BOOK REVIEWS

ANCSA AND 1991: A FRAMEWORK FOR ANALYSIS

VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION. By Thomas R. Berger. Hill & Wang, New York, 1985. pp. xvii, 202. $16.95.

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Thomas Berger, a noted Canadian barrister, received a commission from the Inuit Circumpolar Conference, an organization of aboriginal peoples in Alaska, Canada, Greenland, and elsewhere, to conduct an extensive study of the Alaska Native Claims Settlement Act ("ANCSA").[1] To fund the study Berger raised money from an impressive array of sources.[2] He then spent three years conducting hearings in the villages of Alaska. He took testimony from "more than 1,450 witnesses."[3] The result is a book, *Village Journey: The Report of the Alaska Native Review Commission* ("*Village Journey*"), that recounts Native testimony and prescribes a solution for the problems of ANCSA.

At first blush, Berger's descriptions of the hearings and Native way of life produce a volume both lyrical and empirical—a rare and readable combination. Indeed, on one level *Village Journey* may represent a comprehensive statement of the predominant Native sentiment. The book, however, has numerous shortcomings.

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1. 43 U.S.C. §§ 1601-1629(a) (1986). For a relatively comprehensive description of ANCSA, see Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 UCLA-ALASKA L. REV. 103, 106-12 (1979).

2. *See* T. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION ix-x (1985). Sources of funding included the National Endowment for the Humanities, the Ford Foundation, the Rockefeller Foundation, and Rockefeller Brothers Fund, among others.

3. *Id.* at 7.

As an attempted comprehensive analysis of ANCSA, Berger's work fails. *Village Journey* is advocacy scholarship—advocacy masquerading as scholarship. Berger's study is completely outcome oriented and devoid of any balance. Berger adopts a revisionist approach[4] and concludes that Congress forced the billion dollar and forty-four million acre settlement upon unwilling or duped Natives who lacked capable leadership.[5] In reaching his conclusions, Berger completely ignores corporation law, economic analysis, and other potentially conflicting points of view. Even the selection of testimony leaves the reader incredulous. Only one Alaska Native whose testimony Berger excerpts found a favorable thing to say about ANCSA and the Native corporations.[6]

Alaskans should be concerned about books such as *Village Journey.* Berger's type of partial Native rights advocacy may be defining the framework that will determine what happens to ANCSA in the watershed year of 1991. The solutions chosen to remedy the perceived problems of ANCSA may affect Alaska at least as much as did the original 1971 settlement.

Berger, along with many Native leaders, justifiably asserts that problems exist with ANCSA. One notable problem, due in part to forces beyond Native control, is that most of the regional and village corporations that acted as receptacles for the settlement proceeds of

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4. A revisionist historian is often contrasted to an orthodox historian, although the contrast is not meaningful to some:

> In the sense that the revisionist reverses an existing interpretation of an event in history the label is correct but of little value [because] every generation of historians tends to give new interpretations to the past. To the American diplomatic historian, however, "revisionist" is the label given to a number of men who, after one or both world wars, took upon themselves the task of persuading the American people to change their view of the origins of those wars and of the reasons for American intervention in them.

W. COHEN, THE AMERICAN REVISIONISTS: THE LESSONS OF INTERVENTION IN WORLD WAR I at vii (1967). Revisionism has since spread to reinterpretation of the cold war, American foreign policy in general, and American economic history. *See, e.g.,* J. KOLKO & G. KOLKO, THE LIMITS OF POWER: THE WORLD AND UNITED STATES FOREIGN POLICY, 1945-54 (1972); G. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-16 (1963); W. APPLEMAN WILLIAMS, OPEN DOOR POLICY AND THE COLD WAR (1971). Revisionists' pronounced tendency is to level criticism at existing or prevalant American interpretations of past events, institutions, and processes, often from a leftist perspective.

5. *See infra* notes 35-37 and accompanying text.

6. *See* T. BERGER, *supra* note 2, at 27 ("We [Natives] have become a fairly significant political force and . . . we own a bank, we do several things not even dreamt of ten to fifteen years [ago]. We're also finding out that you can be a Native banker and a Native lawyer and a Native teacher."); *cf.* Polan, *Eskimo Leaders Push to Instill Traditions as a Deadline Looms,* Wall St. J., June 26, 1985, at 1, col. 1 (conflicting views of ANCSA among Natives and Native leaders).

Native land claims have been unsuccessful.[7] When Alaska Natives become free to alienate their shares in 1991, the title to subsistence lands held by these corporations will be vulnerable to creditors' claims, taxes, and corporate takeover.

To deal with these problems, Alaskans with divergent points of view together must develop an analytical framework within which to formulate solutions that accommodate competing interests and correct those defects in the ANCSA scheme that jeopardize Natives' birthrights. *Village Journey* fails to set forth such a constructive framework. Instead, Berger's one-sided approach results in an ill-conceived and unbalanced recommendation. He prescribes that before 1991 Alaska Natives receive all that the Natives and Indian affairs specialists claim is justly deserved.

In some detail Berger's proposals for ANCSA and for 1991 are:

1. All lands held by ANCSA corporations should be transferred to specially created tribal governments. Such a transfer would put the land beyond creditors' and tax collectors' claims.[8]
2. Natives should enjoy exclusive hunting and fishing rights on the forty-four million acres of ANCSA lands, as well as exclusive jurisdiction over such hunting and fishing.[9] The State of Alaska should be prohibited from telling "them when, what, and how much they can harvest."[10]
3. ANCSA's transfer of eleven percent of Alaska's lands to Native corporations provides Natives with "inadequate" hunting and fishing rights.[11] Berger suggests that "Native people must have guaranteed access to their other fishing, hunting, trapping, and gathering areas on state and federal lands."[12] These "other" lands constitute most of the remaining eighty-eight to eighty-nine percent of Alaska. In addition,

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7. *See, e.g.,* U.S. DEP'T OF THE INTERIOR, ANCSA 1985 STUDY at V-35 to V-105 (Draft June 29, 1984) (summary financial data for the 13 regional corporations).
8. T. BERGER, *supra* note 2, at 158-59.
9. *Id.* at 163.
10. *Id.* at 162.
11. *Id.*
12. *Id.* Berger holds up Indian fishing rights in the State of Washington as a prototype for his Alaska vision. In Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), the Supreme Court upheld a lower court treaty interpretation that gave Indians the right to one-half of the harvestable catch within treaty waters and jurisdiction over their members' fishing. According to Berger, "[t]he affirmation of these treaty rights has revitalized the Native economies and societies in western Washington." T. BERGER, *supra* note 2, at 163.

Any revitalization in Washington, however, has occurred at tremendous cost. *See, e.g.,* Parker, *A Decade Later, Boldt Decision is Still Snarled in Controversy,* Seattle Times, Feb. 8, 1984, at 1, cols. 1-4; Douglas, *The Boldt Revolt,* The Seattle Weekly, Nov. 3, 1976, at 9. Hatred, armed range wars between non-Indians and Indians, backlash and resentment, and untold economic losses for non-Indian fishermen forced from their chosen vocations has been the result of the interpretation. *See, e.g.,* Parker,

Berger proposes that Native authorities share jurisdiction to police hunting and fishing on those lands.[13]

4. Congress should appropriate additional sums of money as further "compensation" to Natives.[14] Dissipation of resources from litigation over terms of the Act, high inflation in ANCSA's early years, and delay in conveying lands to the corporations are factors that mandate such compensation.[15]

5. The Native regional corporations should continue to exist,[16] but with several important changes. First, the regional corporations should convey title to subsurface estates, which they hold as to all forty-four million acres, to newly created tribal governments.[17] Second, as to the approximately sixteen million acres held in fee simple, regional corporations should consider transferring these lands to the tribal governments as well, "to ensure unified village control of the greatest possible acreage."[18] Alternatively, the regional corporations might retain title but grant "subsistence easements" in the land to the tribal governments.[19] Any new owner of those lands would be required to honor the easements and would be precluded from developing any other resources that the land contains.[20]

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supra; Douglas, *supra.* For Berger to hold up the Washington experience as a "notable example," *see* T. BERGER, *supra* note 2, at 163, has to be the product of unfamiliarity with the negative consequences in Washington flowing from the Washington fishing rights decisions.

13. T. BERGER, *supra* note 2, at 162-63.

14. *See id.* at 166.

15. *Id.*

16. ANCSA provided for 12 regional corporations dividing the entire state. A 13th regional corporation also came into existence to receive settlement proceeds for Natives not residing in any of the 12 geographically defined regions. ANCSA also provided for a second layer of smaller corporations. The Act named 205 possible village corporations and provided for formation of others. *See, e.g.,* Branson, *supra* note 1, at 106-08. The relationships, including revenue sharing, between the two sets of corporations are complex and thus beyond the scope of this essay. For a description of those relationships, see *id.* at 108-14; *see also* Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act,* 5 UCLA-ALASKA L. REV. 58 (1975); Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act—Part II,* 5 UCLA-ALASKA L. REV. 237 (1976).

17. T. BERGER, *supra* note 2, at 169.

18. *Id.* Why such a conveyance for little or no consideration would not amount to corporate waste Berger fails to reveal. Corporate waste has been defined as a "[t]ransaction . . . that no person of ordinary sound business judgment would say that the consideration received by the corporation was a fair exchange for what was given by the corporation." AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.30 (Tent. Draft No. 2, 1984); *accord* Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979); Schreiber v. Bryan, 447 A.2d 17, 26 (Del. Ch. 1982).

19. T. BERGER, *supra* note 2, at 170.

20. No rational purchaser would then ever purchase the regional corporation lands.

Finally, Congress should pass laws abrogating the Native shareholder appraisal remedies provided by Alaska state corporate law when there is a sale of all or substantially all of a corporation's assets.[21] Such a remedy entitles a dissenting shareholder to seek appraisal for shares in the state courts in lieu of acquiescing in the sale of corporate assets.[22]

6. Most village corporations should dissolve.[23] If village corporations are engaged in profit-making endeavors that depend upon the retention of land, they should be permitted to lease the transferred lands from the tribal governments.[24] Regarding the rights of third parties when village corporations dissolve, Berger states that "[t]hird parties with bona fide claims against village corporations must be protected. It may be that Congress should appropriate funds to pay off these debts, of which no one knows the full extent."[25]

In Berger's view, the Alaska Natives desire and deserve life in a modern world with all of the benefits and none of the burdens. He writes: "The Native peoples of Alaska want their own lands and their own forms of government, and they also want access to the social, economic, and political institutions of the dominant society."[26]

Because of his unbalanced approach, Berger's proposals and their underlying justifications are inappropriate, naive, and at times alienating. At one point Berger holds up the Treaty of New York[27] as a model for Alaska because it provided that "any citizen of the United States [who] settled on Creek land without Creek permission . . . forfeited the protection of the United States."[28] Berger further notes approvingly that "[e]ntry into Creek territory could be made only with the display of a valid passport."[29]

Berger prefers tribal to municipal governments so that white community members can be excluded from all voice in local affairs.[30] "[The Natives] want Native political institutions. They are talking

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21. T. BERGER, *supra* note 2, at 158-59, 197.

22. The relevant sections of the Alaska Business Corporation Act are ALASKA STAT. §§ 10.05.435-.447 (1985) (shareholder vote and dissenters' rights upon "sale or exchange of all, or substantially all, the property and assets" of the corporation outside the normal course of business).

23. *See* T. BERGER, *supra* note 2, at 168.

24. *Id.*

25. *Id.* at 196.

26. *Id.* at 177.

27. Treaty of New York, arts. 6 & 7, Aug. 7, 1790, in TREATIES BETWEEN THE UNITED STATES AND THE INDIANS 1778-1831, at 29, 31 (new ed. 1975).

28. T. BERGER, *supra* note 2, at 120.

29. *Id.*

30. Berger states: "The fact is, state-chartered local government gives non-Natives access to power." *Id.* at 145.

about sovereignty."[31] Berger finds this acceptable because "[i]t is unreasonable . . . to assume that tribal government will discriminate against non-members . . . ."[32] Such a view is contrary to human nature.

Berger advances lofty justifications for his one-sided rewriting of ANCSA and remapping of Alaska. "Arguments for the rule of law in international relations," opines Berger, "can never be soundly based until the nations that have dispossessed and displaced indigenous peoples accept the precepts of international law that now require a fair accommodation of indigenous peoples in their own nations."[33] These arguments are misplaced. Alaska Natives have not been "dispossessed and displaced," at least not in any radical sense. Many Natives continue to reside in the same area as did their forbearers.[34] True, by receiving outright title to millions of acres they gave up access to other lands. For the surrender of claims to those lands, which had been thought to impede progress, Native Alaskans received a settlement generous by most objective measures, albeit ill-conceived in execution.

Another view Berger repeatedly advances is that Congress thrust or "imposed" the ANCSA scheme upon the Natives.[35] This rationale for the proposals outlined by the author is simply naive. Congress never acts, but merely reacts to proposals. Assorted coalitions led by Natives presented ANCSA to Congress and heavily lobbied for its adoption.

The Native leaders who lobbied for ANCSA were educated and capable people, supported by their constituents.[36] Perhaps they overly

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31. *Id.* at 137.

32. *Id.* at 152.

33. *Id.* at 182.

34. *See* Arnott, *Legislation: The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and the Future,* 9 AM. INDIAN L. REV. 135, 138-39 (1981).

35. *See, e.g.,* T. BERGER, *supra* note 2, at 13 ("Congress has tried to transform these people by legislation. . . ."); *id.* at 26 (Natives perceive that they were not consulted.); *id.* at 88 ("ANCSA is a barrier designed to fall of its own weight."); *id.* at 90 ("Alaska Natives were a problem to be solved, and Congress thought it knew how to solve it."); *id.* at 118 ("At the hearings I held throughout Alaska, I heard the same complaint. 'The U.S. government ignored the mere existence of our tribal governments and ignored proper procedure.' "); *id.* at 131 ("While enacting ANCSA, Congress ignored tribal government. . . .").

36. An extensive and nearly contemporaneous report is contained in R. ARNOLD, ALASKA NATIVE LAND CLAIMS 92-144 (2d ed. 1978). Arnold describes in detail: (1) the work of organizations such as the Alaska Native Federation, Alaska Native Brotherhood, and Tanana Chiefs Conference; (2) the unqualified support of the National Congress of American Indians and Association on American Indian Affairs; and (3) the efforts of well-known Native leaders like Emil Notti, Willie Hensley, and Donald Wright.

publicized the benefits that would allegedly flow from ANCSA. Regardless of the Native leaders' good intentions, they caused their constituents to believe that ANCSA and its corporate structure would bring them wealth. The promise of material wealth, not the preservation of subsistence ways of life or the availability of social services in the local villages, probably caused many Natives readily to give their approval to ANCSA.[37]

Although Berger's revisionist account disguises the Natives' motives for originally embracing ANCSA, many signs reveal the truth. The Natives and Berger continue to share an unhealthy but telltale fixation with dividends, out of touch with modern financial theory.[38] Village corporations remain profit-oriented despite the oft-cited wisdom of adopting a not-for-profit status that would facilitate the delivery of social, fraternal, and like benefits.[39] The failure stems in part from the persistent hope among Native shareholders for material wealth from ANCSA. Native affairs specialists reinforce this unrealistic vision. Berger himself continues to second an erroneous interpretation of corporation law that frowns on altruistic endeavors by business corporations, or the use of not-for-profit entities.[40]

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37. *But cf.* T. BERGER, *supra* note 2, at 26 (After ANCSA "Alaska Natives confidently expected that their. . . way of life" would be protected.); *id.* at 37 ("Above all, stockholders have expected the regional corporations to protect traditional ways of life and ancestral lands used for subsistence.").

Although Natives may have expected village corporations to protect their "way of life," nothing could be farther from accurate with regard to regional corporations. Both among Natives and non-Natives, regional corporations have been regarded first, last, and foremost as profit-seeking entities.

38. *Compare* T. BERGER, *supra* note 2, at 25 (election against formation as not-for-profit corporations because dividends could not be distributed) *and id.* at 29 (ANCSA corporate directors have not felt compelled to declare dividends because their shareholders are "assigned to them by an act of Congress.") *and id.* at 33 (stating that village corporations' distributions from the Alaska Native Fund "could not long support operating budgets, let alone pay dividends") *and id.* at 37 ("In theory, the regional corporations can provide shareholders with jobs and pay them dividends, but in fact . . . most corporations have never paid regular dividends.") *and id.* at 40 ("A healthy balance sheet cannot always be translated into . . . dividends. . . .") *with* Black, *The Dividend Puzzle,* 2 J. PORTFOLIO MGMT. 5, 6-8 (1976) (reviewing factors such as double taxation of dividend income and modern portfolio theory that should make shareholders more indifferent to receipt of dividend income).

39. *See, e.g.,* Branson, *supra* note 1, at 134-36.

40. *See, e.g.,* T. BERGER, *supra* note 2, at 25 (village corporations advised and expected to incorporate as for-profit entities; inference that otherwise legal difficulties would have been encountered); *id.* at 159 ("A corporation cannot take from the rich and give to the poor without facing a shareholders' suit; but a tribal government can implement measures designed to achieve social justice."). These overstated or slightly warped propositions should be contrasted with well-evolved notions of corporate social responsibility activities and judicial reluctance to review good faith decisions by boards of directors. *See, e.g., Corporate Social Responsibility,* 30 HASTINGS L.J. 1247

Contrary to Berger's one-sided analysis, what Alaska needs is an open discussion that encourages the presentation of disparate points of view. The first step to such an impartial, rational discourse is the development of an analytical framework within which to evaluate ANCSA. At most, Berger provides an incomplete framework. A complete, functional set of parameters is, of course, beyond the scope of this book review. Nonetheless, it is possible to set forth a few ground rules that would facilitate productive analysis.

1. ANCSA, though flawed in execution, was negotiated at arms length by capable Native leaders and was, therefore, probably fair.

In the latter pages of his book, Berger adopts a righteous tone. He suggests that Alaska Natives have been denied "the rights held by other Native Americans" and that this denial is not "morally defensible."[41] In reality what proves indefensible is Berger's assertion. Alaska Natives have never known the mistreatment and misery experienced by Indian peoples from other parts of the United States. In the settlement of their land claims, the Alaska Natives received approximately one billion dollars and title to forty-four million acres of land, which constituted eleven percent of Alaska and eighty-nine percent of all private lands in the state.[42] The ANCSA land grants are equivalent in area to the State of Missouri, and are significantly larger than all of Pennsylvania or New York.

Besides the sheer size of the settlement, other indicia of fairness exist. As previously noted, capable Natives bargained for the settlement.[43] In that process, they negotiated from positions of relative strength. Native claims blocked construction of the pipeline necessary for Alaska North Slope oil to find its way to the market.[44] Congress quickly had to resolve Native land claims. Both the size of the settlement and the process leading to it indicate that ANCSA constituted a fair, arms length settlement.

The fair settlement, however, may have been flawed in execution. The exclusive utilization of corporations as receptacles for the settlement probably was a mistake.[45] A portion of the land deeded to the

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(1979); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 (Tent. Draft No. 4, 1985) (business judgment rule and its modern application).

41. T. BERGER, *supra* note 2, at 157.

42. *See, e.g., id.* at 24 (197 million acres of federal, 124 million acres of state, and 44 million acres of ANCSA lands in Alaska's 375 million acres); R. ARNOLD, *supra* note 36, at 272.

43. *See supra* note 36 and accompanying text.

44. *See generally* M. BERRY, THE POLITICS OF OIL AND NATIVE LAND CLAIMS (1975).

45. It deserves mention that Natives apparently suggested a corporate form of organization in the first place. *See, e.g.,* Arnott, *supra* note 34, at 148 (citing *Hearings*

corporations likely should have been put beyond the reach of corporate takeover or corporate mismanagement by the Natives.[46] The corporate vehicle and share ownership have divided a resource that is, or should be in part, indivisible.[47] The division will become greater as Natives trade their shares after 1991. As subsistence lands, some of the ANCSA corporate lands must be viewed as belonging to all of the Native people instead of the particular subgroup which happens to own the shares.

In retrospect, another flaw in the settlement was the granting of millions of acres of land and millions of dollars to corporate shells that lacked experienced management and established business operations. In the normal course of events, a business and its management grow and receive progressively larger infusions of capital and other resources. To the extent that the ANCSA formula bypassed this normal growth pattern it was a prescription for failure that deserves a remedy.

2. In evaluating ANCSA, fault should be assessed on all sides.

While non-Natives deserve partial blame for the problems of ANCSA, the Natives are not without fault. There has been monumental mismanagement by Natives. This mismanagement has taken the form not only of misfeasance and malfeasance but also of venal conduct of the worst sort. Bluntly put, a few Natives motivated by greed have exploited other Natives and the corporations to the extent of millions of dollars.[48]

Excessive litigation by the Native corporations and their representatives constitutes another form of mismanagement.[49] Although the points of comparison are very rough, one study of 190 public corporations randomly selected from the 1975 *Fortune* study shows that in American corporations shareholder litigation takes place a median of once every 6.7 years.[50] ANCSA regional corporations have been named as participants in 155 reported decisions over a fourteen-year

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on S. 2906, 90th Cong., 2d Sess. 27 (1970)); *id.* at 154 (Natives proposed 12 regional corporations rather than one larger corporation).

46. Perhaps a significant portion of the lands held by village corporations could be transferred. Less justification exists, however, for the transfer of regional corporations' holdings. Given the profit-seeking nature of the regional corporations, the general assumption had to be that those lands could be at risk.

47. *See, e.g.,* T. BERGER, *supra* note 2, at 17.

48. *See, e.g.,* Moses v. McGarvey, 614 P.2d 1363 (Alaska 1980) (allegations of self-dealing by regional corporation's president and his daughter); Branson, *supra* note 1, at 120 n.89 (allegations of mismanagement surrounding construction of Calista Sheraton Hotel).

49. For example, sources indicate that the corporations have expended approximately thirty-five million dollars in legal fees for the litigation of a single issue, namely the subsurface resource provisions of ANCSA. T. BERGER, *supra* note 2, at 9.

50. Jones, *An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971-1978,* 60 B.U.L. REV. 306, 312 (1980). For purposes

period, for a frequency of occurrence of 1.16 lawsuits per regional corporation per year.[51] This ANCSA statistic, moreover, does not include suits filed but voluntarily dismissed pursuant to a settlement or nonsuit. The amount of money spent by ANCSA corporations in seeking judicial solutions clearly represents a form of mismanagement.[52]

3. Native Alaskans will not be able to recreate the economic, political, or social climate that existed prior to the passage of ANCSA.

The 1971 ANCSA agreement has generally been perceived as fair.[53] Because the enactment of ANCSA caused a number of changes in Alaska, the Natives will not be able to write on a clean slate, as Berger suggests. The Natives should be precluded from taking all of ANCSA's benefits without bearing its costs, especially in light of their own mismanagement. Perhaps this line of thought provides a key to ANCSA's future: save the good in ANCSA. The high road approach of a late date, near complete rejection of ANCSA, advocated by Berger, would prove too costly and would unfairly disadvantage other Alaskans, creditors of the corporations, and the United States Treasury.

4. Any meaningful discussion of ANCSA's future must include divergent points of view and draw from all appropriate disciplines.

The reexamination of ANCSA cannot be limited to Indian and Native affairs policy analysis, but must also include corporate and economic analysis. Thus far, Indian and Native affairs specialists like Berger have dominated the discussion about the future of ANCSA. These specialists, naturally inclined toward what they know best, focus on tribal government, reservation status, and government appropriation. Admittedly, some solutions do lie in those directions.

Many ANCSA problems, however, are economic, and require management and economic analysis. Such economic analysis may unearth reasons for ANCSA's shortcomings or failures that are altogether different from those advanced by Native affairs specialists. For

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of the Jones study, "shareholder litigation" encompassed three types of suits: (1) derivative suits; (2) class action suits; and (3) individual suits. *Id.* at 309.

51. Lexis search conducted under the names of the 13 ANCSA regional corporations, dated March 15, 1986, on file with the *Alaska Law Review.*

52. In fact, from ANCSA's earliest days the tendency seems to have been to rely on litigation or to seek legislative and political solutions to Native problems. This overdependency on litigation and politics has caused the corporations to neglect economic analysis and the development of management skills. Proposals such as Berger's seem to reinforce this tendency to seek judicial and political solutions.

53. *See, e.g.,* R. ARNOLD, *supra* note 36, at 145-48; Arnott, *supra* note 34, at 157-60. *See also supra* notes 42-44 and accompanying text (arguments based upon circumstances leading up to and surrounding bargaining for the original 1971 settlement).

example, economic analysis and academic corporation law increasingly focus on the theory of the firm.[54] One aspect of the theory of the firm concerns the market for corporate control. When corporate management operates inefficiently, share prices will reflect the inefficiency. If share prices sufficiently decline, a third party may seek corporate control by purchasing enough voting shares to mandate the election of corporate representatives who, in the third party's opinion, will manage efficiently. Corporate managers, faced with this threat to their incumbency, are forced to operate efficiently.

Market forces may discipline corporate managers better than legal restraints and produce the best results for all concerned, including shareholders.[55] In Alaska Native corporations, however, the market for corporate control cannot operate either in its ex post or its ex ante aspects because of the restrictions on alienation. This does not necessarily mean that the Natives' shares should be freely alienable. The example merely demonstrates that any analysis of ANCSA must include a full scale examination of the modern theory of the firm and of other forms of relevant economic analysis.

Any analysis of the problems of ANCSA also requires a close look at corporation law. Berger's one-sided study seems to be plagued by a dearth of understanding of corporation law. He accepts at face value a representation that corporate existence under ANCSA costs village corporations $70,000 each annually.[56] A rudimentary knowledge of corporation law would inform him that tens of thousands of comparably sized corporations in Alaska and elsewhere exist with no more than several hundred dollars compliance costs each year.

Berger fails to perceive the adaptability of modern business associations. He does not recognize that Native corporations could cast share transfer restrictions in the form of options rather than rights of first refusal.[57] Once shares become alienable, with option share restrictions in place, ANCSA corporations would have a contractual right to re-acquire selling Natives' shares at a fixed option price rather than having to match a third party's highest offer, as in a right of first refusal restriction. In that manner, Native corporations' treasuries

54. The seminal piece is Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305 (1976). A more recent piece is Fama, *Agency Problems and the Theory of the Firm,* 88 J. POLIT. ECON. 288 (1980).

55. *See* Manne, *Mergers and the Market for Corporate Control,* 73 J. POL. ECON. 110 (1965); *see also* Carney, *Toward a More Perfect Market for Corporate Control,* 9 DEL. J. CORP. L. 593 (1984).

56. T. BERGER, *supra* note 2, at 33 ("[T]he minimum cost to a village of carrying out the corporate duties that ANCSA has imposed on it is about $70,000 annually.").

57. *See id.* at 102.

might be preserved and, simultaneously, post-1991 intra-firm share restrictions made to work. Based on an incomplete understanding of corporation law, Berger also rejects other forms of entity, such as non-profit corporations.[58] Likewise, he never probes the possibility of amending Alaska state law to make other forms of entity amenable to both Native and non-Native needs.[59]

What any study of ANCSA needs is participation by corporation law specialists who fully understand how to utilize the extreme flexibility afforded by modern corporation law. The participation of economists, corporate specialists, and other experts could supplement and explain in an accurate, complete, and impartial manner the full range of options for 1991 and beyond.

ANCSA is too important to Alaska and to the Natives involved for its future to be determined by one-sided studies and hasty, emotional recommendations. Thomas Berger had an extraordinary opportunity to study ANCSA. *Village Journey* reveals that he largely failed to capitalize fully on that opportunity. Fortunately, several years remain before the watershed year 1991 arrives. Time still remains for the completion of the thorough study of ANCSA that Natives, non-Natives, the State of Alaska, and other interested parties deserve.

58. *See, e.g., id.* at 114 (observation that non-profit corporation law provides for a minimum quorum of only ten percent with no apparent understanding of how higher quorum requirements can be implemented).

59. *See, e.g., id.* at 114-15 (discussion of Alaska law governing cooperatives, including five percent quorum requirement; no discussion of amending Alaska law to make quorum and other features more suitable for Native organizations). *Cf.* Branson, *supra* note 1, at 112-14, 132-34 (suggested revisions of Alaska statutes to result in better mesh between ANCSA and corporation law).