

The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form

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In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA),¹ granting the Indians, Eskimos, and Aleuts of Alaska² title to over forty million acres of land³ and awarding them almost one billion dollars⁴ for the extinguishment of their claims to Alaska lands.⁵ At the time, Natives supported ANCSA as a formal recognition of their longstanding use and occupancy of the land. They thought it would safeguard their traditional, subsistence-based economy by securing title to that land for future generations.⁶ ANCSA is unusual both for the enormous compensation it mandated, and for the organizational structure it created to administer settlement benefits.⁷

ANCSA authorized the creation of two tiers of Native corporations to receive federal benefits on behalf of Alaska Natives.⁸ These corporations pay out the direct cash benefits of the settlement as dividends and hold title to the settlement land. The Act divided Alaska into twelve geographic regions, which attempted to group together Natives "having a common heritage and sharing

1. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(e) (1988)).

2. Although the Eskimos, Indians, and Aleuts are each distinct peoples, this Note will refer to them collectively as Natives or Alaska Natives. See THOMAS R. BERGER, *VILLAGE JOURNEY*, at vii-viii (1985) (using same description).

3. 43 U.S.C. §§ 1611, 1613(h) (1988).

4. *Id.* § 1605.

5. *Id.* § 1603; *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1031 (D. Alaska 1977) (holding ANCSA extinguished all claims based on aboriginal title), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980).

6. See BERGER, *supra* note 2, at 26, 60.

7. See H.R. REP. NO. 31, 100th Cong., 1st Sess. 3 (1987). Although the ANCSA settlement was innovative in several areas, this Note addresses only those provisions concerning ownership of land and membership in the entities created under the Act. Several articles have addressed the ramifications of ANCSA for tax and corporate law purposes. See, e.g., Douglas M. Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 UCLA-ALASKA L. REV. 103 (1979); Richard Goodman, *Charitable Donations Under the Alaska Native Claims Settlement Act*, 3 UCLA-ALASKA L. REV. 148 (1973); Monroe E. Price et al., *The Tax Exemption of Native Lands Under Section 21(d) of the Alaska Native Claims Settlement Act*, 6 UCLA-ALASKA L. REV. 1 (1976).

8. 43 U.S.C. §§ 1606-1607.

common interests."⁹ Each region was required to incorporate under the laws of Alaska as a business for profit, and every Native enrolled in that region received one hundred shares of stock.¹⁰ At the second tier of organization, eligible Native villages within each region were also required to incorporate to receive settlement benefits.¹¹ In order to give Natives time to adjust to the concept of corporate organization, stock issues were made inalienable for a twenty-year implementation period.¹² Both regional and village corporations were entitled to select and hold land. Village corporations continue to hold title only to the surface estate, while regional corporations control both the subsurface estates and timber rights of all the lands granted under ANCSA.¹³

Twenty years after the enactment of ANCSA, problems abound. Land conveyances have been slow;¹⁴ the one billion dollars in funds has dried up;¹⁵ many village corporations have considered bankruptcy; and several regional corporations are teetering on the edge of insolvency.¹⁶ Although Congress has enacted several rounds of amendments,¹⁷ the remaining Native corporations are threatened with the loss of their lands. The twenty-year moratorium on the alienability of shares has not proved sufficient to acclimate Alaska Natives to the world of corporate shareholding,¹⁸ and legislative efforts to keep Natives in control of Native corporations after 1991 have been inadequate.

This Note examines issues of membership and landholding under ANCSA and considers how the contemporary corporate view of these concepts collides with Native sovereignty. It looks at the failure of the ANCSA amendments to ensure Native control over Native corporations and to provide secure title to the lands those corporations hold. Using a model of corporate landholding and

9. *Id.* § 1606(a). Congress also provided for the establishment of a 13th region for nonresident Natives. *Id.* § 1606(c).

10. *Id.* § 1606(d), (g).

11. *Id.* § 1607(a). Most Alaska Natives received 100 shares from their regional corporations and 100 shares from their village corporations. Natives associated with a region who did not reside in an eligible village received only regional stock. BERGER, *supra* note 2, at 24. Natives born after the settlement was enacted did not receive any shares. *See* 43 U.S.C. § 1604(a).

12. 43 U.S.C. § 1606(h)(1).

13. *Id.* § 1611(a).

14. "Fifteen years after enactment, Native corporations had received patents to less than 8% of their 40,000,000 acre land entitlement." H.R. REP. NO. 31, *supra* note 7, at 4; *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 748 (1982) (less than 15% of land granted under ANCSA had been conveyed seven years after Act's passage).

15. The nearly one billion dollars in cash benefits was distributed by 1982. S. REP. NO. 201, 100th Cong., 1st Sess. 20, *reprinted in* 1987 U.S.C.C.A.N. 3269, 3270.

16. H.R. REP. NO. 31, *supra* note 7, at 4; U.S. Dep't of the Interior, ANCSA 1985 Study, at ES-14 (June 29, 1984) (unpublished draft) [hereinafter ANCSA 1985 Study] ("[A]t the regional level, only one corporation has not reported a loss since its formation—and more than one has had to consider bankruptcy.").

17. *See, e.g.*, Pub. L. No. 99-96, 99 Stat. 460 (1985); Pub. L. No. 95-178, 91 Stat. 1369 (1977); Pub. L. No. 94-204, 89 Stat. 1145 (1976). The most comprehensive amendments thus far are the Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, 101 Stat. 1788 (1988) (codified at 43 U.S.C. §§ 1601-1629e (1988)) [hereinafter ANCSA amendments].

18. Congress recognized this in its deliberations over the ANCSA amendments. S. REP. NO. 201, *supra* note 15, at 20, *reprinted in* 1987 U.S.C.C.A.N. at 3270-71.

membership based on the chartered cities of the seventeenth and eighteenth centuries, the Note will present a means of rethinking ANCSA corporations that emphasizes affirmative Native control over corporate membership and land. An Australian land rights law will illustrate how corporate landholding can accommodate this limited Native sovereignty.

Part I focuses on ANCSA. It describes the background of the law and its operation. This part also explains the flaws in ANCSA relating to control of Native land and membership in Native organizations and shows why the ANCSA amendments fail to protect Native interests and sovereignty. Part II introduces a theoretical model of corporate sovereignty based on chartered cities, demonstrating a more satisfactory construct for reformulating the means and extent of Native sovereignty over land. It describes the Australian situation in order to highlight some of the advantages and limitations of corporate Native landholding. Part III draws from these two paradigms in order to propose broad conceptual changes that might reconcile Native sovereignty and corporate landholding in Alaska.

I. ALASKA NATIVE CLAIMS

The special relationship between the United States government and Native Americans was established in *Cherokee Nation v. Georgia*, in which Chief Justice Marshall described the Indian tribes as "domestic dependent nations."¹⁹ This dependency is most commonly played out through federal provision of social services and protection of land and subsistence resources. In addition, however, "the ascendancy of federal power over Native American communities creates an unequal *political* relationship upon which the Native Americans are compelled to rely."²⁰ Federal power and Native reliance have created what is often described as a trust relationship. This relationship affirms the distinctness of tribal societies and acknowledges their "nationhood,"²¹ while simultaneously denying them the full sovereignty of a foreign country.²² Yet the

19. 30 U.S. (5 Pet.) 1, 17 (1832).

20. DAVID S. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 4 (1984).

21. The scope of cases dealing with tribal powers and limitations is enormous. For the purposes of this discussion, this Note will mention only powers relating to landholding and membership.

The powers of tribes extend "over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). These powers are not delegated, but arise from the sovereignty that Native groups enjoyed before coming under the authority of the United States. *See generally* COHEN, *supra* note 14, at 229-57 (describing source and scope of tribal authority). Tribes are free to determine their form of government and their membership. *Id.* at 247-48; *see* cases cited *infra* note 81. Tribes also have broad powers to allocate their lands and to regulate land use. COHEN, *supra* note 14, at 250. *But cf.* *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding right of Congress to abrogate Indian treaties); *United States v. Kagama*, 118 U.S. 375 (1886) (upholding federal jurisdiction for punishment of major crimes committed by Indians in Indian country).

22. One of the most significant limitations on Native sovereignty is the prohibition on disposing of tribal lands without the consent of the United States. 25 U.S.C. § 177 (1988). Chief Justice Marshall first formalized this policy in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

category of domestic dependency opens up the possibility that sovereignty is not an all-or-nothing proposition.²³ Instead, sovereignty for Native Alaskans under ANCSA might take an intermediate form that honors the primacy of group landholding for Native identity but relinquishes full territorial jurisdiction.

A. Alaska Native Organization

Alaska Native experience comprises an unusual chapter in the history of federal-Indian relations. There were never any treaties between the federal government and the Alaskans, and very few reservations were ever established.²⁴ Unlike the tribal Indians of the lower forty-eight states, whose experiences have shaped federal policy, Native Alaskan society is generally village oriented.²⁵ Obtaining sovereign status comparable to other Native American groups has been difficult for Alaska Natives, because Alaska Native governments "lack . . . a clearly defined territory subject to their jurisdiction."²⁶ These factors, together with Alaska's remoteness and no previous pressures toward development, help explain why the federal government was slow to recognize that Alaskan Native villages are independent political communities.²⁷

23. See, e.g., Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 967 (1990) (discussing diversity and subtlety of relationships among sovereigns).

24. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977) (discussing history of relations with Native Alaskans), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980).

25. See BERGER, *supra* note 2, at 74; CASE, *supra* note 20, at 441.

26. CASE, *supra* note 20, at 14.

27. The federal government denied the sovereignty of Native villages at an early point in federal-Alaskan relations. *In re Sah Quah*, 31 F. 327 (D. Alaska 1886) (disputing internal governing authority of a group of Tlingit Indians). Disagreement over Alaska Native status continues. As recently as 1988, the Alaska Supreme Court held in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), that "with limited exceptions, there are no 'tribes' in Alaska." Eric Smith & Mary Kancewick, *The Tribal Status of Alaska Natives*, 61 COLO. L. REV. 455, 463 (1990) (footnote omitted). The Ninth Circuit has concluded that Native villages are tribes under federal law. See *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990) (all Indian Reorganization Act or ANCSA Native villages have tribal status); *cf.* *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988) (tribal status of Alaska Native villages and existence of Indian country in Alaska to be determined according to usual federal Indian law tests).

The early statutory treatment of Alaska Natives was equally confused. Although other Native groups were the subjects of special legislation, the first laws relating to Alaska did not distinguish Alaska Natives from other residents of Alaska. CASE, *supra* note 20, at 6-7, 440-42. Native Alaskans finally achieved the same status as other Native Americans when the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988), was amended in 1936 to account for village- as opposed to reservation-oriented self-government. Act of May 1, 1936, ch. 254, § 1, 49 Stat. 1250 (codified at 25 U.S.C. § 473(a) (1988)).

Statutes passed since ANCSA have been ambiguous with respect to the tribal status of Native villages. "[I]n a variety of contexts, Congress treats Alaska Native villages as tribes. However, no statute expressly declares that the villages are tribes with the same legal status as lower 48 tribes." Smith & Kancewick, *supra*, at 459. Nevertheless, Smith and Kancewick contend that Alaska Native villages are tribes for purposes of federal law because they meet the test for tribal status enunciated in *Montoya v. United States*, 180 U.S. 261 (1901). Smith & Kancewick, *supra*, at 482-96. In *Montoya*, the Supreme Court defined a tribe as "a body of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." 180 U.S. at 266.

Although ANCSA does not terminate Native self-government in Alaska, it does sever Native land ownership from Native government, and therefore the territorial reach of tribal council power remains in question. See CASE, *supra* note 20, at 447.

Before 1971, Alaska Native government fell into three categories. Nearly every Native village retained a tribal council,²⁸ and with the extension of the Indian Reorganization Act (IRA) to Alaska in 1936, many villages established federally recognized governments as well. Many Native villages also formed municipal governments under the laws of Alaska.²⁹ In addition to these various governmental bodies, many Alaska Natives participate in village-operated IRA corporations as well as nonprofit development and service groups.³⁰ With the enactment of ANCSA, village and regional corporations were added to the network of Native organizations addressing Native needs. While their functions may seem purely economic, ANCSA corporations have political implications for Alaska Native self-governance.

B. *The Passage of ANCSA*

Before ANCSA, legislation relating to Alaska had postponed defining Native land claims.³¹ Neither the Treaty of Cession,³² which formalized the purchase of Alaska from Russia, nor the Organic Act of 1884,³³ which established a government in the territory, attempted to resolve the problem. It was not until Alaska attained statehood in 1958 that momentum for a settlement began to gather.³⁴ The discovery of oil in Prudhoe Bay in 1969 provided the final impetus for a legislative settlement. Oil companies eager to exploit Alaska's natural resources were unwilling to begin development until title to

28. COHEN, *supra* note 14, at 750. See generally Arthur Hippler & Stephen Conn, *The Village Council and Its Offspring: A Reform for Bush Justice*, 5 UCLA-ALASKA L. REV. 22 (1975) (discussing current functioning of Alaskan village councils).

29. CASE, *supra* note 20, at 372-73. Of 210 Native villages initially recognized under ANCSA, approximately 120 were organized as municipalities under state law. Of those 120, approximately 70 also had organized IRA councils. *Id.*

30. See generally *id.* at 384-414 (discussing nongovernmental Alaska Native organizations).

31. COHEN, *supra* note 14, at 741-43.

32. Treaty Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, U.S.-Russia, 15 Stat. 539.

33. Act of May 17, 1884, ch. 53, 23 Stat. 24.

34. Under the Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339, the federal government authorized Alaska to select over 100 million acres from "vacant, unappropriated, and unreserved" federal land. 72 Stat. at 340. "These lands were regarded as essential to the economic viability of the State." H.R. REP. NO. 523, 92d Cong., 1st Sess. 4 (1971), reprinted in 1971 U.S.C.C.A.N. 2192, 2194. The Act purported to recognize the right of Natives to lands that they used and occupied, but did not attempt to define use or occupancy. During the early 1960's, the impending state selection of 103 million acres from the public domain became a significant danger to Native land rights. ROBERT D. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 100 (1976). In response to this threat, Alaska Natives protested early state selections and filed claims with the Department of the Interior. In late 1967, the Secretary of the Interior ordered a halt to the land conveyances until Alaska Native claims were settled. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1017 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); J. Tate London, *The "1991 Amendments" to the Alaska Native Claims Settlement Act: Protection for Native Lands?*, 8 STAN. ENVTL. L.J. 200, 203-05 (1989). When the land freeze was finally enacted, overlapping Native protest claims totaled nearly 380 million acres—more than the total area of the state. ARNOLD, *supra*, at 119.

the land had been quieted.³⁵ In 1971, Congress responded to these pressures by passing the Alaska Native Claims Settlement Act.

C. Provisions of the Act

The most striking feature of ANCSA is the two-tier corporate structure and shareholding that it mandates for the organizations that administer settlement benefits. The Act divides responsibility for the distribution of land and money; village corporations administer most of the land, and regional corporations control monetary benefits.³⁶

Under the Act, village corporations selected a total of twenty-two million acres of land. Each village's acreage was based on its Native population. All village landholdings consist solely of the surface estate. The regional corporations selected an additional sixteen million acres of land, based not on Native enrollment, but on the land area of each region.³⁷ The remaining two million acres were set aside for Native groups who did not fit into the main provisions of the Act.³⁸ Regional corporations presently hold the subsurface estate of the entire forty million acre settlement. Through an elaborate profit-sharing arrangement, each region must divide seventy percent of its profits from timber and subsurface resources among all twelve regional corporations.³⁹

The monetary settlement was administered entirely by the regions. ANCSA established the Alaska Native Fund in the United States Treasury and authorized payments from two major sources. The fund received general federal appropriations totaling \$462.5 million over an eleven-year period. An additional \$500 million came out of federal and state mineral revenues. Payments were made directly to regional corporations based on the number of Native shareholders in each region.⁴⁰

35. COHEN, *supra* note 14, at 742.

36. Although the mineral estate, which the regional corporations control, would seem to be a part of the land settlement, it is more accurately characterized as a financial benefit. The Department of the Interior explains:

The mineral deposits have not been used by the natives in the past on a village subsistence basis, as has the land, but instead is [sic] included as a part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.

H.R. REP. NO. 523, *supra* note 34, at 16, reprinted in 1971 U.S.C.C.A.N. at 2206.

37. 43 U.S.C. § 1611(c) (1988). Because some of the largest Native regions were also some of the least populous, this provision helped to balance land selections among the various regions. ARNOLD, *supra* note 34, at 257.

38. These included special Native corporations organized in non-Native cities, Natives living away from both cities and villages (the so-called "hermit clause"), Native allotments which were not completed before the passage of the Act, and cemeteries and historic sites. ARNOLD, *supra* note 34, at 151.

39. 43 U.S.C. § 1606(i) (1988).

40. Regional corporations could only retain some of these funds for investment. Fifty-five percent of the monetary settlement had to be distributed to individuals or village corporations. Arthur Lazarus & W. Richard West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS., Winter 1976, at 132, 136.

Although the village corporations are not stockholders or subsidiaries of their regional corporations, the structure of ANCSA creates complex interdependencies between both types of Native corporations.⁴¹ For five years, regional corporations were responsible for supervising payments to the village corporations from the Alaska Native Fund and from timber and subsurface revenues. They not only had the authority to withhold money until the village corporations submitted approved plans for the use of the funds, they also had the power to review and approve village corporations' articles of incorporation and annual budgets.⁴² Furthermore, "[t]he Regional Corporation [could] require a village plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that [would] benefit the region generally."⁴³ Finally, as already mentioned, regional corporations hold subsurface estate to all lands granted under ANCSA. Although severance of ownership between surface and subsurface estates is not unusual in Alaska,⁴⁴ and villages must consent to subsurface development within their boundaries,⁴⁵ this division of title raises problems of accountability.⁴⁶ Thus, while village corporations are established as autonomous entities, the powers granted to the regions can put serious limitations on their independence.

41. Lazarus & West, *supra* note 40, at 135; John F. Walsh, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227, 238 (1985). See generally Monroe E. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act* (pts. 1 & 2), 5 UCLA-ALASKA L. REV. 58, 237 (1975-1976) (commenting on conflicts between regional and village corporations, including issues of financial management, land transactions, and mineral development).

42. 43 U.S.C. §§ 1606(l), (1607)(b) (1988).

43. *Id.* § 1606(l).

44. Alaska is required to reserve title to minerals in the 103 million acres it received under the Alaska Statehood Act. "The Congress then believed that the mineral resources of Alaska were for the benefit of all Alaskans." *Alaska Native Land Claims: Hearings on H.R. 13,142 and H.R. 10,193 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 136 (1969) [hereinafter *1969 Hearings*].

45. "[T]he right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation." 43 U.S.C. § 1613(f) (1988). However, given the conflict in the Act between the role of the villages in protecting subsistence interests for small groups of Natives and the role of the regions in furthering resource development for the benefit of Native Alaskans as a whole, some commentators believe it is unlikely that villages would be able to exercise absolute veto power over regional subsurface development plans. "[T]he Village Corporation cannot veto exploration which would not affect subsistence values or traditional sites, nor can it demand compensation except as a substitute for the value of the surface estate lost." Price, *supra* note 41, at 254.

46. The mining and drilling companies that obtain access to subsurface resources will have no contractual obligations to the Natives who own the surface. They only answer to the regional authorities, which could be hundreds of miles away. Without the benefit of a direct contractual relationship with these companies, villages may find it difficult to ensure that their surface rights are not jeopardized while the companies are operating on their lands. *1969 Hearings, supra* note 44, at 187 (statement of Arthur J. Goldberg, counsel to the Alaska Federation of Natives (AFN)). Under the profit-sharing provisions of the Act, regions may even be required to pursue subsurface development. Price, *supra* note 41, at 251-52.

D. *The Failed Promise*

In the preamble to ANCSA, Congress recognized the enormous material inequities that faced Alaska Natives in the years before the settlement.⁴⁷ Congress stated that the settlement should not only be quick and certain, but that it should be accomplished "in conformity with the real economic and social needs of Natives."⁴⁸ These needs drove the Natives' first spending priorities after the enactment of ANCSA, which included providing adequate housing, supplying drinking water, building sewer systems, and improving education and employment training.⁴⁹

Lawmakers in Washington and Alaska Natives expected that Natives' lives would improve as a result of the substantial resources provided under the Act. But the corporate vehicle itself proved to be a stumbling block. A 1985 Department of the Interior study on the effects of the implementation of ANCSA observed: "[O]ne must bear in mind the limitations of the corporate form of organization as the means of delivering benefits."⁵⁰ Corporations can transfer money directly to shareholders either by giving them jobs or by paying them dividends. ANCSA corporations have only been able to employ a small fraction of Natives, and most corporations have been unable to pay significant dividends.⁵¹ The study concluded that most of the economic improvement for Native Alaskans since the passage of ANCSA could not be attributed to the Act itself.⁵² ANCSA's impact on both Native employment and Native income has been limited to those few jobs created by the new corporations.⁵³

47. It is estimated that Alaska Natives numbered 73,000 in 1800. Their numbers dropped to 28,000 by 1920 and recovered to 60,000 by 1969. *1969 Hearings, supra* note 44, at 283 (answers of AFN to questions submitted by Rep. Aspinall). In 1959, median income for urban Alaska Natives was \$1863, whereas white Alaskans earned \$4768. *Id.* In 1960, about 20% of nonfarming, nonwhite rural Alaskans over the age of 25 (nearly all of whom were Natives) lacked any schooling. Only about 10% of the same group had completed the eighth grade, and only about 1% had completed college. *Id.* at 148. In contrast, the median level of education for whites was more than 12 years. Most telling, perhaps, are statistics on mortality. The average age of death for Native Alaskans in 1966 was 34.5 years, and infant mortality rates for Natives ranged from 3 to 12 times those of whites. *Id.* at 283.

48. 43 U.S.C. § 1601(b) (1988).

49. *1969 Hearings, supra* note 44, at 506 (statement of Emil Notti, AFN president).

50. ANCSA 1985 Study, *supra* note 16, at ES-11.

51. *Id.*

52. A more sweeping conclusion was supported by testimony from the ANCSA hearings conducted by Thomas Berger. One Native observed: "The claims settlement act, to this date, has never put any food on the table yet. [The people are] still living the same way they lived centuries and thousands of years ago. They don't have jobs. They don't have checks from the regional corporations. They're still the same." BERGER, *supra* note 2, at 27.

53. ANCSA 1985 Study, *supra* note 16, at IV-16, IV-18. Despite some marked improvements, average Native family income was 56% of average non-Native family income in 1979. *Id.* at IV-18 (income was \$15,921 for the average Native family and \$28,395 for the average non-Native family). Native housing remained substandard. Thirty-seven percent of Native households had more than one occupant per room, and 40% lacked plumbing. The figures for non-Native households were 7% and 6%, respectively. *Id.* at IV-20. The infant mortality rate for Natives dropped 29% between 1970 and 1980, but the 1980 rate was still almost double that of non-Natives. *Id.* at IV-5. Finally, declines in the rate of deaths among Natives due to prevention of illnesses such as tuberculosis, influenza, and other respiratory diseases were more than offset by the increases in accidents and suicides. The suicide rates for Alaska Natives for the periods 1968-

The performance of the corporations themselves was also disappointing. From the outset, ANCSA corporations were more than just businesses for profit. Rather, they had the impressive task of improving the social and economic status of Alaska Natives. Yet by most accounts, the vast majority of ANCSA corporations have never been economically secure, much less profitable.⁵⁴ Several factors combined to diminish significantly the funds available for maintaining the corporations and for paying direct cash benefits to individual Natives.⁵⁵ These included the high costs of corporate compliance with the Act's requirements,⁵⁶ a period of high inflation in Alaska in the early 1970's,⁵⁷ extensive litigation over ambiguous provisions in the Act,⁵⁸ and long delays in the final conveyancing of land to the regions and villages.⁵⁹ Many smaller village corporations, which received less cash and land because of their size, are insolvent. Mergers, both between villages and between regions and villages, have become one tactic for survival.⁶⁰ Over half of the villages have considered selling some corporate lands to avoid bankruptcy.⁶¹

72 and 1972-81 were two and three times the national rate and over twice the rate for non-Native Alaskans.
Id.

54. *Id.* at ES-14.

55. "Village Corporations were drastically undercapitalized. Although \$962.5 million is a significant sum of money, when paid out over a number of years and divided among 13 Regional Corporations, over 200 Village Corporations, and over 80,000 individual Natives, the average Village Corporation received very little money." S. REP. NO. 201, *supra* note 15, at 21, *reprinted in* 1987 U.S.C.C.A.N. 3269, 3271.

56. Janie Leask, AFN president, testified before Congress on the impact of compliance with ANCSA on village corporations. "We now have villages which are almost broke from going through the steps of incorporation, corporate elections, enrollments, stock issuances, land conveyances, CPA audits, meetings, decisions, public reporting . . . They haven't made much money or really engaged in much economic development activity. But they have implemented ANCSA." H.R. REP. NO. 31, *supra* note 7, at 4. The Department of the Interior reached a similar conclusion. "The workload which the corporations bore in implementing ANCSA should not be underestimated. Corporate resources were strained at the regional level, and even more so at the village level, for several years." ANCSA 1985 Study, *supra* note 16, at ES-13.

Regional and village corporations have invested in a range of projects, including grocery stores, hotel and apartment complexes, office buildings, road construction, and tug and barge services, with varying degrees of success. ARNOLD, *supra* note 34, at 226-27, 231-32.

57. Regional corporations retained distributions from the Alaska Native Fund in order to fund business activities and investments in natural resources. Spreading the payments over a number of years was intended to help corporations maintain a level of income during the startup period. However, inflation reduced the purchasing power of the distributions to regional corporations by 35.7%. ANCSA 1985 Study, *supra* note 16, at III-25.

58. A Senate report on ANCSA estimated the costs of litigation in the tens of millions of dollars. S. REP. NO. 201, *supra* note 15, at 20, *reprinted in* 1987 U.S.C.C.A.N. at 3270. Much of this litigation has focused on the revenue-sharing provision of the Act, 43 U.S.C. § 1606(i) (1988). See COHEN, *supra* note 14, at 749.

59. See *supra* note 14. Due to the complexities of surveying millions of acres, resolving competing claims to tracts of land, and determining a federal easement policy, it was many years before some corporations received formal title to their lands. These delays frustrated resource development plans and forced deferral of substantial revenues. Several village corporations faced serious financial problems because they were unable to generate revenue and had to use Alaska Native Fund distributions to cover operating expenses. ANCSA 1985 Study, *supra* note 16, at III-56.

60. "Due to mergers and consolidations, the number of villages has shrunk [from 224] to 172." ANCSA 1985 Study, *supra* note 16, at V-12.

61. London, *supra* note 34, at 207; Walsh, *supra* note 41, at 233.

The unprecedented structure that Congress chose for administering ANCSA benefits reflects "a tension between the goal of assimilating Alaska Natives and the goal of safeguarding the ancestral lands and culture of Alaska Natives."⁶² On the one hand, corporate shareholding represents a model of mainstream America that Alaska Natives were supposed to embrace as a means of entering the dominant society.⁶³ On the other hand, Native corporations' power to control land without federal interference, coupled with the twenty-year restriction on alienability of shares, "reflects the desire of Congress to allow Alaska Natives maximum control over their own destiny and the destiny of their land."⁶⁴ As the twenty-year period expires, flaws in the Act and its amendments make it likely that this tension will be resolved to the detriment of Native self-determination.

E. *The ANCSA Amendments*

On February 3, 1988, President Reagan signed the ANCSA amendments into law.⁶⁵ These amendments represented nearly six years of efforts by Native groups to ensure that Natives maintained control of ANCSA corporations and their assets after the twenty-year implementation period expired on December 18, 1991.⁶⁶ Their efforts addressed two major concerns: Native control over corporate membership and protection of corporate assets.

1. *Alienability and Membership*

Alaska Natives' immediate concern was the impending alienability of ANCSA corporate stock. ANCSA restricted alienability for twenty years, under the assumption that within that time Native shareholders would have been enriched by the settlement and would be ready to abandon their traditional ways and enter the corporate world. This has not been the case. In addition, most ANCSA corporations have not achieved the financial stability that would enable them to withstand exposure to market forces. The disastrous infancy of the ANCSA corporations makes it clear that the remaining heritage of Native Alaskans, forty million acres of land, is not secure from outside speculators.⁶⁷ The conventional corporate model of freely transferable shares offers no protection from these external forces.

62. London, *supra* note 34, at 201.

63. Monroe E. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89, 95 (1979).

64. Walsh, *supra* note 41, at 232.

65. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, 101 Stat. 1788 (1987) (codified at 43 U.S.C. §§ 1601-1629e (1988)).

66. London, *supra* note 34, at 209.

67. See *supra* text accompanying note 61 (some villages may go bankrupt, leaving non-Native creditors to take over assets).

The ANCSA amendments provide incomplete solutions to the problem of alienability. Through the amendments, ANCSA now allows Native corporations to extend alienability restrictions indefinitely, although they are not required to make these changes. Corporations have several choices: they can opt-out, opt-in, or recapitalize. Under the opt-out approach, alienability restrictions continue until shareholders vote to remove them.⁶⁸ Under the opt-in approach, alienability restrictions terminate unless shareholders vote affirmatively to extend them. Under recapitalization, Native corporations can restructure by issuing different classes of stock carrying different voting rights.⁶⁹

Several features of the Act prevent these amendments from providing full security to Native corporations. Although the shareholders of each corporation can choose whether to extend alienability restrictions indefinitely, villages and regions are linked together in several important ways.⁷⁰ The fact that regions retain control over the subsurface estate of the villages and may compel villages to enter into joint ventures is crucial for the preservation of village subsistence economies. A regional corporation that comes under non-Native control may still require a village corporation that has chosen indefinite inalienability to participate in development it does not want.⁷¹ Even when both the region and the village remain under Native control, restrictions on alienability will not secure village control over the use of village land where there are region-village conflicts over development and land use.

The ANCSA amendments also try to address the growing problem of "new Natives,"⁷² those born after December 18, 1971, who were not included in the original settlement. As amended, ANCSA permits Native corporations to expand the settlement by amending their articles of incorporation and issuing stock to new Natives. Such amendments require the approval of existing shareholders, who also may decide whether new Natives should pay for their stock, receive dividends, or be able to bequeath the stock as part of their estates.⁷³ If the ANCSA amendments merely establish another cutoff date, Congress will either have to deal with another set of new Natives in the future or satisfy itself with settling the claims of existing Natives without equal treatment for future generations. If, however, Congress envisioned corporations with open rolls and continuous stock issues, the amendments undermine the purpose of a stock-issuing, for-profit corporation.⁷⁴

Technical defects aside, none of these amendments addresses the conceptual problem of membership under ANCSA. Generally, the basis of private, shareholding corporations is individual contribution of property. Members buy shares

68. 43 U.S.C. § 1629(c) (1988).

69. *Id.*

70. *See supra* text accompanying notes 41-46.

71. Walsh, *supra* note 41, at 238.

72. London, *supra* note 34, at 206.

73. 43 U.S.C. § 1606(g) (1988).

74. BERGER, *supra* note 2, at 110.

with the understanding that part of the value of membership lies in its transferability.⁷⁵ Native status, however, is not a fungible asset. It is based on association and community, and is closely dependent on group landholding.⁷⁶ The choice of the corporation over the tribe as a paradigm for Native organization is not just symbolic. When Alaska Natives speak of losing control of their corporations, they speak in terms of losing their heritage as Natives. Those born after December 18, 1971, do not articulate their claims as rights to corporate shares as such, but as rights to recognition of their Native status.⁷⁷ Thus, in describing the corporate reports of ANCSA entities, the Department of the Interior observed "a strong sense of a community of interest that encompasses far more than the financial activities of the corporation. This characteristic reflects both the homogeneity of shareholders and the corporations' sense of sociocultural responsibility."⁷⁸

ANCSA corporations were not formed with cultural considerations in mind. Although the corporate landholding is group based, under ANCSA Native interests in land are privatized in corporate entities. Furthermore, since membership in these corporations is not coextensive with Native identity, Native landholding is not firmly under group control.⁷⁹ Native control over ANCSA corporations has a real impact because congressional action since ANCSA has conferred quasi-tribal status on the ANCSA corporations.⁸⁰ Through their ownership of tribal lands and their exercise of tribal powers, ANCSA corporations have become more than private landholding entities. Continuing to treat them as purely economic units with anonymous memberships is incompatible

75. ROBERT CLARK, *CORPORATE LAW* 13-14 (1986).

76. *See, e.g.*, COHEN, *supra* note 14, at 472.

77. One Native woman commented: "It's pretty hard to take when you have a son that's two weeks too late, and he asks you, How come I'm not a Native?" BERGER, *supra* note 2, at 107.

78. ANCSA 1985 Study, *supra* note 16, at V-8. Despite this homogeneity, Native attitudes toward their ANCSA corporations vary widely. In a survey of Natives conducted by the Department of the Interior, when asked if they would ever sell their stock in their village corporations, only 5.1% of Natives said they would. Only 5.8% said they might consider selling their regional corporation stock. *Id.* at IV-32. Yet more than a third said they would consider selling under certain circumstances, "including price offered, personal need, and the identity of the buyer." *Id.* at IV-33. Taking these factors into account, the Department of the Interior concluded that as many as 40% of Natives would sell stock if they were in need. *Id.* at ES-11. However, even with these other variables figured in, fully half of all Natives are "not selling." *Id.* at IV-34.

79. This raises several problems that cannot be answered under traditional corporate law doctrines. If ANCSA corporate stock is sold to non-Natives, at what point would non-Native shareholding terminate a corporation's status as a Native organization? A corporation that had come completely under the control of non-Natives would no longer be distinctly Native for the purposes of federal benefits, but it is not clear what degree of Native ownership is dispositive. CASE, *supra* note 20, at 387-88. Conversely, if there are Natives who do not own ANCSA corporate stock, how can the corporations benefit nonshareholding Natives? They cannot ignore their fiscal responsibilities, but the extent to which ANCSA corporations can participate in projects to benefit the community as a whole is uncertain. The Department of the Interior's conclusions are surprisingly forthright. "Since the benefits of ANCSA are not perceived as connected strictly to stock ownership, the suitability of the corporate form of organization must be questioned." ANCSA 1985 Study, *supra* note 16, at V-7.

80. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e) (1988); Indian Financing Act of 1974, 25 U.S.C. § 1452(c) (1988); Indian Health Care Improvement Act, 25 U.S.C. § 1603(d) (1988); Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(8) (1988).

not only with traditional Native governance, but also with fundamental Native rights to sovereignty.⁸¹

2. *The Settlement Trust Option*

Besides addressing membership in ANCSA corporations, the ANCSA amendments also attempt to safeguard the assets of ANCSA corporations. In their ANCSA draft amendments, the Alaska Federation of Natives (AFN) recommended that ANCSA corporations be permitted to transfer land or other assets to Native entities, such as traditional or IRA tribal councils.⁸² Despite a disclaimer stating that none of the amendments should be construed as “diminishing or in any way affecting the scope of any governmental authority of a federally recognized tribe,”⁸³ the State of Alaska feared that transfers to such qualified transferee entities (QTE) would strengthen the claim that there was “Indian country” in Alaska.⁸⁴ Furthermore, since land conveyed to tribal councils would be held in trust by the federal government,⁸⁵ some argued that the QTE option would contravene Congress’ declaration that “settlement [of Alaska Native claims] should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship.”⁸⁶ For these reasons, the QTE was defeated in favor of the settlement trust option.

The settlement trust option authorizes the transfer of certain ANCSA assets to trusts chartered under state law. Native corporations can use the trusts to protect corporate land from some risks of doing business.⁸⁷ Settlement trusts can manage the lands transferred to them and create institutions designed to “promote the health, education, and welfare of its beneficiaries and preserve

81. Determination of membership in ANCSA corporations may conflict with tribal authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (issues of cultural survival, such as membership, are for tribes to determine without interference); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906) (courts will not confer rights to share in distribution of land in contradiction to tribal principles of citizenship); *Roff v. Burney*, 168 U.S. 218 (1897) (Indian nation has power to confer and revoke membership).

82. *Amendments to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to Establish a Memorial in the District of Columbia: Hearings on S. 485, S. 1330, S. 2065, and S. 2370 Before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources*, 99th Cong., 2d Sess. 165-66 (1986). This became known as the qualified transferee entity option.

83. *Id.* at 169.

84. “Indian country” refers to tribal territorial jurisdiction. It includes all land within Indian reservations, all dependent Indian communities, and all Indian allotments. 18 U.S.C. § 1151 (1988). Since ANCSA did not terminate federal benefits for Alaska Natives, and left intact tribal organizations recognized by the federal government and eligible for federal programs, ANCSA villages remain dependent Indian communities. “As long as the indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered ‘dependent Indian communities.’” COHEN, *supra* note 14, at 766.

85. COHEN, *supra* note 14, at 489. Private purchases of Indian land have been prevented by legislation since colonial times. *Id.* at 508-10; *see also supra* note 22.

86. 43 U.S.C. § 1601(b) (1988).

87. S. REP. NO. 201, *supra* note 15, at 35, *reprinted in* 1987 U.S.C.C.A.N. at 3285.

the heritage and culture of Natives."⁸⁸ There are, however, several serious limitations to the powers of settlement trusts. Regional corporations have veto power over trust instruments. Without a regional corporation's approval, villages in the region may not convey their assets.⁸⁹ Regional corporations are absolutely prohibited from conveying their subsurface estates to trusts.⁹⁰ Finally, settlement trusts may not alienate any land they receive from Native corporations⁹¹ or confer any benefits on Natives who do not own ANCSA stock.⁹²

Although the settlement trust option allows Native corporations to shield some of their assets, it goes only a short distance toward unifying the ownership and management of Native property with the governance of Native people. Settlement trusts are not tribal governing bodies; they are creatures of the state, unrelated to Native government. Conveying assets to a trust will protect the assets from creditors, but since the land held in trust is inalienable, its potential use or development for Native benefit is limited. A QTE would have had the authority to implement need-based benefits for all Natives, but trust power is restricted to providing benefits only to ANCSA shareholders. In addition, by prohibiting the conveyance of subsurface estate to the lands, the settlement trust option ensures that some of the Natives' most valuable assets remain unprotected from creditors and subject to the pressures of corporate profitability. Because trust instruments are subject to regional corporation veto, village autonomy remains subordinate to regional interests under settlement trusts.

II. TRANSFORMING ANCSA CORPORATIONS

At first blush, the idea of treating tribes, clans, and Native villages as corporations seems strained, if not completely counterintuitive. Yet Anglo-American law offers historical models in which corporate landholding and governance converge and in which community and autonomy from central authority are primary. The charter companies that established the American colonies represented delegations of authority from the King that made it possible for autonomous groups of people to hold land jointly and administer their affairs.⁹³ This part offers an alternative analysis of ANCSA corporations by examining the ways in which corporate cities during the colonial period used their corporate individuality and their landholding as a means of maintaining political sovereignty. It then outlines an Australian land claims structure in

88. 43 U.S.C. § 1629e(b)(1).

89. S. REP. NO. 201, *supra* note 15, at 35, *reprinted in* 1987 U.S.C.C.A.N. at 3286.

90. 43 U.S.C. § 1629e(a)(2).

91. *Id.* § 1629e(b)(1)(B).

92. *Id.* § 1629e(b)(1), (3); *see also* S. REP. NO. 201, *supra* note 15, at 35, *reprinted in* 1987 U.S.C.C.A.N. at 3285; London, *supra* note 34, at 224.

93. The corporate chartered city developed from the feudal practice of negotiating "specially tailored 'deals'" between the sovereign and private citizens. Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 377-78 (1985).

order to demonstrate that the corporate form is not necessarily incompatible with Native landholding.

A. *Chartered Cities*

The corporate colonies, derived from the ancient boroughs of England, bore little resemblance to modern-day private corporations. From medieval times through the eighteenth century, “[c]orporations were chartered with particular rights, properties, privileges, and immunities to serve particular purposes.”⁹⁴ All corporations shared the feature of a unique and specific relationship to the sovereign; it allowed them to “‘opt out’ of feudal obligations,”⁹⁵ and gave them their legal identity.⁹⁶ Although the rights and privileges spelled out in the charter determined formal recognition for the ancient borough,

[t]he state did not bring a community into legal existence. It was, rather, in the nature of such a place that it came to be viewed as a singular individual. And it was the presence of recognized corporate property that gave it such a nature, the presence of an estate that was not the ‘common’ property of all the community’s residents.⁹⁷

Since early English corporation law simply provided “a framework that enabled a group to act in concert,”⁹⁸ charters often merely formalized existing arrangements. By virtue of their preexisting singularity and their exercise of “corporate” powers over corporate estates, ancient boroughs frequently derived their corporate status independent of their charters.⁹⁹

The charter confirmed corporate ownership of property and determination of membership. With respect to property, the charter defined a preexisting community by what it owned, not as a collective or a commons, but as an “individual.” Corporate membership, in turn, was conceived not as an asset one could buy or sell, but as a nonfungible characteristic derived by virtue of one’s belonging to the “person” of the corporate community.¹⁰⁰ These guarantees, of financial independence in the form of property and of personhood in the form of rights over membership, gave the corporation an “autonomy protected against the power of the central state.”¹⁰¹ Property, which made autonomy

94. HENDRICK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* 22 (1983).

95. Williams, *supra* note 93, at 374.

96. FREDERIC W. MAITLAND, *TOWNSHIP AND BOROUGH* 18 (1898).

97. HARTOG, *supra* note 94, at 180.

98. Williams, *supra* note 93, at 383.

99. MAITLAND, *supra* note 96, at 19. “[T]he corporateness of the old boroughs was not manufactured but grew . . .” *Id.* at 20.

100. Maitland describes this as “not the transfer of something, some thing, called ownership from one sort of ‘units’ to another . . . [but] the crystallization round several different centres and in very different shapes of that vague ‘belongs’ which contains both public power and private right, power over persons, right in things.” *Id.* at 30.

101. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1081 (1980).

realizable, "was closely tied to the very possibility of an individualized personality, to a classical notion of citizenship. Property made it possible for a person to shape an identity rather than to be shaped by external forces."¹⁰² For the person of the corporate city, this meant the ability to govern by its own rules.

1. *The Case of Colonial New York*

Modern municipal law treats cities as mere creatures of the state,¹⁰³ whose function is to accept delegated state power and carry out state policy. But city power has not always been so circumscribed. In his book, *Public Property and Private Power*, Hendrik Hartog provides a history of the corporation of the city of New York.¹⁰⁴ New York City, using its royal charter as the basis for its authority,¹⁰⁵ controlled significant aspects of its own development and managed serious city problems using its real estate. Central to Hartog's account is the importance of corporate private property "as a continuing tool of governance."¹⁰⁶

The waterlot grant system was an early example of this indirect, property-based form of governance.¹⁰⁷ New York was founded as a port city, and the charter company expected that commerce and the shipping industry would generate major corporate revenues.¹⁰⁸ Rather than finance waterfront development itself, the corporation turned to individual landholders. In exchange for the profits that individual operators could make from renting docks, wharves, and piers constructed on waterlots granted by the city, individual grantees were required to build two streets or wharves and to maintain them for the benefit of the public.¹⁰⁹ While lacking the infrastructure and administrative capability of a twentieth-century city, colonial New York could, through the waterlot grants, direct the development of a major asset and profit from it as well.

102. HARTOG, *supra* note 94, at 24.

103. See 1 CHESTER J. ANTEAU, *MUNICIPAL CORPORATION LAW* § 2.00 (1989). This doctrine traces its origins to *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 638, 668-69 (1819).

104. HARTOG, *supra* note 94.

105. The Montgomerie Charter of 1730, New York's last and most extensive charter, granted the corporation an elective structure and additional lands. More importantly, the city received governmental powers. A Common Council was established to pass ordinances and bylaws "for the further publick good common profit trade and better government and rule of the Said City and for the better preserving governing disposing letting and Setting of the land Tenements possessions and hereditaments goods and Chattels" of the corporation. HARTOG, *supra* note 94, at 16 (quoting 2 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 611 (Albany, J.B. Lyon 1894)). The Montgomerie Charter created an institution in which rights to property and rights to government were inseparable. Unlike the view of municipal law that came to predominate in the 19th century, courts and legislatures in 18th-century New York viewed the Montgomerie Charter "as a property transaction rather than a delegation of governmental powers." *Id.* at 20. New York City's status was not unique. Colonial company charters generally conferred land and trading privileges in addition to quasi-governmental powers. See H.R. Hahlo, *Early Progenitors of the Modern Company*, 27 *JURID. REV.* 139, 157 (1982).

106. HARTOG, *supra* note 94, at 8.

107. *Id.* at 44-68.

108. *Id.* at 53-58.

109. *Id.* at 50.

For chartered cities and ancient boroughs, there was a complex link between the property, membership, and governance of a community, and the sovereignty that community enjoyed.¹¹⁰ In the case of New York City, the corporation owned and managed its private estate and its government. These extensive holdings allowed the corporation a sphere of autonomy that remained undisturbed by the state into the nineteenth century. At its height, this corporate autonomy was exemplified by New York City's requirement that its members take an oath of "political allegiance to the corporation as an autonomous political entity."¹¹¹ The governmental and proprietary functions of the city merged in its residents as well. New York was an "open" corporation; citizens of the city were members of the corporation.¹¹² They enjoyed this status not because they had purchased a transferable right, but because the city was an association, a "person," inseparable from the individuals who comprised it.¹¹³

Corporate New York's decline occurred during the nineteenth century, contemporaneous with the evolution of centralized government and the increasing importance of the distinction between governmental functions and private enterprise. As a result, "New York City's ability to manage its corporate endowment, once the symbol and the reality of its chartered independence, was now held to be just another derivative power, subordinate like all the others to the state legislative will."¹¹⁴

2. *Implications for Alaska Natives*

Alaska Natives' exercise of self-government under ANCSA raises some of these same complexities. The relationship between the federal government and the Indian tribes suggests a relationship similar to that which once existed between the corporation and the King. Just as early corporate law provided a formal basis for a preexisting community to act in concert, under federal Indian law Indian sovereignty is inherent in the tribe and not the result of a grant of rights from the state. But in Alaska, although villages traditionally controlled Native landholding, ANCSA specifically divorces land ownership from governance.¹¹⁵ ANCSA treats landholding by Native corporations as a grant from the federal government, thereby diminishing the sovereignty of Alaska Natives;

110. "All political power exhibits proprietary traits, and every ownership of land is actually or potentially a right of governing and doing justice." MATLAND, *supra* note 96, at 31.

111. HARTOG, *supra* note 94, at 102.

112. *Id.* at 36-37. This was not the case in Philadelphia, the other major chartered colonial city, where only the elite of the city participated in its governance. *Id.*

113. During the 18th and early 19th centuries, incorporated companies were not conceived separately from their members. Instead of the incorporators "forming" a corporation as we would say today, at the time incorporators were said to have "formed themselves into" a corporation, thus implying that, although the corporation had an independent legal existence, it was not abstracted from its members. Paddy Ireland et al., *The Conceptual Foundations of Modern Company Law*, 14 J.L. & SOC'Y 149, 150 (1987).

114. Carol M. Rose, *Public Property, Old and New*, 79 NW. U. L. REV. 216, 218 (1984) (reviewing HARTOG, *supra* note 94).

115. CASE, *supra* note 20, at 447.

similarly, New York lost its corporate sovereignty once the management of its corporate endowment was held to be derived from the state. In both cases, the preexisting autonomous unit was subordinated to the state. This means that ANCSA corporations are unable to govern their property autonomously.

Like the chartered cities, ANCSA corporations manifest their corporate identity through the individual character of their property and the uniqueness of their membership. As private entities, however, ANCSA corporations lack the quasi-governmental authority of the chartered cities that would enable them to combine their ownership of land with a claim of sovereign territory. This limitation results in part from our development of a body of federal Indian law that can reconcile landlessness with a measure of sovereignty¹¹⁶ and a theory of municipal law that can divorce territorial control from governmental autonomy.¹¹⁷ The further distinction in municipal corporate law between public, governmental functions and private enterprise “equally works a split in the . . . association of property and government. In the modern vocabulary, ‘property’ is depoliticized into the ‘private’ property of individuals, and ‘government’ is de-propertyed into the range of ‘public’ activities best managed by the large-scale centralized state.”¹¹⁸

For Alaska Natives, the depoliticizing of property and the “de-property-ing” of government may prove fatal. Although we may be able to conceive of a landless yet sovereign tribe, or a territory lacking a fully independent government, such a split between land and governance can only weaken Native sovereignty. Without the deeply political notion of group landholding, or the more intimate means of governance implied by sovereign land management, Alaska Native autonomy risks being swallowed by the market for corporate control. Under ANCSA, private landowning entities have become the guardians of Native heritage, the emblem of Native culture, and the best hope for achieving some measure of economic security for Native communities.¹¹⁹ By virtue of their assets, ANCSA corporations have enormous potential to influence and better the lives of Alaska Natives. Yet, as private corporations, they lack the powers of political governance. They are unable to protect and to use their property for the benefit of the Native population as a whole. They are even unable to define the community they serve. Although the corporations own the land, they are not sovereign over it.

The ANCSA amendments represent an effort at damage control. They attempt to correct flaws in ANCSA by introducing ways in which ANCSA land and membership can be controlled so that Native interests are not overshadow-

116. *See id.* at 467.

117. *See* 1 ANTIEAU, *supra* note 103, §§ 2.00-16.

118. Rose, *supra* note 114, at 223.

119. *See* Walsh, *supra* note 41, at 228. *See generally* BERGER, *supra* note 2, at 90-91 (discussing Native conflict between development and traditional relationship to land). In some cases, village corporations are even formally recognized as tribes. *See supra* text accompanying note 80.

owed. ANCSA corporations now have the ability to limit their membership to Natives and to include new Natives. They may also protect some of their assets by putting them in state-chartered trusts. Both remedies address the Act's problems ad hoc. The ANCSA amendments do nothing to remedy ANCSA's conceptual incongruities, and therefore they cannot address the sovereign interest of Alaska Natives to control affirmatively their land and their membership. If corporate Native landholding is to work at all, the modern notion of corporate existence must take into account traditional relationships to land.

B. *The Australian Perspective*

According to Felix Cohen, a basic principle of Indian law is that "those powers which are lawfully vested in an Indian tribe are not delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'"¹²⁰ The powers exercised by tribes are the indicia of their independence; they are in no way derived from federal authority. Yet, under ANCSA, Native control over land appears to be a delegation from the federal government to the Native corporations. Traditionally, the village controlled its lands, but ANCSA deliberately "severed Native land ownership from Native government."¹²¹ This severance has severely circumscribed the ability of Alaska Natives to control their future collectively.

Corporate native landholding of a different sort is in force in Australia. Although Aborigines have no formal rights to sovereignty over their clan lands, the Australian Parliament has enacted legislation that allows groups of Aborigines to claim traditional territory. This landholding is corporate, but the structure avoids the problems of membership and alienability that surfaced with ANCSA. The Australian legislation effects a compromise resulting in greater respect for traditional forms of ownership than in Alaska, but also less freedom for Native groups in making use of their land.

1. *The Aboriginal Land Rights (Northern Territory) Act*

In 1976, the Australian Parliament passed The Aboriginal¹²² Land Rights (Northern Territory) Act (ALRA).¹²³ The ALRA was enacted after years of agitation by Aborigines and the failure of Australian courts to recognize aboriginal title to land based on use and occupancy.¹²⁴ The primary functions

120. COHEN, *supra* note 14, at 231 (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)).

121. CASE, *supra* note 20, at 447.

122. The official Australian term for the original occupants of Australia is "Aboriginals." This Note will follow the convention of Aboriginal rights activists and refer to them as "Aborigines" unless the context requires the adjectival form.

123. 1976 AUSTRAL. ACTS P. 191 [hereinafter ALRA].

124. *See, e.g., Milirrpum v. Nabalco*, 17 F.L.R. 141 (Sup. Ct. N. Terr. 1971). For a thorough account of Aboriginal activism from settlement through the 1970's, see LORNA LIPPMANN, *GENERATIONS OF*

of the Act are to create a procedure by which groups of Aborigines can claim and hold land within the Northern Territory based on "traditional ownership"¹²⁵ and to protect land under aboriginal title.

Although there are substantial differences between ANCSA and ALRA,¹²⁶ both acts attempt to formalize native landholding in corporate structures. Instead of regional and village corporations, ALRA creates land councils and land trusts. The statute divides the Northern Territory into two regions and establishes a land council in each area. Land councils are corporate bodies that may acquire, hold, and dispose of property.¹²⁷ Their members are Aborigines living in the land council area, chosen by other Aborigines of the area.¹²⁸ The council is a representative body with broad responsibilities for determining the wishes of the Aborigines of the region regarding the management of Aboriginal land, protecting the interests of traditional owners of Aboriginal land, consulting with traditional owners regarding any proposal for using Aboriginal land, and negotiating with parties wishing to use Aboriginal land.¹²⁹

RESISTANCE: THE ABORIGINAL STRUGGLE FOR JUSTICE (1981).

Understanding the difference between the treatment of Native Americans and Aborigines requires some discussion of the legal regime under which England established its colonies. Under the rules of international law applicable during the American colonial era, "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). The original inhabitants were recognized as the rightful occupants of the land, but their power to dispose of the land as they wished was limited by their having come under the authority of the discovering nation. *Id.* at 574. The rule of discovery, however, did not declare an absolute right to land for the discovering power. See HENRY REYNOLDS, *THE LAW OF THE LAND* 10 (1987). Rather, discovery gave "an inchoate title which could only be developed further by actual occupation." *Id.* at 10-11. In the United States, the consistent policy toward Native land claims has been "to grant . . . title to a portion of the lands which [the Native people] occupied, to extinguish the aboriginal title to the remainder of the lands . . . and to pay the fair value of the titles extinguished." H.R. REP. NO. 523, *supra* note 34, at 4, *reprinted in* 1971 U.S.C.C.A.N. at 2193-94.

The legal status of the Australian colonies under international law was quite different. Australia was not discovered and conquered. Instead, it acquired the status of *terra nullius*—land belonging to no one. REYNOLDS, *supra*, at 12. European thinkers reasoned that such countries could be legitimately annexed. Although it was clear by the beginning of the 19th century that Australia was not the "solitary haunt of a few miserable savages," *id.* at 32, the British authorities never challenged explorers' early observations that, aside from a few small parties gathered on the coast, the continent was uninhabited. Their ultimate justification for claiming ownership of half the continent in 1788 (long before Europeans had traversed most of the land) was that since the Aborigines "ranged over [the land] rather than resided on it," the British themselves were the original occupants. *Id.* at 13. This is the legal basis on which the sovereignty of Aborigines has been denied.

125. "Traditional Aboriginal owners" of land are "a local descent group of Aborigines who have . . . common spiritual affiliations to a site on the land . . . that place the group under a primary spiritual responsibility for . . . the land; and . . . are entitled by Aboriginal tradition to forage as of right over that land." ALRA, *supra* note 123, § 3.

126. The two acts have fundamentally different purposes. ANCSA is a land settlement act. In exchange for the extinguishment of aboriginal title in a large area of land, ANCSA conveys a portion of that land to Natives in fee. ALRA is a land claims act. It gives title to Aborigines who can demonstrate group ownership of land.

127. ALRA, *supra* note 123, § 22.

128. *Id.* § 29.

129. JOHN L. TOOHEY, SEVEN YEARS ON: REPORT BY MR. JUSTICE TOOHEY TO THE MINISTER FOR ABORIGINAL AFFAIRS ON THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976 AND RELATED MATTERS 56 (1983).

Under ALRA, Aborigines claiming traditional ownership of land make a formal application to the Aboriginal Land Commissioner to have their claim investigated. The Aboriginal Land Commissioner gives directions for hearing the claim, and if he is satisfied that the Aborigines are the traditional owners of the land, he recommends to the Minister of Aboriginal Affairs that a land grant be made.¹³⁰ If the Minister is also satisfied with the claim's validity, he establishes a land trust to receive land for the benefit of the traditional owners and recommends to the Governor-General that a fee simple estate be granted to the trust.¹³¹ Land trusts hold title to land for the benefit of a single descent group of Aborigines who are entitled to the use and occupation of the land concerned.¹³² The land trusts are corporate bodies, consisting of four or more Aborigines who live in the area of the land council or who are, in the opinion of the land council, traditional owners of the land held by the trust.¹³³

Since most Aborigines who can demonstrate traditional ownership are neither readily identifiable to outsiders nor conversant in Western concepts of landholding, ALRA "interpose[s] a Land Council between the traditional owners and those who wish to deal in some way with Aboriginal land."¹³⁴ Although the land council is authorized to deal with parties seeking to use Aboriginal land, it cannot take any action concerning land trust land unless "the traditional Aboriginal owners . . . of that land understand the nature and purpose of the proposed action and, as a group, consent to it."¹³⁵ Land vested in a land trust is generally inalienable,¹³⁶ although leasing is permitted.

2. *Comparison With ANCSA*

Despite different legal regimes with respect to native land rights, the Alaskan and Australian acts adopt some of the same mechanisms to reconcile native and Western patterns of landholding and land use. In certain respects, ALRA balances these incompatible patterns more successfully than ANCSA does.

The Australian Parliament avoided the pitfall of imposing a definition of native status on Aborigines by allowing them to determine the membership of Aboriginal corporations themselves. ALRA tautologously defines an "Aboriginal" as "a person who is a member of the Aboriginal race of Australia."¹³⁷ In establishing traditional ownership, however, ALRA addresses the rights of clan groups, not individual Aborigines. It is the clans, self-perpetuating and self-

130. ALRA, *supra* note 123, § 50(1)(a).

131. *Id.* § 11(1).

132. *See id.* §§ 4-5.

133. *Id.* § 7.

134. TOOHEY, *supra* note 129, at 56.

135. ALRA, *supra* note 123, § 23(3)(a).

136. *Id.* § 19.

137. *Id.* § 3.

defining groups of people, who assert ownership over traditional territory. The perpetuation of the group through time is determined by Aboriginal customs of descent and relation to land.¹³⁸ By recognizing the authority of Aboriginal clans to determine their makeup and to allow for change over time, ALRA achieves a measure of independence and self-determination for Aborigines.

Aborigines do not have federally recognized governments for most purposes. Nevertheless, provisions of the Act show considerable deference to the desires of Aborigines to control their ancestral lands. Although ALRA introduces new forms of administration to Aboriginal society, it also recognizes that existing Aboriginal forms of governance should decide how that administration should proceed.¹³⁹ ALRA puts title to Aboriginal lands in trusts overseen by Aborigines who are themselves traditional owners.¹⁴⁰ These trusts are supervised and assisted by land councils, who represent all the Aborigines of the region. This structure is roughly analogous to the village and regional corporations under ANCSA. Unlike ANCSA, however, ALRA eschews complex financial interconnections between the two tiers of corporate organization, thereby avoiding potential incentives for coercing development at the local level. Recognizing the collective nature of traditional Aboriginal decision-making, ALRA prohibits the land council and the trustees from making any material decisions about land trust land without the cooperation of the traditional owners as a group.¹⁴¹

Land councils are an important resource for the local descent groups, but they also have broad protective powers over the land trusts. Land trusts not only need the consent of the traditional owners as a group before approving development, they also must obtain permission from the land council for any encumbrance of their land.¹⁴² Alienation of Aboriginal land requires the consent of the Minister for Aboriginal Affairs.¹⁴³

One remarkable feature of the Act is that Aborigines demonstrating traditional ownership of land are granted extensive mineral rights over that land. Private ownership of subsurface petroleum or natural gas does not exist in

138. See, e.g., Nancy Williams, *Yolngu Concepts of Land Ownership*, in *ABORIGINES, LAND AND LAND RIGHTS* 94, 98-100 (Nicolas Peterson & Marcia Langton eds., 1983).

139. A.E. WOODWARD, *ABORIGINAL LAND RIGHTS COMMISSION SECOND REPORT* 11 (1974).

140. Justice Woodward foresaw a significant role for land trusts, despite their limited powers. "If the right people are appointed to them, they will represent the maintenance of traditional values. The idea is that the trustees should be drawn from the most important tribal leaders in the area concerned." *Id.* at 71. This is in contrast to Justice Toohey's later observations about the land councils. "In light of . . . the relatively artificial structure of Land Councils, the members of councils may not always be those who would speak with the most authority on land matters in local communities." TOOHEY, *supra* note 129, at 47.

141. Cooperation does not mean unanimity—only a simple group consensus as it is traditionally obtained. *Alderson v. Northern Land Council*, 67 F.L.R. 353, 361-62 (Sup. Ct. N. Terr. 1983). Although ANCSA also requires the consent of the villages for subsurface development, various wrinkles in region/village relations qualify this consent. See *supra* notes 45, 71 and accompanying text.

142. ALRA, *supra* note 123, § 5(2)(a).

143. *Id.* § 19(2). This clear example of paternalism in ALRA is in contrast to the fee simple land grant under ANCSA.

Australia, nor is there much private ownership of solid minerals.¹⁴⁴ Nevertheless, from the outset, the Australian authorities have recognized that Aboriginal interest in land extends below the surface.¹⁴⁵ Thus, although they have never enjoyed the formal legal recognition accorded to Native Alaskans, some Aborigines have achieved a form of sovereignty over their traditional lands that exceeds the conventional rights in land normally recognized in Australia.

Aborigines of the Northern Territory can now claim ancestral lands and receive title to them. Once traditional ownership is established, it is recognized in perpetuity. The Act's prohibition on alienation is strongly paternalistic, but development remains an option for those traditional owners who choose to enter leasing agreements with the permission of the land council, and revenues from mineral royalties are made available to Aborigines through the Aborigines Benefit Trust Account.

III. TRIBE AS CORPORATION: CORPORATION AS TRIBE

The models of corporate landholding exemplified by chartered cities and the Aboriginal Land Rights Act suggest that one way to address the interrelated problems of the alienability of ANCSA land and the alienability of ANCSA corporate membership is to reformulate the structure and powers of ANCSA corporations. Landholding for Native Alaskans could entail an intermediate sovereignty, one that would not require a complete jurisdiction coextensive with territory, but would demand respect for certain essential land rights.

ANCSA corporate membership should be defined by belonging to the "corporate body" rather than by ownership of shares. In Australia, determinations of traditional land ownership apply to preexisting groups, not to individuals. Similarly, membership in the corporation of the city of New York was a lifelong association. For ANCSA corporations, an autonomous understanding of corporate membership would mean abandoning shareholding and relying on Alaska Native tradition. This would eradicate the conceptual difficulties posed both by new Natives and control by non-Native shareholders.

144. Philip McNamara, *Mineral Resources in Lands Owned by Australian Aborigines*, 7 J. ENERGY L. & POL'Y 1, 16 (1986).

145.

[I]t is clear that Aboriginal ownership was not expressed in terms merely of the land surface. In many of the legends which gave expression to man's spiritual connexion with his land, his mythical forbears emerged from the ground and returned to it at different points in their sagas. Their spirit essences still pervade those places and are retained in the soil and the rocks.

WOODWARD, *supra* note 139, at 104.

Under ALRA, land trusts have veto power over proposed mineral development and the ability to negotiate terms on which mining may be conducted. The Act also authorizes payment of mineral royalties into the Aborigines Benefit Trust Account, ALRA, *supra* note 123, § 63(2), despite the fact that Australian mining law is based on the assumption that all minerals belong to the Crown. WOODWARD, *supra* note 139, at 115.

The Alaska Native Fund has been completely exhausted; therefore, some oversight functions of the regional corporations are no longer necessary. Nevertheless, regional corporations could continue to be useful in coordinating subsurface development because individual projects may include many villages, and orderly development may require centralized administrative bodies. The regional corporations could advise, facilitate, and negotiate mineral and resource leasing, timber rights, and land development in a manner similar to Aboriginal Land Councils. They could also adopt a role like that of the land councils by serving as a buffer between villages and outside interests. Where regional corporations have developed technical and business expertise, they could help shield villages from exploitation. However, since Alaska Native government has always been focused at the village level, any reformulation of ANCSA should reject the strong paternalism of ALRA and give villages and regions equal power in controlling subsurface estate and timber rights.

Like the corporate cities, ANCSA-incorporated villages should receive quasi-governmental powers over the land they own. This could be accomplished through special purpose federal charters¹⁴⁶ delineating their powers.¹⁴⁷ Assuming that membership in Native corporations is determined according to Native criteria, those powers should include the power to own, alienate, lease, manage, preserve, zone, and otherwise dispose of land for the continued use and benefit of Alaska Natives and their descendants; the power to determine membership in the landholding organ; and the power to make rules and regulations for the use and enjoyment of the corporate property. Corporate governmental powers should be expressly limited to exclude civil and criminal jurisdiction over the corporate territory.¹⁴⁸ The result would be a body with distinct and explicit authority to govern Native lands. Once Native sovereignty over land use is clear, it would be possible for Native villages to use their property as a "continuing tool of governance."¹⁴⁹ Regardless of the policies they might follow concerning development, individual villages would have unquestionable authority to manage their lands.

Corporate leadership should be determined by the villages. Some villages may choose to control the corporation through existing entities, while other villages may choose to create councils dealing specifically with land and land use.¹⁵⁰ In any case, villagers, the "traditional owners" of the land, should

146. The Indian Reorganization Act authorizes the Secretary of the Interior to charter business corporations. 25 U.S.C. § 477 (1988).

147. See *supra* note 105.

148. In rejecting the qualified transferee entity option in 1987, Congress was concerned with the impact that tribal ownership of corporate assets would have for the sovereignty debate in Alaska. See *supra* notes 27, 84. Corporations chartered for special purposes could avoid that controversy by expressly limiting the powers of the corporation to dealings in land and excluding criminal or civil jurisdiction over that land.

149. See *supra* note 106 and accompanying text.

150. Whichever option they choose, villages would not need to exert great organizational effort to assume explicit quasi-governmental power over their land. There may already be de facto Native governmental control in some villages. "[I]t is not unusual for a small village with limited leadership resources to have

decide how their chartered landholding body will be governed. Such an arrangement would reconcile both governmental and Native aspirations for the administration of the settlement land. By relinquishing claims to criminal and civil jurisdiction outside this realm of sovereign land management, Alaskan villages would satisfy state concerns about Native territorial jurisdiction.¹⁵¹ By holding their lands in fee, Alaskan villages would fulfill the congressional intent that ANCSA not create a federal wardship or trusteeship. By reuniting land ownership with a measure of governance, Alaskan villages would approach a level of independence that was once enjoyed by the corporate boroughs and cities.

IV. CONCLUSION

For the corporate city as well as the tribe, the problem is one of an ambiguously sovereign authority. The decline of the corporation of the city of New York, and of city power generally, has sometimes been attributed to "the more general liberal hostility towards all entities intermediate between the state and the individual, and thus all forms of decentralized power."¹⁵² This hostility rests on the fallacy of viewing sovereignty as an absolute. Our legal system's discomfort with shades of sovereignty is manifest both in modern municipal law and in federal Indian policy. In ANCSA, we see the results of an attempt to shift Native sovereignty out of the realm of political rights entirely and into a privatized form.

We need not conceive of sovereignty in black and white. Indeed, John Marshall recognized its relativity with the term "domestic dependent nations."¹⁵³ Sovereignty is better understood as an interaction between spheres of more and less limited powers.

Sovereignty-talk, at its best, comprehends the willingness and the ability to hold, in tandem, apparently contradictory images of the relationship between self and other. It is the ability to insist on absolute dominion, and yet also recognize the dominion of others, or to comprehend the possibilities of equality even while also comprehending a relationship of hierarchy.¹⁵⁴

Within this framework of simultaneous equality and dependency we can understand and evaluate the powers and limitations of corporate tribal sovereignty for Alaska Natives.

a considerable overlap in its decisionmaking bodies; the same people may sit on the city council, the traditional or IRA council, and the village corporation's board." ANCSA 1985 Study, *supra* note 16, at V-20.

151. See *supra* note 84.

152. Frug, *supra* note 101, at 1080.

153. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1832).

154. Dane, *supra* note 23, at 991.

