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ARTICLE

GOVERNMENT OWNERSHIP OF STOCK IN A CORPORATION

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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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[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

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[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

[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

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[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

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[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

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[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,

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,

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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.