STILL SQUARE PEGS IN ROUND HOLES? A LOOK AT ANCSA CORPORATIONS, CORPORATE GOVERNANCE, AND INDETERMINATE FORM OR OPERATION OF LEGAL ENTITIES

DOUGLAS M. BRANSON*

This Article examines an issue that many corporations, trusts, not-for-profit corporations, and other entities should consider: whether the choice of legal form matters? Is it significant, for example, that a corporation organizes as a corporation as opposed to a trust, or vice versa? Ultimately, the Article concludes that entity choice in fact is not as important as one may previously have thought. In reaching that conclusion, this Article examines converging corporate and trust laws in addition to governing standards, and takes an in depth look at Alaska Native Corporations and Hawaii's Bishop Estate, both of which help illustrate the non-traditional corporate and trust functions performed by such entities. From these examinations, it is clear that governance is governance regardless of the choice of legal form, a valuable lesson for every legal entity today.

TABLE OF CONTENTS

I.	INTRODUCTION	204
II.	EVOLUTION OF CORPORATE LAW	207
	A. Change in the Board of Directors' Mission	
	B. Enhanced Committee Structures	
	C. Board Composition: Legal Requirements	
	D. Specialist Directors	
	E. Duty of Loyalty	
	F. Approval of Trustee and Director Compensation	
	1. Tappio var di 1100000 una 2 motore demponduren.	

Copyright © 2007 by Douglas M. Branson.

^{*} W. Edward Sell Chair in Business Law, University of Pittsburgh; B.A., University of Notre Dame; J.D., Northwestern University; LL.M., University of Virginia.

	G. Level of Compensation	.213
III.	EVOLUTION IN CORPORATE GOVERNANCE	.214
	A. Background	.214
	B. Board Size	
	C. Elimination of Trophy Directors	
	D. Board and Boardroom Decorum	.216
	E. Director Training	.216
	F. Director Performance Reviews	.217
	G. Standards of the Corporation	.217
IV.	CORPORATE LAW, GOVERNANCE, AND ANCSA	,
	CORPORATIONS	.218
	A. ANC Non-Corporate Functions	218
	1. Delivery of Social Services	218
	2. Provision of Elder Benefits	210
	3. Dispensation of "Political" Patronage	220
	B. Consequences of Differing Functions	
	1. Discriminatory Distributions (Dividends and	• 222
	Other Payments)	222
	2. Tendency Toward Management Myopia	22/
V.	3. Suggested Use of Advisory Boards THE REMAINING STRICTURES OF TRUST LAW	. 224
v .		
		. 223
	B. Duty of Loyalty: Differing Interested Director and	225
	Trustee Standards	. 223
	C. Standards of Care May Differ Between Corporation	
	and Trust	. 220
	D. Penalties for Fiduciary Duty Violations	. 226
T 7T	E. Restrictions on Delegations	. 227
VI.	GOVERNANCE IN A TRUST OPERATED AS A	220
	PARTNERSHIP	. 228
	A. Background	. 228
	B. Hoarding Assets	. 229
	C. Mis-investments	
	D. Micro-management	. 230
	E. Officious Intermeddling	230
	F. Waste of Assets	. 231
	G. Trustee Compensation	. 232
	H. Judicial Review of Directorial Versus Trustee	
	Compensation	. 233
VII	CONCLUCION: INDETERMINACY AND SCHIZORURENIA	23/

I. INTRODUCTION

In the modern era, many entities exist that no longer fit neatly into the existing legal categories, such as partnership, corporation,

limited liability company, limited partnership, not-for-profit corporation, mutual-benefit corporation, trust, charitable trust, or charity. Many entities exhibit attributes of three, four, or even five types of legal entities; they are indeterminate. The question this Article asks is if the choice of legal entity makes any difference or as big of a difference as it did more than thirty years ago, and, accordingly, how directors and senior executives of such entities should conduct themselves. Does it remain a useful endeavor to shoehorn them into this or that legal category? What legal consequences flow from the choice? Have those consequences lessened over time? Does entity choice matter any more, as many people feel it does, and if so, for how much?

These questions are examined below in two contexts that have traditionally had very different laws and governance standards: the corporation and the charitable trust. This examination reveals that: the differences in the law and governance practices in corporations and charitable trusts have blurred over time. And, as the law and governance practices have converged, the choice of legal form has become less important.

To illustrate that entity choice is not as important as it once was, this Article looks at two unique entities: the Alaska Native Corporation and the Bishop Estate (a charitable trust). In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA).³ ANCSA bestowed upon Alaska Natives forty-four million acres of land and \$1 billion. Rather than to Natives themselves, ANCSA bestowed the land and money on 13 regional and 203 village corporations, all of which obtained certificates as business corporations under Alaska law.⁴ Despite certificates as

^{1.} The greatest proliferation of new entities and new types of entity has been in the area of limited liability companies (LLCs), attributed principally to the flexibility LLC forms are thought to bestow on owners. *See, e.g.*, Larry Ribstein, *Unlimited Limited Liability*, 24 DEL. J. CORP. L. 407 (1999). Comparatively, the vastly increased amount of flexibility that modern corporation laws now contain has received little attention. An exception is Dennis S. Karjala, *A Second Look at Special Close Corporation Legislation*, 58 Tex. L. Rev. 1207 (1980) (arguing that there is no need for special legislation because mainline statutes have become sufficiently flexible).

^{2.} The author explored the question of what state corporate laws should require of Native corporations in 1979. *See* Douglas M. Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 UCLA ALASKA L. REV. 103, 125–31 (1979).

^{3. 43} U.S.C. §§ 1601–28 (2000).

^{4.} See, e.g., ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 196–98 (1978). Two-hundred and three village corporations were eligible to receive land and money, and all were originally chartered as business ("profit") corporations

business corporations, however, ANCSA corporations shift from role to role. They act as political entities, business corporations, not-for-profit corporations, and social service agencies, sometimes doing so over time while at other times simultaneously. Observers urge that, despite being corporations in law, ANCSA corporations take on these various colorations at various times.

A similar situation is found in Hawaii in the form of the Bishop Estate, which is a charitable trust. Beatrice Pauahi Bishop (1831–1884), a member of the Hawaiian royal family, left her landownings, the largest in Hawaii, in trust "to erect and maintain in the Hawaiian Islands two schools... called the Kamehameha Schools." The schools were to give "preference to Hawaiians of pure or part aboriginal blood." The trust became the "wealthiest charity in the United States," with assets well over \$10 billion, making it third among United States foundations and greater in size than all but five of 746 university endowments. Yet the five

under Alaska law. *Id.* Most Alaska Natives who enrolled in the 1970s did so in a regional and in a village corporation, but not all. Several thousand Alaska Natives, known as "at large" shareholders, hold shares in a regional but not in a village or urban corporation. *See, e.g,* Oliver v. Sealaska Corp., 192 F.3d 1220 (9th Cir. 1999) (claim by at large shareholders).

- 5. See Branson, supra note 2, at 125–31.
- 6. See, e.g., Hanson v. Kake Tribal Corp., 939 P.2d 1320, 1324 (Alaska 1997) (upholding argument that discriminatory payments amount to a "social welfare program" under ANCSA); see also David Case, Listen to the Canary: A Reply to Professor Branson, 4 ALASKA L. REV. 209, 218–19 (1987) (analogies to tribal governments and tribes).
 - 7. SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST 301 app. (2006).
 - 8. Id.
 - 9. Id. at 51.

10. The largest ten foundations are: 1. Bill and Melinda Gates - \$29.1 billion; 2. Ford - \$11.6 billion; 3. Robert Wood Johnson - \$9.1 billion; 4. The Lily Endowment - \$8.4 billion; 5. W.W. Kellogg - \$7.3 billion; 6. William and Flora Hewlett - \$7.1 billion; 7. David and Lucille Packard - \$5.8 billion; 8. Andrew W. Mellon - \$5.5 billion; 9. John and Catherine MacArthur - \$5.4 billion; and 10. Gordon and Betty Moore - \$5.2 billion. Noelle Barton, Caroline Preston & Ian Wilhelm, Slow Growth at the Biggest Foundations, CHRONICLE OF PHILANTHROPY, Mar. 23, 2006, at 6, 7. The largest university endowments are: 1. Harvard University - \$25.5 billion; 2. Yale University - \$15.2 billion; 3. Stanford University - \$12.2 billion; 4. University of Texas System - \$11.6 billion; 5. Princeton University - \$11.2 billion; 6. Massachusetts Institute of Technology -\$6.7 billion; 7. University of California System - \$5.2 billion; 8. Columbia University - \$5.2 billion; 9. Texas A&M University - \$5.0 billion; and 10. Michigan University System - \$4.9 billion. Erin Strout, College Endowments Post 'Respectable' Returns for 2005. THE CHRONICLE OF HIGHER EDUCATION, Jan. 27, 2005, at App. 1.

trustees ran the Bishop trust as a small charity, at times as if it was a partnership and at other times as if it was an adjunct to a political party.

Parts II and III provide an overview of the evolution of corporate law and corporate governance over the last thirty or so years. Many changes in corporate law and corporate governance practice have occurred in this time, and an understanding of each is the starting point for any discussion about the importance of corporate form.

Part IV examines the question of whether entity choice matters in the context of Alaska Native Corporations. Through an examination of the hybrid roles that Native corporations play, this Article concludes that form is not as important as it was thirty years ago. Although technically corporations, Alaska Native Corporations perform many non-traditional corporate functions, functions that typically have been assumed by nonprofit corporations, trusts, political entities, and social service agencies. Although by serving these roles, Native corporations may provide valuable, necessary services, Part IV concludes by suggesting that hybridization has some serious consequences for corporate law and corporate governance.

Part V then shifts to an examination of the law and governance practices of charitable trusts. Although differences remain between trust and corporate law, Part V identifies the areas where trust law has converged with corporate law. concludes with an examination of the Bishop Estate. Although the Bishop Estate was organized as a trust, it served many non-trust Thus, just as with Alaska Native Corporations, the functions. choice of entity was less relevant. Unlike Alaska Native Corporations, however, mismanagement of the Bishop Estate led to a number of tragic consequences. Alaska Native Corporations should heed this tale of mismanagement, because in environment where form matters less, proper governance—not just proper trust governance or proper corporate governance—matters more.

II. EVOLUTION OF CORPORATE LAW

A. Change in the Board of Directors' Mission

Historically, the dominant legal entity form for business enterprises has been the corporation, but corporate law has not stood still. Older corporate statutes required boards of directors to manage the business and affairs of the corporation. That imperative, however, has given way to a softer phrasing: "corporate powers shall be exercised by or under the authority of, and the business and affairs managed by or under the direction of, [the] board of directors." The reality is that modern directors do not manage, at least in corporations of size. Instead, they oversee the management and perhaps provide strategic direction to the corporation. The American Law Institute's *Principles of Corporate Governance and Structure* attempts to align legal requirements with reality by providing that "[t]he management of the business of a publicly held corporation should be conducted by or under the supervision of such senior executive officers as are designated by the board of directors." Therefore, the highest calling of a board of directors becomes to select, monitor, and, if necessary, replace the senior executive officers of the corporation, most particularly the Chief Executive Officer (CEO).

11. Model Bus. Corp. Act \S 8.01 (1984). See also Alaska Stat. \S 10.06.450(a) (2006).

13. See, e.g., id. § 3.02(a)(1). Boards of directors are to "[s]elect, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives." Id. In corporate settings, the shareholders monitor the directors who, as a board, monitor the senior executives. There are watchers watching the watchers, so to speak. Post-Enron and post-WorldCom, many politicians, regulators, and other onlookers have abandoned the model, attempting to put directors (most of whom are part-time) back in the business of managing. In the last several years, for example, the Model Business Corporation Act section 8.01 has been amended by the addition of a new subsection (c). This subsection states:

In the case of a public company, the board's oversight responsibilities include attention to:

- (i) business performance and plans;
- (ii) major risks to which the corporation may be exposed;
- (iii) the performance and compensation of senior officers;
- (iv) policies and practices to foster the corporation's compliance with law and ethical conduct;
- (v) preparation of the corporation's financial statements;
- (vi) the effectiveness of the corporation's internal controls;
- (vii) arrangements for providing adequate and timely information to directors; and
- (viii) the composition of the board and its committees, taking into account the important role of independent directors.

MODEL BUS. CORP. ACT § 8.01(c) (2005). See also Douglas M. Branson, Too Many Bells? Too Many Whistles? Corporate Governance in the Post-Enron, Post-WorldCom Era, 58 S.C. L. Rev. 65, 109–11 (2006).

^{12. 1} Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 3.01 (1994).

B. Enhanced Committee Structures

Today, company boards organize through a committee structure. Modern corporate laws facilitate board supervision and oversight by authorizing the creation of a wide array of board committees. The principal committees are the audit, the nominating, and compensation committees. Individual boards of directors may also have one or more legacy committees, such as finance, capital improvements, social responsibility, and so on. The newest committees to appear have been the risk management committee, which oversees implementation by management of a reporting and early warning system to ward off criminal or regulatory contretemps, and the disclosure committee, which often functions as a subcommittee of the board's audit committee.

C. Board Composition: Legal Requirements

There are no particular legal requirements for being a director. Older formulations required directors to exercise "care and skill." Modern commentators, however, deny that any skill

^{14.} MODEL BUS. CORP. ACT § 8.25(a) (2005) ("Unless this Act, the articles of incorporation or the bylaws provide otherwise, a board of directors may create one or more committees and appoint one or more members of the board of directors to serve on any such committee."). This section further provides that "each committee may exercise the powers of the board of directors." *Id.* § 8.25(d); *see also* Alaska Stat. § 10.06.468 (2006).

^{15.} See, e.g., 1 Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations §§ 3A.02–.05, at 114–33 (1994); Douglas M. Branson, Corporate Governance §§ 5.04–.07, at 234–43 (1993).

^{16.} In the 1960s, corporations often had but a single committee, styled as the executive committee, which had the power of the full board, save for items Today's Model Business Corporation Act enumerated in corporate law. empowers directors to create "one or more committees." There is no mention of an executive committee. MODEL BUS. CORP. ACT § 8.25(a) (2005). Cf. ALASKA STAT. § 10.06.468 (2006) ("[A board of directors] "may designate from among its members an executive committee and other committees of the board."). The executive committee exercised the board's power between meetings of the full board. Usually the CEO, another senior executive, such as the Chief Financial Officer (CFO), and the heads of principal subsidiaries or divisions made up the executive committee. Today, executive committees are seen infrequently for the reason that they permit an inner circle, usually dominated by insiders, to hijack governance of the corporation. The remaining board members, more than ever, become the "parsley on the fish." Even if the remaining directors wish to play a greater role in governance, costs will hinder collective action by them sufficient to overcome actions of a powerful executive committee. See, e.g., DOUGLAS M. Branson, No Seat at the Table 135 (2007).

ever was a prerequisite for the position.¹⁷ These latter commentators in fact won out in the drafting of the *Model Business Corporation Act* (MBCA), which provides that directors "shall discharge their duties with the care that a person in like position would reasonably believe appropriate under the circumstances." Once she becomes a director, however, a person must come up to the speed necessary to perform a director's responsibilities in that corporation.¹⁹

D. Specialist Directors

There is no such thing as an honorary, ceremonial, advisory, or specialized director. Each director must bring to bear her abilities across the full spectrum of matters that come to the board. In the past, one would occasionally come across specialized directors, denominated as such, for example a director charged with oversight over a particular geographical region or state. Today, however, the practice is to place specialists, either by expertise or geography, such as the technical wizards in a software company, on advisory boards.²¹

Nominating committees, often known as governance committees, choose directors based upon strengths the candidates possess and the board feels it needs. A current vogue, for example, is to select one or two directors with international experience. Furthermore, the federal Sarbanes-Oxley Act ("SOX") requires that at least one member of the board's audit committee be a

^{17.} Orbel Sebring, Report of Committee on Corporate Laws, Changes in the Model Business Corporation Act, 30 Bus. Law. 501, 505 (1975) ("While the cases are replete with discussions of the need for directors to use ... skill ... [,]there is a paucity of authority as to what 'skill' and 'diligence,' as distinguished from 'care,' are properly to be expected from a corporate director. ... In point of fact, skill, in the sense of technical competence in a particular field, has never been regarded as a qualification for the office of director. ... Accordingly, the words 'diligence' and 'skill' were omitted from the standard adopted.").

^{18.} MODEL BUS. CORP. ACT § 8.30(b) (2005). Alaska's standard of conduct for directors is more objective than the most recent Model Act iterations, and makes express a duty of inquiry: "with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances." Alaska Stat. § 10.06.450(b) (2006). It does not import skill into the equation and, in that respect, is consonant with the Model Act.

^{19.} See, e.g., Francis v. United Jersey Bank, 432 A.2d 814, 821–22 (N.J. 1981) (spouse became director after husband's death); BRANSON, supra note 15, § 6.05, at 264.

^{20.} See generally Branson, supra note 15, § 6.17, at 279.

^{21.} See discussion infra Part IV.B.3.

director who is a "financial expert," defined by the Securities and Exchange Commission as one with hands on experience in auditing public corporations.²² Boards may search for individual members of stature as well as for those with certain technical expertise, such as in engineering, finance, or computing. Those are strengths, not specialties. It is important to note that a corporate director must still bring to bear the requisite amount of care and loyalty to each matter that comes to the full board's attention, just as co-trustees must.²³

E. Duty of Loyalty

A corporate director's duty is in every instance to serve the best interests of the corporation rather than the best interests of one's self, family members, friends, associates, or other businesses in which the director may have an interest.²⁴ Shareholder plaintiffs and their lawyers often perceive conflicts of interest as major violations of this fiduciary duty, sins that violate a moral code governing behavior as well as the law. They are not. The aim for which the law strives, and after the fact may award damages for breach, is compliance with the duty of loyalty (the duty to serve the best interests of the entity). That being said, a conflict of interest is a warning sign to which the fiduciary and her lawyer must pay special attention, because, in the least, the appearance of a duty of loyalty violation may be imminent. Added procedural steps may need to be taken at this stage. "[C]onflicts of interest in the modern charity world [, for example,] are a problem to be managed rather than a disease to be eradicated."25

For example, if an organization proposes to hire the child of a director for the role of marketing director, both the director and the organization can manage the affair as an interested director transaction. In doing so, the interested director can make full disclosure, recuse herself (although statutes do not require that she do so), and have the transaction approved by a disinterested decision maker (usually the other directors but sometimes the

^{22.} Sarbanes-Oxley Act § 407, 15 U.S.C. § 7265(b) (Supp. III 2003).

^{23.} For example, delegation to a committee of the board relieves neither the full board nor committee members from their legal responsibilities. *See* MODEL BUS. CORP. ACT. § 8.25(f) (2005) ("The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with standards of conduct...."); ALASKA STAT. § 10.06.468(d) (2006) (providing for the same).

^{24.} Wardell v. Union Pac. R.R., 103 U.S. 651, 657–58 (1880); BRANSON, *supra* note 15, § 8.02, at 394–96.

^{25.} PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, at xxxvi (2006).

shareholders).²⁶ Laws of every jurisdiction contain safe harbor provisions sanitizing an interested director transaction that the director and corporation manage in that way.²⁷ There are of course other options a director or senior executive of a business entity may choose to manage conflicts of interest.²⁸

F. Approval of Trustee and Director Compensation

Corporate directors, of course, have a conflict of interest in setting their own compensation qua directors. Statutes, however, obviate the conflict.²⁹ Therefore, managing of the traditional sort becomes unnecessary.

That statutory background does not end the matter. One of the teachings of Enron is that excessive director compensation can taint an otherwise capable board of directors. Enron paid its directors \$350,000 per year, roughly half in stock and half in cash. Additionally, the corporation paid from \$70,000 to \$500,000 in charitable gifts or consulting fees to entities with which the fourteen so-called "independent" directors were affiliated. Directors in a corporation or trustees in a large charity are supposed to watch the watchers, or watch the doers/watchers, the

^{26.} See, e.g., 1 Am. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.02(a) (1994) (authorization or ratification by disinterested directors).

^{27.} See id. at 235–36, 238–40 (describing safe harbor statutes of fifty-two jurisdictions and including a table of disclosure provisions for various safe harbor statutes). In *Marciano v. Nakash*, 535 A.2d 400 (Del. 1987), the Supreme Court of Delaware made clear that such statutes are non-exclusive and a director or controlling shareholder, when challenged, could escape liability based upon the fairness of the transaction, even though the fiduciary had not complied with the statute.

^{28.} For example, directors faced with an apparent conflict of interest can choose to do nothing. If the child in the example above is eminently qualified for the position, no damage or potential for damage exists as it might when the child has meager qualifications. In the former case, the duty of loyalty is not violated. A third way to manage the transaction would be for the interested party to resign from the board of directors. Finally, the choice not to do the transaction at all could be adopted.

^{29.} See, e.g., MODEL BUS. CORP. ACT § 8.11 (2005) ("Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.").

^{30.} PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE, S. REP. No. 107-70, at 54–57 (2002); Douglas M. Branson, *Enron – When All Systems Fail: Creative Destruction or Roadmap to Corporate Governance Reform*, 48 VILL. L. REV. 989, 1019–20 (2003).

senior executives. One of a director's highest callings is to reprimand or remove senior executives, mainly the CEO, if in the board's judgment that is necessary. Overly compensated directors will have less of an incentive to rock the boat if down the road they could lose their directorship and the emoluments of office that go with it. There does not exist any conflict of interest or duty of loyalty violation one can put their finger on; instead, experience teaches that excessive compensation for directors corrupts the system, presenting a moral hazard for the individual director.³¹

G. Level of Compensation

What level of compensation is excessive? In Marx v. Akers, the New York Court of Appeals declined to find as a matter of law that \$75,000 in annual compensation was excessive.³² Richard Breeden, as corporate monitor, required that emerging from bankruptcy as MCI, Inc., WorldCom pay its directors no less than \$150,000 annually.³³ Conference Board of the United States statistics show that fees directors in large, publicly held corporations receive are well below the \$350,000 received at Enron. Average director compensation for directors in 2002 was: (1) \$59,000 in the diversified financial services industries, at petroleum companies, (3) \$54,500 in the (2) \$55,500 telecommunications industry, (4) \$48,500 in the gas and electric industry, and (5) \$48,000 in the industrial chemicals industry.

^{31.} Corporate governance expert Charles Elson has opined that it is per se wrongful for directors to receive any compensation from the corporation other than a director's fees. Branson, *supra* note 30, at 1020 ("[Directors] should have 'no financial connection to the company whatsoever'.... If a director's role is as a consultant, hire him as a consultant. If a director's role is to be as a director, hire him as a director. You cannot blend the two.").

^{32. 666} N.E.2d 1034, 1042–43 (N.Y. 1996) (stating that the compensation package included \$55,000 cash and 100 shares of IBM common stock). IBM later raised the annual retainer to \$100,000, along with modest stock option grants. Early in 2007, IBM announced a \$200,000 annual flat fee compensation scheme, citing the potential corrupting influence of stock grants, which it eliminated altogether. Joann S. Lublin & William M. Bulkeley, *IBM Ends Director Stock Options*, WALL ST. J., Dec. 21, 2006, at A1.

^{33.} RICHARD C. BREEDEN, RESTORING TRUST: REPORT TO HON. JED S. RAKOFF, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK § 3.01, at 78 (2004).

^{34.} CHARLES PECK, HENRY M. SILVERT & GINA MCCORMICK, THE CONFERENCE BOARD, DIRECTOR COMPENSATION, AND BOARD PRACTICES IN 2002, at 6. The amount directors receive in restricted stock grants and options tends to be small but increases total compensation and changes the categories, as follows: (1) oil and gas services, \$96,028; (2) chemicals, \$76,805; (3) diversified

Pre-SOX, a California court held that receipt of \$235,000 in fees by a firm did not cause a partner of that firm to lose his status as an independent director of Chevron, Inc.³⁵ Post-Enron and post-SOX, the New York Stock Exchange (NYSE) regulations fix the level of compensation a consultant or her firm may receive without having to be classified as non-independent at \$100,000 per year.³⁶ Of course, loss of independence does not equate to banishment. Instead, loss of independent status simply means that: director's vote may no longer be the swing vote on board tallies; (2) she may no longer serve on the audit committee; and (3) she may not count in the director counting exercise, which leads to the determination that a clear majority of independent directors approved the transaction and that the transaction is entitled to "enhanced" business judgment rule protection.³⁷ Rather than banishment, therefore, possession of these deficits often may, but not necessarily will, result in loss of the person's position as a director.

III. EVOLUTION IN CORPORATE GOVERNANCE

A. Background

Corporate governance is not law, although many law schools offer the subject. Rather, among other things, corporate governance is a meld of mandatory legal requirements, enabling legal provisions, and business and management science tools and devices. For the most part, corporate governance is soft law—advisory and aspirational, a larger concentric circle around laws, such as corporate statutes and cases—or quasi-laws—such as NASDAQ or stock exchange rules, which contain mandatory content and form smaller circles within the larger circle of

financial services, \$76,750; (4) food, beverage, and tobacco, \$72,894; and (5) plastics and rubber manufacture, \$71,200. *Id.* at 8.

^{35.} Katz v. Chevron, 27 Cal. Rptr. 2d 681, 689–90 (Cal. Ct. App. 1994).

^{36.} NYSE LISTED COMPANY MANUAL § 3.03A.02(b)(ii) (2004), available at http://www.nccg.ru/en/site.xp/057053049124.html. The NASDAQ governance regulations decree loss of independence any time a director or her firm receive \$60,000 or more annually from the corporation on whose board she sits. NASDAQ CORPORATE GOVERNANCE RULES CHANGES (2003), available at http://www.nasdaq.com/about/CorpGovSummary.pdf.

^{37.} Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1343 (Del. 1987) ("[W]ith the independent directors in the majority, proof that the board acted in good faith and upon reasonable investigation is materially enhanced.").

"corporate governance." Precepts of modern corporate governance speak to the following: board size, elimination of trophy directors, board and boardroom decorum, director training, director performance reviews, and standards of the corporation.

B. Board Size

Wise corporate governance practice holds that a board of directors should neither be too large given the size of the corporation (thirteen or fifteen, potentially even seven or nine for a smaller corporation), nor too small (just one or three, or even five for a larger entity). The average board size of NYSE listed corporations was 9.2 persons in 2003.³⁹ The number of directors ranged from three to thirty-one. Average board sizes in the *S&P* 500, the 500 largest corporations by revenue, was 10.9 directors.⁴⁰ The mode among the *Fortune 200* was eleven in 2000, twelve in 2001, and eleven again in 2002. The trend is toward smaller boards, often having only seven or nine directors.⁴¹

C. Elimination of Trophy Directors

Many corporations eschew hiring or retaining directors who serve on several other boards of directors. Similarly, many publicly held companies forbid their CEOs to sit on any other boards of directors, or limit the CEO to a single board. Directors who sit on four or more boards of directors become trophy directors.

^{38.} See, e.g., John Farrar, Corporate Governance at 4 (2d ed. 2005); see also Douglas M. Branson, Teaching Comparative Corporate Governance: The Importance of Soft Law and International Institutions, 34 Ga. L. Rev. 669 (2000).

^{39.} Board Basics, WALL St. J., Oct. 27, 2003, at R7 (table).

⁴⁰ Id

^{41.} See Branson, supra note 16, at 144-45 (2007).

^{42.} See Anita Raghavan, More CEOs Say 'No Thanks' to Board Seats, WALL St. J., Jan. 28, 2005, at B1.

^{43.} See, e.g., Branson, supra note 16, at 155; see also Judith Dobrzynski, When Directors Play Musical Chairs, N.Y. Times Money & Business, Nov. 17, 1996, at 1 (reporting of a director who held eighteen board seats in the 1950s). A number of trophy directors still exist. Shirley Jackson, for example, the president of Renesselaer Polytechnic Institute sits on seven boards of directors, including Marathon Oil, US Steel, AT&T, Federal Express, Public Service Enterprise, and Medtronic. Susan Bayh, the wife of Indiana Senator Evan Bayh, sits on eight boards of directors, including Wellpoint Health Networks, Anthem Insurance, Dandereon, Novavax, Curis, Ennis Communications, and Golden State Foods. Branson, supra note 16, at 97–99.

Corporate governance eyes trophy directors warily or simply does not countenance them at all.⁴⁴

D. Board and Boardroom Decorum

Boards generally observe high standards of decorum. Individual directors phrase criticisms in the form of recommendations, advice, or suggestions. Because the directors have fully vetted most matters before they come to a vote, many votes are recorded in board minutes as having been unanimous. Matters as to which substantial disagreement exists simply do not make it to the voting stage.⁴⁵

There is nothing unusual about this. Board members serve a number of years together in a small circle of individuals. They cannot engage in the confrontational or even combative style found in legislature or faculty meetings. Instead, a directors' job is to walk softly and to carry a big stick (removal of the CEO) and possibly to aid in giving strategic direction to the corporation.⁴⁶

E. Director Training

Pre-SOX, training for directors was rare, consisting at most of a lecture or two by corporate counsel on fiduciary duties, in the abstract. Post-SOX, a number of law and business schools now offer week long courses for directors, which often have financial content, making directors conversant with weighed average cost of capital (WACC), return on capital employed (ROCE), or earnings before depreciation, interest, taxes and amortization (EBDITA).

^{44.} Another subspecies of director governance that experts eye warily is the celebrity director. CEOs at American Express (James Robinson), Hollinger International (Conrad Black), Morrison Knudsen (William Agee), and Walt Disney Company (Michael Eisner), among others, stand accused of having used celebrity directors to delay their own comeuppance. For a discussion of the issue in the case of CEO Michael Eisner of the Walt Disney Company, see JAMES B. STEWART, DISNEY WAR 214, 279–80 (2005).

^{45.} See RAKESH KHURANA, SEARCHING FOR THE CORPORATE SAVIOR: THE IRRATIONAL QUEST FOR CHARISMATIC CEOs 84–85 (2002) ("The sense of internal cohesion on a corporate board . . . is reinforced . . . by the existence of group norms. . . . There is a strong emphasis on politeness and courtesy, and an avoidance of direct conflict and confrontation.").

^{46.} At the Bishop Estate, trustee meetings were the opposite; they had the "shoot to kill" debating society flavor. *See* KING & ROTH, *supra* note 7, at 88, 148–49 ("[Trustee] Jervis threw a rolled-up copy of the Sunday *Advertiser* at [minority trustee Oz] Stender. Then Peters berated Stender, calling him a traitor. Peters looked like he was going to hit Stender, but then Jervis stepped between them, cursing Stender and shouting.").

Restoring Trust, written by Richard Breeden while corporate monitor at WorldCom (later MCI, Inc.), requires both initial and refresher training for rank and file directors as well as for audit committee members.⁴⁷

F. Director Performance Reviews

Had Enron required a 360-degree review of its corporate officers, Andrew Fastow, the wrongdoing Chief Financial Officer, never would have gotten far in his fraud. In such a review, peers, superiors, and subordinates all conduct performance reviews, including reviews of director performance. Good governance advocates call for such reviews in, for example, the governance committee's charter. A committee charter could also spell out the consequences if a director failed to receive a sufficient mark in, for example, three successive reviews. To

G. Standards of the Corporation

A corporate board may be able to relieve the burden of managing numerous and repetitive conflicts of interest and thus potentially avoid duty-of-loyalty violations. In cases in which the problem likely will repeat itself, the full board may delegate the management to a mid-level corporate executive likely to have no interest in the matter. In that way, the full board need not entertain every request to use additional space on the corporate aircraft, or to reserve off-season space in the corporate hunting or golf lodge. The *ALI Corporate Governance Project* enshrines such a delegation as a "standard of the corporation." Ultimately, it adds another neutral decision-maker that directors or boards may utilize in conflict-of-interest transactions, at least those that are not major transactions.

^{47.} See BREEDEN, supra note 33, at 54–55 (suggesting initial and annual refresher training for all directors); id. at 107 (suggesting additional annual training for directors on the audit committee).

^{48.} See Branson, supra note 30, at 1018.

^{49.} See, e.g., Francie Dalton, All-Around Feedback: Harness the Power of 360-Degree Mechanisms, 24 LEGAL MGMT. 14 (2005); Robert J. Derocher, 360 Degree Evaluations: A Case Study from the D.C. Bar, 27 BAR LEADER 23 (2002).

^{50.} The Bishop Estate provides an example of a charter that does not provide for adequate performance reviews. *See infra* Part VI and accompanying text; *see also* King & Roth, *supra* note 7, at 101 ("[T]here were no job descriptions, performance standards, or annual reviews").

^{51. 1} Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 1.36 (1994).

IV. CORPORATE LAW, GOVERNANCE, AND ANCSA CORPORATIONS

As a matter of form, Alaska Native Corporations are technically corporations. However, they perform many non-corporate functions. Part A below discusses the various shapes that Native corporations take. Part B discusses a few of the consequences relating to corporate governance associated with the hybrid nature of Native corporations.

A. ANC Non-Corporate Functions

1. Delivery of Social Services. Many corporations provide college and university scholarships for youths, who must be Alaska Natives and must be descendants of shareholders or shareholders themselves. Village corporations fund health clinics in their respective villages. They also operate food banks whose bounty goes exclusively to Alaska Natives.

Although these activities are laudable, they are often aimed only at Alaska Natives, in such a way that shareholder and creditor concerns may be overlooked. Native corporations, for example, have attempted to put corporations' lands beyond creditors' and disgruntled shareholders' reach. In Jimerson v. Tetlin Native Corporation, 52 the corporation conveyed 643,174 of 743,174 acres of land that the corporation owned to the not-for-profit Tetlin Tribal In Skaflestad v. Huna Totem Corp., ⁵³ another village corporation placed \$35 million received from the IRS into a settlement trust. Viewed through a cynical lens, conveyances to settlement trusts and tribal councils re-slice the ANCSA pie. While ANCSA provisions shield conveyances to trusts from judicial scrutiny, arguably settlement trusts were intended to insure protection of historic cultural sites, not wholesale conveyances to put cash, land, and other assets beyond both creditors' and shareholders' control.⁵⁴ By using the ANCSA provisions in this way, the potential to benefit from the 1971 settlement is compromised for a significant group of Alaska Natives, not only including those who have moved away and receive no benefit or enjoyment from land held in trust, but also including those shareholders who stayed but disagree with creating land reserves or putting aside extra cash to benefit elders.

^{52. 144} P.2d 470, 471 (Alaska 2006).

^{53. 76} P.3d 391, 392–93 (Alaska 2003).

^{54.} See 43 U.S.C. § 1629e(b)(1) (2000).

To this end, if village corporations wish to have increased ability to dispense largess as they see fit, they should convert to not-for-profit status. This author has long held that village corporations should give consideration to doing so.⁵⁵

2. Provision of Elder Benefits. Alaska Natives have always accorded special status to their elders. Several regional and village corporations have sought to add flesh to the commitment. They have set aside substantial resources to provide elder benefits, above distributions to all shareholders.⁵⁶ Under ANSCA, these corporations make distributions (elder benefits) not with respect to shares but with respect to shareholders (over sixty-five years of age).⁵⁷ This practice is arguably contrary to traditional corporate law principles.⁵⁸

However, ANCSA provides, if not for the payments themselves, then at a minimum a means for making them. The Act authorizes Native corporations to amend their articles of incorporation to provide for "Natives who have obtained the age of sixty-five." The corporation may make additional payment to elders once a corporation has formally proposed a resolution, allowed whatever debate to ensue, obtained a shareholder vote, and filed articles of amendment with the Alaska Secretary of State authorizing an additional class of shares, and distributed newly authorized shares to elders. Although they are still distributions under corporate law, payments are made with respect to shares (elder-preference shares), not with respect to shareholders. ANCSA corporations creating a class of elder preference stock thus adhere to the existing rule set as modified by ANCSA.

^{55.} See Branson, supra note 2, at 134–36.

^{56.} See, e.g., Elizabeth Bluemink, Lawsuit Hits CIRI Bonus for Seniors, Anchorage Daily News, Oct. 17, 2007, at B-1 (explaining that suits have been filed in opposition to providing added financial benefits to original elders in Sealaska, Cook Inlet, and Goldbelt Native corporations).

^{57. 43} U.S.C. § 1606(g)(2)(B)(iii)(I) (2000).

^{58.} See 11 WILLIAM MEADE FLETCHER ET AL, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5352 (perm. ed., rev. vol. 2003).

^{59. 43} U.S.C. § 1606(g)(2)(B)(iii)(I) (2000).

^{60.} See, e.g., Sierra v. Goldbelt, Inc., 25 P.3d 697, 701–02 (Alaska 2001) (creating class of elder preference stock but limiting distribution to "original shareholders" while also authorizing distribution regardless of whether an Alaska Native still owned any shares of stock in the corporation).

^{61.} Which would, of course, pursuant to the Supremacy Clause of the United States Constitution, trump any inconsistent state laws. *See* U.S. CONST., art. VI ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land. . . . ").

However that may be, ANCSA corporations have chosen less arduous routes than amendment of the articles of incorporation. Boards of directors have instead allocated corporate funds to settlement trusts, also provided for by ANCSA,⁶² but, again, arguably intended to put certain Native historical sites and similar lands, not expanses of land or shareholder funds, out of creditors' or shareholders' reach.⁶³

Dissident shareholders have mounted a number of challenges to the provision of elder benefits. They have lost them all. Courts have held that settlement trust provisions preempt the state law rule of equal treatment.⁶⁴ Courts have turned back arguments that limitation of a benefit to original shareholders amounts to violating state law provisions outlawing record dates set more than sixty days in advance.⁶⁵

In turning back these challenges, courts may be saying several things. One possibility is that the end, the provision of elder benefits, justifies the means. Second, the choice of entity does not matter. ANCSA corporations are not like other business corporations, as the ANCSA makes clear. The normal corporate law rules, or some of them, do not apply. Finally, judges may be acting out of political expediency.

3. Dispensation of "Political" Patronage. Wisely, Native corporations react to the environment that surrounds them. They have branched out into a number of different industries, such as provision of security services and homeland-security support. 66

^{62. 43} U.S.C. § 1629e(a) (2000).

^{63. 43} U.S.C. § 1629e(b)(1).

^{64.} See, e.g., Broad v. Sealaska Corp., 85 F.3d 422, 426–27 (9th Cir. 1996) (holding that ANCSA preempts conflicting state laws). The author served as cocounsel for plaintiffs in the case. See also Sierra v. Goldbelt, Inc., 25 P.3d 697, 702 (Alaska 2001). "Native corporations must have broad discretion to fashion elder benefit programs that meet the needs of elders," overriding any objections based upon otherwise applicable state law. Id.

^{65.} See, e.g., Sierra, 25 P.3d at 701–02; ALASKA STAT. 10.06.408(b) (2006) (corporations may set record date no more than sixty days in advance). Goldbelt provided for the issuance of elder-preference stock but simultaneously provided that the corporation would immediately repurchase the shares. Sierra, 25 P.3d at 700. Plaintiffs complained that the benefit was both underinclusive and overinclusive: the corporation provided the benefit only for elders who had been original shareholders but bestowed the benefit on all such elders, whether they continued to own common stock or not. Id. at 701.

^{66.} See, e.g., Robert O'Harrow, Jr. & Scott Higham, Alaska Native Corporations Cash in on Contracting Edge, WASHINGTON POST, Nov. 25, 2004, at A-1. There are now over 200 ANCSA corporations and subsidiaries thereof that

Critics opine that Native corporations have branched into too many of them.⁶⁷

In Alaska itself, political exigencies may influence the business decisions of some Native village corporations. The structure of Native corporations makes this possible and maybe even desirable. Because the shares in ANCSA corporations have been inalienable, each Alaska Native tends to hold the same number of shares. In such a case, in which most holders have 100 shares and a restriction exists on transfer, corporate finance experts have predicted that the entities will function as political organizations (one person, one vote; rather than one share, one vote, as in a business corporation). Groups of shareholders, for example, those who stayed behind in the Native village, will lobby for and receive benefits from the corporation. 68

The extent to which political exigencies influence business decisions is not always clear, but in several situations they are at least one potential explanation for a decision made by a Native corporation. Boards and management, at times, have formed various divisions and subsidiaries to create more jobs. For example, one smaller regional corporation paid \$27.8 million to shareholders in 2006 in their capacities as employees and apart from any dividends or distributions. This has had the likely effect of garnering more votes and political support for certain Native corporations' board of director incumbents. An additional, more negative effect of these actions has been to overextend Native corporations and their management.

operate as "disadvantaged small businesses." *Id.* They are exempt from even the \$3 million (\$5 million in construction) cap on no-bid contracts that are in place for other minority small businesses. *See id.*

67. See, e.g., Robert O'Harrow & Scott Higham, Some Post 9-11 Awards Given Without Bids to Native Alaskans [sic], WASHINGTON POST, Mar. 5, 2005, at A-4 (arguing that Native corporations receive inordinate amount of no-bid homeland security contracts that may not be beneficial to the general public).

68. See Jonathan Karpoff & Edward M. Rice, Organizational Form, Share Transferability, and Firm Performance: Evidence from ANCSA Corporations, 24 J. Fin. Econ. 69, 99 (1989) (arguing that, due to transferability restrictions, shareholders wage political-style campaigns to gain support of other shareholders and to influence management); see also Jonathan M. Karpoff & Edward M. Rice, The Structure and Performance of Alaska Native Corporations, 10 Contemp. Pol'y Issues 71, 83 (1992) (explaining that management of Settlement Trusts "would likely become politicized, much like many current aspects of the corporations").

69. E. Budd Simpson, *Doing Business with Alaska Native Corporations*, BUSINESS LAW TODAY, July/Aug. 2007, at 37–38.

Another corporation provided commercial transportation from a remote village to a remote logging site where village corporation shareholders acted as stevedores. In that case, the plaintiff argued that the village corporation was subsidizing the lodging of the workers while on-site and likely received little if any financial benefit from these maneuvers. The trial court, though, found in favor of the village corporation, and the Alaska Supreme Court, under an abuse of discretion standard, affirmed this decision. Nevertheless, it is not clear that actions of the village corporation resulted in any real economic benefit. Political exigencies may have helped motivate the actions.

B. Consequences of Differing Functions

In serving a variety of non-corporate functions, Native corporations often take action that can be construed as contrary to accepted corporate governance standards. With such a variety of interests that are often conflicting, directors and managers can become overextended and have a difficult time making business decisions.

1. Discriminatory Distributions (Dividends and Other Payments). By serving multiple non-corporate functions that favor some shareholders over others, Native corporations often sacrifice the widely accepted corporate law rule that the operations of the corporation are to be run to the benefit of all shareholders. One such illustration of this phenomenon is discriminatory distributions—that is, dividends and other payments made to some shareholders, but not others.

An example of discriminatory distributions dates back to the 1980s. Kake Tribal Corporation, a large village corporation, began a program to purchase whole life insurance policies on shareholders' lives. The corporation, however, established eligibility criteria. A shareholder had to apply for the benefit,

^{70.} See Demmert v. Kootznoowoo, Inc., 24 P.3d 1208, 1210–12 (Alaska 2002) (upholding trial court finding that, rather than a distribution subject to the equal treatment rule, the corporate subsidy of living and transportation expenses was part of a fully disclosed program of shareholder hire).

^{71.} *But see id.* at 1210, 1212 (affirming lower court finding that lodging was not subsidized and that potential economic benefit existed).

^{72.} The facts are outlined in *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320 (Alaska 1997). The author served as co-counsel to plaintiffs and argued the case before the Alaska Supreme Court. Due to the author's personal involvement in the case, the facts provided herein are more illustrative than the factual account in the court's opinion.

which she would not know of unless she had remained in the village or had received a communication from a friend who had. Publicity about the program was word-of-mouth. Further, the applicant had to be over twenty-one years of age. Lastly, she also had to be an original shareholder, with ownership dating to the corporation's formation in 1977. Because of these limitations, only 48% of the corporation's approximately 560 shareholders received the insurance benefit.

Traditional corporate law holds that distributions must be uniform across a class of shares. A corollary holds that the corporation makes distributions with respect to shares, not with respect to shareholders. The identity of the shareholder (under eighteen, over eighteen, over sixty-five, lives in the village, lives outside the village, and so on) is irrelevant.⁷³

Arlene Hanson, the widow of an original shareholder, sensed this and made inquiries into the shareholder insurance benefits. The corporation refused to supply her with an application. She consulted an attorney, who, after being rebuffed by the corporation as well, brought a class action lawsuit. The Supreme Court of Alaska upheld a judgment for the plaintiffs and expanded an award of damages from \$47.30 to \$98 per share for adults and \$121 per share for youths.⁷⁴ The court held that the youths' minority had tolled the statue of limitations. Eventually, the parties agreed to a \$7 million settlement.

Hanson illustrates a court decision limiting a Native corporation's power to distribute benefits to less than all shareholders. However, Native corporations continue to make payments to or on behalf of certain, but less than all, shareholders. Certain portions of the ANCSA seem to authorize such distributions. Other sections of the ANCSA may seem to, but are limited in scope. For example, one section of the ANCSA establishes the "[a]uthority of a Native Corporation to provide benefits to its shareholders... to promote [their] health, education, or welfare... Eligibility for such benefits need not be based on

^{73.} See, e.g., FLETCHER, supra note 58, § 5352.

^{74.} See Hanson, 939 P.2d at 1329–30. The court gave all shares an amount equal to that received by elder shareholders, who had been ineligible for insurance and received cash instead. The six-year statute of limitations, however, cut off at \$98 per share for adult Alaska Natives. There was no similar cutoff for youths, for whom the statute of limitations had been tolled by their minority. They received a full measure of parity with the elder group, namely \$121 per share.

^{75.} See Bluemink, supra note 56, at B-1; see also supra Part IV.A.2 (provision of elder benefits).

^{76. 43} U.S.C. § 1606(g)(2)(B)(iii)(I) (2000).

share ownership... and such benefits may be provided on a basis other than . . . share ownership."⁷⁷ This provision protects distributions to some shares, much as a not-for-profit corporation's actions would be protected in dispensation of its largess. Yet, in all probability due to a drafting mistake, the provision only applies to regional corporations, not Native village corporations.⁷⁸

- 2. Tendency Toward Management Myopia. One principal reason for the push for independent directors is the hope that, with independence, boards of directors will become more diverse, not merely in terms of skin color or sex, but of viewpoints and base of experience. By contrast, ANCSA provides that in Native village corporations all directors must be Natives. At first blush, the requirement seems innocuous, a product of the time when Congress enacted ANCSA. But experience shows that Alaska Native Corporations often lack the range of viewpoints, perspectives, and independence that characterize boards of comparably sized public companies.
- 3. Suggested Use of Advisory Boards. Advisory boards of directors have become common in the high-tech, banking, and real estate fields. For example, a corporation might create an advisory board staffed by persons whose technical expertise is unparalleled, but who remain completely unschooled in business or finance. Advisory board members receive the same salary and emoluments of office as do those individuals whom shareholders elect as directors. Banks often have staff advisory boards for various regions as sources of information about trends and business practices in disparate areas in which the bank does business. A corrective measure to the management myopia in certain ANCSA corporations might be to institute a small, diverse advisory board that could supply a wider range of viewpoints and a critical eye that is arguably now absent.

^{77. 43} U.S.C. § 1606(r) (2000).

^{78.} ANCSA section 7 governs regional, not village, corporations. Moreover, section 8(c) explicitly states which provisions applicable to regional corporations carry over to apply to village corporations and does not include subsection (r). See 43 U.S.C. § 1607(c) (2000). If its drafters intended subsection (r) to permit village corporations to deviate from the usual rules applicable to corporations, evidently those drafters placed the provision in the wrong place.

^{79. 43} U.S.C. § 1606(f) (2000) (mandating that all directors must be shareholders who must, in turn, be Natives).

V. THE REMAINING STRICTURES OF TRUST LAW

Trust law has traditionally been more restrictive than corporate law. This remains true in many areas, such as with the duty of loyalty. However, in other ways trust and corporate law are no longer as far apart.

A. The Theories

Some differences between corporate, trust, and other laws are theoretical today. A trust, for example, is a relationship between trustees and beneficiaries, not a separate enterprise. A corporation, in contrast, is a separate being. At least in the abstract, a corporation is "an artificial being, invisible, intangible," separate from its owners, flesh and blood or otherwise, for all purposes. In between, a partnership is schizophrenic. The original Uniform Partnership Act treats a partnership as an aggregate of individuals for some purposes and as an entity in its own right for others. Today's Revised Uniform Partnership Act ("RUPA") remains schizophrenic, leaning more toward an entity theory than an aggregate theory.

B. Duty of Loyalty: Differing Interested Director and Trustee Standards

As compared to corporate law, trustee law is stricter with respect to duty of loyalty transactions. Trustees, it is well accepted, may not purchase at their own sale. The absolute prohibition applies regardless of whether the transaction was fair. Thus, the range of choices is much narrower when the fiduciary is a trustee rather than a corporate director and deals with the trust or with trust property. When the warning flag (that is, a conflict of interest) pops up, a trustee, advisor, or both must conclude that the

^{80.} See, e.g., KING & ROTH, supra note 7, at 211.

^{81.} Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

^{82.} See UNIF. P'SHIP ACT, 6 U.L.A. 276, Chairman's prefatory note (1914) (describing the dichotomy of the "entity theory" and the "aggregate or common law theory," and adopting the aggregate of individuals associated in business theory with "modification").

^{83.} See REVISED UNIF. P'SHIP ACT, 6 U.L.A. 6, prefatory note (2003) ("The Revised Act enhances the entity treatment of partnerships to achieve simplicity for state law purposes, particularly in matters concerning the title to partnership property. RUPA does not, however, relentlessly apply the entity approach. The aggregate approach is retained for some purposes, such as partners' joint and several liability.").

^{84.} GEORGE T. BOGERT, TRUSTS § 95, at 343 (6th ed. 1987).

transaction cannot go forward. A trustee cannot self-deal ("purchase at her own sale"). The prohibition is absolute.⁸⁵

C. Standards of Care May Differ Between Corporation and Trust

Traditionally, the trustee had to meet a high, objective standard of care; namely, the care and skill with which a reasonably prudent person would exercise the management of her own affairs. By contrast, corporate officials have a lower, quasisubjective standard. They need only "discharge their duties with the care that a person in a like position would reasonably believe appropriate in similar circumstances." However, some authorities deny that any difference exists any longer. "Under both the trust and corporate legal regimes, the fiduciary must exercise such attention to the affairs of the organization (what to do and how to do it) as would a prudent person in managing his or her own affairs." The objective standard of tort law, the care taken by a reasonably prudent person in the circumstances, falls in between these two extremes.

D. Penalties for Fiduciary Duty Violations

Whether under trust, corporate law, partnership, or other doctrines, the remedies a plaintiff may seek from a feckless fiduciary are extreme. The plaintiff may seek money damages equivalent to the harm the entity has suffered; the illicit profits the fiduciary has gained, even though the entity has suffered no positive harm; all gains whether achieved by virtue of the breach or through the fiduciary's independent efforts, often by way of imposition of a constructive trust; and disgorgement of all compensation received by the defendant during the period a court finds him to have been in breach of his duties. Arguably, a

^{85.} See, e.g., Susan Gary, Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law, 21 U. HAW. L. REV. 593, 598 (1999) ("A trustee who deals directly with the trust will have breached his or her duty of loyalty regardless of whether the trustee acted in good faith and regardless of the fairness of the transaction.").

^{86.} See IIA Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 174, at 466–67 (4th ed. 1987).

^{87.} MODEL BUS. CORP. ACT § 8.30(b) (2005).

^{88.} PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 25, at 17.

^{89.} See, e.g., Branson, supra note 15, §§ 6.02–.03, at 251–57 (comparing and contrasting director, trustee and reasonable person standards of care).

^{90.} See, e.g., Branson, supra note 15, § 10.11, at 575–80 (constructive trusts and forfeiture of compensation); 3 FLETCHER, supra note 58, § 884.90, at 362–64

plaintiff may seek more from a trustee; a court may "surcharge" a trustee who has breached his duty. 91

Today, the practice of surcharging a trustee has given way to Internal Revenue Code section 4958. Section 4958 permits the Internal Revenue Service to levy an excise tax of twenty-five percent on a fiduciary (trustee or not-for-profit director or executive) of a charity who receives "excess benefits," and 200% if the situation remains uncorrected.⁹²

E. Restrictions on Delegations

Restrictions on delegations are illustrative of the manner in which trust and corporate law may differ but also of the way in which they are coming closer together. Traditionally, a trustee could only delegate ministerial trust functions. Like the prudent person standard, the prohibition on delegations limited the ability of trustees and trusts to avail themselves of modern portfolio management methods. The 1994 Uniform Prudent Investor Act adopted a prudent investor standard in lieu of a prudent person standard, expressly to permit a trustee to use professional money managers in the same way a wealthy individual would. The newer versions of the Restatement of Trusts reflect the development.

Corporations' boards of directors have always delegated, at least in all but the smallest of corporations. They entrusted to the

(constructive trusts); *id.* § 888, at 370–72 (liability for profits regardless of good faith or want of damage to the corporation); *id.* § 894, at 384–86 (forfeiture of compensation in the discretion of the court).

- 91. See, e.g., 3 SCOTT & FRATCHER, supra note 86, § 206, at 252–54; Richard V. Wellman, Punitive Surcharges Against Disloyal Fiduciaries—Is Rothko Right?, 77 MICH. L. REV. 95, 96 (1978) (criticizing courts that surcharge "a disloyal fiduciary for a sum exceeding amounts causally related to the breach").
- 92. See 26 U.S.C. § 4958 (2000); see generally Gary, supra note 85, at 632–33 (discussing the background and intent of § 4958).
- 93. RESTATEMENT (SECOND) OF TRUSTS § 171 (1959). See John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105 (1994) (discussing the move from the nondelegation rule to a more pro-delegation rule).
- 94. See Bevis Longstreth, Modern Investment Management and the Prudent Man Rule 152–57 (1986).
- 95. UNIFORM PRUDENT INVESTOR ACT § 2(b) (1994), 7B U.L.A. 15–48 (2003). The Uniform Prudent Investor Act was adopted by Alaska in 1998 and is currently still in force; ALASKA STAT. §§ 13.36.225–.290 (2006).
 - 96. See Unif. Prudent Investor Act § 9 (1994), 7B U.L.A. 15-48 (2003).
- 97. RESTATEMENT (THIRD) OF TRUSTS § 90 (2003). See generally Gary, supra note 85, at 600–03 (describing the history of the Uniform Prudent Investor Act and reasons for its adoption into the Restatement).

corporation's officers the day-to-day and month-to-month management of the corporation's business and affairs. They delegated board functions to groups of their own number, that is, director committees. Over time, the list of matters that could not be delegated has become smaller. Seemingly, under the most recent versions of the Model Business Corporation Act, a board committee could count a non-director as a member. Description of the Model Business Corporation Act, a board committee could count a non-director as a member.

VI. GOVERNANCE IN A TRUST OPERATED AS A PARTNERSHIP

Governance in a corporation and a trust may still be different in some key respects, but at least one point is clear. Akin to corporations, trusts may control significant assets and business operations and the governance tools needed are by and large common to both forms of legal entity. The seminal example is Hawaii's Bishop Estate.

A. Background

Hawaii's Bishop Estate became fantastically wealthy. In the 1950s, the trust already was "by far the biggest private landholder in the state. Its name was on one of every nine acres" Successive land booms in Hawaii "push[ed] land values higher and higher, in some cases by 1,000 percent, then 2,000 percent" Cash flow began to match rises in asset values.

Successive surges in revenue coincided with the malefactions of the Bishop Estate trustees. The trustees mis-invested the money that came into their hands. They mismanaged not only the trust but also the Kamehameha School, the trust's principal beneficiary. The trustees began shading over from micromanaging to officious intermeddling in the beneficiary's affairs. Mis-investment aside, the trustees oversaw subordinates' waste of trust assets on

^{98.} Compare Branson, supra note 15, § 4.30, at 204–07 (describing how 1984 Model Business Corporation Act listed eight matters that a full board could not delegate to a committee), with Model Bus. Corp. Act § 8.25(e) (2005) (listing only four matters that may not be delegated under current Model Act).

^{99.} See MODEL BUS. CORP. ACT § 8.25(a) (2005) ("[A] board of directors may create one or more committees and appoint one or more members of the board of directors to serve on any such committee."). This phrasing seemingly permits non-directors to be members of board committees.

^{100.} King & Roth, *supra* note 7, at 53. At its high point, Bishop Estate held fee simple title to 440,184 acres. *Id.* at 32.

^{101.} Id. at 53.

^{102.} *Id.* at 195–97. A single investment in 1991-93 of \$500 million in Goldman Sachs turned out to be a "home run." Bishop Estate realized \$1.5 billion upon Goldman's initial public offering in 1999. *Id.* at 197–99, 255.

expenditures that served no business purpose. Lastly, a principal item of waste was the remuneration the trustees had the trust pay them, exceeding \$1 million per year for what were part-time positions. ¹⁰³

Similar to some ANCSA corporations, the Bishop Estate, a trust, shifted from operation as a charity to a partnership to a political entity.

B. Hoarding Assets

Over ten years, the Bishop Estate trustees saw to it that the trust accumulated \$350 million in liquid assets, "five times a single year's operating budget" for the Kamehameha Schools. At the same time, Kamehameha rejected eleven out of every twelve applicants. Moreover, the Internal Revenue Service assessed the trust large amounts of taxes on "unrelated business income" because the Bishop Estate trustees placed excess cash in operating entities using business corporations as their legal form. 106

C. Mis-investments

In the late 1980s, the financial consultants to the trust proposed "a well-diversified portfolio of marketable securities . . . professionally managed and [which] took full advantage of Bishop Estate's tax exempt status": ¹⁰⁷

The trustees, however, took a different route. With the proceeds from land sales during the 1980s and 1990s the trustees set up tax paying companies, wholly owned by the Bishop Estate, that actively pursued "special-situation investments" [oil drilling, a golf course, commercial real estate]. These were private business deals that offered the potential of large gains somewhere down the road with the likelihood of little or no income in the meantime. They tended to be risky, illiquid, and not easily managed

Effectively operating the trust as a private equity firm, the trustees bet that by investing in operating businesses, they could reap larger profits, even after paying ordinary income taxes on "unrelated

^{103.} See id. at 54–55, 100, 190–91, 201–02. For a significant period of time, "[e]ach trustee was taking nearly \$1 million in annual trustee fees and enjoying the perks of a Bishop Estate trustee, such as the offer of free membership at exclusive golf courses...." *Id.* at 76.

^{104.} Id. at 200

^{105.} Id. at 201.

^{106.} Id. at 197.

^{107.} Id. at 81-82.

^{108.} Id. at 82-83.

business income," than they could with a portfolio of passive investments and no income taxes. Overall, they lost that bet. ¹⁰⁹ In one window alone, 1994 to 1996, Arthur Andersen found that the Bishop Estate lost \$2 million or more in forty-seven investments. ¹¹⁰

D. Micro-management

To justify trustee compensation that exceeded \$1 million per trustee per year, the trustees clung to the "lead trustee' system." "[T]rust functions and areas of responsibility were divvied up among the Bishop Estate trustees." Each trustee was responsible for one of five areas: asset management, education and communication, government affairs, legal affairs, and alumni relations. One trustee had a staff of thirteen employees.¹¹¹

Experienced persons urged the trustees to accept one of two alternatives. The first option was to leave the management of the schools to the principal and his staff. The second option was to hire a CEO and to adopt a corporate-style model, with the five trustees acting as a board of directors that would oversee management by senior executives rather than attempting to manage the charity themselves. The trustees turned deaf ears to all proposals. 112

E. Officious Intermeddling

Corporate directors do not necessarily violate their duty of care by micromanaging. Damage to the corporation is an element of the cause of action. Until damages result, duty-of-care violations are in the air, so to speak, and are not actionable. The trustees of the Bishop Estate, however, did harm the trust.

One trustee set up an office for herself at Kamehameha School. She forced the school to abandon the five-year contracts it

^{109.} See id. at 195-98.

^{110.} *Id.* at 195. The duty of care has also been the means by which shareholders have attacked purposeful acts that, while not venal, make little sense. *See*, *e.g.*, Hun v. Cary, 82 N.Y. 65, 76–78 (N.Y. 1880) (directors exhausted remaining funds on new building). Not only did the Bishop trustees cause the trust to make bad investments, thus violating their duty of care in investing on the trust's behalf, but the trustees also violated their duty of loyalty. For example, trustees made personal multi-million dollar investments in a Texas coal bed methane natural gas project, MacKenzie Methane. The trustees then caused the trust to invest a further \$85 million to prop up a failing venture in which they had personal investments. KING & ROTH, *supra* note 7, at 83.

^{111.} KING & ROTH, *supra* note 7, at 97.

^{112.} See id. at 86–87, 123–24, 164.

^{113.} See, e.g., Branson, supra note 15, § 6.14.

had traditionally awarded, substituting year-to-year appointments that put everyone on the bubble each year. In a noisy withdrawal, one valued teacher quit as a result of trustee intermeddling.¹¹⁴ Others preceded and followed him, for similar reasons.

In the mid-1990s, when the trustees changed the direction of the school's outreach from an extension program to new schools, the schools had to hire new staff members. Not only did a trustee insist upon review of all prospective hires, she allowed paperwork to sit on her desk for months. The schools were able to begin hiring only seven weeks before they opened their doors, and were thus at a distinct disadvantage.¹¹⁵

F. Waste of Assets

Courts have defined "waste" as a transaction in which "'no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." The business judgment rule, which protects both directors and transactions from judicial scrutiny, does not extend its protections to acts or transactions found to have involved waste or gifting of corporate assets. 117

Waste by the Bishop Estate trustees included sixteen trips to Las Vegas by a trustee, who never once accounted for the trust funds she spent.¹¹⁸ Additionally, the trustees caused the trust to pay the defense costs of an employee who had been charged with a crime unrelated to his duties at the trust.¹¹⁹

^{114.} See King & Roth, supra note 7, at 109–10, 118–24.

^{115.} *Id.* at 118–19.

^{116.} Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000) (quoting *In re* The Walt Disney Co. Derivative Litig., 731 A.2d 342, 362 (Del. Ch. 1998)); *see also* Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979); Schreiber v. Carney, 447 A.2d 7, 26–27 (Del. Ch. 1982). *See generally* BRANSON, *supra* note 15, § 6.15.

^{117.} See, e.g., 1 Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 4.01(c), at 184 (1994); Fred W. Triem, Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule, 24 Alaska L. Rev. 23 (2007).

^{118.} KING & ROTH, *supra* note 7, at 110–11.

^{119.} *Id.* at 203. Additionally, the trust was made to finance campaign expenses for friends of the trustees who had run for office. Trustees forced Bishop Estate employees to sell tickets to political fundraisers to benefit friendly politicians. The employees targeted the sale of tickets to firms that did "non bid" business with Bishop Estate. In whole or in part, the firms could then recoup the cost of tickets through overcharging the trust for goods and services. *See id.* at 203, 208. In another case, the trustees caused payment of a \$132,000 "consulting fee" to the speaker of the state house of representatives for his "services" in the purchase of land in upcountry Maui. *Id.* at 223.

Despite the existence of an in-house legal staff to aid them, the trustees expended millions of dollars to hire outside lawyers. Yet, the trust had neither any policy with regard to employee or trustee conflicts of interest, nor rudimentary training in what fiduciary duties may require. 121

G. Trustee Compensation

The tail that wagged the dog was the receipt by each trustee of \$1 million in annual compensation. Trustees justified their compensation on the time they expended with the charity and hands-on involvement in the choice of investments, either of which any trustee should be doing in a trust the size of the Bishop Estate.

Under English common law, of course, both trustee and corporate director positions were honorary in nature. The law expected persons to serve in those capacities with no compensation. Compensation could be awarded if the trust instrument provided for it, but, overall, law provided that trustee compensation must be reasonable. And, as late as 1939, the New York courts held that corporate directors were neither employees

^{120.} See id. at 98, 152, 207–08. For example, Bishop Estate trustees expended trust funds for lobbyists to lobby against the proposed tax code (section 4958 of the Internal Revenue Code, enacted 1996) which would authorize the IRS to levy a twenty-five percent or greater excise tax upon an insider who, like the Bishop Estate trustees, had received "an excess benefit." The penalties are known as "intermediate sanctions," in comparison to the ultimate sanction, revocation of a charity's tax-exempt status. See, e.g., Gary, supra note 85, at 632–34; KING & ROTH, supra note 7, at 210.

^{121.} KING & ROTH, *supra* note 7, at 98. Even the interim trustees, who took office after the probate court had removed the wrongdoers, hired the most expensive, and reputedly the best, legal experts (e.g., Professor John Langbein of Yale Law School and Professor John Luebsdorf of Rutgers) to justify the trustees' positions and to take sympathetic views of the former trustees' actions. They expended \$1 million in doing so. *Id.* at 274–75.

^{122.} See id. at 76.

^{123.} See id. at 100.

^{124.} See, e.g., RALPH D. WARD, 21ST CENTURY CORPORATE BOARD 43 (1997) ("From the late 1800s until well into the 1900s, outside investors considered their board service a matter of looking after their assets. Such basic housekeeping was thought no more deserving of remuneration than balancing one's own checkbook."); IIIA SCOTT & FRATCHER, supra note 86, § 242, at 271–72 ("In England a trustee is not entitled to compensation for his services as trustee" Originally, the rule was the same in the United States).

^{125.} See IIIA SCOTT & FRATCHER, supra note 86, § 242, at 274–75.

nor any other sort of agents. Thus, they had to look to statutory and contractual provisions for indemnification and other sorts of remuneration because the common law would not be construed to provide them. The provide them.

In the not-for-profit, and particularly in the educational, sectors, the tradition continues that trustees serve without compensation. That is as true at Harvard University, with an endowment of \$25.5 billion, 29 as it is at an elite secondary school that resembles the Bishop Trust's Kamehameha, the Milton Hershey School in Pennsylvania, with an endowment of \$5.4 billion. The answer of the Bishop Estate trustees was that by their involvement they acted as five co-CEOs. They analogized themselves to the five fingers of a single hand, akin to partners in a partnership.

Neither the trustees nor those who supported them ever acknowledged the bizarre governance arrangement at Bishop Estate, with five trustees, legally holding part-time positions, being paid \$1 million per year, who purported to manage, hands-on, a complex institution with over \$10 billion in assets.

H. Judicial Review of Directorial Versus Trustee Compensation

As has been seen¹³³ in the field of trusts, courts insist that the trustee's compensation be reasonable. By contrast, in the corporate field, courts have abandoned any meaningful role in the review of directorial or senior executive compensation. In the not-too-distant past, courts abdicated compensation decisions to boards of directors, reviewing the board or a board committee's decision under the highly deferential business judgment rule, with one exception. Courts applied a loose control known as the

^{126.} N.Y. Dock Co. v. McCollum, 16 N.Y.S.2d 844, 847 (N.Y. Sup. Ct. 1939) (corporate directors are not agents; rather they are *sui generis* in the eyes of the law).

^{127.} See IIIA SCOTT & FRATCHER, supra note 86, § 242, at 272–73.

^{128.} King & Roth, *supra* note 7, at 100.

^{129.} See id.; see also Governing Harvard, 108 HARV. MAG., May-June, 2006, at 25, available at http://www.harvardmagazine.com/on-line/050688.html.

^{130.} See Shelly Branch, Trust Pushing Sale of Hershey Raises Level of Criticism, WALL St. J., Aug. 1, 2002, at B6.

^{131.} KING & ROTH, *supra* note 7, at 100.

^{132.} *Id*.

^{133.} See supra note 124 and accompanying text.

^{134.} See Triem, supra note 117, at 26–27.

reasonable relationship test. The test required that a court strike down compensation levels if they bore no *reasonable relationship* to the services or the benefit provided. The services or the benefit provided.

It was then up to the Delaware Chancery Court, in the bubble years of the 1990s, to abandon the reasonable relationship test and other standards of judicial review, perhaps altogether. In a case involving an award of one million stock options to the CEO of Coca Cola as a gift in gratitude for past services, ordinarily considered a waste of corporate assets, Delaware Vice Chancellor Jack Jacobs held that, in effect, only the business judgment rule remains as a standard of judicial review. ¹³⁷ If directors had made a judgment or decision, were free of conflicts of interest in the matter, informed themselves to the extent they believed necessary, and had a rational basis for the decision made, ¹³⁸ courts could not review a decision, including a decision regarding compensation, for reasonableness. ¹³⁹

Thus, although reasonableness remains a yardstick courts can utilize to review a trustee's compensation, in corporate law at least, one authoritative court has abandoned the reasonableness test. In a corporation, the business judgment rule rather than reasonableness has become the standard. If directors and senior executives script it correctly, the compensation decision they reach will not be reviewable by a court in any meaningful sense.

Hawaii's Bishop Estate trust is a cautionary tale for trusts that begin to segue through the operating modus operandi of a number of different entities, without adhering to the principles of sound governance, which in reality apply to charities, trusts, corporations, many partnerships and LLCs, and other forms of entity.

VII. CONCLUSION: INDETERMINACY AND SCHIZOPHRENIA

I used to think that choice of entity was a paramount concern, that continued adherence to a single form of entity was crucial. I

^{135.} The leading reasonable relationship case was *Rogers v. Hill*, 289 U.S. 582, 585, 591 (1933), in which, pursuant to a bylaw containing a bonus formula, American Tobacco paid its senior managers bonuses equivalent to four to five times their annual salaries.

^{136.} Id. at 591.

^{137.} See Zupnick v. Goizueta, 698 A.2d 384, 388 (Del. Ch. 1997).

^{138.} See, e.g., Douglas M. Branson, The Rule that Isn't a Rule – The Business Judgment Rule, 36 VAL. U. L. REV. 631, 639–44 (2002) (discussing components of the rule).

^{139.} See id. at 632, 639-44.

^{140.} See id.; see also Zupnick, 698 A.2d at 388.

argued that, for better or worse, ANCSA corporations should pursue a business corporation analogy down the line. ¹⁴¹

In 1988, I attended a symposium in which the principal speaker, Thomas Berger, a former justice of the British Columbia Supreme Court, regaled listeners with tales of fiascos and management failures in ANCSA corporations in village after village. He laid all failures squarely at the feet of such organizations' formation and operation as corporations, demonizing them in no uncertain terms.

A Native American legal scholar stood to correct Justice Berger. A corporation is merely a form of organization. In this day and age, a Native American tribe functions as if it were organized as a corporation. The council of elders serves as a board of directors, and the chief or head person much as a corporate CEO. The days in which no democracy among members is heeded are gone. Many of the modes of operation and the consequences that flow from the choice of legal entity have long since blurred. A few remain distinct.

Corporate governance, for example, has become governance. The structure and methods that have come to be accepted as ways in which business entities should organize are methods of organization and management. Nothing in them limits their use to corporations, or to business entities. Thus, "[governance under the proposed Restatement of Principles of The Law of Nonprofit Organizations] relies on the traditional corporate model of governance and accountability: a well-informed, independent board." [I]n line with the modern judicial view, [the proposed Restatement] generally conforms charity fiduciary duties to the corporate standard. . . . Despite the differences in terminology, the corporate and trust law standards of conduct do not seem to differ in substance." 144

Thus, there exist nuances that may necessitate an awareness of differences among legal treatments of entities, and perhaps some

^{141.} Branson, *supra* note 2, at 131–32.

^{142.} Thomas Berger, Speech at the American Association of Law Schools Annual Meeting (Jan. 1988). Berger has also written on this matter. *See* Thomas Berger, Village Journey: The Report of the Alaska Native Review Commission (1985). The author of this article reviewed Berger's book. Douglas M. Branson, *ANCSA and 1991: A Framework for Analysis*, 4 Alaska L. Rev. 197 (1987) (book review). In addition, a response to this book review was published in the same issue. Case, *supra* note 6 (book review).

^{143.} PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 25, at xxx.

^{144.} Id. at xxxi-xxxii.

small differences in management methods as well, between trust and corporation, or political entity, charity, or tribe for that matter. The differences, though, are becoming smaller. Indeed, focus on perceived differences in the applicable law may obfuscate the most valuable lesson.

Setting those differences, whatever they may still be, aside, corporate governance is governance and little, if at all, about corporations themselves. Governance is a bundle of tested structures and methods for organizing and managing the affairs of larger entities. Having regard for that principle, together with the lessons learned from the Enron, WorldCom and other debacles, can point the way to best practices for endowments, charities, trusts, not-for-profit entities, as well as business organizations, including ANCSA corporations.

145. Mr. Chief Justice Veasey has stated:

All good corporate governance practices include compliance with statutory law and case law establishing fiduciary duties. But the law of corporate fiduciary duties... [is] distinct from the aspirational goals of ideal corporate governance practices. Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements... are highly desirable, often tend to benefit stockholders, sometimes reduce litigation, and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.

Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000).