

No. 22574 - State of West Virginia ex rel. Glen B. Gainer III,
Auditor of the State of West Virginia v. The West
Virginia Board of Investments

Cleckley, J., concurring:

I concur in the entirety of the excellent majority opinion.

I write separately only to add a few observations. First, as Justice Workman accurately described, the primary impetus behind the inclusion of Section 6 of Article X in the 1863 Constitution was a desire by a majority¹ of those voting to avoid the burdensome and unwise debts that had been incurred by the mother commonwealth

¹It was a majority, but barely. An effort to delete from Section 6 the prohibition on state investment in private corporations and persons failed by a scant vote of 22-21, largely along sectional lines. 3 Debates and Proceedings of the First Constitutional Convention of West Virginia 247 (1861-1863). Indeed, those favoring investment (primarily delegates from the undeveloped southern counties) achieved a late convention compromise for inclusion in the finance article of the following section, which seriously limited the impact of Section 6:

"If the State become a stockholder in any association or corporation for purposes of internal improvement, such stock shall be paid for at the time of subscribing, or a tax shall be levied for the ensuing year, sufficient to pay the subscription in full."

3 Debates and Proceedings of the First Constitutional Convention of West Virginia at 878. It is significant that the 1872 convention dropped the Section 7 compromise but retained Section 6 in full force.

That fact is even more remarkable given that the 1872 convention was dominated by ex-Confederates, most of whom came from those portions of the State that in 1863 most needed and therefore sought investment in internal improvements.

of Virginia and by other states during the decades preceding the Civil War. Also influential, however, was a desire to avoid another (though related) undesirable development that plagued Virginia. Many in what is now West Virginia believed, and resented, that political cronyism and bias for eastern development controlled state investments rather than need or sound investment strategy. See, e.g., Remarks of Delegate Van Winkle, 3 Debates and Proceedings of the First Constitutional Convention of West Virginia at 228-29. State stock purchases typically benefitted those entities which were connected with powerful eastern legislators, and this practice offended the westerners' sectional and moral sensibilities. Clearly, such favoritism would detract from good government and wise decision making.

Second, the framers who opposed state investment in private corporations and individuals did so because they believed it unsound to turn public dollars over to private entities whose overriding motive is profit, not the public interest. A transfer

²See, e.g., Remarks of Delegate Dering, 3 Debates and Proceedings of the First Constitutional Convention of West Virginia at 201:

"It would be ruinous to the State if we should agree to strike out 'corporations or person' in this section and thereby authorize the legislature to loan the credit of the State to

of public money to support capitalistic enterprises thus meant that those funds would be diverted to advance private profit making and not necessarily the best interests of the people. Admittedly, what is good for corporate profits is sometimes good for the public; yet corporate and public aspirations often run at cross-purposes.

Third, I believe Section 6 prevents still another evil: when government officials invest in private corporations, they invite favorable treatment for the objects of the investments and, perhaps, unfavorable treatment for the objects' competitors. Thus, a state investment portfolio can disrupt the essential objectivity that government-as-regulator should maintain, both in its legislative and enforcement capacities.

corporations or individuals. What is a corporation? A soulless thing organized to make money for its projectors without regard to any other purpose. The gentleman from Doddridge and other gentlemen here want to lend and pledge the credit of the State to these soulless corporations, to cities and towns, corporations and persons. He proposes to incorporate in our organic law an invitation for all time to come for adventurers and cheats and companies organized for all sorts of questionable purposes throughout the whole country to come in and lay siege to our treasury and empty its coffers."

These potential evils are at least implicated by the facts of this case. Whether such harms could be prevented by the creation of less drastic procedural safeguards and whether the need for a greater return on state investments of pension and similar funds outweigh the concerns regarding state indebtedness, political favoritism, and profiteering are not questions for us to decide.

As Justice Workman correctly explains, we are not free to ignore the clear commands of the Constitution; only the people voting on a constitutional amendment can change Section 6's answers to the above questions and decide that modern pension arrangements call for a modified attitude about state investment in private corporations.

³I do not mean to imply a position--one way or another--regarding the desirability of such an amendment. Certainly, recent experiences in this State, see State v. Morgan Stanley & Co., Inc., ___ W. Va. ___, ___ S.E.2d ___ (No. 22358 ___\ /___/___), and in Orange County, California, indicate that we need, at a minimum, safeguards against officials who seek to reap big profits through speculative investments of public funds. Whether and what safeguards are sufficient are matters beyond our domain.