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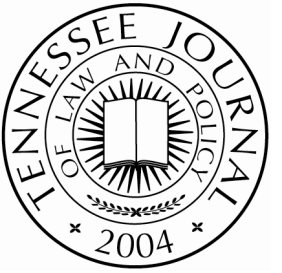

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ARTICLE

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN: AN ANALYSIS OF RACE-CONSCIOUS ADMISSIONS PROGRAMS AND HOW THE SUPREME COURT WILL RULE

By: Kevin McNelis

I. Introduction

More than half a century removed from the Civil Rights movement, diversity remains a hotbed issue in American society, particularly on college campuses. The overarching issue presented in *Fisher v. University of Texas at Austin* is whether a public university can consider an individual's race in its admissions decisions. The answer depends on how the Supreme Court will interpret the Constitution in its upcoming term – notably the Equal Protection Clause of the Fourteenth Amendment, which provides that all United States persons are entitled to the equal protection of the laws.[1]

Diversity has long been asserted as an important factor in a college education. In fact, the Supreme Court approved this belief in the 1978 case *Regents of the University of California v. Bakke,* where it held that achieving a diverse student body is a compelling state interest that can be satisfied by the use of race-conscious

[1] U.S. CONST. amend. XIV, § 1.

admissions programs.[2] What the Supreme Court must decide in *Fisher* is this: how does the University of Texas at Austin's affirmative action plan stand up next to the standards the Court has established in and since *Bakke*? In other words, is the race-conscious admissions program at the University of Texas at Austin ("UT Austin") constitutional?

In this policy note, I will address the history of Supreme Court decisions regarding race-conscious admissions programs at public universities; I will also analyze each justice's tendencies and how their tendencies could affect this decision. In doing so, I will conclude that UT Austin's program is unconstitutional. In its efforts to achieve diversity, it considers race disproportionately among other important factors, thus failing the standard of strict scrutiny.[3]

II. Development of the Law: Supreme Court Decisions and Standards

In order to prohibit racial discrimination in federally-funded programs, Congress enacted the Civil Rights Act of 1964.[4] Title VI of such law specifically provides that no United States citizen shall be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" based on his or her race.[5] But as the government made its move to prohibit segregation,

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[2] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314–15 (1978). However, race can only be considered if it is done so alongside several other factors. *Id.*

[3] *See generally* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that strict scrutiny standard must be applied whenever racial classifications are imposed by the government).

[4] *Overview of Title VI of the Civil Rights Act of 1964*, THE UNITED STATES DEP'T OF JUSTICE, http://www.justice.gov/crt/title-vi-civil-rights-act-1964-42-usc-2000d-et-seq (last updated Jan. 22, 2016).

[5] 42 U.S.C. § 2000(d) (1964).

an entirely different question arose as to whether public universities could achieve integration by implementing race-conscious admissions programs.[6]

In *Bakke*, the Court dealt with the University of California at Davis ("UC Davis") medical school's race-conscious admissions program, which allocated sixteen of one hundred seats of its incoming class to minority students.[7] Because this allocation "absolutely excluded" non-minorities from a certain amount of seats and because it used race as the sole factor in achieving diversity, the program was unconstitutional under a strict scrutiny analysis.[8] The Court found the program operated essentially as a racial quota.[9] Under the strict scrutiny analysis, the program failed the narrow tailoring requirement; as Justice Powell opined, it was not "necessary to promote [the] substantial state interest" of diversity.[10] Although the Court struck down the UC Davis program, it made clear that race-conscious admissions programs, if done properly, could be constitutionally permissible to achieve diversity within the classroom.[11] In fact, Powell expounded upon his belief that

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[6] *See generally A Brief History of Affirmative Action,* UCI: OFFICE OF EQUAL OPPORTUNITY AND DIVERSITY, http://www.oeod.uci.edu/aa.html (last updated June 23, 2015). In 1961, President John F. Kennedy issued Executive Order 10925. *Id.* One provision of such order provided that government contractors "take affirmative action" to ensure that no employee was treated differently due to their "race, creed, color, or national origin." *Id.* Superseding this was Executive Order 11246, issued by President Lyndon B. Johnson in 1965, which prohibited employment discrimination based on "race, color, religion, and national origin" by employers whom received federal funds. *Id.*

[7] CHARLES V. DALE, CONG. RESEARCH SERV., RL30410, AFFIRMATIVE ACTION AND DIVERSITY IN PUBLIC EDUCATION: LEGAL DEVELOPMENTS 4 (2012).

[8] *Id*.

[9] *Bakke*, 438 U.S. at 320; *see* DALE *supra* note 7, at 4.

[10] *Bakke*, 438 U.S. at 320.

[11] *Id.*

a constitutionally sound race-conscious admissions program would actually benefit students.[12]

In the end, the *Bakke* court delivered a total of six opinions,[13] with Powell "split[ting] the difference between two four-justice pluralities."[14] In the 5–4 decision that struck down UC Davis' program, only Powell's opinion included the idea that the state had a compelling interest in achieving a diverse student body.[15] Accordingly, it came as no surprise that race-conscious admissions programs at other public universities remained relatively unaffected by *Bakke* in the decades following its decision.[16] It was not until the Supreme Court heard two Michigan cases – *Grutter v. Bollinger* and *Gratz v. Bollinger* – that the fragile precedent of *Bakke* would be revisited.[17]

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[12] *Id.* at 314 (1978) (Justice Powell remarks that a school with a diverse student body is advantaged by the backgrounds and experiences each student brings. The diversity enhances the learning experience because students are subject to new ideas that may better equip them in their studies and future careers).

[13] *Id.* at 269, 324, 379, 387, 402.

[14] DALE, *supra* note 7, at 6. One of these four-Justice pluralities, led by Justice Stevens, struck down the university's racial quota on statutory civil rights grounds. *Id.* The other plurality, led by Justice Brennan, would have found the racial quota constitutional on the grounds that it would right past wrongs in regards to racial discrimination. *Id.* Powell, in reaching the same result as the Stevens plurality, found the quota unconstitutional. *Id.* Therefore, in a 5–4 decision, the Court struck down the University of California at Davis' racial quota, but under different reasoning. *Id.*

[15] *Id.* at 7.

[16] *See* John Valery White, *From Brown to Grutter: Affirmative Action and Higher Education in the South: What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2148 (2004). I say relatively because outright quota system was declared unconstitutional.

[17] DALE, *supra* note 7, at 8–10; *see* Paula C. Johnson, *Grutter and Gratz Synopsis on Affirmative Action*, COLUMBIA LAW SCHOOL BLOGS 1, 1 (2009), http://blogs.law.columbia.edu/salt/files/2009/08/Grutter-and-Gratz-Synopsis-on-Affirmative-Action.pdf. Similar to *Bakke*, *Grutter* and *Gratz* both dealt with race-conscious admissions programs at the University of Michigan Law School and undergraduate program,

In *Grutter*, the Court subjected University of Michigan ("Michigan") Law School's race-conscious admissions program to the same strict scrutiny analysis that it applied in *Bakke*.[18] That is, the program had to be narrowly tailored in order to further a compelling state interest.[19] Adhering to Justice Powell's observation in *Bakke* – that race can only be "one element in a range of factors" – Michigan's law school used race only as a "plus" factor, allowing a more individualized review of each applicant without his or her race becoming a defining factor.[20] The Court held that a program that considers race only as a plus factor satisfies the narrow tailoring requirement.[21] Accordingly, the Court found the program constitutionally permissible and distinct from that in *Bakke*,

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respectively. Johnson, *Grutter and Gratz Synopsis on Affirmative Action*, COLUMBIA LAW SCHOOL BLOGS at 1. The claimants in each case alleged that they were unlawfully denied admission because race was the predominant factor in the decision. *Id.* Both programs considered race as one of the many factors that went into the admissions decision. *Id.* However, the law school did so in a "holistic manner," whereas the undergraduate program did so within a 150-point system. *Id.* In the latter approach, if one's race was considered in the minority, that applicant received twenty points. *Id.* The Court found that this "placed too much emphasis on race in an inflexible, determinative way." *Id.*

[18] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[19] *Id.* at 333 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.")).

[20] *Id.* at 336–37; *Bakke*, 438 U.S. at 314.

[21] *Grutter*, 539 U.S. at 334 (explaining that when race is considered only as a plus factor, an applicant can be compared holistically to others, whereas a quota system based on race allows certain individuals – like minorities – protection from that comparison); *see Bakke*, 438 U.S. at 317.

despite several dissenting Justices' aversion surrounding the term "critical mass."[22]

In *Gratz*, the Court ruled differently and struck down the undergraduate program's 150-point scale approach, in which one hundred and fifty points were available to applicants, but only a total of one hundred was required to gain admission with twenty points being applied if the applicant was a minority.[23] This decision harkened back to what Justice Powell opined in *Bakke*: that admissions programs should individually assess each applicant; no single characteristic, such as race, should hold a fixed weight in regards to admissions decisions.[24] The *Gratz* Court decided that the system in which minority applicants automatically received a 20-point award was not narrowly tailored to achieve the university's compelling interest of a diverse student body, and thus failed the test of strict scrutiny.[25] *Grutter* and *Gratz* collectively provided the framework, that race can be used only as one of many factors, for race-conscious admissions programs at public universities. [26] However, Justice O'Connor's majority opinion in *Grutter* foretold of a time – then "25 years from

[22] *Id.* at 343–44. The term "critical mass" refers to the amount of underrepresented minority students Michigan Law School desired to enroll in order to attain the "educational benefits of a diverse student body." *Id.* at 330. However, no "number, percentage, or range of numbers or percentages" can define a critical mass exactly. *Id.* at 318. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas have a problem with this classification. *Id.* at 379, 390. Kennedy, particularly, denounces the concept as a "delusion used . . . to achieve numerical goals indistinguishable from quotas." *Id.* at 389. Rehnquist and Scalia each label it as a "sham." *Id.* at 347, 383.

[23] Johnson, *supra* note 17, at 1; *see* Peer Caldwell, *Defining the New Race-Conscious Frontier in Academic Admissions: Critical Perspectives on Grutter v. Bollinger*, 31 T. MARSHALL L. REV. 197, 200 (2006).

[24] Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

[25] *See id*. at 270–75.

[26] *See generally Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 345.

now" – when the use of racial preferences would "no longer be necessary to further the interest [of diversity]."[27] Today, American society finds itself past the halfway marker of O'Connor's 2003 prediction, but the use of race-conscious admissions programs at public universities is still a hotbed issue, perhaps now more than ever.

III. Current Policy: *Fisher* and How It Measures Up

In 1997, Texas enacted what is commonly referred to as the Top Ten Percent law, which automatically admits to public universities any applicant who "graduated with a grade point average in the top 10 percent of the student's high school graduating class."[28] Proponents of the law argue that deserving and qualified applicants are ensured admission.[29] Those opposed to the law argue that awarding automatic admission solely on class rank bars the evaluation of other potentially qualifying attributes of applicants.[30] This poses a problem in and of itself, because, since the enactment of the law, public universities in Texas, particularly UT Austin, have seen an increasing number of incoming freshmen enrolled through the Top Ten Percent

[27] *Grutter*, 539 U.S. at 343.
[28] TEX. EDUC. CODE § 51.803(a) (West 1997); *see* DALE, *supra* note 7, at 12.
[29] Steven Thomas Poston, Comment, *The Texas Top Ten Percent Plan: The Problem It Causes for The University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257, 267–68 (2008).
[30] *Id*. at 260. UT Austin President William Powers, Jr. remarked that relying so heavily on class rank ignores certain individuals who may not necessarily be in the top ten percent of their graduating class but excel in other areas. *Id.* (citing Holly K. Hacker, *Class Rank is Low on Many Colleges' Lists: UT Admitting More to Make up for Law Some Say Ignores Other Factors*, DALLAS MORNING NEWS, Dec. 2, 2007, at 1A).

law.[31] By 2008 – the year Abigail Fisher sought admission – over eighty percent of UT Austin's incoming freshman class was admitted by way of the law.[32]

The question – at issue in *Fisher v. University of Texas* – then became, how does the university fill the remaining seats? It did so, and continues to do so, by adopting a race-neutral approach that considers "essays, leadership, awards and honors, work experience, extracurricular activities, community service, and special circumstances such as socioeconomic status or family responsibilities."[33] A few years before Abigail Fisher applied for admission to UT Austin, however, the university added race and ethnicity to those criteria.[34] When Fisher was denied admission, she sued, alleging that the university had already acquired a "critical mass" of minority students by way of the Top Ten Percent law and that there was no reason to consider race on top of that.[35]

But what is a critical mass?[36] During the district court's hearing of *Grutter*, Erica Munzel, Michigan Law School's Director of Admissions, testified that it is within the university's discretion to decide when a critical mass

[31] Poston, *supra* note 29, at 259. The fear is that, ultimately, "UT Austin will only be able to enroll automatically admitted students who qualify by way of the Plan." *Id.*
[32] *Id.*; *see* DALE, *supra* note 7, at 12.
[33] DALE, *supra* note 7, at 12.
[34] *See* HOUSE RES. ORG., SHOULD TEXAS CHANGE THE TOP 10 PERCENT LAW? TEX. H.R. FOCUS REP. NO. 79–7, Reg. Sess., at 7 (2005), http://www.hro.house.state.tx.us/focus/topten79-7.pdf.
[35] Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 501 (2012) [hereinafter *Diversity Within Racial Groups*] (finding the phrase "critical mass" became the accepted terminology regarding the body of minority students the university wished to see represented in its incoming freshman classes). *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).
[36] *See supra* text accompanying note 23.

has been reached.[37] The Court accepted the term, but it made clear during its first hearing of *Fisher* in 2012 that the *Grutter* decision did not "hold that good faith would forgive an impermissible consideration of race."[38] In a decision supported by seven justices, the Supreme Court remanded the case to the Fifth Circuit, asking for a "more stringent" review of whether UT Austin should be allowed to consider race within its admissions criteria.[39] Essentially, the Court held that the Fifth Circuit failed to employ strict scrutiny in its review of UT Austin's program.

With its second go at *Fisher*, the Fifth Circuit, in a 2–1 decision, upheld UT Austin's race-conscious admissions program.[40] The court held the program to be narrowly tailored because the consideration of race was necessary to target certain minority groups, affirming the idea that "no workable race-neutral alternatives" could achieve the same goal.[41] After the Fifth Circuit denied her

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[37] *See Grutter*, 539 U.S. at 318. Specifically, Munzel stated that "there is no number, percentage, or range of numbers or percentages that constitute[s] critical mass." *Id.*

[38] Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2421 (2013).

[39] Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 764–65 (2015) [hereinafter *Narrowly Tailored but Broadly Compelling*]. In essence, the Court wanted factual proof from UT Austin to support its contention that, in order to achieve diversity, its race-conscious admissions program was necessary, along with the race-neutral approach of the Top Ten Percent law. *Id.*

[40] Fisher v. Univ. of Tex., 758 F.3d 633, 659–60 (5th Cir. 2014).

[41] *Fisher*, 758 F.3d at 644, 657 (citing *Fisher*, 133 S. Ct. at 2420). *Narrowly Tailored but Broadly Compelling*, *supra* note 39, at 791 (quoting *Fisher*, 758 F.3d at 657). The Fifth Circuit mentions that in 2008 – the year that Fisher sought admission – eighty-one percent of UT Austin's incoming freshman class was admitted via the Top Ten Percent law. *Fisher*, 758 F.3d at 657. Out of the remaining nineteen percent of seats left available via the race-conscious, holistic approach, twelve percent of those admitted were white; 3.3 percent were Hispanic or African American. *Id.* To the court, the holistic approach "overwhelmingly and disproportionately" represented white students,

request for a hearing *en banc*, Fisher again appealed to the Supreme Court, which heard the case for the second time on December 9, 2015.[42]

IV. Analysis of the Policies

As the Fifth Circuit pointed out during its second review of *Fisher*, the Top Ten Percent law functions based off a "fundamental weakness" in the Texas high school system.[43] Under this law, UT Austin draws a large number of its applicants from Dallas, Houston, and San Antonio – three areas that hold over half of the Texas population and, unfortunately, see some of the most pronounced cases of segregation within their school systems.[44] Nevertheless, with its look at *Fisher*, the Supreme Court must decide whether the Top Ten Percent law produces adequate diversity at UT Austin, or whether the addition of UT Austin's race-conscious holistic review is necessary in order to produce such diversity.

In 2004, the year before UT Austin implemented its race-conscious admissions program, minority enrollment of African Americans and Hispanics was at a combined 21.4

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thus it agreed with the university's argument that a consideration of race was necessary in order to "target minorities with unique talents and higher test scores to add to the diversity" of the incoming class. *Id.*

[42] *Narrowly Tailored but Broadly Compelling*, *supra* note 39, at 766. *See generally* Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, N.Y. TIMES (June 29, 2015), http://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html?_r=0.

[43] *Fisher*, 758 F.3d at 650–51 (noting that the "sad truth," as the court puts it, is that there is a "de facto segregation" of schools within the state of Texas which allows the Top Ten Percent law to achieve diversity).

[44] *Id*. at 651

percent, both having increased from 2003.[45] Caucasian enrollment decreased from 59.3 percent to 58.6 percent.[46] That same year, "77% of the enrolled African American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students."[47] Looking at the statistics generally, these numbers indicate that the UT Austin achieved its goal of a diverse student body without the help of a race-conscious admissions program. I say generally because it is difficult to look at the numbers any other way when UT Austin, much to the disapproval of the Supreme Court's conservative justices, has not defined critical mass.[48]

Though UT Austin is not required to place a numerical value on critical mass, it should be required to define its goal more precisely.[49] Under a strict scrutiny analysis, the Court must verify that UT Austin can only achieve the benefits of diversity by using race in its admissions process.[50] This will be difficult because, as Judge Garza mentioned in his dissent in the Fifth Circuit's second *Fisher* decision, the Court "cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends."[51]

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[45] Jonathan W. Rash, *Affirmative Action on Life Support: Fisher v. University of Texas at Austin and the End of Not-So-Strict Scrutiny*, 8 DUKE J. CONST. LAW & PUB. POL'Y SIDEBAR 25, 28 (2012).

[46] Press Release, University of Texas at Austin, Fall enrollment figures show greater percentage of minorities at The University of Texas at Austin (Sept. 14, 2004) (on file with UT Austin's website) http://news.utexas.edu/2004/09/14/nr_enrollment.

[47] Fisher v. Univ. or Tex., 631 F.3d 213, 224 (5th Cir. 2011).

[48] *See Diversity Within Racial Groups*, *supra* note 35, at 472 n.23.

[49] *Id.* at 475–76; *see* Fisher v. Univ. of Tex., 758 F.3d 633, 667 (5th Cir. 2014).

[50] Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420 (2013) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).

[51] *Fisher*, 758 F.3d at 667.

V. How the Court Will Rule

Chief Justice Roberts and Justices Scalia, Alito, Thomas, and Kennedy have "never voted to uphold the affirmative action programs at issue in any racial affirmative action case that the Supreme Court has resolved on the merits of a constitutional challenge."[52] Yet out of those five justices, Kennedy may be the most important.[53] Many legal analysts believe that Justice Kennedy will be the swing vote in the Court's upcoming decision, a position he seems to have assumed since Justice O'Connor's retirement in 2006.[54] This consideration is crucial because UT Austin's race-conscious admissions program is based heavily off of the Michigan Law School program that was upheld in *Grutter*, a case in which Justice Kennedy dissented.[55] What's more, his views on race-conscious

[52] Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 48 (2012).

[53] Four of the nine justices who sat for *Grutter* and *Gratz* remain on the Supreme Court – Scalia, Thomas, Breyer, Ginsberg, and Kennedy. This article was written before the death of Justice Scalia, which admittedly, could affect the result in a subsequent affirmative action case. Out of the other four, three were in the *Grutter* majority – O'Connor, Stevens, and Souter. Rehnquist dissented. *See generally Grutter*, 539 U.S. 306. Roberts, Alito, and Sotomayor were the three justices who heard the second *Fisher* case but were not present during *Grutter* and *Gratz* (keeping in mind that Kagan recused herself from the case). *See Diversity Within Racial Groups, supra* note 35, at 9.

[54] Eboni S. Nelson, *Reading Between the Blurred Lines of Fisher v. University of Texas*, 48 VAL. U.L. REV. 519, 523 (2014).

[55] *Id.* at 529; *see* Grutter v. Bollinger, 539 U.S. 306, 389 (2003). In his dissent, Kennedy stated that "the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." *See generally* Spann, *supra* note 52, at 55.

admissions programs, since the *Grutter* decision, have remained relatively the same.[56]

While on the surface his leanings match him to the Court's conservative bloc, Justice Kennedy is different from Roberts, Scalia, Alito, and Thomas when it comes to race-conscious admissions programs.[57] In his *Grutter* dissent, Kennedy reaffirmed what Justice Powell opined in *Bakke*, by holding that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."[58] But where he differs – and quite significantly so – from the Court's liberal bloc, is on its application of strict scrutiny.[59] Referring to its application of strict scrutiny in *Grutter* as "perfunctory," Kennedy believed the majority abandoned the standard, giving too much deference to Michigan Law School's guarantee that its race-conscious admissions program was constitutional.[60] Deference, according to Kennedy, is "antithetical" to strict scrutiny.[61] To him, details matter, and the details in *Grutter* mirror those in *Fisher*—they are practically nonexistent, according to Kennedy's previous stated preferences.[62]

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[56] *Will the Supreme Court End Affirmative Action? A preview of Fisher v. University of Texas at Austin on the Eve of Oral Argument*, CATO EVENTS PODCASTS (Dec. 7, 2015) (downloaded using iTunes).
[57] *See id.*
[58] *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting).
[59] Paul Horwitz, *Fisher, Academic Freedom, and Distrust*, 59 LOY. L. REV. 489, 492 (2013).
[60] *Grutter*, 539 U.S. at 388–89 (Kennedy, J., dissenting).
[61] *Id*. at 394.
[62] *Grutter*, 539 U.S. at 357 (Thomas, J. and Scalia, J., concurring in part and dissenting in part). Justices Thomas and Scalia refer to Michigan Law School's goal of achieving diversity as a "we know it when we see it" approach. *Id.* He insists that, because the university offers relatively little in understanding what a critical mass is, the approach is "not capable of judicial application." *Id.* Kennedy endorses this opinion in his dissent. *See Grutter*, 539 U.S. at 388–89 (Kennedy, J., dissenting);

With Justice Kagan's recusal from the case – due to her previous position as Solicitor General – Kennedy will more than likely have the deciding vote.[63] If he abandons his historically unflinching stance and casts his vote with the liberal bloc, the result would be a 4–4 tie, in which the Fifth Circuit's ruling would be controlling. However, the Court will likely treat UT Austin's program as parallel to that of Michigan Law School's program, holding the university to its contention that "[its] admissions program is precisely the type of system expressly upheld in *Grutter*."[64] Undoubtedly cognizant of the similarities between *Fisher* and *Grutter*, Kennedy will likely observe his past position and vote to strike down UT Austin's program as unconstitutional under the standard of strict scrutiny.[65]

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see also Will the Supreme Court End Affirmative Action?, *supra* note 56.

[63] *Diversity Within Racial Groups*, *supra* note 35, at 463 n.3.

[64] Brooks H. Spears, Casenote, *"If the Plaintiffs are Right, Grutter is Wrong": Why Fisher v. University of Texas Presents an Opportunity for the Supreme Court to Overturn a Flawed Decision*, 46 U. RICH. L. REV. 1113, 1137 (2012) (citing Brief in Opposition to Motion for Preliminary Injunction at 16, Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. May 5, 2008)).

[65] Rash, *supra* note 45, at 26. *See generally Grutter*, 539 U.S. at 389, 394–95 (Kennedy, J., dissenting); *Fisher*, 758 F.3d at 646. In his *Grutter* dissent, Kennedy notes that eighty to eighty-five percent of applicants to Michigan Law School were admitted based on undergraduate grades and Law School Admissions Test scores alone. *Id.* at 389. Similarly, in *Fisher*, over 80 percent of UT Austin applicants were admitted via the Top Ten Percent law. Kennedy's concern is how universities like Michigan and UT Austin fill the remaining seats by considering race, among other factors. *Fisher*, 758 F.3d at 646. To Kennedy, considering an applicant's race at this point in the admissions process can disadvantage those applicants devoid of any minority status. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). Kennedy asserts that "the numerical concept of critical mass has the real potential to compromise individual review." *Id.* Further, in Kennedy's dissent in *Grutter*, he stated his belief to be that Michigan could have effectively used other race-neutral programs to accomplish the same goal of attaining a diverse student body. *Id.* Judge Garza, the sole

VI. What It Means for Other Race-Conscious Admissions Programs Nationwide

A decision to strike down UT Austin's program would allow the Court to "rewrite the deferential standard espoused in prior cases."[66] In *Grutter*, Justice O'Connor disputed the long-held notion that strict scrutiny is to be "strict in theory, but fatal in fact" and asserted that "context matters" when applying strict scrutiny.[67] However, this notion is exactly what Justice Kennedy opposed when making his remark that deference is antithetical to strict scrutiny.[68] If UT Austin's program is invalidated, Kennedy and the Court's conservative bloc will have a chance to revise the strict scrutiny analysis to be more fatal in fact.

With a strict scrutiny analysis that is more fatal in fact, the Court – especially Kennedy – would likely endorse an instruction that "deference . . . cannot coexist with strict scrutiny."[69] As it stands now, *Grutter* allows an overly-deferential standard in which courts defer to universities in their usage of their race-conscious admissions programs, but after *Fisher*, universities may be required to demonstrate that it "actually needs more diversity in order

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dissenter in the Fifth Circuit's ruling in the second *Fisher* case, believes the same can be said of UT Austin—it did not show that "qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law." *Fisher*, 758 F.3d at 669 (Garza, dissenting).

[66] *See* Rash, *supra* note 45, at 43; *see also* Eric K. Yamamoto, Carly Minner, & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 248 (2006). *Grutter*, among others, was a pivotal case that highlighted a shift in how the Court applied its strict scrutiny analysis.

[67] *Grutter*, 539 U.S. at 326–27 (citing Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995)).

[68] *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

[69] Rash, *supra* note 45, at 43 (noting, however, that universities, for First Amendment reasons, "must be afforded some level of deference" in achieving diversity).

to attain the educational benefits that flow therefrom . . . even before reaching the question of whether the particular policy at issue is narrowly tailored."[70]

While the Court may strike down UT Austin's program, diversity will remain a compelling state interest appropriate for universities to pursue. Several states may elect to ban the consideration of race, however, in order to avoid a strict review from federal courts.[71] Those states that do will consider different factors separate from yet similar to race that could effectively yield the same desired result.[72] So far, in states that have abandoned race-conscious admissions programs, public universities have "increased their emphasis on factors such as overcoming adversity, geographic variety, and socioeconomic disadvantage."[73] In doing so, the future of the ultimate public policy objective established over twelve years ago in *Grutter* will be advanced through a mechanism that does not consider race as one of many factors.

[70] *Id.* at 44.
[71] Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES, April 22, 2014, http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=1.
[72] Kaitlin Mulhere, *How Wednesday's Supreme Court Case Could Change College Affirmative Action*, TIME: MONEY, Dec. 8, 2015, http://time.com/money/4140410/preview-fisher-texas-supreme-court-affirmative-action/.
[73] *Id.*

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TIME IS MONEY—BUT OUR INDIGENTS HAVE NEITHER

By: Lee T. Nutini

I. Introduction

The status of indigent defense in this country now rests on the issue of insufficient time and money—both for the client and her counsel. An accused's lack of time and money may be material to their predicament, but it is her counsel's lack of these necessities that can prove far more fatal to the accused's case. From the criminal client's perspective, the lawyer's role is to charge a set fee, accept the client's money, zealously represent the client's interests, and (hopefully) return freedom: freedom from jail; freedom from liability; freedom from monies owed—which is why so many affluent accused will pay whatever it costs to receive a quality legal defense.[1] The issue regarding lack of resources was most profoundly characterized in *Strickland v. Washington*, a landmark Supreme Court case defining the right to counsel in an increasingly financially polarized American landscape:

> It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares

[1] Indeed, O.J. Simpson famously spent north of $3 Million for his defense. *See* V. Dion Haynes, *The $25 Million Question: What is Simpson Worth?*, CHICAGO TRIBUNE, Feb. 7, 1997,http://articles.chicagotribune .com/1997-02-07/news/9702070269_1_nicole-brown-simpson-los-angeles-civil-lawyer-legal-fees.

> thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. *Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?*[2]

When Justice Marshall first proposed this question in 1984, he wrote with remarkable foresight. Indeed, the state of indigent defense would come to revolve around the question of funding. This paper will attempt to answer Justice Marshall's question. I will also evaluate the legal system's wide array of responses through the Justice Department's most recent participation in *Hurrell-Harring v. New York*, and propose new solutions that could effect positive change.

II. The Problem

The overall quality of indigent legal defense is affected both by private appointed attorneys and public defenders. Thus, the problem brought to light by Justice Marshall's question is best defined by the *difference* in the justice provided by attorneys with manageable caseloads, who are adequately paid for their work, and those attorneys who are overloaded for their given salary (or those private defense attorneys who work on an appointment basis). In essence, the schism is rooted in simple human self-interest: how does one remain zealously passionate when rewards seem small, or may not materialize at all? For those

[2] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) (emphasis added).

hanging a shingle, passion alone cannot pay the electric bill and keep the lights on. Moreover, the right to counsel depends upon effective assistance being, at the very least, *possible* on the part of the attorney. But lack of funding nationwide has caused numerous public defense programs to provide the accused with lawyers "in name only."[3]

Lack of both time and money on the part of indigent defenders translates to insufficient and inadequate representation in myriad ways. Attorneys who lack sufficient time to investigate, interview, and simply communicate with clients cannot fulfill the most essential requirements of representation. Taken alone, insufficient funding for public defenders—or poor reimbursement for appointed attorneys—also affects many critical stages of a client's case. For example, public defender offices need significant cash flow to investigate their clients' cases, interview witnesses, hire experts (e.g. hematologists, fingerprint experts, ballistics experts), or even set up psychological evaluations required for establishing insanity defenses or combating *mens rea* allegations.

This growing funding problem was evident well before *Strickland* was handed down. In fact, following the landmark case *Gideon v. Wainwright* in 1963,[4] New York founded its Office of Indigent Legal Services in 1965.[5] Like many other states,[6] control over the public defense

[3] Brief for Respondents at 9, Hurrell-Harring v. New York, No. 03–3674 (N.Y. App. Div. 2009) (citing the need for "standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants have sufficient qualifications and training").
[4] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).
[5] *Counsel at First Appearance*, NYS Office of Indigent Legal Services, https://www.ils.ny.gov/content/
counsel-first-appearance (last visited April 29, 2016).
[6] *See County-Based and Local Public Defender Offices, 2007*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES 2007, (2010) [hereinafter DOJ REPORT], http://www.bjs.gov/content/pub/pdf/clpdo07.pdf (noting that

system was ceded to New York's counties, rather than giving responsibility to the state government itself.[7] This setup was intended to provide more efficient appointment services to local indigents. But the counties were ill-equipped to handle the growing number of indigents facing complex legal issues who could not afford a local attorney. Here in Tennessee, the first public defender office was set up in Nashville in 1962,[8] and another in Knoxville soon after the constitutional mandate was passed down in *Gideon*.[9] But the problem facing public defenders in Tennessee, New York, and across the country is that they are so overloaded with cases that their everyday functioning borders on ineffective assistance of counsel.

Furthermore, when private appointed attorneys become *over*-appointed, their acceptance of a new case is tantamount to professional ethics violations.[10] The ABA Model Rules make it clear that attorneys must provide clients with a baseline amount of communication as well as providing them with information necessary to the variety of client-controlled decisions.[11] Attorneys who accept too many appointments often commit per se ethical violations,

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twenty-seven states operate county-based systems, with the twenty-two remaining states using state-wide oversight).

[7] *Counsel at First Appearance*, NYS Office of Indigent Legal Services, https://www.ils.ny.gov/content/
counsel-first-appearance (last visited April 29, 2016).

[8] *See A Short History of the Public Defender*, NASHVILLE DEFENDERS, http://publicdefender.nashville.
gov/about-us/a-short-history-of-the-public-defender/ (last visited March 29, 2016).

[9] *Becoming the CLO*, CLO, https://www.pdknox.org/who-we-are/becoming-the-clo/ (last visited Nov. 11, 2014).

[10] At the very least, their duties of competence, caseload management, and zealous representation are affected by receiving too many appointments. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 cmt. [2], Preamble cmt. [2] (AM. BAR ASS'N 2013).

[11] MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2013); *see also id.* at r. 1.2 cmt. [1].

with some admitting they often do not know or recognize their clients' names; indeed, some appointed attorneys fail to speak to clients before their first day in court.[12]

The situation is equally disastrous for public defender offices. To illustrate the reality of the problem, consider the following data recently reported for public defenders and legal aid organizations in New York: in one populous New York county, attorneys regularly carried caseloads of five hundred to six hundred cases.[13] If one attempts to break down this caseload into hours worked on each client's behalf, it amounts to an average of four hours per case, with only one hour of investigation and interviewing.[14] As many practicing attorneys will admit, a proper initial client interview will last *at least* an hour, and drafting motions and pleadings (not to mention correspondence with counsel and client) can take months of work. Worse still, ethical guidelines are intended as a floor, not a ceiling, on proper conduct;[15] attorneys who cannot meet the floor are violating their professional duties on a daily basis. Thus, New York public defenders do not spend nearly enough time with their clients to properly or ethically represent the client's interests.

In Tennessee, the problem is far worse. Public defenders in cities here have reported handling over 10,000 misdemeanors per attorney every year, spending only an

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[12] *See* David Knowles, *Worst Lawyer Ever? Texas Attorney Slept through Client's Trial, Forgot His Name, and Failed to Enter a Plea Bargain*, N.Y. DAILY NEWS, at 1 (Sept. 17, 2013, 9:41 PM), http://www.nydaily news.com/news/national/worst-lawyer-defense-attorney-sleeps-trial-article-1.1459210.

[13] James C. McKinley, Jr., *In New York, Cuomo Pledges More Aid for Lawyers of the Indigent*, N.Y. TIMES, at 2 (Oct. 21, 2014), http://nyti.ms/1FzjyzZ.

[14] *Id.* at 3.

[15] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2013).

hour on each client.[16] My own experience in Tennessee is that, even in a simple civil matter, client interviews often last at least an hour; engagement correspondence and document drafting take longer. Put simply, no reasonable client, if given the option, would permit her attorney to spend so few hours on her case. But these clients do not have an option, largely because they cannot shop around in the market; they cannot request an attorney who is not overworked.

Indeed, national standards exist to define best practices for public defenders to properly manage caseloads. The American Bar Association recommends defenders handling only one hundred and fifty felony cases or four hundred misdemeanor cases per attorney, per year.[17] But nearly seventy-five percent of county-based public defender offices exceeded the maximum number of recommended cases per attorney, per year.[18] These attorneys' time is not the only issue; they must bear excessive caseloads while suffering from low pay. The 2007 Department of Justice census statistics report that the median salary for these entry-level assistant public defenders is around $43,000 nationwide.[19] Even after six years of experience, salaries peaked between $54,000 and $68,000.[20] Thus, it is no surprise that Justice Marshall's dissent in *Strickland* remains true thirty years later.[21]

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[16] *See* Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, ACS [hereinafter BENNER], https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf (citing DOJ REPORT, *supra* note 6, at 1).

[17] DOJ REPORT, *supra* note 6, at 10.

[18] *Id.* at 1.

[19] *Id.* at 13.

[20] *Id.* at 13.

[21] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

III. New Efforts for Reform

A. *The Case of Hurrell-Harring: New York's Indigents Fight Back*

The problem has most recently come to the fore in *Hurrell-Harring v. New York*, a class action suit in New York challenging the indigent defense status quo.[22] The *Hurrell-Harring* case was brought as a challenge to New York's county-based system, hoping to force the state to address concerns that its public defenders were so overworked and underpaid that their clients ultimately "receive no legal defense at all."[23] The case hopes to resolve an issue that mirrors Justice Marshall's original question in *Strickland*: that inadequate resources result in constructive ineffective assistance of counsel.[24] In the same opinion, Justice Marshall explained the practical effect of the issue he was attempting to frame, stating that the right to effective assistance of counsel

> "is violated not whenever there is a flaw or "deficiency" in the quality of the legal representation provided indigent criminal defendants, but when that representation, taken as a whole, is *so inadequate* as to "undermine[ ] the proper functioning of the adversarial process [so] that the trial cannot be relied on as having produced a just result."[25]

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[22] Hurrell-Harring v. New York, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009).
[23] Matt Apuzzo, *Holder Backs Suit in New York Faulting Legal Service for Poor*, N.Y. TIMES, at 1 (Sept. 25, 2014), http://nyti.ms/1uqCzRD.
[24] *See* Brief for Respondents, *supra* note 3, at 17.
[25] *Hurrell-Harring*, 883 N.Y.S.2d at 351–52 (citing *Strickland*, 466 U.S. at 686) (emphasis added).

The *Hurrell-Harring* case, in essence, argues that this description befits the current state of indigent defense in New York.[26] Because of its deep systemic criticism, the case has the flavor of a national movement, drawing support from leading legal power players as it began to receive national attention. Indeed, the suit, which was filed by the New York Civil Liberties Union, has drawn support from the Department of Justice and then-Attorney General Eric Holder,[27] and projects to be a model for challenging similar understaffed and poorly run indigent defense organizations.

The case, which was originally filed in 2007, came on the heels of a 2006 report by a New York commission appointed by the state's Chief Judge Judith Kaye that found that the "chronically understaffed" public defender offices amounted to severe constitutional violations.[28] The plaintiffs in *Hurrell-Harring* argued for New York to take back control over the county-run public defense system, invigorating it with sufficient resources to guarantee adequate representation. When the case was filed, indigent plaintiffs described a system in which they were left to "navigate courts nearly alone, relying on spotty advice from lawyers who do not have the time or money to investigate their cases or advise them properly."[29]

As the case has progressed, significant players in today's legal sector have weighed in on *Hurrell-Harring* and come to the indigents' aid. For example, after blame fell at the feet of New York Governor Andrew M. Cuomo for the state's ineptitude, even then-Attorney General Eric Holder joined in the fight.[30] Mr. Holder made public

[26] *See id.*
[27] *See* Apuzzo, *supra* note 23, at 1–2.
[28] *See* McKinley, *supra* note 13, at 3.
[29] *See* Apuzzo, *supra* note 23, at 1.
[30] *See id.* In the past, Mr. Holder has pushed for reducing harsh sentences, and eliminating mandatory minimum sentences for

statements similar to his support of public-defense reform in Washington State in 2013, demanding that New York address the massive caseloads burdening its public defenders.[31] In his public statement, Mr. Holder implored New York to "truly guarantee adequate representation for low-income defendants [by] ensur[ing] that public defenders' caseloads allow them to do an effective job."[32]

Specifically, Mr. Holder urged the Justice Department to file an interest statement (similar to an amicus brief) in support of the plaintiffs in the *Hurrell-Harring* case.[33] The Justice Department's motion urged New York to address the grievous inequities in its indigent defense system, citing limited funds and excessive caseloads that reduced the counties' attorneys to representation "in name only."[34] The Justice Department also urged New York State Supreme Court Justice Gerald W. Connolly, who heads review of the case, to evaluate the *entire system* of indigent defense, not just the plaintiffs' individual cases.[35] Luckily, nationwide publicity and calls for aid from these high-level officials yielded a settlement with Governor Cuomo and New York.

B. *The Hurrell-Harring Settlement as Model*

The settlement, reached on October 21, 2014, committed New York State to provide "bigger and better" public defense offices, infusing them with millions of

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nonviolent drug crimes, both of which help return a sense of justice back to America's criminal justice system. *Id.* at 2.

[31] *See id.* at 2.

[32] *See id.*

[33] *See id.*

[34] *See* McKinley, *supra* note 13, at 2.

[35] *See* Apuzzo, *supra* note 23, at 3; *see also* Brief for Respondents, *supra* note 3.

dollars over the next several years.[36] It mandates changes in Long Island and four other upstate counties, with the state agreeing to pay for more defense attorneys, investigators, and experts to assist in the defense of indigent clients. Most importantly, the state agreed to establish new caseload standards for its overworked attorneys: it will define an appropriate level, and then pay whatever expenses arise in meeting that level (which will likely require adding jobs to reduce the workload of its present attorneys).[37] Overall, the settlement creates lock-step improvements that will combine with infusions of cash to aid indigents for at least the next seven years.[38]

While Governor Cuomo stated that the settlement addresses problems his office "inherited" from past administrations, he took a great step forward by making numerous large-scale, specific promises to address the problem in his state.[39] These specific strategies have been hailed as potentially serving as a "model" for other New York counties to address their own broken criminal defense systems.[40] If applied elsewhere, states would need to take responsibility for funding public defender offices and establish (and meet) caseload minimums for attorneys. Because of the shift in funding from county to state, it seems likely that state legislators would need to brace their constituents for new or rising taxes and, perhaps, prepare for an appropriations battle. In that sense, New York has

[36] *See* McKinley, *supra* note 13, at 3 (stating that the settlement terms will last approximately seven years).
[37] *See* Stipulation and Order of Settlement, *infra* note 44, at 7.
[38] *See* McKinley, *supra* note 13, at 3.
[39] *See* Statement, N.Y. GOV, Andrew M. Cuomo, Statement from Governor Andrew M. Cuomo on Settlement Regarding Indigent Legal Services, (Oct. 21, 2014), https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-settlement-regarding-indigent-legal-services(last visited Oct. 29, 2014).
[40] *See* McKinley, *supra* note 13, at 1.

been bold to take on the indigent defense funding responsibilities under the *Hurrell-Harring* settlement.

However bold, the settlement model does not seem to add anything new to the spectrum of available options already in use across the country. In fact, recent statistics show that twenty-two states already utilize a statewide public defender oversight system.[41] As noted previously, the *Hurrell-Harring* settlement also promises to set caseload standards, with New York agreeing to pay the cost of reducing attorney workloads to the appropriate level.[42] But the ABA and various federal judicial commissions already have long-established "best practice" caseload guidelines in place.[43] While it is clear that New York – and other states for that matter – have not abided by these past guidelines, agreeing to abide by "new" standards seems much more like puffery than actual progress. Anyone with even a slight pessimistic lean can review the *Hurrell-Harring* settlement agreement and find nothing novel about it. In essence, it is a relatively simple settlement that merely forces the New York state government to set standards and pay for the necessary changes. But the settlement agreement is hardly expansive; it merely covers the costs of bringing *five* of New York's *sixty-two* counties to a constitutional level of adequate representation.[44] Thus, the settlement's ability to serve as a model for other states is limited by New York's own willingness to serve only a fraction of its people. The state's promises under the settlement terms are closer to a mere gesture; in order to finally cover the costs of providing justice to *all* of the state's indigents, New York must do much more. Thus, the

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[41] *See* DOJ REPORT, *supra* note 6, at 1.
[42] *Id.*
[43] BENNER, *supra* note 16, at 1, 5.
[44] *See generally* Stipulation and Order of Settlement at 1, *Hurrell-Harring v. New York*, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009) (No. 8866–07) (noting that only five counties are party to the agreement).

settlement might best serve as a model for other New York counties, but its limited terms fail to be sufficiently groundbreaking to gain the attention of other state administrations.

C. *Can County-Run Systems Work? Tennessee as Model.*

The theory behind the *Hurrell-Harring* settlement is that county-run programs are no longer sufficient to provide adequate legal representation to indigents. Well before the settlement announcement, Jonathan E. Gradess, the executive director of the New York State Defenders Association, stated that he no longer believed a county-based defense system could be effective.[45] Indeed, Mr. Gradess now dismisses them as "primitive."[46] Is it proper to turn away from those systems? Indeed, there are currently twenty-seven states operating under a predominantly county-based system.[47] Official statistics show that, on average, three-quarters of these county-run systems operate with caseloads that exceed recommended maximums.[48] But if attorney attrition is any indication of an office's health, these offices reportedly have attorney attrition rates of less than one percent.[49] Perhaps these low attrition rates connote job satisfaction, which itself may imply that representation is adequate.[50]

While a state-by-state analysis of constituent county-run systems is far beyond the narrow scope of this

[45] *See* Apuzzo, *supra* note 23, at 4.
[46] *See id.*
[47] *See* DOJ REPORT *supra* note 6, at 1 (defining county-based systems as those "principally funded" by the county or through combination of county and state funds).
[48] *See id.* (using data from 2007).
[49] *See id.* (using data from 2007).
[50] Of course, low attorney attrition rates may show nothing more than a depressed legal market.

paper, let us consider, for example, Tennessee's unique county-based system. Since its full establishment in the late 1980s, the state's public defender system has operated on a district-by-district basis.[51] But prior to 1987, private counsel took indigent appointments, except in Shelby (whose public defender office was founded in 1917) and Davidson (whose office was founded in 1961) Counties.[52] Today, Tennessee is one of only two states[53] that has *elected* public defenders in each of its thirty-one judicial districts.[54]

Tennessee's county-based system is unique because the state has set up several helpful institutions to assist its indigent defenders. For example, the District Public Defenders Conference (Conference) provides oversight by monitoring and providing funds for these separate public defender offices.[55] The Conference's primary role is to make policy decisions on a statewide basis. The state has also aided its public defender offices by setting up the Office of the Post-Conviction Defender (OPCD) and Post-Conviction Defender Commission in 1995.[56] These institutions assist the public defenders by assisting with investigations related to capital convictions, even providing training for capital defense attorneys.[57] Because a nine-

[51] TENN. ADMIN. OFFICE OF THE COURTS TENNESSEE'S INDIGENT DEFENSE FUND: A REPORT TO THE 107TH TENNESSEE GENERAL ASSEMBLY 8–9 (2011) [hereinafter AOC REPORT], http://www.tsc.state.tn.us/sites/default/files/docs/aoc_indigent_defense_fund_report.pdf.
[52] *Id.* at 8.
[53] The other state is Florida. *See* STEPHEN D. OWENS ET AL., U.S. CENSUS BUREAU, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012-UPDATED 25 (2015) [hereinafter CENSUS REPORT], http*://* www.bjs. gov/content/pub/pdf/idsus0812.pdf.
[54] *See* AOC REPORT, *supra* note 51, at 8.
[55] CENSUS REPORT, *supra* note 53, at 25; *see* Tenn. Code Ann. § 8–14–20*2* (2016).
[56] *Id.*
[57] CENSUS REPORT, *supra* note 53, at 25.

member, governor-appointed Oversight Commission regulates the budgetary processes for indigent defense in Tennessee, some of the state's most populous counties receive additional funding from state resources.[58] On the whole, only thirteen states spend more than Tennessee on indigent defense services.[59] Thus, Tennessee operates what appears to be a hybrid county-based system with statewide policy regulation and assisted funding. But does it work for Tennessee's public defenders, and most importantly, for the state's indigent defendants?

D. *Evaluating Tennessee's Hybrid Model*

The Tennessee Administrative Office of the Courts (AOC) issued a detailed report in 2011 to inform the Tennessee General Assembly of the current status of the state's indigent defense program.[60] Speaking to the efficacy of the state's program, the AOC Report stated that despite inadequate staffing, the statewide public defender system was "very cost-efficient."[61] The AOC Report also stated that Tennessee's appointment of private attorneys in cases of public defender conflicts (or in moments of high caseloads) is a "reasonable way to complete" its constitutional obligation to the state's indigents.[62] Notably, the Report shied away from recommending a "shadow"[63] public defender system – essentially an alternate, second office that steps in when conflicts arise – because of the

[58] *Id.* Shelby and Davidson counties receive both local and state funding. *Id.*
[59] *See id.* at 31–32.
[60] AOC REPORT, *supra* note 51, at 2–4.
[61] *Id.* at 16.
[62] *Id.* at 16.
[63] These offices are also sometimes referred to as Alternate Public Defenders or Offices of Conflict Counsel, depending on the locality. *See id.*

high cost.[64] It also refused to recommend a contract-based system due to national concerns over private attorneys being disincentivized from providing timely and adequate representation.[65] Indeed, the AOC reported that Tennessee's current district-focused system is "likely the best system of its kind" for its current purposes.[66]

Laudably, the AOC attempted to provide its own list of modifications in its report that might improve on this "best system."[67] The AOC recommended two modifications to improve Tennessee's indigent defense system: (1) shifting potential savings from correcting the private-public attorney imbalance[68] to increase the Rule 13 hourly rate for appointed attorneys; and (2) decriminalizing some minor offenses in order to reduce the total number of incarcerations.[69] First, the AOC used numbers prepared by the American Bar Association to provide a per capita analysis for indigent defense costs.[70] They reported that Tennessee does not overspend on indigent defense; its per capita cost ranked in the middle of states.[71] Though Tennessee's per capita costs have risen from $9.01 in 2006 to $11.81 in 2009, the AOC found that the state has continued its middle-of-the-road trend.[72] Ultimately, the AOC recommended that any additional funding should be channeled into providing better hourly rates for private

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See id.* at 26.
[68] The AOC reports that, in many areas, too many private attorneys are appointed—perhaps out of convenience—for cases that are better suited for the local public defender office. *Id.* at 26. The Report suggests that savings will arise from returning each type of counsel to its proper role, and any such savings should be allocated to increasing the hourly rate for *properly* appointed private attorneys. *Id.*
[69] *Id.* at 19, 23–24.
[70] *Id.* at 16–19.
[71] *Id.*
[72] *Id.* at 18.

attorneys working appointed cases; its polled participants unanimously agreed that the hourly rates for Rule 13 work were too low.[73] Secondly, the AOC Report noted that numerous polled participants indicated their desire to see the number of jailable offenses reduced.[74] Likewise, some data indicated a drive toward decriminalizing some minor offenses.[75] Though the AOC noted that this modification would not be "popular" with legislators, it recommended a committee address the issue to determine which offenses might be best suited for fines, and not jail time.[76]

I feel that the AOC Report's analysis does well to recommend decriminalizing minor offenses, but misses the mark on its complacent approach to per capita spending. The Report fails to properly account for the burdens placed on understaffed defender offices and economically depressed private appointment-seeking attorneys. Indeed, the AOC Report fails to communicate any regard for potential collateral benefits of increased hiring: adding jobs may help spur an economy by putting money into the hands of the under- or unemployed.[77] It dismisses the concept of alternate or "shadow" public defender offices merely because the setup costs would be "prohibitive"[78]—thus, the AOC easily overlooks an investment in its indigent defense system that could yield economic dividends well into the future. For example, setting up a shadow office would

[73] *Id.* at 19. The AOC, writing aspirationally, stated that any savings gleaned from re-balancing the public-private indigent defense numbers should be applied to increasing the Rule 13 hourly rates. Currently, appointed attorneys receive hourly rates of $40 for out-of-court work and only $50 for in-court work. *Id.*; *see also* TENN. S. CT. R. 13 (2)(c)(1) ("The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars ($40) per hour . . . .").
[74] AOC REPORT, *supra* note 51, at 23.
[75] *Id.*
[76] *Id.* at 23–24.
[77] *See generally* AOC Report, *supra* note 51.
[78] *Id.* at 16.

mean adding a handful of attorneys who would add to the tax base and provide for more manageable caseloads, resulting in better indigent representation.

Of course, setting up an alternate public defender office would require adding several jobs in each county, but imputed conflicts rules necessitate these separate offices.[79] The benefit of adding numerous offices is that more local economies could be affected by job growth and the resulting increase in consumer spending. In reality, Tennessee's larger counties should be able to find room in their budgets for these new offices: indeed, cities ranging in size from Los Angeles to Albany have effectively funded these alternate public defender offices for decades.[80] Therefore, the AOC's myopic evaluation is consistent with conservative disregard for beneficial economic growth via additional hiring. Lobbying for the funds to add jobs – attorneys, investigators, and paralegals alike – in the public defender offices seems the quickest way to alleviate caseload concerns. Meanwhile, setting up a dual system with a shadow public defender office avoids the added costs of private appointments that arise when the public defender is conflicted out.[81]

Furthermore, although I agree that raising the Rule 13 hourly rate might drive more attorneys into the market for appointments, the feedback I have received "on the

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[79] *Id.* at 11.

[80] *Compare* LOS ANGELES COUNTRY, http://apd.lacounty.gov/FAQs.htm (last visited Apr. 7, 2016) (showing data from Los Angeles, California), *with* ALBANY COUNTY, http://access.albanycounty.com/countybudget/2014/executive/_pdf/2014p-alternatepublicdefender.pdf (last visited Apr. 7, 2016) (showing data from Albany, New York).

[81] The AOC reported that allowing public defenders, rather than private appointed attorneys, to handle more cases can and should result in savings to the state's indigent defense fund. *See supra* note 68 and accompanying text.

ground" indicates that other, more nuanced symptoms currently plague the indigent defense economy. In speaking with young attorneys in the Knoxville area, who seek court appointments, many felt distraught at the level of competition for the very same jobs that the AOC thinks require *more* incentives to prove worthwhile.[82] By anecdote, I have heard numerous attorneys beaten out at the courthouse by eager, but perhaps underachieving, young lawyers who seek to pile up appointments at a low cost. Of course, all attorneys need to pay their bills and keep the lights on. But all too often reports surface revealing that appointments have been used as a vehicle for over-billing in a wholesale approach to earning a decent lawyer's salary.[83] The AOC Report hopes only to increase the Rule 13 hourly rates,[84] but due to these current symptoms, that would merely provide a windfall to the attorneys already hoarding or battling for appointments. Admittedly, this unfortunate symptom is difficult for the AOC to recognize through data, as it is made up entirely of attorney competition and financial pressures within certain local bars. But one simple way to counteract negative effects of raising the Rule 13 rate is for courts to tighten their tracking of appointment numbers.[85] Some courts ignore situations when an appointment-saturated attorney requests *even more* appointments; indeed, well-publicized data[86]

[82] *See* AOC REPORT, *supra* note 51, at 19 (increasing the rates "will encourage greater participation by lawyers who are currently unwilling to take appointments").

[83] *See infra* note 89 and accompanying article (discussing Harris Co., Texas attorneys taking excessive appointment caseloads to make millions).

[84] AOC REPORT, *supra* note 51, at 26.

[85] Of course, a full explication of proposals to counteract this problem would provide enough material to fill several additional essays. Thus, here I will only provide a small bite of the apple.

[86] A common example of courts condoning excessive appointment numbers is the situation in Harris County, Texas. *See* Robb Fickman, *We Must Change Harris County's Shameful Appointment System Now,*

exists to show the level of over-appointment that courts condone.[87] If courts refuse to consistently compile data on an appointment-per-attorney basis, then a rising Rule 13 rate would inevitably result in appointment hoarding and exacerbate inadequate indigent representation.

Consequently, the AOC appears to have misunderstood the present issue: indigents are not suffering from a lack of attorneys taking appointments; rather, they suffer from *poor performance* from those attorneys hoarding appointments (one need only Google the name "Jerome Godinich" to plainly see the abuse present in our nation's appointment system).[88] Without better appointment tracking, higher Rule 13 rates would only serve to channel more money into the hands of those already accepting appointments, not drive better lawyers into the field in an attempt to re-take those responsibilities.

IV. Proposing New Solutions

The AOC Report provides quality data analysis and decent recommendations for the future of indigent defense

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http://blog.fickmanlaw.com/2013/01/we-must-change-harris-countys-shameful-appointment-system-now/ (last visited Apr. 7, 2016)*; see also* TEXAS INDIGENT DEFENSE COMMISSION, *infra* note 88 (displaying table of appointment numbers).

[87] Fickman, *supra* note 86, at 1. For the data table, *see* TEXAS INDIGENT DEFENSE COMMISSION, *Harris County Appointment Caseloads 2011*, GOOGLE DOCS, https://docs.google.com/file/d/0By1E7SWXMpKnRUVydEw3Um1zUW8/edit (last visited Apr. 7, 2016).

[88] Consider, for example, that Mr. Godinich, a Houston, Texas attorney, has been appointed cases to the tune of $250,000 per year, all while gaining national attention for his missed habeas corpus deadlines, among other infractions. *See* KHOU.COM, *Experts: Harris Co. Taking Risks with Lawyer Appointment System*, http://www.khou.com/story/news/local/2014/07/11/11209168/ (last visited Nov. 8, 2014); *see also* TEXAS INDIGENT DEFENSE COMMISSION, *supra* note 87, at 1 and accompanying data table (showing Mr. Godinich's over-appointment ratio in his Houston, Texas practice).

in Tennessee. But its proffered modifications do not appear to be *solutions* to the present symptoms. Indeed, new solutions should be proposed that square with the nuanced economic and client-felt symptoms reported today. The client-centered symptoms can best be categorized as either (1) inadequate attorney-client contact, including failures of communication, and (2) insufficient public funding that creates *de facto* inadequate and ineffective legal representation. Proposed solutions to each of these symptoms will be addressed in turn.

A. *Solving Inadequate Attorney-Client Relations*

Indigent defense statistics nationwide reflect attorney-client communication that fails to even meet the floor set by professional legal ethics standards.[89] Attorneys who fail to meet with clients for mere minutes prior to pleas, or those who cannot recognize the faces or names of their clients on the day of court, amount to little more than legal representation "in name only."[90] In essence, these sad realities are the inevitable conclusion of an indigent defense system in which both public defenders and private appointed attorneys are overworked and undercompensated. Thus, when facing prevailing attorney-client relationships the answer to Justice Marshall's query in *Strickland* is clear: effective representation arises from counsel who are not overworked *and* adequately paid.[91]

First, a side issue looms large when attempting to define new procedures to meet Sixth Amendment constitutional standards. Indeed, one must fire at the proper target. The target here is defined by the fact that adequately paid retained representation and today's appointed

[89] *See* KHOU.COM, *supra* note 88, at 2.
[90] *See* Knowles, *supra* note 12, at 2–3.
[91] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

attorneys produce two completely distinct forms of justice. Indeed, no one seems to argue that indigents are denied effective counsel because they did not receive Johnnie Cochran-style zealousness.[92] The difference in those two legal economies has produced best practice status quos that provide high justice only for those willing and able to fork over the cash. But should the two modes of representation be forced to comply with the same just result? In other words, should the public take it upon itself to provide indigents with results *at least as good as* results received by private hired counsel? The answer to that question would prove fruitful for an entirely new essay on the matter. However, for the limited purpose of this article, it seems that a *floor* of justice might be the line to consider when addressing economic strategies to improve indigent defense. That is, sufficient funds are not generally available to provide all indigents with top-of-the-line counsel, and present cues indicate that baseline efforts to provide reasonably competent counsel are widely tolerated. Sadly, indigent justice is a lower justice—and strategies to improve that standard must address the proper opposition and attempt to reach the correct goal. Thus, solutions proposed to remedy indigent defense must be directed at the *actual* style of representation that indigents deserve under the state and federal constitutions.

Given the above status quo, we must propose solutions to the "lower" form of justice that marks inadequate attorney-client relationships and communication with indigent clients. In my view, the acceptable floor of communication must be that detailed by the ABA Model Rules regarding professional ethics and responsibility. The Model Rules' proscriptions are easy enough to follow,[93] but

[92] *See* Haynes, *supra* note, 1.

[93] The Model Rules require reasonably timed call-backs and keeping clients reasonably informed as to the status of their litigation, among

given the reports *supra*, many current public defenders and private appointed counsel fail to meet the low standard. The real systemic issue today is that lawyers fail to report—and thus courts fail to enforce—these simple practice guidelines when potential misconduct arises.[94] While the judiciary cannot force the legislature to add jobs or fund appointments, it can be sure that the democratic wheels will begin to churn when reversal upon reversal piles up following a showing that attorneys did not adequately communicate with their clients. My instinct is that numerous judges overlook the fact that attorneys are providing wholly inadequate representation, often failing to communicate with clients even *once* prior to plea, because they are sympathetic to local defense offices' lack of resources. But why should judges – of all people – permit *constitutional* inequities due to budget concerns? This lack of enforcement of known ethics rules is tantamount to ruling from a political bench. The failure to do their part, permitting reversals based on ineffective assistance and lack of communication, means that judges have abdicated their proper role in our society.

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other things. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2013).

[94] For example, note the massive amount of "covered up" instances of prosecutorial misconduct by the Department of Justice itself. *See* PROJECT ON GOVERNMENT OVERSIGHT, *Hundreds of Justice Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 13, 2014), http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html. *See generally* DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, *Annual Report* 2012, at 7–13, http://www. justice.gov/opr/annualreport2012.pdf (summarizing complaints and investigations of attorney conduct).

B. *Solving Insufficient Public Funding for Public Defenders and Appointment Processes*

Secondly, the focus of Justice Marshall's *Strickland* query lies within the constraints placed on legal representation by both time and money.[95] But, as we are often reminded, time *is* money—and that *ipse dixit* proves true for indigent defense economies. All at once, appointed attorneys lack the funding necessary to commit their time to their appointments, while public defenders have too many cases (which acts as a drain on their time) and not enough money to pay for additional investigators, paralegals, interpreters, experts, and anything else necessary for a proper defense. It is clearly not a novel concept that increased public funding should solve problems of both time and money, but apparently the best arguments in favor of increased funding have not yet been heard by the powers that be. Indeed, it seems the only manner in which justice can be restored to indigent defense programs is to increase funding to add attorney positions, raise hourly appointment rates, and provide for the ancillary services necessary for proper legal representation.

Critically, we face a new age of legal economies. The larger American economy faces a unique paradox of having a concurrent glut of jobless but trained JDs and chronically understaffed public defense programs.[96] Indeed, all JDs graduate with problem-solving skills[97] and the legal analytics necessary to address myriad concerns of the average citizen, including criminal matters.[98] Perhaps law

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[95] *See Strickland*, 466 U.S. at 709 (Marshall, J., dissenting).

[96] For a brief but knowledgeable perspective on this paradox, see William E. Foster, *There Are Not Too Many Lawyers*, HUFFINGTON POST, http://www.huffingtonpost.com/william-e-foster/not-too-many-lawyers_b_2631224.html (last updated Apr. 8, 2013).

[97] *See id.*

[98] This is precisely why the Model Rules on permissive withdrawal do not allow attorneys to refuse an appointment based on ignorance or

schools could create cooperative programs with the local bar to commit several new graduates to the local public defender offices for one- or two-year terms, or even pledge them to a program for a term of appointment work to help reimburse tuition debt. Law schools could use program funding from their "access to justice" initiatives to assist these cooperative programs in paying new graduates' salaries. In exchange for their commitment to indigent defense programs, these young lawyers would receive basic courtroom experience, reduce law school debt, and develop a greater sense of the public service essential to a life in the law. Just as programs like Teach for America have proven, I believe young and skilled graduates will happily trade an uncertain future for the lower-pay, high-reward positions in underserved areas.[99] Indigent defense co-ops would be rebranded as a valuable way to gain experience while serving the public, and, if they follow the Teach for America model, these positions may even become highly competitive and prestigious.[100] A prestigious rebrand would ultimately draw the attention of the law schools' best students. These concepts are just the tip of the iceberg, but any effort to merge a market of attorneys who *need work* with those indigents who *need representation* is a fine way to alleviate the inadequate representation caused by excessive caseloads.

Furthermore, it is no secret that every state and local government faces financial challenges that hardly permit

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inexperience alone. All JDs are equipped with basic skills to address common criminal matters, especially with a bit of extra study or help from an associated attorney. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, r. 1.1 cmt. [2], r. 6.2 cmt. [2] (AM. BAR ASS'N 2013).

[99] Valerie Strauss, *How Teach for America became Powerful*, WASH. POST, Oct. 22, 2012, https://www.washingtonpost.com/news/answer-sheet/wp/2012/10/22/how-teach-for-america-became-powerful-2/

[100] *See id.*; *see also* 2015 Annual Report, TEACH FOR AMERICA, https://www.teachforamerica.org/about-us/annual-report.

finding room in the budget for new hiring.[101] Moreover, in some areas it may be politically unpopular to seek additional funding to aid representation for the indigent accused.[102] However, budgetary challenges have not been addressed from the correct perspective. It seems to me that in any government, regardless of its tax base, funds should be doled out *first* to those issues facing *constitutional level* discrepancies. That is, budgets cannot be balanced while also excluding the proper funds to *merely* meet the constitutional floor on indigent representation. Of course, *Gideon v. Wainwright* and its progeny demand that the indigent be provided with effective counsel.[103] Judges' frequent use of the blinder method[104] is appalling, commonly overlooking indigents who fail to receive *any* of the essential duties of representation set by the ABA Model Rules: competence, communication, and zealousness.[105] Funding programs that meet this floor for *every* indigent – a

[101] For a comprehensive report on post-recession state and local budget woes, *see generally* 60 MINUTES, "State Budgets: The Day of Reckoning," (CBS television broadcast Dec. 19, 2010), http://www.cbsnews.com/news/state-budgets-the-day-of-reckoning/.

[102] *See, e.g.*, Brenda Goodman, *Official Quits in Georgia Public Defender Budget Dispute*, N.Y. TIMES, Sept. 7, 2007, at A18, http://www.nytimes.com/2007/09/07/us/07georgia.html?_r=0.

[103] Gideon v. Wainwright , 372 U.S. 355, 344 (1963).

[104] Judges sometimes choose to ignore clear ethics violations in the indigent defense context, a tactic I refer to as "putting on blinders." *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, at 10, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf ("LDF's investigations found that in circuit courthouses throughout the state, [ethics rules] are often ignored by defense attorneys, prosecutors, and judges who are sworn to uphold them").

[105] *Id.; see also* MODEL RULES OF PROF'L CONDUCT r. 1.1, r. 1.4, Preamble (AM. BAR ASS'N 2013).

low standard for bare-minimum justice, indeed – must take precedence over more common legal requests, such as increasing judicial salaries. I fail to see how common funding requests like road improvements have for a generation been taken more seriously than efforts to fund adequate indigent legal representation. Only *one* of these expenses sounds in our state and federal constitutions, not to mention extensive post-*Gideon* Supreme Court jurisprudence.

V. Defending and Improving the Solution

A. *Can a Lawsuit be a Solution?*

Lawsuits like *Hurrell-Harring* are effective insofar as they bring media attention to a worthy cause, but litigation fails to address problems stemming from the judiciary. Litigation that forces states to address inequities – as *Hurrell-Harring* does – will obviously change the way lawyers deal with indigent clients. In fact, as discussed *supra*, the *Hurrell-Harring* settlement model forces New York to set new standards for caseloads, and then to pay for any ancillary costs of meeting those lower caseloads: adding new attorneys, offices, staff, etc.[106] Those remedies will undoubtedly affect the quality of legal representation experienced by New York's indigent clients. Indeed, indigents will be represented by attorneys who have more time and resources to represent their interests.

But what this sort of litigation-based reform does not do – and thus does not model for other states facing similar issues – is affect the way judges appoint attorneys or rule on (or even perceive) ineffective assistance claims. Specifically, a settlement like *Hurrell-Harring* will *permit* attorneys to spend more time and money on needy clients, but the settlement will not *ensure* that clients are actually

[106] *See* Stipulation and Order of Settlement, *supra* note 44, at 7.

receiving better services. The settlement does not include terms tied to particular outcomes, but merely regulates the front-end infusion of resources.[107] In reality, judges may not be able to tell when clients receive the settlement's intended benefits or if an attorney has actually committed her extra time to the client's cause. Thus, states like New York may not see fewer ineffective assistance claims following the *Hurrell-Harring* settlement, despite having more money to remedy poor indigent defense.

B. *How Can We Ensure Litigation-based Reform Improves Indigent Defense?*

States like Tennessee that may face litigation as local indigents attempt to improve the quality of defense should be careful to tie settlement terms to specific and measurable outcomes. Litigation can certainly bring attention to a needy cause, but states should only promise resources that affect results. A complete settlement should also include terms that *stop* providing resources to programs that do not see improved outcomes over time. Indeed, if infusions of cash do not reduce ineffective assistance claims or, at the very least, reduce reports of indigent dissatisfaction, then the state's funds are better spent elsewhere.

But outcomes-based funding tied only to objective data can wreak its own sort of havoc—see the litany of No Child Left Behind critics[108]—so I would suggest measuring progress through a combination of subjective and objective

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[107] *Id.* at 13. Note that the settlement includes some reporting measures, but fails to specify any terms that connect funding with measurable improvements, much less the criteria upon which to evaluate efforts. *Id.*

[108] *See, e.g.*, *No Child Left Behind Worsened Education*, HUFFINGTON POST, (Aug. 21, 2012, 5:18 PM), http://www.huffingtonpost.com/2012/08/21/no-child-left-behind-wors_n_1819877.html; *Democrats Decry "No Child Left Behind*," CNN.COM, (Feb. 21, 2004 11:59 AM), http://www.cnn.com/2004/ALLPOLITICS/02/21/dems.radio.reut/.

reports. Litigation that results in a settlement similar to *Hurrell-Harring* could be extremely effective if funds are linked to improved experiences by the indigents the litigation hopes to serve. Subjective improvements could be measured by administering exit polls or similar evaluations of the clients' experience. Judges could also be polled on the quality of representation they experience in the courtroom and, perhaps, make a good faith attempt to report more indigent defense attorneys who consistently fall below the "effective" standard. For example, if judges in a locality know that a particular public defender receives added resources to improve representation, then they can be "on notice" to remain aware of the quality of service. Compiling this subjective data and combining it with objective outcomes (such as data on ineffective assistance claims) will take manpower, but it could go a long way to ensuring state resources are being well-spent. Settlement terms such as those in *Hurrell-Harring* are just votes of good faith, if not tied to measurable outcomes that improve indigent representation on the ground.

VI. Conclusion

Just as Justice Marshall's powerful dissent in *Strickland* foreshadowed,[109] indigent defense now centers on disputes over limited resources. Both counsel's and the indigent accused's lack of time and money to defend their case has greatly impacted the quality of justice the indigent experience. Moreover, insufficient resources have forced public defenders and private appointed attorneys into a new status quo marked by inadequate representation that is tantamount to legal ethics violations. Brave settlements, such as that in *Hurrell-Harring*, can go a long way to bringing media attention to the arguably lower form of

[109] Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

justice indigents commonly receive.[110] But litigation and their associated settlements will only be as effective as their terms permit; indeed, if infusions of resources are not conditioned on measurable improvements, then attorneys may experience a windfall without passing along benefits to their indigent clients. Indigents in states like Tennessee who may hope to improve their situation should insist on both subjective and objective analyses to ensure they receive the intended benefits of a richer indigent defense system. Justice Marshall's words[111] have never been truer: reasonably competent attorneys must have sufficient time and money to fight for the justice that indigents undoubtedly deserve.

[110] *See supra* pp. 16–19 and accompanying Part A (discussion on disparate resources causing two distinct forms of justice, where indigents receive a "lower form" than wealthier clients).
[111] *See* Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

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ARTICLE

GOVERNMENT OWNERSHIP OF STOCK IN A CORPORATION

By: Harrison Sullivan[1]

I. Introduction

Most state constitutions contain a provision that forbids a town, city, or municipality from owning stock in a corporation; however, a few state constitutions contain a provision forbidding that state itself from owning stock in a corporation.[2] This article will examine the following: (1) why state and federal government ownership of corporations creates problems; (2) the history and modern-day relevancy of the problems on the state level; (3) state constitutional reactions to the problems; (4) the history and modern-day relevancy of the problems on the federal level; (5) whether a federal constitutional amendment is due; and (6) whether a state constitutional amendment is due.

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[1] Doctor of Jurisprudence, The University of Tennessee College of Law, May 2014; B.B.A. Mississippi State University, 2011.

[2] *See* DEL. CONST. of 1897, art. VIII, § 8; TENN. CONST. of 1870, art. II, § 29. The constitutions of both Delaware and Tennessee forbid towns, cities, and municipalities from owning stock in a corporation, but not the state itself. *See, e.g.*, Eye Clinic, P.C. v. Jackson-Madison Cty. Gen. Hosp., 986 S.W.2d 565, 571 (Tenn. Ct. App. 1998) (stating that "[t]he language of Section 29 [of article II of the Tennessee Constitution] suggests that the drafters intended that the phrase, 'county, city or town,' be confined to its literal meaning"). *But see* PA. CONST. art. VIII, § 8 (1968); PA. CONST. art. IX, § 9 (1968). The commonwealth of Pennsylvania itself – as well as its towns, cities, and municipalities – are forbidden from owning equity in a corporation. Per my research, roughly one fifth of the states have a provision disallowing the state from owning stock in a corporation.

II. Problems Arising When Government Owns Stock in a Corporation

Whenever the government owns stock in a corporation, problems may ensue.[3] In this article, these problems generally will be discussed under the aegis of "shareholder-regulator problems" and will be fleshed out throughout the article. This section will generally discuss the nature of the shareholder-regulator problems, then the difficulty of monitoring such problems, and lastly, the difficulty of reviewing such problems, in order to give a background as to why these shareholder-regulator problems exist in the first place.

A. First: Shareholder-Regulator Problems

By owning stock in a corporation, the government assumes the roles of both a shareholder and a regulator of the corporation. Both of these roles, when intertwined in one governmental unit, create shareholder-regulator problems. To understand the extent of these problems, first consider the nature of both of the roles individually.

i. Government as a Shareholder

Generally, a shareholder is an individual or entity that owns stock in a corporation. Shareholders traditionally are granted certain rights – via state corporation law – such as the right to elect and remove the board of directors, amend the corporation's corporate charter, vote to approve corporate strategy decisions such as mergers and acquisitions, and bring shareholder derivative suits.[4]

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[3] *See* Marcel Kahan & Edward B. Rock, *When the Government is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1317 (2011).
[4] *See* 1 Publicly Traded Corporations: Governance & Reg. § 2:7 (2013) (surveying various states' corporate statutes).

However, the shareholders' most important role is to elect a board of directors to run the corporation, determine its policies, and appoint officers to effectively manage the corporation.[5] When the government owns stock in a corporation, the government assumes these roles and responsibilities and is required to act for the betterment of the corporation's shareholders in all respects. If the shareholder is a controlling shareholder, the shareholder assumes even more responsibilities, and thus, the shareholder-regulator problems are even more pronounced.[6] First, the controlling shareholder owes fiduciary duties to the remaining shareholders.[7] Second, heightened legal standards for alleged breaches of fiduciary duties apply to the controlling shareholders.[8]

ii. Government as a Regulator

The government is also a regulator of corporations.[9] As "[r]egulation is a significant and distinct feature of how modern [governments] govern their economy and society

[5] *See id.* ("The board in turn designates officers to act as agents of the board. Within this model, however, the board is presumed to act as a surrogate for and in the interests of the shareholders.")

[6] Under Delaware law, for example, a shareholder is deemed to be a "controlling" shareholder if (1) "the shareholder controls a majority of the votes in a corporation" or (2) "if the shareholder controls less than a majority but there is evidence that the shareholder exercises control over the board [of directors]." *See* Kahan & Rock, *supra* note 3, at 1315 (citing Rodman Ward, Jr. et al., *Folk on the Delaware General Corporation Law § 151.5.1* (5th ed. 2006)).

[7] *See* Kahan & Rock, *supra* note 3, at 1315.

[8] *See id.*

[9] *See* Andrew S. Taylor, *How and Why to Regulate the American Corporation*, DISSIDENT VOICE (Sept. 11, 2010), http://dissidentvoice.org/2010/09/how-and-why-to-regulate-the-american-corporation/ ("Corporations are formed by government action at the state (rather than federal) level.").

through rulemaking and enforcement,"[10] "most American laws regarding corporate formation and operation are written at the state level."[11] This means that each individual state is a regulator of the corporations incorporated within its state and is responsible for ensuring that each corporation complies with the state's own regulatory efforts.[12] The federal government, on the other hand, "govern[s] [its] economy and society through rulemaking and enforcement"[13] of acts such as Sarbanes-Oxley or through creating agencies like the Securities and Exchange Commission to oversee self-regulating organizations such as the New York Stock Exchange.[14]

Over time, the role of corporate regulator has changed. More recently, states have allotted corporations expanded freedom as an incentive to incorporate in their states, ostensibly to attract more business and thereby increase tax revenues.[15] As a result, "each state [has] vied

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[10] Myriam Senn, *Developing Regulatory Governance in Times of Transnational Regulation: From a Heuristic to an Analytic Approach?*, INST. OF PUBLIC GOVERNANCE & MGMT, http://www.esade.edu/public/modules.php?name=news&idnew=964&newlang=English.

[11] Taylor, *supra* note 9.

[12] *See id.* For an example, states have regulated corporations by regulating their securities at the state level through "blue sky" laws. *See* Steve A. Radom, *Balkanization of Securities Regulation: The Case for Federal Preemption*, 39 TEX. J. BUS. L. 295, 298 (2003).

[13] Senn, *supra* note 10.

[14] *See* Cary Coglianese, ET AL., *The Role of Government in Corporate Governance*, REGULATORY POLICY PROGRAM AT THE CENTER FOR BUSINESS AND GOVERNMENT, HARVARD UNIVERSITY, at 2–3, http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/mrcbg/programs/rpp/reports/RPPREPORT8.pdf.

[15] *See id.* For example, in Delaware, the state corporation law gives corporations "enormous freedom" of contract to adopt terms and provisions that incorporators believe to be most advantageous to their particular enterprise. Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 847 (2008); *see also* Jones Apparel Group v. Maxwell

to establish the most permissive corporate environment, wooing potential business managers with increasingly liberal legal environments for corporate formation and operation."[16] The federal government, on the other hand, has increased its regulatory role, creating regulatory reforms in the wake of the recent corporate scandals to ensure accountability.[17]

B. Difficulty of Monitoring the Shareholder-Regulator Problems

In addition, it is very difficult to monitor such problems when they occur among shareholders.[18] For regular, private shareholders, most issues arise from financial incentives, such as when one shareholder enriches himself financially at the expense of another shareholder.[19] However, a government has a wide variety of incentives other than strictly financial ones.[20] Indeed, for some scholars, the predominant concern when the government owns stock in a corporation is that the government will attempt to "induce the corporation to pursue political or policy goals rather than maximize the corporation's value for the proportionate benefit of all its shareholders."[21] It

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Shoe Co. 883 A.2d 837, 845 (Del. Ch. 2004) (stating that "Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations . . . .").

[16] Taylor, *supra* note 9 (stating that "corporations have experienced a steady *increase* in business freedom over the past century . . . .").

[17] *See* Coglianese, ET AL., *supra* note 14, at 2–3, 5.

[18] *See* Kahan & Rock, *supra* note 3, at 1317–18.

[19] *See id.* at 1318.

[20] *See id.*

[21] *Id.* For an opinionated view on the government's interest as shareholder, see Brian Hunt, *A Timeless Lesson on Investing with the Government*, THE GROWTH STOCK WIRE (Feb. 11, 2013),

usually is easy to measure and identify such improperly motivated financial transactions amongst shareholders; however, determining whether a particular transaction amongst shareholders only serves to effectuate the government's political goals, and not the shareholders' or the corporation's objectives, is much more difficult to identify or measure because political goals can be amorphous and far-reaching.[22]

C. Review of Shareholder-Regulator Problems

Whenever a government owns stock in a corporation, it is extremely difficult to review decisions made by the government as a shareholder for administrative law purposes. Most private shareholders are unitary actors, and even when such a private shareholder is a corporation, there is a hierarchical authority structure within the corporation so that the Chief Executive Officer ("CEO") or the board will be held accountable.[23] However, within a particular government, the executive branch and the legislative branch each may exert control over interests in a corporation, and thus, many problems could arise both within and across the two branches. For example, consider this problem within a state: if the state treasury owns stock in a corporation, should the entire Executive Branch be held accountable? Should the regulatory agency of the state (and not the Treasury who might own the stock) be entirely responsible for regulating, or should the Treasury be held responsible too? The answer to those questions could create an entirely new system of checks and balances within a

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http://www.growthstockwire.com/3307/a-timeless-lesson-on-investing-with-the-government.

[22] *See* Kahan & Rock, *supra* note 3, at 1318 ("Self-dealing transactions and material-conflict transactions are relatively easy to identify by objective standards. By contrast, to determine whether a transaction serves the government's political goals is much harder.").

[23] *See id.* at 1318–19.

government. And what if different political interests control the executive and legislative branches, as is likely in the case of divided party government? In that situation, different political actors may bring different influences to bear on the matter of regulation.

III. State Shareholder-Regulator Problems

As mentioned, both state and federal governments may own stock in a corporation. However, as the two have inherently different responsibilities, roles, powers, etc., so too are their shareholder-regulator problems vastly different. Consider the shareholder-regulator problems of the state.

A. Historical Ownership

The tension between the state's self-serving interest as shareholder and its role as a government regulator has been prevalent from the beginning of this country's history; however, this matter was more common earlier on, as many states played a more robust regulatory role before they started relaxing regulatory laws to attract business.[24] In the late eighteenth and early nineteenth centuries, for example, states' financial interests in one corporation often prevented the state from chartering[25] a competitor corporation for fear of the state losing dividends due to the increased competition.[26]

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[24] *See* Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2927, 2932 (2012).

[25] At that time – showing its role as a regulator – only a state legislature could charter a corporation and to do so required an individual legislative act. *See id.* at 2927–28.

[26] *See id.* One such example took place in the Commonwealth of Pennsylvania in 1792 when Pennsylvania attempted to acquire shares in the lucrative Bank of North America. Although the negotiations ultimately did not lead to an agreement, local merchants were upset that

i. Pennsylvania

Perhaps the most notable example of this occurred in 1803 when a group of local merchants petitioned the legislature to charter the Bank of Philadelphia, which would have been a direct competitor of the commonwealth's recently chartered investment, the Bank of Pennsylvania.[27] The commonwealth opposed the chartering of yet another banking institution in the state because it would reduce the Bank of Pennsylvania's profits and therefore endanger the commonwealth's investment.[28] Local merchants responded by arguing that with "the extensive interest which the [commonwealth] holds in the Bank of Pennsylvania, [the commonwealth] cannot too seriously consider the probable baneful effects of an additional chartered Bank at this period, on fiscal concerns of the state and on the banking system."[29] Interestingly, Pennsylvania came face-to-face with the tension resulting from its dual role as both a shareholder and a regulator:

> As a stockholder in the Bank of Pennsylvania, its interests presumably coincided with those of the private investors

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the commonwealth government went outside of the commonwealth for an investment, and therefore attempted to obtain a corporate charter for a competitor of Bank of North America in Pennsylvania: the Bank of Pennsylvania. Hesitant to potentially thwart their pending investment in Bank of North America by chartering its competitor, the Pennsylvania government agreed to allow the charter for Bank of Pennsylvania only if the commonwealth was allowed to subscribe to a third of the bank's capital stock as consideration for potentially harming its investment in Bank of North America. *See id.* at 2928–29.

[27] *See id.* at 2928.

[28] *See id.*

[29] *Id.* (quoting Anna Jacobson Schwartz, *The Beginning of Competitive Banking in Philadelphia, 1782–1809*, 55 J. POL. ECON. 417, 429 (1947)).

> of the bank, but as arbiter of the public welfare, it had to consider the views of the promoters of the Philadelphia Bank. These [views] conflicted with the ambitions of Bank of Pennsylvania stockholders.[30]

The commonwealth's new holding in the Bank of Philadelphia had the potential to create another shareholder-regulator problem in the future, and in 1807, its interests as a shareholder in the bank led it to oppose another bank's incorporation request.[31] The Bank of Pennsylvania offered to pay the commonwealth a large sum of money in return for denying the Bank of Philadelphia's charter; instead, the government decided to accept "bonus" payments from the Bank of Philadelphia for allowing the bank to incorporate in the commonwealth.[32] These payments were subsequently made "until the liquidation of the [commonwealth's] shareholdings in banks in 1837 created the preconditions for a truly liberal chartering policy."[33]

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[30] *Id*. at 2929 (quoting Schwartz, *supra* note 29, at 426–27). Notably, one legislature's proposal – advocating for the elimination of this tension – aptly described the conflict of interests the dual roles inevitably brought about:

> [I]t being the duty of the government to consult the general will and provide for the good of all, embarrassments must frequently be thrown in the way of the performance of this duty, when the government is coupled in interest with institutions whose rights are founded in monopoly, and whose prosperity depends on the exclusion and suppression of similar institutions.

Id.

[31] *See id.*

[32] Richard Sylla, *Early American Banking: The Significance of the Corporate Form*, 14 BUS. & ECON. HIST. 105, 111 (1985).

[33] Pargendler, *supra* note 24, at 2929.

ii. New Jersey

The State of New Jersey experienced a similar conflict of interest in regard to a different industry. In 1832, New Jersey passed a monopoly bill that gave exclusive privileges to a railroad corporation in exchange for a large amount of the corporation's stock to the state.[34] However, a few years later, a competitor corporation petitioned the state for a charter to build and operate a turnpike that likely would have decreased demand for the railroad.[35] The state refused the charter – and thus, stifled its competition – because granting it would have hurt the state's immensely profitable equity position in the original railroad corporation.[36]

B. Modern Ownership

As capital and product markets developed throughout the nineteenth century, state equity ownership in corporations became increasingly rare and remained so well into the twentieth century.[37] Especially after World War II – even while foreign governments were quickly increasing their equity positions in private corporations[38] –

[34] *See id.* at 2930.
[35] *See id.*
[36] *See id.* at 2930–31 (quoting John Joseph Wallis, *Market-Augmenting Government? States and Corporations in Nineteenth-Century America*, MARKET-AUGMENTING GOVERNMENT: THE INSTITUTIONAL FOUNDATIONS FOR PROSPERITY 223, 251 (Omar Azfar & Charles A. Cadwell eds., 2003) (stating that the state needed to "preserve inviolate, sacred and unimpaired, the faith, the integrity, and the revenues of the state . . . .").
[37] *See id.* at 2931.
[38] For example, by 1929, the Brazilian government had taken over two-thirds of the country's railroads' equity positions. *See id.* at 2932. China, Italy, and most of continental Europe have also seen large-scale increases in the number of state-owned corporations. *See generally id.* at 2942–54.

states largely decreased their equity positions with tax regimes, which replaced dividend payouts as the major source of government revenue from corporations.[39]

IV. State Constitutional Redresses

From the late eighteenth century into the early twentieth century, many states were adopting their own state constitutions and freely amending provisions within them. However, respective state governments took differing positions on whether they could own equity in a corporation.[40] For example, consider Pennsylvania and New Jersey.

A. The State Cannot Own Equity in a Corporation: The Commonwealth of Pennsylvania

As noted previously, Pennsylvania was abruptly faced with shareholder-regulator problems when it bought stock in a corporation.[41] Interestingly, the 1790 version of the Pennsylvania Constitution – the constitution in place at the time of the mentioned facts – contained no provision forbidding state ownership of stock in a corporation, which would have prevented the shareholder-regulator problems from arising in the first place.[42] Perhaps the conflict of

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[39] *See id.* at 2931–32 (quoting Adolph A. Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 9 (1965)) (stating that the income tax rates "virtually make[] the state an equal partner [in the corporate enterprise] as far as profits are concerned"). This incentivizes state governments to "enact corporate laws that are more managerialist [sic] than is socially desirable . . . ." *Id.* at 2932.

[40] *See generally* DEL. CONST. of 1897, art. VIII, § 8; TENN. CONST. of 1870, art. II, § 29.

[41] *See generally* Part II, section A. of this article.

[42] *See* PA. CONST. of 1790, art. VIII, § 8, http://www.duq.edu/academics/gumberg-library/pa-constitution/texts-of-the-constitution/1790.

interest stemming from state ownership of a bank was not enough for the state legislature to act. However, the commonwealth adopted another version of its constitution in 1838, which was later amended in 1857 to include a provision forbidding the commonwealth – and its towns, cities, and municipalities – from owning stock in a corporation. [43] What happened in between? The Pennsylvania Railroad Company incorporated.

In 1846, Pennsylvania Railroad Company ("PRR") was chartered as a corporation in Pennsylvania.[44] As part of the corporation's initial capital financing, Allegheny County and the City of Philadelphia purchased shares of the corporation's stock.[45] The commonwealth effectively gave PRR a monopoly in the state, as it also turned down the opportunity to charter another competitor railroad whose presence would have limited the future dividends from PRR.[46] This initial funding of the corporation caused quite a stir amongst Pennsylvania residents and legislators at the time because many believed it was not the two municipalities' roles to invest in private companies.[47] As one state legislature remarked, "[Philadelphia], in undertaking this immense work of State improvement, will leave the quiet orbit in which she has hitherto revolved to

[43] *See* PA. CONST. of 1838, art. XI, § 5, 7, (amended 1857), http://www.duq.edu/academics/gumberg-library/pa-constitution/texts-of-the-constitution/1838.
[44] *See* 1 COVERDALE & COLPITTS, THE PENNSYLVANIA RAILROAD COMPANY: CORPORATE, FINANCIAL AND CONSTRUCTION HISTORY OF LINES OWNED, OPERATED AND CONTROLLED TO DECEMBER 31, 1945 9 (Allen, Lane & Scott 1947).
[45] *See id.* at 13.
[46] *See* ALBERT J. CHURELLA, THE PENNSYLVANIA RAILROAD, VOLUME I: BUILDING AN EMPIRE, 1846–1917 100–01 (Richard R. John et al. eds., Univ. of Pa. Press 2011).
[47] *Id.* at 101.

rush into a wild and eccentric path in which she was never designed to move."[48]

The two municipalities went forward with purchasing the company's stock, and by 1856 half of their equity investments were worthless due to a variety of misfortunes.[49] This resulted in "toxic effects" between the municipalities that had invested in PRR and PRR itself.[50]

> The worst result of these investments in railroad stock by Philadelphia and other communities in the State was not the loss of many millions of the taxpayers' money, but the close association and alliance thereby created between certain powerful corporations and the various . . . governments, an association and alliance which is generally thought to be . . . one of the leading causes of the misgovernment long so manifest throughout the state . . . .[51]

Even though both the public and private sectors were at fault, the voters in Pennsylvania could direct their blame only towards the former, and did so in 1857 with an amendment to the commonwealth's constitution that directly forbade the commonwealth, as well as its municipalities, from owning stock in a corporation.[52] Even

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[48] *Id.* (quoting the July 1846 minority report of the Joint Committee of the Philadelphia City Councils).

[49] Philadelphia lost close to $5 million, and Allegheny County lost millions in pledged county bonds to the company. *See generally id.* at 100–02.

[50] *Id.* at 102.

[51] *Id.*

[52] *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 32 (Univ. of Pittsburgh Press)(1960). *Compare* PA. CONST. of 1838, art. XI, § 5, 7, (as amended 1857), *with* PA. CONST. of 1838.

though the direct implications of the PRR fiasco only involved the municipalities, in considering this amendment, the 1857 General Assembly undoubtedly considered the shareholder-regulator problems that the commonwealth had encountered with the state bank, as well as the need to prevent the commonwealth from mixing its interests too extensively with corporations, just as the municipalities had done in the PRR situation.

B. The State Can Own Equity in A Corporation: The State of New Jersey

As noted previously, New Jersey also faced a shareholder-regulator problem in its equity ownership in infrastructure within the state.[53] At the time of the conflict of interest New Jersey, like Pennsylvania, had no provision in its constitution forbidding state ownership of equity in a corporation.[54] Unlike Pennsylvania, however, the New Jersey legislature never adopted a later constitutional provision forbidding the state from owning equity in a corporation.[55] In fact, the 1947 version of New Jersey's constitution contains a provision disallowing municipalities from owning equity in a corporation—implicitly allowing the State of New Jersey to do so.[56]

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[53] *See generally* Part II, section A. of this article.

[54] The State of New Jersey has passed three different constitutions: the first in 1776, the second in 1844, and the current, in 1947. The first Constitution (the one in effect at the time of the noted conflict of interest) contained no provision disallowing the state from owning equity in a corporation. *See generally* N.J. CONST. of 1776.

[55] *See generally id.* N.J. CONST. of 1844; N.J. CONST. of 1947.

[56] *See* N.J. CONST. of 1947 art. VIII, § 3. *See generally* Eye Clinic, P.C. v. Jackson-Madison Cty. Gen. Hosp., 986 S.W.2d 565, 571 (Tenn. Ct. App. 1998) (stating that "[t]he language of Section 29 suggests that the drafters intended that the phrase, 'county, city or town,' be confined to its literal meaning").

V. Federal Ownership and Its Shareholder-Regulator Problems

As a result of the recent financial crises, the federal government responded by intervening in private enterprises as never before: "[g]overnments . . . increased their regulatory control over businesses in financial services and other sectors; businesses assist[ed] governments in implementing regulation; and governments [were] directly and indirectly engaged in financing businesses that had been conducted through non-governmental entities." [57] Basically, the federal government created a massive bailout of banks, financial institutions, and automobile manufacturers by purchasing shares of the corporations' stock, by effectuating mergers and acquisitions, and overseeing restructuring of corporations.[58] This article will now specifically focus on the federal government's purchase of stock in corporations.[59] Until recently, there had been marginal precedents for such extensive governmental intervention in a private corporation; however, these precedents laid the foundation for the recent large-scale government purchase of stock.

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[57] Joan MacLeod Heminway, *Federal Interventions in Private Enterprises in the United States: Their Genesis In and Effects on Corporate Finance Instruments and Transactions,* 40 SETON HALL L. REV. 1487, 1487 (2010).

[58] *See* Aaron Jack, *The Economic Freedom Amendment: A States-Based Response to the Nationalizing Effects of Bailouts and Federal Ownership of Corporate Stock*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 32 (2012). *See generally* Heminway, *supra* note 57 (describing all the federal government's interventional efforts).

[59] *See generally* Kahan & Rock *supra* note 3, at 1299 (summarizing different voting stock, nonvoting stock, debt, and control positions of the federal government's recent investments in corporations). Additionally, federal ownership in stock of a corporation is not to be confused by government-sponsored enterprises, corporations that are privately owned and chartered by Congress to further public policy goals.

A. Historical Ownership

During the Great Depression, with the banking system on the verge of collapse, Congress created the Reconstruction Finance Corporation ("RFC") to make loans to struggling banks, and in 1933, Congress created the Emergency Banking Act, which gave the RFC the authority to purchase preferred stock in struggling banks as a way of providing financial capital to them.[60] All in all, the RFC purchased preferred stock in nearly 40 percent of all banks in the country.[61] This injection of capital was praised at the time, and some suggest that it prevented the collapse of the banking system and eventually enabled the federal government to receive most of its initial investment back.[62]

Fifty years later, the federal government again bought stock in a corporation, this time the Continental Illinois National Bank.[63] Congress, through the Federal Deposit Insurance Corporation ("FDIC"), purchased $1 billion worth of preferred stock in Continental – the seventh largest bank in the country at the time – because it feared the struggling bank's failure would result in other

[60] *See* Lisa L. Broome, *Government Investment in Banks: Creeping Nationalization or Prudent, Temporary Aid?*, 4 FLA. INT. L. REV. 409, 421–22 (2009).
[61] *See id.* at 421.
[62] *See id.* at 423–24 (stating that the federal government broke even on its RFC investments); *see also id.* at 423 (quoting MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 1867–1960 427 (1963)) (stating that Milton Friedman said the RFC "played a major role in the restoration of the banking system"); *id.* (quoting JESSE JONES, FIFTY BILLION DOLLARS 34 (1951) (stating that the head of the RFC remarked that "[i]f the system as a whole had not been assisted by the injection of a large amount of new capital into about one-half of all banks in the country, the collapse would have become so widespread that few, if any, banks could have continued operating").
[63] *See id.* at 424.

banks failing as well.[64] However, as a result, there was a significant amount of criticism and political fallout, because the federal government essentially determined that some institutions were "too big to fail" while others were not.[65]

B. Modern Ownership: The 2008 Financial Crisis

The 2008 financial crisis began when the investment bank Bear Stearns collapsed and the federal government orchestrated a deal in which J.P. Morgan would acquire Bear Stearns; however, the federal government allowed the similarly situated Lehman Brothers to fail, choosing to rescue Bear Stearns and not Lehman Brothers because Bear Stearns was "too big to fail."[66] In the wake of the fall of the Lehman Brothers and the ensuing financial crisis, Congress passed the Emergency Economic Stabilization Act of 2008 ("EESA"), [67] which gave the Treasury unprecedented authority to directly intervene in the financial markets and the economy at large through the Troubled Asset Relief Program ("TARP"). [68] Although the bill was originally

[64] *See id.*
[65] *See id.* at 424–25.
[66] *See generally* Jack, *supra* note 58.
[67] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3756 (codified in 12 U.S.C.A. § 5221).
[68] *See* Matthew R. Shahabian, *The Government as Shareholder and Political Risk: Procedural Protections in the Bailout*, 86 N.Y.U. L. REV. 351, 351 (2011). This bill set aside $700 billion to strengthen Wall Street's financial institutions. *See id.* at 352. The EESA also purposefully blocked judicial review of the government's actions under the bill, as the lack of judicial review helped to ensure the Treasury would not be tied up in court during the financial crisis. *See id.* Ben Bernanke rationalized the EESA by stating that it would increase investor confidence and ultimately have a positive impact on the economy and GDP. *See* Chairman Ben S. Bernanke, Before the Committee on Banking, Housing, and Urban Affairs, U.S.

intended to give the Treasury authority to buy "toxic" assets from struggling financial institutions to provide immediate relief, the Treasury quickly started buying newly designated and issued series of preferred stock from such institutions.[69] It thus became the largest shareholder in corporations like Citigroup, American International Group ("AIG") and Bank of America.[70] While past ownership of stock did not create many tangible shareholder-regulator problems, this more recent trend has created a multitude of them, as "[t]he [federal] government's preferred stock investments in financial services firms gave it a current, long-term financial and, to some extent, governance stake in the recovery of these systemically important firms."[71]

i. Shareholder-Regulator Problems

Under the terms of the EESA, the federal government receives preferred voting stock of a corporation in exchange for its financial investment in the corporation and therefore possesses the traditional type of control over a corporation that comes with common stock,

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Senate, Federal Reserve System, September 23, 2008, https://www.federalreserve.gov/newsevents/testimony/bernanke20080923a1.htm.

[69] Perhaps following European trends? *See generally* Landon Thomas, Jr. & Julia Werdigier, *Britain Takes a Different Route to Rescue Its* Banks, N.Y. TIMES, Oct. 8, 2008, http://www.nytimes.com/2008/10/09/business/worldbusiness/09pound.html?_r=0; Jack, *supra* note 58 (stating that there is little evidence to suggest that Congress intended for the TARP funds to be used in this manner).

[70] *See* Shahabian, *supra* note 68, at 351–52. The Treasury used the $700 billion to purchase shares in many troubled financial institutions; however, the three largest, most troubled institutions – Citigroup, AIG, and Bank of America – required more financial aid than the rest, and as a result, the federal government became the majority shareholder in them. *Id.* at 352.

[71] Heminway, *supra* note 57, at 1489.

such as having the ability to elect a board of directors or to vote on major corporate transactions.[72] Because the government is also a regulator, however, it can use that capacity to carry out many of the same roles, and possibly more, than a voting shareholder would. This dual role position has led to many fears of possible large-scale nationalization of private business, as the federal government, with no termination period on either the EESA or the TARP, could keep buying controlling equity positions in private businesses as a means to carry out policy agendas.

For example, Congress could enact a statute that effectively modifies any share purchase agreement between the Treasury and financial institutions receiving money under the EESA.[73] Because the EESA allows executive compensation to be subject to approval by the Treasury, the federal government could potentially exert undue influence on a corporation's executives by refusing to approve their salaries until the corporation fulfills the government's wishes.[74] The Treasury also retains a unilateral right to veto an end to the relationship, disallowing the receiving corporation from terminating the relationship on its own.[75] Additionally, although the regulations enacted pursuant to carrying out its role as a shareholder are subject to judicial review, the government's actions as a shareholder are not,

[72] *See* Shahabian, *supra* note 68, at 358.
[73] *See id.* at 359.
[74] *See id.* This provision in the EESA was a direct result of AIG executives giving themselves bonuses (before the EESA was enacted) with money given to it by the federal government. See Representative Earl Pomeroy's response to the bonuses where he proclaimed, "Have the recipients of these checks no shame at all? . . . [AIG bonus recipients] are disgraced professional losers. And by the way, give us our money back." Kahan & Rock *supra* note 3, at 1301 (quoting Carl Hulse & David M. Herszenhorn, *A.I.G. and Wall St. Confront Upsurge of Populist Fury*, N.Y. TIMES, Mar. 20, 2009, at A1).
[75] *See* Shahabian, *supra* note 68, at 359.

which gives the federal government great freedom to act first and ask permission later.[76] All of these regulatory powers enable the federal government to possess leverage that a typical shareholder could not. This presents a problem for private shareholders, as the government can use its position [as a shareholder and a regulator] to further political goals and engage in informal policymaking by influencing corporate policy . . . ."[77] Consider the following examples of where this has already happened.

A. American International Group, Inc.

In the fall of 2008, while the Bear Stearns and the Lehman Brothers saga was ongoing, the federal government rescued AIG from collapse by providing it with $85 billion in exchange for 79.9 percent of its voting equity.[78] Afterwards, the federal government wanted to settle the money that AIG owed other financial corporations and began negotiating with those corporations.[79] However, two years later, a congressional subpoena showed that the original settlement terms with one of the corporations was later modified to waive all legal claims against it.[80] As one *New York Times* article notes, the waiver was added after the "federal regulators force[d] [AIG] to accept it,"[81] possibly through one of the unique leverage tools described above. Beyond that, there has been much criticism that the federal government

[76] *See id.*
[77] *Id.* at 360.
[78] *See* Kahan & Rock, *supra* note 3, at 1309. Note that this agreement took place a month prior to the enactment of the EESA, thereby not confining the federal government to receive strictly nonvoting shares.
[79] *See* Shahabian, *supra* note 68, at 361.
[80] *See id.* at 361–62.
[81] *Id.* at 361.

"'unfairly handcuff[ed]' A.I.G. and 'undermin[ed] the financial interests of taxpayers.'"[82]

B. General Motors

Starting in late 2008, the Treasury also interpreted TARP to provide itself with the authority to operate outside of "financial institutions" and to intervene directly in the failing automobile industry.[83] Accordingly, the federal government also extended $49.5 billion to General Motors (GM) in exchange for a 60.8 percent equity stake in the corporation.[84] Such a stake effectively "turn[ed] GM into a

[82] Shahabian, *supra* note 68, at 361–62. However, ultimately, the federal government profited close to $12.4 billion off of the AIG investment. *See* Zachary Tracer, *AIG Stock Sale Repays Bailout as U.S. Government Profits*, BLOOMBERG (Sept. 11, 2012), http://www.bloomberg.com/news/2012-09-11/aig-stock-prices-at-32-50-share-as-treasury-cuts-stake.html. So, perhaps the federal government's strong-arm tactics paid off?

[83] The following is an interpretation of "financial institution:"

> For GM and Chrysler to fit [the] definition [of a "financial institution" under TARP], one must read the phrase 'any institution, including, but not limited to' to sweep in institutions that are not financial institutions under any normal understanding of the term. As a matter of statutory interpretation, that argument hardly passes the smell test. As a matter of politics, the Treasury had little choice: Congress had already rejected a request to authorize funds to bail out the auto industry and had only passed the EESA on its second try. But however thin the basis under the EESA, it did not help the secured bondholders who objected in the Chrysler bankruptcy; they found out that they did not have standing to make the argument.

Kahan & Rock, *supra* note 3, at 1311–12.

[84] Deepa Seetharaman, *U.S. Reports $9.7 Billion Loss on General Motors Bailout*, REUTERS (Oct. 29, 2013) http://www.reuters.com/article/2013/10/29/us-autos-gm-treasury-

sort of Government Motors, making the federal government the company's de facto boss and bank lender."[85] As a shareholder and regulator, one major issue that the federal government faced with owning such a large stake in GM was whether to focus on making money or on making clean and "green" cars.[86] As a result, when GM prioritized environmental concerns, the federal government pushed back, presumably with the intent of getting its investment back.[87] The federal government attempted to use its regulatory role to pass legislation that would have crippled GM's attempts at researching and producing the cleaner, greener cars; however, the Obama Administration stepped in to minimize congressional management in that area.[88]

C. Shareholder-regulator Problems Abroad

Other countries have experienced significant shareholder-regulator problems as well. Although not under the same United States law, these examples illustrate the inherent problems associated with the federal government owning stock in a corporation. Consider Brazil and the oil company, Petrobas. At the time of the discovery of new oilfields off its coast, Brazil owned forty percent of the oil corporation, which meant that the government would have to share a significant portion of their profits from Petrobas with outsiders.[89] To capitalize on the recent discovery and

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idUSBRE99S0WL20131029. The Treasury also invested in Chrysler for an eight percent equity interest. *See* Jack, *supra* note 58.

[85] Neil King & Jeffery McCracken, *Control of GM Would Create Conflicts for Government*, WALL ST. J., Apr. 28, 2009, http://online.wsj.com/news/articles/SB124087977542061821.

[86] *Id.*

[87] *See* Shahabian, *supra* note 68, at 362–63.

[88] *See id*. Also note that the federal government recently announced an estimated loss of $9.7 billion on the GM bailout. *See* Tracer, *supra* note 82.

[89] *See* Pargendler, *supra* note 24, at 2941.

the potential for enormous profits, Brazil agreed to assign Petrobas rights in the oil reserves in exchange for additional company equity.[90] "The result was a high-profile self-dealing transaction in which the interests of the Brazilian public as indirect beneficiaries of the government's oil and equity holdings were pitted against the economic interests of Petrobas's minority (and mostly foreign) investors."[91] This is a classic example of the shareholder-regulator problem.

VI. Federal-Based Response: Is It Time for an Amendment to the United States Constitution?

As illustrated, the government's dual role as both a shareholder and a regulator presents a significant risk of creating problems for the corporation, the shareholders, and the competitors alike.[92] Usually, most states and countries do not effectuate the most important restraints on government power via regulations or statutes because of the elevated risk involved; instead they inscribe these restraints

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[90] *See id.*

[91] *Id.*

[92] *See id.* at 2965. For a more expansive list, consider these consequences of the government owning stock in a private corporation: it creates an uncertain regulatory environment; disrupts bankruptcy laws; disrupts lien laws (unsecured versus secured creditors); upends interest rate structure; distorts risk versus reward principles inherent in free market system; disregards contract rights; threatens private property rights fundamental to our capitalist system; creates moral hazards and fundamental conflicts of interest in governmental officials' dual roles as regulator and shareholder (public trust versus private fiduciary duty); suspends judicial review in violation of separation of powers principle; leaves disenfranchised investors with no legal recourse due to sovereign immunity; and threatens free market system at all levels, not just "too big to fail" institutions. KANSAS OFFICE OF SECURITIES COMMISSIONER, Economic Freedom Amendment: A States-based Response to Nationalization and Bailouts, http://ksc.ks.gov /index.aspx?NID=187.

in constitutions, which are (usually) significantly harder to amend—and thus reduce risk of government limiting burdens on its own exercise of power.[93] As the federal government currently has significant power to pursue its own incentives as a shareholder, creating the inherent shareholder-regulator problems, should the United States appropriately restrain the federal government's power in this arena with an amendment to the U.S. Constitution?

A. Possible Strategies

Although an amendment to the United States Constitution would be the most effective route for mitigating the shareholder-regulator problem, no such amendment has been enacted. If one were to be enacted in the future, though, the critical question would be how to best reconcile legitimate private concerns with public necessity. Accordingly, scholars present a number of strategies to best mitigate the shareholder-regulator problem. [94] The most effective strategy, called "privatization," would simply prevent the federal government from owning any stock in a corporation.[95] One such amendment has already been proposed.[96] In 2009, a Republican Representative from Ohio introduced a federal constitutional amendment that would have prohibited the United States government from owning any stock in corporations.[97] Responding to "government intervention in private enterprise on a scale that many have never seen,"

[93] *See* Pargendler, *supra* note 24, at 2965.
[94] *See generally id.* at 2957–73 (listing one scholar's many different strategies).
[95] *See id.* at 2958.
[96] Press Release, House of Representatives, Rep. Mike Turner Introduces Constitutional Amendment to Prohibit the Government from Owning Stock in Corporations (Jun. 30, 2009) [hereinafter *Press Release*].
[97] *Id.*

the representative stated that a constitutional amendment is the "only solution" to the apparently limitless government ability to expand its ownership of business.[98]

Another strategy to mitigate the shareholder-regulator problem could be to disallow the federal government from being a majority shareholder in a corporation, as most of the more serious problems occur when the government is a majority shareholder, thus assuming fiduciary duties and more direct control.[99] The media has shown support for this strategy. For example, one article in the *New York Times*, titled "Owner as Regulator, Like Oil and Water," states that "[i]f it wasn't already obvious, at least one reason the government shouldn't own controlling stakes in major companies is that ownership and regulation are inherently incompatible."[100] However, this approach still would not prevent the federal government from enacting legislation to advance even its minority interests in a corporation.

Perhaps the most feasible way to address these issues would be a dual regulatory scheme, where wholly private corporations would be governed by one body of corporate law and corporations with government ownership would be governed by a separate body of law more narrowly tailored to address shareholder-regulator problems.[101] By relieving private corporations from the government's interests as a shareholder, this strategy seems very feasible; however, corporations with government ownership could still be at an advantage over the ones

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[98] *Id.*

[99] *See* Pargendler, *supra* note 24, at 2961–62.

[100] James B. Stewart, *Owner as Regulator, Like Oil and Water*, N.Y. TIMES, Jan. 13, 2012, http://www.nytimes.com/2012/01/14/business/government-ownership-and-gm-regulation-dont-mix.html?pagewanted=all&_r=0.

[101] *See* Pargendler, *supra* note 24, at 2962–68. This has also been suggested in Brazil. *Id.* at 2934.

without it, as the government could simply regulate the corporations in which it owns stock toward a better position in the market.[102]

B. Going Forward: A Case Study from Brazil

Admittedly, it would be difficult to come up with an equitable strategy for an amendment. However, one must wonder if such an amendment will, indeed, be needed, even in the near future. If history ever repeats itself, the United States could follow in Brazil's footsteps in this regard. Starting in the early 1920s, Brazil's government started buying stock in corporations within the country.[103] Just twenty short years later, Brazil's government started doing so on a very large scale and as one scholar noted, "The impetus for the creation of these [truly] national giants came from a combination of national security considerations in view of the ongoing world war and a lack of private capital for financing industrialization."[104] Sound familiar? In the 1960s, this trend had only picked up steam. "[W]hat began as an institutional reform to promote the low cost capitalization of private sector growth has in effect become a vehicle for public enterprise capital expansion."[105] By the mid-1970s, the government was a controlling shareholder in twenty-two of the top twenty-five companies in Brazil.[106] Shortly thereafter, Brazil entered a period of financial crisis, and the country used corporations it was a controlling shareholder in as instruments to effectively carry out the macroeconomic

[102] *See id.* at 2963.
[103] *See id.* at 2932.
[104] *Id.*
[105] *Id.* at 2934 (quoting José Roberto Mendonça de Barros & Douglas H. Graham, *The Brazilian Economic Miracle Revisited: Private and Public Sector Initiative in a Market Economy*, 13 LATIN AM. RES. REV. 5, 21 (1978)).
[106] *Id.*

policies of the country.[107]After decades of corporate law reform and failure, in 2000, a Brazilian stock exchange finally took a new approach to the shareholder-regulator problems that were amidst the past few decades and created different standards for wholly private corporations and corporations with government equity ownership.[108] The response: a dramatic capital expansion.[109] Thus, Brazil's dual regulatory scheme to help mitigate the shareholder-regulator problems achieved the end advanced by this article, although by different means.

VII. States-Based Response: Is It Time for an Amendment to States' Constitutions?

If Congress is unwilling, either statutorily or constitutionally, to explore the possibility of addressing the shareholder-regulatory problems—and, thus, is unwilling to rein in some of this seemingly unwieldy regulatory power—states could go so far as to amend their own constitutions to prevent the federal government from intervening in private enterprises within their respective state. Specifically, states could enact a constitutional provision preventing the federal government from owning stock in a corporation incorporated in their states.

With the 2008 financial crisis and the federal government's de facto control of corporations looming in the minds of state legislatures, some states are, in fact, considering such constitutional provisions.[110] Kansas was the first state in the country to propose such an

[107] *See id.* at 2935–36.
[108] *See id.* at 2940–41.
[109] *Id.* at 2941.
[110] *See* KANSAS OFFICE OF SECURITIES COMMISSIONER, Economic Freedom Amendment: A States-based Response to Nationalization and Bailouts, http://ksc.ks.gov/index.aspx?NID=187.

amendment.[111] The Kansas Securities Commissioner has argued for a privatization amendment to the Kansas state constitution, which would "shield holders of private property from nationalization of business by the federal government."[112] He said that Congress's bailout efforts permitted the federal government to own stock in nine hundred Kansas businesses, including seventeen banks.[113] Furthermore, the proposed amendment would "protect non-government shareholders in these companies from being exposed to the unique risks created when the federal government becomes a controlling shareholder of private companies" in that it would "realign[] state and federal economic policies with [Kansas] founding principles by limiting the federal government to its proper role as a neutral regulator rather than a vested owner of private enterprise."[114]

Additionally, scholars have proposed an expanded legal framework for federal ownership of private stock.[115]

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[111] *See* Tim Carpenter, *Kansas Securities Regulator Pushing Constitutional Amendment*, THE TOPEKA CAPITAL-JOURNAL, Feb. 5, 2013, http://m.cjonline.com/news/business/2013-02-05/kansas-securities-regulator-pushing-constitutional-amendment. The proposed amendment to the Kansas Constitution reads as follows: "Any transfer to the United States, or any entity controlled by the United States, of any ownership interest in any entity formed pursuant to the laws of this state shall be prohibited, provided, the foregoing prohibition shall not apply to any investments through pension funds operated by the United States or any entity controlled by the United States." *Press Release*, *supra* note 96.

[112] Carpenter, *supra* note 111.

[113] *Id.*

[114] Jack, *supra* note 58, at 38.

[115] *Id*. at 36. However, one scholar concludes that, while governmental ownership of private enterprise is "inherently unstable," nevertheless, because he believes that instances of government ownership are likely to be rare in the future due to the political and legal atmosphere, "there is no need at this point to wade into the debate about whether government ownership is ever appropriate, and if so, under what circumstances it is justified." Steven M. Davidoff, *Uncomfortable*

However, because federal law enacted after the financial crisis has not addressed any of the shareholder-regulator problems, these scholars are also proposing that there be amendments to state constitutions to address the concerns.[116]

A. Constitutionality of Such an Amendment

i. Supremacy Clause

A proposed state amendment naturally raises the issue of constitutionality, as the Supremacy Clause "assures that the Constitution and federal laws and treaties take precedence over state law and binds all judges to adhere to that principle in their courts."[117] However, pertinent to the issue at hand, the United States Supreme Court has held that a state's interest in regulating its corporations was sufficient to uphold a state law prohibiting certain types of share transfers, [118] so perhaps a state constitutional amendment preventing (or even minimizing) a state-incorporated constitution from transferring shares to the federal government would be constitutional as well. Further, in *United States v. Burnison,* the Supreme Court upheld a state statute that prevented testamentary transfers

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Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis, 95 MINN. L. REV. 1733, 1736, 1773–74 (2010–2011) (illustrating the lax approach some take towards the issue).

[116] Jack, *supra* note 58, at 36.

[117] ORIGINAL TEXT AND EXPLANATION, CONSTITUTION OF THE UNITED STATES, http://www.
senate.gov/civics/constitution_item/constitution.htm.(last visited July 28, 2016).

[118] *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94 (1987); *see also* Keven Garden, *CTS Corp. v. Dynamics Corp. of America: A State's Right to Tend to its Tender Offers*, 37 AM. U. L. REV. 947, 950 (1988).

of real and personal property to the United States.[119] There, the Court acknowledged that a state does not have unlimited authority to restrict transfer of property but found that nothing in the Supremacy Clause "prohibit[ed] the state from preventing its domiciliary from willing property to the Federal Government."[120] There are many political and historical reasons to honor donative intent.[121] Thus, the Supreme Court's perceived state interest for justifying a disregard of donative intent must have been quite strong. Along these same lines, a state's interest in preventing the federal government from buying shares in corporations incorporated in its state could be deemed an equally strong justification for disregarding shareholder intent.

ii. Dormant Commerce Clause

A proposed state amendment restricting the transfer of stock to the federal government would also raise Dormant Commerce Clause issues, as such an amendment would restrict commerce among the states. In *CTS Corp. v. Dynamics Corp. of Am.,* the Supreme Court was faced with a similar issue.[122] There, the Court stated that "recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations."[123] The Court added, though, that the statute at issue did not precipitate such an

[119] *See* 339 U.S. 87, 93 (1950) (holding that the state has broad power to say what is devisable and to whom it may be given).
[120] *Id.*
[121] For example, honoring donor intent is consistent with a system of private property; it encourages and rewards a life of hard work; it is consistent with and promotes family ties; it encourages individuals to accumulate wealth for old age and give to family; and it encourages family members to love, serve, and protect their elders. PETER WENDEL, WILLS, TRUSTS, AND ESTATES 3 (Aspen Publishers 2005).
[122] *See CTS Corp.*, 481 U.S. at 88–89.
[123] *Id.* at 88.

adverse effect because each state was only allowed to regulate rights of the corporations incorporated in its own state, subjecting each corporation to the law of only one state.[124] Further, the Court also held that "a State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs," adding that the statute at issue furthered such interests by allowing the shareholders to decide for themselves whether a substantial corporate transaction was advantageous to them.[125] One scholar said:

> The proposed constitutional amendment is similar to the . . . statute that was affirmed in *CTS*. First, it applies evenly to both residents and non-residents of an adopting state. Second, it only applies to [corporations] formed under the adopting state's law. Third, states have a strong interest in protecting shareholders [as well as] corporations formed under state law.[126]

In light of this holding, a state constitutional amendment could potentially withstand analysis under the Dormant Commerce Clause and therefore prevent the federal government from owning stock in a corporation. Perhaps a state constitutional amendment would pass constitutional muster if it generally prevented federal government ownership but also allowed the shareholders of each corporation to elect whether to bypass the

[124] *See id.* at 89 (stating that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations . . . .").
[125] *Id.* at 91.
[126] Jack, *supra* note 58, at 37.

constitutional protection, thus letting the shareholders determine for themselves, much like in *CTS*.

iii. Takings Clause

Lastly, a proposed state amendment raises the issue of the Takings Clause, as preventing shareholders from transferring shares to the federal government, therefore restricting free ownership, could be viewed as a taking.[127] Justice Holmes once opined that "compensation must be provided when government regulation 'goes too far' in diminishing the value of private property."[128] Would preventing a shareholder from selling shares to the federal government diminish the value of the shares enough to trigger the Takings Clause warrant some type of "just compensation"? Traditionally, the Takings Clause has only applied to real property and not personal property.[129] In fact, personal property has been treated as being '"less protected from regulatory takings than real property."[130] As equity in a corporation is undoubtedly personal property, the Takings Clause is unlikely to apply and therefore no just compensation would be needed.

VIII. Conclusion

The government, whether state or federal, owning stock in private businesses clearly has created, and

[127] Securities have been deemed to be personal property subject to the Takings Clause. *See generally In re* Heldor Indus. 139 B.R. 290 (D.N.J. 1992) (overturned on other grounds).
[128] William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
[129] Jack, *supra* note 58, at 37.
[130] *Id.* (quoting Bridget C. E. Dooling, *Take It Past the Limit: Regulatory Takings of Personal Property*, 16 FED. CIR. B.J. 445, 446 (2007)).

continues to create, shareholder-regulator problems. If not reined in sooner rather than later, there is no guarantee that the federal government will not simply continue owning more stock in private corporations and thus continue exhibiting inappropriate control, in light of the inherent problems associated with the roles of shareholder and regulator, over the corporations. A federal constitutional amendment or a state constitutional amendment is needed to prevent what happened in Brazil from happening here in America. Such an amendment is needed to ensure that the federal government does not reach too far into the realm of private enterprises and capital markets. Time will tell how much more the federal government will use private enterprises as its pawns, but one thing is for certain: if left unchecked, the federal government is not unlikely to be nice and play by the rules on its own.

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DEATH BY JURY: JURISPRUDENTIAL TRENDS AND HYBRID CAPITAL SENTENCING AUTHORITY

By: Jacob T. Hayes[1]

I. Introduction

American imposition of the death penalty has taken on varying forms in the several states since the invalidation of many state capital punishment procedures in *Furman v. Georgia*.[2] In the process of redrafting capital punishment statutes in an effort to make sentencing more consistent, state legislators grappled with the issue of final punishment and whether the judge or the jury took on the responsibility of that decision.[3] Leading up to the turn of the century, of the thirty-eight states that imposed the death penalty, twenty-nine of them gave sentencing authority to the jury with little or no supervision by the trial judge.[4] Five states left sentencing to the judge, and four states (Florida, Alabama, Indiana, and Delaware) maintained a "hybrid" system, where the jury made the determination on capital punishment subject to a judicial override.[5] Within these "hybrid" states, the jury made the decision at trial whether to impose life imprisonment without parole or death, but the judge could then potentially override the jury decision based on a weighing of "aggravating" and "mitigating"

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[2] *See* Furman v. Georgia, 408 U.S. 238, 240 (1972).
[3] *See* William J. Bowers, Wanda D. Foglia, Jean E. Giles, & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 932 (2006).
[4] *See id.* at 933.
[5] *Id.*

factors.[6] Most notably, the jury did not have a role regarding the presence of aggravating factors or the lack of mitigating factors in this sentencing stage.[7]

It was in this context that the Supreme Court decided *Ring v. Arizona*, a Sixth Amendment challenge to Arizona's capital sentencing scheme.[8] This decision, which extended the jury fact-finding responsibilities articulated by the Court in *Apprendi v. New Jersey*, invalidated outright judge-only sentencing of the death penalty in those five states utilizing that scheme.[9] The question remained, however, regarding the constitutionality of the judicial override in place in the hybrid states.[10] The Supreme Court answered this question in January of 2016 through *Hurst v. Florida*, a direct challenge to Florida's judicial override of jury decisions in a capital punishment case.[11] This recent decision has several implications regarding the jury's role in sentencing, and it may in fact lead to an overall shift in the imposition of the death penalty in the United States.

In this policy note, I will attempt to track the jurisprudential trends within the American courts to better understand the state of capital punishment and its imposition in the future. The key issue at the heart of these recent decisions lies in the sentencing roles of the judge and the jury. I contend that, since *Apprendi* and *Ring*, the courts have shifted from judicial authority in sentencing to an expanded role and increased responsibility for the jury. Moreover, in light of *Hurst*, I will discuss what role the

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[6] ALA. CODE § 13A–5–47 (1981); *see also* DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013), FLA. STAT. § 921.141(3) (2015).
[7] *See* Hurst v. Florida, 136 S. Ct. 616, 620 (2016) (quoting FLA. STAT. § 921.141(3) (2015)).
[8] *See* Ring v. Arizona, 536 U.S. 584, 588 (2002).
[9] *See Ring*, 536 U.S. at 609; *see also* Apprendi v. New Jersey, 530 U.S. 466, 492 (2000).
[10] *See Ring*, 536 at 609 (O'Connor, J., dissenting) (expressing concerns that hybrid schemes remained unresolved by the majority).
[11] *See generally Hurst*, 136 S. Ct. 616.

jury takes on in these hybrid states, specifically in the finding of "aggravating" factors. If the jury is now experiencing nearly total authority in decision-making for capital cases, what does this mean for the death penalty and its imposition in general? I conclude that the expanded role of the jury, coupled with public views on the death penalty indicated by recent polling, may result in fewer defendants sentenced to death, creating a significant shift in American imposition of capital punishment.

II. Development of the Law: The Role of the Jury in Capital Punishment Sentencing

The Supreme Court expressed appreciation for the jury in *Duncan v. Louisiana*, stating that jury trial provisions in federal and state constitutions "reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[12] This position suggests the jury as a buffer, a populist check to the state's ability to impose judgment on private citizens—a tradition going back to common law England.[13] The role of the jury in American courts is thusly situated, with the Bill of Rights ensuring the right to a jury as such a buffer against the will of the state.[14] Unfortunately, the jury's responsibilities as a fact-finder, specifically in capital sentencing schemes, were initially not so clearly defined.[15]

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[12] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
[13] *See* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 3–4 (1989) (noting that Sir Blackstone refers to the English jury as the grand "palladium" of English liberty says that "competent . . . jurymen" are the guardians of public justice.)
[14] *See* U.S. CONST. amend. VI.
[15] *See* White, *supra* note 13, at 4.

The Supreme Court has heard several key cases that dealt directly with sentencing in capital punishment, beginning in the early seventies and continuing to January 2016.[16] In 1970, the Court, in *In re Winship*, ruled that the reasonable doubt standard, applied to those facts found by the jury, was a required element of constitutional due process.[17] Post-*Furman*, the Court heard constitutional challenges to judge-determined sentencing enhancements, most notably *Walton v. Arizona*.[18] In *Walton,* the Court examined the constitutionality of an Arizona statute allowing a judge to determine whether the jury's guilty verdict in a capital murder case should carry a sentence of life imprisonment or death.[19] The statute directed the judge to determine the existence of any aggravating or mitigating circumstances relevant to the imposition of the death penalty.[20] The defendant in *Walton* contended that the jury should make that determination, but the Court disagreed, holding that "aggravating circumstances" constituted a sentencing guide rather than elements of an offense, and thus were not constitutionally required to be heard by a jury.[21]

The Supreme Court in *Apprendi* took this determination a step further, holding that any fact that increases the statutorily prescribed maximum penalty must be proven beyond a reasonable doubt.[22] The case specifically involved a challenge to a sentence enhancement if the judge determined that a defendant acted with racial prejudice.[23] The majority viewed this

[16] *See generally Hurst*, 136 S. Ct. 616.
[17] *See In re* Winship, 397 U.S. 358, 363 (1970).
[18] *See generally*, Walton v. Arizona, 497 U.S. 639 (1990); Jones v. United States, 526 U.S. 227 (1999).
[19] *See Walton*, 497 U.S. at 642–43.
[20] *See id.* at 643.
[21] *Id.* at 647–49.
[22] *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).
[23] *See id.* at 470.

determination, which potentially doubled the defendant's sentence, as seeking a specific mens rea and therefore could not stand as a simple sentencing guideline.[24] In an interesting break from previous decisions, the *Apprendi* court seemingly dismissed the distinction between "elements" and "sentencing factors" and placed on the jury all fact-finding responsibilities that will impact the defendant's punishment.[25] The Court saw the jury's duty as one "not of form, but effect," and stated that any labels placed on a particular fact are irrelevant if that fact is essential to the imposition of a sentence and it exposes the defendant to greater punishment.[26] The *Apprendi* decision represented a significant shift in responsibility from judge to jury in sentencing, a shift that at the time was logically at odds with precedent of *Walton*.[27] The Court seized the opportunity to resolve issues with precedent two years later in *Ring v. Arizona*.[28]

The defendant in *Ring* faced the death penalty under the same statutory scheme as the defendant in *Walton*, wherein he was found guilty of first-degree felony murder by the jury and subsequently sentenced to death by the judge due to certain "aggravating factors."[29] Justice Ginsberg, in delivering the opinion of the Court, directly addressed the irreconcilability of *Walton* and *Apprendi*, ultimately endorsing the *Apprendi* reasoning and overruling *Walton*.[30] Any fact, noted the Court, that subjects the

[24] *See id.* at 493.
[25] *Id.* at 494.
[26] *Id. But see* Almendarez-Torres v. United States, 523 U.S. 224 (1997) (stipulating that history of prior convictions exposing a defendant to greater punishment did not require review by the jury).
[27] *See Apprendi*, 530 U.S. at 536–37.
[28] *See Ring*, 536 U.S. at 590.
[29] *See id.* at 591–94.
[30] *See id.* at 604–05 ("*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a

defendant to a greater punishment must be reviewed by a jury and proven beyond a reasonable doubt.[31] This included Arizona's sentencing enhancement of "aggravating factors" because the maximum penalty for the felony murder verdict issued by the jury was life imprisonment, but the defendant was then subjected to a harsher penalty of death after the judge considered additional facts related to the case.[32] This scheme, according to the majority, violated the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. [33] Effectively invalidating judge-only sentencing in the five states that possessed such a procedure, the *Ring* decision expanded the scope of *Apprendi* to capital punishment cases and marked a significant shift in sentencing responsibility from the judge to the jury.[34]

III. Current Policy – Substantive Law at Issue

A. Legal Issue Presented

The cases at issue in *Apprendi*, *Ring*, and more strike at the heart of a debate guiding capital punishment jurisprudence since *Furman*: who reserves the right to punish a defendant, the people or the state? [35] Are "sentencing enhancements" (such as a determination of aggravating factors by a judge) state attempts at eroding the jury's role in the imposition of capital punishment? In each

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'sentencing factor' is not determinative of the question 'who decides,' judge or jury.").

[31] *See id.* at 602.

[32] *See id.* at 597.

[33] *See id.* at 609.

[34] *See* Kimberly J. Winbush, Annotation, *Application of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to State Death Penalty Proceedings*, 110 A.L.R.5th 1, § 2a (2003).

[35] *See* White, *supra* note 13, at 2.

case examined above, the petitioner sought to have a jury of his peers render the final judgment, not the court. Relying on constitutional imperatives, these petitioners asserted that protections from state-sanctioned punishment are baked into the Bill of Rights.[36] If the state is given the right to create laws and punish human behavior, then the jury, a cross-section of the society, ensures that state administration of justice will be rendered by members of the community and not a singular official.[37] Conversely, the statutes forming the basis of judicial sentencing schemes were intended to resolve the issues of *Furman* and remove the arbitrary administration of capital punishment by juries.[38] The goal was to satisfy the (possibly paradoxical) aims of consistency and individualization in sentencing by allowing impartial judges to be the final word in the imposition of capital punishment.[39] States arguing to keep their judicial sentencing schemes maintain that the judge is better equipped, in both academics and experience, to provide the most beneficial administration of justice in society.[40]

Based on the *Apprendi* and *Ring* decisions, it seems that the Court is falling on the side of the jury in this issue. By requiring that "aggravating factors" and other sentence enhancements be proven beyond a reasonable doubt, the Court is, in effect, forcing states to include the jury in nearly every aspect of capital sentencing. By increasing jury involvement, and therefore allowing for more conflicting opinions regarding the proper administration of

[36] *See Ring*, 536 U.S. at 595; *see also Apprendi*, 530 U.S. at 471.
[37] *See* Witherspoon v. State, 391 U.S. 510, 519 (1968).
[38] *See* K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 70 (2004); *see also* Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 94–95 (2002) (describing the twin goals as consistency and individualization).
[39] *See* Tomer, *supra* note 38, at 70.
[40] *See id.* at 73.

justice, the courts potentially could see more "arbitrary" sentencing. Moreover, the Court views the constitutional basis for the jury's authority as an intentional safeguard against failures in state sentencing, and while jury sentencing tends to be more arbitrary, it seems the Court is willing to tolerate that arbitrariness in favor of preventing the erosion of public rights to a jury trial.[41]

A. *Hurst v. Florida*

It is within that framework that the Supreme Court discussed "hybrid" sentencing schemes in *Hurst v. Florida*. In the years following the *Ring* decision, those state procedures rendered invalid were redrafted to include the jury as fact finder when determining "aggravating factors," but the so-called "hybrid" states did not experience any changes to their sentencing schemes.[42] There were attempts to challenge these hybrid procedures before the Supreme Court prior to *Apprendi* (most notably *Hildwin v. Florida*), but no challenge successfully invalidated the hybrid scheme until *Hurst* in 2016.[43] The defendant in *Hurst* faced the death penalty after the jury found him guilty of first-degree murder and recommended the death sentence after consideration of aggravating factors.[44] The trial judge then concurred in this recommendation after considering aggravating factors independently.[45] The Court, in keeping

[41] *See Ring*, 536 U.S. at 607; *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).
[42] *Recent Case: Criminal Procedure – Sixth Amendment – Alabama Supreme Court Upholds a Death Sentence Imposed by Judicial Override by a Jury Recommendation for Life Imprisonment Without Parole: Ex parte Hodges, 856 So. 2d 936 (Ala. 2003)*, 117 HARV. L. REV. 1283 (2004); *see generally* Winbush, *supra* note 34 at § 20.
[43] *But see* Hildwin v. Florida, 490 U.S. 638 (1989) (upholding Florida hybrid scheme), *overruled by* Hurst v. Florida, 136 S. Ct. 616, 621 (2016).
[44] *See Hurst*, 136 S. Ct. at 620.
[45] *See id.*

with *Ring* and *Apprendi*, determined that Florida's sentencing scheme violated the Sixth Amendment right to a jury trial as well as constitutional due process.[46]

As in *Ring*, the required finding of an aggravated circumstance exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict and, as a result, a jury determination of fact was necessary for the imposition of the death penalty.[47] The Court acknowledged that the Florida scheme did afford the jury an advisory verdict, contrasting the Arizona scheme in *Ring*, but nonetheless found this distinction irrelevant because the judge maintained the ability to override a jury verdict based on her own independent determination of aggravating factors.[48] In making this decision, the Court invalidated Florida's hybrid sentencing scheme as a violation of the Sixth Amendment and, in so doing, the Court potentially rendered unconstitutional similar schemes in states such as Alabama and Delaware.[49]

IV. Analysis – The Implications of *Hurst* on Capital Punishment Sentencing

The *Hurst* court extended the reasoning of *Apprendi* to a sentencing procedure that allowed a judicial role in fact-finding and shifted ultimate responsibility to the jury in a previously hybrid scheme. Moreover, the implications of this shift suggest a resolution to the issue of judicial imposition of capital punishment. Of the thirty-eight states that impose a death penalty, thirty-five of them now include the jury in the sentencing phase, and pending revisions to the Florida statute this spring, that total will rise to thirty-

[46] *See id.* at 621–22.
[47] *See id.* at 622.
[48] *See id.* at 621.
[49] *See id.* at 620–21.

six.[50] Only Alabama and Delaware still maintain a hybrid system.[51]

Over the past several years, American approval of the death penalty has had several peaks and valleys, with approval being at its highest in 1994 at eighty percent.[52] More recently, however, polling indicates a shift towards public disapproval of the death penalty.[53] Polls released by the Pew Research Center and Columbia Broadcasting System ("CBS") News in April of 2015 showed public support for the death penalty at fifty-six percent, near the lowest level recorded in the last forty years.[54] According to the November 2015 American Values Survey of 2,695 Americans, fifty-two percent preferred the imposition of life without parole rather than death.[55] In light of these polling numbers, the implications on the opinions of future juries in capital punishment cases are very interesting. If

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[50] *See* Bowers, *supra* note 3, at 933 (citing *Ring*, 536 U.S. at 608 n.6); *see also* Casey C. Sullivan, *Florida's Capital Punishment Sentencing Is Unconstitutional*, THE FINDLAW U.S. SUPREME COURT NEWS & INFORMATION BLOG (Jan. 12, 2016, 1:50 PM), blogs.findlaw.com/supreme_court /2016/01/floridas-capital-punishment-sentencing-is-unconstitutional.html (considering the implications of the *Hurst* decision nationally).

[51] *See* ALA. CODE § 13ª–5–47 (1981); DEL. CODE ANN. tit. 11, § 4209(d)(1) (2013).

[52] *See* GALLUP, www.gallup.com/poll/1606/death-penalty.aspx (last visited Jan. 25, 2016).

[53] *See id.* Polling indicates that in the last decade disapproval of the death penalty among Americans has increased at a significant rate, increasing from twenty-six percent to thirty-seven percent since 2000.

[54] *See Less Support for Death Penalty, Especially Among Democrats*, PEW RES. CTR. (April 16, 2015), http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/.

[55] *See Anxiety, Nostalgia, and Mistrust: Findings from the 2015 American Values Survey*, PUBLIC RELIGION RESEARCH INSTITUTE (Nov. 17, 2015), http://publicreligion.org/research/2015/11/survey-anxiety-nostalgia-and-mistrust-findings-from-the-2015-american-values-survey/#.VqaDyPkrKUm.

the jury is to be a cross-section of society, reflecting the public opinion, then more and more jurors may find themselves unwilling to impose the death penalty on defendants.

Interestingly, the invalidation of the hybrid scheme may have additional impact in the number of death sentences ordered. Of the top fifteen states that imposed the death penalty in 2015, Florida and Alabama, hybrid states, were second and third, respectively.[56] Closer examination of the jurors in these hybrid states reveals important facts that suggest increased jury authority will lead to fewer death sentences. Data collected by the Capital Jury Project ("CJP") in 2005 provided multiple examples of juror opinions on imposing death in an actual case, specifically by comparing statements from jurors in jury-only sentencing states with those in hybrid states.[57] The resulting facts revealed that jurors in a hybrid state, where they were specifically instructed as providing a recommendation to the judge and not an actual sentence, were much more likely to impose the death sentence knowing they did not bear ultimate responsibility for the defendant's fate.[58] These hybrid jurors were also much more likely to misunderstand the court's instructions, take less time in deliberation, and refrain from asking for clarification or additional testimony.[59]

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[56] *See States in Order of Number of Death Sentences – 2015*, DEATH PENALTY INFORMATION CENTER (2015), http://www.deathpenaltyinfo.org/2015-sentencing#2014topstates.

[57] *See* William J. Bowers, Wanda D. Foglia, Jean E. Giles, & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 951–52 (2006). A total of 1198 interviews with jurors from 353 capital trials in fourteen states were conducted. These fourteen states were responsible for over seventy-six percent of persons on death row as of January 1, 2005.

[58] *See id.* at 956.

[59] *See id.* at 960–74. In Alabama, a hybrid state, nearly forty percent of jurors concluded deliberations in a capital punishment case within one

Narrative accounts taken from jurors in Alabama, Florida, and Indiana showed general feelings of detachment from the defendant and of being "off the hook" for whatever became of the individual standing trial.[60] The data collected by CJP suggests that providing full responsibility for sentencing to juries may lead to more deliberative and considerate decision-making from the jurors, suggesting a diminishing rate of state executions and thus changing the nature of capital punishment in the United States in the future.

V. Conclusion

The sentencing role in capital punishment has had its fair share of deliberation in our nation's highest Court, and over the decades since *Furman*, the Court's opinion has shifted on the importance of jury sentencing. Following the decisions in *Apprendi*, *Ring*, and now *Hurst*, the way Americans impose capital punishment has been firmly situated with the jury. This jurisprudential shift adds to the debate surrounding the death penalty by placing responsibility for its imposition on the people. Moreover, this "conscience of the community" is growing less fond of the death penalty every year. Fewer and fewer Americans favor the death penalty as a punishment and, in the future, these same individuals will make up juries across the

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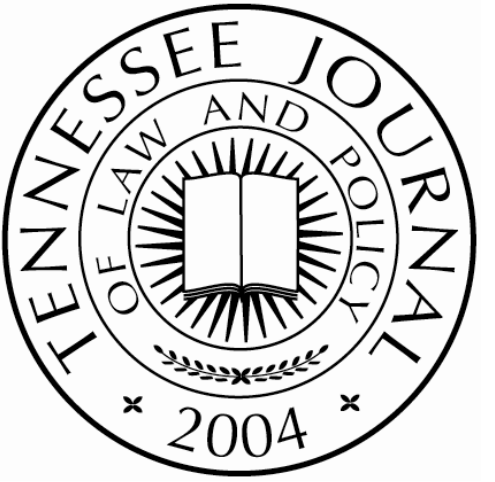
hour. Thirty-eight percent of Florida jurors concluded deliberations within one hour, and in Indiana twenty-eight percent of jurors concluded deliberations within an hour. By contrast, in California, a jury-only state and the largest number of inmates on death row, only seven percent of jurors decided within an hour

[60] *Id.* at 961–63. Contrasting these figures with those from jury-only sentencing states shows a wide gulf in juror opinions and weight of responsibility. Those jurors that understood their verdict was the ultimate determination were much more likely to ask for clarification, deliberate for several hours or days, and give added consideration to mitigating factors in a capital punishment case.

nation. By placing sentencing authority on the jury, the Court effectively gave final say on the imposition of death to this "arbitrary" cross-section of the community.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