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Faster - Cheaper - Unconstitutional: Why the Public's Subsidy of JobsOhio Violates Article VIII, Sections 4 & 6 of the Ohio Constitution

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COMMENT

FASTER. CHEAPER. UNCONSTITUTIONAL: WHY THE PUBLIC'S SUBSIDY OF JOBSOHIO VIOLATES ARTICLE VIII, SECTIONS 4 & 6 OF THE OHIO CONSTITUTION¹

INTRODUCTION

On February 18, 2011, Ohio Governor John Kasich signed the 129th Ohio Assembly House Bill 1 into law,² authorizing the state to replace Ohio Department of Development activities with a new, private entity called JobsOhio.³ JobsOhio aims to attract jobs to the state and help local companies expand.⁴ It touts that by “[u]sing a

¹ “Faster. Cheaper. Easier.” was the initial slogan for JobsOhio. See Tara Dodrill, *JobsOhio Regional Rollout a Success*, YAHOO! NEWS (Sept. 19, 2011), <http://news.yahoo.com/jobsohio-regional-rollout-success-210500677.html> (discussing JobsOhio’s slogan). As one official has remarked, “[JobsOhio] will allow us to move at the speed of the market, not at the speed of statute.” David Holthaus, *JobsOhio is a Bold Break*, THE CINCINNATI ENQUIRER, July 30, 2011, BIZ.

² Catherine Candisky, *Kasich Privatizes Ohio Job Creation*, THE COLUMBUS DISPATCH, Feb. 19, 2011, at 1A.

³ See Am. Sub. H.B. 1, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (to be codified at OHIO REV. CODE ANN. § 187.01) (“The governor is hereby authorized to form a nonprofit corporation, to be named “JobsOhio,” with the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state.”). see also *id.* (to be codified at OHIO REV. CODE ANN. § 187.03(A)) (“JobsOhio may perform such functions as permitted and shall perform such duties as prescribed by law, but shall not be considered a state or public department, agency, office, body, institution, or instrumentality for purposes of section 1.60 or Chapter 102., 121., 125., or 149. of the Revised Code.”).

⁴ Candisky, *supra* note 2, at 1A.

private-sector approach, [it] will work at the speed of business, enabling Ohio to be more nimble and flexible and thus more competitive in its economic development efforts.”⁵ However, in its need for speed, JobsOhio cuts corners with the Ohio constitution.

The Ohio Constitution contains multiple provisions designed to prohibit state funding of private enterprise,⁶ and this Comment focuses on two of them: article VIII, sections 4 and 6, as well as the exception found in section 13.⁷ Part I of this Comment explores a brief history behind the state’s adoption of article VIII, sections 4 and 6, and analyzes Ohio courts’ jurisprudence interpreting and applying these provisions.⁸ Part II provides background and analysis on the function and purposes of House Bill 1 (“H.B. 1”), the enacting legislation for JobsOhio.⁹ Finally, Part III analyzes how article VIII, sections 4 and 6 apply to H.B. 1, and concludes that certain provisions of JobsOhio violate these sections of the Ohio Constitution.¹⁰

I. HISTORY AND ANALYSIS OF OHIO CONSTITUTION ARTICLE VIII

A. Historical Background

In the early 1800s, the young state of Ohio played an active role in developing its economy.¹¹ State assistance took the form of public financing of private enterprise with the goal of developing a statewide transportation network, including railroads, canals, and turnpikes.¹² The public initially supported investments designed to expand the state’s access to markets, but that enthusiasm quickly soured.¹³ State-subsidized corporations failed or squandered the government funds, leaving the public to bear the cost—and those costs were great.¹⁴

⁵ JOBSOHIO, JOBSOHIO OVERVIEW, <http://www.ohioeda.com/pdf/mandiedirect/jobsohiooverview.pdf>

⁶ See *infra* note 27.

⁷ OHIO CONST. art. VIII, §§ 4, 6.

⁸ See *infra* Part I.

⁹ See *infra* Parts II and III.

¹⁰ See *infra* Part III.

¹¹ See David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U. TOL. L. REV. 405, 407–08 (1985) (describing the state government’s role in Ohio’s economic development in the early to mid-1800s, particularly in the establishment of a transportation network).

¹² *Id.* at 408–09 (noting that in 1837, the Ohio General Assembly passed the “Loan Law” that “required the state to give financial aid to private canal, turnpike, and railroad companies”).

¹³ See Gold, *supra* note 11, at 409 (“Scattered skepticism about public and mixed enterprise began to turn to widespread revulsion against state involvement in economic affairs.”).

¹⁴ See *id.* at 411 (“[Radical Democrats] were angered by the tax burdens imposed on citizens for the benefit of private companies and by the public losses incurred when subsidized corporations failed.”).

Between 1825 and 1830, Ohio's debt increased "nearly eleven-fold, from \$400,000 to \$4,333,000."¹⁵

While the state's debts accumulated, private transportation developers misused state funds.¹⁶ Massive inefficiencies resulted. It is estimated that less than half of the 30,000 miles of railroad built between 1880 and 1882 was necessary for development.¹⁷ Developers wasted public money building duplicate railroad lines, and, in some instances, never building the promised lines at all.¹⁸ Development was often uneven and only benefited certain regions of the state.¹⁹

On top of the massive debt and inefficiencies, public financing of private enterprises resulted in widespread corruption.²⁰ According to one scholar's account, "railroads, through 'practices of rate discrimination, favoritism, wastefully duplicated lines, stock gambling, frauds on investors, monopolies and political corruption' constituted an 'aid to plutocracy [and] a danger to the republic.'"²¹

Public outcry over corruption and accumulation of debt, particularly among the anti-corporation Democrat party, contributed to the push for the 1850–51 state constitutional convention.²² This convention marked the start of a new era for the state, focused on reducing public support for private enterprise. As one commentator noted, "[i]t cannot be gainsaid that during the period from 1850 to about 1920, the judiciary and the legislative branch exerted prodigious efforts to prevent the entanglement of the government and the private sector in an attempt to insure that the government worked for the good of *all* the people."²³

¹⁵ *Id.* at 409; see also Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace. The Battle to Revive Judicial Rulings and State Constitutional Enactments Prohibiting Public Subsidies to Private Corporations*, 30 U. TOL. L. REV. 393, 395 (1999) (noting that much of the increase in debt was due to the investment in railroad, which amounted to nearly \$1.5 billion, "more than a quarter of the total active capital of the nation"). Ohio and Pennsylvania alone saw their combined debt escalate from \$6.7 million in 1825 to \$29 million in 1836. *Id.*

¹⁶ See Rubin, *supra* note 15, at 397 ("[T]he reason for the public's outrage against public aid to private corporations was that tax money was being used to pay off the debt incurred resulting from the issuance of bonds, the proceeds of which were turned over to private companies, primarily railroads.").

¹⁷ *Id.* at 396.

¹⁸ See Gold, *supra* note 11, at 411.

¹⁹ *Id.* at 412.

²⁰ See, e.g., Rubin, *supra* note 15, at 395 (noting that, particularly with railroad construction, bribery of public officials "seemed to be the norm").

²¹ *Id.* at 397.

²² See Gold, *supra* note 11, at 411 (noting public disgust with government aid of private corporations was part of the motivation to hold a constitutional convention in 1850).

²³ Rubin, *supra* note 15, at 398 (citing Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724, 1735 (1995)).

Ohio's 1850–51 convention led to the adoption of a new constitution containing several provisions aimed to limit public aid for private endeavors.²⁴ The resulting constitution, like many other constitutions that states adopted during a wave of mid-nineteenth-century constitutional reforms, included numerous provisions designed to limit the use of public funds to support private enterprise.²⁵ Among these are article VIII, sections 4 and 6.²⁶

B. Analysis of Article VIII, Sections 4 and 6

Article VIII, sections 4 and 6 of the Ohio Constitution, as well as article VIII, section 13, which limits sections 4 and 6, are particularly relevant in analyzing the constitutionality of JobsOhio.²⁷

Even before implicating these constitutional provisions, at a minimum, public funds in Ohio must be spent for a public purpose.²⁸ In determining whether public funds support a public purpose, the Ohio Supreme Court gives great deference to the legislature and will only overturn a legislative determination based on a “manifestly arbitrary or unreasonable” standard.²⁹ Despite the Court’s great

²⁴ See *id.* (“[T]he enactment of the state constitutional provisions prohibit[ed] special legislation, lending of credit, and requiring uniformity of taxation.”). While beyond the scope of this Comment, in addition to the provisions mentioned above, there are other constitutional requirements placing limits on the use of public funds for private enterprise. For example, article XIII, section 1 of the Ohio Constitution confers corporate powers and states “[t]he general assembly shall pass no special act conferring corporate powers.” OHIO CONST. art. XIII, § 1. Related is article XIII, section 2 of the Ohio Constitution, entitled, “General corporation laws; regulation of corporations; sale or transfer of personal property” and allows corporations be formed under general laws. *Id.* at § 2. Article VIII, section 3 of the Ohio Constitution concerns creation of debt and states (in part), that with some exceptions, “no debt whatever shall hereafter be created by or on behalf of the state.” OHIO CONST. art. VIII, § 3. Lastly, article VIII, section 5 of the Ohio Constitution, entitled “State not to assume debts of political subdivisions; exceptions” articulates the following: “The state shall never assume the debts of any county, city, town, or township, or of any corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the state in war.” *Id.* at § 5.

²⁵ See Rubin, *supra* note 15, at 393 (noting that almost all state constitutions prohibit the public subsidies to private enterprises such as sport stadiums).

²⁶ OHIO CONST. art. VIII, §§ 4, 6 (specifically, article VIII, section 4, prohibits the state from financial involvement in a private enterprise, and article VIII, section 6 bans counties, cities, townships from financing private enterprises). See *infra* Part I.A for the full provisions of OHIO CONST. art. VIII, §§ 4, 6. For an excellent overview of the full history of article VIII, sections 4 and 6 of the Ohio Constitution, see Gold, *supra* note 13, at 412–422.

²⁷ OHIO CONST. art. VIII, §§ 4, 6, 13.

²⁸ State *ex rel.* Taft v. Campanella, 368 N.E.2d 76, 84 (Ohio Ct. App. 8th 1977), *aff’d*, 364 N.E.2d 21 (Ohio 1977) (“It is clear that a county’s funds or credit may not be used to finance a private purpose or a private interest. Purely governmental functions performed by non-private entities, however, may be financed by county funds or county credit.”).

²⁹ Bazell v. City of Cincinnati, 233 N.E.2d 864, 868–69 (Ohio 1968) (“The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable.” (citing Gordon v. Rhodes, 100 N.E.2d 225, 231 (Ohio 1951))).

deference to the legislature in determining what constitutes a public purpose, any legislative scheme must still overcome the restrictions of article VIII, Sections 4 and 6.

In particular, sections 4 and 6 create an additional hurdle by (1) prohibiting joint ownership between the government and private entities, (2) prohibiting private financial gain, and (3) prohibiting government subsidies for commerce or industry. These prohibitions are relevant to JobsOhio because while its proponents may argue the program constitutes a public purpose, the program cannot overcome the hurdle created by section 4 and 6 because JobsOhio authorizes joint ownership between the state and private entities, fosters private financial gain, and allows for government subsidy of commerce in violation of the Ohio constitution.

1. Article VIII—Public Debts and Public Works

Article VIII of the Ohio Constitution concerns “Public Debts and Public Works.”³⁰ In *Grendell v. Ohio Environmental Protection Agency*, an Ohio court of appeals described article VIII as “an expression of concern with placing public tax dollars at risk to aid private enterprise . . . [and an] interest in not placing state tax dollars at risk in unwise investments.”³¹ Specifically, article VIII, sections 4 and 6 prohibit the government from using public funds to finance private enterprise, whether at the state or the county or township level.³² Article VIII, section 4 of the Ohio Constitution states the following:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association, in this state, or elsewhere, formed for any purpose whatever.³³

Similarly, article VIII, section 6 also bans public financing of private enterprises, but does so only at the city, town, or township level:

No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or

³⁰ OHIO CONST. art. VIII.

³¹ 764 N.E.2d 1067, 1073 (Ohio Ct. App. 2001).

³² OHIO CONST. art. VIII, §§ 4, 6.

³³ *Id.* at § 4.

association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit.³⁴

a. Sections 4 and 6 Prohibit Joint Ownership

The Ohio Supreme Court first interpreted article VIII, section 6 in *Alter v. City of Cincinnati*.³⁵ *Alter* concerned the constitutionality of a waterworks act authorizing the city of Cincinnati to contract with a corporation for the expansion of water services, as well as to confer joint ownership of the waterworks with the corporation.³⁶ The *Alter* Court interpreted section 6 to mean that “[t]here can be no union of public and private funds or credit, nor of that which is produced by such funds or credit.”³⁷

In applying the rule prohibiting the union of public and private funds, the *Alter* court determined that the joint-ownership provision of the act was unconstitutional, stating:

[section 6] not only prohibits a “business partnership,” . . . but it goes further, and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual . . . [a] union of public and private funds or credit, each in aid of the other, is forbidden by the constitution.³⁸

Furthermore, in *State ex rel. Ryan v. City Council of Gahanna*,³⁹ the Ohio Supreme Court elaborated on the meaning of “joint venture” to

³⁴ OHIO CONST. art. VIII, § 6. Section 6 is entitled “Political subdivisions to avoid financial involvement with private enterprise; mutual insurance exception”

³⁵ 46 N.E. 69, 70 (Ohio 1897) (“The full scope of this section of the constitution has not yet been determined by this court.”)

³⁶ *Id.* at 71 (“[T]he enlargements, extensions, improvements, and additions, together with the existing works, all taken together, will constitute one completed whole,—one waterworks system, one waterworks,—owned in part by the city, and in part by the individual or corporation; and thereby the union of public and private capital and funds in one enterprise will become complete.”)

³⁷ *Id.* at 70.

³⁸ *Id.* (emphasis added).

³⁹ 459 N.E.2d 208, 210 (Ohio 1984).

hold that a municipality's financing of an enterprise in ways favorable to the private entity constituted "joint ownership," which the state constitution prohibited.⁴⁰ In *Ryan*, the city of Gahanna purchased and developed an industrial park, financing it by issuing notes. The notes "were issued in anticipation of long-term bonds, at a favorable rate to private corporations," and the Court concluded that "[t]his [was] as much a joint enterprise as if the city . . . had given the money directly to the corporations to develop the land, to construct their buildings and to carry on their activities in the industrial park."⁴¹

Simply put, the Ohio Supreme Court has affirmed that the "primary purpose" of article VIII, section 6 "is to prohibit the use of county funds or credit for private purposes . . . [in that it] shall not be used for economic gain by private interests."⁴² Sections 4 and 6 always "forbid [the] government to hold stock in private companies or to raise money for or [to] loan its credit to private individuals or businesses."⁴³

One rationale for the prohibition on the union of private and public funds is the desire for full *governmental control*. As the *Alter* court wrote:

[t]he whole ownership and control must be in the public. . . . [A city] cannot engage in an enterprise with an individual or corporation for the construction...of a property which, as a completed whole, is to be owned and controlled in part by the city, and in part by an individual or corporation.⁴⁴

Ohio courts have consistently looked to the degree of governmental control over ownership when deciding whether an enterprise is in the public interest.⁴⁵

⁴⁰ *Id.* at 210.

⁴¹ *Id.*

⁴² *State ex rel. Taft v. Campanella*, 368 N.E.2d 76, 84 (Ohio Ct. App. 8th 1977), *aff'd*, 364 N.E.2d 21 (Ohio 1977).

⁴³ *Gold*, *supra* note 11, at 460.

⁴⁴ *Alter v. City of Cincinnati*, 46 N.E. 69, 70 (Ohio 1897).

⁴⁵ *Id.* at 71 ("The existing waterworks would be so tied to the extensions as to be dependent upon them, and the extensions would be so tied to the existing works as to be of but little value without them. It is this close connection and dependence one upon the other that constitutes both together as a single whole, and makes a union of public and private funds and credit."); *cf. Bazell*, 233 N.E.2d at 871 (holding that a stadium built, controlled and funded by the municipality which is rented to private individuals is not in violation of the Ohio constitution); *Taft*, 368 N.E.2d at 83 (concluding that the use of county credit to fund a hospital is a public interest, because the project is governmental and because the county would own and lease the facilities).

b. Sections 4 and 6 Prohibit Private Financial Gain

In *State ex rel. Wilson v. Hance*, the Ohio Supreme Court invalidated contracts that involved the union of government and private property, where a private entity benefitted financially.⁴⁶ The Court once again emphasized the loss of governmental control present in such a situation, stating, “[u]nder the terms of the mortgage, the administrator of R.E.A. can, if he so desires, take control of this part of the plant, thereby removing such control from the city.”⁴⁷

However, the Ohio Supreme Court distinguished *Wilson* in *Bazell v. City of Cincinnati*.⁴⁸ There, the Ohio Supreme Court stated that there may be narrow instances where a private party may derive profits, stating that a municipality may rent out:

[a municipally funded stadium designed] to accommodate large crowds at athletic and other exhibitions . . . to private persons who will provide such exhibitions; that the municipality may do so even though such private persons will derive profits from providing those exhibitions; that, in connection with the construction and operation of such a stadium, a municipality may acquire land and devote it to automobile parking and derive a profit from doing so; and that, as an incident to the construction and operation of such stadium, a municipality may construct and maintain a scoreboard and derive revenue from the sale of advertising space thereon.⁴⁹

One key point in *Bazell*, however, is that the city’s scheme provided money to a county, *not* to a private entity.⁵⁰ The Court noted this, stating “although [section 6] forbids the lending of a city’s credit to or in aid of a private business enterprise . . . it does not prohibit such lending by a city to a public organization such as a county.”⁵¹ In *Bazell*, the private entity’s profits were incidental, were not derived

⁴⁶ 159 N.E.2d 741, 747 (Ohio 1959). (“[T]he contract involved in the present action clearly violates the provisions of Section 6 of Article VIII of the Constitution of Ohio.”). *Wilson* concerned the city’s transfer of land to Pioneer Rural Electric Co-operative, Inc., which placed a mortgage on the land and then returned it to the city (subject to the mortgage). *Id.* at 746. The Court held that unlike a situation where a city was merely leasing land to a private company, the case instead involved “union of property owned by Pioneer and property owned by the city of Piqua, from which the net proceeds of sales to Pioneer, and more, are to be paid to Pioneer in the form of the payment of its . . . loan.” *Id.* at 746–47.

⁴⁷ *Id.* at 746.

⁴⁸ 233 N.E.2d at 864.

⁴⁹ *Id.* at 870.

⁵⁰ *Id.* at 871.

⁵¹ *Id.*

from the sale of land, and did not subject the city or state to loss of control over ownership of land or decision making related to the operation of the enterprise.

c. Sections 4 and 6 Prohibit Government Subsidies for Commerce or Industry

In addition to prohibiting state or county subsidies for private purposes, the Ohio Supreme Court has stated that article VIII, sections 4 and 6 “have been uniformly held to prohibit governmental involvement only in ventures that subsidize commerce or industry.”⁵² For instance, the Court has upheld public financing of subsidized housing for low-income individuals as constituting a public purpose, which did not violate article VIII, sections 4 and 6.⁵³ The Court stated, “[l]ending credit to purchasers of subsidized housing is such a subsidy, not a business venture. Accordingly, it is not prohibited by article VIII, section 6 of the Ohio Constitution.”⁵⁴

Ohio courts have upheld subsidies for other nonprofit entities that did not constitute business ventures, including Ohio’s allocation of funds to a veterans’ organization that the state used for over a generation for representing veterans’ claims to the Veterans Administration.⁵⁵ Ohio courts have also allowed the funding of a nonprofit entity for the operation of a public zoo that a municipality owned⁵⁶ and homeless services that a municipality contracted to a nonprofit organization, when the municipality could provide those services itself.⁵⁷

⁵² State *ex rel.* Tomino v. Brown, 549 N.E.2d 505, 508 (Ohio 1989) (noting that historically sections 4 and 6 have not been applied to cases concerning public welfare, but have uniformly prohibited the subsidy of commercial ventures).

⁵³ *Id.* (holding that city’s issue of revenue notes for housing construct was not unconstitutional because it was undertaken for welfare purposes and not a business purpose).

⁵⁴ *Id.* at 509.

⁵⁵ State *ex rel.* Dickman v. Defenbacher, 128 N.E.2d 59, 65 (Ohio 1955) (“It has been held on numerous occasions by the courts of other states . . . that Section 4, Article VIII of our state Constitution . . . enjoin[s] the making of appropriations for private enterprises, but that the appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body.”).

⁵⁶ See McGuire v. City of Cincinnati, 40 N.E.2d 435, 438 (Ohio Ct. App. 1st 1941) (“All the expenditures, all the activities here relate to public property controlled by public authority and operated for a public purpose, through the agency selected and controlled by such public authority. So we conclude that there is no inherent constitutional defect in the arrangement between the City and the Zoological Society.”).

⁵⁷ Franklinton Coal. v. Open Shelter, Inc., 469 N.E.2d 861, 868 (Ohio Ct. App. 10th 1983) (“[I]t is appropriate for a political subdivision to contract with a nonprofit corporation to provide services to the inhabitants of the political subdivision that could be provided by the municipality itself as a public service.”).

In each of these instances the courts upheld the public subsidy not simply because the case involved a nonprofit service in the public interest, but also because these schemes did not utilize public funds for business ventures, they allowed the state to retain control and ownership, and they did not subject taxpayer dollars to enterprises that would result in private gain. This distinction is particularly relevant to JobsOhio, which is also configured as a nonprofit.⁵⁸ Based on these precedents, JobsOhio's nonprofit status is not sufficient to demonstrate its constitutionality. Proponents must also demonstrate that the state is not using public funds to underwrite business ventures, allow funds to be used for private gain, or involve joint ownership with a private entity.

2. Article VIII, Section 13: The Exception to Article VIII, Sections 4 and 6

Any discussion of article VIII, sections 4 and 6 should also consider that article VIII, section 13 provides an *exception* to bans on public funding of private enterprise.⁵⁹ Article VIII, section 13 identifies the promotion of economic development through acquiring, constructing, selling, or leasing industrial or commercial property or facilities and by financing the acquisition or construction through borrowing, issuing bonds, or making or guaranteeing loans.⁶⁰

As one commentator notes, “the avowed purpose of section 13 is to make possible the acquisition, construction, or improvement of ‘property, structures equipment, and facilities’—that is, capital assets—for ‘industry, commerce, distribution, and research.’”⁶¹ For

⁵⁸ See *supra* note 3.

⁵⁹ OHIO CONST. art. VIII, § 13; see also Gold, *supra* note 11, at 462–63 (“If a proposed use of public funds for a public purpose falls under the prohibitions of section 4 or 6, it may nevertheless be constitutional under the exceptions to these provisions contained in section 13.”).

⁶⁰ The amendment states:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities.

OHIO CONST. art. VIII, § 13.

⁶¹ Gold, *supra* note 11, at 457 (quoting OHIO CONST. art. VIII, § 13).

this reason, article VIII, section 13 carves out an exception to the absolute prohibition of public-private enterprises of concern to sections 4 and 6.

II. OHIO'S MODERN DAY ECONOMIC DEVELOPMENT: H.B. 1 "JOBSOHIO"

In November 2010, Ohioans elected officials who ran on a platform of economic reforms focused on privatizing Ohio's Department of Development.⁶² Ohio's reforms centered around the goal of "transfer[ing] state activities designed to attract new investment—and thus new jobs—from government agencies to private entities described as quasi-public or public-private partnerships ('PPPs')." ⁶³ Although politicians promoted the initiatives as a fresh new idea,⁶⁴ some states have had similar programs in place for as long as twenty years.⁶⁵ In fact, today there are currently PPPs in seven states: Florida, Rhode Island, Virginia, Michigan, Wyoming, Indiana, and Utah.⁶⁶

PPPs occupy "a gray area between the public and private sectors" in that they are a form of nonprofit entity "free from bureaucratic strictures while serving the public interest."⁶⁷ Despite high hopes for these reforms, several states with PPPs "abandoned them due to performance problems."⁶⁸ One organization's analysis of former and current PPPs found that states often encounter a number of practical difficulties, including misuse of taxpayer funds, excessive executive bonuses, questionable subsidy awards, conflicts of interests in subsidy awards, possible ineffectiveness, and resistance to accountability.⁶⁹

In February, 2011, as discussed above, Ohio Governor John Kasich signed into law H.B. 1,⁷⁰ amending sections 1.60, 102.01,

⁶² PHILIP MATTERA ET AL., GOOD JOBS FIRST, PUBLIC-PRIVATE POWER GRAB: THE RISKS IN PRIVATIZING STATE ECONOMIC DEVELOPMENT AGENCIES, 2–3 (January 2011), <http://www.goodjobsfirst.org/pdf/powergrab.pdf>. The enactment of JobsOhio is part of a larger trend, with Arizona, Wisconsin and Iowa also introducing proposals similar to Ohio's H.B. 1. *Id.* at i.

⁶³ *Id.* at 1.

⁶⁴ Kasich's campaign website described JobsOhio as "A New Vision for Reviving and Growing Ohio's Economy." *JobsOhio Plan*, KASICH TAYLOR FOR OHIO, http://www.kasichforohio.com/site/c.hpIJKWOCJqG/b.6186591/k.9589/JobsOhio_Plan.htm (last visited Dec. 18, 2011). The media has also described JobsOhio as a "bold break." Holthaus, *supra* note 1.

⁶⁵ MATTERA ET AL., *supra* note 62, at 4.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 14.

⁶⁸ *Id.* at i.

⁶⁹ *Id.* at i–ii.

⁷⁰ Am. Sub. H.B. 1, 129th Gen. Assemb., Reg. Sess. (Ohio 2011); *see also* Candisky, *supra* note 2, at 1A.

102.02, 102.022, 117.01, 121.01, 121.22, 121.41, 121.60, 121.67, 122.011, 124.01, 145.012, 149.011, 2921.01, and 4117.01 and enacting sections 187.01 to 187.12 of the Ohio Revised Code. The bill authorizes Kasich and the Kasich administration's Development Director to replace the Ohio Department of Development with a newly formed PPP, JobsOhio.⁷¹

JobsOhio is set up as a nonprofit entity governed by a nine-member board appointed by the governor,⁷² "responsible for the promotion of economic development, job creation, job retention, job training and the recruitment of businesses to Ohio."⁷³ In July 2011, Kasich announced the appointed board members,⁷⁴ a panel that *The Columbus Dispatch* described as "[r]ich in business acumen and thick with ties" to Kasich.⁷⁵ While specific details regarding JobsOhio's implementation are still emerging (and not always publicized), the Department of Development's recommendations to the Ohio General Assembly, published on August 18, 2011, contains some details.⁷⁶ The plan, thus far, requires the Ohio legislature to divide the state into six regions in which "[l]ocal economic development groups . . . would partner with JobsOhio to spur job growth and keep employers from leaving the state" with "[m]uch of the focus . . . on technology and innovation."⁷⁷

The funding for H.B. 1 consists of \$1 million in startup financing that the Ohio General Assembly allocated to the program, and the profits from Ohio's wholesale liquor enterprise, which JobsOhio leased from the state for twenty-five years.⁷⁸ This financing arrangement is, of course, premised on the idea that JobsOhio investments will generate sufficient profits to pay the state back. Architects of JobsOhio expect it to pay \$1.2 billion, with "\$700

⁷¹ See *supra* note 3.

⁷² Joe Vardon, *JobsOhio Board Members Share Links to Governor*, THE COLUMBUS DISPATCH, July 12, 2011, at 1A [hereinafter *Links to Governor*].

⁷³ See OHIO DEP'T OF DEV., REPORT TO THE OHIO GENERAL ASSEMBLY PURSUANT TO ORC SECTION 187.05 2 (2011) [hereinafter *Dep't of Dev. Report*].

⁷⁴ See *About Us*, JOBSOHIO, <http://jobs-ohio.com/about/> (last visited Dec. 28, 2011) (listing current board members, including James C. Boland, Steven A. Davis, and E. Gordon Gee).

⁷⁵ *Links to Governor*, *supra* note 72. In particular, board member Gordon Gee and Kasich are "friends and are often partners in public business." *Id.* Kasich gave board members Steven Davis and Gary Heminger tax incentives to keep their companies in the state. Additionally, Kasich served as a board member of another board member's company, and is working with yet another board member (Martin Harris) to advance medical industry needs. *Id.*

⁷⁶ See generally *Dep't of Dev. Report*, *supra* note 73 (outlining proposed regulatory and statutory changes necessary to implement the JobsOhio program).

⁷⁷ Julie Carr Smyth, *Private JobsOhio Move Will Cost 211 State Jobs*, BLOOMBURG BUSINESS WEEK (August 19, 2011), <http://www.businessweek.com/ap/financialnews/D9P752180.htm>.

⁷⁸ JOBSOHIO OVERVIEW, *supra* note 5.

million to pay off debt backed by liquor profits, and \$500 million to the state general fund.”⁷⁹ However, this estimation is not without its critics, including *The Plain Dealer* which questions “whether mortgaging liquor profits to a long-term bond deal risks saddling taxpayers with excessive debt payments,” and warns that “a JobsOhio deal must be priced and timed just right or taxpayers will have bartered a steady earner for a speculative investment.”⁸⁰

Some critics are also concerned about H.B. 1’s lack of transparency and accountability. For instance, H.B. 1 was written to purposely shield JobsOhio employees from ethics provision of the Ohio Revised Code.⁸¹ *The Cincinnati Enquirer* described this as “a veil of secrecy” for an operation that is more private than public, with a law “carefully constructed” to keep much of the activity secret.⁸² The extent of H.B. 1’s secrecy is problematic. For example, under the authorizing legislation, JobsOhio is not classified as a public employer; therefore, the employees are not considered public servants.⁸³ And while board members must file financial disclosure statements, they are kept confidential.⁸⁴ There are no restrictions, including state-residency requirements, on whom the governor may appoint.⁸⁵ While the board needs to hold four open meetings a year, they can be closed “to consider business strategy of the corporation” and for other reasons.⁸⁶

Supporters of JobsOhio assert that privacy provisions meant to limit public exposure “are vital because they allow negotiations to take place without business plans becoming public,” and they prevent companies from being at risk for a public records request.⁸⁷ In practice, however, concealing business recruitment efforts makes it

⁷⁹ Jim Siegel, *How Will the Budget Affect You?* THE COLUMBUS DISPATCH, July 3, 2011, at 1A.

⁸⁰ Editorial, *Close Scrutiny for JobsOhio*, THE PLAIN DEALER, May 29, 2011, at G2.

⁸¹ See Sub. H.B. 1, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (to be codified at OHIO REV. CODE ANN. § 187.03 (B)(1)) (“With the exception of the governor, directors and employees of JobsOhio are not employees or officials of the state and, except as provided in division (B)(2) of this section, are not subject to Chapter 102., 124., 145., or 4117. of the Revised Code.”).

⁸² Holthaus, *supra* note 1.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The governor came under fire for this. The Governor’s first pick for director was Mark Kvamme, “a wealthy venture capitalist from California and long-time friend of Kasich’s.” *Id.* However, at the time of appointment Kvamme was not a resident of Ohio, and a lawsuit contended that H.B. 1 violates the Ohio Constitution’s residency requirements. See *Links to Governor*, *supra* note 72, at A6 (“Kvamme, 51, was picked to be Kasich’s development director but was moved into Kasich’s office as director of job creation after ProgressOhio sued over his then-status as a California resident.”).

⁸⁶ Holthaus, *supra* note 1.

⁸⁷ *Id.*

susceptible to fraud. One study of state efforts to privatize economic development found several instances of abuse and fraud with business recruitment initiatives, particularly among states with “mediocre” disclosure provisions.⁸⁸ Two of the states with limited disclosure laws, Texas and Florida, had documented conflicts of interest problems, with funds being awarded to board members’ companies, or to campaign contributors.⁸⁹ In Florida, the *St. Petersburg Times* conducted an extensive investigation of Florida’s privatized economic development program, Enterprise Florida, and described it as “a public-private venture only in the sense that the public pays and the private receives. Despite critical audits, legislative questions and gubernatorial promises of reform, the group has proved to be virtually immune to the normal checks and balances.”⁹⁰

Ohio is vulnerable to the same risks of abuse of funds. One commentator’s analysis demonstrates that Governor Kasich and the Republican Party’s campaign committees have accepted nearly half a million dollars in contributions from those very organizations that will be receiving grants from JobsOhio.⁹¹ And as the complaint filed against the state notes, “[s]uch investments do not involve commingling but instead provid[e] value, whether cash or by other means, in exchange for an asset, namely an equity position.”⁹² While these relationships may not necessarily result in wrongdoing, strong accountability and transparency would go a long way in providing assurance to taxpayers that officials are not engaging in pay-to-play politics or otherwise misusing funds.

⁸⁸ See MATTERA ET AL. *supra* note 62, at 12. Four states given “mediocre” disclosure systems included Florida, Rhode Island, Utah and Virginia. *Id.*

⁸⁹ *Id.* at 9–10.

⁹⁰ MATTERA ET AL., *supra* note 62, at 10 (internal citation omitted).

⁹¹ See Dave Harding, *Kasich To Give Public Money To Private Groups Supporting His Agenda*, PROGRESSOHIO.ORG (August 29, 2011 11:30 AM), <http://www.progressohio.org/blog/2011/08/kasich-to-give-public-money-to-private-groups-supporting-his-agenda.html> (“[S]upporters of SB5 and Republican committees received contributions from board members of Team NEO, Dayton Development Coalition, Cincinnati USA Partnership, Greater Cleveland Partnership and the businesses associated with board members who were CEOs or presidents. Board members of the Greater Cleveland Partnership topped the list of donors, giving \$372,040.92 to pro-SB5 lawmakers and Republican committees. Of that, \$144,685 came from KeyCorp. Team NEO—which is in line to share part of \$24 million in Third Frontier money—has close ties to the Partnership and receives significant financial support from it.”) (utilizing analysis from *JobsOhio/SB5 Supporters Research: Recipients that Endorsed SB5*, PROGRESSOHIO.ORG, <http://www.scribd.com/doc/63499225/JobsOhio-SB5-Supporters-Research-Recipients-That-Endorsed-SB5> (last visited Dec. 28, 2011)).

⁹² ProgressOhio.org., Inc. v. JobsOhio, No. 11 CVH 08 10807 (Franklin Cnty. Ct. Com. Pl. filed August 29, 2011); see also *Dep’t of Dev. Report*, *supra* note 73, at 11 (discussing campaign contributions from firms that seek to benefit from Third Frontier grants administered by JobsOhio).

In addition to the criticism concerning the lack of accountability and transparency, the state also faces legal action challenging the constitutionality of JobsOhio. On April 18, 2011, ProgressOhio.org, along with one member of both the Ohio House and Senate filed suit against the state, challenging the constitutionality of JobsOhio.⁹³ In an apparent response to some of the suit's charges, the Kasich administration submitted amendments to H.B. 1 in June 2011 that addressed some of the provisions at issue.⁹⁴

In August 2011, the Ohio Supreme Court declared section 3 of H.B. 1 unconstitutional.⁹⁵ Section 3 conferred exclusive, original jurisdiction on the Supreme Court of Ohio.⁹⁶ Writing on section 3, the Court stated, “[n]either legislation nor rule of court can expand our jurisdiction under Section 2, Article IV of the Ohio Constitution.”⁹⁷ The Court dismissed the suit for lack of subject matter jurisdiction, and Progress Ohio re-filed the suit in Court of Common Pleas, Franklin County Ohio.⁹⁸

⁹³ Originally filed with the Ohio Supreme Court, the case was filed with and later dismissed by the Court of Common Pleas, Franklin County Ohio for lack of standing, a decision that is currently being appealed. *ProgressOhio.org v. JobsOhio*, No. 11 CVH 08 01807 (Franklin Cnty. Ct. Com. Pl. filed August 29, 2011). This suit challenges the constitutionality of JobsOhio on multiple grounds, including that: (1) HB 1 is a special act conferring corporate powers in violation of article XIII, section 2 of the Ohio Constitution, and (2) that it violates article VIII, section 4 of the Ohio Constitution. *Id.* at 3.

⁹⁴ Joe Vardon & Jim Siegel, *Kasich's Senate-Budget Amendments Strip Him of JobsOhio Powers*, THE COLUMBUS DISPATCH (June 6, 2011, 4:15 PM), <http://www.dispatch.com/content/stories/local/2011/06/06/amendments-kasich-submitted-to-senate-budget-strip-him-of-jobsohio-powers.html>.

⁹⁵ See *ProgressOhio.org v. JobsOhio*, No. 2011–Ohio–4101, slip op. at 1 (Ohio 2011) (per curiam) (“Section 3 of 2011 Am.Sub.H.B. No. 1 is unconstitutional insofar as it attempts to confer exclusive, original jurisdiction on this court to consider the constitutionality of the act’s provisions—Cause dismissed for lack of subject-matter jurisdiction.”).

⁹⁶ *Id.* at 3 (citing Am. Sub. H.B. 1, Section 3, 129th Gen. Assemb., Reg. Sess. (Ohio 2011)). Section 3 of H.B. 1 states:

The Supreme Court of Ohio shall have exclusive, original jurisdiction over any claim asserting that any one or more sections of the Revised Code amended or enacted by this act, or any portion of one or more of those sections, or any rule adopted under one or more of those sections, violates any provision of the Ohio Constitution; and over any claim asserting that any action taken pursuant to those sections by the Governor or the nonprofit corporation formed under section 187.01 of the Revised Code violates any provision of the Ohio Constitution or any provision of the Revised Code. Any such claim shall be filed as otherwise required by the Court’s rules of practice not later than the sixtieth day after the effective date of this act. If any claim over which the Supreme Court is granted exclusive, original jurisdiction by this section is filed in any lower court, the claim shall be dismissed by the court on the ground that the court lacks jurisdiction to review it.

⁹⁷ *ProgressOhio.org*, No. 2011–Ohio–4101 at 3.

⁹⁸ *ProgressOhio.org v. JobsOhio*, No. 11 CVH 08 10807 (Franklin Cnty. Ct. Com. Pl. filed Aug. 29, 2011).

III. APPLICATION OF OHIO'S CONSTITUTIONAL PROVISIONS TO JOBSOHIO

While it is beyond the scope of this Comment to explore all the constitutional issues implicated by H.B. 1, this Comment seeks to analyze how article VIII, sections 4 and 6 applies to an entity such as JobsOhio.⁹⁹ Because of JobsOhio's joint ownership between the state and private entities, the loss of governmental decision making and authority, and subsidies to commerce provisions, H.B. 1 violates article VIII, sections 4 and 6 of the Ohio Constitution.

A. H.B. 1 Establishes Joint Ownership Between the Government and Private Enterprise in Violation of Article VIII, Sections 4 and 6.

As discussed in Part I, the Ohio Supreme Court has interpreted Ohio Constitution article VIII, sections 4 and 6 to mean that “[t]here can be no union of public and private funds or credit, nor of that which is produced by such funds or credit.”¹⁰⁰ In direct violation of this long-standing rule, JobsOhio intends to solicit private funds to help finance the initiative, in addition to the public funds it is receiving.¹⁰¹ The Ohio Department of Development's August 2011 report to the Ohio General Assembly outlines the entity's plan:

JobsOhio's work will begin gradually in August 2011, and will accelerate to its full potential in early 2012. After that time, it will use private funds to incentivize businesses to locate to or expand in Ohio, aiding in job creation and retention. Additionally, JobsOhio will include tax credits as part of the incentive packages offered to businesses, with final approval authority remaining with the state.¹⁰²

⁹⁹ Even though H.B. 1 involves the use of state funds, and therefore implicates article VIII, section 4 rather than article VIII, section 6 this comment's analysis will rely upon Ohio courts' interpretation of both sections 4 and 6, since Ohio courts have explicitly used case law from both provisions interchangeably. See *State ex rel. Eichenberger v. Neff*, 330 N.E.2d 454, 458 (Ohio Ct. App. 10th 1974) (interpreting the meaning given to section 6 to be equally applicable to the State under section 4).

¹⁰⁰ *Alter v. City of Cincinnati*, 46 N.E. 69, 70 (Ohio 1897).

¹⁰¹ See JOBSOHIO OVERVIEW, *supra* note 5 (“Funding: The Ohio General Assembly has appropriated \$1 million for the start-up of JobsOhio. Long-term funding for JobsOhio and its economic development activities comes from Ohio's wholesale liquor enterprise, which will be transferred to JobsOhio for 25 years. JobsOhio also can receive additional public and *private funds*.”) (emphasis added); see also, Reginald Fields, *Kasich Introduces JobsOhio; Board Focuses on Development*, THE PLAIN DEALER, July 12, 2011, at B1 (“The private board will operate with both taxpayer and private money....[and in addition to appropriated funds and lucrative liquor sales] the board is seeking private investors.”).

¹⁰² *Dep't of Dev. Report*, *supra* note 73, at 16.

According to multiple media accounts, Mark Kvamme, JobsOhio interim CIO along with the staff of JobsOhio “will . . . be the primary fundraisers for the \$10 million to \$15 million pool of private money that will be used to invest. . . . from private companies that stand to benefit from job expansion, such as banks, utilities and insurance firms.”¹⁰³

It is hard to imagine a more direct violation of the Court’s prohibition on joint ownership. JobsOhio’s combination of private and public money creates a “union of public and private funds” prohibited by *Alter*.¹⁰⁴ Joint financing makes the state a “part-owner” of the venture, thereby subjecting the state to loss of total ownership and control of the initiative, in violation of *Alter*’s requirement that “the whole ownership and control must be in the public.”¹⁰⁵ Of course, the Kasich administration may argue that it is taking steps to prevent the commingling of money, thereby avoiding constitutional concerns.¹⁰⁶ However, the Ohio Supreme Court has not been primarily concerned simply with the commingling of funds, but the state’s loss of decision-making control and exposure to financial risks.

Indeed, the manner in which JobsOhio will conduct its decision making also speaks to the very type of scenario that sections 4 and 6 seek to prevent: the loss of decision-making authority by the state. For instance, the August 18, 2011 Ohio Department of Development’s report to the General Assembly recommends changes in decision-making authority, allowing the state to cede control of grant and tax incentive allocation to local development organizations. While the state will retain “approval authority” for tax credits, “JobsOhio should be authorized to offer grants and tax incentives.”¹⁰⁷ The report states that “[l]ocal development organizations would prefer to work with one point of contact [and] JobsOhio should be that contact, with expedited approval processes and servicing of transactions centralized and perhaps outsourced to a third party.”¹⁰⁸

¹⁰³ See Holthaus, *supra* note 1.

¹⁰⁴ *Alter v. City of Cincinnati*, 46 N.E. at 70.

¹⁰⁵ *Id.*

¹⁰⁶ For instance, the administration may point to a provision in H.B. 1 stating that private funds coming into JobsOhio should not be mingled with public money. See Am. Sub. H.B. 1, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (to be codified at OHIO REV. CODE ANN. § 187.07) (“At no time shall any public money coming into the possession of JobsOhio be commingled with other money of the corporation, and any funds or accounts of the corporation that hold public money shall be maintained and accounted for separately and independently from any other funds or accounts of the corporation.”).

¹⁰⁷ *Dep’t of Dev. Report, supra* note 73, at 10.

¹⁰⁸ *Id.* at 11. In addition, the report recommends that the Office of Business Development move to JobsOhio. According to the report, “This office provides the interface for businesses

While the report notes that JobsOhio will determine the “recommended level of incentives that will go into the package presented to business,” the report indicates that the task of approving the final set of incentives and working closely with the appropriate authorities in other state agencies “should remain with the state.”¹⁰⁹ Though the Department of Development will have some final decision-making authority (at least with regard to tax credits), it is not clear whether the state will simply be a “rubber stamp” for decisions made by JobsOhio officials.

In addition to this decision-making arrangement running afoul of the state constitution, the state’s loss of control over the allocation of tax credits and grants is vulnerable to fraud and corruption. One study found that two states with privatized economic development programs similar to JobsOhio, Michigan and Rhode Island, both experienced “big scandals” with regard to their tax subsidy awards.¹¹⁰ In Michigan, the Michigan Economic Development Corporation approved a \$9 million subsidy for a project headed by a convicted embezzler, and Rhode Island’s similar program approved a \$75 million loan for what both of the state’s gubernatorial candidates described as a “risky videogame venture.”¹¹¹ The loss of state control over allocation of funds is not only unconstitutional but unwise policy.

B. H.B. 1 Subsidizes Commerce in Violation of Article VIII, Sections 4 and 6.

In addition to concerns with funding and decision making, H.B. 1 also constitutes a subsidy of commerce in violation of article VIII, sections 4 and 6.¹¹² According to JobsOhio, it will use liquor profits to “[f]und ongoing economic development activities, including marketing, business development incentives, operations, and *equity investments in targeted industries*.”¹¹³ As one media outlet notes, “[JobsOhio] will capture billions of dollars in state funds and—in the

considering job retention, expansion, and location in Ohio. It also structures incentive packages and manages investment projects through various stages of approval.” *Id.* at 10. The report identifies the funding as “GRF, Facilities Establishment Fund or in the future, private funds.” *Id.*

¹⁰⁹ *Id.* at 10–11.

¹¹⁰ MATTERA ET AL., *supra* note 62, at 9.

¹¹¹ *Id.* at 9–10.

¹¹² See *supra* Part I.B (analyzing how article VIII, sections 4 and 6 have been interpreted to prohibit subsidies for commerce or industry).

¹¹³ JOBSOHIO, STABLE, SUSTAINABLE FUNDING FOR ECONOMIC DEVELOPMENT, *available* at <http://www.ohioeda.com/pdf/mandiedirect/jobsohiofunding.pdf> (emphasis added).

biggest departure from the past—will invest in private firms, taking ownership stakes much like a venture capital firm does.”¹¹⁴

JobsOhio’s use of public funds for equity investments in targeted industries violates the plain text of section 4, which forbids the state from becoming “a joint owner, or stockholder, in any company or association, in this state, or elsewhere, formed for any purpose whatever.”¹¹⁵ By placing public funds in equity ventures, the state becomes a stockholder in such companies, in direct violation of the constitution’s text.

In addition, JobsOhio will also have what it calls “Close the Deal Funds,” which it describes as “[a]ny type of additional funding required to retain or attract businesses.”¹¹⁶ This type of direct financing constitutes a joint business venture, which Ohio courts have struck down. In *Ryan*, the Ohio Supreme court invalidated the public financing of an industrial park, noting it “[was] as much a joint enterprise as if the city . . . had given the money directly to the corporations to develop the land, to construct their buildings and to carry on their activities in the industrial park.”¹¹⁷ In addition to violating the prohibition on joint ventures, discretionary funds are also at risk of being used for private financial gain of the sort invalidated in *State ex rel. Wilson v. Hance*.¹¹⁸

Ohio’s use of discretionary cash to fund business ventures is also fraught with the type potential abuse that underscored the adoption of article VIII, sections 4 and 6 of the Ohio Constitution in 1851.¹¹⁹ Prior to the adoption of these provisions, public officials used taxpayer money to fund speculative ventures, and it was the public that suffered when these ventures failed or resulted in corruption and waste, at the taxpayer’s expense.¹²⁰

Lastly, JobsOhio’s funding stream, as well as the use of “Close the Deal Funds,” and investment in equity investments, place public funds at risk for speculative uses, in prohibition of article VIII. As one Ohio court notes, article VIII “express[es] concern with placing

¹¹⁴ Holthaus, *supra* note 1. However, if and when JobsOhio will begin making equity investments is not entirely clear. One media outlet reported that “in a press conference after the presentation, Kwamme said it has not been formally decided whether JobsOhio will take that step of actually taking investment stakes in promising firms.” David Holthaus, *Kwamme [sic]: DOD Still Has a Role*, THE CINCINNATI ENQUIRER (Aug. 26, 2011), <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/AB/20110825/BIZ/308250082/> (last visited Oct. 5, 2011).

¹¹⁵ OHIO CONST. art. VIII, § 4.

¹¹⁶ *Dep’t of Dev. Report*, *supra* note 73, at 15.

¹¹⁷ *Id.* at 210.

¹¹⁸ 159 N.E.2d 741, 747 (Ohio 1959).

¹¹⁹ See *supra* Part I (providing background on constitutional provisions)

¹²⁰ See *supra* notes 18–22 and accompanying text.

public tax dollars at risk to aid private enterprise” and aims to prevent putting state tax dollars “at risk in unwise investments.”¹²¹ Of particular concern is JobsOhio’s funding stream, which relies in part on financing from speculative investments:

\$61 million in liquor profits earmarked for other programs are supposed to be offset by annual annuity payments that JobsOhio will be required to make to the state. What all of these numbers really mean is that a JobsOhio deal must be priced and timed just right or taxpayers will have bartered a steady earner for a speculative investment. Determining what’s “just right” won’t be easy, however, because the JobsOhio law, while prescribing some forms of what might generously be termed openness, explicitly shields JobsOhio from open-records and open-meetings laws.¹²²

JobsOhio’s funding is reliant on the program’s ability to make sufficient annuity payments, a precarious arrangement that is the type of financial risk that sections 4 and 6 seek to limit. In addition to potential risks with the financing arrangement, JobsOhio’s use of discretionary cash, without some type of limit on its use, could also result in speculative uses of public finances that article VIII aims to prohibit.

C. JobsOhio’s Status as Nonprofit Entity Fails to Remedy Constitutional Concerns

While in some instances the state can administer funds to a private, nonprofit entity without violating article VIII, sections 4 and 6, this nonprofit status alone is not dispositive. The courts have upheld financing of nonprofits when the scheme did not involve business ventures, but instead provided a service (such as the processing of veteran’s claims).¹²³ Additionally, in those instances where courts have upheld public financing of nonprofits, the government had total ownership and did not subject public funds to private gain.¹²⁴ For those reasons, JobsOhio’s nonprofit status is not enough to remedy the constitutional flaws previously discussed, including joint

¹²¹ *Grendell*, 764 N.E.2d 1067, 1073.

¹²² *Opinion, Close Scrutiny for JobsOhio*, THE PLAIN DEALER, May 29, 2011, at G2.

¹²³ *See, e.g., State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59, 66–67 (Ohio 1955) (upholding enactment of the General Assembly of Ohio to appropriate funds for veterans organizations that provide services designed to promote the rehabilitation of veterans).

¹²⁴ *See supra* Part I.B.1.c for full discussion.

ownership between the state and private enterprise and the subsidy of commerce, in violation of sections 4 and 6.

D. Article VIII, Section 13 is Inapplicable to JobsOhio.

Finally, as explained in Part II.B, the one exception to article VIII, sections 4 and 6 is section 13, which allows the government to promote economic development by acquiring, constructing, selling, or leasing industrial or commercial property or facilities.¹²⁵ However, JobsOhio's plans do not describe economic development in terms of the state's acquisition and development of property, but rather as equity investments in corporations.¹²⁶ For this reason, H.B. 1 does not implicate article VIII, section 13, and therefore sections 4 and 6 apply with full force to any analysis of JobsOhio.

CONCLUSION

Many of the reasons that nineteenth-century Ohioans initially sought to prohibit public investment in private enterprise—concerns of inefficiencies, ineffectiveness, corruption, favoritism and fraud—are the same type of issues other states have experienced in the previous twenty years with entities designed similar to JobsOhio.¹²⁷

Indeed, this Comment's analysis of H.B. 1 reveals that it may very well be a twenty-first century "plunder law" and concludes that multiple provisions of H.B. 1, including provisions that allow for joint-ownership between the state and private entities, loss of governmental decision making and authority, and subsidies to commerce, violate article VIII, sections 4 and 6 of the Ohio Constitution.¹²⁸ Ohio would be wise to heed the lessons of the past¹²⁹

¹²⁵ OHIO CONST. art. VIII, § 13.

¹²⁶ Indeed, the Ohio Department of Development intends to keep the Urban and Site Development Office and the Housing and Partnerships Office under the control of the state. See OHIO DEP'T OF DEV., JOBSOHIO 14 (Sept. 7, 2011), available at <http://www.development.ohio.gov/JobsOhioRollout> (follow "Central Region Presentation in Columbus" hyperlink).

¹²⁷ See Rubin, *supra* note 15, at 397 (citing Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724, 1735 (1995)) (describing one scholar's account of railroad investment issues, that "through 'practices of rate discrimination, favoritism, wastefully duplicated lines, stock gambling, frauds on investors, monopolies and political corruption' constituted an 'aid to plutocracy [and] a danger to the republic.'" Similarly, Good Jobs First summarizes the major problems with PPPs as the following: "[T]he track record of those few states that have taken the step is filled with examples of misuse of taxpayer funds, political interference, questionable subsidy awards, and conflicts of interest. Rather than making economic development activities more effective, privatization often is little more than a power grab by governors and powerful business interests." MATTERA ET AL., *supra* note 62, at i.

¹²⁸ See *supra* Part III (discussing Application of Ohio's Constitutional Provisions to JobsOhio).

and prevent placing the public tax dollar and the public trust at risk with a precarious investment in a private enterprise such as JobsOhio.

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¹²⁹ See generally Part I (discussing Historical Background on Ohio Constitutional article VIII).

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