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JobsOhio: Don't let Progress Stand in the Way of Progress

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JobsOhio: Don't let Progress Stand in the Way of Progress

Patrick Martin¹

I. Introduction

“Full employment does not mean literally no unemployment; that is to say, it does not mean that every man and woman in the country who is fit and free for work is employed productively every day of his or her working life ... Full employment means that unemployment is reduced to short intervals of standing by, with the certainty that very soon one will be wanted in one's old job again or will be wanted in a new job that is within one's powers.”²

In July of 2009, Ohio's unemployment rate reached a fifteen year high of 10.6%.³ In June of 2009, John Kasich formally announced his campaign for the Governor of Ohio.⁴ In this announcement, Kasich committed to “skinnying down the size of government, phasing out the [S]tate's income tax over time and attracting more high-tech jobs to the [S]tate.”⁵ John Kasich was elected and was sworn in as Ohio's 69th governor on January 10, 2011.⁶ “In his inaugural address he called on Ohioans to come together to make the Buckeye State stronger and more

¹ Thanks and love to my wife, Eva Buttacavoli. Without her support, the journey through University of Dayton School of Law would not have been possible.

² William H. Beveridge, FULL EMPLOYMENT IN A FREE SOCIETY 18 (1945).

³ U.S. Dept. of Labor, Bureau of Labor Statistics, available at <http://www.bls.gov/regions/midwest/ohio.htm#eag>.

⁴ Mark Niquette, Kasich Announces Run for Governor in 2010, Columbus Dispatch, June 1, 2009, http://www.dispatch.com/content/stories/local/2009/06/01/kasich_runs.html.

⁵ *Id.*

⁶ Governor of Ohio, <http://www.governor.ohio.gov/About/GovernorKasich.aspx> (last visited Feb. 21, 2015).

prosperous for all.”⁷ One mechanism for achieving greater prosperity for all Ohioans was the Ohio Legislature’s implementation of JobsOhio.

JobsOhio was created through the passage of House Bill 1 in the 129th Ohio General Assembly. The legislation was signed into law on February 18, 2011.⁸ Articles of incorporation were filed for JobsOhio with the Secretary of State on July 5, 2011 and Governor Kasich announced the JobsOhio Board of Directors at the first board meeting on July 11, 2011.⁹

JobsOhio has been the target of criticism on multiple fronts including from ProgressOhio, a 501(c)(3) organization focused on progressive messaging in the political marketplace.¹⁰ ProgressOhio filed suit in the Common Pleas Court of Franklin County, Ohio claiming that the JobsOhio legislation violated the Ohio Constitution.¹¹ Specific allegations in the suit claimed that JobsOhio was unconstitutional because it violated § 3 and § 5, Article VIII of the Ohio Constitution in that JobsOhio, a private not-for-profit entity, can illegally incur debts and create liabilities on behalf of the State.¹² ProgressOhio also claimed that JobsOhio violated § 4, Article VIII of the Ohio Constitution because it gives aid and/or loans the credit of the State to a corporation and provides for the State to become a joint owner or stock holder in a private company.¹³ In addition to the Article VIII claims, the suit claimed that JobsOhio violated Article

⁷ *Id.*

⁸ JobsOhio, http://governor.ohio.gov/Portals/0/pdf/JobsOhio_Overview_FINAL.pdf.

⁹ *Id.*

¹⁰ ProgressOhio, <http://www.progressohio.org/about-us/> “ProgressOhio.org was formed in 2006, as a 501(c4) to be a non-profit dedicated to working on behalf of progressive causes in Ohio. We are affiliated with [ProgressNow](#) as an earned media hub in addition to [USAction](#) and Fair Share as a field and coalition leading organization. ProgressOhio is a clearinghouse for Progressive ideas, which continually challenges conservative propaganda in the media and seeks to make sure progressive ideas are heard.”

¹¹ ProgressOhio.org, Inc. v. JobsOhio, Franklin County Ohio, Common Pleas, No. 11 CV 10807 (Dec. 2, 2011).

¹² ProgressOhio.org, Inc. v. JobsOhio, Franklin County Ohio, Common Pleas, No. 11 CV 10807, Complaint ¶ 2 (Dec. 2, 2011).

¹³ *Id.*

XIII, § 1 and § 2 because JobsOhio was an unconstitutional creation of a corporation.¹⁴ The claims made in the suit by ProgressOhio were off point and inaccurate. JobsOhio is not in violation of the Constitution of Ohio and while the case was dismissed because the complainants did not have standing to bring suit and no ruling was held on the merits of JobsOhio, the Supreme Court was correct in dismissing the action by ProgressOhio.¹⁵

This comment will set out the basis of constitutionality for JobsOhio. It will assess the purpose behind the law, the relevant sections of the Ohio Constitution that have been implicated by the criticisms, and the interpretive analysis that clears JobsOhio for future legal existence.

II. Background

The United States has been in an economic downturn since the fall of Lehman Brothers in September of 2008.¹⁶ Fueled by the desire for profits in a low interest rate environment, financial institutions turned to higher risk investments such as sub-prime mortgage lending and credit-default swaps to maintain and increase their profits.¹⁷ Coupled with these activities,

¹⁴ *Id.* at Complaint ¶¶ 16-18.

¹⁵ ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St. 3d 520 (Ohio 2014); the suit was dismissed because the plaintiffs did not have standing to bring suit *Id.*; Additional criticism can be found in a law review article published at Case Western Reserve University at Osmer, Sarah, COMMENT: FASTER. CHEAPER. UNCONSTITUTIONAL: WHY THE PUBLIC'S SUBSIDY OF JOBSOHIO VIOLATES ARTICLE VIII, SECTIONS 4 & 6 OF THE OHIO CONSTITUTION, 62 Case W. Res. 919

¹⁶ The Origins of the Financial Crisis Crash Course, The Economist, September 7, 2013, <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>.

¹⁷ *Id.*; Sub-Prime Mortgage: "type of loan granted to individuals with poor credit histories (often below 600), who, as a result of their deficient [credit ratings](#), would not be able to qualify for conventional mortgages. Because subprime borrowers present a higher risk for lenders, subprime mortgages charge interest rates above the [prime lending rate](#)." What is a Sub Prime Mortgage?, Shauna Carther, available at <http://www.investopedia.com/ask/answers/07/subprime-mortgage.asp>; Credit Default Swap (CDS): "A CDS contract involves the transfer of the credit risk of [municipal bonds](#), emerging market bonds, [mortgage-backed securities](#), or [corporate debt](#) between two parties. It is similar to insurance because it provides the buyer of the contract, who often owns the underlying credit, with protection against default, a credit rating downgrade, or another negative "credit event." The seller of the contract assumes the credit risk that the buyer does not wish to shoulder in exchange for a periodic protection fee similar to an insurance premium, and is obligated to pay only if a negative credit event occurs." Credit Default Swaps: An Introduction, Wayne Pinsent, Available at <http://www.investopedia.com/articles/optioninvestor/08/cds.asp>.

central banking regulators had eased the restrictions on bank capital holding requirements and failed to monitor the impending ill health of the world's financial giants.¹⁸

The global financial crisis had direct impact on the State of Ohio; in September of 2008, Ohio's unemployment rate passed the 7.0% mark on its way to a fifteen year high of 10.6% where it stayed from July of 2009 through February of 2010.¹⁹ Given the economic downturn and increase in unemployment, Ohio was at a cross roads. The implementation of JobsOhio was an important step for the road to economic recovery in Ohio.

JobsOhio is not unconstitutional and is not in violation of Articles VIII or XIII of the Ohio Constitution. By design, JobsOhio is not an agency or political subdivision of the State. Even if JobsOhio was an agency of the State, its activities are well within the permitted scope of the Constitution. Creating economic development activities are an enumerated duty of the State and the implementation of JobsOhio is a potentially positive effort towards increasing the economic viability of Ohio. This benefit is evidenced by Ohio's unemployment rate of 4.8% compared to the national average unemployment of 5.7% as of January 2015.²⁰

III. Purpose of the Legislation

The following section will detail the legislation that created the JobsOhio organization. It will include the sponsorship and history of the law, highlight key components of the legislation, and address specific economic development benefits of the program.

¹⁸ The Origins of the Financial Crisis Crash Course, *supra* note 16.

¹⁹ U.S. Dept. of Labor, Bureau of Labor Statistics, available at <http://www.bls.gov/regions/midwest/ohio.htm#eag>.

²⁰ *Id.*

1. Bill Sponsorship and History

JobsOhio was created through House Bill 1 and was sponsored by Republican Michael Duffey, an Ohio Representative from Worthington, and was introduced on January 11, 2011.²¹ The purpose of the legislation was to move responsibility for economic development activities from the State-based Ohio Department of Development, to a non-profit independent entity.²² The Ohio Department of Development was later renamed the Development Services Agency (DSA).²³ The expectation was that JobsOhio would bring a more efficient and faster approach to economic development in the State, beyond the abilities of the DSA.²⁴ It was also believed that an independent organization would be removed from the bureaucratic processes of the State and would be more flexible and nimble in addressing the job recruitment and job retention activities of economic development.²⁵

The legislation was then introduced in the Ohio Senate by Senator Mark Wagoner on February 2, 2011.²⁶ The legislation passed both houses by an overwhelming majority and was sent to Governor Kasich for signing on February 17, 2011, and it became effective the next day.²⁷

²¹ JobsOhio Passes from House Committee, Awaits Vote on the House Floor, Ohio House of Representatives Republican Caucus, January 27, 2011, available at <http://ohiohousegop.blogspot.com/2011/01/jobsohio-passes-from-house-committee.html>; Ohio Legislature Website, <http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0001?OpenDocument>.

²² Ohio Legislative Service Commission, Monica Baker, Available at <http://www.lsc.state.oh.us/analyses129/11-hb1-129.pdf>.

²³ OHIO REV. CODE § 122.01 (LexisNexis), When the original legislation for JobsOhio was passed, the State economic development agency was known as the Ohio Department of Development. All references to the Ohio Department of Development have been updated to the Development Services Agency.

²⁴ JobsOhio Passes from House Committee, *supra* note 21.

²⁵ *Id.*

²⁶ Ohio General Assembly, http://archives.legislature.state.oh.us/BillText129/129_SB_1_I_Y.pdf.

²⁷ Ohio General Assembly, <http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0001?OpenDocument>; House vote was 60 for and 35 against, Senate vote was 30 for and 2 against. <https://votesmart.org/bill/12703/33482/establishes-jobsOhio#.VEKahLI0z4g>.

2. Key Components of the Legislation

To improve the economic development efforts in the State, the JobsOhio legislation approved the creation of a non-profit entity to take over the economic development activities for the State.²⁸ JobsOhio is not an agency or political sub-division of the State; it is completely separate from State government and the Development Services Agency.²⁹ The new entity is required to be incorporated by the Governor and is governed by a nine member board.³⁰ The board serves by appointment and at the discretion of the sitting governor of the State.³¹

Board members, all United States citizens, cannot be compensated and at least six of the members must be residents of Ohio.³² Board members should have financial backgrounds and experience in the operation of businesses.³³

As the organization is not an agency of the State, JobsOhio directors and employees are not public employees of Ohio.³⁴ Because the directors and employees are not State employees, they are not subject to certain stipulated requirements and limitations of other public employees as may be defined in the Ohio Revised Code.³⁵

The JobsOhio entity is tasked with executing a contract between JobsOhio and the DSA.³⁶ The substance of the contract identifies how JobsOhio will work in conjunction with the

²⁸ OHIO REV. CODE § 187.01 (LexisNexis).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at § 187.02.

³³ *Id.*

³⁴ *Id.* at § 187.03.

³⁵ *Id.*

³⁶ *Id.* at § 187.04.

DSA to provide economic development services to the State.³⁷ Specific business development activities that may be administered by JobsOhio include 1) promoting and advocating for the State, 2) making development recommendations to the DSA, 3) performing research, 4) establishing and managing programs or offices in support of economic development, and 5) negotiating on behalf of the State in attracting and retaining businesses in Ohio.³⁸

The legislation specifies certain controls and places specific behavioral standards on the directors and employees of JobsOhio, as well as the organization itself.³⁹ Directors and employees are required to sign an ethical conduct statement, complete an annual course on ethical behavior, and comply with all gift policies as established by the board.⁴⁰ The ethics standards include prohibitions on any form of bribery and the acceptance of any valuable thing or benefit in return for preferential treatment in carrying out the duties of JobsOhio.⁴¹ The organization cannot co-mingle any privately obtained funds with publicly obtained funds and must abide by specific deposit requirements of any public money received.⁴²

JobsOhio is subject to mandated reporting requirements as defined in the legislation.⁴³ The board is required to hire an independent accountant for the purpose of completing audited financial statements detailing the financial condition of JobsOhio.⁴⁴ In addition to a financial audit, JobsOhio is also subject to a supplemental compliance and control review to be conducted

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at § 187.061.

⁴⁰ *Id.*

⁴¹ *Id.* at § 187.10.

⁴² *Id.* at §§ 187.07-08.

⁴³ *Id.* at § 187.01.

⁴⁴ *Id.*

by the independent financial auditors.⁴⁵ The audited financial statements and the compliance and control review are then provided to the governor, the auditor of the State, the speaker of the house of representatives, and the president of the senate.⁴⁶ These audit reports and other governance policies are publicly available on the JobsOhio website.⁴⁷

Start-up funding of \$1 million was established through the general fund of the State but came from the then existing DSA budget.⁴⁸ These funds were designated for transition and start-up costs until a permanent funding source could be established.⁴⁹ A permanent funding model was established in 2011 with the enactment of House Bill 153, which authorized the State to franchise the State-managed liquor distribution business to JobsOhio.⁵⁰ The term of the franchise was for twenty five years and was funded by a private bond sale by JobsOhio.⁵¹ At the end of the twenty five year period, the liquor distribution business will transfer back to the State of Ohio consistent with the terms of the franchise agreement.⁵²

JobsOhio completed the acquisition of the State liquor distribution franchise on February 1, 2013.⁵³ Supported by a \$1.5 billion private bond financing secured by the future revenue flows of the liquor distribution business, JobsOhio delivered approximately \$1.4 billion to the State of Ohio.⁵⁴ This payment represented a negotiated present value that the State would have

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ JobsOhio, <http://jobs-ohio.com/corporate-governance/>.

⁴⁸ Ohio HB 1, Section 5, 129th General Assembly; effective February 18, 2011 *supra* note 27.

⁴⁹ *Id.*

⁵⁰ Ohio Legis. Serv. Comm'n., <http://www.lsc.state.oh.us/analyses129/h0153-ps-129.pdf>.

⁵¹ *Id.*

⁵² OHIO REV. CODE § 4313.02 (LexisNexis).

⁵³ JobsOhio audited financial statements, June 30, 2013, by KPMG, page 13-14, available at http://jobs-ohio.com/images/2013_JobsOhio_Audited_Financial_Statements.pdf

⁵⁴ *Id.*

received over the subsequent twenty five years; the State sold the future revenue stream for present value funds.⁵⁵ Approximately \$800 million of these funds were used by the State to retire existing debt which was secured by the liquor proceeds.⁵⁶ The additional approximate \$600 million was credited to the general fund of the State.⁵⁷

Under this agreement, JobsOhio will fund its economic development activities through the liquor distribution profits.⁵⁸ JobsOhio has entered into a contract with the State of Ohio in which the State will supply ongoing operations, management, and administrative support to JobsOhio for management of the liquor franchise.⁵⁹ These services include advertising, marketing, technology support, and tax reporting.⁶⁰ Liability for repayment of the bonds rests solely with JobsOhio and there is no recourse to the State in the event of default by JobsOhio, the obligors of the debt.⁶¹

3. What JobsOhio does for Economic Development

While the legislative actions created and established the legal structure for JobsOhio, the important benefit to the State is the programs of job attraction and retention that are delivered by the organization. JobsOhio is the central coordination point for the attraction and retention of jobs in Ohio.⁶² Through a network of six regional partners, geographically located throughout

⁵⁵ Interview with Don Grubbs, Chief Legal Counsel, JobsOhio, in Columbus, OH. (Oct. 10, 2014).

⁵⁶ JobsOhio audited financial statements *supra* note 53.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² JobsOhio, <http://jobs-ohio.com/>.

the State, JobsOhio delivers a comprehensive package of incentives and benefits to existing and potential employers.⁶³

Benefits to companies, provided by the JobsOhio programs, include access to business construction and expansion loans, specific purpose grants, site selection, and employee recruiting services.⁶⁴ In addition to these privately funded economic resources, JobsOhio also partners with the State of Ohio to develop comprehensive packages that may incorporate State-granted tax incentives.⁶⁵

JobsOhio is able to provide these services utilizing the approximate \$100 million of annual profits that are generated through the operation of the liquor distribution business.⁶⁶ No State money is being utilized for these programs.⁶⁷ Even the \$1 million start-up grant that was authorized by the legislature was reimbursed to the State after the bond sale.⁶⁸

There have been numerous successes in the State as a result of the efforts of JobsOhio. Examples of new business entrants into Ohio include Dayton automotive glass manufacturer, Fuyao.⁶⁹ The Chinese automotive glass manufacturer will invest \$360 million, and create over 1,550 jobs in the re-development of a manufacturing facility that was a former General Motors

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Don Grubbs, *supra* note 55.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Andrew J. Tobias, JobsOhio to refund more than \$1 million to state, Dayton Daily News, (Mar. 19, 2013), <http://www.mydaytondailynews.com/news/business/economy/jobsohio-to-refund-millions-to-state-comply-with-s/nWxJ4/#603b408f.3457494.735667>.

⁶⁹ Trystan Navera, Fuyao Executes Agreement with JobsOhio with \$6.6M in Incentives, Dayton Business Journal (Aug. 6, 2014), http://www.bizjournals.com/dayton/blog/morning_call/2014/08/fuyao-executes-agreement-with-jobsohio-with-6-6m.html.

production plant.⁷⁰ Lululemon, the British Columbia based athletic apparel maker, opened a North American distribution facility in Columbus bringing 170 additional jobs to the region.⁷¹ The efforts of JobsOhio incited the H. J. Heinz Company to invest \$28 million for expansion in an existing processing plant in Massillon, creating 250 new jobs and stabilizing the retention of 450 jobs.⁷²

IV. The Ohio Constitution

The challenge to JobsOhio raised by ProgressOhio was based on claimed violational conduct outside the boundaries of the Ohio Constitution. The next section will outline the contested sections of the Ohio Constitution. This will include a historical perspective of Article VIII, relevant sections of Article VIII, and the relevant sections of Article XIII.

1. An Overview of Article VIII – Public Debt and Public Works

Article VIII of the Ohio Constitution was adopted as part of the constitutional convention that was held in 1850-1851.⁷³ The intent of Article VIII was to curb abuses in the spending of public funds and to minimize the amount of public debt.⁷⁴

In the early 1800's, Ohio was faced with an economic challenge because the lack of transportation infrastructure made it difficult to move goods from Ohio to the populated regions of the east coast of the United States.⁷⁵ To alleviate this problem, the State invested funds in

⁷⁰ Laura Bischoff & Dave Larsen, Historic deal part of global strategy, Dayton Daily News (Jan. 18, 2015), <http://www.daytondailynews.com/news/news/historic-deal-part-of-global-strategy/njqxj/>.

⁷¹ Modern Materials Handling (Dec. 1, 2014), <http://columbusregion.com/Media-center/Press-Releases/2013-Press-Releases/lululemon-to-Open-Second-U-S-Distribution-Center-i.aspx>; See also http://www.mmh.com/article/sweating_the_details_at_lululemons_ohio_dc.

⁷² JobsOhio Strategic Plan, p. 3-5, http://jobs-ohio.com/images/JO_2014_Strategies.pdf; See also <http://www.cantonrep.com/article/20131118/News/131119352>.

⁷³ OHIO CONSTITUTION HANDBOOK 393 (Thomas R. Swisher ed., 1990); Article VIII became effective September 1, 1851. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

private companies that were tasked with building railroads, canals, and turnpikes.⁷⁶ The State-sponsored funding was deployed in the form of loans and capital investments in these private entities.⁷⁷ The investment of public funds allowed these private entities to leverage their own minimal amount of invested capital with that of the State and offered the companies significant profit potential, with little oversight from the State on how the investments and loans were deployed.⁷⁸

The investment in private companies and the credit extension to these companies for transportation infrastructure left the State with a debt balance of over \$20 million.⁷⁹ This was a significant amount of debt in the mid-1800s,⁸⁰ and would be approximately \$63 billion in 2015 dollars.⁸¹ This debt load and growing criticism from the citizenry were two of the primary impetuses driving the Constitutional convention of 1850-1851.⁸² While the State had an important objective in developing transportation infrastructure, the uncontrolled pattern of tax-and-spend put Ohio in economic peril.⁸³ Changes were required in the financial operations of the State to protect Ohio from future economic chaos that could result from a growing debt burden created by State involvement in private entities. These changes came in the adoption of Article VIII.⁸⁴

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Calculation of 2015 present value of \$20M in 1850 based on annual interest rate of 5%.

⁸² OHIO CONSTITUTION HANDBOOK, *supra* note 73 at 393.

⁸³ *Id.*

⁸⁴ *Id.*

2. Article VIII § 4 – Credit of state; the state shall not become joint owner or stockholder

The Constitutional language of Article VIII, § 4 states that:

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.⁸⁵

The plain meaning of § 4 is clear and unambiguous. The State cannot burden its credit standing, be a joint owner, or invest in any company, for any reason.⁸⁶ The intent of this section is a direct attack on the distrust that the public had towards State investment in Non-State entities.⁸⁷ This section was a response to the transportation infrastructure investment deals gone awry that were entered into in the 1830s and 1840s.⁸⁸ In an attempt to utilize private companies to build the needed infrastructure, the State loans and investments crippled the balance sheet of Ohio and caused significant distrust of these arrangements by citizens of the State.⁸⁹ Section 4 was passed by the 108 Constitutional delegates with only 6 dissenting votes.⁹⁰

It is important to note that this section in no way forbids the State from “using private enterprise to fulfill legitimate government purposes, as long as the [S]tate. . . avoids [direct investment] in private business ventures.”⁹¹

⁸⁵ OHIO CONST. art. VIII, § 4, Effective September 1, 1851.

⁸⁶ Steven H. Steinglass & Gino J. Scarselli, *THE OHIO STATE CONSTITUTION* 273 (2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; There were a total of 108 delegates elected to serve on the 1850-1851 Ohio Constitutional Convention. Terzian, Barbara A., *OHIO'S CONSTITUTIONS: AN HISTORICAL PERSPECTIVE*, 51 Clev. St. L. Rev. 357, 370 (2004) available at <http://engagedscholarship.csuohio.edu/clevstlrev/vol51/iss3/5>.

⁹¹ OHIO CONSTITUTION HANDBOOK, *supra* note 73 at 410.

3. Article VIII § 6 – Counties, cities, towns, or townships, not authorized to become stockholders.

The constitutional language of Article VIII, § 6 in part states that:

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 association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association.⁹²

The intent of § 6 was to transfer the limitations created on the State in § 4 to all political subdivisions within the boundaries of Ohio.⁹³ This section reinforces the general distrust that existed in the investment of public funds with private enterprise.⁹⁴

4. Article VIII § 13 – Economic development

The constitutional language of Article VIII, § 13 in part states that:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, . . . 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. . . . [M]aking of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds

⁹² OHIO CONST. art. VIII, § 6, Effective September 3, 1912.

⁹³ Steinglass, *supra* note 86, at 274.

⁹⁴ *Id.*

or other obligations issued or guarantees made pursuant to laws enacted under this section.⁹⁵

The language of § 13 was originally adopted in 1965.⁹⁶ This section creates an exception to the limitations of State and municipal loan grants addressed in § 4 and § 6 of Article VIII, if the funds are used for a project that supports the “public interest for a proper purpose.”⁹⁷ Projects meeting the standards of § 13 could include programs in the areas of job creation, commerce, industry, research, and distribution.⁹⁸ One key limitation retained in § 13 is that there can be no pledge of current or future tax payments to secure repayment of any loaned funds.⁹⁹ While the adoption of § 13 would seem to all but deem § 4 and § 6 obsolete, Ohio courts initially viewed § 13 as one that should be narrowly interpreted.¹⁰⁰

5. Article XIII § 1 – Corporate Powers

The constitutional language of Article XIII, § 1 states that:

The General Assembly shall pass no special act conferring corporate powers.¹⁰¹

The language of Article XIII, § 1 was originally adopted in 1851 as part of the convention of 1850-1851.¹⁰² This section sets out the general assembly’s authority in creating corporations and forbids the conferring of corporate powers through “special” acts of legislation.¹⁰³ The intent of this section was to prevent legislators from introducing legislation

⁹⁵ OHIO CONST. art. VIII, § 13, Effective November 5, 1974.

⁹⁶ Steinglass, *supra* note 86, at 277.

⁹⁷ *Id.* at 278.

⁹⁸ Steinglass, *supra* note 86, at 278.

⁹⁹ OHIO CONST. art. VIII, § 13, Effective November 5, 1974.

¹⁰⁰ C.I.V.I.C. Grp. v. City of Warren, 88 Ohio St. 3d 37, 42 (2000).

¹⁰¹ OHIO CONST. art. XIII, § 1, Effective September 1, 1851.

¹⁰² Steinglass, *supra* note 86, at 319.

¹⁰³ *Id.*

that conferred special corporate powers on a constituent in the legislator's own district that would give preferential treatment to that constituent over other corporations in the State.¹⁰⁴ A "special" act was defined, as separate from a "general" act, and is one that "is . . . local and temporary in its operation."¹⁰⁵

6. Article XIII § 2 – Corporate Powers

The constitutional language of Article XIII, § 2 states that:

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.¹⁰⁶

The first sentence of Article XIII, § 2 was adopted as part of the 1850-1851 convention and the subsequent language was added in 1912 after a subsequent constitutional convention.¹⁰⁷

This section allows corporations to be created under general laws and supplements § 1 which forbids creation of corporations through special laws.¹⁰⁸ The intent of this section was to standardize the process of creating corporations and limit the opportunity for preferential treatment conferred to some corporations by the legislature.¹⁰⁹

¹⁰⁴ State ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 280 (1950).

¹⁰⁵ *Id.* at 271.

¹⁰⁶ OHIO CONST. art. XIII, § 2, Effective after amendment September 3, 1912.

¹⁰⁷ Steinglass, *supra* note 86, at 320-321.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

V. Articles VIII and XIII; Ohio Courts and Legislation

Ohio Courts have been generally consistent in their interpretation of Articles VIII and XIII of the Ohio Constitution. These interpretations set the basis for validation of JobsOhio as within the boundaries of the Constitution.

1. Ohio Courts and The Interpretation of Article VIII, § 4 and § 6

Article VIII, and specifically § 4 and § 6, have been historically bounded by judicial opinions in the State. There are a number of cases that set the boundaries for the constitutionality of State and municipal actions in the context of § 4 and § 6 of Article VIII.

When originally adopted, if the credit of the State was put at risk to fund a private organization, the assumption of risk would likely violate Article VIII, § 4 of the Ohio Constitution.¹¹⁰ Even if the assumption of risk by the State was for a legitimate public purpose, that purpose did not override the limitations of State investment as considered in § 4.¹¹¹ Even if a loan by the State to a private organization was sufficiently collateralized by the private organization against default, the loan would not be constitutional under § 4.¹¹²

In the early 1960's, by statute, Ohio established the Ohio Development Financing Commission "in order to promote the welfare of the people of the [S]tate, to stabilize the economy, to provide employment, to assist in the development within the [S]tate of industrial, commercial, distribution, and research activities required for the people of the [S]tate, and for their gainful employment."¹¹³ The intended practice of the commission was to issue State-backed bonds for which the proceeds would then be used for economic development purposes,

¹¹⁰ State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 49 (1964).

¹¹¹ *Id.*

¹¹² *Id.* at 51.

¹¹³ *Id.* at 46.

providing grants and loans to businesses for development and expansion.¹¹⁴ If the businesses defaulted on the loans provided by the State, the State would be obligated to the bondholders for repayment of the underlying debt.¹¹⁵

The Ohio Supreme Court interpreted the constitutionality of the Ohio Development Financing Commission in *State ex rel. Saxbe v. Brand*.¹¹⁶ The Ohio Attorney General brought suit against the Ohio Development Financing Commission claiming that the issuance of bonds on behalf of private entities was in violation of § 4, Article VIII of the Ohio Constitution.¹¹⁷ Because the State would retain the obligation for debt repayment to the bond holders, the Court held that the practice was in violation of § 4 because the State's credit would be extended for the benefit of a private entity.¹¹⁸

It is significant to note that this decision in *Saxbe*, was the catalyst for adoption of § 13 of Article VIII, creating an exception to § 4 and § 6, allowing some limited State-backed loans for the benefit of private enterprises under specific circumstances.¹¹⁹ One specific limitation enumerated in § 13 is that any money borrowed or loaned by the State on behalf of a private enterprise for economic development purposes, could not be collateralized with the present or future tax receipts of the State.¹²⁰

Consistent with the intention of Article VIII, § 6, a city cannot enter into a partnership with a private enterprise to jointly own a service-providing entity, even if the benefits would

¹¹⁴ *Id.* at 47.

¹¹⁵ *Id.* at 49.

¹¹⁶ *Id.* at 44.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 51.

¹¹⁹ *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d 111, 114 (1991).

¹²⁰ *Id.*

inure to the constituents of the municipality.¹²¹ It could be appropriate for a municipality to lease or purchase a facility from a private enterprise.¹²² It could also be appropriate for a city to sell or lease a property to a private enterprise. But if the completed project is jointly owned by the municipality and private enterprise, the relationship would be in violation of § 6.¹²³

The interpretation of § 6 by the Ohio Supreme Court was made clear in *Alter v. Cincinnati*.¹²⁴ The city of Cincinnati enacted the Water Works Act with the intention of extending water service throughout the city.¹²⁵ The act authorized a \$6.5 million expenditure, financed through bonds, to complete the upgrade of the water system.¹²⁶ The act stipulated that the water extension program could be facilitated with a private partner, and upon completion of the extensions, the private partner would own the rights to those extensions and would become a joint owner with the city of the water purification and delivery system.¹²⁷ The Court held that the joint ownership aspect of the legislation was unconstitutional because § 6 “prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality must be the sole owner and controller of the property in which it invests its public funds. A union of public and private funds . . . is forbidden.”¹²⁸

Alternatively, the State is permitted to contract with private entities. When the State or one of its political subdivisions is not able to provide an adequate service to a group of citizens

¹²¹ *Alter v. Cincinnati*, 56 Ohio St. 47, 64 (1897).

¹²² *Id.*

¹²³ *Id.* at 64.

¹²⁴ *Id.* at 47.

¹²⁵ *Id.* at 62-63.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 65.

through its own agencies or employees, it is constitutional for the State to contract with a private enterprise to provide needed services to the constituents.¹²⁹ The contracting of public services is appropriate as long as the State does not have an ownership interest in the contracted party.¹³⁰

A State function being provided through a private enterprise was found constitutional by the Supreme Court in *State ex rel. Dickman v. Defenbacher*.¹³¹ The Veterans Administration Office was established by the federal government to provide services to disabled veterans and their dependents.¹³² The services provided by the Veteran's Administration, which were authorized through federal acts, included medical care, dental care, convalescent rehabilitation, and vocational training to eligible veterans.¹³³ States were given the responsibility of managing the presentation of claims to the federal government on behalf of the eligible veterans who were citizens of each state.¹³⁴ Ohio had no State-sponsored veterans' administration agency in place so the State authorized payments to private organizations such as the Red Cross, the Veterans of Foreign Wars, and the Disabled Veterans Organization to manage the claims of eligible Ohio residents on the state's behalf.¹³⁵ In ruling in *Dickman*, challenging the distribution of these funds to these organizations, the Ohio Supreme Court held that the payments were not unconstitutional because the payments satisfied a legitimate public purpose and did not violate § 4 of Article VIII.¹³⁶ The private contracted organizations did not co-mingle public funds with

¹²⁹ *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 154 (1955).

¹³⁰ *Id.* at 153.

¹³¹ *Id.* at 142.

¹³² *Id.* at 152.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 151.

private funds, provided regular reports of finances to the State Legislature, and fulfilled a service that was in the best interest of the State and its constituents.¹³⁷

These historical interpretations and holdings regarding Article VIII, § 4 and § 6 by the Court were adjudicated prior to the adoption of Article VIII § 13. A more time relevant evaluation is the interpretation of constitutional boundaries by the courts of exceptions created in § 13 and the constitutionality of § 13's codification enacted through O.R.C. § 166.

2. Legislative and Judicial Support for Article VIII, § 13

130 years after the Constitutional Convention of 1850-1851, the Ohio Legislature recognized the constrictive limitations to economic development that were imposed in § 4 and § 6 of Article VIII, and also recognized that economic development activity by the State was encouraged in § 13. With an effective date of July 14, 1983, the Ohio Legislature enacted Ohio Revised Code § 166 which codified the actions permitted in § 13 and permitted a broader program of economic development to attract and retain companies and jobs in Ohio.¹³⁸

The legislation enabled the State to offer incentive-based loans to private entities which met certain criteria for job creation in the State.¹³⁹ The initial adoption of the legislation defined eligible projects to include the acquisition, rehabilitation, or construction of facilities.¹⁴⁰ The facilities were required to be related to industry, commerce, research, or some combination of the three.¹⁴¹ The expected beneficial effect to the State for financing of these projects included the

¹³⁷ *Id.* at 151-153.

¹³⁸ OHIO REV. CODE, § 166 (LexisNexis).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at § 166.01.

¹⁴¹ *Id.*

creation of new jobs, the preservation of existing jobs, and the improvement of general economic welfare.¹⁴²

In the initial enactment of O.R.C. § 166, a basic loan fund was established that would offer qualifying loans to companies that met the standards of the program and that had qualified eligible projects.¹⁴³ In addition to being an eligible project, criteria for obtaining a loan required that the project be assessed as economically sound, the principal amount to be guaranteed by the State did not exceed 90% of the total value of the project, the loan rates could not be excessive, and the principal obligor (private entity implementing the project) was responsible and in a position to likely be able to meet the repayment obligations of the loan.¹⁴⁴

The monetary source for the establishment of the "Facilities Establishment Fund" was from "excess" profits derived from the control and distribution of the alcoholic spirits business which was administered by the State.¹⁴⁵ Excess funds were defined as those monies available to the State from revenue derived from the sale of spirituous liquor after the payment of all costs, expenses, and taxes associated with the operation of the Division of Liquor Control including the maintenance of an adequate reserve balance.¹⁴⁶

Shortly after the passage of O.R.C. § 166, and consistent with its intended result, the Director of Development of Ohio requested that the Treasurer of Ohio distribute loan funds for the benefit of a private entity that was granted a facilities loan fund award.¹⁴⁷ The Treasurer refused to issue the loan funds because of a concern over the constitutionality of the program as

¹⁴² *Id.*

¹⁴³ *Id.* at § 166.06.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at § 166.03; *Id.* at § 166.08(6).

¹⁴⁶ *Id.*

¹⁴⁷ *State ex rel. Duerk v. Donahey*, 67 Ohio St. 2d 216, 217 (1981).

it may have been in violation of Article VIII, § 13.¹⁴⁸ The Treasurer contended that the loan fund was unconstitutional because § 13 did not allow the use of “monies raised by taxation” in support of loans guaranteed by the State for economic development purposes.¹⁴⁹ While the income generated by the State was revenue from liquor sales, the treasurer contended that all funds flowing into the State coffers should be considered tax revenue.¹⁵⁰

In its evaluation of *Duerk*, the Court held that the inflow of funds from liquor sales did not constitute a tax receipt by the State.¹⁵¹ The inflow of these revenues to the Department of Liquor Control was actually taxed by the State in the form of the “gallon tax” which was excised on the Department.¹⁵² The Court held that if the revenues were considered a tax, they would not then be taxed again by the State.¹⁵³ Additionally, in showing deference to the actions of the legislators, the Court held that it must start from a presumption that a law in question is constitutional unless there is a clear “conflict with inhibitions of the Constitution.”¹⁵⁴

From its beginnings in 1983, O.R.C. § 166 has been amended and expanded as the importance of economic development activities increased. The importance of economic development has increased because of the ever expanding pressure from a global economy. The legislation has been amended over time to allow a broader portfolio of eligible projects and a greater category of loan funds for economic development purposes.¹⁵⁵ Specific examples of expanded development incentive opportunities include The Ohio Innovation Loan Program

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 218.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 219.

¹⁵⁵ See generally OHIO REV. CODE § 166 (LexisNexis).

(2003), which was established to enable the creation of innovation projects by private companies or for the support of governmental agencies tasked with bringing innovation based projects to the region.¹⁵⁶ Innovation projects had a broad definition and went beyond the original definition of qualified projects established in O.R.C. § 166 covering investment in facilities and real property. Innovation projects expanded the definition to include permissible investment in items such as software, patent rights, trademark rights, inventory, contractual rights, and other intangible assets.¹⁵⁷

The reach of O.R.C. § 166 continued to be expanded by amendment with the adoption of the Research and Development Loan Fund (2003), the Logistics and Distribution Infrastructure Loan Fund (2008), the Advanced Energy Projects Fund (2008), and the Economic Development Support Fund (2012).¹⁵⁸

The Micro Lending Program (2009), targeted companies that may not be able to secure traditional financing for job creation projects.¹⁵⁹ Because of the increased risk of default with these companies, the loan value could not exceed 75% of the total project cost, a reduction from the original loan value extension of 90% of project cost.¹⁶⁰

Consistent with the initial enactment of O.R.C. § 166, the expansion of the economic development services authorized by the amendments to § 166 continued to be funded by excess profits generated by the sale of liquor.¹⁶¹ This expansion also supports and is consistent with the funding model employed by JobsOhio, utilizing the excess profits of the liquor distribution

¹⁵⁶ OHIO REV. CODE § 166.12(A) (LexisNexis).

¹⁵⁷ *Id.* at § 166.01(K).

¹⁵⁸ *Id.* at §§ 166.17-35.

¹⁵⁹ *Id.* at § 166.07.

¹⁶⁰ *Id.* at § 166.07(3).

¹⁶¹ *Id.* at §§ 166.17-35.

business. The enactment of O.R.C. § 166 by the Ohio Legislature was a clear indication that times had changed since the Constitutional Convention of 1850-1851 and the State needed to play a more active role in the support of economic development within its borders.

The creation of JobsOhio continues to recognize the importance of economic development efforts on behalf of the citizens and businesses of Ohio. The migration of economic development services to JobsOhio is intended to achieve the benefits of economic development through a commercial oriented and business approach to organizational management of the effort. It also removes the loaned funds off of the State's balance sheet with no recourse to the State in the event of default on those loans.

The exceptions to § 4 and § 6, created in § 13 of article VIII, are important for economic development in the State and the subsequent legislation enacted to codify § 13 has been adjudicated to be within the boundaries of the Ohio Constitution.

3. What is a “Public Purpose”?

The enumerated language in Article VIII, § 13 requires that any project deemed to qualify for State-backed loans must provide a legitimate public purpose.¹⁶² Courts in Ohio have not attempted to define “public purpose” in a rigid sense but have viewed each question raised in the context of the particular circumstances.¹⁶³ It has been the practice of the courts to construe the concept of public service in a broad sense.¹⁶⁴ In general, courts have held that the “test of ‘public use’ is the right of the public to receive and enjoy its benefits.”¹⁶⁵

Courts have interpreted public purpose in a broad sense. Cuyahoga County adopted a plan to issue public bonds which would be deployed to purchase a local hospital, refurbish the

¹⁶² OHIO CONST. art. VIII, § 13.

¹⁶³ State ex rel. Taft v. Campanella, 50 Ohio St. 2d 242, 244 (1977).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 245.

facilities, and retire existing debt on the property.¹⁶⁶ After completion of the upgrades, the facility was leased to a non-profit health agency for administration of the hospital.¹⁶⁷ The county auditor challenged the transaction under Article VIII, § 6 and § 13 of the Ohio Constitution claiming that the debt repayment was not within the scope of the public interest.¹⁶⁸ The Court held that the overall transaction was in the scope of the public interest because the improved hospital facility would provide a more comprehensive, efficient, and available health care experience for the community.¹⁶⁹ The bond proceeds delegated to debt refinancing would save the health agency \$8 million over the life of the bonds and this economic benefit would be an advantage for the citizens of Cuyahoga County, hence the satisfaction of a public purpose.¹⁷⁰

The economic development of commerce and its corresponding creation of jobs, income taxes, and property taxes are well within the scope of “public interest.”¹⁷¹ Stark County established a non-profit entity, the Community Improvement Corporation, and designated it as the county’s agency for commercial, industrial, distribution, and research development in the region.¹⁷² To carry out its mission of attracting and retaining businesses in the area, the county issued bonds with the proceeds being used for economic development activities by the commission.¹⁷³ A local company applied to, and won approval from the commission for county-backed financing for the construction of a medical facility in the area.¹⁷⁴ A suit was brought

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Cnty. of Stark v. Ferguson*, 2 Ohio App. 3d 72, 77 (1981).

¹⁷² *Id.* at 73.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

challenging the legality of issuing bonds on behalf of the private enterprise claiming that this action violated § 6 of Article VIII.¹⁷⁵ The Third District Court of Appeals held that “[t]he polestar of ‘proper public purpose’ and ‘public interest’ [in the context of § 13, Article VIII] is the creation or preservation of jobs and employment opportunities.”¹⁷⁶ The action of issuing bonds, backed by the credit of the State, to encourage private economic development was held to be constitutional.¹⁷⁷

4. Ohio Courts and The Interpretation of Article XIII, § 1 and § 2

Article XIII, § 1 and §2, require that corporations not be created by “special” legislative acts and that all corporations be created under the general laws of the State. These sections have been interpreted by judicial opinions in the State.

The primary evaluation of constitutionality depends on the categorization of an act as being special or one created within the general laws of the State. In evaluating this question, the Ohio Supreme Court defined a special act in *State ex rel. Kauer v. Defenbacher*.¹⁷⁸

The dispute in *Kauer* arose from the enactment of an Ohio statute that created a corporation to develop the Ohio Turnpike.¹⁷⁹ A separate statute allocated funds to the turnpike corporation for the purpose of analyzing and planning for the construction of the highway.¹⁸⁰ This action was challenged as violating Article XIII, § 1, claiming that a special act created a corporation.¹⁸¹ The Court noted that the language in § 1 did not distinguish the limitation of the

¹⁷⁵ *Id.* at 74.

¹⁷⁶ *Id.* at 77.

¹⁷⁷ *Id.*

¹⁷⁸ *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268 (1950).

¹⁷⁹ *Id.* At 272.

¹⁸⁰ *Id.* At 273.

¹⁸¹ *Id.* at 281.

granting of power through a special act for a public versus a private corporation.¹⁸² The Court also noted that the intent of the section was to create an even playing field for all corporations in the State.¹⁸³ The Court held that a special act was one “that is local and temporary in its operation.”¹⁸⁴ Because the turnpike project was not limited in its geographic scope and the construction of the turnpike would be a permanent development, the action did not violate Article XIII, § 1, and did not constitute a special act.¹⁸⁵

Article XIII, § 2 grants broad authority to the legislature regarding the creation of corporations. The provision, “affords full and complete authority to the General Assembly to provide by general laws for the formation of corporations and for changes in the organization or structure of existing corporations.”¹⁸⁶ Section 2 is distinguished from § 1 by the ability to act under general laws, not special laws.

VI. The Action Brought by ProgressOhio

ProgressOhio is a non-profit corporation organized in the State of Ohio with the purpose of informing and educating the public on progressive ideals with the intention of fostering a more just and democratic society.¹⁸⁷ On August 29, 2011, ProgressOhio filed suit in the Common Pleas Court of Franklin County, Ohio and named as defendants JobsOhio, Ohio Governor, John Kasich, Director of the Ohio Department of Development, Christiane Schmenk,

¹⁸² *Id.* at 280.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 281.

¹⁸⁵ *Id.*

¹⁸⁶ *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 341 (1944).

¹⁸⁷ *ProgressOhio.org, Inc. v. JobsOhio*, Franklin County Ohio, Common Pleas, No. 11 CV 10807, Complaint ¶ 7 (Dec. 2, 2011).

Director of the Ohio Department of Budget and Management, Timothy Keen, and Ohio Treasurer, Josh Mandel.¹⁸⁸

The complaint asserted that JobsOhio, and the legislation that created it, was in violation of Article VIII, § 4 of the Ohio Constitution.¹⁸⁹ ProgressOhio contended that the creation of JobsOhio formed an illegal partnership between Ohio and the JobsOhio private non-profit corporation and the State was advancing its credit to JobsOhio in violation of § 4.¹⁹⁰ ProgressOhio further asserted that the State, through JobsOhio, was going to make unconstitutional equity investments in private companies for the purpose of attracting and retaining jobs within the boundaries of the State.¹⁹¹

The suit also asserted that JobsOhio violated § 1 and § 2 of Article XIII.¹⁹² The suit claimed that O.R.C. §187 was a “special” act that conferred unconstitutional powers to a private corporation and the JobsOhio entity was not being created under the general laws of Ohio.

Due to the alleged constitutional violations in the creation of a private non-profit entity, ProgressOhio prayed for injunctive relief of prohibiting the formation and continued operations of JobsOhio because it violated Article VIII, § 4, and Article XIII, § 1 and § 2 of the Ohio Constitution.¹⁹³

The Common Pleas Court of Franklin County issued a final ruling on December 2, 2011 when it held in favor of the JobsOhio Motion to Dismiss the claim.¹⁹⁴ The Motion to Dismiss

¹⁸⁸ *Id.* at Title.

¹⁸⁹ *Id.* at Complaint ¶ 20.

¹⁹⁰ *Id.* at Complaint ¶ 21.

¹⁹¹ *Id.* at Complaint ¶ 23.

¹⁹² *Id.* at Complaint ¶¶ 16-18.

¹⁹³ *See generally Id.*, Complaint.

¹⁹⁴ ProgressOhio.org, Inc. v. JobsOhio, Franklin County Ohio, Common Pleas, No. 11 CV 10807, Motion to Dismiss (Dec. 2, 2011).

was based on ProgressOhio's lack of standing to bring suit in the matter.¹⁹⁵ In requesting a dismissal, JobsOhio argued that ProgressOhio did not meet the three prong test for standing: 1) ProgressOhio or its members did not establish that they had suffered any damages, 2) ProgressOhio did not show that the issues created by JobsOhio were germane to ProgressOhio's interests, and 3) because prongs 1 and 2 of the test failed, the court could not determine if any individual members of ProgressOhio should be considered as relevant parties to the suit.¹⁹⁶ The ruling of the trial court was subsequently affirmed by the Tenth District Court of Appeals and the Ohio Supreme Court.¹⁹⁷ While the outcome sided with JobsOhio, the case was not decided on the merits of the organization and the constitutionality of the JobsOhio initiative.

If the case brought by ProgressOhio was decided on the merits of the organization, JobsOhio would have prevailed and the Court would have held that JobsOhio was within the constitutional boundaries of the State.

The Argument

VII. The Analysis of Why JobsOhio is Constitutional

The economic development initiatives of JobsOhio are well within the limits set out in the Constitution of Ohio and there is no violation of Article VIII or Article XIII of the Constitution. First, JobsOhio is not a State agency and the employees of JobsOhio are not employed by the State, they are employed by JobsOhio. Second, JobsOhio is not funded by the State; it is self-funded, utilizing the profits of the spirituous liquor distribution business that was franchised from the State for a twenty five year period. Third, economic development, which is a constitutionally valid public purpose of the State, is being outsourced and fulfilled by the

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520 (Ohio 2014); *ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655 (Ohio Ct. App., Franklin County 2012).

private entity known as JobsOhio. Finally, the creation of JobsOhio was valid under § 1 and § 2 of Article XIII because JobsOhio was created under the general laws of the State and was not the product of a special act.

Even if the JobsOhio organization was an agency of the State, its activities would be constitutional. First, economic development is clearly within the purview of allowable State activities and the function serves a legitimate public purpose. Second, the making of State-backed loans to private enterprises, with the purpose of encouraging the creation and retention of jobs, is valid and consistent with the intent of Article VIII, § 13 of the Ohio Constitution. And third, JobsOhio is not making equity investments in the targeted companies, an activity that if undertaken, may be considered unconstitutional for a State agency, as enumerated in Article VIII, § 4.

This argument validates the constitutionality of JobsOhio. It discredits the arguments raised by ProgressOhio in its suit to invalidate the JobsOhio program based on constitutional boundaries.

JobsOhio is Separate and Distinct from the State

1. JobsOhio is not an Agency of the State

JobsOhio does not violate Article VIII, § 4 of the Constitution because JobsOhio is not a State entity. JobsOhio was established as an entity separate and distinct from the State of Ohio.¹⁹⁸ Because it was established as an independent and separate entity from the State, its employees are not on the State payroll.¹⁹⁹ Because JobsOhio is not an agency or political subdivision of the State, it is not bound by the limitations placed on the State which are

¹⁹⁸ OHIO REV. CODE § 187.01 (LexisNexis).

¹⁹⁹ *Id.* at § 187.03.

articulated in Article VIII, § 4 of the Constitution. If JobsOhio was a political subdivision of the State, it may be more constrained to constitutional limits imposed on State activities.

2. JobsOhio is not Funded by the State

Because JobsOhio is not an agency of the State, it does not fall within the State budget allocations and performs its functions through a self-funded model. The funding model for JobsOhio is based on the revenue and profit stream generated by the distribution and sale of spirituous liquors within the State borders.²⁰⁰ JobsOhio franchised the revenue and profit stream from the State of Ohio for a twenty five year period.²⁰¹ At the end of the twenty five year franchise term, the liquor distribution business will transfer back to the control of the State, in accordance with the franchise agreement.²⁰² JobsOhio paid the State approximately \$1.4 billion for the liquor distribution revenue stream.²⁰³ The payment to the State was funded by a private bond financing, secured by those future revenue streams of the liquor business, under the control of JobsOhio and its subsidiary, Jobs Ohio Beverage System.²⁰⁴

Some opponents argue that the franchising of the liquor business to JobsOhio in effect creates an ongoing use of State funds for private economic development incentives; this argument does not hold true. The franchise of the liquor distribution business was an arms-length transaction between the State of Ohio and JobsOhio.²⁰⁵ If JobsOhio were to default on its obligations to repay the bond funds, the State would not be the obligor to the bonds held by the creditors. The bond holders are attached to the future revenue stream of the liquor distribution

²⁰⁰ *Id.* at § 4313.02.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ JobsOhio audited financial statements *supra* note 51.

²⁰⁴ *Id.*

²⁰⁵ Don Grubbs, *supra* note 55.

business under the control of JobsOhio. The State has already been paid for this revenue stream and carries no recourse for the repayment of these bonds.²⁰⁶

By authorizing and requiring JobsOhio to self-fund, the State has benefited from a \$1.4 billion present value infusion of cash and was able to retire approximately \$800 million of existing State debt from the balance sheet.²⁰⁷ State funds are not being utilized for the financing of JobsOhio and the State has been able to improve its over-all financial condition.

3. Contracting with a Private entity to Provide a Valuable Public Service is Constitutional

It has been held by the judiciary of Ohio that economic development satisfies the criteria of a legitimate public purpose.²⁰⁸ When fulfilling a legitimate public purpose, the State may contract with a private enterprise to fulfill that public service on behalf of the citizens of the State.²⁰⁹ In establishing JobsOhio to manage the centralized economic development activities of the State, the State is effectively carrying out its duties for the benefit of the citizens.

In a competitive business environment, it is critical to understand your strengths and weaknesses in fulfilling your economic mission. The State has recognized that the efforts of economic development were inefficient when administered through the dedicated State agency of the Development Services Agency (DSA). The DSA was constrained by the political bureaucracy of Ohio and was not effective in meeting the economic challenges of the State. The creation of JobsOhio significantly removes the inefficiency of State-based functions and allows the State to be more competitive in its delivery of jobs and economic benefits within its borders.

²⁰⁶ *Id.*

²⁰⁷ JobsOhio audited financial statements *supra* note 53.

²⁰⁸ *Cnty. of Stark v. Ferguson*, 2 Ohio App. 3d 72, 77 (1981); *State ex rel. Taft v. Campanella*, 50 Ohio St. 2d 242, 245 (1977).

²⁰⁹ *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 154 (1955).

The activities of JobsOhio are not in violation of the Article VIII, § 4 of the Ohio Constitution because JobsOhio is not a State agency, JobsOhio is not funded by the State, and it is appropriate for the State to outsource an essential service for a legitimate public purpose if the State cannot provide that service efficiently on its own.

4. JobsOhio was not Created under a Special Act

JobsOhio does not violate Article XIII, § 1 and § 2 because JobsOhio was created under the general laws of the State and was not created under special laws of the State. The Ohio Supreme Court has ruled that creation of a corporation would be enabled by a special act if the corporations intended scope of influence was limited to a specific geographic area of the State and the life expectancy of that corporation was expected to be temporary.²¹⁰

The impact of JobsOhio is expected to be felt throughout the State and there is no geographic limit to its effect throughout the eighty eight counties in Ohio. The legislation did not time-limit the existence of JobsOhio. There is an initial term of twenty five years placed on the liquor franchise agreement, but this is only covering the liquor agreement between JobsOhio and the State. It does not limit the life expectancy of JobsOhio as a private non-profit corporation.

Because the legislation creating JobsOhio did not limit its geographic scope of operations across the State and the corporation is not time limited in existence, it would not be considered to be created under a special act. If its creation does not fall within the category of special act, it should be considered as being created under the general laws of Ohio and would comply with Article XIII, § 1 and § 2 of the Ohio Constitution.

²¹⁰ State ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 281 (1950).

JobsOhio Activities Fall within the Boundaries Permitted for a State Agency

Even if JobsOhio was an agency of the State, its activities would not be outside the boundaries of allowable limits as defined in the Ohio Constitution because economic development serves a legitimate public purpose, loans to private enterprises are valid, and JobsOhio is not making equity investments as part of incentive packages to target companies.

1. Economic Development Serves a Legitimate Public Purpose

As previously discussed, economic development serves a clear public purpose and is a constitutional mandate of the functions of the State.²¹¹ It is for the betterment of the State and its citizens to increase the number of jobs available and to promote the economic health of the State. JobsOhio is fulfilling an essential and valid economic purpose on behalf of the State and it is able to provide this service in a sense, free of charge to the citizenry of Ohio.²¹² The delivery of a critical service at no expense to the taxpayers creates a win-win for all.

2. State-Backed Loans are Constitutional

Although any loans provided by JobsOhio are not backed by Ohio, State-backed loans to private enterprises for purposes of economic development are constitutional and in compliance with Article VIII, § 4, and within the exception created in § 13 of Article VIII.²¹³ The constitutionality of State or municipal backed loans to private enterprises, for the purpose of economic development, has been deemed valid by Ohio courts.²¹⁴

The Ohio legislature has continued to show strong support for economic development loans, backed by the State, through its adoption and amendments to Ohio Revised Code §166.

²¹¹ OHIO CONST. art. VIII, § 13, Effective November 5, 1974.

²¹² Don Grubbs, *supra* note 55.

²¹³ OHIO CONST. art. VIII, §§ 4, 13

²¹⁴ State ex rel. Duerk v. Donahey, 67 Ohio St. 2d 216, 219 (1981).

Since its original adoption in 1983, codifying the distribution of State-backed loans to private enterprises for the purpose of economic development, the legislature has recognized the importance of these programs. There have been at least six amendments to the statute that expand the amount of funds and types of projects that qualify for a private enterprise to receive State-backed loans.²¹⁵ The purpose of these loans has been expanded to not only include loans for structures and real property, established in the Facilities and Establishment Fund, but to also include the support of investments in research and development, technology improvements, and intellectual property investments including patents and trademarks.²¹⁶

If JobsOhio was a State agency, the distribution of funds for government-backed loans would be constitutional. The economic development loans to private enterprises could be carried out by the State if JobsOhio had not been created. The JobsOhio organization is capable of moving at the speed of business, far exceeding the capabilities of a State-based agency. Some loan transactions can be completed in as little as four to five weeks; much shorter than the expected timeline of a transaction administered by a State agency.²¹⁷

Because the placement of loans by JobsOhio would be constitutional if it were a State agency, the activities are valid when performed by a private entity.

3. There are no Equity Investments in Private Enterprises

JobsOhio does not currently make equity investments in private enterprises, in support of economic development.²¹⁸ The constitutional delegates were well intentioned in 1850 and did identify a risk that would go beyond one that should be incurred on behalf of the State, equity

²¹⁵ See generally, Ohio Rev. Code § 166 (LexisNexis).

²¹⁶ Ohio Rev.Code § 166.07 (LexisNexis); *Id.* at § 166.17; *Id.* at § 166.21.

²¹⁷ Interview with David Burrows, Vice President Development, Dayton Development Coalition, in Dayton, Ohio (Oct. 6, 2014).

²¹⁸ Don Grubbs, *supra* note 55.

ownership in whole or in part of a private enterprise.²¹⁹ The perils of equity investments were disallowed through the judicial interpretation of Article VIII, § 4.²²⁰ The abuse of State funds that was prevalent during the infrastructure building period of the early 1800's was not to be repeated in the future.²²¹

JobsOhio recognizes this increased level of risk assumption and has chosen to generate economic development through loans as opposed to the higher risk equity investment. Because JobsOhio is not making equity investments in private enterprises for the purpose of economic development, its activities would be valid, even if it were a State agency.

Even if JobsOhio was a State agency, its efforts would be considered constitutional because economic development functions serve a legitimate public purpose, the issuance of State-backed loans to private enterprises for the purposes of economic development is within the limitations prescribed in the Ohio Constitution, and JobsOhio does not currently make equity investments in targeted companies.

VIII. Conclusion

Ohio faced an economic crisis in the late 2000's dampened by historical levels of State unemployment. Actions were required to establish the return of jobs and to rebuild economic prosperity for thousands of unemployed Ohioans. JobsOhio was a catalyst for the economic recovery that is now being realized in Ohio.

The creation of JobsOhio was not an attack on the Ohio Constitution as asserted by ProgressOhio. The creation of JobsOhio is well within the parameters of the Constitution and does not extend beyond the allowable boundaries that have been interpreted by Ohio Courts. If

²¹⁹ OHIO CONST. art. VIII, § 4.

²²⁰ *See generally*, *Alter v. Cincinnati*, 56 Ohio St. 47 (1897).

²²¹ *Steinglass, supra* note 86, at 273.

the action brought by ProgressOhio was decided on the merits of the organization against a constitutional standard, Courts would most likely rule that JobsOhio is valid and the claims asserted by ProgressOhio would be held without merit.