Behind Closed Doors: An Argument for State Constitutional Standing to Challenge Public–Private Development Corporations

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I. INTRODUCTION

On February 8, 2011, Ohio Governor John Kasich signed into law a bill establishing a public–private development corporation (PPDC) named

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JobsOhio.[1] In essence, JobsOhio privatized the former Ohio Department of Development as a means of attracting greater economic interest to the state more quickly than a government agency could.[2] Unlike public entities, however, JobsOhio is not subject to public records laws,[3] state ethics laws,[4] open meeting restrictions,[5] or purchasing order procedures.[6] Instead, a nine-member board of directors with gubernatorial appointments meets quarterly, out of public view, to discuss economic development strategy and decide which private businesses will receive tax subsidies.[7] Funding for the corporation's business subsidies comes from private donations and profits gained through Ohio's "lucrative [public] liquor enterprise," which JobsOhio leased for $1.4 billion.[8]

The establishment of JobsOhio immediately raised concerns over its legality under the Ohio Constitution.[9] Editorials across the state sprung to life with admonitions against the governor and state legislature for spending public money behind a "veil of secrecy."[10] Two provisions under the state

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[1] H.B. 1, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (codified at OHIO REV. CODE ANN. § 187.01 (LexisNexis 2014)).

[2] *See* OHIO REV. CODE ANN. § 187.01 (LexisNexis 2014) ("The governor is hereby authorized to form a nonprofit corporation, to be named 'JobsOhio,' with the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state.").

[3] *Id.* § 187.04(C).

[4] *Id.* § 187.03(A).

[5] *Id.*

[6] *Id.*

[7] *Id.* §§ 187.01(C), (F)(7), 187.04(A).

[8] Jim Provance, *JobsOhio Exempt from Public Records Laws, State Supreme Court Rules*, BLADE (Dec. 3, 2013), https://www.toledoblade.com/Economy/2013/12/03/JobsOhio-exempt-from-public-records-laws-state-Supreme-Court-rules.html [http://perma.cc/QW33-YXCP].

[9] *See generally* Sarah Osmer, Comment, *Faster. Cheaper. Unconstitutional: Why the Public's Subsidy of JobsOhio Violates Article VIII, Sections 4 & 6 of the Ohio Constitution*, 62 CASE W. RES. L. REV. 919 (2012) (arguing that the structure of JobsOhio violates the provisions of the Ohio Constitution that prohibit the commingling of public money with private enterprise).

[10] *See, e.g.*, *JobsOhio Must Be Accountable*, CINCINNATI.COM (Mar. 22, 2013), http://archive.cincinnati.com/article/20130322/EDIT01/303220046/JobsOhio-must-accountable [http://perma.cc/6bud-u664] ("The legislation that set up the organization was whipped through by the Republican-controlled Legislature despite serious reservations by many over the secrecy built into its structure. The legislation established JobsOhio as a private entity and created a veil of secrecy for the work of this new corporation. JobsOhio has been called a public–private entity, or a quasi-private organization, but it is more private than public. The law carefully constructed a wall to keep much of its activity secret."); *Kasich Needs Deal-Makers Acting in Public*, SPRINGFIELD NEWS-SUN (Feb. 2, 2011), http://www.springfieldnewssun.com/news/lifestyles/philosophy/kasich-needs-deal-makers-acting-in-public/nNnBz/ [http://perma.cc/4B9W-S8JM] ("Private—let's be frank, secret—development organizations too often want to have their cake and eat it, too. They want the public's money, without which they'd be financially impotent, but the directors also want

constitution expressly prohibit the commingling of public money to support private enterprise.[11] Without transparency and accountability, one commentator has noted, Ohio is vulnerable to the same financial abuses that have plagued public–private development corporations in other states.[12]

Despite these widespread concerns, citizen groups have been unsuccessful in their challenges to the constitutionality of JobsOhio. In June 2014, the Ohio Supreme Court held that a private group of concerned citizens lacked the requisite standing to sue the public–private development corporation.[13] ProgressOhio, a nonprofit group organized under 26 U.S.C. § 501(c)(4), brought suit against JobsOhio for declaratory and injunctive relief.[14] It sought a declaration that the development corporation violated the Ohio Constitution and an injunction to halt its continued operation.[15] Five Justices, however, found that the citizens' group lacked a sufficient injury or personal stake in the outcome of the controversy to warrant a court ruling on the merits of the case.[16] Moreover, the majority held that ProgressOhio did not have standing

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to be exempt from the messiness of working in public."); Plain Dealer Editorial Board, *JobsOhio Can't Be Allowed to Hide from the Public*, CLEVELAND.COM (Mar. 20, 2013), http://www.cleveland.com/opinion/index.ssf/2013/03/jobsohio_cant_be_allowed_to_hi.html [http://perma.cc/ZLZ7-ENSR] (noting the reticence of the Kasich Administration to comply with a subpoena by Republican State Auditor Dave Yost, and opining that "[t]he rule in Ohio should be that public funds are the people's funds, and that the officials in whose custody that money happens to be are merely trustees for the people"); *Senate Republicans Must Not Rush to Judgment on JobsOhio*, VINDY.COM, (Feb. 3, 2011), http://www.vindy.com/news/2011/feb/03/senate-republicans-must-not-rush-to-judg/ [http://perma.cc/XH2G-SQAS] ("It took the Republican-controlled Ohio House of Representatives less than a month to pass a bill that stands the state's economic development system on its head. Such a drastic change demanded thoughtful deliberation, especially considering that secrecy is one of the underpinnings of the new plan. Instead, GOP leaders rammed the legislation through, and in the process rode roughshod over the concerns and amendments presented by the minority Democrats."); *see also* Dylan Scott, *The Strange Case of JobsOhio and Public Auditing of Private Firms*, GOVERNING (June 10, 2013), http://www.governing.com/blogs/view/gov-ohio-officials-battle-over-auditing-of-economic-development-money.html [http://perma.cc/5K9G-42JG] (describing the "unusual" instance of Ohio Republican lawmakers in prohibiting the state auditor from investigating how formerly public liquor revenues were being used by JobsOhio).

[11] OHIO CONST. art. VIII, § 4 ("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.* § 6 ("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 . . . .").

[12] Osmer, *supra* note 9, at 932.

[13] ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1101, 1104–05 (Ohio 2014).

[14] *Id.* at 1104.

[15] *Id.*

[16] *Id.*

under the state's public-right doctrine, which exempts the personal-injury requirement of standing in the event of an issue that is "of great importance and interest to the public."[17] Finally, the Court refused to grant standing to the citizens' group under the JobsOhio Act itself, even though ProgressOhio had brought its declaratory judgment action within the ninety-day statute of limitations.[18] Although the Court assured critics that "a proper party" would have standing to sue JobsOhio, the characteristics of such a party remain unclear,[19] given the fact that the statute of limitations ran out in December 2011.

Justice Pfeiffer dissented.[20] By denying ProgressOhio standing to sue JobsOhio, he wrote, the majority of the Court effectively precluded anyone from challenging the constitutionality of the public–private development corporation because of the statute's ninety-day limitation on constitutional challenges.[21] Justice Pfeiffer would have found the citizens' group to have public-right standing given the important constitutional questions raised.[22] Denying standing to groups like ProgressOhio, Pfeiffer wrote, effectively blocked judicial review of constitutionally questionable legislation.[23] Pfeiffer's

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[17] *Id.* at 1105. Indeed, the Court even called into question the general holding of a prior case, which found that the American Academy of Trial Lawyers had public-right standing to challenge the 1996 Tort Reform Act, despite not having a traditional injury-in-fact. *Id.* at 1106 (questioning the continued validity of State *ex rel*. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999)).

[18] *Id.* at 1107–08.

[19] *ProgressOhio.org*, 13 N.E.3d at 1108 ("A proper party—i.e., one with legal standing—may unquestionably contest the constitutionality of JobsOhio. As to that proper party, the courthouse doors remain open.").

[20] *Id.* at 1110–15 (Pfeifer, J., dissenting). Technically, the Ohio savings statute could allow for ProgressOhio to bring a new cause of action within a year of the dismissal of the Supreme Court case in light of the case's dismissal on procedural grounds. *See* OHIO REV. CODE ANN. § 2305.19(A) (LexisNexis 2010) ("In any action that is commenced . . . if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after the date of . . . the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.") In fact, the attorney who originally brought the lawsuit against JobsOhio has filed a writ of mandamus action in the lower state courts within the savings statute timeframe. Email from Victoria Ullmann, Attorney for ProgressOhio, to author (July 26, 2015, 2:30 EST) (on file with author). The mandamus avenue is a plausible, albeit difficult, way to force the courts to reach the merits of the case. Email from Victoria Ullmann, Attorney for ProgressOhio, to author (July 27, 2015, 8:27 EST) (on file with author).

[21] *ProgressOhio.org*, 13 N.E.3d at 1110 (Pfeifer, J., dissenting).

[22] *Id.* at 1111–12.

[23] Writing at the end of his opinion, Justice Pfeifer decried the court's decision as denying access to justice for Ohioans:

> Across our state, in every county, there is a courthouse; many of them are historic buildings that sit in the center of town and are the center of civic life. In those courthouses are dedicated staff and judges who have sworn to "administer justice without respect to persons"; there, no lobbyists, no connections, no special

dissent illustrates the need for a comprehensive solution that permits citizens to challenge the constitutionality of public–private development corporations in state court.

Problems of constitutional accountability exist outside Ohio. The state is not alone in its efforts to privatize state economic development operations, as a number of other state legislatures have created similarly secretive public–private development corporations over the last twenty years.[24] Besides Rhode Island, each state with a PPDC has a provision in its state constitution prohibiting the commingling of public money with private enterprise.[25]

Conflicts of interest and accountability issues abound. For example, the *St. Petersburg Times* conducted a report on Enterprise Florida, the state's public–private development corporation, and found numerous conflicts of interest among board members whose companies made financial contributions to Enterprise Florida and then received "substantial state subsidies" from the corporation.[26] The *Times* later wrote that Enterprise Florida "has shown itself to be a public–private venture only in the sense that the public pays and the

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> relationships are necessary before a citizen can be heard. Today, we slam the doors on all those courthouses, denying Ohioans the opportunity to discover whether their government has been true to the Constitution.

Id. at 1114 (citation omitted) (quoting OHIO REV. CODE § 3.23).

[24] *See* ARIZ. REV. STAT. ANN. § 41-1502 (Supp. 2014) (Arizona Commerce Authority); FLA. STAT. ANN. § 288.901 (West 2012) (Enterprise Florida, Inc.); IND. CODE ANN. § 5-28-3-1 (West 2008) (Indiana Economic Development Corporation); MD. CODE ANN., ECON. DEV. § 10-105 (LexisNexis 2008) (Maryland Economic Development Corporation); MICH. COMP. LAWS ANN. § 207.804 (West 2014) (Michigan Economic Growth Authority); N.C. GEN. STAT. ANN. § 143B-431.01 (West, Westlaw through 2015 legislation) (North Carolina Economic Development Partnership); 42 R.I. GEN. LAWS § 42-64-4 (2006) (Rhode Island Commerce Corporation); VA. CODE ANN. § 2.2-2234 (2014) (Virginia Economic Development Partnership); WIS. STAT. ANN. § 238.02 (West 2015) (Wisconsin Economic Development Corporation); WYO. STAT. ANN. § 9-12-103 (2015) (Wyoming Business Council). Virtually all other states have similar provisions that prohibit the mixing of public funds in aid of private business. Ralph L. Finlayson, *State Constitutional Prohibitions Against Use of Public Financial Resources in Aid of Private Enterprise*, 1 EMERGING ISSUES ST. CONST. L. 177, 179–80 nn. 3–4 (1988); *see also infra* Part II.B.

[25] The following state constitutional provisions, along with their article titles, prohibit the mixing of public funds with private endeavors: ARIZ. CONST. art. IX, § 7 (Public Debt, Revenue, and Taxation); FLA. CONST. art. VII, § 10 (Finance and Taxation); IND. CONST. art. XI, § 12 (Corporations); MD. CONST. art. III, § 34 (Legislative Dep't); MICH. CONST. art. 4, § 30 (Legislative Branch); N.C. CONST. art. V, § 3 (Finance); VA. CONST. art. X, § 10 (Taxation and Finance); WIS. CONST. art. VIII, § 3 (Finance); WYO. CONST. art. 16, § 6 (Public Indebtedness). For further discussion, see generally Finlayson, *supra* note 24 (chronicling state constitutions that include provisions against the lending of public credit to private business or owning stock in private enterprise).

[26] PHILIP MATTERA ET AL., GOOD JOBS FIRST, PUBLIC–PRIVATE POWER GRAB 10 (Jan. 2011), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/powergrab.pdf [http://perma.cc/WZ6K-HRJL].

private receives."[27] In Michigan, a scandal erupted when it was discovered that the Michigan Economic Development Corporation (MEDC) approved $9 million in tax subsidies to a convicted embezzler for a project in Flint, Michigan.[28] Public outcry arising from the incident prompted the MEDC director to offer his letter of resignation, which the Governor ultimately declined to accept.[29]

Citizens should be allowed to challenge the constitutionality of public–private development corporations. Even if a state's highest court ultimately upholds the constitutionality of such a development corporation on the merits, citizens should have the opportunity to know for sure that their government has abided by the law. Given the difficulty of meeting traditional standing requirements for private citizen groups, however, a solution that will otherwise confer standing on citizens to sue is necessary.

This Note will argue that a uniform state constitutional amendment conferring standing on citizens to challenge the constitutionality of public–private development corporations is needed to permit access to justice. Part II begins with an overview of the evolution of public–private development partnerships and corporations. Part III explores the literature surrounding traditional standing in federal courts and the principles behind modern day standing doctrine. Part IV proposes a uniform state constitutional amendment that should either be passed by state legislatures or through voter referenda in states that have incorporated JobsOhio-like corporations. In order to allow citizen groups access to the courthouse to challenge the constitutionality of such corporations, a uniform constitutional amendment is needed.

II. THE RISE AND RATIONALE OF PUBLIC–PRIVATE DEVELOPMENT CORPORATIONS

At the local level, formalized partnerships between government and private enterprises have existed for a number of years.[30] These public–private partnerships (PPPs), which are able to more efficiently provide critical services, such as waste disposal, are not inherently negative. Indeed, in many circumstances such partnerships promote economic development in ways that would not be possible if a private corporation or a public agency were left to

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[27] *Id.*

[28] *Id.* at 9; *see also* Kristin Longley, *State Officials 'Embarrassed' After Learning $9M in Tax Credits Went to Richard A. Short, Convicted Embezzler*, MLIVE (Mar. 17, 2010), http://www.mlive.com/news/flint/index.ssf/2010/03/state_officials_embarrassed_af.html [http://perma.cc/YZ4S-6JQV].

[29] MATTERA ET AL., *supra* note 26, at 9.

[30] Kelsey Hogan, Note, *Protecting the Public in Public–Private Partnerships: Strategies for Ensuring Adaptability in Concession Contracts*, 2014 COLUM. BUS. L. REV. 420, 424.

its own devices.[31] In recent years, however, PPPs have expanded from engines of urban development to statewide public–private development corporations (PPDCs).[32] In many instances, the PPDCs that have sprung up on the statewide level differ from their local counterparts.

A. *Public–Private Partnerships as Economic Development Engines*

Public-private partnerships are not necessarily a negative public policy tool. As a preliminary matter, however, there are a few definitional issues when discussing the nature of public–private partnerships. At least three strands of PPPs can be readily identified: (1) the government contracting model, (2) the privatization of government services approach, and (3) the urban regenerative approach.[33] The government contracting model reflects the history of governments occasionally leaning on private enterprise to bear the brunt of costs associated with major infrastructure development.[34] The privatization approach reflects the trend in the United States of entrusting private actors with the provision of formerly public services, such as prison operation and education.[35] Of the three approaches, the urban regenerative approach is most like the modern trend toward statewide development corporations because of its focus on economic development.[36]

Perhaps the most widely known form of an urban renewal PPP is the Business Improvement District (BID).[37] "Clothed with limited powers

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[31] *Id.* at 424–25 ("Private provision of [critical utility] services has been relatively uncontroversial because they represent industries where the oft-cited justification for PPPs—that the private sector can provide these services more efficiently, effectively, and at a lower cost than the government—is most clearly apparent.").

[32] *See supra* note 24 and accompanying text.

[33] Dominique Custos & John Reitz, *Public–Private Partnerships*, 58 AM. J. COMP. L. 555, 556 (2010).

[34] *See generally id.* at 567–70 (tracing the history of public partnerships with private business to develop railroads and utilities, for example).

[35] *See generally* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (highlighting the opportunities and risks presented by the privatizing of formerly governmental functions, especially in the educational context).

[36] *See* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 422–23 (1999) ("'[T]he cornerstone of economic development strategies of virtually all U.S. cities' has been the public–private partnership." (footnote omitted) (quoting Marc V. Levine, *The Politics of Partnership: Urban Redevelopment Since 1945*, *in* UNEQUAL PARTNERSHIPS: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT IN POSTWAR AMERICA 12, 12 (Gregory D. Squires ed., 1989))).

[37] *See generally* Daniel R. Garodnick, Comment, *What's the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733, 1733 (2000) (describing BIDs as a "regular presence on the municipal terrain"); *see also* Briffault, *supra* note 36, at 366 (accounting for more than one thousand BIDs across the United States); Richard Schragger, *Does Governance Matter? The Case of*

traditionally held by the state, BIDs are private entities that provide supplemental sanitation, security, and social services to limited geographic areas within cities."[38] BIDs operate by levying higher property taxes on residents who live within a district in exchange for services, such as garbage collection or street maintenance, that supplement existing city government services.[39] These district-specific taxes fund the administrative costs of BID operation as well as the additional services enjoyed by BID residents.[40] BIDs generally require the approval of the local government and the majority of people with business and property interests in the proposed districts before going into effect.[41]

BIDs have become popular because they are perceived as more effective and efficient at providing services than municipal government.[42] Governments favor BIDs as cost-saving measures that improve downtown areas and do not require tax increases on the general public.[43] Commercial merchants and business owners favor BIDs because the special taxing districts solve the "free rider" problem faced by local chambers of commerce.[44] Instead of relying on the altruism of a few "civic-minded" volunteer business owners to prop up a chamber or merchants' association, BIDs receive taxes that are valuated by property and distributed to improvements and activities that stay within the district.[45] Richard Briffault, a prominent scholar on urban law and governance, has noted that "[e]ven BID critics rarely challenge claims that BID programs have improved safety and sanitation within the districts."[46]

Yet, controversy still surrounds BIDs in some respects. A recurring critique of BIDs, and PPPs more generally, is their inherent decrease in transparency and accountability. Government actors can be voted out of office when they fail to deliver quality services to city residents; private actors are insulated from such accountability because "[p]rivatization transfers decision-making power over service delivery and facility operations to the private sector, which operates out of public view."[47] Another prevalent line of criticism is that BIDs are "undemocratic" because they are comprised of

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Business Improvement Districts and the Urban Resurgence, 3 DREXEL L. REV. 49, 50 (2010) ("BIDs are now a fixture of American cities and many cities abroad.").

[38] *See generally* Garodnick, *supra* note 37, at 1733.

[39] Briffault, *supra* note 36, at 368–69.

[40] *Id.* at 368.

[41] *Id.* at 369.

[42] *Id.* at 370; Hogan, *supra* note 30, at 430 ("Many believe that the private sector can provide certain services or operate certain facilities more efficiently and effectively than the government. The competition and market forces that characterize the private sector incentivize high quality service, cost-saving improvements, and the implementation of innovative designs and technology." (footnote omitted)).

[43] *See* Briffault, *supra* note 36, at 369.

[44] *Id.* at 369.

[45] *Id.* at 369–70.

[46] *Id.* at 371.

[47] Hogan, *supra* note 30, at 433.

specially elected members and because they seem to contradict the idea of "equal treatment . . . in the provision of public services."[48]

Although some transparency and accountability is, concededly, sometimes eroded with the cession of governmental powers to private players,[49] PPPs focusing on urban regeneration are not necessarily secretive organizations.[50] In *Baltimore Development Corp. v. Carmel Realty Associates*, developers requested copies of the meeting minutes of the Baltimore Development Corporation (BDC) after submitting development proposals to the BDC for buildings they owned within a "Superblock" project in Baltimore.[51] The BDC President denied the developers' information request, writing that the BDC was not subject to the Maryland Public Information Act because it was a "separate non-profit corporation."[52] The functions of the BDC were mostly public: the corporation was formed to promote economic development and attract businesses to the City of Baltimore; to increase the city's tax base; its members were appointed by the Mayor; and 80 percent of its funding was provided by the City of Baltimore.[53] Interpreting the Maryland public records law, the Maryland Supreme Court found that the BDC was a "public body" and thus subject to the requirements of the state statute.[54]

Furthermore, local governments have historically been considered quasi-private, quasi-public entities themselves.[55] Richard Briffault has gone as far as to characterize local government as "the most 'private' level of government."[56] Therefore, public–private partnerships developed under the auspices of a local government are less problematic in terms of transparency and accountability than at first blush, given the quasi-private nature of municipal corporations and political subdivisions.[57]

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[48] Briffault, *supra* note 36, at 371, 373.

[49] *See* Hogan, *supra* note 30, at 432–33.

[50] *See, e.g.*, City of Balt. Dev. Corp. v. Carmel Realty Assoc., 910 A.2d 406, 410 (Md. 2006) (holding that the City of Baltimore Development Corporation was a public body for purposes of Maryland's open meetings and public records laws).

[51] *Id.* at 414.

[52] *Id.*

[53] *See id.* at 424–25.

[54] *Id.* at 426–28.

[55] Briffault, *supra* note 36, at 471–72; *see also* Owen v. City of Indep., 445 U.S. 622, 644–45 (1980) ("On the one hand, the municipality was a corporate body, capable of performing the same 'proprietary' functions as any private corporation, and liable for its torts in the same manner and to the same extent as well. On the other hand, the municipality was an arm of the State, and when acting in [a] 'governmental' or 'public' capacity, it shared the immunity traditionally accorded to the sovereign."); *cf.* Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057, 1065–67 (1980) (arguing that cities are relatively powerless due to their reliance on the state for power and funding and because cities "cannot exercise the economic power of private corporations").

[56] Briffault, *supra* note 36, at 374.

[57] *Cf.* Audrey G. McFarlane, *Putting the "Public" Back into Public–Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 60 (2007) (urging courts to take a more active role in monitoring economic development through public–

B. *Purpose of Public–Private Development Corporations*

Every state legislature in the United States has formed some sort of entity, whether a public agency or development corporation, whose main function is to spur economic growth in the state.[58] A few examples will suffice. In

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private partnerships in order to "protect the public interest"). McFarlane notes the growing public skepticism of government action, particularly with respect to the use of eminent domain for economic development purposes: "Recent actions at the state and local level have begun to reflect . . . the current public distrust of certain public–private partnerships as well as a strong sentiment that the goals and processes of these partnerships should embody the interests of the public." *Id.* at 40.

[58] The following statutes, listed alphabetically by state, establish the primary economic development apparatus in each of their respective states: ALA. CODE § 41-9-201 (LexisNexis 2013) (Alabama Dep't of Commerce); ALASKA STAT. § 44.33.020 (2014) (Alaska Dep't of Commerce, Community, and Economic Development); ARIZ. REV. STAT. ANN. § 41-1502 (Supp. 2014) (Arizona Commerce Authority); ARK. CODE ANN. § 15-4-209 (2009) (Arkansas Economic Development Commission); CAL. GOV'T CODE § 12096.2 (West 2011) (Governor's Office of Business and Economic Development); COLO. REV. STAT. § 24-46-102 (2014) (Colorado Economic Development Commission); CONN. GEN. STAT. ANN. § 32-1b (West 2003) (Connecticut Dep't of Economic and Community Development); DEL. CODE ANN. tit. 29, § 5003 (2003) (Delaware Economic Development Office); FLA. STAT. ANN. § 288.901 (West 2012) (Enterprise Florida); GA. CODE ANN. § 50-7-1 (2013) (Georgia Dep't of Economic Development); HAW. REV. STAT. ANN. § 201-2 (West 2008) (Hawaii Dep't of Business, Economic Development, and Tourism); IDAHO CODE § 67-4701 (2014) (Idaho Dep't of Commerce); 20 ILL. COMP. STAT. ANN. 605/605-7 (West 2015) (Illinois Dep't of Commerce and Economic Opportunity); IND. CODE ANN. § 5-28-3-1 (West 2008) (Indiana Economic Development Corporation); IOWA CODE ANN. § 15.105 (West 2011) (Iowa Economic Development Authority); KAN. STAT. ANN. § 74-5002a (West 2008) (Kansas Dep't of Commerce); KY. REV. STAT. ANN. § 154.12-050 (LexisNexis 2009) (Kentucky Cabinet for Economic Development); LA. STAT. ANN. § 51:923 (2003) (Louisiana Dep't of Economic Development); ME. REV. STAT. ANN. tit. 5, § 13053 (2013) (Maine Dep't of Economic and Community Development); MD. CODE ANN., ECON. DEV. § 10-105 (LexisNexis 2008) (Maryland Economic Development Corporation); MASS. ANN. LAWS ch. 23A, § 1 (LexisNexis 2014) (Massachusetts Office of Business Development); MICH COMP. LAWS ANN. § 207.804 (West 2014) (Michigan Economic Growth Authority); MINN. STAT. ANN. § 116J.01 (West 2014) (Minnesota Dep't of Employment and Economic Development); MISS. CODE ANN. § 57-1-1 (West 1999) (Mississippi Dep't of Economic and Community Development); MO. ANN. STAT. § 620.010 (West 2014) (Missouri Dep't of Economic Development); MONT. CODE ANN. § 90-1-105 (2014) (Montana Dep't of Commerce); NEB. REV. STAT. ANN. § 81-1201.02 (LexisNexis 2011) (Nebraska Dep't of Economic Development); NEV. REV. STAT. ANN. § 231.043 (LexisNexis 2013) (Nevada Governor's Office of Economic Development); N.H. REV. STAT. ANN. § 12-A:1 (2013) (New Hampshire Dep't of Resources and Economic Development); N.J. STAT. ANN. § 34:1B-4 (West 2011) (New Jersey Economic Development Authority); N.M. STAT. ANN. § 9-15-4 (LexisNexis 2011) (New Mexico Economic Development Dep't); N.Y. UNCONSOL. LAW § 6254 (McKinney 2012) (New York State Urban Development Corporation); N.C. GEN. STAT. § 143B-431.01 (West, Westlaw through 2015 legislation) (North Carolina Economic Development Partnership); N.D. CENT. CODE § 54-34.3-01 (2014) (North Dakota Dep't of Commerce, Division of Economic Development and Finance); OHIO REV. CODE ANN. § 187.01 (LexisNexis 2014)

Alabama, the primary economic development entity is the state Department of Commerce, whose purpose is "to promote the development of the state's human, economic and physical resources" to oversee "comprehensive statewide planning and economic development."[59] The Maine Department of Economic and Community Development was formed to effectuate and coordinate the state's "economic growth and development policies . . . to realize the greatest possible degree of effectiveness."[60] Similarly, the Oregon Business Development Department was designed to promote economic growth in the state through the active recruitment of domestic and international business,[61] collaborate with Oregon companies to aid in their "expansion or help them retain jobs in the state,"[62] and to "coordinate state and federal economic and community development programs."[63]

The most common type of state economic development arrangement is the public agency. A number of states call such an agency the Department of Commerce,[64] while others refer to their primary economic development entity as an Economic Development Office or Department,[65] or Department of Community Development.[66] A few states make explicit the executive-branch nature of their respective state economic development agency, by labeling the

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(JobsOhio); OKLA. STAT. ANN. tit. 74, § 5003.2 (West 2014) (Oklahoma Dep't of Commerce); OR. REV. STAT. § 285A.070 (2013) (Oregon Business Development Dep't); 71 PA. STAT. AND CONS. STAT. ANN. § 1709.104 (West 2012) (Pennsylvania Dep't of Community and Economic Development); 42 R.I. GEN. LAWS § 42-64-4 (2006) (Rhode Island Commerce Corporation); S.C. CODE ANN. § 13-1-10 (1977) (South Carolina Dep't of Commerce); S.D. CODIFIED LAWS § 1-53-1 (2012) (Governor's Office of Economic Development); TENN. CODE ANN. § 4-3-701 (2015) (Tennessee Dep't of Economic and Community Development); TEX. GOV'T CODE ANN. § 481.024 (West 2012) (Texas Economic Development Corporation); UTAH CODE ANN. § 63M-1-201 (LexisNexis 2014) (Utah Governor's Office of Economic Development); VT. STAT. ANN. tit. 10, § 213 (2010) (Vermont Economic Development Authority); VA. CODE ANN. § 2.2-2234 (2014) (Virginia Economic Development Partnership); WASH. REV. CODE ANN. § 43.330.020 (West 2012) (Washington Dep't of Commerce); W. VA. CODE ANN. § 31-15-6 (LexisNexis 2009) (West Virginia Economic Development Authority); WIS. STAT. ANN. § 238.02 (West 2015) (Wisconsin Economic Development Corporation); and WYO. STAT. ANN. § 9-12-103 (2015) (Wyoming Business Council).

[59] ALA. CODE § 41-9-200(b) (LexisNexis 2013).

[60] ME. REV. STAT. ANN. tit. 5, § 13052 (2013).

[61] OR. REV. STAT. § 285A.075(1)(d) (2013).

[62] *Id.* § 285A.075(1)(e).

[63] *Id.* § 285A.075(1)(c).

[64] *E.g.*, IDAHO CODE § 67-4701 (2014) (Idaho Dep't of Commerce); KAN. STAT. ANN. § 74-5002a (West 2008) (Kansas Dep't of Commerce); S.C. CODE ANN. § 13-1-10 (1977) (South Carolina Dep't of Commerce).

[65] *E.g.*, DEL. CODE ANN. tit. 29, § 5003 (2003) (Delaware Economic Development Office); GA. CODE ANN. § 50-7-1 (2013) (Georgia Dep't of Economic Development).

[66] *E.g.*, ME. REV. STAT. ANN. tit. 5, § 13053 (2013) (Maine Dep't of Economic and Community Development); 71 PA. STAT. AND CONS. STAT. ANN. § 1709.104 (West 2012) (Pennsylvania Dep't of Community and Economic Development).

agency the "Governor's Office of Economic Development."[67] The arrangement of these agencies is straightforward. All are public entities, organized as executive branch departments under the state government,[68] and subject to normal public accountability requirements, such as public records laws.[69]

Two examples of unique economic development agencies stand out: New York and Vermont. In New York, the Urban Development Corporation was initially formed in 1968 as a public entity to promote economic development throughout the state.[70] The mandate of the corporation at the time was to "generate industrial, commercial and civic development in distressed urban areas . . . through the construction of low- and moderate-income housing."[71] Since then, the aim of the corporation has expanded to include promotion of economic development more generally.[72] The unique aspect of the New York economic development entity is its nature as a purely public development corporation. For example, the corporation maintains all the flexibility and powers of a development corporation like JobsOhio,[73] while still being subject to transparency requirements and public meetings.[74]

The Vermont Economic Development Authority (VEDA) was similarly created as a "public instrumentality" of the state of Vermont,[75] designed to promote economic development.[76] Like the New York Urban Development Corporation, VEDA functions as a corporation, but is organized as a state agency and subject to reporting and disclosure requirements.[77] Its primary function is to serve as a financial lender to various industrial enterprises, small businesses, and agricultural endeavors.[78] One benefit of VEDA is its low-interest program, which allows for more liquid financing and, according to a state website, "help[s] Vermont's economy grow and prosper."[79]

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[67] *E.g.*, NEV. REV. STAT. ANN. § 231.043 (LexisNexis 2013) (Nevada Governor's Office of Economic Development).

[68] *See, e.g.*, GA. CODE ANN. § 50-7-1 (2013) ("There is created as part of the executive branch of the state government the Department of Economic Development.").

[69] *See, e.g.*, S.C. CODE ANN. § 13-1-25 (1977) (Public monies defined; accountability and disclosure requirements; reporting requirements); TENN. CODE ANN. § 4-3-730(a) (2015) (Records).

[70] N.Y. UNCONSOL. LAW § 6252 (McKinney 2012).

[71] *History of Empire State Development*, N.Y. ST. EMPIRE ST. DEV., http://www.empire.state.ny.us/AboutUs/History.html [http://perma.cc/NEE4-8JWX].

[72] *Id.*

[73] N.Y. UNCONSOL. LAWS § 6255.

[74] *See Public Meetings & Notices*, N.Y. ST. EMPIRE ST. DEV., http://www.empire.state.ny.us/PublicMeetings_Notices.html [http://perma.cc/J7A2-K44T].

[75] VT. STAT. ANN. tit. 10, § 213 (2010).

[76] *Id.* § 211.

[77] *Id.* § 217 (Records; annual report; audit).

[78] *About VEDA*, VEDA, http://www.veda.org/about-veda/ [http://perma.cc/LM3Q-KJVD].

[79] *Id.*

Public-private development corporations like JobsOhio generally share the same purpose as state-operated economic development agencies. For instance, the Arizona Commerce Authority was established to "provide private sector leadership in growing and diversifying the economy of the state," with a focus on creating high quality employment and attracting and retaining businesses.[80] Along similar lines, the Indiana Economic Development Corporation was formed to coordinate the state's economic growth efforts and to encourage job creation and the "promotion of Indiana."[81] Finally, the Wyoming Business Council—nominally a council, but in reality a public–private development corporation—is tasked with preparing and carrying out the state's economic development and promotional program as well as encouraging and "solicit[ing] private sector involvement, support and funding for economic development in the state."[82]

Thus, at a basic level, the purpose of public–private development corporations like JobsOhio is the same as their public agency counterparts—economic development and job creation. As the New York and Vermont examples demonstrate, some states have even created a public-backed development corporation, subject to transparency and accountability laws, in order to spur economic growth. Conceivably, then, states might create a PPDC that is both flexible as an economic development tool and transparent. The PPDCs that are the focus of this Note, however, have not taken that route.

C. *"Veil of Secrecy"[83]: The Problem with Public–Private Development Corporations*

Unlike their public counterparts, public–private development corporations are routinely not subject to the same transparency and accountability standards. The Arizona Commerce Authority (ACA), for example, has broad authority to enter into executive session—out of public view—to discuss the granting of public subsidies to private businesses.[84] Playing "Kingmaker," the leadership of the ACA "chooses which businesses to assist and which to ignore, with few checks and balances."[85] Although the ACA was originally

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[80] ARIZ. REV. STAT. ANN. § 41-1502(A) (2014).

[81] IND. CODE § 5-28-1-1(a) (2008).

[82] WYO. STAT. ANN. § 9-12-105(a) (2015).

[83] *See supra* note 10. This Note does not pass judgment on the wisdom of public–private development corporations, as a policy matter. My argument centers around the need for transparency and ability of citizens to challenge the *arguably* unconstitutional structures of PPDCs like JobsOhio, the Arizona Commerce Authority, the Indiana Economic Development Corporation, and other similar organizations. Whether PPDCs are, in fact, unconstitutional is beyond the scope of this paper and largely depends on the interpretation by state courts of their respective state constitutions.

[84] *See* ARIZ. REV. STAT. ANN. § 41-1502(I) (2014).

[85] Emily Gersema, *AZ Commerce Cronies: Picking and Choosing Winners with Your Tax Dollars*, GOLDWATER INST. (Mar. 20, 2014), http://goldwaterinstitute.org/en/

touted as a means to increase economic growth on a statewide level, grants such as the $100,000 given to a Flagstaff ice cream cone maker appear to have little benefit beyond the municipal level.[86] The Republican Senate president in Arizona was skeptical of turning the state Department of Commerce into a public–private corporation for lack of accountability and has maintained his concern: "You'd have a big pot of money, and really nobody to oversee it."[87]

To take another example, the primary economic development engine of Florida—Enterprise Florida—has also faced significant criticism for lack of accountability and transparency.[88] Approximately 85 percent of Enterprise Florida funding is public, while only 15 percent comes from private, corporate donations.[89] Tax subsidies given to Enterprise Florida Board members such as Hewlett Packard and Wells Fargo have at least created the perception of "pay-to-play" and other conflicts of interest.[90] Coupled with certain exemptions from state public records laws,[91] such perceptions have cast a shadow over the dealings of Enterprise Florida, as they have with other public–private development corporations.

In essence, the concerns that have long motivated critics of local public–private partnerships now have been expanded writ large.[92] In the nineteenth century, many states nearly went bankrupt when railroad companies—aided by issuance of public bonds—either never constructed the promised rail lines, or

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work/topics/free-enterprise/entrepreneurship/arizona-commerce-cronies-picking-and-choosing-winn/ [http://perma.cc/3YCH-E7Q7].

[86] *Id.*

[87] *Id.*

[88] *See* BEN WILCOX & DAN KRASSNER, INTEGRITY FLORIDA, ENTERPRISE FLORIDA: ECONOMIC DEVELOPMENT OR CORPORATE WELFARE? 12 (Feb. 2013), http://integrityflorida.org/wp-content/uploads/2013/02/Enterprise-Florida-Economic-Development-or-Corporate-Welfare-FINAL.pdf [http://perma.cc/5BA6-4UTB].

[89] *Id.* at 5.

[90] *Id.* at 5–6.

[91] Sunshine Law, Enterprise Florida, Inc., Fla. Att'y Gen. Advisory Legal Opinion No. AGO 92-80 (Nov. 5, 1992) (advising the Secretary of Commerce that Enterprise Florida is exempt from disclosing records related to corporate donors).

[92] *See* Osmer, *supra* note 9, at 920–22 (noting the public-subsidized railroad crisis of the early 1800s led to mass corruption, public outcry, and ultimately two constitutional provisions prohibiting public aid to private enterprise); *see also* David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 277–82 (1963) (summarizing the responses of many states to the railroad-aid crisis in passing constitutional provisions barring the use of public funds to aid private business); Nick Beermann, Comment, *Legal Mechanisms of Public–Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?*, 23 SEATTLE U. L. REV. 175, 180–81 (1999) (tracing the history of public subsidies of railroads in Washington, which largely led to many states skirting bankruptcy, and the resultant state constitutional provision that proscribed public lending of credit to private enterprise).

were terribly mismanaged.[93] States responded by passing constitutional provisions barring the use of public funds to aid private enterprise.[94]

Modern public–private development corporations appear to circumvent the wave of state constitutional prohibitions against providing public funds to support private corporations.[95] The biggest issue, however, is lack of certainty over whether a PPDC violates its respective state constitution. Given the reluctance of the Ohio Supreme Court to grant standing to private groups to challenge the constitutionality of JobsOhio,[96] other state courts may also be hesitant to open the courthouse doors to determine the constitutionality of a PPDC.

State courts should not be so reluctant to decide the merits question of whether a particular financing arrangement is unconstitutional. The Kentucky Supreme Court, for example, reached the question of whether providing tax incentives and public–private financing to Toyota Motor Corporation violated the state constitution.[97] In order to attract Toyota to bring its business to Kentucky, the Governor and General Assembly agreed to purchase a 1600-acre tract of land for $35 million, to be paid through a revenue bond issue generated by the State Property and Buildings Commission.[98] All funds used to pay for the debt service, bonds, principal and interest, would be paid out of "appropriations from the General Funds of the Commonwealth."[99]

In a 4-3 vote, the Kentucky Supreme Court upheld the financing plan as constitutional because it served a "public purpose."[100] Two private citizens, as well as the State Budget Director, had intervened to challenge the constitutionality of the financial arrangement.[101] The Court defined the parties in interest in broad language, saying it was the people of the Commonwealth who had a stake in knowing whether their government had been true to the

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[93] Beermann, *supra* note 92, at 180–81.

[94] Pinsky, *supra* note 92, at 281 ("The public was commonly burdened with enormous debt while its interest in improved transportation, which motivated projects in the first place, was completely or substantially frustrated. The nineteenth-century experience which gave rise to the public aid limitations [in state constitutions] demonstrates that if public funds are to be risked, the risk must flow from public rather than private decision.").

[95] Osmer, *supra* note 9, at 939 ("Many of the reasons that nineteenth-century Ohioans initially sought to prohibit public investment in private enterprise—concerns of inefficiencies, ineffectiveness, corruption, favoritism and fraud—are the same type of issues other states have experienced in the previous twenty years with entities designed similar to JobsOhio.").

[96] *See supra* Part I.

[97] Hayes v. State Prop. & Bldg. Comm'n, 731 S.W.2d 797 (Ky. 1987); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1858–59 (2001).

[98] *Hayes*, 731 S.W.2d at 798.

[99] *Id.*

[100] *Id.* at 799.

[101] *Id.* at 798–99.

Constitution.[102] Such a pronouncement stands in stark contrast to the decision of the Ohio Supreme Court, which denied standing to a private group to challenge the state public–private development corporation under a functionally identical provision of the Ohio Constitution.[103]

Despite clear concerns over the transparency, accountability, and constitutionality of PPDCs, there is no clear answer as to their legality. Although some courts like the Kentucky Supreme Court are willing to entertain challenges on the merits arising under state constitutional provisions that prohibit public aid to private businesses, others are not or may not be so willing. Therefore, it is important to understand how private groups may achieve standing in their respective state courts to challenge the constitutionality of public–private development corporations.

III. STANDING

To fully understand the nature of standing in state courts, it is useful to survey the development of standing doctrine in the federal courts. Historically, standing in the federal judicial system has been rather restrictive in light of the constraint on federal courts that they may only hear cases that form a "case or controversy" under Article III of the U.S. Constitution.[104] State standing doctrine need not, and should not, exactly mirror federal justiciability requirements because state courts are not subject to the constraints of the federal Constitution, among other reasons. Indeed, state courts should experiment with standing criteria, and adopt more easily satisfied requirements.

A. *Standing in Federal Court: A Review*

Standing doctrine is the gatekeeper to state and federal court. "In essence," the Supreme Court has held, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[105] Black-letter law tells us that, in order to sue a defendant in federal court, a plaintiff must satisfy the following criteria: (1) the plaintiff must have suffered from an "injury in fact," meaning the invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's alleged conduct must exist; and (3) it must be likely, "as opposed

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[102] *Id.* at 799 ("In a practical sense, the parties who have a real interest are the people of this Commonwealth who have a right to a determination of whether the executive and the legislature have acted within the limitations of their constitutional power, the executive and legislative branches of government who sponsored and enacted the legislation, and Toyota, the industry induced to come to this Commonwealth.").

[103] *See supra* Part I.

[104] U.S. CONST. art. III, § 2, cl. 1.

[105] Warth v. Seldin, 422 U.S. 490, 498 (1975).

to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[106]

The literature on standing in federal court is well-developed,[107] and extensive treatment of the subject is beyond the scope of this Note. Suffice it to say, however, that the ease of reciting the black-letter law of standing is

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[106] *E.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (citing Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000)); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

[107] As one eminent observer has noted, the purposes of standing and various arguments in the literature surrounding the issue are "numbingly familiar." William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988); *see, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 459 (2008) (concluding that standing doctrine does not effectively serve the "separation of powers" function that is often suggested); Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 870 (2012) ("[C]ourts should apply a relatively liberal approach in deciding standing issues for private plaintiffs pursuing climate change suits, even if courts ultimately conclude that it is inappropriate to grant relief on the merits to those same plaintiffs."); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 102 (1984) (arguing for a broader conception of the injury-in-fact requirement for traditional standing to give greater respect for intangible legal injuries, which would result in a "clean[er]" doctrine and a "lowered access threshold"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 511 (1996) (arguing that, while efficiency in the name of separation of powers is an important ideal, the Supreme Court should reevaluate its justiciability doctrine to acknowledge the equally important ideals of the judiciary's "coordinate function of adjudicating federal law cases to promote liberty, the rule of law, and checks an balances, yet also recognizes the need to exercise that jurisdiction with due regard for governmental efficiency"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (contending that *Lujan*'s invalidation of a Congressional grant of standing was a "misrepresentation of the Constitution"); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 689 (2004) (arguing that standing had its roots in the eighteenth and nineteenth centuries, and is thus not a "recent invention" by federal judges, contrary to the belief of some critics); Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After* Cuno *and* Winn, 40 HASTINGS CONST. L. Q. 1, 2 (2012) (evaluating the state of state taxpayer standing in federal courts after two Supreme Court decisions addressing the issue and concluding that such suits will be funneled from federal courts into state courts, which will be able to adopt and manage state taxpayer standing challenges given state courts' more liberal standing rules); Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1003 (2001) (arguing that state courts "can, should, and will" adjudicate the federal environmental claims of parties who lack Article III standing in light of the generally more liberal standing principles in state courts); Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237, 272–78 (2008) (arguing that barring associational standing to protection and advocacy organizations for the mentally disabled would often result in rights violations going unaddressed).

belied by its complicated and circuitous development at the Supreme Court.[108] Although the Supreme Court itself has admitted the law of standing is not precisely coherent,[109] the doctrine does illuminate important values regarding the role of courts in the American judicial system.[110] Such values include the separation of powers,[111] management of limited judicial resources,[112] improving judicial decision making by ensuring a specific controversy is before the court,[113] and protecting against the "intermeddling" of petitioners trying to protect the rights of third parties.[114] With the increase in recognition of constitutional rights over time, and the concomitant expansion of potential plaintiffs, the Supreme Court has become more concerned with issues of standing.[115]

Federal courts have generally been wary of allowing plaintiffs to bring "generalized grievances" before a judicial body.[116] Justice Scalia has written that the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution" will not satisfy the standing requirements imposed by Article III.[117] "Vindicating the *public* interest," which includes ensuring governmental adherence to the Constitution and federal laws, "is the function of Congress and the Chief Executive."[118] Thus, honoring the constitutional separation of powers is often

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[108] *See generally* Nichol, *supra* note 107 (charting throughout the uncertain contours of standing doctrine at the federal level).

[109] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . ."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 55 (6th ed. 2012).

[110] CHEMERINSKY, *supra* note 109, at 55.

[111] *Id.* at 56.

[112] Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973) (decrying the recent liberalization of the Court's standing doctrine and advocating a new theory of standing that emphasizes the doctrine's role as a rationing mechanism of limited judicial resources).

[113] CHEMERINSKY, *supra* note 109, at 57.

[114] *Id.*

[115] *See* PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL–STATE RELATIONS 254–56 (8th ed. 2014).

[116] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 575 (1992).

[117] *Id.* at 573.

[118] *Id.* at 576; Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("There is . . . a functional relationship [between standing and separation of powers], which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.").

a primary reason for federal courts when they decline to hear a case on its merits based on standing grounds.

B. *Standing in State Court: An Opportunity for Experimentation*

As the discussion above demonstrates, federal standing doctrine emphasizes the notion that, at the national level, courts are bodies of limited jurisdiction and should only hear cases that meet certain requirements. State courts need not be so limited, however. Legal reasoning, including the differences between state and federal courts, supports broader standing doctrines in state courts. Further, public policy favors allowing citizens easier access to the courthouse at the state level.

1. *Legal Theory Supports Broader State Court Standing*

State courts differ in important respects from their federal counterparts. States, and their respective constitutions, were initially designed to facilitate change—particularly in relation to the federal Constitution. One important difference between state and federal courts, moreover, is the fact that state courts are not organized under Article III of the U.S. Constitution, which imposes the familiar "cases and controversies" requirement for all claims brought before a federal court.[119] Thus, state courts can serve as "laboratories" for experimenting with standing doctrine,[120] either through judicial common law, state statute, or constitutional amendment.

State constitutions were designed as change agents.[121] "Unlike the largely rigid federal Constitution," Judge Jeffrey Sutton writes, "the state constitutions were not fixed."[122] In other words, because state constitutions could be more easily amended than the federal Constitution, they were constructed as "incubators" for all manner of majoritarian-based change.[123] Allowing state legislatures and courts to experiment in their respective Brandeisian

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[119] U.S. CONST. art. III, § 2 (extending the federal judicial power to all cases arising under the laws and treaties of the United States; affecting ambassadors, public ministers and consuls; and any case of admiralty or maritime jurisdiction).

[120] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizen choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Hans A. Linde, *The State and Federal Courts in Governance*: Vive La Différence*!*, 46 WM. & MARY L. REV. 1273, 1287–88 (2005) (advising state courts not to adopt a "rigid adherence" to federal justiciability guidelines for the sake of following federal court decisions).

[121] Jeffrey S. Sutton, Review, *Court's as Change Agents: Do We Want More—or Less?*, 127 HARV. L. REV. 1419, 1422 (2014) (reviewing EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013)).

[122] *Id.*

[123] *See id.*

"laboratories" of democracy can lead to a robust debate that permits federal courts—and even the Supreme Court—to "learn from the states."[124]

Apart from the deliberative benefits of experimenting with standing doctrine in the state courts, other justifications support easily satisfied standing requirements at the state level. Helen Hershkoff has written a seminal and in-depth article exploring the many reasons why state courts should not adhere to restrictive federal justiciability standards.[125] She writes that "state courts may be conforming to federal limits because of the perceived dominance of Article III jurisprudence without independently assessing how best to shape and give content to the state judicial function."[126] Separation of powers concerns are perhaps most prominent among the reasons for federal courts, and the state courts following federal requirements,[127] to exercise judicial restraint and defer to the political branches when a litigant does not meet Article III justiciability requirements.[128] "Closely linked to the perceived need for judicial restraint," Hershkoff writes, "is the concern that Article III decisionmaking is final and beyond popular revision."[129]

Obvious differences between federal and state governance make such separation of powers concerns less important at the state level for three reasons. First, unlike their federal counterparts, state courts are not organized under Article III of the federal Constitution. Thus, state judges are not constrained by the "cases" and "controversies" requirement that federal standing doctrine affirms and requires. Second, most state court judges are popularly elected, unlike federal judges.[130] "Without the protection of life tenure, state judges appear beholden to popular approval."[131] Such popular

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[124] *See id.* at 1427–28.

[125] Hershkoff, *supra* note 97, at 1842. *But see generally* M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729 (2015) (arguing that state courts should follow federal standing doctrine, particularly with respect to the public interest doctrine, because the federal doctrine provides notice to litigants as to what courts will adjudicate and delineates a consistent framework in determining whether a case or controversy exists).

[126] Hershkoff, *supra* note 97, at 1906. Indeed, the Ohio Supreme Court has adopted the same standing formulation enunciated by the Supreme Court in *Lujan*. Moore v. Middletown, 975 N.E.2d 977, 982 (Ohio 2012). The federal standing doctrine was reaffirmed in the *JobsOhio* case. ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1101, 1104 (Ohio 2014).

[127] Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers.").

[128] Hershkoff, *supra* note 97, at 1886 ("That federal judges are unelected, and federal courts presumed undemocratic, figures prominently as a justification for Article III restraint."); *see also id.* at 1886 n.275.

[129] *Id.* at 1886.

[130] Thirty-nine states currently hold some kind of election of judges, either through partisan election or by some type of merits-retention system. Adam Liptak, *Judges on the Campaign Trail*, N.Y. TIMES (Sept. 27, 2014), http://www.nytimes.com/2014/09/28/sunday-review/judges-on-the-campaign-trail.html [http://perma.cc/LE34-V9RK].

[131] Hershkoff, *supra* note 97, at 1887.

elections tend to alleviate countermajoritarian concerns that inhere in discussions surrounding the final, constitutionally binding decisions made by insulated, unelected federal judges.[132] Third, the structures of state governments differ significantly from the federal model, undermining the separation of powers rationale that serves as a basis for federal judicial restraint.[133]

The Supreme Court has expressly endorsed the idea that state courts should not be bound by federal standing doctrine. In *ASARCO Inc. v. Kadish*,[134] the Court held that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law."[135] Plaintiffs in *ASARCO* were a collection of individual taxpayers and members of the Arizona Education Association.[136] They sought the invalidation of a state statute governing mineral leases because they allegedly did not comport with the leasing requirements intended by Congress when it passed the New Mexico-Arizona Enabling Act of 1910.[137] Defendants then sought review by the Supreme Court.[138] After an analysis of standing precedent,[139] the Court concluded that the plaintiffs in the original suit would not have satisfied federal justiciability requirements.[140]

Nevertheless, the Court affirmed the decision of the Arizona Supreme Court invalidating the state statute for noncompliance with federal law.[141] "[T]he state judiciary . . . chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the Arizona courts."[142] The Court went on to recognize the importance of upholding the state court's decision as a matter of deference to Arizona's sovereignty.[143] Important to note is the degree of breadth of the Court's

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[132] *Id.*

[133] *See id.* at 1891–98.

[134] ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

[135] *Id.* at 617.

[136] *Id.* at 610.

[137] *Id.* For more discussion on *ASARCO*, see James W. Doggett, Note, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 851–54 (2008).

[138] *ASARCO*, 490 U.S. at 610.

[139] *Id.* at 611–16.

[140] *Id.* at 616–17.

[141] *Id.* at 633.

[142] *Id.* at 617.

[143] Justice Kennedy, writing for the majority, said:

> If we were to vacate the judgment below on the ground that respondents lacked federal standing when they brought suit initially, that disposition would render nugatory the entire proceedings in the state courts. The clear effect would be to impose federal standing requirements on the state courts whenever they adjudicate issues of federal law, if those judgments are to be conclusive on the parties. That result, however, would be contrary to established traditions and to our prior decisions

holding. Even when reviewing questions of application of federal law, state courts have the freedom to experiment with and diverge from federal justiciability requirements. The Court could have limited its decision to allowing divergence only on state law claims. Instead, it chose a more expansive interpretation that affirmed the preeminence of state sovereignty regarding questions of standing in state court.[144]

In light of the Supreme Court holding in *ASARCO*, some commentators have urged their respective home state courts to take up the invitation to develop unique standing doctrines that diverge from the restrictive federal requirements.[145] Like Hershkoff, these commentators highlight the differences in organizational structure between federal governance and state governance that should lead to experimentation with standing doctrine in state court, rather than lock-step adherence to federal requirements. Noting the prominence of separation of powers concerns in the federal judiciary as a reason for strict standing requirements, one scholar points out that state judges are often elected and therefore part of the "political branches."[146] In that sense, state judges are part of the very process to which federal judges often defer. Further, the concern at the federal level of judges enshrining a particular viewpoint in the Constitution is allayed by the ease of constitutional amendment at the state level.[147] Such a fundamental difference in the structure of state governance from its federal counterpart counsels in favor of allowing state courts to deviate from federal standing doctrine.[148]

> recognizing that the state courts are not bound by Article III and yet have it within both their power and their proper role to render binding judgments on issues of federal law, subject only to review by this Court.

Id. at 620.

[144] For an argument that state courts should be bound by federal justiciability requirements when hearing federal claims, see William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265 (1990), responding to the apparent anomaly produced by *ASARCO* that would effectively permit review "when a state court sustains the asserted federal claim, but denies review when the state court rejects the federal claim."

[145] *See, e.g.*, Avis K. Poai, *Hawai'i's Justiciability Doctrine*, 26 U. HAW. L. REV. 537, 537–38 (2004) (arguing that Hawaii should not "cling" to federal justiciability standards because it is not bound by the Article III cases and controversies requirement); Stasha D. McBride, Note, *Civil Procedure: Time to Stand Back: Unnecessary Gate-Keeping to Oklahoma Courts*, 56 OKLA. L. REV. 177, 177 (2003) (arguing that Oklahoma should stop adhering to federal standing requirements and adopt its own, state-based standing doctrine out of recognition for the differences between federal and state and local governance). *But see* Kevin Hallstrom, *Standing Down: The Negative Consequences of Expanding Hawai'i's Doctrine of Standing*, 30 U. HAW. L. REV. 475, 475 (2008) (responding to Poai's article by raising separation of powers concerns).

[146] McBride, *supra* note 145, at 197–98.

[147] *Id.* at 200.

[148] *Id.*

In short, state courts should experiment with their standing doctrine in light of the multitude of differences among federal and state governance, as well as the Supreme Court's express permission for state courts to do so.

2. *Public Policy Supports Broader State Court Standing*

Public policy supports the broadening of standing in state court to allow for the challenging of public–private development corporations for one simple reason: to hold elected officials in the legislative and executive branches accountable to their state constitution. The basic question boils down to this: if regular citizens cannot challenge the constitutionality of a state law, who can or will?[149]

State courts should be more willing to hear constitutional challenges against development corporations by private citizens because, otherwise, elected officials will be able to behave with impunity, effectively amending the constitution by not following it. If legislative and executive branch officials know that they can create secretive organizations that provide subsidies to private businesses without fear of rebuke by the judicial branch, then those officials will do so freely. In other words, non-electoral constraints are needed to enforce the fiscal provisions of state constitutions in order to prevent political corruption.[150] A nominal electoral process is insufficient to overcome the interests of politicians in continuing with the financial arrangements of a public–private development corporation.

Some might argue that judges would be making policy best left to the "political" branches if they were to interpret the constitutionality of public–private development corporations. This argument fails for two reasons. First, most state court judges are elected.[151] As such, state judges could be considered "policy makers" in the sense that they must respond, in some fashion, to the popular will of the electorate. State judges are also less insulated than their federal counterparts due to their lack of life tenure. Even if one considered the interpretation of a state constitution to be policy making, then, such interpretation is less problematic at the state level. Second, judges

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[149] *See generally* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrine*, 81 FORDHAM L. REV. 1263 (2012) (discussing the implications of denying standing to taxpayers to sue to enforce state constitutional debt limits).

[150] *See* Dave Ebersole, *Democracy in Ohio: Ohio's Fiscal Constitution and the Unconstitutional Nationwide Arena Deal*, 40 HASTINGS CONST. L.Q. 319, 320–46 (2012) (describing the public–private financing arrangements involved with the purchase of a sports stadium in Columbus, Ohio, and need for non-electoral restraints to prevent the expenditure of public funds in aid of such a private enterprise); *cf.* Brief of Amici Curiae Ohio Law Professors in Support of Defendants-Appellees JobsOhio, et al. at 23, ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1101 (Ohio 2014) (No. 2012-1272) (arguing that a taxpayer's interest in the faithful adherence to his state's constitution could be pursued through the political process, and need not be pursued in the court system).

[151] *See supra* note 130 and accompanying text.

would not, in fact, be making policy; they would simply be enforcing the constitution. Deciding whether a particular government-created arrangement violates the state constitution is the job judges were elected to do.

A strong judicial role is necessary to ensure the legislative and executive branches follow the constitution. Expanding standing doctrine in state court can accomplish that need.

IV. CONSTITUTIONAL QUESTIONS: THE NEED FOR A STATE STANDING AMENDMENT

Citizen groups cannot rely solely on state courts to grant standing to challenge the constitutionality of public–private development corporations, despite the legal and policy-based reasons for doing so. Although some courts have experimented with their standing doctrines, many continue to adhere to the traditional requirements enunciated by the federal court system. In light of state courts' reluctance to develop judicial common law recognizing broad standing for citizens to challenge PPDCs under state constitutions, a more explicit method of conferring standard is necessary to ensure access to the courthouse.

A. *The Best Approach: Legislative Conferral of Standing or State Constitutional Amendment?*

What is the best method by which to confer standing onto private citizen groups to challenge the constitutionality of public–private development corporations? A state statute and a constitutional amendment each have their strengths and weaknesses. In terms of political will at the statewide level, future state judicial interpretation, and ability to persevere, a constitutional amendment is the better route.

1. *Legislative Conferral of Standing*

Causes of action in federal and state courts that are created by statute are referred to as "legislative conferrals of standing."[152] On the federal level, the Supreme Court has limited the ability of Congress to confer standing on private citizens in the absence of the concrete injury required by Article III.[153] According to the Court, the requirement that plaintiffs be sufficiently injured is unassailable under the Constitution.[154] The Court has not completely closed

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[152] Doggett, *supra* note 137, at 840 n.6.

[153] Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–78 (1992). *See also generally* Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015) (granting review on the question of whether Congress may confer Article III standing in the absence of a concrete harm).

[154] *Lujan*, 504 U.S. at 576 ("Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases,

the door on legislative conferral of standing, however, as Justice Kennedy has expressed an openness to allowing Congress to confer standing where no actual injury exists.[155]

Although state courts are not required to follow federal standing doctrine,[156] some state courts have continued to adhere to the justiciability requirements that the Constitution imposes upon federal courts.[157] The Michigan Supreme Court, for example, found that the state legislature could not constitutionally confer standing onto private citizens who lacked "actual and particularized injuries."[158] In *National Wildlife Federation v. Cleveland Cliffs Iron Co.*, plaintiffs sought to challenge the issuance of a permit for mine expansion to the Cleveland Cliffs Iron Company.[159] The group brought suit under the Michigan Environmental Protection Act (MEPA), which allowed for "any person" to file a lawsuit for the protection of the environment.[160] Despite such explicit legislative conferral of standing, the Michigan Supreme Court declined to honor the wishes of the legislature, referencing Article III of the federal Constitution and quoting Supreme Court decisions as a basis for its decision.[161]

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they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches.").

[155] *Id.* at 580 (Kennedy, J., concurring) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ."); *see also* Summers v. Earth Island Inst., 555 U.S. 488, 501 (2009) (Kennedy, J., concurring).

[156] *See* Doggett, *supra* note 137, at 851 ("Since state courts are not organized under the Federal Constitution, but rather under state constitutions, states have been free to vary justiciability standards in their courts from federal norms."). *See generally* ASARCO v. Kadish, 490 U.S. 605 (1989); Hershkoff, *supra* note 97, at 1858–59.

[157] *See generally* Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531 (2004) (noting Ohio courts' general acceptance of federal constitutional standing principles, despite the ability to diverge from Article III standing requirements, and concluding that federal standing doctrine is optimal and Ohio courts should continue to follow it).

[158] Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 818 (2004). To be clear, the Michigan Supreme Court did not technically find the citizen suit provision of the state environmental statute unconstitutional; rather, the Court found the citizen group had standing to sue under traditional standing principles while unmistakably expressing its disdain toward the statute in dicta. *See* Heather Terry, Comment, *Still Standing but "Teed Up": The Michigan Environmental Protection Act's Citizen Suit Provision After* National Wildlife Federation v. Cleveland Cliffs, 2005 MICH. ST. L. REV. 1297, 1298.

[159] *Cleveland Cliffs*, 684 N.W.2d at 804–05.

[160] *Id.* at 805 n.1 ("The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." (quoting MICH. COMP. LAWS § 324.1701(1))).

[161] *Id.* at 810–11 ("If the Legislature were permitted at its discretion to confer jurisdiction upon this Court unmoored from any genuine case or controversy, this Court

Similarly, the Illinois Supreme Court has held that a state statute conferring standing on private citizens was unconstitutional where the state was the real party in interest.[162] In *Lyons v. Ryan*, a group of Illinois taxpayers sued on behalf of the state to recover public funds that were misused by former Governor and Secretary of State of Illinois, George Ryan.[163] Ryan was accused of issuing drivers' licenses to unqualified drivers in exchange for political contributions.[164] The Court found that the state, rather than the group of taxpayers, was the real party in interest because the alleged fraud did not involve direct expenditure of any public funds—aside from the incidental use of funds, such as the salaries of employees involved in the fraud.[165] As such, the Attorney General had wide discretion to pursue charges against the Governor in the state's interest, and was the only officer with the constitutional authority to bring a claim against the Governor.[166] In short, like the *Cleveland Cliffs* case and despite express legislative conferral of standing, the Illinois Supreme Court found that taxpayers did not have standing to sue under the state law, declaring the statute unconstitutional.[167]

As these two cases demonstrate, even a state statute conferring standing onto citizen groups to bring lawsuits does not guarantee access to the courthouse. James Doggett, in *"Trickle Down" Interpretation*, has noted that

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would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch."). One commentator has criticized the Court's reliance on separation of powers arguments in following federal standing doctrine. Jennifer M. Minuchi, Comment, *Judicial Branch Standing—The Decision to Apply Federal Judicial Standing in a State Forum and its Impact on a Government by, of, and for the People*. National Wildlife Federation v. Cleveland Cliffs Iron Company*, 684 N.W.2d 800 (Mich. 2004)*, 36 RUTGERS L.J. 1487, 1500 (2005). Interestingly, the Michigan Supreme Court later overturned the decision in *Cleveland Cliffs*, stating that Michigan courts should not be bound by federal standing doctrine. Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 697 (2010) ("[*Cleveland Cliffs*] departed dramatically from historical jurisprudence in Michigan, and the bounds of the constitutional text, when [it] interpreted the *Michigan* Constitution to compel a standing doctrine that is essentially coterminous with the federal standing doctrine."). For an argument that the Michigan Supreme Court's overruling of *Cleveland Cliffs* and its return to non-federal standing doctrine may lead to "judicial confusion" and "a breakdown of constitutionally mandated separation of powers," see Kenneth Charette, Comment, *Standing Alone?: The Michigan Supreme Court, the* Lansing *Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199, 219–20 (2011).

[162] Lyons v. Ryan, 780 N.E.2d 1098, 1106 (Ill. 2002).

[163] *Id.* at 1100–01.

[164] *Id.* at 1100.

[165] *Id.* at 1104–05; Doggett, *supra* note 137, at 860.

[166] *Lyons*, 780 N.E.2d at 1105.

[167] *Id.* at 1106; *see also* Scachitti v. UBS Fin. Servs., 831 N.E.2d 544, 556 (Ill. 2005) (declaring as unconstitutional a state statute conferring standing on private citizens to sue on the state's behalf in recovery of fraudulently obtained public funds because such conferral usurped the power of the Attorney General to represent the state in litigation). For a more in-depth discussion of these two Illinois cases, see Doggett, *supra* note 137, at 859–63.

"certain state courts have begun to express skepticism toward legislative conferral of standing," while relying on U.S. Supreme Court decisions to support their skepticism.[168] In fact, a number of state courts have incorporated an injury-in-fact requirement into their state constitutional jurisprudence, despite their ability to experiment with standing doctrine.[169]

Although some state courts have broken away from the lock-step adherence to federal standing doctrine,[170] legislative conferral of standing is an unreliable way of allowing private citizens access to the courthouse to challenge unconstitutional governmental action. Given the reluctance on the part of state courts to experiment with standing doctrine, a more venerable method of conferring standing is necessary to ensure citizen groups can challenge the constitutionality of public–private development corporations in court.

2. *State Constitutional Amendment*

A state constitutional amendment avoids the potential gap faced by legislative conferral of standing. By enshrining the right of citizens to challenge the legality of public–private development corporations in the state constitution, a state court cannot decline to reach the merits of a case simply by adhering to federal justiciability requirements, out of a sense that such adherence is a wise practice.[171] Instead, state courts would be required, under their respective constitutions, to decide whether such economic development arrangements are permissible.

Two viable methods exist for amending a state's constitution—through the state legislature or by voter referendum. Passage of an amendment granting standing to citizen groups would be most easily attained through a state legislature, in terms of the number of people needed to agree to such an amendment. After all, most state legislatures contain less than two hundred members,[172] while a voter referendum would require the affirmative vote of thousands of regular citizens. On the other hand, given that the legislature would have been the entity to initially create a public–private development corporation, state legislators may conceivably be reluctant to allow citizens to challenge the corporation's constitutionality.

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[168] Doggett, *supra* note 137, at 855.

[169] *Id.* at 855 n.100 (collecting cases).

[170] *Id.* at 840 ("[M]any state appellate courts have concluded that state legislatures may constitutionally confer standing onto private citizens to represent the public interest in court."); *id.* at 840–41 n.9 (collecting cases).

[171] *See generally* Harmanis, *supra* note 125 (arguing that state courts should develop a more restricted version of public interest standing, in part, because of the wisdom of the federal "case or controversy" requirement).

[172] *Number of Legislators and Length of Terms in Years*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx [http://perma.cc/8PUJ-563Q] (last updated Mar. 11, 2013).

As such, voter referenda may be the only realistic option of passing a state constitutional amendment to allow private citizen groups to challenge the constitutionality of public–private development corporations. Direct democracy, as some commentators refer to it, has a long history going back to at least the Progressive Era at the beginning of the twentieth century.[173] Constitutional amendment by initiative "empowers citizens, by petition, to require a popular vote on whether to adopt a" change to the state constitution.[174]

One type of voter referendum,[175] called the direct constitutional initiative, has the benefit of requiring no involvement by the state legislature or members of the executive branch.[176] A group of concerned citizens, such as ProgressOhio, would merely need to pass precirculation review by the state's secretary of state or attorney general and then collect the threshold number of signatures to place a question on the ballot.[177] Arizona, for example, requires signatures of 15% of the electorate who last voted for governor before a constitutional amendment proposition will be placed on the ballot.[178] Michigan requires the signatures of 10% of total voters in the last gubernatorial election.[179] Ohio similarly requires the signatures of 10% of gubernatorial voters, but also requires the signatures of at least 5% of the qualified electors in each of one-half of the counties in the state.[180]

The downside to direct constitutional initiative is its relative lack of prevalence among states with public–private development corporations. Only sixteen states in total allow for direct constitutional initiative, and only four of those states—Arizona, Florida, Michigan, and Ohio—are ones with PPDCs.[181] Voters in these four states will have a relatively easy time placing before the electorate the question of whether the state constitution should be amended to

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[173] Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 300 (2008).

[174] Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 49 (1995).

[175] A number of different types of voter referenda exist. For instance, voters may approve or disapprove an already-enacted piece of legislation through a Popular Referendum. The legislature may also place before voters particular questions in a process called a Legislative Referendum. Also available are Direct Statutory Initiative—whereby citizens place on the ballot a proposed statute to be enacted—and Indirect Statutory Initiative, which requires pre-approval from the legislature. For a more detailed discussion, see Krislov & Katz, *supra* note 173, at 302–04.

[176] *See id.* at 303.

[177] See *id.* at 310–21 for a full discussion on how an interest group might pass a constitutional amendment through direct initiative from start to finish.

[178] COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 14 tbl.1.3 (2014 ed.), http://knowledgecenter.csg.org/kc/system/files/1.3%202014.pdf [http://perma.cc/CN7F-C6LA] (summarizing the constitutional amendment procedure by initiative).

[179] *Id.*

[180] *Id.*

[181] *Id.*

allow private citizens to challenge the constitutionality of the state's development corporation. On the other hand, citizens in Indiana, Maryland, North Carolina, Rhode Island, Virginia, Wisconsin, and Wyoming will have to rely on more indirect measures of enshrining the right to sue their state's PPDC in the state constitution.[182]

B. *Text of Proposed Standing Amendment*

The text of a uniform state constitutional amendment that confers standing on private citizens to challenge the constitutionality of public–private development corporations in state court might read as follows:

> 1. Any private citizen of this State, regardless of whether he or she has suffered a concrete and particularized injury, shall have standing to challenge the constitutionality in state court of any public–private development corporation, which receives public funding for any aspect of its operation; provides publicly or privately funded support to any private enterprise, business, or company through direct grant of money, tax subsidy, or any other special privilege designed to attract the relocation to or continued presence in this state of said enterprise, business, or company; and is organized under the laws of this state;
> 2. No time limitations shall be imposed on the filing of citizen suits to challenge the constitutionality of the creation of such development corporations.
> 3. Interpretation of this Section should be broadly construed so as to reach the merits of any constitutional challenge brought hereunder.

C. *Rationale of Amendment and Implications*

A uniform standing amendment, likely to be adopted through citizen initiative, is a satisfactory solution to the problem of private citizens failing to meet traditional standing requirements to sue development corporations for two general reasons. First, as the Supreme Court of the United States has noted, state courts are not bound by the same justiciability requirements as federal courts.[183] Commentators have further argued that the state court system is a particularly suitable place for the vindication of public rights by private individuals that would otherwise be impossible in the federal court system.[184] Therefore, state courts are appropriate venues for granting more liberal standing rights to private citizens, as they are not constrained by federal

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[182] *See supra* note 175.

[183] ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (recognizing the right of state courts not to follow the dictates of the Supreme Court's Article III standing jurisprudence).

[184] John DiManno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008) (arguing that state courts are uniquely situated to adopt public interest standing models); *see also* Hershkoff, *supra* note 97, at 1834; Poai, *supra* note 145; McBride, *supra* note 145.

standing principles. Second, an amendment conferring standing on private citizens is particularly appropriate because it represents the democratic will of the electorate.

The proposed uniform state constitutional amendment accomplishes three things with its three prongs. First, the amendment confers standing on any state citizen to sue a JobsOhio-like development corporation. Importantly, the first prong of the amendment limits constitutional challenges to those development corporations that receive public funds and funnel some of that money to benefit private enterprise. This prong will serve to bar frivolous lawsuits against state development agencies that are part of state government, and therefore do not operate behind a "veil of secrecy." Second, the amendment prohibits a statute of limitations from barring constitutional challenges to the *creation* of a public–private development corporation. Suits challenging particular *actions* of a development corporation may still be time-barred by the legislature. Finally, the third prong directs a court to reach the merits of a constitutional challenge brought under the amendment if at all possible. This clause should protect against any attempts by judges to circumvent the language of the amendment. For instance, a state court might try to locate a loophole in the "corporation" language of the amendment's text by holding that a PPDC organized as a limited liability company or partnership is shielded from suit. The "interpretation" clause, however, will give advocates ammunition to persuade a reticent court to reach the merits question of the constitutionality of its state's PPDC.

Practically speaking, the above amendment will be able to garner the requisite support in states with direct constitutional initiative options. Groups like ProgressOhio and the Goldwater Institute in Arizona have been bothered by the lack of transparency and accountability—as well as the questionable constitutionality—of their respective state's PPDC. Accordingly, with amendment language that guarantees the right to challenge such corporations, these groups will acquire the necessary support among similarly frustrated citizens to at least gain access to the ballot. The limited scope of the language will then aid in the passage of the ballot initiative before the general public. The amendment does not declare the state's PPDC unconstitutional; it merely provides a means to challenge the PPDC's constitutionality. As such, it is less controversial than a more broadly worded amendment might be (*e.g.*, an amendment that confers standing to challenge *any* potential violation of the state constitution).

By enshrining the conferral of standing on citizens in a state's constitution—as opposed to a statute—state courts will be compelled to recognize the ability of interest groups to challenge the constitutionality of public–private development corporations like JobsOhio.

V. CONCLUSION

Public-private development corporations like JobsOhio were incorporated for the same purpose as state economic development agencies—to spur job creation, economic growth, and to attract tourism to their respective states. Unlike state departments of economic development, PPDCs are often not subject to public records laws, procurement procedures, or other mechanisms that ensure transparency and accountability. These "veils of secrecy" create a problem when virtually every state constitution contains provisions prohibiting the commingling of public money with aid to private enterprise. Given many state courts' adherence to rigid federal standing doctrine, however, groups seeking to challenge the constitutionality of PPDCs in state court may find the doors to the courthouse are closed.

This Note has proposed that states with JobsOhio-like development corporations adopt constitutional amendments to allow private citizens to challenge the constitutionality of such corporations. Through direct constitutional initiative or other means, citizens may place the amendment on the ballot to be voted on by the general public. An amendment conferring standing to sue will ensure that access to the courthouse will be guaranteed for citizens "to discover whether their government has been true to the Constitution."[185]

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[185] ProgressOhio.org, Inc. v. JobsOhio, 13 N.E.3d 1110, 1114 (Ohio 2014) (Pfeifer, J., dissenting).