Democracy in Ohio: Ohio's Fiscal Constitution and the Unconstitutional Nationwide Arena Deal

by DAVE EBERSOLE*

I. "Do you have any questions?"

Between September 2011 and March 2012 multiple public institutions unanimously approved the public purchase of Nationwide Arena in Columbus, Ohio (hereinafter the "Transaction").[1] The Transaction is designed to save Columbus' National Hockey League franchise, the Columbus Blue Jackets ("CBJ"), from moving to another locality.[2] Through public testimony at Columbus City Council and the Franklin County Convention Facilities Authority ("FCCFA"), as well as written correspondence with the Franklin County Commissioners, I voiced public policy concerns regarding democracy, public debt, economic development, and the Transaction's legality under the Ohio Constitution. When I offered to field questions following testimony before the Columbus City Council and the FCCFA, each organization declined the invitation and proceeded to unanimously approve the Transaction.[3] Further,

* Member of the Ohio Bar. B.S. The Ohio State University; J.D. The Ohio State University. All the views expressed here are my (the author's) own and do not represent the views of any organization. All citing references are available upon request. Thanks to Dale Oesterle for his helpful advice and comments on this article. All errors are my own.

1. Doug Caruso, *Casino Tax-Financed Deal for Nationwide Arena Completed*, THE COLUMBUS DISPATCH, Mar. 29, 2012, http://www.dispatch.com/content/stories/local/2012/03/29/arena-deal-closes.html.

2. Doug Caruso, *Saving the Blue Jackets*, THE COLUMBUS DISPATCH, Sept. 15, 2011, http://www.dispatch.com/content/stories/local/2011/09/15/saving-the-blue-jackets.html. Following the Transaction's closing, Mayor Michael Coleman publicly suggested that Columbus pursue an NBA franchise. Lucas Sullivan & Aaron Portzline, *Coleman wants NBA team to share Nationwide Arena with Blue Jackets*, THE COLUMBUS DISPATCH, May 10, 2012, http://www.dispatch.com/content/stories/sports/2012/05/10/downtown-double-team-coleman-seeks-nba-team-for-city.html.

3. Doug Caruso, *Council approves casino money to buy Nationwide Arena*, THE COLUMBUS DISPATCH, Oct. 3, 2011, http://www.dispatch.com/content/stories/local/2011/

my repeated requests to calculate the Transaction's return on investment (a common metric for capital projects) went unanswered.[4]

The Transaction has widely applicable implications for public finance in democratic institutions. Public officials' unanimous support for the Transaction and their apparent disinterest in the serious issues discussed in this article support a broader inference that collective decision-making through elected representatives materially affects public finance policy. As a result, the Transaction demonstrates that nonelectoral fiscal restraints are needed in constitutions.[5] Moreover, there are significant legal implications for drafting and enforcing constitutional fiscal provisions, in part because the Transaction does not comply with the Ohio Constitution.

Significantly, with certain adjustments, the Transaction could have achieved technical compliance with the Ohio Constitution while still frustrating the constitutional purpose.[6] This circumstance raises

10/03/Council-shouted-down-during-casino-vote.html. ("But David Ebersole, an Ohio State University law student, said the deal is too complex to be transparent and that it has no hope of showing a return on investment"); Mandie Trimble, *Nationwide Arena Purchase Moves Forward*, WOSU, (Oct. 18, 2012, 6:32 PM) ("Board members heard from one public speaker, Dave Ebersole, who opposes to [sic] the arena purchase."), http://beta.wosu.org/news/2011/10/18/cfa-board-members-ok-arena-purchase/. It should be noted that Councilman Zach Klein abstained from the Oct. 3, 2012, Columbus City Council vote because his law firm, Jones Day, was involved with the Transaction. One FCCFA member also abstained from the Oct. 18, 2012, FCCFA vote.

4. On multiple occasions, I asked the Transaction's proponents whether and how they calculated return on investment, but I never received a meaningful response. *See* Caruso, *supra* note 3; Trimble, *supra* note 3 (I inquired about return on investment at City Council and FCCFA meetings). When I wrote to the Franklin County Commissioners, in part to question the Transaction's return on investment, Commissioner John O'Grady did not calculate return on investment in his response letter. *See* Franklin County Commissioner John O'Grady's cover letter to Peck, Shaffer, & Williams LLP, *Letter Dated November 14, 2011*, attached as Exhibit B. Instead, Mr. O'Grady claimed that the Transaction will "protect 10,000 jobs" and cited a report from the Ohio State John Glenn School of Public Affairs, a report which ironically identifies return on investment as an important metric for the Transaction and undermines any assertion that it is not necessary to calculate return on investment for the Transaction. *See* discussion *infra* Pt. III(C).

5. GEOFFREY BRENNAN & JAMES M. BUCHANAN, 9 THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION 9.1.18, 9.2.7 (1980), http://www.econlib.org/library/Buchanan/buchCv9c1.html#Ch. 1, Taxation in Constitutional Perspective. "To a very substantial extent, modern economists have implicitly accepted the prevailing twentieth-century presumption (or faith?) that nominally democratic electoral processes are sufficient in themselves to guarantee that government activity remains within acceptable limits." *Id.*

6. While I hesitate to contemplate circumventing the Ohio Constitution, the Transaction could have been arranged in a manner to achieve technical legal compliance. As written, the Transaction is funded with revenue bonds that are repaid only with casino tax revenue. If, instead, the Transaction were financed with general obligation bonds, the

the larger issue of how much leeway, if any, future interpreters should allow in arranging public finances consistent with constitutional fiscal restraints.[7] As a check on issues that arise in public finance due to collective decision-making through elected representatives, courts should honor the purposes behind constitutional fiscal provisions, which are ratified directly by the people.[8] In many instances throughout U.S. history, however, courts have upheld complex financial arrangements that frustrate the purposes behind state constitutional fiscal provisions as technically compliant.[9] While the Transaction does not achieve technical compliance with the Ohio Constitution, the Transaction does provide context for this article to discuss issues regarding the economic purposes for fiscal restraints on public finances and the policy rationale for placing these restraints in state constitutions as directives from the people to their government.

II. Public Finance in Democracy

A. Public Finance in Democratic Institutions

Democratic constitutions, by their very nature, are designed to limit the impact that individual self-interest has on the public interest.[10] Public investment, especially public investment in the

Transaction would likely be constitutional under the Ohio Constitution and related Ohio Supreme Court precedent. *See* discussion *infra* Part IV(B)(3)(ii)(b).

7. *See* David Gold, *Public Aid to Private Enterprise Under the Ohio Constitution*, 16 U. TOL. L. REV. 405, 406–07 (1985).

8. *See id.* at 407 ("Regardless of whether one adheres to the originalism or adjudication as the proper method of constitutional decision-making, then, the first step toward understanding a constitutional provision is discovering, as far as possible, the intentions of the adopters.").

9. *See* Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1333–39 (1991); *see e.g.* Dale Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosions of the Constitution's Ban on Business Subsidies*, 73 U. COLO. L. REV. 587, 613–14 (2002).

10. John Stuart Mill, *Ought Pledges to be Required from Members of Parliament?*, REPRESENTATIVE GOVERNMENT (1861).

> [T]he very simple principle of constitutional government requires it to be assumed that political power will be abused to promote the particular purpose of the holder; not because it is always so, but because such is the natural tendency of things, to guard against which is the especial use of free institutions.

Id. See also James Madison, THE FEDERALIST No. 51.

private sector, presents one circumstance in which many parties influencing the public decision stand to individually gain, economically and politically, from that decision.[11] Moreover, these incentives put decision-makers and other influential parties in materially distinct positions from the general public because they receive individual benefits separate and apart from the public benefits. As a foundation, this section will explain the relevance of individual economic and political incentives in public finance, and identify incentives surrounding the Transaction.

1. Self-Interest or Benevolence: Are Individual Economic and Political

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> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Id. See also Alexander Hamilton, THE FEDERALIST No. 78.

> A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Id.

11. Gold, *supra* note 7, at 431 ("[Delegates to the 1873-74 Ohio constitutional convention] complained of the corruption that invaded the political process when public authorities parceled out railroad "offices and contracts" and when private interests had a direct financial stake in the outcome of elections.").

Incentives Relevant?

Public investment presents unique individual economic and political incentives that are particularly relevant to collective decision-making through democratic institutions. To begin the analysis, it is helpful to establish that most individuals (a term used here to include the family unit) behave in their self-interest most of the time.[12] In fact, principles of market-based free enterprise and private property rights reflect individual self-interest.[13] Free enterprise is based upon market participants behaving competitively, and in their own self-interest, to prosper.[14] For instance, individuals

12. JAMES M. BUCHANAN AND GORDON TULLOCK, 3 THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF A CONSTITUTIONAL DEMOCRACY 3.3.0, 3.3.2-3.3.4 (University of Michigan Press) (1962), http://www.econlib.org/library/Buchanan/buchCv3.html. Human wants and desires, of course, are heterogeneous and constantly changing such that it is impossible to characterize how individual self-interest will drive conduct in every instance or in situations subject to uncertain future circumstances. Frank Knight, *Ethics and Economic Interpretation*, 36 QUARTERLY J. ECON. 454, 458–463 (May, 1922). But cultural norms greatly affect human desires such that public policy can be developed with an understanding that people will often behave in accordance with cultural norms. Frank Knight, *Ethics of Competition*, 37 QUAR. J. ECON. 479, 480–84 (Aug., 1923) (hereinafter "Knight II"); *see* FRANK KNIGHT, RISK, UNCERTAINTY AND PROFIT 265 (1921) (reprint of Sentry Press 1964) (hereinafter "Knight III") ("The higher up the scale we go, the larger the proportion of the aesthetic element and of social suggestion there is involved in motivation, the greater becomes the uncertainty connected with foreseeing wants and satisfying them."), http://direct.mises.org/document/5150/Risk-Uncertainty-and-Profit. In modern society, for example, many individuals are driven towards excelling in the free enterprise system, often to accumulate wealth, consume goods or services, or attain social status. Knight III, at 360; Knight II, at 602–05.

13. BUCHANAN & TULLOCK *supra* note 12, at 3.20.20. Private property rights are based upon the principle that individuals will use their best judgment to address future uncertainties when they reap benefits individually rather than collectively. Knight III, *supra* note 12, at 351–61. To be sure, a system of private property rights and free enterprise is not perfect, but still better than any other. Knight III, *supra* note 12, at 374–75.

14. BUCHANAN & TULLOCK *supra* note 12, at 3.20.20; Knight III, *supra* note 12, at 358–60; Frank Easterbrook & Daniel Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165–74, 1176 (1981) ("The standard economic assumption since Adam Smith introduced the invisible hand has been that the firm's rational pursuit of its self-interest yields more gains for it than losses for its rivals.") It should be noted that, while beyond the scope of this article, recent years have renewed interest in the debate over the efficient capital markets hypothesis and shareholder wealth maximization as the primary goal for firms. *Compare* George Dent, *The Essential Unity of Shareholders and the Myth of Short-Termism,* 35 DEL. J. CORP. L. 97 (2010) *with* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (Berrett-Koehler Publishers 2012).

voluntarily enter into contracts because they expect to gain in some way.[15] Involuntary contracts, by contrast, are generally void.[16]

This self-interest principle may be properly extended from the market to the political context.[17] To be sure, individuals sometimes behave altruistically even when participating in a market economy.[18] Critics argue that politicians, in distinction to market participants, play a benevolent role in which they pledge to put the "public good" before their own self-interest.[19] Democratic politicians, however, simply cannot act completely independent of their self-interest.

To briefly digress, the public good is properly determined, at least in part, as a procedural matter.[20] That is, legislation properly enacted within constitutional limits, and judicially upheld as within those limits if necessary, determines the public good.[21] Critics who seek public good that is "found" must explain where it came from, either from a source external to ourselves or through procedure (i.e., a contract theory).[22]

To the extent that procedure determines the public good, whether in whole or in part, whether at the constitutional level or the

15. JAMES M. BUCHANAN & GEOFFREY BRENNAN, 10 THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 10.2.15-10.2.21. (Cambridge University Press) (1985), http://www.econlib.org/library/Buchanan/buchCv10.html.

16. Frank Easterbrook & Daniel Fischel, *Contractual Freedom In Corporate Law: Articles & Comments; The Corporate Contract*, 89 COLUM. L. REV. 1416, 1428 (1989) ("Contract is a term for voluntary and unanimous agreement among affected parties."), 1436 ("The argument that contracts are optimal applies only if the contracting parties bear the full costs of their decisions and reap all the gains.").

17. BUCHANAN & BRENNAN, *supra* note 15, at 10.3.16-10.3.18; BUCHANAN & TULLOCK, *supra* note 12, at 3.20.7-3.20.8. *But see* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process and Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 65–68 (1990) (refuting the analogy between individual self-interest in free markets and political self-interest in democratic institutions).

18. BUCHANAN & BRENNAN, *supra* note 15, at 10.3.16-10.3.18; BUCHANAN & TULLOCK, *supra* note 12, at 3.3.2-3.3.4.

19. BUCHANAN & BRENNAN, *supra* note 15, at 10.3.16-10.3.18.

20. BUCHANAN & TULLOCK, *supra* note 12, at 3.2.4; BUCHANAN & BRENNAN, *supra* note 15, at 10.3.16-10.3.18. For the purposes here, it need only be established that procedure plays at least some role in determining the "public good." I (the author) do not advocate either a completely contractarian or anti-contractarian constitutional position as that issue is beyond the scope of this writing. *See generally* BUCHANAN & BRENNAN, *supra* note 15, at Ch. 2 ("The Contractarian Vision") and Ch. 3 ("The Myth of Benevolence"). In addition to these positions, there may be a middle ground in which external influences have a constitutional effect and procedure (contract theory) is the driving force at the post-constitutional decision-making level. *Id.* at 10.2.6.

21. BUCHANAN & TULLOCK, *supra* note 12, at 3.1.6, 3.4.1-3.4.4.

22. BUCHANAN & BRENNAN, *supra* note 15, at 10.3.23.

post-constitutional decision-making level, politicians must act upon their internal dictates. Politicians in their collective capacity are the procedure that determines the public good such that any arguments that individual politicians independently determine and seek the public good presuppose that there is a public good completely external to the process.[23] These critics, then, underestimate the role of procedure in determining the public good. In other words, politicians cannot be completely benevolent because they cannot independently determine the actions or positions that benevolence supports.[24]

Identifying the democratic politician as self-interested is not intended to condemn politicians.[25] Rather, the purpose here is to establish that our democratic institutions are imperfect and that individual economic and political incentives are relevant to discourse about public finance. These incentives influence politicians and other decision makers, even if the extent of that influence is indeterminate and varying in scope from politician to politician and case to case.[26]

2. The Transaction's Individual Economic and Political Incentives

As is often the case with public investment in the private sector, individuals holding influence over the Transaction have economic and political incentives separate and apart from the general public.[27] To understand these incentives, it will be necessary first to provide historical context regarding CBJ.

23. *Id.* at 10.3.16-10.3.18; BUCHANAN & TULLOCK *supra* note 12, at 3.14.7 ("independent criterion for determining the appropriate allocation of resources between the public sector and the private sector does not exist").

24. BUCHANAN & BRENNAN, *supra* note 15, at 10.3.19.

25. BRENNAN & BUCHANAN, *supra* note 5, at 9.1.15-9.1.16 ("The logic of constitutional restrictions is embodied in the implicit prediction that any power assigned to government may be, over some ranges and on some occasions, exercised in ways that are at variance with the desired usage of such power, as defined by citizens behind the veil of ignorance.").

26. *See e.g.* JAMES BUCHANAN & RICHARD WAGNER, 8 THE COLLECTED WORKS OF JAMES M. BUCHANAN: DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES 8.4.34 (Academic Press Inc.) (1977), http://www.econlib.org/library/Buchanan/buchCv8.html. Although these incentives often involve conflicts of interest, in some instances these incentives can play a positive role. For example, campaign contributions to a candidate who advocates a particular position may assist constituents in communicating with their representatives.

27. *See* Gold, *supra* note 7, at 431.

a. John H. McConnell Brings Professional Hockey to Columbus

On or about November 1996, Columbus Hockey Limited ("CHL"), an Ohio LLC, applied for an NHL franchise on behalf of the City of Columbus.[28] CHL included several prominent local entrepreneurs including John H. McConnell, Lamar Hunt, John Wolfe and Ronald Pizzuti.[29] John Wolfe is the chairman, publisher and CEO of the Columbus Dispatch Printing Co. ("The Dispatch").[30] To obtain an NHL franchise, Columbus first needed to secure funding for a sports arena.[31] A May 1997 ballot proposal for a sales tax increase to fund a publicly owned arena for the hockey franchise failed, as did four previous ballot proposals for a sports arena.[32] Local leaders then turned to Nationwide Insurance Enterprise ("Nationwide"), a prominent insurance company with its world headquarters in Columbus, to privately finance a new sports arena.[33] However, following a series of negotiations, Nationwide and Hunt Sports Group, led by Lamar Hunt, could not reach an agreement on lease terms.[34]

Following initial negotiations, John H. McConnell assured the NHL that he would lease the arena and purchase the franchise even if Hunt and Nationwide could not reach an agreement on lease terms.[35] Sure enough, because Hunt believed that an NHL team would lose millions under the deal, he was unable to reach a lease agreement with Nationwide.[36] Led by John H. McConnell, CHL members including John Wolfe and Ronald Pizzuti then broke away from CHL

28. McConnell v. Hunt Sports, 132 Ohio App. 3d 657, 668 (1999). The NHL had previously indicated that it was seeking to expand. *Id.*

29. *Id.* at 667 ("The members of CHL were McConnell, Wolfe Enterprises, Inc., Hunt Sports Group, Pizzuti Sports Limited, and Buckeye Hockey, L.L.C"). Ameritech was also included in the group. *Id.* at 671. John Wolfe is the Chairman and CEO of The Columbus Dispatch Printing Co. John H. McConnell is the founder of Worthington Industries Inc., a prominent metal manufacturing company headquartered in Columbus, Ohio.

30. Jeff Bell, *Businessperson of the Year: John F. Wolfe, Dispatch Printing Co.*, COLUMBUS BUSINESS FIRST, Dec. 30, 2011, http://www.bizjournals.com/columbus/print-edition/2011/12/30/businessperson-of-the-year-john.html?page=all.

31. *McConnell*, 132 Ohio App. at 668.

32. *Id.*

33. *Id.*

34. *Id.* Hunt Sports Group owned Columbus' Major League Soccer franchise, the Columbus Crew. *Id.* at 667.

35. *Id.* at 668.

36. *Id.* ("Again, Hunt Sports Group indicated that the lease proposal was unacceptable and that the NHL team would lose millions with this proposal.").

and formed a new group to lease the arena and secure the franchise.[37] Other CHL members stated that they found the lease terms to be unacceptable and did not join McConnell's group.[38] Indeed, McConnell's group was able to reach a lease agreement and secure the NHL franchise that became CBJ.[39] The final barrier to an NHL franchise in Columbus, litigation between Hunt and McConnell's group, was decided in favor of McConnell's group.[40] To be sure, before Columbus even secured an NHL franchise, there were serious questions about the franchise's viability raised during the Hunt negotiations and through voter disapproval for a sports arena.

b. Professional Hockey, Casino Gambling and the Local Media

As early as 2008, John P. McConnell, CBJ majority owner and the son of John H. McConnell, suggested that CBJ might move away from Columbus due to the team's financial troubles.[41] In 2009, CBJ CEO Michael Priest stated that CBJ had lost $80 million over the prior seven years.[42] CBJ has since stated that it lost $25 million in

37. *Id.* at 669. McConnell's group breaking away from CHL led to the litigation regarding, among other issues, fiduciary duties in the CHL operating agreement.

38. *Id*. at 669–70. Ameritech and Buckeye Hockey, LLC were the other CHL members that agreed with Hunt. *Id.*

39. *Id.*

40. *Id.* at 703 ("In summary, appellant's [Hunt Sports Enterprises'] first, second, third, fourth, and fifth assignments of error are overruled.").

41. Aaron Portzline, *Heir's presence to be less apparent*, THE COLUMBUS DISPATCH, Aug. 24, 2008, http://www.dispatch.com/content/stories/sports/2008/08/24/jackets24.ART_ART_08-24-08_C1_DPB4D5V.html. John P. McConnell stated the following:

> I can tell them that we bought the team to have it here in Columbus. We're dedicated to keeping it in Columbus. But I can't offer guarantees. I am reasonably comfortable that we'll be here for a long time. Certainly, every fiber of what we try to do is to fulfill that original thought. My father worked on various sports commissions for probably 35 years to get a pro team for this town. It was one of his dreams.

Id.

42. Jeff Bell, *Blue Jackets waive white flag on sin tax bid for Nationwide Arena*, COLUMBUS BUSINESS FIRST, June 2, 2009, http://www.bizjournals.com/columbus/stories/2009/06/01/daily22.html?page=all; Stephen Buser, Emeritus Professor of Finance, The Ohio State University, *Report on the Blue Jackets*, at 9, Nov. 5 2009 ("financial statements prepared by the Blue Jackets indicate that financial losses based on standard accounting measures were in the range of $12.9 million to $16.6 million in 2006, $5.5 million to $9.9 million in 2007, $12 million to $16.5 million in 2008 and $12 million to $15 million in 2009"), on file with the author. Professor Buser is a proponent of the Arena Deal. Steph Greegor, *Oh, the irony, Casino dollars proposed to save the Arena district*

2010-11 alone.[43] In short order, Lamar Hunt's predictions about a Columbus NHL franchise losing millions under Nationwide's lease terms had unfortunately come to pass.[44] CBJ's initial attempt to obtain public financial support for the team was unsuccessful when a CBJ-led attempt to subsidize CBJ with a county sin tax for alcohol and tobacco sales failed in 2009.[45]

As CBJ was experiencing financial difficulties, Ohio was also considering a constitutional amendment to authorize casino gambling amid an economic downturn. During the public debate over the casino amendment, CBJ minority-owner, The Dispatch, strongly opposed the amendment in an editorial.[46] The Dispatch argued that the casino amendment was too lengthy and that a more appropriate amendment would delegate implementation to the Ohio General Assembly via its statutory authority.[47] Nonetheless, in November 2009, Ohio voters approved an Ohio constitutional amendment to authorize four casinos in Ohio.[48] The casino was unpopular, however, in Franklin County (where Columbus is located), with 58% of voters voting against the casino amendment.[49]

THE OTHER PAPER, Sept. 15, 2011 (quoting Stephen Buser: "They put together just a fantastic deal."), http://www.theotherpaper.com/news/article_bcd4a9be-dfb7-11e0-9c44-001cc4c002e0.html.

43. Joe Yerdon, *Report: Blue Jackets Lost $25 million last season; $80M over six years*, NBCSPORTS (May 11, 2011, 11:28 AM), http://prohockeytalk.nbcsports.com/2011/05/11/blue-jackets-report-they-lost-25-million-last-season-80-million-over-six-years/; Dave Ghose, *Saving the Blue Jackets*, COLUMBUS MONTHLY, Feb. 2012, http://www.columbusmonthly.com/February-2012/Saving-the-Blue-Jackets/; *see also* Caruso, *supra* note 2 ("The Blue Jackets have said they are losing $10 million to $12 million per year on their lease deal with Nationwide.").

44. *McConnell*, 132 Ohio App. at 668.

45. Bell, *supra* note 42.

46. In an editorial, The Dispatch argued that the casino amendment was too detailed and rigid, and that a better amendment would delegate implementation to the Ohio General Assembly. *Editorial: No on State Issue 3*, THE COLUMBUS DISPATCH, Oct. 12, 2009, http://www.dispatch.com/content/stories/editorials/2009/10/11/NOCAS.ART_ART_10-11-09_G4_O5FAO6D.html. A competing media outlet, *The Other Paper*, contended that The Dispatch disapproved of the casino amendment to protect its business interest in the Arena District.

47. *Id.*

48. OHIO CONST. art. XV §6(c); OHIO ISSUES REPORT: STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 3, 2009 GENERAL ELECTION (2009), http://www.sos.state.oh.us/sos/upload/publications/election/Issues_09.pdf.

49. *Franklin County Board of Elections, General Election: Franklin County, Ohio, Nov. 9, 2009*, FRANKLIN COUNTY BOARD OF ELECTIONS 1, 10 (2009), at 10, http://vote.franklincountyohio.gov/assets/pdf/2009/general/Official-Franklin-County-Only-Results.PDF.

Just three weeks following the November 2009 election in which Ohio voters approved casino gambling, Ohio legislators introduced a constitutional amendment to move the original site for the Columbus casino.[50] The amendment asked voters statewide whether the Columbus casino should be moved from the Arena District where CBJ plays to Columbus' near west side.[51] Significantly, The Dispatch owns 20% of the property in the Arena District.[52] Due to The Dispatch's business interest in the Arena District, the company set to construct and operate the Columbus casino, Penn National Gaming Inc., would later suggest that The Dispatch promoted the move to protect its business interest.[53] Similarly, competing media outlets identified The Dispatch's conflict of interest in reporting on a story in which it had business interests.[54]

50. *Franklin County Legislators Propose May 2010 Ballot Issue To Give Cities Casino Opt-Out*, GONGWER OHIO (Nov. 24, 2009), http://www.gongwer-oh.com.

51. *House Sends Casino Relocation Plan To Ballot, Rejects Cutbacks To Third Frontier*, GONGWER OHIO (Jan. 27, 2010), http://www.gongwer-oh.com.

52. A Dispatch affiliate, Capitol Square Ltd., an Ohio LLC, holds a 20% ownership stake in Columbus' Arena District. Benjamin J. Marrison, *Sinister? No. Errors? Sometimes*, THE COLUMBUS DISPATCH, July 26, 2011, http://www.dispatch.com/content/stories/insight/2011/04/24/sinister-no—errors-sometimes.html. Although Capital Square Ltd. is a privately held entity that need not disclose its property holdings, The Dispatch reports about Capitol Square's interest are presumably reliable because they may amount to an admission against interest in this context.

53. A Penn National subsidiary, CD Gaming Ventures LLC, identified this interest in a federal court filing. First Amended Complaint for Injunctive Relief, Damages and Declaratory Relief, CD Gaming Ventures LLC v. City of Columbus et al., No. 2:11-CV-216 (S.D. Ohio 2011) at 10.

> Shortly after passage of the Amendment, and notwithstanding the clear mandate of the citizens of Ohio, Columbus 'business interests,' including owners of land in the Arena District area such as The Dispatch Printing Company, which is controlled by the Wolfe family and owns The Columbus Dispatch newspaper and twenty percent of the Arena District development, notified Penn that they opposed the development of a casino on the Arena District Land and would do everything in their power to thwart development of a casino on the Arena District Land.

Id. Notwithstanding Penn National's assertion, a casino in the Arena District could conceivably benefit The Dispatch's interest in the Arena District with additional business activity.

54. Doug Caruso, *Suit asks court to force casino-site annexation*, THE COLUMBUS DISPATCH, Mar. 10, 2011, http://www.dispatch.com/content/stories/local/2011/03/10/suit-asks-court-to-force-casino-site-annexation.html.

Indeed, Columbus' major business interests, including The Dispatch, organized a group that led the public campaign to build voter support to move the casino.[55] In conjunction with The Dispatch-led public campaign, a Dispatch executive was publicly outspoken about endorsing the relocation amendment.[56] The Dispatch also endorsed the casino relocation amendment in an editorial.[57] Penn National even invested two million dollars to support the campaign for the relocation amendment, purportedly because it believed that the City of Columbus would compensate it

> It should be obvious at this point to any thinking person that The Dispatch has gone far beyond any definition of journalistic integrity and has simply decided that, instead of reporting the news, it intends to create its own news to reflect its owners' personal opinions,' said Bob Tenenbaum, a spokesman for Penn National.

Id.; Jeff Bell, *Pitch for Issue 2 ready to hit state airwaves*, COLUMBUS BUSINESS FIRST, Apr. 12, 2010 (quoting an Ohio lobbyist who identifies local business interests in moving the casino out of the Arena District or, alternatively, defeating casino gambling in Ohio altogether), http://www.bizjournals.com/columbus/stories/2010/04/12/story4.html?page=3; Steph Greegor, *All In: The Dispatch Co. filed a counterclaim demanding that Penn National annex its proposed casino into Columbus. Wasn't that the city's fight?*, THE OTHER PAPER, Mar. 24, 2011 ("Tompkins said it's also completely legit to 'editorialize' an opinion, which the Dispatch has done often throughout the casino process, rallying strongly against state Issue 3 that legalized casino gambling in 2009."), http://www.theotherpaper.com/news/article_fabebfd2-5626-11e0-9ef3-001cc4c002e0.html. *But see* Bell *supra* note 30. Penn National accused The Dispatch of promoting its "business and political agenda," but John Wolfe stated the following:

> It was not about Penn National or about gambling,' he said. 'It was an issue of maintaining an annexation policy that has benefited this city for decades . . . I can tell you our ownership in the Arena District had no bearing whatsoever on our editorial position or [our thinking] that the casino needed another location and needed to annex to Columbus.

Id.

55. Lyndsey Teter, *Who is Stand Up Columbus?*, THE OTHER PAPER, June 9, 2011 (noting that Dispatch executive Mike Curtain was a leading figure in the organized effort to pass the casino relocation amendment), http://www.theotherpaper.com/news/article_319ab240-56a4-5139-b5b3-ecd7bc43a171.html.

56. Jeff Bell, *Casino critic pleased with progress, so far*, COLUMBUS BUSINESS FIRST, Mar. 1, 2010, http://www.bizjournals.com/columbus/stories/2010/03/01/story7.html?surround=etf&ana=e_article.

57. Dispatch *endorsement: For State Issue 2*, THE COLUMBUS DISPATCH, May 28, 2010, http://www.dispatch.com/content/stories/editorials/2010/03/28/for-state-issue-2.html.

for relocation costs and environmental clean-up at the new casino site.[58]

Organized and influential opposition to the amendment never developed.[59] Proponents for the relocation amendment argued that the Arena District did not have the infrastructure to handle additional economic activity and that the move would assist economic development at the new site.[60] Some even viewed the move as an alternative to defeating casino gambling in Columbus after local voters had rejected the statewide ballot measure in 2009.[61] In a statewide vote in May 2010, Ohio voters overwhelmingly approved the constitutional amendment that moved the casino originally set for Columbus to an area just outside Columbus.[62]

Meanwhile, the Columbus Chamber of Commerce commissioned a study late in 2009 to determine CBJ's economic impact on the region. Contrary to unbiased academic studies during the 2004-05 NHL lockout finding that NHL teams have a minimal impact on city economies other than to shift the location of economic activity within NHL cities,[63] the Columbus Chamber report determined that

58. The Dispatch averred that it campaigned with Penn National for the casino relocation amendment, and Penn National has not publicly refuted this claim. Answer, Counterclaim and Cross-claim of Intervening Defendant the Dispatch Printing Company, Central Ohio Gaming Ventures LLC v. Goodman et al., Case No. 11CVH-2850 (Franklin County Court of Common Pleas 2011), at 8 ("The Dispatch entered into a 50/50 joint effort with Penn to contribute $4 million to support Issue 2.").

59. *See* Ohio Prosperity Project, *2010 Primary Election* (noting that there was no organized opposition to the 2010 casino relocation amendment), http://www.bipac.net/page.asp?content=2010_State_Ballot_Issues&g=OHIO.

60. Bell, *supra* note 56; *House Panel Advances Columbus Casino Relocation Plan*, GONGWER OHIO (Jan. 21, 2010), http://www.gongwer-oh.com.

61. Bell, *supra* note 56; *House Panel Advances Columbus Casino Relocation Plan*, GONGWER OHIO (Jan. 21, 2010), http://www.gongwer-oh.com.

62. *Proposed Constitutional Amendment to Change the Location of the Columbus Casino Facility Authorized by Previous Statewide Vote*, CLEVELAND-MARSHALL COLLEGE OF THE LAW (May 4, 2010), https://www.law.csuohio.edu/sites/default/files/lawlibrary/ohioconlaw/Issue2FinalLanguage_000.pdf.

63. Doug Caruso, *What economy does arena boost?*, THE COLUMBUS DISPATCH, Sept. 26, 2011 (citing economic reports), http://www.dispatch.com/content/stories/local/2011/09/26/whateconomydoesarenaboost.html. *See also* Dennis Coates & Brad Humphreys, *Do Economists Reach a Conclusion on Subsidies for Sports Franchises, Stadiums, and Mega-Events?* (Int'l Ass'n of Sports Economists, Working Paper Series, Paper No. 08-18, 2008).

> Abstract: This paper reviews the empirical literature assessing the effects of subsidies for professional sports franchises and facilities. The evidence reveals a great deal of consistency among economists doing research in this area. That evidence is that sports subsidies cannot be

Columbus would suffer a severe negative economic impact if CBJ relocated to another locality.[64] Shortly after the Chamber report was released, Columbus hired attorney John Rosenberger to reach "a deal" between CBJ, Nationwide and public officials, which would later become the Transaction for the public purchase of Nationwide

> justified on the grounds of local economic development, income growth or job creation, those arguments most frequently used by subsidy advocates.

Id.; *see also* Brent Bordson, *Public Sports Stadium Funding: Communities Being Held Hostage By Professional Sports Team Owners*, 21 HAMLINE L. REV. 505, 507 n. 20 (1998). Bordson cites the following authorities:

> *See* Jim McCartney, *Study: The Twins Can Go South and Economy Won't Follow: Report Claims Teams Have a Negative Effect on Local Income Levels*, ST. PAUL PIONEER PRESS, Oct. 26, 1997, at A1. Dennis Coates, the author of a recent unpublished study on the impact of sports teams on local economies, commented on the proposals considered by the Legislature to build a new stadium for the Minnesota Twins by saying, 'in general, you'd be better off to tell them to go to hell.' *Id.* Coates' study examined 37 metropolitan areas over the last 26 years, and concluded that sports teams' average annual cost was about $ 400 per person. *See id.* * * * The new Arizona baseball stadium for the Diamondbacks is expected to create 400 permanent jobs. *See id.* However, with the cost of the stadium estimated at $ 280 million, the actual cost per job created is $ 700,000. *See id.* In Cleveland, the cost per job created from the new basketball arena and baseball stadium was $ 231,000 for each of the new 1,250 jobs created, and a recent proposal to build a new $ 800 million baseball stadium for the New York Yankees would cost $ 1.82 million per job for each of the 440 permanent jobs that would be created. *See id.*

Id.

64. Buser, *supra* note 42, at 7.

> To appreciate the sensitivity of economic forecasts to the retention of the Blue Jackets, one need only consider the devastating, but fortunately temporary, effect on businesses in the Arena District during the period of suspended NHL games in late 2004 and early 2005. The Columbus Dispatch published a series of stories detailing the negative impact not only on businesses in the Arena District but also for businesses in adjacent areas and even some businesses in outlying areas. The impact was especially severe in the Arena District. As a result, a major owner of business property in the District, Nationwide Realty, was forced to reduce lease charges by a factor of 50% during the period of suspended NHL play.

Id. The Buser report accurately noted that it is unusual for an NHL team to play in a privately owned arena. *Id.* at 7-8.

Arena.[65] Once voters approved the casino amendment, casino tax revenue was slated for Columbus and Franklin County coffers, and City officials began contemplating casino tax revenue as a funding source to subsidize CBJ.[66]

But with the move outside the Columbus city limits, Columbus needed to annex at the new Columbus casino site in order to maximize its share of casino tax revenue under the Ohio Constitution.[67] In exchange for annexing the new casino site, Penn National expected Columbus to provide tax incentives to compensate it for the land it owned at the original casino site and other relocation costs.[68] When Columbus refused to compensate Penn National for the relocation costs, Penn National balked at annexing the casino site to Columbus.[69]

In response, Columbus accused Penn National of reneging on a promise to annex the land and proceeded to withhold water and sewer service to the casino site until annexation.[70] An Ohio state

65. *See* Charlie Boss, Robert Vitale & Tom Reed, *Jackets fans fight for hockey: Amid turmoil on the ice and behind the bench, the Jackets get support for lease modification*, THE COLUMBUS DISPATCH, Feb. 5, 2010 http://www.dispatch.com/content/stories/local/2010/02/05/Blue_Jackets.ART_ART_02-05-10_A1_9TGGN10.html. Mr. Rosenberger was paid $38,000 under his original contract. *Id.*

66. Proponents of the Transaction first publicly mentioned casino tax revenue as a funding source for subsidizing the Blue Jackets in July 2010. *See, e.g.,* Jeff Bell, *Can casino tax windfall save Blue Jackets?*, COLUMBUS BUSINESS FIRST, July 19, 2010, http://www.bizjournals.com/columbus/stories/2010/07/19/story2.html?page=all. The Hollywood Casino in Columbus opened to the public on October 8, 2012. Steve Wartenberg, *Casino era begins*, THE COLUMBUS DISPATCH, Oct. 9, 2012, http://www.dispatch.com/content/stories/local/2012/10/09/casino-era-begins.html.

67. OHIO CONST. art. XV, §6(C)(3)(c) ("Five percent of the tax on gross casino revenue shall be distributed to the host city where the casino facility that generated such gross casino revenue is located."); Doug Caruso, *Casino can't reach annexation deal by deadline*, THE COLUMBUS DISPATCH, July 20, 2011, (noting that Columbus would lose millions in casino tax revenue as well as income tax revenue from casino workers if the casino were not annexed to Columbus), http://www.dispatch.com/content/stories/local/2011/07/20/casino-cant-reach-deal-by-deadline.html.

68. *See* Dave Davis, *Columbus casino moves forward despite questions over water and sewer*, THE PLAIN DEALER, Apr. 25, 2011, ("[Penn National states] they've lost $30 million on the Arena District property, and that elected officials and business executives promised they'd help soften the financial blow caused by moving."), http://blog.cleveland.com/metro/2011/04/columbus_casino_moves_forward.html.

69. *Penn National sues Columbus as casino annexation fight escalates*, COLUMBUS BUSINESS FIRST, Mar. 11, 2011, http://www.bizjournals.com/columbus/news/2011/03/11/penn-national-sues-columbus-as-casino.html; Lyndsey Teter, *Wish them well*, THE OTHER PAPER, Dec. 2, 2010, http://www.theotherpaper.com/news/article_4570881c-2c9b-56b2-8cf0-4643dad4e4a2.html.

70. Columbus and Franklin County passed legislation denying sewer service to the casino site. City of Columbus Ordinance No. 1824-2010; County of Franklin Resolution

senator even suggested a constitutional amendment allowing Franklin County voters to opt out of the original casino amendment.[71] Penn National then accused Columbus of reneging on a promise to provide financial assistance and filed a lawsuit to compel Columbus and Franklin County to provide sewer and water service to the new casino site.[72] In a surprising twist, an affiliate of The Dispatch purchased a vacant lot adjacent to the casino site to provide legal standing to challenge Penn National's zoning application for the land and bring legal claims against Penn National regarding its sewage management.[73] In the suit, The Dispatch sought to force annexation

No. 0989-10; First Amended Complaint of CD Gaming Ventures LLC *supra* note 53, at 18-19. Columbus argued that it had a policy not to provide water and sewer service to property outside city limits without first requiring annexation, while Penn National sought to enforce a prior contract regarding sewer lines and also to drill water well(s) on the land. Elizabeth Gibson, *County signs off on city water deal: Casino related pact allows access-minus annexation*, THE COLUMBUS DISPATCH, Dec. 15, 2010 ("Columbus policy has been to require annexation into the city before extending water and sewer services to unincorporated pockets of the county."); *see also* Jeff Bell, *Penn National begins work on Columbus casino, sewer deal or no sewer deal*, COLUMBUS BUSINESS FIRST, Apr. 25, 2011, http://www.bizjournals.com/columbus/blog/2011/04/penn-national-begins-work-on-columbus.html.

71. James Nash, *Effort to move casino begins*, THE COLUMBUS DISPATCH, Dec. 10, 2009 (According to State Senator David Goodman, "The General Assembly could put a measure on the May 2010 ballot that would allow Franklin County to opt out of the voter-approved constitutional amendment allowing casinos in four cities."); *Committee Opens Hearings On Variety Of Casino Legislation*, GONGWER OHIO (Dec. 9, 2009), http://www.gongwer-oh.com.

72. First Amended Complaint of CD Gaming Ventures LLC *supra* note 53, at 12.

> The City asked CDG to submit to annexation of the Delphi Land so that the City could again lay claim to tens of millions of dollars a year from the 'host city tax' and other tax revenue associated with the operation of the casino in Columbus. CDG agreed to explore annexation of the property into the City based on the City's assurances that it would execute a development agreement with CDG that would include substantial financial incentives. Additionally, the City agreed to assist Penn by locating a buyer who would make an acceptable offer for the Arena District Land. These two promises by the City were intended to allow Penn to recapture its significant loss as a result of relocation.

Id. See also id., at 14 ("However, the City reneged on these promises."); *see also* Caruso *supra* note 67.

73. Jeff Bell, *Dispatch-Penn National fight raises ethics debate*, COLUMBUS BUSINESS FIRST, Apr. 28, 2011, http://www.bizjournals.com/columbus/blog/2011/04/dispatch-penn-national-conflict-gives.html?page=all; Steph Greegor, *Playground Bully*, THE OTHER PAPER, July 21, 2011, http://www.theotherpaper.com/news/article_816b9f68-719e-11e0-93d4-001cc4c03286.html.

and halt casino construction until the land was connected to sewer and water lines.[74]

While The Dispatch's business interest in the Arena District had been identified earlier,[75] scrutiny intensified during the public fight between The Dispatch and Penn National.[76] Competing media outlets, one of which The Dispatch acquired later in 2011, questioned whether it was ethical for The Dispatch to report on a matter where it's parent company had a pecuniary business interest, publicly protested its position and was a party to related litigation.[77] Moreover, as City officials were contemplating using tax revenue for CBJ during the annexation dispute,[78] The Dispatch, as CBJ equity holder, had an interest in annexing the casino site without tax incentives insomuch as that tax revenue was otherwise slated to subsidize CBJ.[79]

While a preliminary resolution was announced in July 2011, just two months before the Transaction was announced in September 2011, the litigation involving Columbus, CBJ, The Dispatch and Penn National was not finally resolved until November 2011.[80] Ultimately,

> Only a "Machiavellian," mind-the word Penn vice president Eric Schippers used in March to describe The Dispatch's actions, would think 10 steps ahead of its enemy to thwart future actions. Like, for example, knowing that Penn National would be applying for a zoning certificate from Franklin County come April, then knowing that only adjacent property owners could object to that zoning certificate application, and then, say, hunting down a property that met that specification and buying it under the auspice of a newly formed business entity-Strata 33 Investments-in March so that when Penn National filed that zoning application, they could file their objection just two days later.

Id.

74. First Amended Complaint of CD Gaming Ventures LLC, *supra* note 53, at 28–29. *See also* Caruso, *supra* note 54.

75. Bell, *supra* note 54 (quoting an Ohio lobbyist who identifies local business interests in moving the casino out of the Arena District or, alternatively, defeating casino gambling in Ohio altogether).

76. Bell, *supra* note 73; Marrison, *supra* note 52.

77. Bell, *supra* note 73; Greegor, *supra* note 73; Greegor, *supra* note 54.

78. Bell, *supra* note 66.

79. *See* Ghose, *supra* note 43 ("Though they weren't talking about it, city officials needed to end the annexation dispute to make progress in the Blue Jackets rescue plan.").

80. Doug Caruso, *Casino annexation Complete Tonight*, THE COLUMBUS DISPATCH, Nov. 7, 2011, http://www.dispatch.com/content/blogs/the-city/2011/11/casinoannexation.html. *See also Penn National Casino Dispute Ends; Nationwide buying Arena District*

the parties made the following concessions: Penn National agreed to annex the land; Columbus agreed to provide sewer and water service and make road and environmental improvements to the casino property; The Dispatch agreed to drop its litigation against Penn National; and Nationwide agreed to purchase the land in the Arena District at the original casino site.[81] With the new casino site successfully annexed to Columbus, Columbus received millions of dollars in additional casino tax revenue under the Ohio Constitution, which allowed the Transaction to proceed.[82]

In the latest development, as this article is going to print, the NHL is in the midst of a lockout and it is questionable whether and to what extent CBJ will play hockey during the 2012-13 NHL season.[83] The lockout also threatens to cancel the 2013 NHL All-Star game, which is scheduled to be played in Nationwide Arena.[84]

c. Parties Benefitting From the Transaction

Several parties standing to individually gain from the Transaction, including private parties who negotiated CBJ's original private lease, publicly sought to influence the current public Transaction as a matter of public interest through the Greater

Land, COLUMBUS BUSINESS FIRST, July 22, 2011, http://www.bizjournals.com/columbus/morning_call/2011/07/penn-national-moving-ahead-after.html.

81. COLUMBUS BUSINESS FIRST, *supra* note 80; Lyndsey Teter, *The Dispatch vs. the casino – still*, THE OTHER PAPER, July 21, 2011, http://www.theotherpaper.com/news/article_c4eb2100-92b4-11e0-b5a5-001cc4c03286.html.

82. Documents filed in federal court estimated the annual "host city" bonus casino tax revenue that Columbus would receive under OHIO CONST. art. XV §6(3)(c)(3) as $9.5 million, which is the same amount that officials estimated the Transaction would save CBJ annually. *Compare* First Amended Complaint of CD Gaming Ventures LLC *supra* note 53, at ¶28 (estimating that Columbus will receive $9.5 million annually as host city of the Columbus Casino if the casino site is annexed to Columbus) *with* Caruso *supra* note 2 (estimating that the Transaction will save CBJ $9.5 million annually). The Dispatch also moved to protect John Wolfe from discussing "financial matters regarding the Columbus Blue Jackets." Memorandum in Support of Motion for Non-Party John Wolfe for Protective Order, at 5. See discussion *infra* Part IV for a detailed discussion of the Transaction and related legal analysis.

83. Josh Jarman, *Franklin County taxpayers have little on the line in hockey lockout*, THE COLUMBUS DISPATCH, Sept. 19, 2012, http://www.dispatch.com/content/stories/local/2012/09/19/whats-the-impact.html; Jeff Bell, *NHL lockout to keep Nationwide Arena dark but public won't be burned*, COLUMBUS BUSINESS FIRST, Sept. 21, 2012, http://www.bizjournals.com/columbus/print-edition/2012/09/21/nhl-lockout-to-keep-nationwide-arena.html?page=all.

84. Jeff Bell, *Last Chance for NHL All-Star Game seen in latest labor talks*, COLUMBUS BUSINESS FIRST, Nov. 6, 2012, http://www.bizjournals.com/columbus/blog/2012/11/last-chance-for-nhl-all-star-game-seen.html.

Columbus Sports Commission ("GCSC").[85] The GCSC has a mission to attract sporting events to Columbus to benefit the city economically and socially.[86] While the Transaction's economic and social benefits are suspect,[87] the Transaction otherwise falls within the GCSC's interest to promote sporting events including CBJ's NHL games. To promote this interest, GCSC Executive Director Linda Logan testified before Columbus City Council in support of the Transaction.[88] Private sector influence on the Transaction, including influence from GCSC members, must be considered to determine whether the Transaction serves the public interest.

CBJ management and ownership are heavily represented on the GCSC Board of Commissioners Executive Committee, including CBJ CEO Michael Priest, equity holder Ronald Pizzuti,[89] and Butch Moore representing The Dispatch, another equity holder. As the Transaction is designed to subsidize CBJ's large losses in recent years to maintain CBJ in Columbus,[90] these CBJ equity holders have an economic interest in the Transaction separate from any public benefits that may accrue to the general public.

Additional conflicts of interest with The Dispatch are worth noting because they further identify nonpublic benefits and call into question the veracity of print media reports. As a 10% owner of Nationwide Arena, The Dispatch received millions of dollars under the Transaction.[91] In addition, The Dispatch has an interest in subsidizing CBJ to provide material for its sports page. These pecuniary interests in the approval of the Transaction and CBJ's

85. *About GCSC*, Greater Columbus Sports Commission, http://www.columbussports.org/about/index.cfm. GCSC Board of Commissioners Executive Committee members Brian Ellis and Ron Pizzuti negotiated CBJ's original lease. *McConnell v. Hunt Sport Enterprises Inc.*, 132 Ohio App. 3d 657, 667–70 (1999) (identifying Ronald Pizzuti as part of the CBJ ownership group that, among other things, negotiated the original Arena lease with Nationwide executive Brian Ellis). The GCSC, through Executive Director Linda Logan, publicly testified before Columbus City Council on the Transaction. Caruso, *supra* note 3.

86. *See* text and accompanying notes, *supra* note 85 ("Greater Columbus Sports Commission: About GCSC.").

87. See discussion *infra* Pt. III.

88. Caruso, *supra* note 3.

89. *McConnell*, 132 Ohio App. 3d at 667–70.

90. *See* discussion *infra* Pt. III.

91. Jeff Bell, *State chips in $10M for Columbus arena buyout*, COLUMBUS BUSINESSFIRST, Oct. 31, 2011, http://www.bizjournals.com/columbus/blog/2011/10/state-chips-in-its-10m-loan-for.html. The Dispatch has an equity interest in CBJ and, prior to the Transaction, also had an ownership interest in the Arena.

involvement in the casino annexation dispute create at least the appearance of a conflict of interest. Furthermore, The Dispatch's recent acquisition of other media outlets gives it considerable control over Central Ohio print media.[92] As a result, the print media may not be a reliable check on porous disclosure from government officials.

In a similar vein to CBJ's current ownership, GCSC Board of Commissioners Executive Committee Chairman Brian Ellis, President and Chief Operating Officer of Nationwide, stands to privately gain from the Transaction. Prior to the Transaction, Nationwide leased Nationwide Arena to CBJ, but CBJ had not paid their rent in four years.[93] As a result of the Transaction, Nationwide transferred its interest in the Arena to the public sector and took on an ownership interest in CBJ, which is subsidized with a below-market use agreement for the Arena. Thus, Nationwide has a pecuniary interest separate from the any public benefits that arise from the Transaction. At least one commentator, however, argues that Nationwide's role in the Transaction arises from a motive for social responsibility rather than pecuniary gain.[94]

Perhaps the most prominent figure is Gene Smith, Athletic Director at The Ohio State University, who represents Ohio State on the GCSC Board of Commissioners Executive Committee. The Transaction is designed, in part, to limit competition between Ohio State's Jerome Schottenstein Center and Nationwide Arena to drive down costs for non-hockey and non-Ohio State events, including shows and acts.[95] As part of this arrangement, Ohio State has a large

92. Dan Eaton, *Dispatch buys Columbus Monthly, Other Paper*, COLUMBUS BUSINESSFIRST, Sept. 27, 2011, http://www.bizjournals.com/columbus/news/2011/09/27/dispatch-buys-columbus-monthly-other.html. It should be noted that Columbus Business First also regularly reports on the Transaction.

93. Mandie Trimble, *Arena Deal Falls Short of Solving Blue Jackets Fiscal Woes*, WOSU (Oct. 26, 2011), http://beta.wosu.org/news/2011/10/26/arena-deal-falls-short-of-solving-blue-jackets-financial-woes/. (citing an email from Nationwide President Brian Ellis); Mandie Trimble, *Franklin County Commissioners Approve Arena Deal*, WOSU (Dec. 20, 2011), available at http://beta.wosu.org/news/2011/12/20/franklin-county-commissioners-approve-arena-deal/.

94. Mark Williams, *Team-ownership deal unusual*, THE COLUMBUS DISPATCH, Sept. 15, 2011, http://www.dispatch.com/content/stories/business/2011/09/15/team-ownership-deal-unusual.html.

95. Josh Jarman, *Private manager for Nationwide Arena was formed to cover costs*, THE COLUMBUS DISPATCH (June 19, 2012), http://www.dispatch.com/content/stories/local/2012/06/19/private-arena-manager-formed-to-cover-costs.html; Encarnacion Pyle, *OSU keeps arena deal a secret*, THE COLUMBUS DISPATCH, May 30, 2012, http://www.dispatch.com/content/stories/local/2010/05/30/osu-keeps-arena-deal-a-secret.html ("Ohio State University says it doesn't matter financially where a performer lands—

role in managing Nationwide Arena following the Transaction, but the financial details have not been fully disclosed.[96] The Dispatch's public records requests for these details have been denied, purportedly justified by the trade-secret exception to public disclosure.[97] At a minimum, Ohio State, a public institution, has a role in the Transaction that raises transparency concerns. But the uncertainty regarding Ohio State's financial role in the Transaction also raises substantive concerns about public finances.

In addition, political benefits are likely to accrue to politicians as a result of the Transaction. GCSC Board of Commissioners Executive Committee Member Rhett Ricart, representing the FCCFA, stands to increase the FCCFA's prominence and facilitate political benefits for politicians. That is, the Transaction increases the FCCFA's importance to the political power structure in Columbus, Ohio. By furthering interventionist economic development policies with the Transaction, the FCCFA can expect to play a greater role in future government decisions in Columbus and Franklin County. Also, FCCFA members curry favor with politicians including Mayor Michael Coleman, Columbus City Council members and the Franklin County Commissioners. Politicians supporting the Transaction, including Mayor Coleman, are able to claim that they are "doing something to create or protect jobs" during the current economic

at Nationwide Arena or the Schottenstein Center—because the two venues will co-promote most events and share some of the profits."). OSU representative Xen Riggs will manage the Arena following the Transaction.

96. An OSU representative and other OSU employees will manage Nationwide Arena under the Transaction, but OSU will not receive a management fee and the revenue sharing agreement for non-hockey events has not been disclosed. Arena Sub-Management Agreement*:* Columbus Arena Management LLC and The Ohio State University, Section 5.2 (providing for no management fee to OSU); Appendix C, Arena Sub-Management Agreement*:* Non Hockey Event Scheduling and Revenue Distribution Procedures (redacting some information). *See* discussion *infra* notes 214-16. Separately, there are transparency issues surrounding Columbus Arena Management LLC. *See, e.g.,* Lucas Sullivan, *Nationwide Arena: Control handed to private board*, THE COLUMBUS DISPATCH, May 20, 2012, http://www.dispatch.com/content/stories/local/2012/05/20/control-handed-to-private-board.html; Lucas Sullivan, *O'Brien: Arena dealings must be public*, THE COLUMBUS DISPATCH, May 22, 2012, http://www.dispatch.com/content/stories/local/2012/05/22/obrien-arena-dealings-must-be-public.html; Josh Jarman, *Arena official wants private operating board to be transparent*, THE COLUMBUS DISPATCH, June 4, 2012, http://www.dispatch.com/content/stories/local/2012/06/04/arena-meet.html; Lucas Sullivan, *Tiff on secret meetings slows down Nationwide Arena board*, THE COLUMBUS DISPATCH, Oct. 13, 2012, http://www.dispatch.com/content/stories/local/2012/10/13/tiff-on-secret-meetings-slows-down-arena-board.html.

97. Pyle, *supra* note 95.

crisis, which is an assertion that will be critically challenged in Part III.

Finally, lawyers and lobbyists involved with the Transaction benefit from fees that the Transaction generates. These service-providers make the Transaction possible: lawyers write and negotiate the Transaction's terms and lobbyists put interested parties in contact with one another. For the Transaction, law firms Peck, Shaffer and Williams LLP served as bond counsel and Dinsmore & Shohl, LLP represented the FCCFA as general counsel.[98] Put simply, lawyer and lobbyist interest in generating fees are a private benefit that generate additional support for the Transaction separate from incentives driven by public benefits. The analysis that follows will examine to what extent these private incentives influenced the public purchase of Nationwide Arena.

B. Procedural Checks on the Transaction's Incentives and Other Transparency Issues

Against this background, procedure is extremely important to determine the public good because procedure is not based upon a particular end-state or the effects upon individuals. Our democratic institutions are designed with procedural safeguards to combat the individual economic and political incentives that might otherwise distort the public good toward a particular end-state. In this way, upholding the integrity of our procedural rules is imperative to maintain our democratic institutions as legitimate and combat the self-interested economic and political incentives decision-makers face. This section will discuss the Transaction's procedural deficiencies, in effect casting doubt on the procedural checks on the Transaction's decision-makers' individual economic and political incentives.

1. Violating the Ohio Constitution

First and foremost, procedural checks on the Transaction are highly questionable because the Transaction is illegal, as will be explained in Part IV. A constitutional amendment to the Ohio

98. Attorneys representing public bodies that are parties to the Transaction each approved only a portion of the Transaction, even though all documents must be read together to understand the Transaction. Peck Shaffer & Williams LLP Letter Dated March 28, 2012; Dinsmore & Shohl LLP Letter Dated March 28, 2012; Ron O'Brien, Franklin County Prosecutor, Letter Dated March 28, 2012; Richard C. Pfeiffer, Jr., Columbus City Attorney, Letter Dated March 28, 2012. *See also* text and accompanying notes *infra* note 221.

Constitution is necessary to authorize the Transaction. If the Transaction is to be financed with casino tax revenue, existing Ohio Constitutional provisions authorizing certain debt issuances do not serve as legitimate authority.[99] As there was little public discourse after I informed public decision-makers about serious legal and public policy issues, it seems as though public officials did not take the Ohio Constitution and related policy issues seriously.

In fact, there is little doubt that the Transaction attempts to circumvent these checks on publicly financed projects. Voters rejected ballot initiatives for increased taxes to fund a new sports arena on five separate occasions.[100] Clever-by-half financing, rather than a meaningful distinction between new taxes and revenue debt, provides the purported authority for Columbus, the FCCFA and the Franklin County Commissioners to now approve the deal. [101]

2. Special Issues with Transparency in Public Debt

The Transaction is not transparent insofar as there is a public illusion regarding public debt issued to finance the Transaction. Public debt is inherently suspect because it burdens future taxpayers, who are not able to represent their interests during negotiations, with investment risk and interest expense.[102] While issuing public debt for

99. *See* discussion *infra* Pt. IV. (citing OHIO CONST. art. VIII §13).

100. *Key dates in the Nationwide Arena Deal*, THE COLUMBUS DISPATCH, Sept. 15, 2011, http://www.dispatch.com/content/stories/local/2011/09/15/arena-deal-timeline-art-g20e57tm-1.html. (Voters previously rejected tax issues for arenas and stadiums in 1978 (65 percent), 1981 (79 percent), 1986 (53 percent) and 1987 (56 percent)). Although media outlets and public officials agree that voters rejected tax hikes for a sports arena on five occasions, the Franklin County Board of Elections website provided elections results for only three such elections. *See* Franklin County Board of Elections, *Abstract of the Votes Cast at the General Election Held on Tuesday, November 3rd, 1981, in Franklin County, Ohio*, at 31, http://vote.franklincountyohio.gov/assets/pdf/1981/general/Official-Results-General-Election-November-3-1981.pdf; Franklin County Board of Elections, *Abstract of the Votes Cast at the General Election Held on Tuesday, November 3rd, 1987, in Franklin County, Ohio,* at 5, http://vote.franklincountyohio.gov/assets/pdf/1987/general/Official-resuls-General-Election-November-3-1987.pdf; Franklin County Board of Elections, *Official Results: Primary Election of May 6, 1997 in Franklin County, Ohio*, http://vote.franklincountyohio.gov/assets/pdf/1997/primary/Official-Results-Primary-Election-May-6-1997.pdf.

101. OHIO REV. CODE ANN. § 5739.021 (West 2005) (explaining the process for a county to submit a sales tax proposal to electors).

102. *See* discussion *infra* Pt. III(A). *See also* Edward Zelinsky, *Panel 2: Community Efforts to Attract and Retain Corporations: Legal and Policy Implications of State and Local Tax Incentives and Eminent Domain: Tax Incentives for Economic Development: Personal (and Pessimistic) Reflections*, 58 CASE W. RES. L. REV. 1145, 1149 (2008); Peter Enrich, *Saving the States from Themselves: Commerce Clause Constraints on the State Tax*

capital investment can benefit future generations, in fact benefits are often not conferred upon future generations.[103] Public borrowers can secure lending from creditors without conferring benefits on future generations, in part, because future generations often do not have meaningful exit options to avoid prior period debt. Exit options are limited due to strong familial and societal ties to a particular jurisdiction that likely outweigh public debt concerns when making locational decisions.[104] Ultimately, some regard public debt as permanent because future generations are reluctant to raise taxes or otherwise raise funds to retire public debt for prior consumption.[105]

Moreover, there is a public illusion in which current period beneficiaries of public goods and services funded with debt perceive such goods and services to be cheaper than they really are due to deferred costs (i.e., future taxes).[106] While public benefits are enjoyed currently, many costs (i.e., taxes, special assessments and user fees) are deferred to later periods. Critics argue that current period beneficiaries and taxpayers are able to internalize or discount future period costs to defray this illusion—what is sometimes known as Ricardian Equivalence.[107]

However, individuals tend to discount future benefits and costs too heavily for public projects such that Ricardian Equivalence is problematic even if it is assumed that taxpayers do attempt to take a long-term perspective. Individuals do not live eternally nor know how long they will live and therefore cannot discount capital projects that exceed these time restraints.[108] Further, individuals may not take future costs into account because there is no personal liability for

Incentives for Business, 110 HARV. L. REV. 377, 393 (1996); Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs*, 32 URB. LAW 97, 104 n.26 (2002).

103. Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. 1965, 1972 (2011). *See also* Zelinsky, *supra* note 102, at 1150; Peter Enrich, *Business Tax Incentives: A Status Report*, 34 URB. LAW. 415, 422 (2002).

104. Viktor Vanberg & James Buchanan, *Organization Theory and Fiscal Economics*, 14 THE COLLECTED WORKS OF JAMES M. BUCHANAN: DEBT AND TAXES 440–41.

105. James Buchanan, *Public Debt and Capital Formation*, 14 THE COLLECTED WORKS OF JAMES M. BUCHANAN: DEBT AND TAXES 377. The perspective that public debt is permanent may be troublesome because a major difficulty with social continuity is passing capital on to future generations, and in as "fair" a manner as possible, however society defines "fair." *See* Knight III, *supra* note 12, at 374–75.

106. JAMES M. BUCHANAN, PUBLIC FINANCE IN DEMOCRATIC PROCESS 15, 23, 138–39 (1967).

107. JAMES M. BUCHANAN, 2 THE COLLECTED WORKS OF JAMES M. BUCHANAN: PUBLIC PRINCIPLES OF PUBLIC DEBT: A DEFENSE AND RESTATEMENT 2.8.21-2.8.31 (1958), http://www.econlib.org/library/Buchanan/buchCv2.html.

108. *Id.* at 2.8.24, 2.8.30, 2.12.24.

public debt.[109] Admittedly, individuals may act in their self-interest perpetually to benefit the family interest and posterity.

Nonetheless, rational individuals partaking in the collective decision-making process are unlikely to properly discount future benefits and debt burdens for other reasons.[110] First, unless a tax is levied for a particular public good or service, taxpayers have great difficulty identifying the portion of their tax bill attributable to a particular good or service.[111] Taxpayers, then, have difficulty even identifying their individual burden to partake in the present value analysis in the first place. Second, individuals will discount too heavily future costs and benefits in the present value analysis because many public goods are specialized goods and services without a liquid market.[112] Without a liquid market, future benefits are limited because it is difficult to convert the asset to income or borrow against the asset to maximize value.[113] Furthermore, the absence of a liquid market makes it more difficult for individuals to assess value. Third, citizens who do not pay taxes under our progressive taxing system will not internalize future costs because they do not expect to pay future taxes.[114] As a result of the foregoing, public debt creates a fiscal illusion because both costs and benefits associated with debt-funded projects are difficult to assess. The burdens that public debt inflicts on future generations, including investment risk and interest expense, will be explained in Part III *infra*.

3. Transparency in Public Statements About the Transaction

Facts and circumstances specific to the Transaction raise further questions regarding procedural integrity and the influence of individual economic and political incentives. As noted above, Franklin County voters rejected tax increases to fund a new sports arena on five separate occasions.[115] Voter approval was not sought for the Transaction and financing with debt rather than a new tax is not a meaningful policy distinction because it still obligates future taxpayers until 2039. Columbus Auditor Hugh Dorrian has publicly touted the Transaction as distinct from the voter rejected proposals

109. BUCHANAN & WAGNER, *supra* note 26, at 8.3.24.

110. BUCHANAN, *supra* note 107, at 2.12.30.

111. BUCHANAN, *supra* note 106, at 26.

112. BUCHANAN, *supra* note 107, at 2.12.26.

113. *Id.* at 2.12.27.

114. *Id.* at 2.8.25, 2.12.27-2.12.28.

115. See text and accompanying notes *supra* note 100. *See also* Caruso, *supra* note 2.

for a sports arena on the basis that it does not "increase taxes."[116] Less than a year after approving the Transaction, however, the City passed a new individual income tax on casino gambling winnings, and income derived from other games of chance, including longstanding church raffles and the state-run lottery.[117] The new tax does not directly provide revenue for CBJ and the incidence of the tax is on individuals rather than casinos, but the new tax may be considered a related tax increase because the Transaction disposes of casino tax revenue and the new tax raises revenue related to casino gambling.

Auditor Dorrian also stated to Columbus City Council that there is no commitment to repay the revenue debt funding the Transaction if casino revenues do not materialize.[118] Government entities do not have a legal obligation to repay the bonds issued as part of the Transaction if casino tax revenue does not materialize.[119] However, identifying Nationwide as carrying the risk of loss is dubious. Columbus and Franklin County have a *guaranteed* loss because the Transaction is a below-market transaction that is designed to subsidize CBJ. Moreover, even absent a legal obligation to repay the bonds if casino tax revenue does not materialize, Columbus and Franklin County are likely to repay the bonds to preserve their credit ratings[120] and maintain their relationship with Nationwide.[121]

116. Caruso, *supra* note 2. ("Dorrian pointed out yesterday that voters had turned down arena taxes five times in the past 30 years. But, he said, 'there's a fundamental difference between those attempts and this attempt: Those called for an increase in taxes.'").

117. City of Columbus Ordinance 1769-2012, http://columbus.legistar.com/LegislationDetail.aspx?ID=1159729&GUID=8A5AA583-F704-42B6-9CD3-8B371AA8D0F7#.UB7gXeM2g4s.email. *See also* Lucas Sullivan, *Ohio casino cities tax your winnings*, THE COLUMBUS DISPATCH, Aug. 5, 2012, http://www.dispatch.com/content/stories/local/2012/08/05/ohio-casino-cities-tax-your-winnings.html; Lucas Sullivan, *City to tax casino jackpots*, THE COLUMBUS DISPATCH, July 31, 2012, http://www.dispatch.com/content/stories/local/2012/07/31/city-to-tax-jackpots.html.

118. Caruso, *supra* note 3 ("'If the casino revenue goes away, what is the city's commitment to this going forward?' Ginther asked Dorrian after Downing's comments. 'None,' Dorrian replied.").

119. *Id.* (statements of Auditor Hugh Dorrian and Attorney John Rosenberg). For the Transaction, as payments to bondholders (i.e., Nationwide) are pegged to casino tax revenue, bondholders will not be repaid if there is no casino tax revenue. *See* discussion and citing documents *infra* Part IV(B)(1).

120. State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 52, 197 N.E.2d 328, 333 (1964).

> The sale of revenue bonds of the state to raise money necessarily involves a borrowing of money even though no indebtedness of the state results. If the bonds are not paid, the borrowing power of the

Defaulting on bonds, even revenue bonds, has potential for an adverse effect on Columbus' credit rating, which will increase interest rates on future debt issuances.[122]

The Transaction also demonstrates creditor influence to renegotiate transactions. As reported by Columbus City Officials, including Mayor Michael Coleman's Office, CBJ "creditors" influenced Columbus City Council and the FCCFA to prematurely vote on the Transaction.[123] City officials did not disclose the identity of these creditors when they stated that creditors rushed the Transaction's approval, but at least one report has since identified the creditors as local and national banks.[124]

Creditor influence casts doubt on Auditor Dorrian's statement that Nationwide carries risk of loss if casino tax revenue does not materialize. In recognizing that Columbus City Council and the FCCFA prematurely approved the Transaction to appease creditors, Mayor Coleman recognizes the very same extra-legal market forces (i.e., creditors) that have been dismissed in other contexts. Expressly, City of Columbus officials are arguing on the one hand that market forces do not create a commitment to repay, while arguing on the other hand that the same market forces compelled the Transaction's premature approval. The statements are not reconcilable here as consistent with one another: either creditors influence financial decisions or they do not.

Moreover, a Columbus School Board member stated that he did not expect future property tax revenues from the Nationwide Arena parcel because he expected, as in fact occurred, Nationwide to

> state will as a result be adversely affected, even though the bonds do not represent a debt of the state.

Id. *See also* Oesterle *supra* note 9, at 613–14 (stating that "the financial concept of debt does not depend on the revenue source for the debt payment," but rather reflects the obligation to repay a fixed sum certain).

121. Jeff Bell, *Deal will leave little for Columbus schools*, COLUMBUS BUSINESSFIRST, Sept. 30, 2011, at 38.

122. *Brand*, 176 Ohio St. at 52. *See also* Oesterle, *supra* note 9, at 613–14.

123. Lucas Sullivan & Doug Caruso, *Jackets' creditors sped city's arena-deal vote*, THE COLUMBUS DISPATCH, Nov. 20, 2011, http://www.bluejacketsxtra.com/content/stories/2011/11/20/1120-jackets-creditors-spurred-arena-deal.html.

124. Alex Fischer, the President of Columbus Partnership, a group of local leaders that is designed to "improve the economic vitality of the Columbus region," stated that the creditors were a group of local and national banks deciding whether to extend a line of credit to CBJ. Ghose, *supra* note 43. It should be noted that CBJ has not paid rent to Nationwide Realty, a creditor, in four years. Trimble, *supra* note 93.

renegotiate the existing property tax abatement for a longer term.[125] Therefore, the presence of a revenue stream (i.e., casino money) to service debt does not meaningfully distinguish debt from levying a new tax in this context because the public will likely pay for the Arena even absent that revenue stream. And as noted above, debt financing is a less transparent use of public funds.[126]

Separately, the Transaction is not transparent because it distorts prior voter approval for gambling in Ohio. Voters approved a lengthy amendment to the Ohio Constitution authorizing casino gambling under the impression that such funds would be directed substantially to public school districts.[127] While this holds true, the Transaction now allocates substantial gambling revenue to subsidize professional hockey, which is far removed from educational purposes. To the extent that the Transaction is designed to promote economic development, it does not fit the casino amendment's billing as promoting job development through workforce training.[128]

In sum, Part II identified the need for nonelectoral constitutional fiscal restraints to limit the influence of individual economic and political incentives as they relate to the Transaction. To address these concerns with self-interest and public investment, the Ohio Constitution provides provisions to limit government powers to issue public debt and invest public resources in the private sector. Following poor early 19th Century public investments in Ohio railroads, canals and turnpikes, Ohio's constitutional restrictions on lending government aid or credit were adopted to greatly limit public investment in private enterprise.[129] Part IV will examine these provisions, their policy rationale and their effectiveness as they relate to the Transaction, but first it is necessary to discuss economic development policy, as will be done in Part III.

III. Economic Development: Public Policy and Return on Investment

Policy rationale regarding public finances is important to explain why constitutional fiscal restraints should be respected and enforced.

125. Bell, *supra* note 121.

126. Clayton Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1247 (2009).

127. OHIO CONST. art XV, § 6(C).

128. *Id.*

129. OHIO CONST. art. VIII, §§ 4, 6. *See also* Gold, *supra* note 7, at 411–12.

Otherwise, public financing schemes may be justified with reference to similar ill-conceived projects in other jurisdictions and critics may dismiss complicated constitutional violations as formalistic bickering amongst lawyers.[130] To further the discourse regarding public finance in Ohio, this section discusses: (1) general principles of public debt and public spending; (2) Keynesian economics; and (3) applying these principles to the Transaction.

A. Principles of Public Debt

Classical principles of public debt differ greatly from the intellectual basis, if any, upon which the Transaction is founded. Classical principles authorize public debt issuance merely to facilitate voluntary wealth transfer from the private sector to the public sector.[131] Taxation, on the other hand, transfers private wealth to the public sector coercively.

The Transaction goes beyond the classical transfer function because proponents argue that the Transaction will facilitate economic prosperity in Columbus' Arena District. That is, the debt issuance does not merely transfer funds to the public sector to provide for public goods or services, but goes further to invest the debt proceeds in order to realize or earn public benefits.[132] In seeking a public return on investment, public officials burden future generations with the risk of loss regarding the underlying investment and interest payments on the debt principal.[133]

Some critics argue that public debt does not burden the private sector because it is not coercive and "we owe it to ourselves."[134] However, these critics may overlook the effect that public debt has on crowding out private sector investment.[135] To justify burdening future generations with investment risk and interest payments, public officials should not compare public investment returns with only the future interest burden. In addition, they must establish that the

130. *See, e.g.*, Sullivan & Caruso, *supra* note 123 ("Josh Cox, chief counsel in the city attorney's office, said the delay in producing the final draft can be summed up in one word: 'Lawyers.'").

131. BUCHANAN, *supra* note 107, at 2.8.6, 2.8.16.

132. *Id.*

133. *Id.* at 2.8.27

134. *Id.* at 2.6.2-2.6.3. Note that this analysis is not materially altered whether there is internal or external debt. *Id.* at 2.6.16.

135. *Id.* at 2.4.13-2.4.18.

public return on investment exceeds the return on investment that would otherwise be realized in the private sector.[136]

Here, because the Transaction is grounded in economic development policy, which places emphasis on return on investment, proponents must establish that the Transaction will realize a greater return than would otherwise be realized in the private sector. Astoundingly, Transaction proponents have not even calculated a return on investment, much less established that the return on investment is positive, compared that return to comparable displaced private sector investment, or disclosed their methodology.[137] One explanation is that there is simply no intellectual basis for the Transaction, which is especially plausible because Transaction proponents have provided confusing explanations in response to media inquiries regarding the 2012 NHL lockout and the Transaction.[138]

B. Keynesian Economics and Calculating Public Return on Investment

To calculate return on investment in the public sector, public debt proponents traditionally rely on Keynesian economic theory, which warrants an explanation. Keynesians first identify a trade-off between inflation and unemployment, or what is known as the Philips' Curve.[139] So the reasoning goes, expansionary fiscal and/or monetary policies (accompanied with inflation) will increase aggregate demand, which will cause unemployment rates to fall.[140] Once there is "full employment," there will be a "full employment

136. *See id.* at Chapter 12 (discussing Ricardian Equivalence, explained in Pt. 2 *supra*, and individuals' ability to discount future costs and benefits associated with public projects, which analysis necessarily incorporates return on investment).

137. Following diligent research of available information and both oral and written inquiries to public officials and Transaction proponents, I am not aware that any Transaction proponents have explained whether the Transaction has a positive return on investment. Specifically, I have publicly requested information regarding return on investment during testimony before the Columbus City Council and Franklin County Convention Facilities Authority, as well as written inquiry to the Franklin County Commissioners.

138. For instance, "City Auditor Hugh Dorrian said the loss of tax revenue from the last season-long lockout did not significantly affect the city's income-tax collections." Jarman, *supra* note 83. But if the Blue Jackets do not have an impact on income tax revenue due to a Keynesian multiplier, the Transaction is not likely to create jobs and, further, the Transaction is even less likely to have a positive return on investment.

139. BUCHANAN & WAGNER, *supra* note 26, at 8.11.13. *See also* Milton Friedman, *Nobel Lecture: Inflation and Unemployment*, 85 J. POL. ECON. 451, 459–471 (June 1977) (noting that higher inflation is often accompanied by higher, not lower, unemployment).

140. BUCHANAN & WAGNER, *supra* note 26, at 8.11.8-8.11.16.

surplus" available to pay off the debts accrued during prior periods.[141] In sum, Keynesians will balance the budget over the business cycle rather than annually.[142]

Keynesian reasoning is suspect, however, because political incentives in democratic institutions affect collective decision-making in ways that would not be present if a benevolent despot implemented these policies.[143] Public debt may be regarded as permanent because current generations will be reluctant to retire debt incurred for prior period consumption or poor capital investment.[144] Further, Keynesians have difficulty defining "full employment" and the "business cycle" because they must first identify structural unemployment.[145] Structural unemployment is present not because there are liquidity concerns and a lack of capital to implement good projects, but rather because there is a lack of good projects, natural resources, workers with skills that match the skills employers seek, or skilled workers located where employers are located. At least to the extent that there is structural unemployment, expansionary policies to increase aggregate demand will only lower unemployment in the short term.[146] In the long run, if expansionary policies are implemented during full employment (perhaps due to political incentives to deficit spend or unidentified high structural unemployment), these policies will result in draining public capital from future generations and realize no lasting public benefit.[147]

Even if there were a benevolent despot to implement these policies or if collective decision-making were somehow not influenced by individual self-interests, Keynesian economics requires that public officials identify a public benefit as stimulus ripples through the economy to increase aggregate demand with a multiplier effect.[148]

141. *Id.* at 8.10.14.

142. *Id.* at 8.10.11.

143. *Id.* at 8.6.3.

144. *Id.* at 8.10.34-8.10.35. *See also* Buchanan, *supra* note 106, at 377.

145. BUCHANAN & WAGNER, *supra* note 26, at 8.4.37.

146. *Id.* at 8.11.15.

147. *Id.* at 8.11.15. See also Buchanan, *supra* note 106, at 375; James Buchanan, *The Economic Consequences of the Deficit*, 14 THE COLLECTED WORKS OF JAMES M. BUCHANAN: DEBT AND TAXES 447.

148. Dale Oesterle, *State and Local Government Subsidies for Business: A Siren's Trap*, 6 OHIO ST. ENTREPREN. BUS. L.J. 491, 497 (2011).

> In theory, Keynesians argue that as the government injects money into the economy, private entities and individuals have more money to

Under Keynesian reasoning, the multiplier effect is inversely related to income taxes: as income taxes rise, individual propensity to consume decreases and with it, the multiplier.[149] Columbus voters recently approved an income tax increase from 2% to 2.5%, which has a negative impact on the Transaction's Keynesian multiplier effect under this reasoning.[150]

A positive return on investment is necessary to sustainable economic development that attracts investment capital.[151] Without a positive return on investment, but rather a negative return on investment, government coffers are depleted and must be restored. As a result, new taxes, user fees or assessments will be levied or imposed and, if imposed on businesses, harm the local business environment and economic development by making the jurisdiction less attractive to investors.[152] Also, the business environment may discourage investment capital because fairness is lost. Uncertainty may arise when government investment in private businesses affects private business outcomes (i.e., the government picks winners and losers).[153] With increasing amounts of government intervention, successful business plans are built around government assistance rather than good products/service and efficiency.[154] Furthermore,

> spend, aggregate demand increases and the higher aggregate demand incentivizes private entities to produce more and hire more to increase production. Government spending creates a cascade effect, a multiplier, as the immediate boost to employment and output itself produces a second, third, fourth and beyond level ripple effect on employment and output. The total impact of any government expenditure stimulus is the sum of all these separate output ripples. The ratio of the initial government expenditure to the total impact, the sum of the ripples, is called the "Keynesian Multiplier" or the "Spending Multiplier."

Id.

149. RICHARD MUSGRAVE AND PEGGY MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 504 (1989). *But see* MILTON FRIEDMAN, A THEORY OF THE CONSUMPTION FUNCTION 220–25, 233–35 (Princeton University Press, 1957) (explaining the "permanent income hypothesis," in which current period income is not directly related to consumption).

150. *See* Robert Vitale, *Columbus Gets its Tax Increase*, THE COLUMBUS DISPATCH, Aug. 5, 2009, http://www.dispatch.com/content/stories/local/2009/08/05/electionweb2.html.

151. Enrich, *supra* note 102, at 397–405.

152. Zelinsky, *supra* note 102, at 1150.

153. *Id.* at 1151.

154. Neil Westergaard, *Go away, government. Take subsidies, too?*, COLUMBUS BUSINESSFIRST, Sept. 2, 2011, http://www.bizjournals.com/columbus/print-edition/2011/09/02/go-away-government-take-subsidies.html.

business subsidies at the state and local levels are ineffective because state and local taxes are not a primary determinant of where businesses locate.[155] Rather, the regulatory environment, availability of skilled workers (and education systems) and availability of other raw materials significantly affect firm locational decisions.

To more fully examine the Transactions policy merits, then, it is necessary to determine whether there is likely to be a multiplier effect that warrants the public expenditure on the Transaction. Perhaps revealing an incentive for the Transaction's proponents' failure to calculate return on investment, the following section shows that positive return on investment is unlikely indeed.

C. The Transaction's Return on Investment

The Transaction is not likely to have a positive return on investment. The Franklin County Commissioners identify raising tax revenue as a purpose for the Transaction despite the foregone casino tax revenue under the Transaction.[156] Precisely because the Transaction is designed to raise tax revenue, public officials should calculate return on investment to determine whether foregone casino tax revenue exceeds the tax revenue that the Transaction will preserve or, as a more appropriate metric, create. The 2008 Report from the John Glenn School of Public Affairs, published prior to the Transaction and now cited by Transaction proponents for support,[157] states that it does not calculate return on investment for the Arena investment because it is privately funded and public funds associated with the Arena were limited.[158] Under this line of reasoning, the government should now calculate return on investment before approving a public proposal to purchase the Arena.

It is extremely doubtful that the Transaction will result in a positive return on investment. Put simply, if the Arena was not a good investment for Nationwide in the private sector, then it is not

155. Enrich, *supra* note 102, at 391–92; *id.* at 418–19; Weber, *supra* note 102, at 97; Zelinsky, *supra* note 102, at 1151.

156. Franklin County Commissioner John O'Grady's cover letter to Peck, Shaffer, & Williams LLP, *Letter Dated November 14, 2011*, attached as Exhibit B.

157. Caruso, *supra* note 63.

158. John Glenn School of Public Affairs, *Phase 1 Report: Assessments of the Gross Impacts of the NHL Columbus Blue Jackets, Nationwide Arena, and the Arena District on Greater Columbus, 1998-2008*, at 5–6, http://glennschool.osu.edu/news/art/Phase1_report.pdf.

clear why the investment will be a materially better investment in the public sector.[159]

Under Keynesian economic theory, funds invested in Nationwide Arena and CBJ will stimulate growth in the Arena District due to a multiplier or ripple effect that creates economic activity many times over.[160] However, a positive return on investment is extremely unlikely even assuming a generous 10% tax rate, including sales, property, and city income taxes. Assuming a 10% effective tax rate, the Transaction must stimulate 10 times the amount of economic activity (a multiplier of 10) to earn a positive return on investment. In other words, the Transaction must create $10 of activity for every $1 in public funds spent. For example, a subsidy of $100 would have to stimulate $1,000 in activity (taxed at 10%), to recoup its investment. Empirical studies simply do not support multiplier of 10, but rather tend to show multipliers around 1.0.[161] Applied to the Transaction, the $250 million that is slated to be doled out over the course of the Transaction[162] would have to stimulate $2.5 billion in activity, which is complicated further by inflation.

If there were a positive return on investment calculated, it would likely require making dubious assumptions. First, it is not at all clear that CBJ would leave Columbus but for the public purchasing the Arena.[163] In light of CBJ's $25 million loss last year,[164] the estimated

159. Arguments justifying the Transaction on the basis that it is less costly than constructing a new sports arena presuppose that Columbus needs a public sports arena. Moreover, such arguments overlook that the Transaction acquires the Arena primarily to subsidize rent-free CBJ Arena use, not public use. *See* discussion *infra* Part IV (analyzing the Transaction).

160. Ghose, *supra* note 43 ("The unprofitable Blue Jackets, as the argument goes, are a loss leader necessary for the sake of the Arena District, an economic engine that fills government coffers with sales, income and property taxes."). *See also* Oesterle, *supra* note 148, at 496–99.

161. Oesterle *supra* note 148, at 496 (citing Professor Robert Barro).

162. Bill Bush and Doug Caruso, *Arena deal looks good to folks in high places*, THE COLUMBUS DISPATCH, Sept. 15, 2011, http://www.dispatch.com/content/stories/local/2011/09/15/arena-deal-looks-good-to-folks-in-high-places.html. The $250 million figure is stated in future value terms.

163. Doug Caruso, *Proposed Deal: Casino Tax revenue would fund purchase of Nationwide Arena*, THE COLUMBUS DISPATCH, Sept. 15, 2011, http://www.dispatch.com/content/stories/local/2011/09/14/Proposal-to-keep-Blue-Jackets-in-town-to-be-released-today.html (stating that "Blue Jackets majority owner John P. McConnell has said he will consider moving the team if the lease deal is not reworked."). Upon announcement of the Transaction, Blue Jackets President Mike Priest stated, "This report offers a solution that will provide a long-term sustainable business model for the organization." Caruso, *supra* note 2.

$9.5 million that CBJ will save each year under the Transaction may not be enough for CBJ to turn a profit.[165] Thus, the Transaction may not be enough to save CBJ from dissolution in the long run.[166] Furthermore, there has been little indication that other cities have expressed serious interest in CBJ.

Second, it is far from clear that *all* the economic activity in the Arena District is attributable to CBJ.[167] In fact, it is more likely that Columbus and Franklin County will thrive even in CBJ's hypothetical absence. During the NHL lockout in 2005, unbiased academic research shows that city economies did not experience material detrimental effects.[168] The studies that Columbus Mayor Michael Coleman cites to support public investment in private enterprise are funded by biased special interests.[169] In addition, CBJ's ranking as the worst team in the NHL during the 2011-12 season casts doubt upon the view that it underpins the entire Columbus economy.[170]

If the Transaction's proponents were truly concerned about the Arena District's viability should CBJ leave or dissolve, they should have voiced these concerns before voters approved the 2010 casino relocation amendment to the Ohio Constitution that moved the Columbus casino out of the Arena District, as discussed in Part II.[171] The casino could have acted as the anchor tenant the Transaction's proponents identify as necessary to attract consumers to the Arena

164. Yerdon, *supra* note 43; Ghose, *supra* note 43; Caruso, *supra* note 2 ("The Blue Jackets have said they are losing $10 million to $12 million per year on their lease deal with Nationwide.").

165. Franklin County Convention Facilities Finance Subcommittee, NATIONWIDE ARENA PROPOSAL SUMMARY REPORT, at 17, http://council.columbus.gov/uploadedFiles/City_Council/News/Releases/2011/FinalReport-JohnRosenberger91411.pdf.

166. *See* Caruso *supra* note 3 ("But David Ebersole, an Ohio State University law student, said the deal is too complex to be transparent and that it has no hope of showing a return on investment").

167. By alluding to all economic activity in the Arena District, many government officials have made this implicit assumption. For example, FCCFA Executive Director William Jennison stated, "It would actually cost the community more not to do this because if you were to lose that economic activity, it would be much more costly than the amount of casino taxes that are being invested." *Panel unveils Plan to keep Blue Jackets*, ESPN (Sept. 14, 2011, 8:15 PM), http://espn.go.com/nhl/story/_/id/6971173/group-hopes-use-casino-sustain-columbus-blue-jackets. *See also* Caruso *supra* note 2, ("My motivation is economic development," said Columbus City Auditor Hugh J. Dorrian. "We're not talking about a few jobs; we're talking about thousands of jobs.").

168. See *supra* note 63 and accompanying text (citing studies).

169. *Id.*

170. 2011-12 NHL Standings, ESPN, http://espn.go.com/nhl/standings.

171. OHIO CONST. art. XV, §6(c).

District had the casino been constructed in the Arena District as originally planned.[172] Instead, the casino is now located elsewhere and the Transaction's proponents, who have been planning the Transaction for years,[173] now claim that the Arena is necessary to promote economic development in the Arena District. Due to The Dispatch's heavy involvement in the casino annexation dispute, discussed above, the move may have been designed to appease The Dispatch.

Against this backdrop, stewards of public funds should be held to a high burden of proof when they invest public resources in private businesses.[174] In this case, return on investment has not even been calculated, much less shown to be positive or to compensate for crowded out private sector investment (i.e., opportunity cost). Public policy regarding economic development does not justify, and has not been shown to justify, approving the Nationwide Arena Transaction.

IV. The Ohio Constitution

A. Public Investment in Private Enterprise: Public Policy and the Spirit of the Ohio Constitution

The Transaction raises serious public policy issues and violates the spirit of the Ohio Constitution. Public investment in private enterprise motivated Ohio's 1850-51 Constitutional Convention.[175] To be sure, the debate over public investment in the private sector is

172. Bell, *supra* note 121.

173. Caruso, *supra* note 2 ("Dorrian, Columbus lawyer John Rosenberger and Bill Jennison, executive director of the Franklin County Convention Facilities Authority, rolled out a plan yesterday that has been two years in the making."); Jeff Bell, *Year later, Blue Jackets backers see little progress on resolving team's financial woes*, COLUMBUS BUSINESS FIRST (Jan. 28, 2011), http://www.bizjournals.com/columbus/print-edition/2011/01/28/year-later-blue-jackets-backers-see.html?page=all.

174. Oesterle, *supra* note 148, at 502. *See also* Enrich, *supra* note 102, at 421–22.

175. Gold, *supra* note 7, at 411.

> Although agitation over race, temperance, and judicial reform all contributed to the convocation of a constitutional convention in 1850, the major motivating force was anti-corporation sentiment within the Democratic party. Radical Democrats objected to public subsidization of private companies and to the "special privileges" granted in corporate charters; they 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.

Id.

essentially a debate over the purposes of government.[176] Throughout U.S. history governments have debated the meaning of "public purpose" as it relates to public spending.[177]

In Ohio, 19th century public investments in railroads, canals and turnpikes often resulted in incomplete infrastructure projects, while still benefitting those with a financial interest in short-term profitability in the less developed capital markets of the day.[178] Even the completed projects benefitted only parts of the state while alienating other parts of the tax base.[179] At the 1850-51 Convention, delegates debated whether public investment deterred or precluded private investment in these capital-intensive projects with an unfair business environment.[180]

As a result, Ohio adopted its present-day constitution, including Art. VIII §§4, 6, to draw the line between public investment in private enterprise that is necessary to promote infrastructure and those investments that violate the public trust.[181] Unlike many state

176. *Id.* at 417–18.

177. *See generally* Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 147 (1993).

178. Gold, *supra* note 7, at 412. Spurred on by the success of the Erie Canal, Ohio Governor Ethan Allen Brown called for state-owned systems of canals connecting Lake Erie with the Ohio River. *Id.* at 408. In 1837, Ohio even adopted a "Loan Law" that *required* the state to provide one-third of the capital to construct private canals, railroads and turnpikes if private investors could provide two-thirds of the capital. *Id.* at 408-09 (citing Ohio Laws 35 v. 76 (1837)).

179. *Id.*

180. *Id.* at 413.

> [The delegates] maintained that notwithstanding the Erie Canal, a rare exception founded on geographical fortune, state enterprise meant "extravagance and waste"' private capital would always be found to build any works worth building, and would build them more economically. Moreover, the opponents insisted that "government has no business to be engaged in any speculations, and no tax is legitimate except for the purpose of sustain government within its proper sphere.

Id. (citing REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, at Vol. I, 513, at Vol. II, 120)). At the convention, little debate surrounded the merits of OHIO CONST. art. VIII Section 4 which prohibits the state from lending its credit to private entities; it passed with only six dissenting votes. *Id.* at 412. However, there were opponents to Section 6, the municipal analog to Section 4. *Id.* at 416. These opponents "insisted that few such improvements would be built by private capital alone." *Id.* at 416. Nonetheless, private capital "poured" into Ohio to build railroads in the 1850s. *Id.* at 424.

181. *Id.* at 412–22. As the Ohio Supreme Court explained Sections 4 and 6 in an early case:

judiciaries, the Ohio Supreme Court upheld constitutional fiscal restraints, including §§4, 6.[182] The Court did, however, permit

> Under the constitution of 1802, numerous special acts of legislation had authorized counties, cities, towns, and townships, to become stockholders in private corporations, organized for the construction of railroads, to be owned and operated by such corporations. The stock thus subscribed by the local authorities was generally authorized to be paid for by the issue of bonds, which were to be paid by taxes assessed upon the property of their constituent bodies. Many of these enterprises proved unprofitable, and the stock became valueless. Some of them wholly failed. Heavy taxation followed to meet and discharge the interest and principal of the bonds thus issued. Towns and townships were induced to attempt repudiation of their contracts. And, as the records of this court abundantly show, the assessment and collection of the taxes, which the preservation of good faith required, had repeatedly to be enforced by mandamus. In many, if not all of these cases, it was alleged that the stock subscriptions sought to be enforced had been voted for and made under the influence of false and fraudulent representations made by interested officers and agents of the corporation to be aided by the subscription. At the time of the formation and adoption of the present constitution these evils had begun to be seriously felt, and excited the gravest apprehensions of calamitous results. Under such circumstances this section was made a part of the State constitution. It may be well again to recur to its language: "The general assembly shall never authorize 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 raise money for, or loan its credit to, or in aid of any such company, corporation, or association." The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein.

Walker v. City of Cincinnati, 21 Ohio St. 14, 53–54 (1871). At the 1873-74 Ohio constitutional convention, "[delegates] complained of the corruption that invaded the political process when public authorities parceled out railroad "offices and contracts" and when private interests had a direct financial stake in the outcome of elections." Gold, *supra* note 7, at 431; Grendell v. Ohio EPA, 146 Ohio App. 3d 1, 10-13 (9th Dist. 2001) (discussing the history of Sections 4 and 6).

182. Sterk & Goldman, *supra* note 9, at 1333–39 (extensively discussing judicial doctrines and explanations for permitting public debt); *see also* Oesterle, *supra* note 9, at 615-17 (discussing the Colorado Supreme Court's interpretation of state constitutional fiscal restraints); *e.g.,* State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964).

municipalities to *wholly* construct railroads[183] and streets,[184] which some considered beyond the Ohio constitutional delegates' intent.[185] Municipalities could even sell these wholly constructed projects to private interests at a later date if, in good faith, they did not intend to do so originally.[186] Also, Ohio courts permitted public lending of aid or credit to nonprofit organizations.[187] Notwithstanding these judicial carve-outs, §§4, 6 continued to prohibit the government from lending its credit to for-profit entities.

Following the rise of Keynesian economics, some scholars approved deficit spending in good times and addressed issues regarding public finance and constitutional fiscal restraints from that perspective.[188] Public financing for private projects—now called "Industrial or Economic Development"—became more popular in the 1950s and 1960s.[189] In 1963, the Ohio General Assembly passed an act to, among other things, authorize loans to for-profit private businesses, which the Ohio Supreme Court struck down as unconstitutional.[190] In response, in 1965, the Ohio General Assembly

183. Walker, 21 Ohio St. at 56.

184. City of Newark v. Fromholtz, 102 Ohio St. 81, 130 N.E. 561 (1921).

185. Gold, *supra* note 7, at 415 ("The general tenor of the debates was to the effect that constitutional debt limitations would prevent all forms of state involvement in economic enterprise.").

186. City of Cincinnati v. Dexter, 55 Ohio St. 93, 44 N.E. 520 (1896).

187. State ex. rel Leaverton v. Kerns, 104 Ohio St. 550, 136 N.E. 217 (1922) (stating (in dicta) that Sections 4 and 6 do not prohibit donations of tax revenue to nonprofit corporations, in this case an agricultural society formerly organized as a for-profit entity); State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (veteran's association); Bazell v. Cincinnati, 13 Ohio St. 2d 63, 72 (1968) (citing *Kerns* in holding that Cincinnati may lend its credit to Hamilton County).

188. BUCHANAN & WAGNER, *supra* note 26, at 8.10.11-8.10.24 ("Balance Budget at Full Employment").

189. Gold, *supra* note 7, at 445–46. *E.g.* State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953) (upholding a urban redevelopment plan under OHIO CONST. art. VIII §6); State ex rel. McElroy v. Baron, 169 Ohio St. 439, 160 N.E.2d 10 (1959) (upholding legislation enabling local governments to construct and operate port facilities to be leased to private entities under OHIO CONST. art. VIII §6).

190. State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 52, 197 N.E.2d 328, 333 (1964) (invaliding OHIO REV. CODE ANN. § 121.13 to § 121.36, inclusive, which were enacted under H.B. 270, 130 Ohio Laws 42); Gongwer's Ohio Report (Dec. 8, 1964).

> Walter White (R-Allen) explained that the Resolution (S.J.R.1) is the result of the Supreme Court's decision declaring the financing provisions of H.B. 270, passed by the 105th General Assembly, unconstitutional. This makes the provisions part of the Constitution, White said. White told the House members that Ohio is in

proposed and voters approved Ohio Const. Art. VIII §13, which expands the scope of permissible public investment in the private sector.[191] Specifically, §13 permits self-liquidating public debt issuances for capital projects for a "public purpose,"[192] and significantly exempts such debt issuances from the public investment restraints in §§4, 6.[193]

The Transaction crosses the boundary Ohio voters set forth in 1965 to violate both the spirit and letter of Art. VIII §§4, 6 and 13

> competition with other states for industry, and many of the states (44) have some type of financing to aid industry in construction of facilities.

Id.

191. GONGWER OHIO (Nov. 17, 1964); Gold, *supra* note 7, at 448. Despite mirroring the constitutional language in large part, the ballot proposal language for Section 13 is somewhat difficult to understand. Am. S.J. Res. 1, 130 Ohio Laws spec. sess. 1964. As it appears in Am. S.J. Res. 1, the ballot language for Section 13 reads as follows:

> Proposing to amend Article VIII of the Constitution of the State of Ohio by adding Section 13 to provide that to create jobs and employment opportunities and improve the economic welfare of the people, it is in the public interest and a proper public purpose for the State and other designated agencies of the State to acquire, construct, enlarge, improve or equip, and to sell, lease, exchange and otherwise dispose of property, structures, equipment and facilities for industry, commerce, distribution and research; to make and guarantee loans, and to borrow money and issue bonds or other obligations, to provide moneys for such purposes; to exclude the application of certain sections of Article VIII and Article XII; to authorize laws to carry such purposes into effect; to provide that moneys raised by taxation shall not be obligated or pledged; to provide that no guarantees, loans or lending of aid or credit shall be made under laws enacted pursuant to or validated by such amendment for facilities to be constructed for the purpose of providing electric or gas utility service to the public; to authorize corporations to lend or contribute moneys; and to validate certain laws enacted by the 105th General Assembly.

Id. Separately, according the Ohio Department of Development, Ohio spent $1.02 billion on economic development incentives in 2010. Ohio Department of Development, *2010 Annual Report*, (Dec. 1, 2010), pg. 2, http://www.development.ohio.gov/Department Reports/documents/2010AnnualReport.pdf.

192. "Self-liquidating" is used here to mean those "projects which will directly yield to the government a money return sufficient to service and to amortize the debt." BUCHANAN, *supra* note 107, at 2.12.35.

193. As "moneys raised by taxation" may not be used to repay debt incurred pursuant to §13, presumably §13 is designed to specifically facilitate self-liquidating capital investment.

(hereinafter "§4," "§6" and "§13").[194] First of all, private funds organized to build the Arena after voters rejected five separate ballot proposals to publicly fund a sports arena, such that public investment is unnecessary and even harmful to a fair business environment. Second, the Transaction benefits private investors in the short term, but has not been shown to provide a positive return on investment or ensure the long-term viability of CBJ or Columbus' downtown Arena District.[195] As noted above, if a sports arena was not a good private investment for Nationwide, which invests heavily in the Arena District, there is little reason to believe the Arena will be a good public investment. Third, public investment in the Arena District benefits parts of the Franklin County tax base while alienating others. Thus, the Transaction displays the very evils delegates to Ohio's 1850-51 constitutional convention sought to avoid.

B. The Transaction's Lawfulness Under the Ohio Constitution

The Transaction's financing structure violates Ohio Constitutional restraints on debt and public investment in the private sector.[196] This section will: (1) explain the Transaction's structure; (2) explain how the Transaction violates the Ohio Constitution; and (3) refute counterarguments attempting to provide legal authority for the Transaction.

1. The Structure of the Transaction

The Transaction is structured in a very complex manner, as shown in Exhibit A. Prior to the Transaction's closing, preparation of the final documents and release of those documents to the public, public officials including Columbus City Council, Mayor Michael Coleman, the State of Ohio, the Franklin County Commissioners and the Franklin County Convention Facilities Authority ("FCCFA") authorized funding for the Transaction.[197]

Prior to the Transaction, the FCCFA owned the real estate where the Arena is located, which is referred to as the "Project

194. The spirit of the Ohio Constitution is relevant to this analysis due to the following canon of statutory interpretation: "[The Ohio Constitution] is to be construed according to its intention, where that is clear. . . ." Walker v. City of Cincinnati, 21 Ohio St. 14, 53 (1871).

195. *See infra* Pt. III(C).

196. *See generally* OHIO CONST. art. VIII.

197. Sullivan and Caruso, *supra* note 123.

Site."[198] The FCCFA leased the Project Site to the Capital South Community Redevelopment Corporation, which in turn leased the real estate to a Nationwide affiliate.[199] At the Project Site, Nationwide constructed the Arena together with associated parking and practice facilities, and spaces for commercial offices and restaurants, or what is known as the "Project."[200] In turn, Nationwide leased the Arena to CBJ pursuant to an arm's length agreement that required CBJ to pay rent.[201]

The Transaction alters the existing structure in the following manner:[202] First, to fund the Transaction, the FCCFA issued revenue bonds to Nationwide to obtain roughly $44 million.[203] Second, the FCCFA obtained a loan from the State of Ohio (put into effect through a bond issuance) that provided the FCCFA with $10 million in additional funds.[204] The loan was issued at a 1.00% interest rate and half of the loan amount, $5 million, is forgivable upon timely payment.[205] Third, the FCCFA entered into a circular Lease and Sublease with Columbus and Franklin County.[206] The Lease and

198. Lease Agreement Between the Franklin County Convention Facilities Authority, Lessor, and the City of Columbus, Ohio and the County of Franklin, Lessees (Feb. 1, 2012) (hereinafter "Lease Agreement"), page 1.

199. *Id.* The Nationwide affiliate is Nationwide Arena LLC.

200. *Id.*

201. NALLC-COLHOC Sublease and Management Agreement.

202. To outline the Transaction at the Columbus City Council meeting on Oct. 3, 2011, Attorney John Rosenberger noted that the FCCFA "published" Franklin County Convention Facilities Finance Subcommittee, NATIONWIDE ARENA PROPOSAL SUMMARY REPORT, at 17, http://council.columbus.gov/uploadedFiles/City_Council/News/Releases/2011/FinalReport-JohnRosenberger91411.pdf.

203. CFA Resolution 2012-6 ("Bond Resolution"), Section 6. Section 17 of the Bond Resolution also provides for issuing additional bonds in the future. The $44 million figure includes a credit towards the purchase of the Arena that the FCCFA received in return for issuing bonds to Nationwide. *Id.* at Section 5.

204. Bond Resolution, Section 6(a) ("First Lien Project Bonds); Loan Agreement between The Director of Development of the State of Ohio and Franklin County Convention Facilities Authority, Section 1.2 ("Loan Amount" means Ten Million Dollars ("10,000,000)).

205. Loan Agreement, Section 1.2 (defining "Annual Forgiveness Amount"); Exhibit A-1 (noting 1.00% interest); Exhibit A-3 (repayment schedule).

206. Lease Agreement, Section 1.01 (defining "Lessees Rent" as earmarked casino tax receipts), Section 3.01 (defining Lease Payments as Lessees Rent). Sublease Agreement Between the City of Columbus, Ohio and the County of Franklin, Lessors, and the Franklin County Convention Facilities Authority, Lessee (Feb. 1, 2010) (hereinafter "Sublease Agreement"), Section 3.01 (defining "CFA Rental Payment" as $10, which is a nominal sum). Under Section 2.01 of the Lease and Section 2.01 of the Sublease, the property transferred back and forth between the parties is identically defined as "Lease Premises," which has the same meaning under each agreement. Because the rent under

Sublease are designed not to transfer any real property interests, but simply to transfer to the FCCFA casino tax revenue that Columbus and Franklin County receive pursuant to the Ohio Constitution.[207] The "rent" (i.e., casino tax revenue) that the FCCFA receives from Columbus and Franklin County is used to service the bonds issued to Nationwide and the State of Ohio as well as to manage the Arena.[208] In fact, the FCCFA Bond Resolution defines "Lessee's Rent" with reference to the Lease Agreement, thereby making explicit that casino tax revenue is repaying the bonds and financing the Transaction.[209]

Fourth, Nationwide transferred its interest in the Project and the Project Site to the FCCFA for $42.5 million, which is financed as described in the first three steps above.[210] Whereas the steps already described finance the Transaction and transfer title, the next steps subsidize CBJ.

Fifth, the Transaction replaced the existing lease between Nationwide and CBJ, with a new Use Agreement between the FCCFA and CBJ.[211] Under the Use Agreement, CBJ pays no rent and maintains the right to use the Arena to meet the needs of an NHL franchise.[212] CBJ's right to use the Arena is curtailed during

the Sublease is a nominal sum, the effect of the Lease and Sublease is simply to transfer casino tax revenue from the City and County to the FCCFA.

207. OHIO CONST. art. XV, § 6.

208. Bond Resolution, Section 12, Section 13.

209. Bond Resolution, Section 1 (defining "Lessee's Rent"), Section 7 (creating "Lease Payments Fund"), Sections 12 & 13 (providing for repayment of bonds); Lease Agreement (noting that Lessee's Rent goes to accounts within the Lease Payments Fund).

210. Purchase and Sale Agreement, Section 4.

211. Arena Use License Agreement by and between Franklin County Convention Facilities Authority and COLHOC Limited Partnership (Mar. 28, 2012) (hereinafter "Use Agreement").

212. Use Agreement, Section 5.1 and Section 5.2 (explaining the "public purpose" for the Transaction); *see* Use Agreement Article 5 and Article 6. There is not only no provision for rent under the Use Agreement, but the Use Agreement also shifts CBJ costs to the public sector. Use Agreement, at 2 ("WHEREAS, the Team acknowledges that the Team's costs and expenses for its use of the Arena under this Agreement are an accommodation to the Team to induce the Team to continue to use the Arena for its Home Games."); *see also* Jarman *supra* note 83 (stating that CBJ pays no rent as a result of the Transaction). The extent to which existing CBJ liabilities and future Arena expenses are shifted to the public is not currently available because the FCCFA did not fully disclose exhibits identified in Articles 5 and 6 to the Use Agreement, although Exhibit 5.2 to the Use Agreement provides for evenly splitting losses between CBJ and CAM for twelve month period preceding the Transaction. Significantly, under the Use Agreement, CBJ maintains the right to: enter into third party vendor agreements; sell the

nights where no hockey games are scheduled, but CBJ retains access to the facilities as well as many other rights.[213]

Sixth, the Transaction created a new entity, Columbus Arena Management LLC ("CAM"), to manage the Arena.[214] Under the Management Agreement, CAM manages the Arena, using casino tax revenue to operate the Arena and make capital improvements.[215] An Ohio State representative is the "Arena Manager" and Ohio State entered into an "Ohio State Sub-Management Agreement" with CAM, but Ohio State's role is uncertain because it receives no management fee.[216] Additionally, details surrounding a revenue sharing agreement were redacted from the Sub-Management Agreement that the FCCFA did disclose.[217] As noted above, the Transaction is designed in part to limit competition between Ohio State's Jerome Schottenstein Center and Nationwide Arena in order to limit costs associated with attracting non-hockey and non-Ohio State events to Columbus.[218]

Other agreements and documents should be noted as well. As part of the Transaction, Nationwide renegotiated the current

Arena naming rights; sell advertising at the Arena; sell broadcast rights; and to negotiate premium seat contracts with third parties. Use Agreement, Article 5.

213. Use Agreement, Article 8 ("Grant of Use Rights").

214. Arena Management Agreement by and between Franklin County Convention Facilities Authority and Columbus Arena Management LLC (hereinafter "Management Agreement"); Operating Agreement of Columbus Arena Management LLC (not dated or signed and executed). Under the Management Agreement, the "Arena Manager Board" appoints an Arena Manager (i.e., an individual to manage the Arena). Management Agreement, Section 2.2. The Arena Manager Board consists of the CAM Managers. Management Agreement, Section 5.6.

215. Management Agreement, Section 8.2, Section 8.3. The Management Agreement expressly shows that casino tax revenue will be used to manage the Arena. Management Agreement, Section 12.3. The Arena Manager does not collect any management fee under the Management Agreement. Management Agreement, Article 6 ("No Management Fee"). CAM also provides funds in the event that casino tax revenue and state loan proceeds are insufficient to manage the Arena. Operating Agreement, Articles III-IV.

216. The Arena Manager does not collect any management fee under the Management Agreement. Management Agreement, Article 6 ("No Management Fee"). CAM also provides funds in the event that casino tax revenue and state loan proceeds are insufficient to manage the Arena. Operating Agreement, Articles III-IV. Ohio State receives no management fee pursuant to the Sub-Management Agreement. Arena Sub-Management Agreement between Columbus Arena Management LLC and The Ohio State University, Section 5.2 (hereinafter "Sub-Management Agreement").

217. Appendix C to Arena Sub-Management Agreement: Non Hockey Event Scheduling and Revenue Distribution Procedures. *See also* discussion *supra* Part II(A)(2)(iii); Pyle, *supra* note 95.

218. *See* Pyle, *supra* note 95.

property tax exemption for the Arena to extend beyond the original 2015 expiration date.[219] Also, Nationwide paid $28 million for continued naming rights of the Arena and $52 million for a 30% ownership interest in the now-subsidized CBJ.[220] Attorneys for Columbus, Franklin County and the FCCFA all provided legal opinions contending that parts of the Transaction are legal or otherwise within the authority of public bodies, but no attorney or law firm provided an opinion regarding the Transaction as a whole.[221] Lastly, Columbus, Franklin County, and the FCCFA all issued ordinances and resolutions agreeing to enter into the Transaction or authorizing representatives to negotiate the Transaction.[222] While the structure of the Transaction is complex, it is essential to the analysis provided below.

2. The Nationwide Arena Transaction

The Transaction is unconstitutional because it violates Ohio Const. Article VIII §§4, 6 and does not fall within an exception under

219. *See* Bell, *supra* note 121, at 38. Under a prior agreement with Columbus schools, Nationwide pays $1 million to Columbus City Schools to compensate for its 99% property tax abatement through 2015. *Id.* After 2015, the Arena (i.e., Project Site) will remain free from property tax, but Nationwide will discontinue its annual $1 million payment. *Id.* Columbus City Schools were set to receive $2.7 million after 2015, based on a 2011 valuation of the arena. *Id.*

220. *See* Caruso *supra* note 2.

221. Attorneys representing public bodies that are parties to the Transaction each approved only a portion of the Transaction, even though all documents must be read together to understand the Transaction. Peck Shaffer & Williams LLP Letter Dated March 28, 2012 ("The Project Bonds constitute valid and binding special obligations of the Authority *** the Project Bonds do not represent or constitute a debt or pledge of the faith or credit, or taxing power, of the Authority, the State of Ohio ,or any political subdivision thereof"); Dinsmore & Shohl LLP Letter Dated March 28, 2012 (discussing the loan and real estate documents, but deferring to Peck Shaffer, the Bond Counsel for the FCCFA, regarding other matters); Ron O'Brien, Franklin County Prosecutor, Letter Dated March 28, 2012 ("The County is authorized by the laws of the State of Ohio to enter into and perform its obligations under the Lease and Sublease"); Richard C. Pfeiffer, Jr., Columbus City Attorney, Letter Dated March 28, 2012 ("The City is authorized by the laws of the State of Ohio and the City's Charter to enter into and perform its obligations under the Lease and Sublease).

222. City of Columbus Ordinance No. 1596-2011, http://columbus.legistar.com/LegislationDetail.aspx?ID=987519&GUID=102332F9-FE91-44FD-8B35-A388B30E526F; County of Franklin Resolution No. 0938-11, http://crms.franklincountyohio.gov/RMSWeb/pdfs/Resolutions/r_000004524/resolution-published.pdf; Franklin County Convention Facilities Authority Resolution 2011-27 (authorizing the FCCFA to apply for a State of Ohio loan); Franklin County Convention Facilities Authority Resolution 2011-28 (authorizing the FCCFA to issue bonds to purchase the Arena); FCCFA Resolution 2012-6 (detailing the bond issuances); and FCCFA Resolution 2012-8 (authorizing FCCFA officials to execute other agreement necessary for the Transaction).

Art. VIII §13. Sections 4 and 6 prohibit the State and its political subdivisions from lending its credit to or entering into a joint venture with a private for-profit corporation.[223] Courts interpret §§4, 6 in the same manner, but with §4 applying to the State and §6 applying to cities, counties and municipalities.[224] To facilitate capital investment in self-liquidating capital projects, Ohio voters adopted Ohio Const. Art. VIII §13, which permits a public authority to issue revenue debt when the debt obligation is repaid with funds other than "moneys raised by taxation" (*e.g.*, funds from income-producing assets).[225] Significantly, §13 exempts debt issuances made pursuant to §13 from the §§4, 6 restrictions on public investment in the private sector.[226] To

223. OHIO CONST. art. VIII §6 provides in pertinent part:

> 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.

Id. OHIO CONST. art. VIII §4 provides 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.

Id.

224. Gold, *supra* note 7, at 460 (citing State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 74, 330 N.E.2d 454, 459 (1974)).

225. OHIO CONST. art. VIII §13 also enables public investment in private enterprise. *Id.* at 463 ("The immediate purpose of section 13 was to permit the government to use the proceeds of revenue-bond sales for loans and loan guarantees to private business.").

226. OHIO CONST. art. VIII § 13 provides in pertinent part:

> 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

maintain this exception to §§4, 6, however, §13 directs that the debt obligation must not be repaid with "moneys raised by taxation" and that the debt proceeds may not be used to fund operating expenses.[227]

A political subdivision may not lend its credit to or enter into a joint venture with a for-profit private enterprise when moneys raised by taxation are pledged by the political subdivision to repay debt.[228] In *State ex. rel Ryan v. City Council of Gahanna*, the City of Gahanna issued bonds to purchase land that would be leased to private for-profit businesses at below-market rates.[229] The bonds were a general obligation of Gahanna, but the city also earmarked separate funds raised by a tax levy to service the debt.[230]

In *Ryan*, the Ohio Supreme Court's findings were twofold: First, the court found that the transaction at issue, a below-market lease

> provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, 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, and to authorize the making 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 or other obligations issued or guarantees made pursuant to laws enacted under this section.*

Id. (emphasis added).

227. *Id.*

228. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 128–29, 459 N.E.2d 208, 210–11 (1984); *See also* State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953). In *Bruestle*, discussed extensively in the pleadings in *Ryan*, the Court upheld a plan in which the federal government provided funds for the City of Cincinnati to clear and redevelop blighted property, which was later sold to private developers. *Id.* at 13–14. Because the City's purchase of the property and sale to private developers were at arm's-length, the Court held that there was no lending of credit or joinder of public and private property under OHIO CONST. art. VIII § 6. *Id.* at 34–35. Moreover, notes issued to secure the property were repaid with non-tax revenue. *Id.* at 13–15; *See also* State ex rel. McElroy v. Baron, 169 Ohio St. 439, 160 N.E.2d 10 (1959). Again in *McElroy*, there is no indication that a government leased property at favorable or below-market rates. *Id.* at 444–45. Further, both *Bruestle* and *McElroy* pre-date *State ex rel. Saxbe v. Brand*, in which the Ohio Supreme Court extensively defined "lending of credit" under OHIO CONST. art. VIII, discussed *infra*.

229. *Ryan*, 9 Ohio St. 3d at 126.

230. *Id.* at 126, 129.

arrangement, created a corporate joint venture between Gahanna and private businesses that violated §6.[231] In so finding, the court looked to the "realities of the project" and determined that the lands were being restored primarily to provide businesses with land rather than to develop blighted urban areas.[232] The financing was below-market because the businesses contracting with Gahanna at favorable rates in *Ryan* could not have obtained similarly favorable rates from private developers.[233] Second, the court found that the transaction used moneys raised by taxation by setting aside funds to service the debt, even though the debt was a general obligation of the city.[234] The court noted: "It is the pledge of tax revenue which makes the notes or bonds issued by the respondents an unconstitutional act."[235] The transaction in *Ryan* violated the Ohio Constitution because the financing arrangement violated §6 and the §13 exception did not apply because Gahanna pledged moneys raised by taxation.[236]

In addition, the Ohio Supreme Court has provided extensive guidance to define "lending of credit" as it relates to §§4, 6. Although

231. *Id.* at 128–29.

232. *Id.*

233. *Id.* Similarly, in personal property tax and real property tax cases, the Ohio Supreme Court has determined that the best indicator of true value is a recent arm's-length sale. Shiloh Automotive, Inc. v. Levin, 117 Ohio St. 3d 4, ¶20 (2008); *e.g.*, Grabler Mfg. Co. v. Kosydar (1975), 43 Ohio St. 2d 75 (sale price constituted value of personalty); Bedford Bd. of Educ. v. Cuyahoga County Bd. of Revision, 2012-Ohio-2844, ¶19 (real property).

234. *Ryan*, 9 Ohio St. 3d at 129.

235. *Id.*

236. In dicta, the *Ryan* court identified methods Gahanna could have used to constitutionally structure the transaction. The court stated that the deal would not have been unconstitutional had the city organized an OHIO REV. CODE ANN. §1728 urban redevelopment corporation to purchase and lease out the land. *Ryan*, 9 Ohio St. 3d. at 129. However, the Court did not condone corporate joint ventures created with below-market leases with this statement because 1728 organizations must sell or lease land at "fair value." R.C. §1728.03. Under the facts of *Ryan*, a 1728 organization could not have leased the land at below-market rates. In addition, using a 1728 organization as a conduit to purchase and lease land does not escape the express prohibition on pledging moneys raised by taxation. *Ryan*, 9 Ohio St. 3d at 129. To support this point, the Court identified public bonds that could be constitutionally issued under the facts of *Ryan*, which were bonds created under statutes requiring repayment with non-tax revenues (*e.g.*, private rents) rather than moneys raised by taxation. R.C. §725.05 (stating that only funds identified in R.C. §725.01 may be used to service urban renewal bonds, which funding includes "all proceeds of the sale or other disposition of property of the municipal corporation in any part or all of one or more urban renewal areas; and all urban renewal service payments collected from any part or all of one or more urban renewal areas."); R.C. §761.07 ("but such bonds shall be payable solely from the revenue derived from the sale or lease of projects or by funds derived from the issuance of refunding bonds").

§13's constitutional enactment overruled the holding of *State ex rel. Saxbe v. Brand*,[237] the case continues to validly define "lending of aid and credit" under §§ 4, 6.[238] Lending the State's credit includes: providing a private entity with the ability to borrow; lending actual funds to a private entity; or in the extreme case, possibly a direct grant of funds.[239] Moreover, lending the State's credit does not require that the State incur indebtedness.[240] Notably, *Brand* recognizes that revenue bonds constitute lending the State's credit even though they do not pledge funds outside an identifiable revenue stream.[241] In *Brand*, extending the State's borrowing and lending power to for-profit businesses with nothing received in return constituted lending the State's credit.[242]

a. The Transaction Violates §4 or §6

The Transaction violates §4 or §6 because state and local government bodies "loan its credit to, or in aid of" CBJ, which is a for-profit enterprise, through the Use Agreement.[243] The Use

237. State ex rel. Petroleum Underground Storage Tank Release Co, 62 Ohio St. 3d 111, 114 (1991).

238. State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 46–52, 197 N.E.2d 328 (1964) ("It is sufficient to recognize that that word in that section includes within its meaning (1) a loan of money and (2) the ability to borrow or borrowing power (i.e., the ability to acquire something tangible in exchange for a promise to pay for it."). *See* discussion in *Gold* supra note 7, at 447–48.

239. *Brand*, 176 Ohio St. at 52. In an early case, the Ohio Supreme Court noted that direct grants of funds violate the spirit of §6. Markley v. Village of Mineral City, 58 Ohio St. 430, 438 (1898). *See also* Gold, *supra* note 7, at 444.

240. *Brand*, 176 Ohio St. at 52 (stating that "the sale of revenue bonds of the state to raise money necessarily involves a borrowing of money even though no indebtedness of the state results. If the bonds are not paid, the borrowing power of the state will as a result be adversely affected, even though the bonds do not represent a debt of the state"). *See also* Oesterle *supra* note 9, at 613–14.

241. *Brand*, 176 Ohio St. at 52.

242. *Id.* at 50.

243. OHIO CONST. art. VIII §4 provides, in pertinent part:

> 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 * * *."

Id. OHIO CONST. art. VIII §6 provides, in pertinent part: "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 * * *." *Id.*

Agreement, *under which CBJ pays no rent*, is a below-market arrangement that lends government credit to CBJ or in aid of CBJ.[244] Stated differently, the Transaction creates an impermissible joint venture that includes the FCCFA, Columbus, Franklin County, Nationwide and CBJ.[245]

The FCCFA is lending government credit with a below-market use arrangement to benefit the for-profit CBJ,[246] which is prohibited under *Ryan* and *Brand*. Pursuant to the circular Lease and Sublease, the FCCFA obtains casino tax revenue from Columbus and Franklin County.[247] In turn, the casino tax revenue is used to repay funds borrowed from Nationwide and the State of Ohio.[248] With its newly acquired funds, the FCCFA purchases, operates, and makes capital improvements to the Arena to benefit CBJ.[249] Simply put, the casino tax revenue is funneled through the FCCFA to subsidize CBJ.

The Transaction is properly characterized as a lending of aid or credit because, as in *Ryan*, it is a below-market arrangement that benefits CBJ with government assistance, but does not provide a cognizable benefit to the FCCFA or other public entities.[250] Consider

244. Use Agreement, Section 5.1 and Section 5.2 (explaining the "public purpose" for the Transaction); *see* Use Agreement Article 5 and Article 6. See text and accompanying notes *supra* note 212.

245. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 129–30, 459 N.E.2d 208 (1984) ("A municipal corporation may not enter into a joint venture with, nor extend credit to, a private corporation or association where such venture or extension is supported by the issuance and sale of bonds or notes, guaranteed by earmarked tax revenue of the municipal corporation.").

246. *Id.*

247. Lease Agreement, Section 1.01 (defining "Lessee's Rent" as earmarked casino tax receipts), Section 3.01 (defining "Lease Payment" as Lessee's Rent).

248. Bond Resolution, Section 1 (defining "Lessee's Rent" with reference to the Lease Agreement), Section 12-13 (explaining the use of bond proceeds).

249. Bond Resolution, Section 12-13.

250. *Ryan*, 9 Ohio St. 3d. at 129.

> The respondents have leased the property financed by the notes, which were issued in anticipation of long-term bonds, at a favorable rate to private corporations. This is as much a joint enterprise as if the city of Gahanna 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.

Id. But see Use Agreement, Section 5.1-5.2 (explaining the indirect "public purpose" for the Transaction without providing a return on investment calculation). In the constitutional analysis, CBJ's agreement to play its home games at Nationwide Arena through 2039 cannot be considered adequate consideration for the benefits in receives

that the new Use Agreement provides similar benefits to CBJ as under the pre-Transaction lease, but at a $9.5 million per year discount.[251] To be sure, the Transaction does not involve a lease agreement, but rather a use agreement, which incorporates fewer property rights than a lease agreement. That the Transaction utilizes a use agreement rather than a lease agreement, however, cannot explain this great discount as an arm's length transaction. CBJ still receives benefits from the Arena sufficient to satisfy an NHL hockey team's needs, just as it did under the original lease.[252] And as the Use Agreement is much more favorable to CBJ than the original arm's length lease, any property rights that CBJ surrenders as a result of the Transaction are too insignificant to justify the Use Agreement as an arm's length agreement.[253] *The rent-free Use Agreement with CBJ is therefore a below-market arrangement that lends government aid or credit because CBJ could not have obtained the arrangement from a private developer, which is clear in this case because Lamar Hunt failed to secure a more favorable Arena lease than the lease John H. McConnell negotiated in arm's-length negotiations with Nationwide in 1997.*[254]

General references to facility leases between municipalities and NHL franchises in other jurisdictions cannot establish the market

because the *Ryan* Court rejected arguments attempting to justify below-market transactions for a "public purpose" as constitutional under sections 4 and 6. *Ryan*, 9 Ohio St. 3d. at 130 ("It was never argued herein that urban renewal and economic development are not "proper public purposes." To the contrary, participation in such projects by local governments has long been given legislative recognition and encouragement.").

251. *Compare* NALLC-COLHOC Sublease and Management Agreement, Article 4 (providing rent terms totaling millions of dollars), *with* Use Agreement Sections 5.1 and 5.2 (omitting any rent term). Reports have also reported that the Transaction will save CBJ $9.5 million on an annual basis. FCCFA Report, *supra* note 202, at 12.

252. Use Agreement, Article 8 ("Grant of Use Rights").

253. The Use Agreement is extremely favorable to CBJ, not just because CBJ does not pay rent or incur operating expenses, but also because CBJ maintains access to the Arena and its use during both the Hockey and Non-Hockey season. Use Agreement, Article 8. As might be expected, CBJ has considerably more access to the Arena during the Hockey Season. *Id.* Also, the Use Agreement gives CBJ rights to Arena Naming Rights, rights to the Team to display its Name, Logo and Schedule throughout the Arena, rights to advertise in the Arena, rights to control broadcasting hockey events, and rights to premium seat contracts. Use Agreement, Sections 5.5-5.9. The Use Agreement does obligate CBJ to stay in Columbus through 2039, but this agreement cannot constitute consideration under §§4,6 because this argument is too tenuous to show value and the Ohio Supreme Court rejected this "public purpose" argument in *Ryan*. *Ryan*, 9 Ohio St. 3d at 130.

254. McConnell v. Hunt Sports, 132 Ohio App. 3d 657, 668 (1999). See discussion *supra* Part II(A)(2)(i).

better than specific evidence of the market rate in this case (i.e., an arm's length transaction).[255] Moreover, FCCFA Executive Director William Jennison publicly advertised the renegotiated lease as a below-market arrangement when he stated, "No one is pretending that the publicly owned arena will make money."[256] Thus, there is strong evidence that the Transaction is a below-market arrangement that lends government aid or credit to CBJ in violation of §§4, 6.

b. Section 13 Does Not Authorize the Transaction's Debt Issue

Notwithstanding the §§4, 6 violation, the Transaction could pass constitutional muster if it fell within an exception to §§4, 6 provided under Ohio Const. Art. VIII §13.[257] The Transaction, however, does not fall within the §13 exception. Section 13 exempts certain revenue debt from constitutional debt limits so long as "moneys raised by taxation" are not used to repay the debt.[258] The revenue debt contemplated by §13 is debt serviced by income producing assets or non-tax revenues such as user fees and fines.[259] For example, a building financed with private rents might utilize revenue bonds. By contrast, Ohio Const. Art. XV §6 identifies casino receipts as moneys raised by taxation, thereby placing the Transaction outside §13 and subjecting the Transaction to §§4, 6.

As another independent §13 violation, the proceeds from the bond issuance are impermissibly going to fund operating expenses for the Arena. Section 13 lists several purposes that debt issuances made pursuant to §13 may fund.[260] However, none of those purposes

255. *See, e.g.,* Buser, *supra* note 42, at 8 ("A leading consultant for the NHL, MZSports, has examined alternative forms of financial benefits that NHL cities typically provide. Based on that analysis, the Blue Jackets are at a competitive disadvantage in the amount of approximately $12 million per year compared to the net benefit provided to the average NHL team.").

256. FCCFA Executive Director William Jennison stated, "No one is pretending that the publicly owned arena will make money." Bush and Caruso, *supra* note 162.

257. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 129, 459 N.E.2d 208 (1984) ("The respondents must comply with Section 13 because of the joint venture between the municipal corporation and private corporations or associations.").

258. OHIO CONST. art. VIII §13. OHIO REV. CODE ANN. § 351 (West 2012) (citing §13).

259. *See Ryan*, 9 Ohio. St. 3d at 129 (citing OHIO REV. CODE ANN. §725 and §761, which pledge non-tax revenues to service bond issues as constitutional debt issues under §13). *See also* Gold, *supra* note 7, at 453 n. 240-41 (citing an interview with the Director of the Ohio Department of Development and media reports that §13 was not designed or billed as permitting tax revenues to be pledged to finance projects).

260. OHIO CONST. art. VIII §13. Notably, there is a limit on "public purpose" as defined under §13. C.I.V.I.C. Group v. City of Warren, 88 Ohio St. 3d 37, 41 (2001)

include operating expenses and, as such, aid for operating expenses is presumably not a permissible purpose within §13.[261] From a policy perspective, this restriction is intuitive because debt, which obligates future generations, should fund capital investment rather than consumption in order to match costs and benefits of public goods over time. As operating expenses constitute spending for current period consumption, operating expenses should not be funded with public debt that burdens future generations. Thus, it is unlikely that §13 authorizes public investment in noncapital projects such as operating expenses.[262]

Here, the FCCFA resolution outlining the bond issuances specifically provides that bond proceeds will go towards the fund for operating expenses for the Arena.[263] As the bond proceeds fund operating expenses, §13 is violated on a second ground. Accordingly, §13's exception from the §§4, 6 restriction on public investment in private enterprise does not apply and the Transaction is unconstitutional for violating §§4, 6.

3. Refuting Counterarguments

The law firm Peck, Shaffer and Williams LLP, bond counsel for the Transaction, has presented several arguments attempting to uphold the Transaction as constitutional. Upon sending an earlier draft of this article to the Franklin County Commissioners, Franklin County Commissioner John O'Grady sent me a letter from Peck Shaffer attempting to provide legal authority for the Transaction.[264] Coincidentally, Peck Shaffer also represented the City Council of Gahanna as bond counsel in *State ex rel. Ryan v. City Council of Gahanna*, where Gahanna was found to have unconstitutionally issued bonds. The case set important legal precedent and mirrors the

(holding that street improvements to benefit two cul-de-sacs do not constitute a public purpose under §13). *But see* State ex rel. Brown v. Beard, 48 Ohio St. 2d 290 (1976) (low-income housing is not a public purpose within §13), overruled by State ex rel. Board of County Commissioners v. Zupancic, 62 Ohio St. 3d 297, 299 (1991) (holding that low-income housing is a public purpose within §13); Norton v. Limbach, 65 Ohio App. 3d 709 (1989) (§13 authorizes bonds issued for arbitrage investment).

261. Gold, *supra* note 7, at 457 (citing a telephone interview with Fred Neuenschwander, former Ohio Director of Development).

262. *Id.*

263. Bond Resolution, Section 12-13.

264. Letter from Peck, Shaffer, & Williams LLP to Don L. Brown, County Administrator, County of Franklin, Ohio (Nov. 14, 2011) (hereinafter "Peck Shaffer letter"), attached as Exhibit B.

Transaction in nearly all material legal respects.[265] The Peck Shaffer letter does not cite *Ryan* despite its direct applicability to the Transaction's constitutional issues.

Although the Peck Shaffer Letter is ambiguous in many respects, not even identifying Ohio Const. Art. VIII §§4, 6 or 13, this section will identify and refute the counterarguments as applied to the relevant laws. I sent a response letter to the Franklin County Commissioners explaining that Peck Shaffer has not provided a legal basis for the Transaction, but the Commissioners did not reply. In any event, this section will address the following arguments: (1) the FCCFA is a public authority separate and apart from state and local governments, which is not subject to Article VIII restrictions; (2) Nationwide carries the risk of loss; (3) State, rather than local, taxes are funding the bond issuance; (4) *Bazell v. City of Cincinnati* provides constitutional authority for the Transaction; and (5) an argument regarding subject-to-appropriation debt.

a. Public Authority Arguments

It may be argued that the FCCFA, as a separate entity from the City of Columbus, Franklin County and the State of Ohio, may lend its credit without lending government credit for constitutional purposes. However, it is unlikely that the FCCFA effectively acts as a shield in this manner. In *Brand*, a public commission separate from the State of Ohio issued the loans in question, but nonetheless violated the §§4,6 "lending of credit" restriction.[266] The *Brand* Court stated that lending of credit by the commission *obviously* constituted lending of State credit due to the language of the enabling statute under which the commission was created.[267] Specifically, the enabling statute states that the "commission is a body both corporate and politic in this state, and the exercise by it of the powers conferred by *Sections 122.14 to 122.36*, inclusive * * * is an essential governmental function of the state."[268] In identical fashion, R.C. 351, the statutory authority pursuant to which the FCCFA was created, uses *the same language* to describe the FCCFA.[269] Thus, the FCCFA cannot act as a

265. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 459 N.E.2d 208 (1984) (section entitled "Counsel").

266. State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964).

267. *Id.* at 48.

268. *Id.*

269. OHIO REV. CODE ANN. §351.01(A); §351.02.

shield or conduit to indirectly allow lending government credit under §§4, 6.[270]

To be sure, the Ohio Supreme Court has condoned a narrowly construed "special funds" doctrine, under which public bodies may issue revenue debt that is not considered an obligation of the State.[271] In Ohio, the special funds doctrine applies only in situations where debt-financed projects produce income that is used to service the debt.[272] The special funds doctrine does not apply in situations where tax revenue is used to service debt.[273] Moreover, the doctrine applies only to constitutional debt limits under Ohio Const. Art. VIII §§1, 2 and 3, but not the lending of credit provisions under §§4, 6.[274] In

270. Sterk & Goldman, *supra* note 9, at 1336 ("The Supreme Court has held that the Ohio legislature may not empower a public authority to issue bonds for the purpose of re-lending the borrowed money to promote economic development.") (citing *Brand*).

271. State ex rel. Shkurti v. Withrow, 32 Ohio St. 3d 424, 426–28 (1987); *see also* Sterk & Goldman, *supra* note 9, at 1336–37.

272. *Shkurti*, 32 Ohio St. 3d at 426-28; State, ex rel. Pub. Institutional Bldg. Auth. v. Neffner, 137 Ohio St. 390, 399 (1940).

> Where substantial funds which have heretofore gone into the general funds of the state treasury are pledged to liquidate such bonds, thereby requiring the state to seek and secure revenues otherwise in order to meet its obligations to care for and support its wards, then the obligation of those bonds does become the ultimate obligation of the state. To hold otherwise would result in an evasion of the constitutional limitations.

Id.

273. *Shkurti*, 32 Ohio St. 3d at 428.

274. The Ohio Supreme Court has narrowly construed the special funds doctrine. In two pre-*Brand* cases, the Court upheld revenue debt as non-obligations of the State exempt from strict debt limits under OHIO CONST. art. VIII §§1, 2, and 3. Kasch v. Miller, 104 Ohio St. 281, 288 (1922); State Bridge Comm'n v. Griffith, 136 Ohio St. 334 (1940). *But see* State ex rel. Allen v. Ferguson, 155 Ohio St. 26 (1951) (citing *Kasch* and *Griffith* for the proposition that the special funds doctrine applies to OHIO CONST. art. VIII, § 4). In *Ferguson*, the Court could have refuted the Section 4 argument simply by recognizing that the state was not lending its credit to a private corporation in that case. Gold, *supra* note 7, at 443. Negating *Ferguson* as reliable authority, later cases have distinguished doctrines under §§1, 2 and 3 from other provisions in Art. VIII. *E.g.* State ex rel. Petroleum Underground Storage Tank Release Co., 62 Ohio St. 3d 111, 116 (1990) (distinguishing the meaning of "tax" under §13 with its meaning under §1,2 and 3). *Brand*, of course, makes clear that the special funds doctrine does not apply to Section 4. *Brand*, 176 Ohio St. at 50–51.

> In view of the provisions of Sections 1, 2 and 3 of Article VIII, there would appear to be no reason for the provisions of Section 4 of that article against giving or lending the credit of the state if a giving or

Brand, the Court specifically rejected this line of cases as authority for transactions that violate §4.[275]

As a corollary to the public authority argument, it may be argued that the §13 exception is applicable to uphold the Transaction because the FCCFA acts as a shield. That is, it is not casino tax revenue (*i.e.,* moneys raised by taxation) used to repay the bonds, but rather "rent' or lease payment revenues. However, the *Ryan* court stated that it is simply the pledge of tax revenues by the political subdivision that makes an act unconstitutional.[276] Moreover, courts should look to the "realities" of the transaction to determine whether there is a corporate joint venture.[277]

In this case, Columbus and Franklin County are pledging casino tax revenues to finance the Transaction. Specifically, Columbus and Franklin County are pledging casino tax revenues to make lease payments to the FCCFA,[278] which is in turn pledging the lease payments to repay bonds and fund the FCCFA Arena purchase.[279] By owning the Arena, the FCCFA is able to subsidize CBJ with rent-free Arena usage under the Use Agreement.[280] Thus, the FCCFA is acting as a conduit because the funds pledged by Columbus, Franklin

> lending of credit of the state would occur only where an indebtedness of the state would be involved. In such an instance, the prohibition of such giving or lending of the state's credit to an individual association or corporation would certainly have been already prohibited by Sections 1, 2 and 3 of that article.
>
> Therefore, to give some meaning to the provisions of Section 4 of Article VIII prohibiting the giving or loaning of the credit of the state, we must conclude that those provisions prohibit a giving or loaning of that credit even where no "debts" of the state, either "direct or contingent" have been incurred.

Id. And *Shkurti* and *Ryan*, taken together, provide that the court should look to substance over form in determining whether there is an issuance of debt or public-private joint venture.

275. *Brand*, 176 Ohio St. at 50–51.

276. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 129, 459 N.E.2d 208 (1984).

277. *Id.* at 128.

278. Lease Agreement, Section 1.01 (defining "Lessees Rent" as earmarked casino tax receipts), Section 3.01 (defining Lease payments as Lessees Rent).

279. Bond Resolution, Section 1 (defining "Lessee's Rent" with reference to the Lease Agreement), Section 12 and Section 13 (explaining the use of bond proceeds).

280. Use Agreement, Section 5.1 and Section 5.2 (explaining the "public purpose" for the Transaction); *see* Use Agreement Article 5 and Article 6 (omitting a price or rent term).

County and the FCCFA are all the same funds and must be the same funds, as they are earmarked under the terms of the City Ordinance and FCCFA Bond Resolution.[281] In fact, the City Ordinance recognizes that Columbus is now sharing in the cost of acquiring, operating and maintaining the Arena.[282] In sum, the Transaction does not fall within the §13 exception merely because it incorporates a public authority.

b. Government Entities Carry the Risk of Loss

The Peck Shaffer letter argues that Nationwide carries the risk of loss for the Transaction because Nationwide, as bondholders, are legally entitled only to casino tax revenue. If casino tax revenue does not materialize, Nationwide does not have a legal claim to be repaid for the FCCFA bonds it holds.

This argument is a red herring. "Risk of loss," as defined to exclude below-market arrangements, is not a proxy for whether there is a constitutional violation.[283] As noted above, the below-market Use Agreement is the lending of credit, as defined in *Ryan* and *Brand*, that violates §§4, 6. The Peck Shaffer letter does not explain how the risk of loss is relevant to the constitutional analysis. While this section reiterates *policy* arguments stated above with an implicit lending of credit *legal* argument, the reader should remember that there is a constitutional violation independent from this analysis. Against this backdrop, government entities do carry the risk of loss from both a legal and policy perspective.

i. Government Entities Carry the Transaction's Risk of Loss

From a legal standpoint, government entities carry the risk of loss because the Transaction ensures a *guaranteed loss*. Early Ohio Supreme Court §4 cases taking risk of loss into account struck down financing arrangements in part because the State, acting as a financier, had assumed the risk of loss for the project.[284] While

281. Bond Resolution, Section 12 and Section 13.

282. Columbus City Ordinance 1596-2011.

283. Peck Shaffer Letter, *supra* note 264, at 1 ("Nationwide will . . . bear all the risk of the sufficiency of the revenues pledged to the payment").

284. *See, e.g.,* State ex rel. Campbell v. Cincinnati Street Railway Co., 97 Ohio St. 283 (1918). In *Campbell*, the Court invalidated bonds issued by a subway company operating publicly owned street railways, which were to be repaid with gross receipts from that company. *Id.* at 306–09. In part, the bonds would repay pre-existing company obligations. *Id.* Because the bonds entitled the city to gross receipts from the company, the bonds lent city credit by using government resources (i.e., the gross receipts) to repay existing

bearing risk of loss on the project in each case, the State employed State property to provide financing in situations where there was an arm's length transaction with a private entity.[285]

With the below-market Transaction at issue here, government entities have incurred a guaranteed loss, which is a clearer violation under §§4, 6 than when government entities incur only a potential risk of loss. The revenue stream from casino tax revenue has a present value that could be converted into a lump sum at present.[286] Even if

company obligations. *Id.* at 308–09. In other words, the government loaned its resources to service debt obligations of a private company. *See also* City of Cincinnati v. Harth, 101 Ohio St. 344, 352 (1920) (invalidating a bond issuance enabling the government to repair private railroads because "[t]he city must pay the bonds whether the company pays the money back to the city or not.").

285. *Campbell*, 97 Ohio St. at 307.

> It is urged that the amount of compensation and the method of fixing it is a matter for the determination of the city and its authorities in negotiation with the company, and that it is not a subject of judicial inquiry. Where the parties have full capacity to contract, this is true, in the absence of fraud; and no fraud or bad faith is suggested in this case.

Id. See also Harth, 101 Ohio St. at 349–50.

> The only way provided by which the city is to be reimbursed is by assessing against the company the cost of the things it gives to and does for the company, in addition to the declaration of the statute that the amount of the cost shall be a lien on the property of the company. That is to say, it is a simple, plain loan by the city to the company of the amount of money needed for the purpose. The company becomes indebted to the city for the money the city has spent on the company's property. The company gets the property at once. It may borrow on it or sell it. The city has loaned its money and its credit to the company. It is the very thing that the constitution prohibits.

Id. Notably, *Campbell* is not binding precedent requiring fraud for judicial inquiry into whether public transactions are below-market arrangements; just as in *Ryan* the Ohio Supreme Court did not find fraud but determined that there was an impermissible public-private joint venture due to the favorable agreements with private businesses. *Ryan*, 1269 Ohio St. 3d at 129.

286. In a similar vein, the State of Ohio recently obtained a lump-sum payment from bondholders by issuing bonds secured with payments tobacco companies are making in settlement of litigation. *Fitch Downgrades Ohio Tobacco Bonds; Official Says Budget Not Impacted*, Gongwer's Ohio Report (Feb. 10, 2012) ("The authority, set up by former Gov. Ted Strickland's administration to securitize Ohio's stream of payments from the multi-state settlement with Big Tobacco firms, sold the state's rights to the money through 2052 for about $5.5 billion—nearly all of which has already been spent on school facilities and other programs.").

casino tax revenue does not materialize to ultimately benefit CBJ, government entities are incurring a loss because they are foregoing the present value of the casino tax revenue. Thus, the Transaction is not an arm's length transaction, but rather a below-market Transaction imposing a loss on government entities.

Further, government entities receive little or no benefit from assigning the casino tax revenue stream here because the Use Agreement provides for CBJ to pay no rent. Any benefit in stimulating the economy is too speculative to be legally significant and, as discussed in Part III, has not been supported with any evidence such as a basic return on investment calculation.[287] In assigning the casino tax revenue stream to the FCCFA for the Transaction, Columbus and Franklin County are incurring a loss because they are forgoing funds that they could realize *at present* and receiving little or no benefit in return. The Transaction simply is not an arm's length transaction.

ii. Section 13 Does Not Authorize Revenue Debt Tied to Tax Revenue

Peck Shaffer's revenue debt (i.e., risk of loss) argument also *cuts against* its position that the Transaction is legal. Adopted in response to *Brand* invalidating a debt issuance, §13 is designed to promote public debt issuances for capital investment without affecting the State taxing power.[288] The "moneys raised by taxation" limitation under §13 promotes self-liquidating investments in capital projects funded with non-tax revenues.

Despite §13 facilitating self-liquidating capital investment, the Ohio Supreme Court's §13 jurisprudence encourages governmental entities to pledge their full faith and credit (i.e., take on the risk of loss) to fall within the §13 exception to §§4, 6.[289] While §13 does not permit debt issuances funded with moneys raised by taxation to fall within its exception to §§4, 6, general obligation debt generally does not constitute "moneys raised by taxation."[290] Revenue debt tied to

287. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 130, 459 N.E.2d 208 (1984) (refuting public purpose arguments in this context).

288. Gold, *supra* note 7, at 448–49, 456.

289. *Id.* at 454, 463–64.

290. *Ryan*, 9 Ohio St. 3d at 129 ("If only the full faith and credit of the city of Gahanna had been pledged to repay the notes or bonds, this would have constituted sufficient compliance with Section 13, Article VIII to allow this project to withstand a constitutional challenge.") *See also* Gold, *supra* note 7, at 463–64.

tax revenue, on the other hand, does constitute "moneys raised by taxation."[291]

To structure the Transaction as constitutional, then, proponents should be arguing that the debt issued is a State or municipal general obligation pledging the full faith and credit of that government entity. By contrast, Peck Shaffer and other Transaction proponents structured the Transaction such that the revenue debt issued presents no governmental general obligation.[292] Instead, the revenue debt is tied to tax revenue as the Ohio Constitution expressly prohibits. Peck Shaffer's revenue debt argument therefore cuts against the Transaction as constitutional and falling within §13. For this reason, Peck Shaffer's failure to relate its analysis to the ultimate constitutional issue matters and the letter highlights a key fact necessary to find the Transaction unconstitutional—that the Transaction creates revenue debt.

iii. For Practical Purposes, Government Entities Carry the Risk of Loss

As a matter of public policy, government leaders should expect to repay bonds issued under the Transaction if casino tax revenue provides insufficient funds.[293] On several occasions, government officials and attorneys associated with the Transaction have stated that there is no commitment to repay the debt arising from the Transaction if casino tax revenue does not materialize as expected.[294] Consistent with these statements, the Peck Shaffer letter makes the same claim.[295] However, government entities will likely repay or renegotiate debt even absent a legal obligation to do so in order to maintain favorable credit ratings and appease individual creditors.[296] If casino tax revenue does not materialize in this case, Columbus, Franklin County and/or the State of Ohio will likely renegotiate the

291. *Ryan*, 9 Ohio St. 3d at 129.

292. *See Ryan*, 9 Ohio St. 3d at 129; Gold, *supra* note 7, at 463–64.

293. State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 52, 197 N.E.2d 328 (1964) (stating that revenue debt impacts the State's borrowing power even though indebtedness does not arise).

294. Auditor Hugh Dorrian Oct. 3rd Columbus City Council Meeting. Caruso, *supra* note 3. John Rosenberger, Oct. 18th Franklin County Convention Facilities Authority Meeting.

295. Peck Shaffer Letter, *supra* note 264, at 1.

296. *Brand*, 176 Ohio St. at 52 (1964). *See also* Oesterle, *supra* note 9, at 613–14 (stating that "[t]he financial concept of debt does not depend on the revenue source for the debt payment," but rather reflects the obligation to repay a fixed sum certain).

Transaction to repay bonds issued under the Transaction or otherwise appease Nationwide, even absent a legal obligation to do so.

In fact, the Transaction itself demonstrates Nationwide's influence to renegotiate transactions. A Columbus School Board member did not expect future property tax revenues from the Nationwide Arena parcel because he expected, as in fact occurred, Nationwide to renegotiate the existing property tax abatement for a longer term.[297] Due to Nationwide's influence, the presence of a revenue stream (i.e., casino money) to service debt therefore does not make debt distinct from a tax in this context because the public will likely pay for the Arena even absent that revenue stream. Further, the debt financing is a much less transparent use of public funds and confers an obligation on future generations.[298]

In light of these legal and policy bases, the Transaction does not place the risk of loss on Nationwide. Government leaders and attorneys are referring to dubious legal technicalities when they state that Nationwide assumes the risk of loss under the Transaction. Similarly, a close reading of the Peck Shaffer letter suggests that bond counsel may not have fully contemplated how the Ohio Constitution treats revenue debt in this context or the policy reasoning behind the law.[299]

c. Under §13, Casino Tax Revenue Constitutes "Moneys Raised by Taxation"

The casino tax revenue pledged to repay bonds issued pursuant to the Transaction constitutes "moneys raised by taxation" in violation of §13. As an initial matter, casino tax revenue is unquestionably a tax. Revenue that is identified expressly by constitutional provision or statute as a tax is a tax under §13.[300] Ohio

297. Bell, *supra* note 121.

298. Gillette, *supra* note 126, at 1247.

299. It is worth noting that the Transaction may not have been politically viable if financed with general obligations bonds because then public officials would have had greater difficulty asserting that the Transaction will not "increase taxes."

300. *See* 1994 Ohio Op. Att'y Gen. 353 No. 94-071, at 165.

> However, the court's analysis in *Duerk* suggests that if moneys are not specifically designated as tax moneys by statute or are not collected pursuant to a statutory tax levy, and are not required to be paid into the state treasury for the general expenses of state government, but instead are required to be deposited into a special fund that is used only for other specifically enumerated purposes, then the moneys do not constitute "moneys raised by taxation."

Const. Art. XV §6 expressly identifies casino revenue as a tax, and in doing so uses the word "tax" twenty-six times. Thus, casino tax is a tax, and further, casino tax revenue constitutes "moneys raised by taxation" under §13.

The Peck Shaffer letter argues that the casino tax is a state tax, rather than a city or county tax.[301] This distinction is not meaningful other than to potentially create a §4 (i.e., state) violation rather than a §6 (i.e., city or county) violation. Even if there were only a §4 (i.e., state) violation, by participating in the Transaction, Franklin County, Columbus and the FCCFA are still parties to illegal contracts.

Moreover, there is a §13 violation regardless of which governmental body (state, city, county or public authority) pledges a tax to repay debt. The plain language of §13—"moneys raised by taxation"—does not qualify the type of tax that violates §13.[302] Nonetheless, without providing legal authority, the Peck Shaffer letter states that casino tax revenue loses its character as a tax when the State distributes it to other entities, including Columbus and Franklin County.[303]

But debt issued pursuant to §13 should not affect *any* governmental taxing power, including the government's "casino taxing power" or any other taxing power. It stretches the bounds of reason to argue, as Peck Shaffer does, that Ohio governmental bodies may distribute tax revenue amongst one another to circumvent the Ohio Constitution.

The intended purpose of §13 is also consistent with the plain and unqualified reading of "taxation." Section 13 was designed to promote public investment, but in doing so to protect the State taxing power.[304] In August 2012, shortly after closing on the Transaction, Columbus enacted a new individual income tax on income derived from games of chance, which includes not just casino gambling income, but also income from longstanding church raffles and the

Id. (citing Duerk v. Donahey, 67 Ohio St. 2d 216 (1981)).

301. Peck Shaffer Letter, *supra* note 264, at 2–3.

302. Section 13, in pertinent part, reads as follows: "moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section."

303. Peck Shaffer Letter, *supra* note 264, at 2–3.

304. Gold, *supra* note 7, at 448–49, 456. *See also* State ex rel Pugh v. Sayre, 90 Ohio St. 215, 218 (1914) (citing *Walker* for the proposition that Section 6 is designed to protect "revenues raised by taxation").

existing state-run lottery.[305] Despite statements by public officials trumpeting the Transaction on the grounds that there would be no tax increase, the City has enacted a new tax related to casino gambling. Absent the Transaction, the city would have had additional casino tax revenue that would have lessened or eliminated any need to generate additional tax revenue related to casino gambling. In other words, the Transaction affects the City's taxing power by giving rise to the need for a new tax on casino gambling, which contravenes the purpose of §13.

In addition, Franklin County and Columbus are likely to issue other broadly based taxes, special assessments or user fees to replace casino tax revenue foregone as a result of the Transaction.[306] For example, at the same meeting the Franklin County Commissioners approved the Transaction, they raised resident sewer fees by 30%.[307] Plainly, the Transaction pledges moneys raised by taxation in violation of §13, as supported with policy-based considerations.

d. *Bazell v. City of Cincinnati* Provides No Constitutional Basis for the Transaction.

Bazell v. City of Cincinnati provides no constitutional basis for the Transaction. *Bazell* stands for the well-settled proposition that a public body may lend its credit to another public body.[308] In *Bazell*, the Ohio Supreme Court did not consider whether a government entity may lend its credit to a for-profit business under §6 nor did the Court address §13 at all.[309] Instead, the Court considered whether,

305. City of Columbus Ordinance 1769-2012, http://columbus.legistar.com/Legislation Detail.aspx?ID=1159729&GUID=8A5AA583-F704-42B6-9CD3-8B371AA8D0F7#. UB7gXeM2g4s.email (last visited Oct. 5. 2012). *See also* Sullivan, *supra* note 117.

306. *See* Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 932 (2003) ("The rise in these "non-tax taxes" has had multiple policy, ideological, and political causes—but surely evasion of the tax limits is one of them").

307. Lucas Sullivan, *30% water-sewer rate hike, purchase of arena OK'ed by commissioners*, THE COLUMBUS DISPATCH, Dec. 21, 2011, http://www.dispatch.com/ content/stories/local/2011/12/21/30-water-sewer-rate-hike-purchase-of-arena-okd.html. Admittedly, other factors gave rise to the water-sewer rate hike, including the 41 million gallons of water that Franklin County purchases from Columbus and cannot account for each quarter. *Id.*

308. Bazell v. City of Cincinnati, 13 Ohio St. 2d 63, 72 (1968) ("This court has held that these provisions do not prevent a county from raising money for or lending its credit to a city . . . or to a public organization such as an agricultural society organized to hold annual agricultural fairs.") (citing State, ex rel. Speeth v. Carney, 163 Ohio St. 159 (1955)).

309. *See id.* at 65 (syllabus of the Court). The Court even cited State ex rel. Wilson v. Hance, 169 Ohio St. 457, 159 N.E. 2d 741, (1959), which addresses the lending of

under §6, the City of Cincinnati may lend its credit to another governmental entity, Hamilton County.[310] In stating that a municipality may construct a stadium for public use, the Court did so in the context of a challenge under the municipal home rule in which the plaintiffs contended that the charter municipality exceeded the powers granted to it, not in the context of §§4, 6 and 13.[311] Further, the Court expressly noted that it was only considering the errors identified in the record.[312] Thus, *Bazell* does not address the constitutional issues that the Transaction presents and cannot provide legal authority for the Transaction.

Even if *Bazell* had addressed the relevant constitutional issues, the Transaction is clearly distinguishable from the structure of the financing plan in *Bazell* because: (1) the Transaction's below-market Use Agreement lends public credit to a for-profit business in violation of §§4, 6; and (2) the Transaction pledges moneys raised by taxation in violation of §13.[313]

government credit to a private corporation under §6, to distinguish the issue at bar from the public-private context. *Id.* at 72.

310. *Id.* at 71–72.

311. *Id.* at 67-68 (citing OHIO CONST. art. XVIII §§ 3, 7). The municipal home rule is clearly distinct and subject to different legal analysis from Ohio Const. art. VIII §§4, 6. *See Campbell*, 97 Ohio St. at 304 ("By the provisions of Sections 4 and 5 of Article XVIII plenary power is given to the municipality to deal with the subject. However, these sections of Article XVIII must be construed with Section 6 of Article VIII, which, as already stated, was readopted at the same time. They are entirely consistent and full effect must be given to all of them.").

312. *Id.* at 74–75 (citing R.C. § 2505.21).

313. The *Bazell* transaction was structured as follows:

> Hamilton County is to issue . . . revenue bonds due serially over a period of 40 years to provide money needed for acquisition of the site and for construction of the stadium project; the city is to convey this site to the county; the county is to pay the city from the proceeds of those bonds money for construction of the stadium project; the city is to arrange for construction of that project; the county is to lease the stadium project to the city for 40 years; the city obligates itself under that lease and the co-operative agreement with the county to pay rent in each year to the county in an amount sufficient to enable the county to pay interest and principal on the bonds that will be due in that year; the county is to have no obligation on its revenue bonds other than to use the rent received from the city to pay that interest and principal; and that rent is to be the only source for payment of that interest and principal.

Id. at 72–73.

First, the Transaction violates §§4, 6 by lending public credit to or creating a corporate joint venture with a for-profit business. Lending among public bodies is distinct from lending credit from government entities to a for-profit business. The Transaction lends public credit (*e.g.* the FCCFA and other public entities) to a for-profit business (CBJ) by means of a below-market Use Agreement. In *Bazell*, the City of Cincinnati lent its credit to Hamilton County, which is lending of credit among two governmental entities. The Court's opinion does not provide a sufficient basis to determine whether there was a constitutional violation had the Court considered whether the City of Cincinnati lent its credit to the Cincinnati Reds. Further, there is no indication that there was a below-market lease or use agreement in *Bazell* as there is with the Transaction. Thus, the Transaction presents a violation under §§4, 6 that was not present in *Bazell*.

Second, the Transaction pledges moneys raised by taxation in violation of §13. Under §13, moneys raised by taxation may not be pledged to service debt otherwise falling within §13. The Transaction pledges casino tax revenue as Columbus' lease payment under its FCCFA Lease, which is then pledged to repay the bond issue. In *Bazell*, the private rents generated from stadium operation were paid to Cincinnati, which pledged that revenue to Hamilton County to service the debt issuance that financed the stadium. The private rents are not tax revenue, whereas casino tax revenue is tax revenue. Further, the Court specifically stated that the use of tax revenue to service the bonds was too speculative based upon the record before it.[314] Thus, the Transaction presents a §13 violation that was not present in *Bazell*. For all of the foregoing reasons, *Bazell* does not provide a constitutional basis for the Transaction.

e. Subject-to-Appropriation Debt

The subject-to-appropriation debt argument in the Peck Shaffer letter is another red herring argument. Under Ohio Const. Art. XII §§2, 11, there are additional limitations on public indebtedness and a sinking fund requirement separate from Ohio Const. Art. VIII, §§ 4, 6

314. The *Bazell* Court determined that it was too speculative, based upon the record before them, that tax revenue would be used to service the bonds. *Id.* at 67. By contrast, the Nationwide Arena Transaction clearly uses "casino tax revenue," as defined in OHIO CONST. art. XV § 6.

and 13.[315] Peck Shaffer notes that the "rental payments" pursuant to the circular Lease and Sublease are subject to annual appropriation.[316] Due to the annual appropriation, Peck Shaffer argues that bonds issued in the Transaction do not constitute "indebtedness" or violate debt restrictions under Ohio Const. Art. XII, §§ 2, 11.[317] But this argument does not address the constitutional provisions that the Transaction violates—Ohio Const. Art. VIII §§4, 6, and 13—regarding lending of aid or credit. Thus, the subject-to-appropriation argument, which constitutes a substantial portion of the Peck Shaffer letter, does not provide a constitutional basis for the Transaction.

V. Conclusion: The Future for Ohio's Fiscal Constitution

The Nationwide Arena Transaction's poorly justified economic development purpose and constitutional violation demonstrates that Ohio's fiscal constitution is not properly functioning to limit the impact that individual economic and political incentives have on public finances. The Transaction specifically raises substantive policy and enforcement issues.

First, the Transaction violates Ohio's constitutional fiscal restraints, but the policy debate surrounding the Transaction also identifies potential areas for reform. As noted in Parts III and IV above, principles of public debt warrant debt issuances to voluntarily transfer private funds to the public sector in limited amounts, as well as to facilitate capital formation for self-liquidating capital investment.[318] Indeed, the Ohio Constitution has a provision—Ohio Const. Art. VIII §§1, 2—authorizing debt transfers in limited amounts.[319] But §13 goes beyond that purpose to also exempt all debt issuances made pursuant to §13 from restrictions on public investment in the private sector, i.e., §§4, 6.

Ohio's debt limits, including §13 authorizing debt for a public purpose, should be separated from its restrictions on lending government credit to the private sector. At a minimum, §13's authorization for debt issued to fund self-liquidating capital

315. State ex rel. Kitchen v. Christman, 31 Ohio St. 2d 64, 73-75 (1972) (discussing Ohio Const. art. XII § 11).

316. Peck Shaffer Letter, *supra* note 264, at 2.

317. *Id.*

318. BUCHANAN, *supra* note 107, at 2.12.35.

319. *See* OHIO CONST. art. VIII §2. Note that §2 authorizes debt issuances for particular purposes that go beyond the transfer function in some instances. Section 2p, for example, authorizes economic development through Ohio's Third Frontier Program.

investment should remove the exception to §§ 4, 6.[320] The Keynesian economic theory that may have justified §13's adoption in 1965 is highly questionable following U.S. stagflation in the 1970's.[321]

As the Ohio Supreme Court did in *Brand*, debt limits and restrictions on public investment in the private sector should be analyzed separately.[322] Further, if §13's exception to §§4, 6 is removed, politicians will carry the burden to justify public debt issuances for non-income producing capital investment, and §§4, 6 will have greater meaning to restrict public investment in for-profit businesses.

Second, and more prominent, Columbus' experience with the Transaction demonstrates difficulty enforcing constitutional fiscal restraints.[323] As noted in Part II, procedure plays at least some role in determining the public good. The Ohio Constitution, for example, provides rules relating to public debt issuances for capital investment and restrictions on public investment in the private sector. However,

320. In the context of Ohio constitutional debt limits separate from §§4, 6, the Ohio Supreme Court has refused to expand Ohio's special fund doctrine relating to income-producing property. *See Shkurti*, 32 Ohio St. 3d at 426–27.

> We first note that in *Griffith* and *Kasch* and the subsequent cases approving the special fund exception, the bonds to be issued were to finance construction of a tangible, income-producing property whose income was then pledged to retire the bonds. In the instant case, no such property is constructed or acquired. Rather, an outstanding liability is refunded. Since no property is constructed or acquired, there is no income from the property to pay debt service. Instead, a "surcharge" on current employer contributions is created (R.C. 4141.251) and pledged (R.C. 4141.48[C] and [Q]) to retire the bonds. While this proposed transaction parallels the special fund exception previously sanctioned by this court, it does not fall within the limits of that exception; rather, it is a significant extension of that exception.

Id. Notably, Ohio courts have stated that §13 can authorize debt otherwise prohibited under §§4, 6. *E.g.,* State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 77, 330 N.E.2d 454 (1974) (holding that constitutional authority under §13 moots a potential §4 issue).

321. BUCHANAN & WAGNER, *supra* note 26, at 8.11.11-8.11.19; Friedman, *supra* note 139, at 468–71 (noting that stagflation in the 1970's provides empirical evidence that there is not a trade-off between inflation and unemployment); Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1237–39 (1993) (questioning the soundness of Keynesian economic theory with reference to stagflation in the 1970s).

322. State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 48–49 (§4 analysis), 50-51 (indebtedness discussion), 197 N.E.2d 328 (1964).

323. *See* BRENNAN & BUCHANAN, *supra* note 5, at 9.1.30-9.1.33 ("The Enforceability of Constitutional Contract").

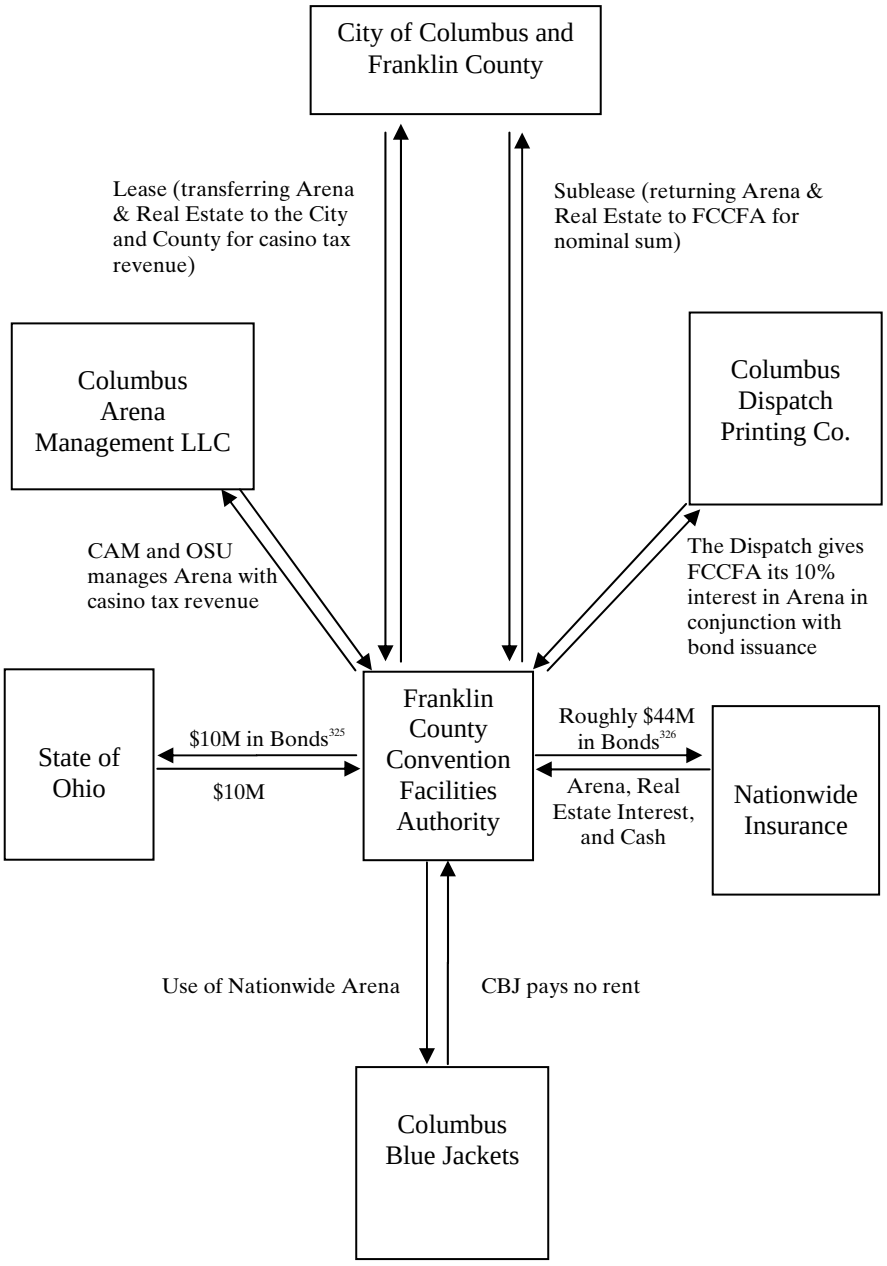
these fundamental laws that represent the state government's contract directly with its citizens and that limit government powers in order to protect individual rights are without effect if they are not respected and enforced. Exacerbating the enforcement issue are non-transparent and complicated financial arrangements, implemented through lawyers, which are designed to circumvent constitutional purposes.

Columbus City Council, Mayor Michael Coleman, the Franklin County Commissioners and the Franklin County Convention Facilities Authority unanimously approved the Transaction without giving serious consideration to return on investment or whether the Transaction was legal. That is, the Nationwide Arena Transaction violates directives from the people through the Ohio Constitution and has been shown here to be a poor investment. In other words, public officials have not followed the rules to determine the public good.

Highlighting the enforcement issue, which this article leaves unresolved, are my largely ignored public efforts to alert public officials to legitimate and serious concerns with the Transaction. As of this writing, no lawsuits have been filed to stop the Transaction despite statutes providing for taxpayer standing against municipalities (e.g., City of Columbus) and counties (e.g., Franklin County).[324] Without enforcement, the Transaction and other public finance arrangements in Ohio need not even technically comply with the Ohio Constitution, much less comport with the constitutional purpose. This circumstance creates a formidable quandary, one I plan to address in a future article examining processes for fiscal constitutional reform in Ohio.

324. OHIO REV. CODE ANN. §§ 733.59, 733.60 (West 2012) (providing for taxpayer standing against a municipality and a one year statute of limitations on such suits); OHIO REV. CODE ANN. §309.13 (West 2012) (providing for taxpayer standing against a county).

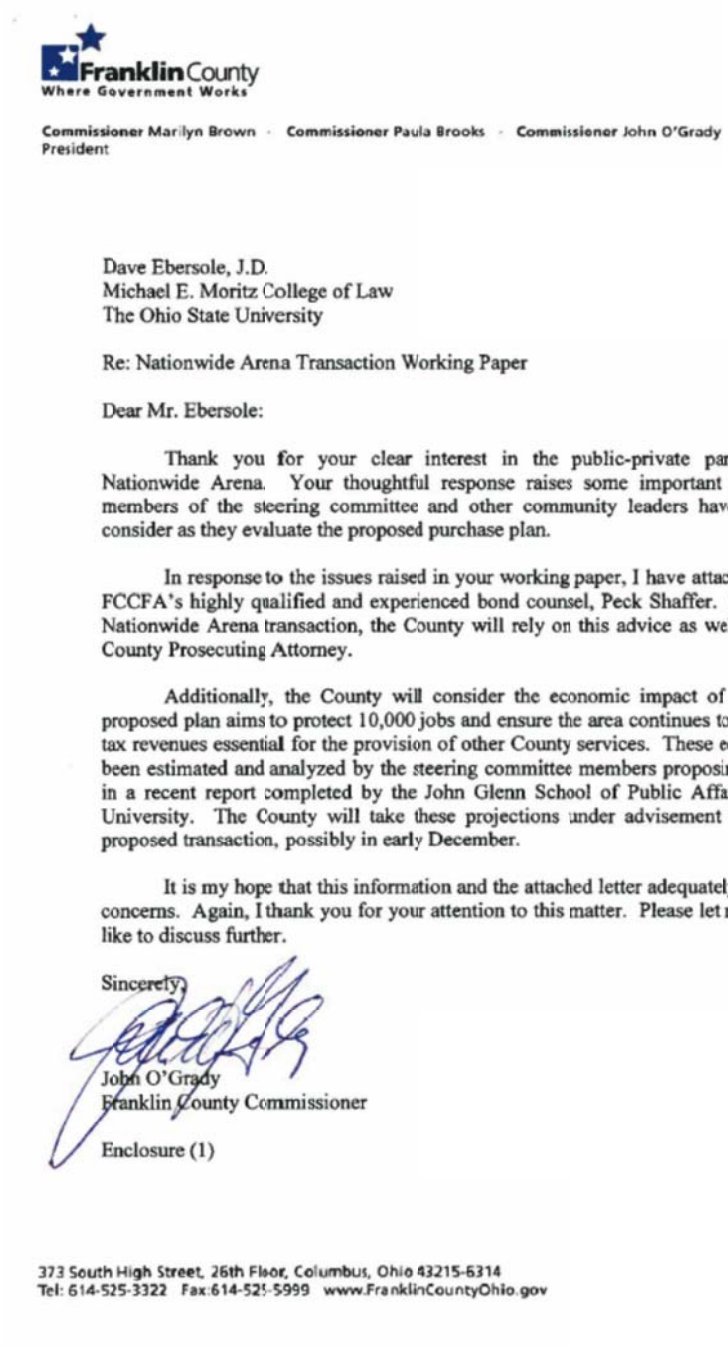
EXHIBIT A



325. The bonds are serviced with casino tax revenue. Bond Resolution, Section 12, Section 13.

326. The bonds are serviced with casino tax revenue. Bond Resolution, Section 12, Section 13.

Exhibit B



Franklin County
Where Government Works

Commissioner Marilyn Brown · Commissioner Paula Brooks · Commissioner John O'Grady
President

Dave Ebersole, J.D.
Michael E. Moritz College of Law
The Ohio State University

Re: Nationwide Arena Transaction Working Paper

Dear Mr. Ebersole:

Thank you for your clear interest in the public-private partnership to purchase Nationwide Arena. Your thoughtful response raises some important points—points which members of the steering committee and other community leaders have taken great care to consider as they evaluate the proposed purchase plan.

In response to the issues raised in your working paper, I have attached the opinion of the FCCFA's highly qualified and experienced bond counsel, Peck Shaffer. When considering the Nationwide Arena transaction, the County will rely on this advice as well as the advice of the County Prosecuting Attorney.

Additionally, the County will consider the economic impact of the transaction. The proposed plan aims to protect 10,000 jobs and ensure the area continues to produce business and tax revenues essential for the provision of other County services. These economic benefits have been estimated and analyzed by the steering committee members proposing the plan, as well as in a recent report completed by the John Glenn School of Public Affairs at The Ohio State University. The County will take these projections under advisement when considering the proposed transaction, possibly in early December.

It is my hope that this information and the attached letter adequately address each of your concerns. Again, I thank you for your attention to this matter. Please let me know if you would like to discuss further.

Sincerely,

John O'Grady
Franklin County Commissioner

Enclosure (1)

373 South High Street, 26th Floor, Columbus, Ohio 43215-6314
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PECK SHAFFER

PECK, SHAFFER & WILLIAMS LLP
ATTORNEYS AT LAW

November 14, 2011

Don L. Brown, County Administrator
County of Franklin, Ohio
373 South High Street, 26th Floor
Columbus, OH 43215-6314

Dear Mr. Brown:

You have requested us to briefly respond to inquiries regarding the legal basis for the Nationwide Arena transaction involving the County of Franklin, the City of Columbus and the Franklin County Convention Facilities Authority. In particular, you have asked us to confirm that in this transaction, there is no joint venture, no lending of aid and credit, no lease to a private business and no general obligation debt supported by taxes. We hereby confirm that to be the case.

Our analysis begins with the fact that the Franklin County Convention Facilities Authority (the FCCFA) has the explicit power under Chapter 351, Ohio Revised Code, to purchase an arena and to issue revenue bonds to finance a portion of that purchase. The FCCFA proposes to purchase Nationwide's interest in the arena for $42.5 million. That facility cost $165 million to build approximately 11 years ago. Nationwide will be paid with cash derived from a State of Ohio loan to the FCCFA and with revenue bonds (essentially a promissory note payable from specified revenues) issued by the FCCFA. Nationwide will be the bondholder, will be paid interest and principal over time to retire the FCCFA bonds and, importantly, will bear all the risk of the sufficiency of the revenues pledged to the payment.

The bonds will be revenue bonds of the FCCFA and the FCCFA only, and will not be general obligations of the FCCFA, the City of Columbus or the County of Franklin. There will be no pledge of the full faith and credit of the FCCFA, the City or the County. No taxes levied or collected by the FCCFA, the City or the County will be pledged to the payment of the bonds.

The Blue Jackets will have no property interest in the arena. Instead, the arena will be a public facility owned by the FCCFA. The FCCFA will make the arena facilities available for use by non-profit and for-profit users, including concert and event promoters, civic and educational institutions, child and adult sports teams, religious organizations, and other groups seeking the use of arena and convention facilities. One of those users will be the Blue Jackets, pursuant to a negotiated use agreement for the use of portions of the facility during specified times in exchange for commitments from the Blue Jackets.

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It is long-settled law that a city, county or convention facilities authority may own and operate a stadium or arena, and may rent that facility to private users. See for example, paragraph three of the syllabus of Bazell v. Cincinnati (1968) 13 Ohio St. 2nd 63 ("A charter municipality may construct a stadium that is designed to accommodate large crowds at athletic and other exhibitions and may rent that stadium to private persons who will provide such exhibitions, and such municipalities may do so even though such private persons will derive profits from providing those exhibitions,..."). Significantly in this case, the revenues produced by the use of the arena by private entities are not pledged to the payment of the FCCFA bonds. In other words, the payment of the FCCFA's bonds is not dependent upon the success of the Blue Jackets or any other user of the arena, since arena revenues will be not be available for or pledged to the repayment of those bonds.

The only FCCFA revenues pledged to the bondholders are the rental payments received by the FCCFA pursuant to the lease/sublease of the facility to the City and the County. Those rental payments will be in an amount equal to a specified percentage of the casino revenue received by the City and the County from the State of Ohio. The obligations of the City and the County to make rental payments are subject to annual appropriation. As a result, those obligations are not "debt" or "indebtedness" of the City or the County within the meaning of the debt limitations contained in Article XII, §2 and Article XII, §11 of the Ohio Constitution. See, for example, State ex rel. Ross v. Donahey (1916) 93 O.S. 414 (lease made by industrial commission subject to appropriation was not debt). Contractual obligations, including lease obligations, which are subject to annual appropriation do not constitute debt because succeeding legislative bodies are not legally obligated to appropriate money for the payment of such obligations. See State ex rel. Preston v. Ferguson (1960) 170 Ohio St. 450 (statute and agreement did not create a debt of the State where appropriations needed to support the original agreement and renewals thereof and where subsequent General Assemblies are not bound).

Prior bond issues of the FCCFA which included in their structure similar leases involving the City and the County have been validated. See for example most recently, The Franklin County Convention Facilities Authority v. Richard Levin, Case No. 09CVH811733, Court of Common Pleas, Franklin County, Ohio (August 28, 2009). No conjecture regarding whether the City or the County will make an annual appropriation is relevant in the legal analysis of whether the obligations of the City and County under the lease are debt.

The use by the City and the County of a portion of their expected revenue from the casino tax seems to be a source of confusion. The casino "tax" is not a tax levied and collected by the FCCFA, the City or the County. See newly enacted Ohio Constitution Article XV §6. Instead, it is a charge levied and collected by the State against gross casino revenue and it is paid by the

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casino operators as a condition of being allowed to operate casinos within the State. The revenue produced is derived from all casinos operating in the State. Those pooled revenues are distributed according to a formula set forth in that §6 to all counties and all public school districts in the State, as well as to host cities, certain large cities, the State Racing Commission, the Casino Control Commission, a law enforcement fund and a gambling addiction fund.

Even if the State's casino revenues are characterized as having been originally derived from a tax levied by the State, payments by the State from those revenues lose that character upon receipt by the cities and counties. For example, unlike taxes levied by a city or county, there are no restrictions imposed on the use of the State casino revenues by the City or the County, other than, of course, that the use be for a public use. In addition, unlike property or other taxes, fees or charges imposed by the City or the County, the City and the County have no ability to increase or decrease the amount of casino revenue received by them. That is solely a function of monies received by the State from the casino operators. Importantly, no governmental function of either the City or the County will be affected should the casino revenues the City and the County intend to use as rental payments be less than anticipated. The risk of casino revenue being less than projected and, as a result, the rental payments being less than anticipated, is a risk taken by the bondholder (Nationwide), not the City, the County or the FCCFA.

We trust this explanation has been helpful in clarifying the legal basis for the arena transaction. Please let us know if we can be of further service.

Very truly yours,

PECK, SHAFFER & WILLIAMS LLP

Per

Mary S. Duffey

MSD/skf

* * *