation in the world—ExxonMobil.[96] In 2006, ExxonMobil "earned higher profits than any company in history: $39.5 billion" (over $100 million daily, which is more than the GDP of Yemen and Bahrain combined).[97] Notably, until recently, ExxonMobil was the only oil and gas company that had not acknowledged that global warming was occurring, and it is the only oil and gas company without any ownership in alternative energy sources.[98]

The political force of oil in domestic and international affairs is vividly recounted in Daniel Yergin's book *The Prize*.[99] In the Prologue, Yergin suggests we have become a "Hydrocarbon Society" with oil serving as the "power source for the industrial world."[100] The national power of fossil fuel industries is immediately apparent by looking at the list of Fortune 500 companies.[101] Six of the seven largest corporations in the world rely on fossil fuels.[102]

94 Even corporate scholars note that the power of corporations is more analogous to that of the state. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 313 (rev. ed. 1968) ("The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with modern states—economic power versus political power, each strong in its own field. . . . The future may see . . . [the corporation] not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization."); *see also* CHARLES E. LINDBLOM, POLITICS AND MARKETS 172 (1977) (corporations have "become a kind of public official and exercise what, on a broad view of their role, are public functions"); PROGRESSIVE CORPORATE LAW xiii (Lawrence E. Mitchell ed., 1995) ("[N]o institution other than the state so dominates our public discourse and our private lives.").

95 Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 1007 (1998).

96 *Our Annual Ranking of America's Largest Corporations*, FORTUNE 500, 2006, *available at* http://money.cnn.com/magazines/fortune/fortune500/full_list/index.html.

97 Geoff Colvin, *Exxon = oil, g*dammit!*, FORTUNE, Apr. 23, 2007, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/04/30/8405398/index.htm.

98 *Id.*

99 DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER (1991).

100 *Id.* at 14.

101 FORTUNE 500, *supra* note 96.

102 *Id.*

Rank	Company	Revenue ($ millions)	Profits ($ millions)
1	ExxonMobil	$339,938	$36,130
2	Wal-Mart Stores	$315,654	$11,231
3	General Motors	$192,604	$-10,600
4	Chevron	$189,481	$14,099
5	Ford Motor	$177,210	$2,024
6	ConocoPhillips	$166,683	$13,529
7	General Electric	$157,153	$16,353

2. Corporations Can Enact Laws in Their Favor—Or Get Rid of Unfavorable Laws

Second, the power of many corporations enables them to enact laws in their *favor* (rather than suffer laws enacted at their expense) or rid themselves of unfavorable laws. For example, a California newspaper reported on the power of the oil industry as a "potent political force" in the state.[103] "[O]il company lobbyists have helped tie up almost a dozen bills considered hostile to the industry, including a plan to tax windfall profits and a proposal to regulate refineries as public utilities."[104]

A quick glance at lobby spending reports illustrates the differing abilities of individuals and corporations to enact laws in their favor. The lobbying budgets for large corporations exceed the capacity of most citizens. It is difficult to square the idea that corporations are "persons" under the Constitution with their lobbying budgets over the past ten years—General Electric ($149,990,000), Edison Electric Institute ($107,132,628), Ford Motor Company ($71,312,808) and General Motors ($77,620,483).[105] In California alone, in 2006, the oil industry spent $11,113,946 on lobbying expenses and another $1,047,008 lobbying the California Public Utilities Commission.[106] The financial force of corporations is multiplied when they unite their efforts. According to a nonpartisan public interest group which tracks lobbying spending, federal lobbying reached $2.45 billion in 2006.[107] Electric Utilities were the third largest industry contributors in 2006, spending over $106.5 million.[108] The oil and gas industry alone spent over $74 million,

103 Tom Chorneau, *Big Oil Lobbyists Stall Bills in Legislature that Industry Opposes*, S.F. CHRON., July 14, 2006, at B-1.

104 *Id.*

105 The Ctr. for Responsive Politics, *Lobbying Spending Database*, http://www.opensecrets.org/lobbyists/overview.asp?showyear=a&txtindextype=s (last visited Jan. 27, 2008) (showing top spenders for the years 1998–2007).

106 CALPIRG EDUCATIONAL FUND, SLICK POLITICS 7 (2006) *available at* http://www.calpirg.org/uploads/Vs/eN/VseNIrrmH4kCa8V9XTsiCA/SlickPolitics2006.pdf.

107 Press Release, Center for Responsive Politics, Despite a Flat Year for Lobbying, Business Booster's Advocacy Soared in 2006 (Mar. 15, 2007), *available at* http://www.opensecrets.org/pressreleases/2007/2006Lobbying.3.15.asp.

108 The Center for Responsive Politics, *Lobbying Spending Database*, *supra* note 105 (for top industry spenders for 2006, see http://www.opensecrets.org/lobbyists/overview.asp?showyear=2006&txtindextype=i) (last visited Jan. 27, 2008).

making it the ninth largest contributor for the 2006 cycle.[109] The automotive industry also contributed generously, coming in as the sixteenth largest contributor with over $63 million in contributions.[110] Between 1991 and 1995, oil companies and automakers spent nearly $34 million to influence public policy in California alone.[111] The fact that corporations' lobbying budgets are so high attests to the effectiveness of this strategy in getting favorable laws passed.[112]

The strength of the fossil fuel industries' ability to avoid regulation is illustrated by what I call "the forgotten history of global warming regulation." I call it the "forgotten history" because many individuals who came of age after 1996 think of global warming as a phenomenon that only recently gained widespread scientific support.[113]

In fact, global warming enjoyed enough support through the eighties and early nineties that Congress and the President took significant steps toward finding an international solution to global warming. The significance of these regulatory artifacts is best summarized by Spencer Weart's view on the difficulty of enacting citizen-driven legislation:

> When a group of citizens (in this case scientists) decide that their government should do more to address some particular concern, they face a hard task. The citizens have only a limited amount of effort to spare, and officials are set in their bureaucratic ways. To accomplish anything—to bring about a new government program, in particular—people must mount a concerted push. For a few years concerned citizens must hammer at the issue, informing the public and finding allies among like-minded officials. These inside allies must form committees, draft reports, and shepherd legislation through the administration and Congress. Interests that feel threatened by change will put up roadblocks, and the whole process is liable to fail from exhaustion.[114]

a. The "Forgotten History" of Global Warming Regulation

Global warming first gained mainstream publicity in the 1980s.[115] Even before that, a group of citizens and scientists had pushed, throughout the

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109 *Id.*

110 *Id.*

111 Todd M. Lopez, *A Look at Climate Change and the Evolution of the Kyoto Protocol*, 43 NAT. RESOURCES J. 285, 294 n.36 (2003).

112 For an interesting article specifically addressing climate change and corporate lobbying during the past couple years, see Sybil Ackerman, *What Are Lobbyists Saying on Capitol Hill? Climate Change Legislation as a Case Study for Reform*, 37 ENVTL. L. 137, 139–45 (2007).

113 For example, in 1995 "in the same month that the United Nation's International Panel on Climate Change reported that the balance of the evidence supported the conclusion that human activity has had a "discernible" influence on global warming, leading House Republicans dismissed global warming as a hoax." Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 KAN. J.L. & PUB. POL'Y 9, 20 (1996).

114 WEART, *supra* note 92, at 11.

115 CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 60 (2005).

1970s, for the government to act on their global warming concerns.[116] These concerns slowly gained traction. In 1978, Congress passed the National Climate Program Act,[117] creating a National Climate Program Office to research climate change.[118] In 1979, the National Research Council issued a conclusion that "[i]f carbon dioxide continues to increase . . . . A wait and see policy may mean waiting until it is too late."[119]

Ten years later, in 1987, President Reagan signed the Global Climate Protection Act, a law directing the Administration to create a plan for stabilizing greenhouse gases and to work toward international regulation.[120] The next year the United States initiated the Intergovernmental Panel on Climate Change,[121] the same year that Jim Hansen, a prominent NASA scientist, told Congress that he believed with "99 percent confidence" that a long term warming trend had begun, probably caused by the greenhouse effect.[122]

Progress continued into the 1990s. Recognizing that global warming required an international solution, the U.N. General Assembly established an Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, with a mandate to create a convention with "appropriate commitments" by 1992.[123] These negotiations successfully produced the United Nations Framework Convention on Climate Change (UNFCCC)—a treaty which laid out key value judgments that set the foundation for continued negotiations toward a binding treaty regulating carbon dioxide.[124] In 1992, the President signed and Congress ratified the UNFCCC.[125]

Although many considered the non-binding nature and the vague terms of the UNFCCC a disappointment at the time,[126] by 2007 standards, the Treaty seems positively progressive. The Treaty recognized climate change as a serious threat and defined common long term objectives. It also set forth principles to guide future negotiations.[127] For example, the UNFCCC

116 WEART, *supra* note 92, at 11–19.

117 Pub. L. No. 95-367, 92 Stat. 601 (1978).

118 *Id.* §§ 3, 5; WEART, *supra* note 92, at 17.

119 NAT'L RESEARCH COUNCIL, AD HOC STUDY GROUP ON CARBON DIOXIDE AND CLIMATE, CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT, at viii (1979).

120 Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100–204, § 1103(a), 101 Stat. 1331, 1408 (1987).

121 Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 464–65 & n.83 (1993) (suggesting that this was an attempt to assert governmental control over an increasingly political issue—some officials hoped that the government involvement would slow down the climate change issue, while others hoped that the intergovernmental nature would increase pressure for strong policy responses); *see also* MOONEY, *supra* note 115, at 61.

122 MOONEY, *supra* note 115, at 61; *Greenhouse Effect and Global Climate Change: Hearing Before the Senate Comm. on Energy and Natural Resources*, 100th Cong. 60 (1988). The next year, in 1989, Hansen found his scientific testimony to Congress edited by the first Bush administration's Office of Management and Budget to emphasize scientific uncertainties.

123 Bodansky, *supra* note 121, at 493.

124 UNFCCC, May 29, 1992, 31 I.L.M. 849 (entered into force Mar. 21, 1994).

125 UNFCCC, May 9, 1992, S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 107 art. 2 p. 5 (1992).

126 Bodansky, *supra* note 121, at n.8 and accompanying text.

127 UNFCCC, *supra* note 124, arts. 2, 3.

adopted the customary principle of international law that States should not allow activities within their borders to "cause damage to the environment of other States [or] areas."[128] The treaty also adopted a modified, cost-aware precautionary principle for addressing climate change.[129]

These steps were significant enough that in 1993, one scholar characterized the time period between 1980 and 1993 as an evolution of awareness with three stages: 1) emergence of scientific consensus, 2) growth in public and political interest, and 3) formulation of an international policy response.[130] What happened between this optimistic assessment in 1993 and 2007 to convince most people that scientific consensus is only beginning to emerge?[131]

One suggestion is that the fossil fuel industry was "asleep" in those initial years.[132] "Indeed, as states became increasingly aware of the stakes and uncertainties involved in the climate question, even states that had initially supported a strong policy response became more cautious."[133] By 1996, when the Kyoto Protocol was put on the table, the industry had "woken up."[134]

b. The Industry's Campaign Against Regulation

In 1996, a $13 million national advertising campaign with the tagline, "It's not global, and it won't work," successfully derailed any possibility that the United States would sign the Kyoto Protocol.[135] The ad campaign was funded by the American Association of Automobile Manufacturers and Global Climate Coalition, an industry group whose members included the American Petroleum Institute, Chevron, Amoco, Chrysler, Cinergy, Duke Power Company, Edison Electric Institute, ExxonMobil, Ford Motor

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128 *Id.* pmbl.

129 *Id.* art. 3, cl. 3 (States "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects . . . . Lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost effective.").

130 Bodansky, *supra* note 121, at 458.

131 *See* Matthew F. Pawa & Benjamin A. Krass, *Behind the Curve: The National Media's Reporting on Global Warming*, 33 B.C. ENVTL. AFF. L. REV. 485, 497–99 (2006) (describing the popular misconception that global warming is a matter of scientific uncertainty).

132 James K. Sebenius, *Designing Negotiations Toward a New Regime: The Case of Global Warming*, 15 INT'L SECURITY 110, 132 (1991) ("[T]he powerful coalitions that will arise to resist major greenhouse action are now mostly asleep.").

133 Bodansky, *supra* note 121, at 463–64 ("The United States may have been the only Western country to view the climate change issue through a domestic policy prism from the outset. After 1987, international environmental issues were coordinated by a working group of the White House Domestic Policy Council, in which the [EPA] was increasingly outmuscled by major domestic political players such as the Departments of Energy, Interior and Commerce, the Office of Management and Budget, and the Council of Economic Advisors.").

134 Pawa & Krass, *supra* note 131, at 500–01(describing several campaigns orchestrated by the fossil fuel industries to confuse the public and avoid regulation).

135 Todd M. Lopez, *A Look at Climate Change and the Evolution of the Kyoto Protocol*, 43 NAT. RESOURCES J. 285, 295 (2003).

Company, General Motors, Ohio Edison, Good Year Tire and Rubber Company, Texaco, and National Petrochemical and Refiners Association, to name a few.[136] Other groups such as the National Coal Association and the American Petroleum Institute spent $2.5 million coordinating separate campaigns to stop fossil fuel regulation.[137]

Following this successful campaign, the Senate passed, by a margin of 95-0, Resolution 98, also known as the Byrd Resolution.[138] This resolution, urging the President not to enter into any convention that would have a significant effect on the U.S. economy, marked the end of U.S. participation in the Kyoto Protocol by signaling that Congress would not ratify participation. On November 12, 1998, Vice President Al Gore signed the Kyoto Protocol, but it was never even sent to the Senate for ratification.[139]

The effectiveness of the campaign spearheaded by the Climate Change Coalition is illustrated by comparing an official statement from 1997 with the uncertainty shrouding official statements about climate change from the EPA in 2007. In 1997, the U.S. Report to the Climate Change Convention summarized that "[c]limate change is a clearly defined problem and is well recognized at the highest levels in the U.S. government. Senior officials (from the President to the heads of cabinet agencies and departments) have taken a strong stand in favor of seeking to reduce emissions."[140] In contrast, in 2007 the EPA continued to justify its failure to regulate carbon dioxide by explaining, among other things, that

> [B]ecause the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in time histories of the various forcing agents . . . a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.[141]

3. Corporations Can and Have Molded Public Opinion

The power of a large budget extends from Congress to the public. Regulated entities often have a vested interest in obfuscating public awareness and avoiding regulation.[142] Wendy Wagner predicts that "[i]n

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136 SourceWatch, *Global Climate Coalition*, http://www.sourcewatch.org/index.php?title=Global_Climate_Coalition (last visited Jan. 27, 2008) (providing the full list of funding sources of the group Global Climate Change Coalition).

137 *Id.*

138 S. Res. 98, 105th Cong. (1997) (enacted).

139 Lopez, *supra* note 135, at 299.

140 OFFICE OF GLOBAL CHANGE, BUREAU OF OCEANS & INT'L ENVTL. SCIENTIFIC AFFAIRS, DEP'T OF STATE PUB. 10496, CLIMATE ACTION REPORT: 1997 SUBMISSION OF THE UNITED STATES OF AMERICA UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 24 (1997), *available at* http://unfccc.int/resource/docs/natc/usnc2.pdf.

141 Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930 (Sept. 8, 2003).

142 *See, e.g.*, Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619 (2004) (arguing that regulated entities have a natural inclination to remain silent, hide the harm that they are

dramatic cases, when expensive liability or regulations could result from an objective assessment of the externalities, actors could invest quite a lot to discredit third-party research and obscure research results."[143]

The success of the fossil fuel industries' avoidance of regulation is largely due to their ability to sway public opinion. These industries have "actively campaigned to create the appearance of uncertainty even where scientific consensus has been reached."[144] Frank Luntz, a Republican Party consultant openly recommended that Republicans promote scientific controversy in the global warming debate:[145]

> Voters believe that there is no consensus about global warming within the scientific community. Should the public come to believe that scientific issues are settled, their views about global warming will change accordingly. Therefore, you need to continue to make the lack of scientific certainty a primary issue in the debate . . . .[146]

Along those lines, phrases he suggests as "words that work" include: "Scientists can extrapolate all kids of things from today's data, but that doesn't tell us anything about tomorrow's world" and "We must not rush to judgment before all of the facts are in. We need to ask more questions. We deserve more answers. And until we learn more, we should not commit America to any international document that handcuffs us."[147]

The campaign to promote uncertainty continues. For example, from May 18 to May 28, 2006, the Competitive Enterprise Institute[148] ran two sixty

causing, or even discredit public research suggesting that their actions are harmful—particularly when the stakes are high).

143 *Id.* at 1649–51 & n.103 (chronicling use of this tactic by the asbestos manufacturers, the breast implant industry, and the tobacco industry).

144 Lisa Heinzerling, *The Accidental Environmentalist: Judge Posner on Catastrophic Thinking*, 94 GEO. L.J. 833, 848 (2006) (reviewing RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE (2004)). This is the same tactic used so effectively by the tobacco industry. "Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public. It is also the means of establishing a controversy." BROWN & WILLIAMSON, SMOKING AND HEALTH PROPOSAL 4 (1998), *available at* http://tobaccodocuments.org/bw/332506.html.

145 Jennifer 8. Lee, *A Call for Softer, Greener Language: G.O.P Adviser Offers Linguistic Tactics for Environmental Edge*, N.Y. TIMES, Mar. 2, 2003, at A24 (reporting on the Luntz memo that had been leaked to the New York Times). For the actual memo, see Memorandum from The Luntz Research Companies on Straight Talk to the George W. Bush White House 137 (2002) [hereinafter *Luntz Memo*], *available at* http://www.luntzspeak.com/graphics/Luntz Research.Memo.pdf.

146 *Luntz Memo*, *supra* note 145, at 137.

147 *Id.* at 138.

148 The Competitive Enterprise Institute is a conservative think tank that vocally campaigns against regulation of greenhouse gases, and other industry regulations. Last year their "most generous sponsors" were the Alliance of Automobile Manufacturers, ExxonMobil, the Pharmaceutical Research and Manufacturers of America, and Pfizer. Other contributors include General Motors, American Petroleum Institute, American Plastics Council, the Chlorine Chemistry Council, and Arch Coal. Joel Achenbach, *The Tempest*, WASH. POST MAG., May 28, 2006, at W08, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/23/AR2006052301305.html.

second commercials in fourteen cities across the United States challenging the idea that carbon dioxide presents a threat.[149] One commercial warns viewers that "some politicians want to label carbon dioxide a pollutant. Imagine if they succeed, what would our lives be like then?"[150] The other commercial explains: "carbon dioxide, it isn't smog or smoke, it's what we breathe out, and plants breathe in."[151] It also asserted that ice sheets were not melting—just the opposite—that scientists had found a growing glacier in Greenland.[152] Notably, the scientist whose work the commercial cited for this claim issued a news release saying that the commercial misrepresented his findings.[153] Both commercials finish by showing a little girl blowing bubbles in a green field with a comforting voice in the background, "Carbon dioxide, they call it pollution. We call it *life*."[154]

One major player in the campaign promoting uncertainty is ExxonMobil. Between 1998 and 2005, ExxonMobil has spent almost $16 million funding global warming skeptics.[155] In September 2006, the Royal Society wrote a letter to ExxonMobil in response to its "Corporate Citizenship Report."[156] The letter asked ExxonMobil to stop funding the Competitive Enterprise Institute (the group that ran the commercials discussed above) and other global warming contrarians.[157] This request was

149 Competitive Enterprise Inst., *We Call It Life*, http://www.cei.org/pages/co2.cfm (last visited Jan. 26, 2008) [hereinafter Competitive Enterprise Inst.] (posting links to view both advertisements).

150 *Id.* The "*Energy*" commercial also states: "The fuels that produce CO_2 have freed us from a world of backbreaking labor . . . allowing us to create and move the things we need, the people we love."

151 *Id.* (from the *"Glacier"* commercial).

152 *Id.* ("You've seen those headlines about global warming . . . but other scientific studies found exactly the opposite . . . Greenland's glaciers are growing, not melting. The Antarctic ice sheet is getting thicker, not thinner. . . And as for carbon dioxide, it isn't smog or smoke, its what we breathe out, and plants breathe in.").

153 Press Release, Engineering Professor Curt Davis Says TV Spots Are Misrepresenting His Research (May 19, 2006), *available at* https://cf.iats.missouri.edu/news/NewsBureau SingleNews.cfm?newsid=9842 ("These television ads are a deliberate effort to confuse and mislead the public about the global warming debate. . . . They are selectively using only parts of my previous research to support their claims. They are not telling the entire story to the public.").

154 Competitive Enterprise Inst., *supra* note 149.

155 UNION OF CONCERNED SCIENTISTS, SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE (Jan. 2007), Executive Summary, at 1, *available at* http://www.ucsusa.org/assets/documents/global_warming/exxon_report.pdf [hereinafter SMOKE, MIRRORS & HOT AIR]; *see also* Chris Mooney, *Some Like It Hot*, MOTHER JONES, May–June 2005, 36 (listing funding for climate skeptics and linking it to ExxonMobil, estimating that they spent more than $8 million between 2000 and 2003).

156 Letter from Bob Ward, Senior Manager of Policy Communication, The Royal Society, to Nick Thomas, Director of Corporate Affairs, ExxonMobil 1 (Sept. 4, 2006), *available at* http://image.guardian.co.uk/sys-files/Guardian/documents/2006/09/19/LettertoNick.pdf (last visited Jan. 27, 2008) [hereinafter Letter from Royal Society to ExxonMobil].

157 *See id.* at 2; *see also* David Adam, *Royal Society Tells Exxon: Stop Funding Climate Change Denial*, GUARDIAN, Sept. 20, 2006, *available at* http://environment.guardian.co.uk/climatechange/story/0,,1876538,00.html (reporting that ExxonMobil did stop funding CEI after this letter).

based on a finding that thirty-nine of the sixty-four organizations to which ExxonMobil donated for "public information and policy research" featured information on their websites that "misrepresented the science of climate change by outright denial of the evidence that greenhouse gases are driving climate change, or by overstating the amount and significance of uncertainty in knowledge, or by conveying a misleading impression of the potential impacts of anthropogenic climate change."[158] All told, the Royal Society concluded that ExxonMobil spent $2.9 million on organizations in the United States which misinformed the public about climate change through their websites.[159] The letter expressed disappointment that ExxonMobil's 2005 Corporate Citizenship Report "leaves readers with such an inaccurate and misleading impression of the evidence on climate change that is documented in the scientific literature."[160] The letter concluded with Bob Ward, the head of the Royal Society, requesting ExxonMobil provide him with a list of organizations in the UK and other European countries that have been receiving funding from ExxonMobil, "so that I can work out which of these have been similarly providing inaccurate and misleading information."[161]

a. Corporations and Public Education

Corporate ability to shape and mold public opinion is not always as obvious as political commercials or vocal advocacy groups. Corporations are increasingly presenting their messages in classrooms across the United States.[162] Corporations with a vested interest in avoiding regulation are playing an increasingly prominent role educating citizens about science and the risks of industrial actions. In 1998, the New York Times published a leaked memo detailing a $5 million "Action Plan" spearheaded by the American Petroleum Institute.[163] The objective of the Action Plan was to "inform the American public that science does not support the precipitous actions Kyoto would dictate, thereby providing a climate for the right policy decisions to be made."[164] The Action Plan explained, "[v]ictory will be

158 Letter from Royal Society to ExxonMobil, *supra* note 156, at 2.

159 *Id.*

160 *Id.* This criticism was based on the statement in ExxonMobil's report that "gaps in the scientific basis for theoretical climate models and the interplay of significant natural variability make it very difficult to determine objectively the extent to which recent climate changes might be the result of human actions." This statement was made to criticize results of the IPCC study—a study in which one of ExxonMobil's own scientists participated.

161 *Id.* at 3.

162 Jim Drinkard, *Lobbyists Trying to Sway Younger Minds*, USA TODAY, June 23, 1998, at 7A (quoting the National Education Association's concern that corporations increasingly are aiming lobbying messages at the classroom: "As teachers, we do not think that has a place in the classroom. Students should not be used as pawns in any sort of lobbying game.").

163 John H. Cushman, Jr., *Industrial Group Plans To Battle Climate Treaty*, N.Y. TIMES, Apr. 26, 1998, at 1, 24; GLOBAL CLIMATE SCIENCE COMMUNICATIONS, ACTION PLAN (1998), *available at* http://www.euronet.nl/users/e_wesker/ew@shell/API-prop.html.

164 GLOBAL SCIENCE COMMUNICATIONS, ACTION PLAN, *supra* note 163. Industry representatives listed as contributing to the development of the plan included Randy Randol from Exxon,

achieved when [a]verage citizens 'understand' (recognize) uncertainties in climate science; recognition becomes part of the 'conventional wisdom'" and "[t]hose promoting the Kyoto treaty . . . appear[] to be out of touch with reality."[165] In pursuit of this goal, several strategies and tactics were developed, including an education plan.[166] The plan explained, "[i]nforming teachers/students about uncertainties in climate science will begin to erect a barrier against further efforts to impose Kyoto-like measures in the future."[167] In pursuit of this teacher education, the Action Plan included organizing a "Science Education Task Group" which would work directly with the National Science Teachers Association "to develop school materials that present a credible, balanced picture of climate science for use in classrooms nationwide" and to distribute the materials directly to schools.[168]

Ironically, the National Science Teachers Association was recently offered 50,000 free DVDs from the producers of Al Gore's film *An Inconvenient Truth*.[169] The Association declined to distribute the DVDs,[170] explaining they did not want to offer "political" endorsement of the film, and explaining that accepting the films could place "unnecessary risk upon the [National Science Teachers Association] capital campaign, especially certain targeted supporters."[171] One of those supporters is ExxonMobil, which has donated $6 million to the National Science Teachers Association since 1996 to "bring standards-based teaching and learning" into schools.[172]

Sharon Kneiss from Chevron, and Joe Walker from American Petroleum Institute.

165 *Id.*

166 *Id.* (detailing goal to "inform and educate members of Congress, state officials, industry leadership, and school teachers/students about uncertainties in climate science" in order to convince American policymakers to "refuse to endorse" the Kyoto Protocol).

167 *Id.*

168 *Id.*

169 Laurie David, Op-Ed., *Science a la Joe Camel*, WASH. POST, Nov. 26, 2006, at B01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/11/24/AR2006112400789_pf.html (Laurie David produced "An Inconvenient Truth" and is a trustee of the Natural Resources Defense Council); John F. Borowski, Editorial, *Largest Science Teachers Organization Rejects Gore Video . . . Why?*, TRUTHOUT, Nov. 28, 2006, *available at* http://www.truthout.org/cgi-bin/artman/exec/view.cgi/66/24120.

170 Letter from Gerry Wheeler, Executive Director of National Science Teachers Association, to Laurie David, Producer of "An Inconvenient Truth" (Nov. 30, 2006), *available at* http://www.nsta.org/main/pdfs/20061130LetterToLaurieDavid.pdf. The National Science Teachers Association did not flatly refuse the offer—they offered to provide a link on their website for teachers to obtain a free video, the opportunity to purchase their mailing list, and other options such as exhibiting at the National Conference on Science Education. These options illustrate the difficulty that citizens face reaching the public on the same scale as corporations. Every option suggested by the National Science Teachers Association requires additional capital in order to reach the intended audience and requires the information be presented in a setting where it competes with corporate sponsored materials.

171 David, *supra* note 169; *see also* Press Release, National Science Teachers Association, NSTA Responds to Your Questions, Question 3 (Dec. 2, 2006), http://www.nsta.org/about/pressroom.aspx?id=52977#faq (last visited Jan. 27, 2008) (explaining the concern that distributing DVDs would threaten their capital campaign was discussed but "mistakenly included" in the email exchange).

172 David, *supra* note 169; *see also* Press Release, National Science Teachers Association Building a Presence for Science Funders, Sample Media Day News Release (Feb. 4 1997),

ExxonMobil is not the only corporation pursuing classroom education as a tactic for shaping public opinion. The American Petroleum Institute offers to mail free classroom materials to science teachers who simply enter their address into a website.[173] The materials are entertaining—almost cartoon-like—and subtly promote the fuel industry. Among the materials provided is a video entitled *Fuel-less* (a spoof on the movie *Clueless*). The video begins with the line "You're not going to believe this but everything I have that's really cool comes from oil!"[174] The video "follows high-school queen Crystal" through a day where everything derived from oil has disappeared—"her makeup, Daddy's credit card, gasoline for her beloved BMW and aspirin"—and concluding by teaching Crystal "where oil comes from, how it is processed, and how the products made from oil impact our everyday lives."[175]

The American Petroleum Institute has also partnered with Scholastic, one of the largest educational publishers, to produce a series of lesson plans called *Powering Your World*.[176] One of the lesson plans, entitled "Adventures in Energy" is a self-driven slideshow complete with music, animated characters, and interactive features.[177] It begins by explaining the importance of oil. "[T]here are so many uses for oil that our consumption has increased almost 300% since 1950! Experts predict that our demand for these products will continue to increase as we strive for a better quality of life, even with substantial energy efficiency improvements."[178] Another slide explains what it would be like without oil products in our lives. The viewer can click on various items in the slide to see how life would be different without oil. For example, in place of an ambulance—a horse and a covered wagon; in place of a couple comfortably watching TV in their living room—the couple bundled up in warm clothes watching a fire; in place of cool tennis shoes—hippie-like sandals.[179] Another slide acknowledges the existence of alternative energy sources, but only as a forum for explaining why they are poor replacements

http://science.nsta.org/bap/publicity/sample_release.asp (last visited Jan. 27, 2008) ("ExxonMobil Foundation has contributed more than $6 million to the Building a Presence for Science program.").

173 API Classroom Energy!, Order Free Materials, http://www.classroom-energy.org/order_materials.html (last visited Jan. 27, 2008).

174 API Classroom Energy!, Fuel-less, http://www.classroom-energy.org/oil_natural_gas/fuel_less/index.html# (last visited Jan. 27, 2008).

175 *Id.*

176 Scholastic, Powering Your World with Classroom Energy, http://teacher.scholastic.com/lessonplans/energy/ (last visited Jan. 27, 2008); *see also* John F. Borowski, Op-Ed., *Why is Scholastic, the World's Largest Supplier of Children's Books, Giving a Venue to the "Dark Side?,"* COMMON DREAMS NEWSCENTER, Aug. 12, 2004, *available at* http://www.commondreams.org/views04/0812-11.htm (discussing Scholastic's partnership with the American Petroleum Institute to provide the "Powering Your World" website).

177 Adventures in Energy, http://www.adventuresinenergy.org (last visited Jan. 27, 2008).

178 Adventures in Energy, Adventures in Energy, http://www.adventuresinenergy.org/main.swf (last visited Jan. 27, 2008).

179 Adventures in Energy, Benefits of Advanced Technology, http://www.adventuresinenergy.org/main.swf (last visited Jan. 27, 2008).

for oil and gas.[180] Notably absent from any of the lesson plans offered on the website is a discussion, or even mention, of global warming.

Think of the consequences of pairing education with corporate interests. In the past year alone, ExxonMobil has given $42 million to key organizations that influence the way children learn about science from kindergarten to high school.[181] The examples discussed above are not to suggest that the National Science Teachers Association is in the palm of corporate hands.[182] The problem is far more subtle. Schools are poorly funded. Corporations have large profits and a vested interest in creating goodwill.[183] Corporate funding and education may be a natural partnership, but one of which we should be circumspect. It has serious long-term consequences for civic debate about the value choices that environmental regulations represent.

The power of corporations to educate the public and sway public opinion is important because it thwarts debate in the public arena. No public interest group can compete with the funding and organization of a self-interested corporate education campaign. In the environmental, as well as other public interest debates, the power to sway public opinion is important because it stifles public debate. The "real debates" over environmental regulation and risk projections "are not about scientific issues, but about fundamental policy differences which reflect honest disagreements about the values of various competing social goals."[184] By reframing environmental issues (value judgments) into factual disagreements about scientific uncertainty, corporations wield enormous power to influence society's understanding about its own role in making policy choices about environmental goals. When it comes to review, corporations should be the *subject* of these debates, not participants.

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180 Adventures in Energy, Life Without Oil and Natural Gas, http://www.adventuresinenergy.org/main.swf (last visited Jan. 27, 2008).

181 David, *supra* note 169.

182 The National Science Teacher's Association's characterization of their relationship with corporate America is "[W]e actively engage corporate America to support NSTA's mission to promote excellence and innovation in science teaching and learning for all." Press Release, National Science Teachers Association, *supra* note 171.

183 As one teacher explained, "A lot of teachers aren't aware that the free curriculum they are getting has a bias. . . . [W]e don't look a gift horse in the mouth." Jim Drinkard, *Lobbyists Trying to Sway Younger Minds*, USA TODAY, June 23, 1998, at 7A (explaining that with budget cuts hitting public schools, teachers will accept supplies from corporations). *See also* CONSUMERS UNION, CAPTIVE KIDS: A REPORT ON COMMERCIAL PRESSURES ON KIDS AT SCHOOL (1995), *available at* http://www.consumersunion.org/other/captivekids/index.htm (reporting on the widespread use of corporate materials to fill funding gaps in schools and expressing concern about the growing use of educational materials produced by commercial interests that contain biased, self-serving, and promotional information). There is one publishing company which publishes and distributes two to three million sponsored booklets per year for energy and utility companies. Consumer Reports reviewed their booklet on global warming, finding it "not commercial, but with a bias to the fossil fuel industry." *Id.*

184 Transmittal Letter Submitting Report from Rep. George E. Brown, Jr. to Democratic Caucus of the Committee on Science (Oct. 23, 1996), *in* ENVIRONMENTAL SCIENCE UNDER SIEGE: FRINGE SCIENCE AND THE 104TH CONGRESS, *available at* http://democrats.science.house.gov/Media/File/Reports/environment_science_report_23oct96.pdf.

IV. PAIRING THE MYTH OF THE CORPORATE PERSON WITH SCALIAN STANDING: ARGUMENTS AGAINST ASSUMING CORPORATIONS ARE ANALOGOUS TO PEOPLE IN THE STANDING ANALYSIS

A. The Corporation as an Individual

Recent standing jurisprudence focuses on whether the *individual* before the court can assert a "particularized" harm unique to that individual.[185] In contrast, a shared harm—one that is not unique to an individual—is generally characterized as a nonjusticiable "generalized grievance."[186] This requirement makes it difficult for citizen groups to address environmental injuries because, by their nature, environmental injuries affect large numbers of people. For example, in *Massachusetts v. EPA*, the dissent concluded that "global warming is a phenomenon 'harmful to humanity at large,' . . . and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world."[187] In other words, one problem with global warming litigation, from the standpoint of Chief Justice Roberts' dissent, is that it harms everyone—and with such a large pool of injured parties, redress should come from the political branches, not the unelected judiciary.

The problem with assuming that widely shared injuries should be addressed politically is that it fails to take into account the power and size of corporations that have the means and the infrastructure to impose externalities on the entire nation, but are still considered "persons" under the standing analysis. The consequence of assuming that corporations are individuals is best illustrated by a series of cases also dealing with automobile emissions. Transportation contributes twenty-seven percent of all greenhouse gas emissions in the United States.[188] In an attempt to curb some of these emissions, California (along with thirteen other states that have announced their intention to follow suit) has adopted standards that would require reduced greenhouse gas emissions from new automobiles.[189] In response to these state actions, automobile dealers and manufacturers (usually General Motors Corporation, Daimler Chrysler Corporation, Association of International Automobile Manufacturers, and Alliance of Automobile Manufacturers) are suing the states to avoid regulation.[190]

185 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

186 *Id.* at 575; United States v. Richardson, 418 U.S. 166, 171 (1974).

187 Massachusets v. EPA, 127 S. Ct. 1438, 1467 (2007) (Roberts, C.J., dissenting).

188 LEARNING FROM STATE ACTION UPDATE, *supra* note 7, at 7.

189 *Id.*

190 *See, e.g.*, Cent. Valley Chrysler-Jeep v. Witherspoon, No. CV F 04-6663, 2007 WL 135688, at *1 (E.D. Cal. Jan. 16, 2007) (auto manufacturers and dealers seeking to enjoin enforcement of California state regulations limiting greenhouse gas emissions from new cars); Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse, No. 2:05-CV-302, 2:05-CV-304, 2006 WL 3469622, at *4 (D.Vt. Nov. 30, 2006) (holding that automobile manufacturers and dealers had standing to challenge Vermont's adoption of California's standards regulating greenhouse gases for autos); Complaint at 2, Lincoln Dodge, Inc. v. Sullivan, No. 1:06-CV-00070 (D.R.I. filed Feb. 13, 2006) (challenging Rhode Island's adoption of California's emissions standards for autos). Earlier, some states attempted to limit auto emissions by requiring that fleets include a certain number

Because these corporations are "persons" and they are the "object" of the state regulations, their standing is virtually assumed. For example, in *Central Valley Chrysler-Jeep v. Witherspoon*, auto dealers and manufacturers challenged California's greenhouse gas emission requirements without any discussion from the court as to whether they had standing.[191] Similarly, in *Green Mountain Chrysler-Plymouth Dodge v. Dalmasse*, automobile manufacturers and dealers sued the state to enjoin enforcement of greenhouse gas emission standards for automobiles. The court explained that the auto manufacturers and dealers had standing because the "[p]robable economic injury resulting from government regulation" would "alter[] competitive conditions" in the market, creating an injury-in-fact" for the auto dealers and manufacturers.[192]

The problem with this approach, as discussed thoroughly above, is that corporations are not equivalent to individuals. Their immense size and power gives them enormous clout in the political realm, as well as disproportionate power to shape and mold public opinion. Moreover, there are simple factual distinctions between a corporation and a person. A human citizen is one person. A corporate citizen may encompass thousands of people. A human citizen has personal responsibilities that compete with her dedication to protect her environment. She has bills, a job, personal relationships, all of which compete for her time. A corporation has none of these competing interests and can sustain litigation through bankruptcy. Furthermore, a citizen engaged in litigation is fighting for something that cannot be translated into economic gain when the litigation ends. A corporation is fighting to maintain its economic gain (sometimes obtained at the expense of the environment).

The size and power of corporations matter because Scalian Standing assumes that the role of the court is to protect the "individual" that is the "*object* of the law's requirement" from the "impositions of the majority."[193] Scalian Standing, however, fails to consider what happens when a minority of "persons" (corporations) amasses enough control of both political branches of government (the executive and the legislative) that they effectively subjugate democratic interests. Doesn't this change the role of the courts?

The second problem with applying Scalian Standing to corporations is that corporate "persons" disproportionately benefit from pursuing a

of zero emission vehicles; auto manufacturers also challenged these standards. *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 258–59 (2004) (holding at least some state fleet purchasing or selling standards preempted); Int'l Auto. Mfrs. v. Comm'r, 208 F.3d 1, 8 (1st Cir. 2000) (finding Massachusetts fleet standards preempted); Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 197 (2d Cir. 1998) (holding fleet requirements preempted); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 309 F.3d 550, 551 (9th Cir. 2002) (upholding fleet purchasing requirements), *overruled by* 541 U.S. 246 (2004).

191 456 F. Supp. 2d 1160, 1166–75 (E.D. Cal. 2006) (refusing to dismiss for summary judgment because auto dealers had stated a claim that the state regulations were preempted by various federal laws).

192 *Green Mountain Chrysler*, 2006 WL 3469622, at *4.

193 Scalia, *supra* note 32, at 894.

litigation strategy. For an industry focused on avoiding regulation, even delay can be worthwhile.[194] For example, in 1991, Professors Shapiro and McGarity recounted a dynamic where OSHA used their discretion to adopt less stringent standards for air contaminants in the workplace (creating threshold standards rather than feasibility standards).[195] Although this regulation represented a compromise, twenty-eight companies and trade associations sued to challenge the regulation. Seeking to avoid litigation, OSHA offered significant concessions to promote settlement; however, eleven companies and trade associations insisted on going to court.[196] The companies' willingness to invoke judicial review to avoid regulation makes sense for two reasons. First, delay can be profitable. OSHA estimated that judicial review delayed implementation of OSHA by approximately two years and that the average annual cost of complying with the standards would have been about $2 million. Assuming an eight percent annual interest rate, the company or trade association could save $320,000 per year simply by litigating the regulation.[197] So, even if the company lost the appeal, as long as the costs of litigation were less than $320,000 per year, they could justify litigation.[198] Second, if the companies won, they avoided regulation.

This dynamic, which is not unique to the example given by Professors Shapiro and McGarity, creates a perverse incentive for regulated entities to litigate. Thus, judicial review of regulations will often involve groundless charges against the "methods used, the reliability of the evidence collected, the qualifications of the researcher conducting the study, or [a suggestion] that the review processes are flawed."[199] This approach is so effective that "virtually every substantive challenge mounted against an EPA model involves multiple technical disagreements on virtually every facet of the model," sometimes without any support in the record.[200]

In contrast, environmental plaintiffs have a limited incentive or ability to litigate. First, environmental injuries are not easily measured on the monetary scale of courtrooms.[201] Unlike medical malpractice or products

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194 Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 737–39; *see also* Wagner, *supra* note 142, at 1651.

195 Shapiro & McGarity, *supra* note 194, at 737.

196 *Id.*

197 *Id.* at 737–38.

198 *Id.* at 738–39 (concluding that most standards are not litigated because they simply adopt the status quo and that the under-regulation created by this dynamic could be avoided by making it easier for OSHA to defend strict regulations).

199 Wagner, *supra* note 142, at 1653–54 (listing examples of the tobacco industry, as well as actors in the oil, lead, asbestos, and beryllium industries, "actively work[ing] to discredit research that, if widely accepted, would likely result in substantial liability, regulation and market costs").

200 *Id.* at 1654–55 n.118 (citing Appalachian Power Co. v. EPA, 135 F.3d 791 (D.C. Cir. 1998)) (finding every challenge to EPA's modeling inputs "without basis and sometimes without support even in the briefs").

201 *See, e.g.*, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.").

liability, most environmental injuries will not sustain large judgments, so there is little incentive for individual plaintiffs to bring a suit. In fact, most litigants cannot bear the cost of litigation. Even if environmental cases led to large judgments, a settlement would not redress the harm. Most environmental cases are to *stop* something from happening.[202] Once it has happened, the damage has been done and there is little incentive to litigate. This problem is compounded by the fact that the extent of many environmental injuries will not be appreciated until later, while there is generally an immediate "benefit" being enjoyed by the potential defendant.

B. The Corporation as the "Object of the Law's Requirement"

Scalian Standing assumes that "an individual who is the very *object* of a law's requirement or prohibition . . . always has standing."[203] Under this assumption, corporations have virtually automatic standing because they are generally the "object of the government action or inaction."[204] This dynamic can be seen most dramatically by comparing two cases. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* (*Engine Manufacturers Association*),[205] the Engine Manufacturers Association challenged a California law that adopted strict purchasing requirements for fleets of vehicles in order to improve air quality in California, particularly in Los Angeles, which was experiencing very unhealthy ozone levels.[206] Writing for the majority, Justice Scalia held that California's purchasing requirements were preempted by the Clean Air Act.[207]

Interestingly, the opinion contains no discussion of standing. In fact, the concept is not even mentioned in Justice Scalia's entire opinion. Lower courts applied the same approach. Before *Engine Manufacturers Association* arrived at the Supreme Court, it produced a circuit split, with the First[208] and Second Circuits[209] finding that state standards were preempted and the

202 This element also makes environmental injuries appear more speculative and uncertain because they will inevitably rely on predictions—usually from scientists—about what the future harm will entail. Because no one can predict how an ecosystem will behave, these predictions appear speculative, even if the likelihood of injury is not. *See, e.g.*, RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 138 (2004); Heinzerling, *supra* note 144, at 833–34 (reviewing Judge Posner's book and suggesting that his argument that cost-benefit analysis cannot take catastrophic risks like global warming into account sits squarely within the environmentalist camp that Judge Posner characterizes as "scruffy, rioting left-wingers").

203 Scalia, *supra* note 32, at 894.

204 Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

205 541 U.S. 246 (2004).

206 *Id.* at 259 n.1 (Souter, J., dissenting) (noting that Los Angeles is the only region in the country designated as in "extreme" nonattainment for ozone levels).

207 *Id.* at 258.

208 Ass'n of Int'l Auto. Mfrs., Inc. v. Mass. Dep't of Envtl. Prot., 208 F.3d 1, 8 (1st Cir. 2000) (holding that Massachusetts could not adopt California's emissions standards for automobile emissions because the Clean Air Act preempted such regulations).

209 Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 201 (2d Cir. 1998) (holding that New York laws adopting California's emissions standards were preempted by the Clean Air Act).

Ninth Circuit[210] upholding California's emission standards. None of these cases discussed whether the petitioners had standing.

The lack of discussion on standing is particularly interesting because the named petitioners in each case are associations. For example, the Engine Manufacturers Association, is an association representing vehicle manufacturers.[211] It characterizes itself as "the voice of the engine manufacturing industry on domestic and international public policy, regulatory and technical issues."[212] In other words, it does not manufacture or purchase vehicles or engines. Nothing on its website indicates that it would be directly affected by the purchasing requirements imposed by California. In fact, it is difficult to understand how or why the Engine Manufacturers Association itself satisfied the injury-in-fact prong.[213]

Comparing *Engine Manufacturers Association* to Justice (then Judge) Scalia's dissent in an earlier case from the D.C. Circuit illustrates how Scalian Standing can disproportionately impact environmental plaintiffs. In *Center for Auto Safety v. National Highway Safety and Transportation Administration*,[214] four non-profit consumer organizations that were dedicated to promoting energy conservation challenged a rule issued by the National Highway Transportation and Safety Agency (NHTSA). The challenged rule relaxed automobile fuel efficiency standards for model years 1985 and 1986.[215] The opinion of the court held that the petitioners "plainly" had standing because in response to NHTSA's lenient rule, vehicles on the market would be less fuel efficient than if the fuel economy standards were more demanding.[216] "NHTSA's low CAFE standards will diminish the types of fuel-efficient vehicles and options available. . . . As a result, petitioners' members will have less opportunity to purchase fuel efficient light trucks than would otherwise be available to them."[217] Thus, the injury was fairly traceable to NHTSA's rule and would be redressed by a favorable decision. Moreover, the court reasoned that by creating broad statutory standing,

210 Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt., 309 F.3d 550 (9th Cir. 2002).

211 Engine Manufacturers Ass'n, *Who Is EMA?*, http://www.enginemanufacturers.org/about/ (last visited Jan. 27, 2008).

212 *Id. But see* Ctr. for Auto Safety v. Nat'l Highway Transp. & Safety Admin., 793 F.2d 1322, 1328–29 n.41 (D.C. Cir. 1986) (holding that Environmental Policy Institute (EPI), a group organized to promote various fuel efficiency programs and conservation in the transportation sector, did not have standing to challenge NHTSA's rule relaxing CAFE standards because even if the rule reduced fuel efficiency, EPI's interest in fuel efficiency did not satisfy the injury prong).

213 It is also difficult to understand why the Engine Manufacturers were not required to go through the associational standing analysis. *Cf. id.* at 1329–30 (requiring groups bringing suit on behalf of their members to show that they satisfied associational standing); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) (requiring associations to show that "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

214 793 F.2d 1322 (D.C. Cir. 1986) (plurality).

215 *Id.* at 1323–24.

216 *Id.* at 1324.

217 *Id.* at 1332.

"Congress itself has already weighed the need for and the value of judicial review of a given category of administrative decisions and has decided it is warranted."[218]

In dissent, Justice Scalia found that the injury to the petitioners was insufficient because fuel efficiency was a "public benefit," not a "private right."[219] Furthermore, the judiciary should not infringe on the "people's prerogative to have their elected representatives determine how laws that do not apply to private rights should be applied."[220]

Compare Justice Scalia's approach in *Center for Auto Safety* to his approach in *Engine Manufacturers*, where he concluded that the Clean Air Act precluded States from setting any standards (whether directed at manufacturers or directed at consumers) which infringed on manufacturers. "The manufacturer's *right* to sell federally approved vehicles is meaningless in the absence of a purchaser's *right* to buy them."[221] Moreover, if the States were able to enact rules which affected the markets, "the end result would undo Congress's carefully calibrated regulatory scheme."[222]

This result seems at odds with his decision in *Center for Auto Safety*. For example, in *Center for Auto Safety*, the fact that the National Highway Safety and Transportation Agency (unelected) was not enforcing fuel efficiency standards in accordance with the law passed by Congress (which was supposed to create a regulatory scheme forcing fuel economy) was an insufficient injury for public interest groups. By hearing the case, the judiciary "interfered" with the public's prerogative to allow their elected officials to make decisions on how to enforce laws that do not grant private rights. In contrast, in *Engine Manufacturers Association*, States *were* enforcing fuel efficiency standards (that had been passed by the state legislature) that were more stringent than laws being enforced by the EPA (unelected). By hearing the case, the judiciary vindicated the "right" of Engine manufacturers to access purchasers in an unencumbered market.

The difference between the two cases can be understood in light of the Scalian Standing assumption that the object of regulation will always have standing because it represents the classic case of the law bearing down upon the individual.[223] In the first case, *Center for Auto Safety*, the public interest groups were suing in order to obtain a "benefit" bestowed by Congress—more fuel-efficient vehicles. In contrast, in *Engine Manufacturers Association*, the Association was representing "individuals" who wanted to

218 *Id.* at 1337.

219 *Id.* at 1342 ("If the injuries hypothesized by the interest groups suing in the present cases are sufficient, it is difficult to imagine a contemplated public benefit under any law which cannot simply—by believing in it ardently enough—be made the basis for judicial intrusion into the business of the political branches. What we achieve today is not judicial vindication of private rights, but judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied.").

220 *Id.*

221 Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255 (2004) (emphasis added).

222 *Id.*

223 Scalia, *supra* note 32, at 894.

be free from regulations imposed by the majority that interfered with their market. Under Scalian Standing, the judiciary should always review limitations imposed on an individual by the majority.

Ironically, Justice Scalia's opinion in *Engine Manufacturers Association* reveals the false dichotomy between obtaining a statutory "benefit" and retaining freedom from regulation. He explains that the manufacturers' "right to sell federally approved vehicles" would be infringed if States were to impose purchasing limitations within their borders, and this limitation "would undo Congress's carefully calibrated regulatory scheme."[224] In other words, the manufacturers' only injury was a failure to receive the *benefit* of a statute creating a federally controlled market. Finding that the States' requirements were preempted did not leave the engine manufacturers to operate in an unregulated market—it left them to enjoy the benefits of a federally regulated market.

Characterizing corporations as persons also elevates economic "injuries" over human "injuries." For example, in *Engine Manufacturers Association*, Justice Scalia characterized unencumbered access to the market as a "right."[225] Protecting the "right" of automobile manufacturers to produce products without State regulation, however, seems odd in light of the externalities that auto manufacturers were imposing on citizens by exercising their "right." The emission standards adopted by California were an attempt to address major environmental injuries being suffered by their citizens. Los Angeles, one of the areas affected by the California law, had been designated as "extreme" nonattainment for ground level ozone.[226] The health effects of exposure to ground level ozone range from coughing and chest pain to bronchitis, emphysema, and asthma.[227] Repeated exposure can permanently scar lung tissue causing reduced lung capacity and increasing susceptibility to diseases like pneumonia.[228] The Court's decision protected the "right" of auto manufacturers to produce products without state interference, and stripped California and other states of the authority to address the environmental injuries that were being inflicted on their citizens as a result of this unencumbered market.[229]

Thus, failing to distinguish between a corporation and an individual in the standing analysis has significant impacts because humans will often be

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224 *Engine Mfrs. Ass'n*, 541 U.S. at 255.

225 *Id.* ("The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them.").

226 *Id.* at 259 n.1 (Souter, J., dissenting).

227 U.S. EPA, *Ground Level Ozone, Health and Environment*, http://www.epa.gov/air/ozonepollution/health.html (last visited Jan. 27, 2008).

228 *Id.*

229 The *Lochner* tensions inherent in this approach are made more visible by comparing a comment made by Franklin D. Roosevelt during his campaign for presidency: "[T]he exercise of the property rights might so interfere with the rights of the individual that the Government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it." Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), *available at* http://americanrhetoric.com/speeches/fdrcommonwealth.htm (last visited Jan. 27, 2008).

the "beneficiaries" of environmental laws while corporations will generally be the "subject of the law's requirement." In other words, applying Scalian Standing without distinguishing between humans and corporations creates a dynamic where corporations benefit from the absence of regulation and can enlist the federal courts to protect them from regulation. However, under Scalian Standing, even if citizens can move the political machine to pass public interest legislation, their only recourse for protecting the benefits of that legislation is to go back through the political branches of government.[230]

C. The Consequences of Pairing Scalian Standing and Corporate Personhood

The assumption that a regulated entity will always have standing because it presents the "classic case of the law bearing down on the individual himself"[231] becomes far more nuanced when applied to environmental injuries. Granting immediate standing to regulated entities creates a dual challenge for protecting the environment. The consequence of protecting this constitutional myth is that the public interest is being squeezed from the decision-making process. If the public interest does not have access to the courts, it does not have leverage over the agency responsible for enforcing the law.[232] An agency is more likely to draft its rules to avoid judicial review. If the only parties able to obtain judicial review are corporations, (regulated entities) those are the parties whose interests will receive the most attention.[233]

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[230] This approach is in direct contrast to the approach articulated by Judge Skelly Wright in *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (noting that once legislation is enacted, the courts' duty is "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy"). Justice Scalia disagrees, acknowledging that standing will likely result in "important legislative purposes" getting "lost or misdirected" and it is "a good thing, too. . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change." Scalia, *supra* note 32, at 897. For a good discussion about how this exchange reflects the Court's misunderstanding of the nature of environmental law, see Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 9, 32–33 (Michael Allen Wolf ed., 2005).

[231] Scalia, *supra* note 32, at 894.

[232] Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.").

[233] William W. Buzbee, *Expanding the Zone, Tilting the Field; Zone of Interests and Article III Standing Analysis after Bennett v. Spear*, 49 ADMIN. L. REV. 763, 768–72 (1997) ("[I]f a stakeholder will have standing and hence can hold out the possibility of obtaining judicial review of agency missteps, the agency is likely to give that stakeholder's objections greater heed than if the stakeholder's final venue for political participation was before the agency itself."); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 87–88 (1995) ("Once agencies know that statutory beneficiaries cannot invoke judicial enforcement of the duty to engage in reasoned decisionmaking, agencies can safely ignore comments filed by beneficiaries . . . . All regulatory agencies will soon resemble the Interstate Commerce Commission (ICC) of the 1950's.").

The potential skewing effect of disproportionate review is important on two levels. Fundamentally, it is important because the government, including its agencies, is supposed to serve citizens, not corporations. Less rhetorically, it is important because decisions made by agencies are often value judgments—official decisions about the degree of risk that a community, a state, or a nation should bear in exchange for potential economic benefits. Making these policy decisions with only one side of the debate involved in the discussion will inevitably lead to poor decision making.[234] "Official decisions are only as good as their scope of reference. If they evade a comprehensive and objective survey of contexts, conditions, possible consequences, and alternatives, they are likely to be sailing blind."[235]

The skewing effect of disproportionate access to courts compounds problems for the public interest.[236] Under Scalian Standing, a group of people who fail to receive "benefits" from a statute should seek recourse in the political branches. In other words, they should take their complaints to the agency or Congress. However, without judicial review, there is little incentive for agencies to make difficult decisions in favor of the public interest. Knowing that strict enforcement will be challenged in court while failure to enforce a statute cannot be challenged (or at the very least is likely to be dismissed for lack of standing) is likely to be a powerful "thumb on the scale" when agency budgets and political capital are limited.

In the context of global warming, where the interests of the public and the interests of corporations are diametrically opposed, it seems odd that people organized to protect themselves from the threat of global warming will find the courthouse doors closed to their "generalized grievances" while fictional "persons" like ExxonMobil will enjoy virtually automatic standing to challenge any greenhouse gas regulations the political process eventually

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234 Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456, 523–29 (1989) (the more deference courts give agencies the less likely they are to worry about interpretive disagreements from stakeholders); Gene R. Nichol, Jr., *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993) (with an "unbalanced scheme of judicial review . . . regulatory incentives become skewed"); Brief for Professors of Administrative Law and Environmental Law as Amici Curiae Supporting Respondents at 13–14, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (No. 03-101) 13–14 ("In the absence of effective judicial review for agency failures to implement a statutory mandate, the statute's beneficiaries would thus face serious difficulty in obtaining redress, either from the agency or from the political process. Requiring citizens to return to the political process to enforce legislative victories already obtained would impose a double and unfair burden on them [and exacerbates the risk that the agency would tend to] skew its decisionmaking in favor of regulated entities, who can readily obtain review of agency action affecting their interests.").

235 Sygmunt J.B. Plater, *Dealing with Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 17 (2005) (listing environmental catastrophes—such as the Exxon-Valdez oil spill—that could have been averted from a more complete decision-making process).

236 Cynthia Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 184 (1997) (arguing that *Lujan v. Defenders of Wildlife* and other cases about justiciability "selectively disadvantage adjudication of certain *kinds* of claims that the agency has acted unlawfully").

produces. Without distinguishing between human people and corporate persons in the standing analysis, however, Scalian Standing allows the judiciary to be co-opted into protecting these special interests from the threat of regulations designed to protect humans from harm.

V. THE LATEST SIGHTING OF THE *LOCHNER*-ESS MONSTER: SCALIAN STANDING AND THE MYTH OF THE CORPORATE PERSON

A. The Lochner*-ess Monster*

What is the *Lochner*-ess Monster? Before I answer that question, recall a few highlights from *Lochner v. New York*.[237] In *Lochner*, the Supreme Court struck down a New York law limiting any employee from working in a bakery for more than sixty hours per week, or ten hours per day.[238] The Supreme Court reasoned that the statute interfered with the individual baker's right to contract.[239] In coming to this conclusion, the Supreme Court second-guessed the purposes and rationale of the legislature—concluding that there was "at least a suspicion that there was some other motive dominating the legislature than the purpose to serve the public health or welfare."[240] The two dissenting opinions in the case highlight some of the tensions in the Supreme Court's reasoning. Justice Harlan noted that the law passed by the New York Legislature reflected the belief of New York citizens that long hours for bakers is dangerous.[241] "Whether or not this be wise legislation is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation."[242] Justice Holmes also dissented: "This case has been decided upon an economic theory which a large part of the country does not entertain. . . . A constitution is not intended to embody a particular economic theory."[243]

So, what is the *Lochner*-ess monster? It is a fiction. Or, rather, it is the dynamic that occurs when the Supreme Court uses a constitutional argument or principle to protect a fiction. In the *Lochner* era, the Supreme Court used "the right to contract" to strike down state laws that state legislatures had enacted to protect their citizens from a system that was disproportionately favoring economic actors over individuals. Underlying the *Lochner* era decisions were assumptions that the existing distribution of property and power was the natural distribution of property and power.[244] This assumption is best illustrated by its foil. "[E]conomic laws are not made by nature. They are made by human beings."[245]

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237 198 U.S. 45 (1905).

238 *Id.* at 64–65.

239 *Id.* at 65.

240 *Id.* at 63.

241 *Id.* at 69 (Harlan, J., dissenting).

242 *Id.*

243 *Id.* at 75 (Holmes, J., dissenting).

244 GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 755 (2005).

245 Franklin D. Roosevelt, Address Accepting the Presidential Nomination at the Democratic

Scalian Standing also protects a constitutional myth—the idea that the separation of powers and the limited role of the judiciary is an end in itself.[246] Underlying this myth are assumptions about the distribution of power and resources in society. One of these assumptions is that the "object of regulation" always has standing because it is a "classic case of the law bearing down upon an individual."[247] This assumption fails to take into account the vast differences in size, power, and wealth between humans and corporations. In practice, Scalian Standing applies an unenumerated constitutional principle[248] in a way that disproportionately protects fictional economic actors over human individuals.[249]

Even James Madison, a champion of the separation of powers, did not envision the branches of government separated into airtight compartments.[250] On the contrary, Madison argued that the intersection of these powers acts as the tool to stop one branch from overreaching.[251] Equally important to the separation of powers, according to Madison, was the concept that no branch "ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[252] Yet, exerting an overruling influence is precisely what Scalian Standing is doing in the environmental arena. By refusing to recognize citizen standing where

National Convention in Chicago (July 2, 1932), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=75174.

246 *See supra* notes 16–41 and accompanying text (arguing that the overriding purpose of Scalian Standing is to hem the power and authority of the judiciary in order to ensure the separation of powers).

247 *Scalia*, *supra* note 32, at 894 ("Thus, when an individual who is the very *object* of the law's requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself and the court will not pause to inquire whether the grievance is a 'generalized' one.").

248 Interestingly, Justice Scalia acknowledges in his article that the constitutional principle he so zealously protects through standing is not explicitly defined or even referenced in the Constitution. In fact, he acknowledges that "the principle of separation of powers is found only in the structure of the document." *Id.* at 881. Nevertheless, he states that the doctrine of standing is a "crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance." *Id.*

249 *See supra* part II.

250 *See* THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other."); THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (Separation of powers "[does] not mean that these departments ought have no *partial agency* in, or no *control* over, the acts of each other").

251 THE FEDERALIST NO. 48, *supra* note 250, at 308. ("[U]nless these departments [the three branches of government] be so far connected and blended as to give each other a constitutional control over the others, the degree of separation which . . . [is] essential to a free government, can never in practice be duly maintained."). Thus, in the administrative state, it may be appropriate that the breadth of the judiciary expand to reflect and counterbalance the extension of the "Fourth branch." *See* Sidney Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 425 (1987).

252 THE FEDERALIST NO. 48, *supra* note 250, at 308.

Congress has created a personal cause of action through citizen suit provisions, Scalian Standing rejects Congress' articulation of injury and causation.[253] Moreover, by providing an avenue for regulated entities to systematically challenge environmental regulations, Scalian Standing is slowly ensuring that environmental laws get "lost and misdirected."

An alternative approach (one recognizing that the judiciary's role can only be understood in relation to the other branches) would acknowledge that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[254] This approach is also more reflective of the subtle interplay between statutory regulatory regimes and the common law.[255]

One way to dismantle these underlying assumptions is to begin by challenging the assumption that a corporation should be considered analogous to a "person" in the standing analysis. The personification of the corporation is not deeply rooted in the legal tradition. In contrast, it has occurred through ad hoc analogies in judicial opinions without any normative decision or conscious analysis about whether a corporation *should* be considered a "person."[256] The corporation originally existed at the mercy of the state, for the purpose of serving a public function, such as building a bridge.[257] Through industrialization, the modern corporation emerged as an institution whose "powers ultimately equaled some of those of a government, but whose conceptual underpinnings were clothed in older language and symbols."[258] One reason for this gap in analysis is that the Constitution does not refer to communal entities like corporations. Accordingly, since the popularization of the corporation as a business model, scholars and jurists have struggled to fit the corporation into the government/individual dichotomy of the Constitution.[259] Moreover, corporate scholars still debate the various analogies used to characterize corporate forms.[260]

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253 Ctr. for Auto. Safety v. Nat'l Highway Traffic, 793 F.2d 1322, 1337 (D.C. Cir. 1986). ("When Congress has conferred standing, it matters not one iota if a large number of people share the injury and would benefit from its redress. The courts may appropriately function as the guardians of majority interests without weakening the separation of powers, when Congress has decided to grant them that role. Indeed, far from *preserving* the separation of powers, when Congress has spoken, the courts place themselves in conflict with the legislative branch if they *ignore* the statutory message.").

254 Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007) (Kennedy, J., concurring in part and concurring in judgment) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992)).

255 *See supra* notes 42–52 and accompanying text.

256 Krannich, *supra* note 56, at 98–99.

257 *Id.* at 64.

258 Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1446 (1987).

259 Krannich, *supra* note 56, at 67 (some historians have argued that the Fourteenth Amendment was drafted specifically with an eye toward protecting corporations who were previously "persons" lacking constitutional rights). *See* CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 111–13 (rev. ed. 1937). Other scholars have since challenged this version of history. *See* HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION 383–89 (1968) (reprinting several articles uncoupling the Fourteenth Amendment from this version of history).

260 Krannich, *supra* note 56, at 89–90 (discussing the various analogies used by courts and scholars to classify corporations and suggesting that "[t]he resurgence in the debate over

Even the historical support for Scalian Standing can be read to argue that corporations should not be accorded standing. In *Marbury v. Madison*, for example, the Court stated that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive or executive officers, perform duties in which they have a discretion."[261] The meaning of this phrase depends entirely on the emphasis. For Justice Scalia, the operative language is that the role of the court is "not to inquire on how the . . . executive officers perform duties." Shift the emphasis, and the operative language directs the court "solely, to decide on the rights of *individuals*."[262] In other words, the court's role is not to protect economic interests, it is to protect the rights of individuals. The importance of shifting this emphasis was, perhaps, best stated by President Lincoln. The Constitution created a government "of the people, by the people, for the people."[263] Similarly, in *McCulloch v. Maryland*, Justice Marshall noted that the Constitution derives its whole authority "directly from the people; is ordained and established in the name of the people; and is declared to be ordained, in order to . . . secure the blessings of liberty to themselves and to their posterity."[264]

What would it look like if we distinguished between a corporation and a person in the standing analysis? One suggestion is to look to the model of associational standing. Currently, for a public interest group to bring a claim under associational standing, the interest group must show: 1) that at least one member would have standing to sue in her own right, 2) that the interests the group seeks to protect are "germane to the organization's purpose," and 3) neither the claim nor the relief requested requires individual members to participate in the lawsuit.[265] This approach would be interesting because by requiring the corporation to bring a suit on behalf of its "members" (shareholders, board members) it would force a discussion about whether there is a "right" to operate in an unregulated market.[266] A second alternative would require a corporation, like an individual, to prove that it is being injured in a way that is distinctly more harmful than other regulated entities (not simply that it is being regulated—but that it is being unfairly regulated in a way that is different than every other competitor). These are just suggestions to begin the discussion, not fleshed out ideas. The call of this Comment is simply to begin the discussion.

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corporate personality during the last thirty years demonstrates that corporate theorists have still not settled on the proper way to characterize the corporate entity").

261 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

262 *Id.* (emphasis added).

263 Abraham Lincoln, Gettysburg Address *in* LINCOLN ADDRESSES AND LETTERS 201, 202 (Charles W. Moores ed., 1914).

264 McCulloch v. Maryland, 17 U.S. 316, 403–04 (1819) (internal quotation marks omitted); *see also* U.S. CONST. pmbl. ("We the People of the United States, in Order to . . . establish Justice . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

265 Hunt v. Wash. State Apple Comm'n, 432 U.S. 333, 343 (1977).

266 *See supra* notes 234–36 and accompanying text.

In summary, I suggest that the fundamental purpose of the separation of powers is to protect against overreaching—whether the overreaching serves special interests, or the interests of government.[267] Madison noted that one purpose of federalism was to "break and control the violence of faction."[268] His definition of faction sounds remarkably similar to the role currently played by corporations: "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[269] As illustrated by the history of global warming, the threat of overreaching by corporations is particularly dangerous in light of their power and influence over the political branches of government.

Although Scalian Standing focuses on the separation of powers, it errs by elevating form over function. Beneath Scalian Standing lie unexplored assumptions about the distribution of wealth and power in society, particularly in relation to corporations. Global warming offers a unique opportunity to explore and evaluate the validity of these assumptions. The reality of global warming requires a paradigm shift away from the economic assumption that resources are limitless and that economic growth translates into lifestyle improvements for most people. The political history of global warming also challenges the assumption that corporations are analogous to persons because it illustrates the vast resources corporations can use to avoid regulation. That experience should serve as a lesson that the interests of corporate persons and human people do not always align. To ensure protection of the individual liberties guaranteed by the separation of powers, Scalian Standing should take into consideration the difference between a corporate person, and a human person.

[267] Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (suggesting that the singular theme weaving throughout the Constitution is a "prohibition of naked preferences," in other words, a prohibition against redistributing "resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want").

[268] THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

[269] *Id.*