

# THE NORTH DAKOTA PUBLICLY TRADED CORPORATIONS ACT: A BRANDING INITIATIVE WITHOUT A (NORTH DAKOTA) BRAND

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## I. INTRODUCTION

When the North Dakota Publicly Traded Corporations Act<sup>1</sup> (“Act”) became law on July 2, 2007, the state of North Dakota officially entered (or tried to enter) the corporate governance market. The Act put North Dakota in direct “competition” with Delaware, which is the corporate home to just under two-thirds of all Fortune 500 companies and was the state of incorporation for approximately “75% of all U.S. initial public offerings since January 2003.”<sup>2</sup> Why North Dakota decided to enter this market is not entirely clear. Part of the answer is that out-of-state proponents of this and similar laws thought (not inappropriately) that North Dakota might adopt it, thus providing a pulpit from which to promote their views of good corporate governance.<sup>3</sup> The other part is that at least some North Dakota supporters believe that the Act might attract new business to the state.<sup>4</sup>

One thing is certain, it was not because North Dakota had significant prior experience with public corporations. As of January 2008, only two publicly traded corporations were incorporated under North Dakota law, the

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1. N.D. CENT. CODE ch. 10-35 (2007).

2. William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response To Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95, 99 (citing E-mail from Richard J. Geisenberg, Assistant Sec’y of State, State of Del., (Oct. 2007); see also Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 212 (2006) (stating that about 50% “of the largest corporations are incorporated in Delaware, the majority of firms going public for the first time are incorporated in Delaware, and the overwhelming majority of firms that change their domicile mid-stream reincorporate in Delaware”).

3. See *Hearing on H.B. 1340 Before the House Judiciary Comm.*, 60th N.D. Legis. Sess., at 12 (Jan. 24, 2007) (testimony of William H. Clark, Jr., President ND Governance Council), available at <http://ndcgc.org/Reference/CommitteeMinutes/2007.01.24%20House%20Judiciary%20Committee%20Minutes.PDF> [hereinafter *Clark Testimony*] (explaining that the law was first proposed and considered in Vermont and that several lessons were learned from the first attempt).

4. *Id.* at 1 (testimony of Rep. Rick Berg) (“This bill has tremendous potential [to] encourage businesses to come to [North Dakota and] it has a real opportunity to not only attract these businesses, but also tell the rest of the country . . . that [North Dakota] believes in a business model that encourages shareholder involvement and support.”).

same number that existed before the optional Act passed.<sup>5</sup> Despite a solid and stable business climate in North Dakota, this is not likely to change much in the foreseeable future.

To be clear, this Article is not arguing that the Act was bad (or good) for North Dakota or that any significant harm (or benefit) has followed directly in its wake. There is already significant debate about the value of increased shareholder (and institutional investor) rights, both in legal scholarship<sup>6</sup> and in the testimony related to passage of the Act.<sup>7</sup> This Article is specifically not entering the debate about whether increased shareholder rights, generally, or the Act, specifically, will help or harm corporations by virtue of the laws themselves. That is for another day or for other commentators. This Article argues that there were, and are, legislative and public relations options that are necessary if North Dakota is to reap any lasting benefit from passage of the Act. What is clear is that North Dakota has gained some national publicity for taking innovative and unique (if largely ineffective) measures in an area traditionally dominated by Delaware.<sup>8</sup>

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5. See *Hearing on H.B. 1340 Before the House Judiciary Comm.*, 60th N.D. Legis. Sess., at 1 (Mar. 5, 2007) (testimony of Dave MacIver), available at <http://ndcgc.org/Reference/Hearings/Tab15.pdf> [hereinafter *MacIver Testimony*]. The two corporations are Integrity Mutual Funds and Dakota Growers Pasta. *Id.*

6. Compare Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1149-50 (1997) (stating that strong protection for minority shareholders leads to better market and better corporate governance), and Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 783 (2001) (arguing that strong public markets requires laws to ensure that minority shareholders have: “(1) good information about the value of a company’s business and (2) confidence that the company’s insiders (its managers and controlling shareholders) won’t cheat investors out of most or all of the value of their investment”), with Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 626 (2006) (“[D]irectors cannot be held accountable without undermining their discretionary authority. Establishing the proper mix of discretion and accountability thus emerges as the central corporate governance question. . . . Active investor involvement in corporate decisionmaking seems likely to disrupt the very mechanism that makes the public corporation practicable . . .”), and Harry G. Hutchison, *Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm*, 36 LOY. U. CHI. L.J. 1111, 1201-02 (2005) (noting the appeal of “director primacy as the appropriate governance model”) (“The capability of shareholders (as a disparate group) to manage relatively large corporations is hindered by collective action problems tied to disparate preferences, different persuasive abilities, different time horizons, as well as differing capacities to digest pertinent financial, microeconomic and macroeconomic information (even when widely available).”). See also Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 852 (1993) (arguing that “political pressure[s] to support local firms and engage in other forms of social investing places important limits on the effectiveness of public fund activism in corporate governance”).

7. See *Clark Testimony*, *supra* note 3, at 2-3; *MacIver Testimony*, *supra* note 5, at 1-6.

8. See, e.g., Cari Tuna, *Theory and Practice: Shareholders Ponder North Dakota Law*, WALL ST. J., Dec. 8, 2008, at B6 (“A new front in the battle over corporate governance is emerging in an unlikely place: North Dakota.”).

This Article first considers how the Act came into existence, examines the key provisions of the Act, and compares those provisions to other prominent corporate governance laws. Part III of the Article considers the market for corporate laws that the Act was designed to enter. Part III also discusses whether such a market actually exists and explains why, even if there is such a market, the Act (at least on its own) is not likely to be an appealing option for public corporations. Part IV then explains that North Dakota already had plenty to offer corporations and shareholders, and that measures other than the Act were and are far more likely to entice new organizations (or reorganizing companies) to the State. Finally, the Article concludes that the Act did little to help or harm North Dakota business and offers some suggestions for what the state could do to capitalize on the publicity and awareness already gained from passage of the Act.

## II. THE ACT: HOW IT HAPPENED, WHO IT SEEKS TO SERVE, AND WHAT IT DOES

### A. FIRST THINGS FIRST: UPDATING THE STATE CONSTITUTION

The Act and other changes to corporate laws became possible in June 2006,<sup>9</sup> when voters approved several amendments to Article XII (Corporations Other than Municipal) of the North Dakota Constitution.<sup>10</sup> Before the amendments, Article XII included language that predated November 2, 1889,<sup>11</sup> when North Dakota became the country's thirty-ninth state.<sup>12</sup>

There can be little doubt that changes were warranted because there "were outdated or unnecessary provisions" of the pre-amendment Article XII.<sup>13</sup> For example, the amendments repealed railway-related provisions of the constitution,<sup>14</sup> which are now under federal jurisdiction, such as railway interconnections and railroad mergers.<sup>15</sup>

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9. See *Hearing on H.B. 1340 Before the House Judiciary Comm.*, 60th N.D. Legis. Sess., at 1 (Jan. 24, 2007) [hereinafter *Jaeger Testimony*](further testimony of Sec. of State Al Jaeger), available at <http://ndcgc.org/Reference/Hearings/Tab1.pdf> ("We knew there were North Dakota companies incorporating in other states because of provisions in the state's constitution unfavorable to public corporations."); Dale Wetzel, *Constitutional Changes Approved*, BISMARCK TRIB., June 14, 2006, available at <http://www.bismarcktribune.com/articles/2006/06/14/news/state/116304.txt>.

10. 2007 N.D. Laws 2004-05 (amending sections 1, 2, and 6, and repealing sections 3, 4, 7, 8, 9, 11, 12, 13, 14, 15, and 17 of article XII of the North Dakota Constitution).

11. Wetzel, *supra* note 9.

12. MERRIAM-WEBSTER'S GEOGRAPHICAL DICTIONARY 1229 (3d ed. 1998).

13. 2007 N.D. Laws 2004.

14. N.D. CONST. art. XVII §§ 12, 13 (repealed 2007).

15. See 49 U.S.C. § 10101 (2005); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-94, FREIGHT RAILROADS: INDUSTRY HEALTH HAS IMPROVED, BUT CONCERNS ABOUT COMPETITION

Perhaps the most significant modification was the change that permitted corporations to choose straight voting or other shareholder voting options.<sup>16</sup> Prior to the amendment, North Dakota corporations were required to use cumulative voting.<sup>17</sup> Cumulative voting has long been thought to protect minority voters,<sup>18</sup> but is not especially popular with corporate managers.<sup>19</sup>

In traditional (or straight) voting, each corporate shareholder is granted one vote per share per open board seat.<sup>20</sup> Cumulative voting, on the other hand, helps provide proportional board representation.<sup>21</sup> In cumulative voting, each shareholder is permitted one vote per share multiplied by the number of open board seats.<sup>22</sup> For example, if a corporation has five open board seats, a shareholder with 100 shares would have 500 votes to cast for any of the candidates, as desired. Thus, in cumulative voting, the shareholder could provide 500 votes for any single candidate, or split the votes as they wish. In traditional voting, the same shareholder could cast only 100 votes for each open seat.<sup>23</sup>

Cumulative voting gained significant traction between 1900 and 1945, when as many as twenty-two states mandated that corporations use cumulative voting.<sup>24</sup> However, today, the appeal of cumulative voting (at least as far as corporate governance legislation is concerned) has passed.<sup>25</sup> By the 1980s, nearly all states had reverted back to permissive voting schemes (allowing, but not requiring, cumulative voting).<sup>26</sup> Perhaps underscoring

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AND CAPACITY SHOULD BE ADDRESSED 38 (2006), available at <http://www.gao.gov/new.items/d0794.pdf>. See generally Beau B. Bump, *Held Captive: How Increased Regulation Arrests Railroads' Ability to Serve the Nation*, 5 DEPAUL BUS. & COM. L.J. 731 (2007) (providing a history of U.S. railroad regulation).

16. N.D. CONST. art. XVII § 6 (amended 2007) (providing for cumulative voting as the default rule, but permitting the articles of incorporation to dictate the voting process for election directors). Delaware's default rule is for straight voting, but permits cumulative voting if specified in the certificate of incorporation. DEL. CODE ANN. tit. 8, § 214 (2001 & Supp. 2008).

17. N.D. CONST. art. XVII § 6 (1998).

18. See STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 236-38 (2d ed. 2009).

19. Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 155 (1994) ("Management's willingness to change corporate domicile to avoid cumulative voting had a significant impact on the decision by several states to shift to permissive regimes.").

20. BAINBRIDGE, *supra* note 18, at 237.

21. *See id.*

22. *Id.*

23. *See id.* (providing a more detailed and expansive explanation of cumulative voting, including a formula to determine the number of directors a given shareholder may elect if cumulative voting is used (using an example from MICHAEL P. DOOLEY, *FUNDAMENTALS OF CORPORATION LAW* 376 (1995))).

24. *See* Gordon, *supra* note 19, at 145.

25. *See id.*

26. *Id.*

the motivation behind (and support for) the constitutional changes,<sup>27</sup> one legal scholar noted in 1994, “No important corporate law jurisdiction [has] maintained mandatory cumulative voting.”<sup>28</sup>

#### B. ACT TWO: THE ORIGINS AND PASSAGE OF THE ACT

Approximately six months after voters approved the constitutional changes, House Bill 1340, which was to become the Act, “[w]as read the first time and referred to the Industry, Business and Labor Committee.”<sup>29</sup> Continuing the theme of modernizing North Dakota’s corporate laws, Secretary of State Al Jaeger, in support of House Bill 1340, stated, “For 117 years, the most anti-business corporation clause in the nation was in North Dakota’s constitution. Now, North Dakota has an opportunity to provide business corporations with an option.”<sup>30</sup>

To provide corporations with this option, a group called the North Dakota Corporate Governance Council (“Council”) was formed as “a nonprofit corporation organized to support enactment of the North Dakota Publicly Traded Corporations Act and to advance the discussion of shareholder rights in publicly traded corporations.”<sup>31</sup> The Council’s initial board of directors was William H. Clark, Jr., William Sorensen, and Steven Herman.<sup>32</sup> Mr. Clark is a corporate attorney from the Philadelphia-based law firm Drinker, Biddle & Reath LLP, and Mr. Sorensen and Mr. Herman are business leaders from Bismarck, North Dakota.<sup>33</sup>

The Act was principally drafted by Mr. Clark and was billed as a “fundamentally pro-business initiative” designed with the “ultimate goal” of improving “the performance of publicly traded companies by providing a new model of corporate governance.”<sup>34</sup> In support of the Act, proponents argued that despite evidence that increased shareholder rights improved business performance, “state corporation laws have not yet moved in the

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27. See, e.g., Dave MacIver, Editorial, *Measure No. 2 Needs a Yes Vote*, BISMARCK TRIB., May 21, 2006, available at <http://www.bismarcktribune.com/articles/2006/05/21/news/opinion/letters/doc446f72b0da947838857047.txt> (“Measure No. 2 changes provisions that are no longer applicable or are covered by more recent federal laws and brings North Dakota incorporation laws into the 21st century. . . . [C]orporation[s] should be allowed the choice of whether to provide for cumulative voting or regular or statutory voting of stocks.”).

28. See Gordon, *supra* note 19, at 146.

29. 60th Leg. Assem., House Journal 99 (N.D. 2007).

30. *Jaeger Testimony*, *supra* note 9, at 1.

31. About Us, North Dakota Governance Council, [http://www.ndcgc.org/index\\_files/Page390.htm](http://www.ndcgc.org/index_files/Page390.htm). (last visited March 3, 2009).

32. *Id.*

33. See *id.*

34. *Clark Testimony*, *supra* note 3, at 1.

direction of providing those greater rights. Instead, it has been left to shareholders to seek greater rights on a company-by-company basis.”<sup>35</sup>

Assuming this assertion is true, it is still a curious argument with regard to the Act, because the testimony in support of the bill indicates that the Act is “purely optional.”<sup>36</sup> That is, only corporations electing to incorporate under the law would be bound by its provisions.<sup>37</sup> Any company that seeks to reincorporate under the Act would need shareholder interest and support that has been (at least to date) lacking, followed by subsequent support of the Board of Directors.<sup>38</sup> Thus, it is hard to imagine more than one or two companies, if any, relocating to North Dakota in search of benefits that were already available under other state laws.<sup>39</sup>

Recently, there has been something of a push to make the process of initiating a reincorporation easier by vesting the power solely in shareholders’ hands. Investor Carl Icahn, a leading shareholder advocate (for obvious reasons),<sup>40</sup> recently argued that there should be “a federal law that allows shareholders to vote by simple majority to move their company’s incorporation to another state.”<sup>41</sup> After all, he argues, “[b]ecause shareholders own companies, they should have the right to move a company to a state that gives shareholders more protections.”<sup>42</sup> Without a federal law, however, the odds of more than a nominal number of public companies relocating to North Dakota remain remote.

Furthermore, as a completely optional set of governance rules, the law does not send much of a message about North Dakota’s commitment to this new shareholder governance scheme.<sup>43</sup> Current North Dakota corporations

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35. *Id.* at 2.

36. *Id.*

37. *Id.*; see also N.D. CENT. CODE §§ 10-35-02(6), 10-35-03 (Supp. 2007).

38. See DEL. CODE ANN. tit. 8, §§ 141, 242(b) (2001 & Supp. 2008). This is true of most states, but is especially accurate, assuming Delaware law applies, which is appropriate given its prominence among publicly held corporations.

39. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684-85 (2002) (“[S]tates other than Delaware stand to derive only small benefits from attracting incorporations, and take at most half-hearted steps to that end.”).

40. See *The 400 Richest Americans*, FORBES, Sept. 17, 2008, available at [http://www.forbes.com/lists/2008/54/400lists08\\_carl-icahn\\_L1XF.html](http://www.forbes.com/lists/2008/54/400lists08_carl-icahn_L1XF.html) (“Another year, another slew of proxy battles for The Forbes 400’s richest ‘shareholder activist.’”). In addition to his role as a “shareholder activist,” Carl Icahn is twentieth among America’s wealthiest people. *Id.*

41. Carl C. Icahn, *Capitalism Should Return to Its Roots*, WALL ST. J., Feb. 7, 2009, at A11 (“That power is currently vested with boards and management.”).

42. *Id.* (“[C]ertain states, like North Dakota, offer many more rights and protections to shareholders”).

43. See BAINBRIDGE, *supra* note 18, at 236-38 and accompanying text. In fact, North Dakota laws were sending mixed messages about the importance of protecting shareholder rights. As noted above, in June 2006, the North Dakota Constitution was changed to eliminate mandatory cumulative voting, which is often viewed as a significant minority shareholder protection

(publicly held or not) are not only not required to adopt the Act as their corporate governance law, it is almost impossible for them to do so.<sup>44</sup> This design is largely because of concerns of some North Dakota business leaders, who opposed the bill.<sup>45</sup> In fact, the initial reaction of Mark Anderson, CEO of Integrity Mutual Funds, which is one of North Dakota's public traded corporations, "was one of disbelief."<sup>46</sup> This local opposition also gives insight to how the law is likely to be viewed by many other business leaders around the country.

There are those who would argue that the optional nature of the Act may be regarded as "trivial" because, "appearances notwithstanding, state corporate law . . . does not prevent companies—managers and investors together—from establishing any set of governance rules they want."<sup>47</sup> As the argument goes, after years of "erosion through competition for corporate charters, what is left of state corporate law is an empty shell that has form but no content."<sup>48</sup>

Although one might argue that the Act seeks to return this missing "content" to corporate laws, the fact remains that it is a tough road to get companies actually to adopt the law. "Either the reforms will get watered down to a thin gruel in the legislative process, or they won't get adopted."<sup>49</sup> In addition, real reform, at least under the current federal law regime,<sup>50</sup> would require the unlikely event of all fifty states adopting the proposed reforms to occur.<sup>51</sup> Thus, the Act's proposals are unlikely to attract many corporate charters, if any, even if the law were made mandatory for public companies.

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provision. *Id.* Shortly thereafter, North Dakota law provided the new, *optional* Act to protect shareholder rights for publicly trade corporations. See N.D. CENT. CODE §§ 10-35-02(6) & 10-35-03.

44. *Clark Testimony*, *supra* note 3, at 4 (explaining that current North Dakota corporations could only opt in to the act with "great difficulty" because "[t]hey are not intended to be able" to do so).

45. *MacIver Testimony*, *supra* note 5, at 1.

46. *Id.*

47. Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 544 (1990).

48. *Id.*

49. *Id.* at 580.

50. Larry E. Ribstein, *The Important Role of Non-Organization Law*, WAKE FOREST L. REV. 751, 753 (2005) (arguing that corporate laws are trivial because firms are free to choose their "applicable internal governance law").

51. Black, *supra* note 47, at 580 ("Without the support of corporate managers, this is an impossible task."). This does nothing for North Dakota business, but would promote the shareholder rights initiatives of the Act's initial proponents.

C. ACTING OUT: THE MAIN PROVISIONS & POTENTIAL PITFALLS OF THE ACT

So what is this “content” the Act seeks to put back into corporate laws? The key provisions of the Act, as highlighted by its proponents<sup>52</sup> include (1) majority voting in director elections<sup>53</sup>; (2) advisory shareholder votes on compensation reports<sup>54</sup>; (3) shareholder access to proxies, allowing 5% shareholders who have held their shares for more than two years to include board nominees<sup>55</sup>; (4) limitations on supermajority vote provisions<sup>56</sup>; and (5) limitations on antitakeover provisions.<sup>57</sup>

While these provisions are not the norm in most state corporate governance laws, virtually all are also currently available to most corporations and shareholders, if so desired.<sup>58</sup> The advantage of reincorporating under the Act is that the changes would take place immediately and *in toto*, rather than “on a piecemeal basis.”<sup>59</sup> As such, were a corporation (and a sufficient number of its shareholders) to desire the rules set forth in the Act, reincorporating in North Dakota would provide a relatively easy way to obtain the benefit of the provisions available under the Act. However, because reincorporation in any state would require the filing of new articles of incorporation,<sup>60</sup> the only real savings gained by reincorporation in North Dakota under the Act would be the time saved incorporating the provisions of the Act directly into the articles of incorporation. If, in all instances, reincorporation is required to gain the benefit of the Act’s provisions, the option to have the desired provisions has always existed, with roughly the same actions required of the company.

In addition, any economy gained by using the Act comes with a concomitant economy in eliminating the shareholder protections offered by the Act. A corporation governed by the Act can opt out of the law merely by changing the articles of incorporation to indicate that the company is no

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52. *Clark Testimony*, *supra* note 3, at 3-5.

53. N.D. CENT. CODE § 10-35-09 (2007). However, this provision only applies if the articles of incorporation do not provide for cumulative voting. *Id.* § 10-35-09(2). This is necessary because the default provision for corporate voting under the North Dakota Constitution is cumulative voting. N.D. CONST. art. XVII § 6.

54. N.D. CENT. CODE § 10-35-12(5).

55. *Id.* § 10-35-08.

56. *Id.* § 10-35-11.

57. *Id.* § 10-35-26.

58. *Clark Testimony*, *supra* note 3, at 4 (“Everyone of these provisions, as a rule, could be put into a company’s organic documents today[, but] certain issues [would be difficult] depending on the particular state in which a company is incorporated.”).

59. *Id.*

60. N.D. CENT. CODE § 10-19.1-11. A North Dakota corporation may, but is not required to, have bylaws. *Id.* § 10-19.1-31.



longer governed by the Act.<sup>61</sup> Thus, although it may be harder to add the entirety of the provisions provided by the Act to an existing corporation, once added, it would also then necessarily be harder to remove all such provisions under traditional state corporate laws.

All of this is not to say that the Act has been completely ignored; rather, the law is simply not likely to bring many new businesses to North Dakota. Instead, the law is being used to pressure out-of-state companies to modify their practices or perhaps motivate other states to provide some more shareholder friendly provisions in their state corporate governance laws.<sup>62</sup> In 2008, at least six companies issued non-binding proposals<sup>63</sup> seeking to have the respective corporations reincorporate in North Dakota.<sup>64</sup> There is little expectation of success, because even if the proposals were adopted by the shareholders, the boards of directors are unlikely to act on the recommendation.

There is, of course, one exception. Where there is a controlling shareholder, such as one with more than 50% of the company, who wants the board to approve a reincorporation, the board is likely to follow the wishes of the controlling shareholder. As an example, American Railcar Industries, Inc., a Delaware corporation, recently indicated that the board of directors would ask the shareholders “[t]o authorize and approve a change of the Company’s domicile from Delaware to North Dakota effected by [a] merger of the Company.”<sup>65</sup>

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61. *Id.* § 10-35-03(1).

62. *See* Tuna, *supra* note 8, at B6; Letter to Office of Chief Counsel Division of Corporate Finance From Qwest Communications (Dec. 31, 2008), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/cheveddensteinerk123108-14a8-incoming.pdf> [hereinafter Qwest Letter]; Letter to Office of Chief Counsel Division of Corporate Finance from AIG (Jan. 14, 2009), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2009/steinercheveddenaig011409-14a8-incoming.pdf> [hereinafter AIG Letter].

63. *See, e.g.*, Letter from Kenneth Steiner to Irwin D. Simon, Chairman of the Board, Hain Celestial Group, Inc. (June 28, 2008) (on file with author), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/kennethsteiner100108-14a8.pdf>. The proposals were phrased as shareholder “requests” of the Board of Directors. For example, the Hain resolution proposed “[t]hat the stockholders of The Hain Celestial Group, Inc. (‘Company’) hereby request that the board of directors initiate the appropriate process to change the Company’s jurisdiction of incorporation from Delaware to North Dakota and to elect that the Company be subject to the North Dakota Publicly Traded Corporations Act.” *Id.* at 14. The proposals are presented as non-binding requests because Delaware law does not permit shareholders (unless authorized in the certificate of incorporation) to require board action (such as reincorporating in another state) through such shareholder proposals. *See* DEL. CODE ANN. tit. 8, § 141 (2001 & Supp. 2008); *see also* BAINBRIDGE, *supra* note 18, at 267 (explaining that many state laws do not grant shareholders the power to initiate proposals, but that the SEC believes “a shareholder proposal is proper if phrased as a request or recommendation to the board”).

64. Tuna, *supra* note 8, at B6.

65. Am. Railcar Indus., Inc., Proxy Statement (Schedule 14A), at 2 (May 6, 2009).

This move is possible because one of the Act's leading proponents, Carl Icahn, owns more than 50% of American Railcar's stock and is chairman of the board of directors, giving him significant influence over the corporation.<sup>66</sup> As such, this public company is not like most other public corporations with diverse ownership.<sup>67</sup> American Railcar would be the first corporation formed under the Act; however, because of Icahn's significant ownership stake, this move is not likely an indicator that many companies will follow suit.

Ironically, if the reincorporation does occur, the shareholders would not reap many of the benefits accorded under the Act. American Railcar's disclosures about the reincorporation proposal explain that "even if the Reincorporation is effected, Company shareholders may not immediately be able to avail themselves of all of the benefits otherwise available to them under the North Dakota Corporate Law."<sup>68</sup> This is because Icahn holds more than 50% of the voting power and can effectively dictate the outcome of any shareholder vote. Of course, if Icahn were to "cease to control more than 50% of the voting power of the Company's common stock, the Company's shareholders would be able to avail themselves of the full panoply of shareholder rights provided by the" Act.<sup>69</sup>

Barring the circumstances just explained, because of its permissive, or opt-in, nature, the Act should not have had any direct or significant impact on business decisions as to whether businesses would locate in North Dakota. The idea was to create a "brand" of corporate governance that sends the message that a North Dakota publicly traded corporation is a corporation that values shareholder input.<sup>70</sup> However, that is not the "brand image" that seems to be emerging.

As just discussed, the Act is shaping up to be a leverage point used by shareholders to urge some modifications to their current corporate governance procedures. Over time, there could be a negative impact (i.e., negative brand image) if the Act is the only forward-looking or unique business-related law passed in the state in the near future. If no other innovative

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66. *Id.* at 43.

67. WILLIAM A. KLEIN, ET AL., BUSINESS ASSOCIATIONS 533 (6th ed. 2006) (explaining that shareholders in most public corporations, even institutional investors and individuals with "shares worth tens of thousands of dollars," rarely have enough shares to impact the outcome of issues put to a vote at annual meetings).

68. *Am. Railcar Indus., Inc.*, *supra* note 65, at 43.

69. *Id.*

70. *See* Clark Testimony, *supra* note 3, at 2 ("One of the things we would like to do is actually create a brand. One of the goals of this statute, is [to] have everyone immediately recognize when they are told that a company is a ND corporation [it] will immediately brand that company as a company that elected to take advantage of the full plan.").

laws are passed in the near future—thus branding North Dakota as the “State With the Small Population, But Big Ideas”—the state runs the risk of becoming the corporate equivalent of sending a child to his or her room. That is, shareholders are essentially telling managers, “If you can’t get your act together, we’ll send you to North Dakota.” So, naturally, managers are likely to want to avoid North Dakota.

Although shareholders cannot generally make this change happen on their own, it is hard to imagine any boards of directors (other than those controlled by people like Mr. Icahn) thinking of North Dakota corporate governance in anything other than a negative way. Thus, even if the board were inclined to make some concessions to appease shareholders, as it stands, incorporating in North Dakota will likely be at the bottom of the list of options.

### III. ANSWERING A QUESTION (ALMOST) NO ONE ASKED: THE REAL MARKET (OR LACK THEREOF) FOR NEW CORPORATE GOVERNANCE LAWS

The options provided in the Act are at least debatably valuable and the provisions, conceptually if not specifically, have been the subject of significant debate. But the law, especially in North Dakota, added little to the debate other than a framework for discussion because (as explained above) all of the “new” provisions in the Act were already available to corporations, either through amendments to current articles of incorporation or through reincorporation (with inclusion of the desired provision in the new corporation’s articles of incorporation).

Numerous reasons have been proffered as to why, and where, corporations seek to reincorporate. Many prominent researchers believe that there is “state competition” for corporate governance laws<sup>71</sup>; others believe that state competition is a “myth.”<sup>72</sup> In either case, the state against which all others are compared is Delaware. There have been countless articles and symposia on this subject, and this Article does not purport to survey all the relevant literature. Instead, it seeks to provide a brief overview of some of the most relevant corporate-law-as-a-market issues in the debate as they apply to the Act.

One of the leaders in the field of corporate law competition is Roberta Romano, Oscar M. Ruebhausen Professor of Law and Director of the Yale

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71. See, e.g., Romano, *supra* note 2, at 214 (explaining that states enact legal reform to keep incorporations and that this legal reform puts them in conflict with Delaware).

72. See, e.g., Kahan & Kamar, *supra* note 39, at 684-85 (“Other than Delaware, no state has engaged in significant efforts to attract incorporations of public companies.”).

Law School Center for the Study of Corporate Law. Professor Romano's research has considered the corporate law "as a product,"<sup>73</sup> as well as the potential value of a federal system of corporate law instead of states competing for corporate business.<sup>74</sup> As she recognized more than twenty years ago, Delaware is "the most successful state in the market for corporate charters."<sup>75</sup>

On the one hand, Professor Romano's research found that state competition is not inherently harmful to shareholders.<sup>76</sup> No studies found that investor wealth suffered from state regulation, whether the state changed statutes or legal doctrine, or if firms changed their state of incorporation.<sup>77</sup> Further, there was even a positive effect of reincorporation on stock prices.<sup>78</sup>

However, just because there is no harm, or no immediate harm, to shareholders from reincorporation does not mean that corporations should (or will) seek to reincorporate in new jurisdictions. Without understanding the reasons for the reincorporation and how specific policies impact investor wealth, the reasons behind new corporate governance laws becomes a conclusive debate, with stakeholders each reaching self-serving, but unsubstantiated results.<sup>79</sup> Even with a full understanding of all the relevant issues (a tall order, at best), "the structure of the corporate charter market makes it particularly difficult for a state with a relatively small volume of incorporations to make inroads against a state with an already substantial market share."<sup>80</sup> Thus, the Act faced an uphill battle at the outset. Given that Vermont (and its five public companies) was the initial target for the "shareholder friendly" legislation, the promoters of the law were primarily interested in passing the law and only secondarily concerned with seeing the law actually impact companies. It seems clear that most of those involved understood that the law itself was likely to do little more than generate discussion and debate.

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73. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 226 (1985) (attempting "to shed light on the peculiar puzzle that one state, Delaware, has consistently been the leading choice for reincorporating firms for over fifty years").

74. Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987) (explaining the debate in the context of whether a federal corporate law system was desirable and that the so-called "market competition" for corporate laws was a market "in which states compete to provide firms with a product, corporate charters, in order to obtain franchise tax revenues").

75. *Id.*

76. *Id.* at 752.

77. *Id.*

78. *Id.*

79. *See id.* at 757.

80. *See Romano, supra* note 73, at 226.

Interestingly, Professor Romano recognized the possible concerns that could be raised from legislation, like the Act, designed to support large investors.<sup>81</sup> She noted that institutional investors' interests could be widely divergent from those of individual shareholders.<sup>82</sup> Individual investors, she explained, are often uninformed and may or may not vote.

As such, voting rights alone cannot protect all shareholders.<sup>83</sup> Although it may seem as though this possibility might raise concerns about management "agenda manipulation," the real concern, she noted, is "that the interest of the majority [of shareholders] is in direct conflict with that of the minority."<sup>84</sup>

Professor Romano determined that the primary reason companies sought to form or reincorporate in Delaware was "not just the guarantee of being located in a state that is responsive to corporate desires but also access to a legal system that reduces uncertainty concerning the consequences of actions and hence the transaction costs of doing business."<sup>85</sup> Some recent commentators have argued that lower transaction costs, and not better corporate governance laws, are the primary reason that Delaware dominates as the state of choice for incorporating.<sup>86</sup>

Others have argued that lower transaction costs are not the only, or primary, reason for Delaware's success, and that the state's success does not necessarily make Delaware law optimal.<sup>87</sup> There can be little doubt that Delaware's ability to charge a premium for companies that incorporate in the state is an indicator that Delaware has some significant appeal.<sup>88</sup> In addition to an income tax based on income from business conducted in the state,<sup>89</sup> Delaware charges a significant franchise tax, which is a charge (per issued share) up to a maximum of \$165,000.<sup>90</sup>

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81. *See* Romano, *supra* note 74, at 755.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See* Romano, *supra* note 73, at 227.

86. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 5. (arguing that regardless of the mandatory corporate law default rules, once a company addresses "agency cost and minority protection questions . . . the principal feature of an efficient corporate law is a reduction in the transaction costs of organizing and operating a business entity").

87. *See* Kahan & Kamar, *supra* note 39, at 684–85.

88. Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1210 (2001) (stating "that there is something special about Delaware in the market for incorporations").

89. DEL. CODE ANN. tit. 30, § 1902 (2009).

90. *Id.* tit. 8, § 503(c).

It has been argued that “Delaware’s ability to charge a premium for incorporation is tied to the three facets of the product that Delaware is selling: substantive law, a forum for litigating disputes, and administrative services.”<sup>91</sup> The first is, at least in part, reduced transaction costs, as noted by Romano and others. With so many companies incorporated under Delaware law, and thus so many conflicts occurring under Delaware law, the Delaware courts have developed a broad and deep cadre of case law.<sup>92</sup> This, in turn, provides Delaware corporations with a better ability to plan transactions and reduce litigation risks than corporations formed under other state laws.<sup>93</sup> Furthermore, the fact that so many corporations are formed in Delaware provides companies with more advisors, legal and financial, who are well versed in the risks and rewards of transactions under Delaware law.<sup>94</sup>

At least with regard to significant portions of corporate law, Delaware courts provide an expertise not found anywhere else.<sup>95</sup> For example, one leading commentator explained how and why Delaware law is so valuable with regard to fiduciary duty law, which applies to all corporations, as compared to piercing-the-veil cases, which are not especially relevant to public corporations<sup>96</sup>:

Most American law on fiduciary duty is made in Delaware by a group of just ten judges. Five are on the Court of Chancery, the trial court where all corporate cases originate, and five sit on the Delaware Supreme Court which hears appeals from the Court of

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91. Kahan & Kamar, *supra* note 88, at 1212.

92. *Id.*; see also *Ficus Investments, Inc. v. Private Capital Mgmt, LLC*, 872 N.Y.S.2d 93, 99 (App. Div. 2009) (“Delaware courts have had ample opportunity to address these issues of indemnification for and advancement of expenses and, although not binding as to either Florida or New York law, their holdings can be instructive.”); *Brandin v. Deason*, 841 A.2d 1020, 1024 (Del. Ch. 2007) (“Delaware courts have a sizeable interest in resolving . . . novel issues [of law] to promote uniformity and clarity in the law that governs a great number of corporations.”).

93. Kahan & Kamar, *supra* note 88, at 1212.

94. *See id.*

95. Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 626 (2005); see also *In re Topps Co. Shareholders Litigation*, 924 A.2d 951, 958 n. 24 (Del. Ch. 2007) (“This court’s unique position as the regular arbiter of corporate law disputes, and the manner in which this court interacts with the Delaware Supreme Court have played an important role in the development of Delaware’s corporate law.”).

96. *See, e.g.*, Douglas G. Smith, *Piercing the Corporate Veil in Regulated Industries*, 2008 B.Y.U. L. REV. 1165, 1887 (2008) (“Many commentators have noted that courts pierce the corporate veil more frequently in cases involving closely held corporations as opposed to large, publicly owned corporate entities.”). Although the concept of piercing the veil of corporate limited liability is a major part of corporate law, it is hardly a significant part of *public* corporations law. *Id.*; see also Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 9 (1994) (“My study of 1600 piercing-the-veil cases found no case in which shareholders in a public corporation were held liable . . .”).

Chancery. For these chancery court judges their experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law.<sup>97</sup>

In addition, Delaware courts, and thus Delaware corporations, are appealing because they provide a (relatively) quick and specialized forum for litigating corporate disputes.<sup>98</sup> Delaware's chancery court is a court with limited subject matter jurisdiction that hears primarily corporate matters.<sup>99</sup> As such, Delaware courts have the expertise to handle cases more efficiently and effectively than other jurisdictions.<sup>100</sup>

Finally, Delaware provides corporations with efficient options and services that make incorporation in Delaware simple and feasible, even if all of the corporation's business is conducted in another location.<sup>101</sup> Corporations are therefore able to avail themselves of Delaware's corporate laws with minimal (if any) inconvenience.

As noted above, there are those who believe that Delaware is so advanced in corporate law that there is no such thing as competition for state corporate law, or at least, any such competition has been over for some time.<sup>102</sup> These commentators question the "conventional wisdom" of state competition for corporate charters:

Other than Delaware, states do not gain significant financial benefits from competing. Even if they attracted a substantial number of public corporations, they would neither earn meaningful additional franchises taxes under their current tax structures nor profit significantly from an increase in legal business. Accordingly, they do precious little to attract incorporations. Delaware aside, states have failed to establish specialized corporate courts,

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97. Thompson, *supra* note 95, at 626.

98. Kahan & Kamar, *supra* note 88, at 1212 ("When a corporate dispute arises, the ability to resolve the dispute quickly and sensibly is critical. This is where Delaware really shines.").

99. *Id.*; see also DEL. CODE ANN. tit. 8, § 111 (2009) (providing that the Delaware Chancery courts have the power, inter alia, "to interpret, apply, enforce or determine the validity of the provisions of . . . : [t]he certificate of incorporation or the bylaws of a corporation"); *id.* tit. 10, § 341 ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity.").

100. See Kahan & Kamar, *supra* note 88, at 1212 (discussing the reputation of the Delaware courts).

101. See DEL. CODE ANN. tit. 8, §§ 131, 132 (permitting corporations to have a registered agent in the state and allowing for a registered office that "need not be" the same as the corporation's place of business"); State of Delaware, Division of Corporations, *About Agency*, <http://www.corp.delaware.gov/aboutagency.shtml> ("Our Division of Corporations operates with a state-of-the-art efficiency and our staff provides prompt, friendly and professional service to clients, attorneys, registered agents and others.").

102. See Kahan & Kamar, *supra* note 39, at 685. ("This is not to say that active competition for incorporations never existed. . . . [C]ompetition may well have existed in the distant past.").

and have left the design of large portions of their corporate laws to judges who lack the knowledge and incentives to attract incorporations. And even though states have been quick to adopt anti-takeover statutes and periodically revise their corporate statutes in other respects, they do so largely for reasons unrelated to attracting incorporations. The notion that states compete, and that this competition results in a metaphorical race, is a myth.<sup>103</sup>

Regardless of whether there is actually competition for incorporations, it seems clear that the Act lacks what would be needed to create any form of real market competition beyond a mere novelty. For one thing, Delaware's significant market power, and resulting revenues, provides the state with major incentives to maintain its position.<sup>104</sup>

Many states that might wish to compete for some of Delaware's market share in corporate law suffer from "an inconvenient geographic location . . . or a negative political reputation—that hamper their ability to attract incorporations."<sup>105</sup> Unfortunately, North Dakota at least arguably suffers from both of these limitations.

Geographically, North Dakota is a remote state, at least as compared to Delaware. Bismarck, North Dakota, is 705 miles from Denver, Colorado; 387 miles from Minneapolis-St. Paul, Minnesota; and 835 miles from Chicago, Illinois, the closest major cities. Dover, Delaware, on the other hand, is less than 175 miles New York City, Philadelphia, and Washington, DC. In fact, Dover, Delaware, is closer to Chicago (801 miles) than Bismarck. Although the electronic age has made distance significantly less important, proximity to the state of incorporation still has its advantages, especially with regard to litigation.<sup>106</sup>

Second, although largely unfair, North Dakota has been the subject of two major news stories that did little to enhance North Dakota's reputation as a good place to do business, thus further harming the prospects of the Act. The first article, *The Emptied Prairie*<sup>107</sup>, was a National Geographic

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103. *Id.* at 748.

104. *See id.* at 742 ("Delaware has strong incentives to copy useful innovations developed by other states.").

105. *See Kahan & Kamar, supra* note 88, at 1213 (discussing the significance of factors that underlie Delaware's substantial market power).

106. This likely explains why the first serious effort to pass William Clark, Jr.'s publicly traded corporations act was in Vermont, not North Dakota. Vermont, while not a short trip from most of the major east coast cities, is hundreds of miles closer than Bismarck, and is only about 180 miles from Boston.

107. Charles Bowden, *The Emptied Prairie*, NAT. GEOGRAPHIC, Jan. 2008, at 140-57, available at <http://ngm.nationalgeographic.com/2008/01/emptied-north-dakota/bowden-text>.



cover story that garnered attention on major network news.<sup>108</sup> Although the article was about the dwindling populations of rural North Dakota, the sentiment seemed to attach to the entire state:

That's the rub in rural North Dakota, a sense of things ebbing, of churches being abandoned, schools shutting down, towns becoming ruins. And all this decline exists amid a seeming statistical prosperity: oil is booming, wheat prices are at record highs, and, as the average farm size grows, the land is studded with paper millionaires living in the lonely sweep of the plains, with surrounding community gone to the wind.

North Dakota is among the windiest states in the Union and one of the coldest south of Alaska. Twice the legislature has considered changing the name to simply Dakota to shake the chill from its image. The state's population has stabilized at around 600,000 thanks mainly to the growth around its cities—Fargo, Grand Forks, Mandan, and Bismarck. But out on the land, the population has relentlessly bled away. So there is money and prosperity and the numbing sense that comes from living in a vanishing world.<sup>109</sup>

The article, of course, does not say directly that North Dakota is not a good place to do business or that incorporation could not be fruitful in the state. Instead, the article implicitly communicates (or reinforces) that the benefits of business in North Dakota have been (and perhaps should be) reaped elsewhere.<sup>110</sup> After all, the article asserts, “North Dakota has a feral edge to it.”<sup>111</sup>

Although this sense of the state as a whole was apparently not the author's intent,<sup>112</sup> and there were follow-up explanations and clarifications, the fact remains that many people, including many North Dakotans, found the article damning of the state overall.<sup>113</sup> Of course, no one would look at

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108. See, e.g., Jonathan Rivoli, *ABC Honors North Dakotans*, BISMARCK TRIB., Jan. 23, 2008, available at <http://www.bismarcktribune.com/articles/2008/01/23/news/local/147186.prt> (discussing the ABC News segment honoring North Dakota as the “Person of the Week”).

109. Bowden, *supra* note 107, at 147.

110. See *id.* (“In most of the United States, abandoned buildings are a sign of change and shifting economic opportunities. On the High Plains, they always mean that something in the earth and the sky mutinied against the settlers.”).

111. *Id.*

112. Chris Rosacker, *I Really Like This Place*, BISMARCK TRIB., June 10, 2008, at 1A (reporting that the author stated in a Bismarck State College appearance, “The comic thing for me is, I really like this place”).

113. Doreen Yellow Bird, *My Heart Belongs to the Great Plains*, GRAND FORKS HERALD, June 11, 2008, available at <http://www.indianz.com/News/2008/009223.asp?print=1> (“[The] article almost made me mutiny as a reader of National Geographic. I see the Plains as a holy

the dwindling population of rural Texas as a reason not to do business in the major cities, but in a sparsely populated state with no metropolitan area with more than 200,000 people,<sup>114</sup> first impressions are hard to change.

The second major news item was a USA Today article about state corruption<sup>115</sup> following the arrest of Illinois Governor Rod Blagojevich.<sup>116</sup> The article, and an accompanying table, asserted that North Dakota was the most corrupt state in the nation because it had more public corruption convictions on a per-capita basis, based on the newspaper's "analysis of Department of Justice statistics."<sup>117</sup> In North Dakota, the article found, 53 federal public corruption convictions between 1998 and 2007 meant there were 8.3 convictions per 100,000 people, which was the highest number in the nation.<sup>118</sup> By comparison, Illinois had 3.9 convictions per 100,000, making it a mere 18th overall.<sup>119</sup>

Although there are significant questions regarding the methodology used for the analysis,<sup>120</sup> the fact remains that the USA Today headline is probably the most recent and significant contact most of America has had in the past two years regarding the business climate in North Dakota. "The most corrupt state in America" hardly supports the "branding effort" of the Act to establish North Dakota as a place shareholders should seek for their corporate governance.

place. I see the abandoned houses as markers of where we've been and the wind as the voice of the land.").

114. Dennis Cauchon, *Big Cities Lure Away North Dakota Youth*, USA TODAY, Feb. 24, 2004, at 1A ("The Fargo metropolitan area had 177,064 residents in 2002.").

115. John Fritze, *North Dakota Tops Analysis of Corruption*, USA TODAY, Dec. 11, 2008, at 5A & tbl.

116. Jeff Coen et al., *Feds Arrest Gov. Blagojevich to Stop . . . A Political "Crime Spree,"* CHI. TRIB., Dec. 10, 2008, at 1 ("The predawn rousting of Gov. Rod Blagojevich from his Ravenswood Manor home Tuesday marked a stunning climax to a tale of alleged public corruption unmatched in Illinois' storied history of elected scoundrels and thrust the state into an unprecedented political crisis."). Blagojevich was eventually unanimously convicted by the state Senate on a broad article of impeachment following his arrest on federal corruption charges related to allegations he was trying to sell the U.S. Senate seat President Barack Obama left open upon taking office. Rick Pearson & Ray Long, *Senate Convicts Blagojevich, Making Him the 1st Illinois Governor to be Thrown Out of Office*, CHI. TRIB., Jan. 30, 2009, at 1.

117. Fritze, *supra* note 115, at 5A.

118. *Id.* at 5A tbl. Louisiana was number two and Alaska was number three. *Id.*

119. *Id.* This, notwithstanding the comments of Robert Grant, head of the Chicago FBI office, "If [Illinois] isn't the most corrupt state in the United States it's certainly one hell of a competitor." *Id.* at 5A.

120. Brian Duggan, *N.D. Says the Only Thing Corrupt Is the Story*, BISMARCK TRIB. Dec. 12, 2008, at 1. The Washington, D.C.-based "Corporate Crime Reporter's 2007 report . . . newsletter only included the 35 most populated states because of the statistical unfairness on sparsely populated states like North Dakota." *Id.* In 2004, the same newsletter had listed North Dakota as public corruption leader, as well, but learned from the "mistake when [they] crunched [their] numbers." *Id.*

#### IV. FIXING WHAT WASN'T BROKEN: WHAT NORTH DAKOTA LAW ALREADY HAD TO OFFER CORPORATIONS AND SHAREHOLDERS

Prior to passing the Act, and certainly after the amendments to Article XII of the North Dakota Constitution, North Dakota had many things to offer new corporations or those in the market for a new corporate home. And, from a shareholder perspective, North Dakota's corporate laws were already significantly more pro-shareholder than those in place in Delaware.

In Delaware, amendments to the certificate of incorporation<sup>121</sup> can only be proposed by the board of directors, although shareholders are required to approve of the proposed change.<sup>122</sup> Under the North Dakota Business Corporation Act, "a shareholder or shareholders holding five percent or more of the voting power of the shares entitled to vote" may propose amendments to the articles of incorporation.<sup>123</sup> Although the Act incorporates this provision, as well,<sup>124</sup> North Dakota offered this pro-shareholder provision long before the Act was envisioned.

For new companies looking to go public or for public companies looking for a new home, the North Dakota Business Corporation Act also has some favorable provisions that could have been financially appealing. Although, as discussed in Part III, the market for corporate governance is not clearly defined, and the reasons corporations choose their home state is not easily identifiable. If filing fees were a reason to move, North Dakota, under the traditional corporate law, is an appealing state. Under the North Dakota Business Corporation Act, any company's annual report filing fee is \$25 (there is no franchise tax based on the number of shares issued).<sup>125</sup> Under Delaware law, the annual report filing fee is also \$25; the franchise tax ranges from \$75 to a maximum of \$165,000.<sup>126</sup> Under the Act, of

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121. The certificate of incorporation in Delaware is the equivalent to the articles of incorporation in other states, like North Dakota. See ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 1.07, at 13 (2d ed. 2004) (explaining that, to form a corporation, the incorporator(s) must file "the articles of incorporation (sometimes called a charter or certificate of incorporation)"); cf. David W. Barrett, *A Call for More Lenient Director Liability Standards for Small Charitable Nonprofit Corporations*, 71 IND. L.J. 967, 986 n.139 (1996) ("The difference between Indiana's term 'articles of incorporation' and Delaware's term 'certificate of incorporation' is purely semantic.").

122. DEL. CODE ANN. tit. 8, § 242(b) (2006).

123. N.D. CENT. CODE § 10-19.1-19(2) (2007).

124. *Id.* § 10-35-15.

125. *Id.* § 10-19.1-147(24).

126. State of Delaware Annual Report & Tax Instructions, <http://corp.delaware.gov/paytaxes.shtml>.

course, the franchise fee is a maximum of \$80,000 (roughly half of Delaware's charge).<sup>127</sup>

On a more basic level, North Dakota offers things like “good schools, reasonable housing prices (the median home price is under \$150,000), short commutes, the nation's lowest crime rate and ample outdoor recreation.”<sup>128</sup> North Dakota also ranks second in academic research and development dollars per \$1,000 of gross state product, between Maryland and Massachusetts, respectively.<sup>129</sup>

In the current struggling economy, North Dakota is also one of the few states with rising personal incomes, state revenues, and low unemployment.<sup>130</sup> Furthermore, in addition to remaining affordable, the housing market remains, at least as compared to the rest of the country, quite stable.<sup>131</sup> Although North Dakota will likely see its share of the economic downturn if the recession continues, the state is well situated as compared to most other parts of the country.<sup>132</sup>

Given the state of the U.S. economy, North Dakota's biggest attraction is not its shareholder friendly public corporation law option. Lacking a streamlined and efficient (i.e., easy) way for shareholders to compel a corporation to relocate to North Dakota, such as a federal law allowing shareholders to order such a move, the legislature is likely to attract more business to the state by focusing on other initiatives and doing more to promote programs already in place.<sup>133</sup>

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127. N.D. CENT. CODE § 10-35-28(3)(b). There would be additional fees because any corporation doing business in North Dakota must have a registered agent in the state, but this can be accomplished for significantly less than \$80,000 per year. *See id.* § 10-19.1-15.

128. Joel Kotkin, *The Great Plains*, WALL ST. J., Aug. 31, 2006, at A8.

129. *Id.*

130. Conor Dougherty & Ben Casselman, *For Energy-Producing States, Prices Yield a Boom*, WALL ST. J., May 21, 2008, at A4.

131. *See, e.g.*, Crystal R. Reid, *Recession Obsession: Will North Dakota Weather the Shaky U.S. Economy?*, BISMARCK TRIB., Feb. 27, 2008, at 1A (“Home sales across the nation remain sluggish; bankruptcies in 2007 surged in some states, but remained stable in others. In North Dakota, the bankruptcies went down and home prices continue to increase.”); Laura McCandlish, *Maryland Home Sales Tumble Nearly 30%*, BALT. SUN, Nov. 22, 2007, at A11 (“Only three states—Nevada, Florida and Arizona—had greater slumps in home sales than Maryland. That only two states, North Dakota and Vermont, posted increases emphasizes the severity of the housing market slowdown, industry experts said.”).

132. Crystal R. Reid, *Economic Outlook for a Year*, BISMARCK TRIB., Jan. 18, 2009, at 1B (“Sub-prime mortgages were relatively scarce in North Dakota and banks were prudent in their lending practices, so there's still a level of stability in the state's markets. . . . But that's not to say that outside factors aren't weighing in, of course.”).

133. *See infra* Part V.

## V. CONCLUSION

The Act is probably not the most effective piece of legislation to create a “brand” that encourages companies to relocate to the state.<sup>134</sup> Even if the corporate governance landscape has evolved to the point that there is an opening for a significant competitor to Delaware, North Dakota is probably not going to be that state. At best, the Act provides a novelty for shareholder and institutional-investor advocates to use as a leverage point with management, and thus—on its own—provides very little long-term upside for the state.

If the state, using the Act, really is seeking to brand North Dakota as a good place for incorporations, and capitalize on the efforts already put forth with regard to the Act, the first task should be to embrace Carl Ichan’s proposal that Congress pass a federal law allowing a majority of shareholders to force their corporation to reincorporate in the state of their choosing.<sup>135</sup> Of course, given the opt-in nature of the Act, the federal law would also need to permit the shareholders to specify the actual corporate law (even within a state) of their choosing.<sup>136</sup>

Such a federal law would likely lead to at least a few incorporations in North Dakota, given that some significant shareholder advocates are already promoting the option.<sup>137</sup> Of course, this presumes that the shareholder advocates are serious about reincorporating in North Dakota, which they may very well be. However, as it is now, the shareholder proposal to reincorporate can be made without any serious expectation of the proposal coming to fruition.<sup>138</sup> If the federal law were to pass, one would expect some other opportunistic state (including perhaps Delaware) to follow North Dakota’s lead, providing a similar shareholder friendly opt-in public corporations law.<sup>139</sup>

Any benefit to North Dakota would thus, again, likely be short lived, but at least in this scenario some revenues would come to North Dakota as the initial state with this type of law. Although it is hard to predict, such a federal law appears unlikely.<sup>140</sup> However, political climates change, and if

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134 As a former public relations executive, the author supports and encourages a focused branding initiative and believes there is a real opportunity to promote North Dakota business, but any such campaign needs to be coordinated and cohesive.

135. See Ichn, *supra* note 41, at A11.

136. See N.D. CENT. CODE §§ 10-35-02(6), 10-35-03 (2007).

137. See Tuna, *supra* note 8, at B6; Qwest Letter, *supra* note 62, at 2; AIG Letter, *supra* note 62, at 2.

138. See Tuna, *supra* note 8, at B6.

139. See Kahan & Kamar, *supra* note 39, at 742.

140. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 902 n.228 (1997)

a federal shareholder-state-of-choice law were to pass, North Dakota would be well situated, at least initially.

Second, if North Dakota really wants to create a brand as a legal innovator, the state should consider taking the lead in areas of deep resources. For example, as a leader in wind energy, North Dakota has the potential to provide renewable energy for more than 50% of the country.<sup>141</sup> Already, North Dakota provides a significant amount of energy to Minnesota, which has a renewable portfolios standard (RPS), requiring as much as 30% of electricity come from renewable resources by 2020.<sup>142</sup>

As a coal-rich state,<sup>143</sup> North Dakota has understandably resisted legislation that might limit the ability to use one its major resources. Rather than pursuing an RPS, as twenty-eight other states have,<sup>144</sup> North Dakota instead passed a non-binding renewable energy goal.<sup>145</sup> However, one way or another, the coal industry is likely to see some restrictions soon, either via a federal carbon tax or, more likely, a federal cap-and-trade program.<sup>146</sup>

Instead of waiting for a federal program to be imposed on the state (or hoping it will never come), North Dakota could take the lead on renewable energy legislation by passing a mandatory sustainable electricity standard (SES). Like an RPS, the SES would require a specified percentage of electricity sold in the state come from sustainable resources.<sup>147</sup> However,

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(reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell, ed., 1995) (“[Sixty]-plus years of experience with the dual federal-state regulatory scheme has taught us two things: (1) Congress is exceedingly unlikely to adopt a federal law of corporations of any sort, communitarian or otherwise; and (2) this is a very good thing as a matter of both economic efficiency and federalism.”)).

141. See RENEWABLES PORTFOLIO STANDARDS, [http://www.dsireusa.org/documents/summarymaps/RPS\\_Map.ppt](http://www.dsireusa.org/documents/summarymaps/RPS_Map.ppt) (providing a map of the state RPS program as of February 2009). Twenty-eight states have an RPS, and another five have a renewable energy goal. *Id.*

142. MINN. STAT. § 216B.1691 (2007) (requiring 30% from renewable resources for a company that owns a nuclear facility, such as Xcel Energy, and 25% for all other utilities).

143. See *Energy Policy: Pumped up*, ECONOMIST, Jan. 31, 2009, at 68 (“Long drag-lines scrape the state’s surface, revealing lignite, or brown coal; 91% of North Dakota’s electricity comes from coal-fired plants”).

144. RENEWABLES PORTFOLIO STANDARDS, *supra* note 141.

145. N.D. CENT. CODE § 49-02-28 (2007).

146. See Tom Fowler, *Q&A/Markey agrees with Pickens*, HOUS. CHRON., Feb. 10, 2009, at 4 (“I think it’s much more likely that a cap-and-trade system [instead of a carbon tax] will be used.”) (quoting Rep. Edward Markey, chairman of the Commerce and Energy Subcommittee on Energy and the Environment). On May 21, 2009, a House committee approved the American Clean Energy and Security Act, which was sponsored by Representatives Henry Waxman and Edward Markey. If approved, the bill would create the first U.S. cap-and-trade system (at the federal level) for reducing greenhouse-gas emissions. *Id.* The bill also includes a renewable electricity standard that would require covered electric utilities to improve energy efficiency and procure 15% of their power from renewable sources by 2020. *Id.*

147. See Joshua P. Fershee, *Changing Resources, Changing Market: The Impact of a National Renewable Portfolio Standard on the U.S. Energy Industry*, 29 ENERGY L.J. 49, 64 (2008). In an RPS, and the proposed SES, all covered electricity retailers would be required to

unlike a traditional RPS, the SES could include clean coal technology.<sup>148</sup> The state legislature would determine what qualifies as “clean coal” (and everything else that is “sustainable” under the SES), and that definition could play a role in future discussions on the federal level.<sup>149</sup>

This is not legislation that would make environmentalists happy, because most environmental advocates are anti-coal, regardless of the method used to generate electricity.<sup>150</sup> The legislation would not likely please many members of the coal industry, either, because they often argue that such regulations are simply too expensive.<sup>151</sup> However, the SES would thrust North Dakota into the midst of an important debate, a debate in which the state has a deep and significant interest. By promoting wind energy, the state would help support wind manufacturing businesses in North Dakota. By including coal in the SES, or at least some forms of clean or “cleaner” coal, North Dakota would also help ensure a market for the state’s coal, and perhaps help steer the national debate toward more opportunities for advanced coal technologies.<sup>152</sup>

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hold renewable energy credits (RECs) in the specified proportion (e.g., 10%) to the amount of retail energy they sold. *Id.*

148. See Sara Parker, *U.S. Senate Says No to “Clean Coal” & Nuclear in RPS*, RENEWABLEENERGYWORLD.COM, June 15, 2007, available at <http://www.renewableenergyworld.com/rea/news/article/2007/06/u-s-senate-says-no-to-clean-coal-nuclear-in-rps-48960> (reporting that a proposed national RPS, “which included clean coal technology and nuclear power alongside traditional sources of renewable energy, was voted down in the U.S. Senate this afternoon 56-29”).

149. See Fershee, *supra* note 147, at 64 (noting that clean coal technologies could be included in an RPS and that “what constitutes ‘clean’ is never an easy answer”).

150. See, e.g., Ken Ward Jr., *Governor’s Energy Plan Gets Mixed Reviews*, CHARLESTON GAZETTE (W. Va.), Feb. 12, 2009, available at <http://wvgazette.com/News/200902110992> (“We would not support [an RPS with] so-called ‘clean coal’ . . . Coal cannot be clean because of what happens when it’s mined and because of the waste that is created when it’s burned.” (quoting Vickie Wolfe, “who follows energy issues for the West Virginia Environmental Council”)); Sara Parker, *National RPS to Include Coal & Nuclear?*, RENEWABLEENERGYWORLD.COM, June 13, 2007, available at <http://www.renewableenergyworld.com/rea/news/print/article/2007/06/national-rps-to-include-coal-nuclear-48921> (“There is no reason to dilute the bill [by adding clean coal and nuclear]. [Renewable sources] are ready for market now. They’re cost competitive now and they don’t require continuing operating and construction subsidies.” (quoting Jim Rubens, Union of Concerned Scientists)).

151. Mark Clayton, *In Big U.S. Energy Bill, Who Will Pay?*, CHRISTIAN SCI. MON., Nov. 7, 2007, at 1 (“[I]ndustry groups—oil, coal, auto, and electric utilities—worry that they will have to foot most of the cost of any new energy legislation, which could run up to \$32 billion.”); see also Stephen Foley, *US Coal Lobbyists Unveil Nightmarish Vision of Life After Cap-and-Trade Law*, INDEPENDENT (U.K.), June 3, 2008, at 34 (reporting the coal industry’s “predictions of dire consequences if carbon emissions were capped”).

152. North Dakota would not be the first state to do so, however. Michigan, for instance, recently passed an RPS that allows coal-fired plants that capture (and store) 85% of carbon dioxide emissions to satisfy the requirements. 2008 Mich. Pub. Acts page no.143, § 3(c)(3) (enrolled S. Bill 213). Similarly, Massachusetts recently added clean coal to its RPS. Lisa Wood, *Mass. Utilities Now Must Include Clean Coal, Other Alternatives in Portfolios*, ELEC. UTIL.

Finally, beyond any one or two specific laws, if North Dakota is seeking a “brand image” at all, the state’s leaders need to determine first what it is that is being branded. Is it corporate governance? Business generally? The people and resources? Only after the product or products are determined can an effective branding campaign can take shape.

Although the Act was not a part of a focused and concerted branding effort for North Dakota, or apparently even a significant ideological commitment to increasing shareholder rights,<sup>153</sup> the state could stand to reap some benefits of offering the first-of-its-kind statute. To do so, however, the state must embrace its position. If the Act is to be taken seriously, North Dakota should: (1) embrace the federal shareholder choice legislation, (2) promote the Act with a coordinated public relations and/or advertising campaign to raise awareness of the state’s innovative approach, and (3) pass and promote other innovative legislation that makes clear North Dakota is a forward-looking, forward-thinking state as far as businesses are concerned.<sup>154</sup>

If the Act is a singular, isolated piece of legislation that is quietly available for anyone who wants it, it is simply some small state law written by large investors (and their advocates) to irritate large companies.<sup>155</sup> But, by embracing the Act and the potentially innovative corporate governance it represents, North Dakota has an opportunity to change, or at least modify, some perceptions about business in the high plains. To do so, would require some effort.

New ways of thinking about a state—new brand images—are not created by going along to get along. There is always risk in seeking a new image, but that risk comes with the potential for the big payoff. North Dakota took the first step to get recognized as a new player in corporate governance by passing the Act. If the first step is also the last step, it will be an opportunity lost.

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WEEK, Jan. 12, 2009, at 23. Nonetheless, as a leader in both wind and coal energy, North Dakota could, and should, take a significant role in the discussion.

153. See N.D. CENT. CODE §§ 10-35-02(6), 10-35-03 (2007) (making clear that the Act is optional and thus not extending any of the Act’s shareholder protections to current shareholders).

154. The state already has a good start on this front. The University of North Dakota’s College of Business and Public Administration is ranked number 13 among U.S. undergraduate schools for entrepreneurship. Press Release, Entrepreneur Media Inc. & The Princeton Review, UND College of Business and Public Administration Ranks #13 in Nation for Entrepreneurship (Sept. 8, 2009), available at [http://www.business.und.edu/entr/Top%20Colleges%202008%20Template%20Release\\_final%20%20\\_3\\_.pdf](http://www.business.und.edu/entr/Top%20Colleges%202008%20Template%20Release_final%20%20_3_.pdf).

155. See Tuna, *supra* note 8, at B6 (“‘This is more a wake-up call for Delaware to modernize than any significant attempt to attract business in North Dakota,’ says Richard Ferlauto, head of corporate governance and pension investment at the American Federation of State, County and Municipal Employees.”).