A more Modest Court:

The Ohio Supreme Court's Newfound Judicial Restraint

by Jonathan H. Adler & Christina M. Adler

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The Ohio Supreme Court has changed significantly over the past six years, in large part due to changes of court personnel. Four new justices have joined the court since 2002. Significant turnover on the court has produced significant change in the court's approach to many legal issues, in particular the degree of deference shown to legislatively enacted policies.

During the 1990s, the court developed a reputation for aggressively intervening in controversial policy matters, from tort reform to school funding, as well as for, as some contend, its embrace of dubious legal arguments. In one 1993 case, the court was excoriated for its handling of a First Amendment case in which "not one justice" on the divided court, "analyzed the case competently."[1] In a 2001 decision, the court declared a federal constitutional right protected by substantive due process, even though the Court could have reached the same result on independent and sufficient state grounds.[2]

Between 1990 and 2002, the court repeatedly struck down legislation or ordered the legislature to adopt controversial policy measures. The court's opinions led to charges the court was "usurping" legislative authority.[3] For instance, one commentator noted that, in a series of opinions spanning a wide-range of issues, the Court's so-called "Gang of Four"[4]—Justices Paul Pfeifer, Andrew Douglas, Francis Sweeney, and Alice Robie Resnick—"blurred the lines between the legislative and judicial branches of government and essentially turned the court into a super-legislature on several major public policy issues in Ohio."[5] Among other things, the court invalidated several legislatively adopted tort reform measures and invalidated the state system of school financing four times in the span of five years.

Beginning in 2002, things started to change. The replacement of several justices and public reaction to the court's posture caused a shift in the Court's overall orientation. As David J. Owsiany concluded in a 2004 report on the Ohio Supreme Court: "Over the last two years, the new majority reversed the court's willingness to make public policy from the bench as had been the case during the 1990s through 2002."[6] A recent report by the Center for Legal Policy at the Manhattan Institute likewise concluded that the change on the court since 2002 has resulted in "reasonably predictable rulings" and a "friendlier and fairer" legal environment for business.[7] Today, the court is significantly more deferential to the legislature and less likely to expand or create causes of action. Only one of the "Gang of Four"—Justice Pfeifer—remains on the court, and he is a frequent dissenter from the court's rulings.

Whereas the Ohio Supreme Court had previously declared various legislatively enacted tort reforms unconstitutional, it now applies a presumption of constitutionality to legislative enactments more consistently. Thus, in 2007 the court rejected facial challenges to recent tort reform legislation,[8] and upheld the exclusion of certain types of injuries from those covered by workers' compensation.[9] The current court is also largely unsympathetic to new and innovative tort claims or cases that seek judicial revision of existing rules or statutes to facilitate plaintiffs' actions.[10] A 2006 analysis by the *New York Times* found the success rate for major plaintiffs' firms before the supreme court was significantly lower from 2004-2006 than it had been in the prior three years.[11]

Evidence of the court's greater deference to the legislature can be found in many areas. In education, for example, the court has stopped attempting to force a $1 billion-plus reorganization of state school funding, as it had in the *DeRolph* litigation, and it rejected a

* *Jonathan H. Adler is Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law. Christina M. Adler is an attorney in northeast Ohio. The views expressed herein are solely those of the authors and should not be attributed to the Federalist Society for Law & Public Policy Studies, the Center for Business Law & Regulation, or the Case Western Reserve University School of Law.*

constitutional challenge to state legislation creating charter schools.[12] The court has also shown broad deference to other legislative actions, upholding the state's nonparental visitation statute,[13] domestic violence statute,[14] and incest statute[15] against constitutional and other challenges.

While the court appears less likely to invalidate legislative actions, it continues to scrutinize government actions to ensure they are constitutional. Perhaps most notably, the court unanimously held that economic development, by itself, is not sufficient to satisfy the public use requirement for eminent domain actions under the Ohio state Constitution.[16] In other cases, the court rejected an "antiprocreation condition" placed upon a defendant under community control as unconstitutionally overbroad,[17] and refused to invalidate a surrogacy contract because it allegedly violated public policy concerns.[18]

In several cases, the court has been drawn into contentious political battles. The court accepted and ruled on cases implicating gubernatorial privilege, the validity of a governor's veto, and the composition of county election boards. As this paper goes to press, additional cases are pending concerning the application of election rules concerning absentee ballots and early voting. Apart form the merits of the court's decisions in these and related cases, the court's apparent readiness to resolve partisan political disputes has contributed to the perception of a politically oriented court.

The Current Court

Four justices have been replaced since 2002. Justices Andy Douglas, Deborah Cook, Francis Sweeney, and Alice Resnick were replaced by Justices Maureen O'Connor, Terrence O'Donnell, Judith Lanzinger, and Robert Cupp, respectively. For a brief period in 2003, a majority of the court's justices were women (Resnick, Cook, Stratton, and O'Connor). Since Justice Cupp's election to replace Justice Resnick in 2006, all seven justices on the Ohio Supreme Court have been Republicans. Despite the uniform party affiliation of the justices, the court is hardly monolithic or ideologically consistent. Wide divergences in judicial philosophies remain among the current justices.

Chief Justice Thomas J. Moyer has been Chief Justice of the Ohio Supreme Court since January 1987. He previously served for eight years on the Tenth District Court of Appeals in Franklin County. Moyer also worked as an executive assistant to Republican Governor James A. Rhodes and as an attorney in private practice. Chief Justice Moyer is generally considered to be a centrist justice who is committed to principles of stare decisis, and often reluctant to overturn prior decisions, even if he believes prior cases were wrongly decided. Justice Moyer serves on the board of Justice at Stake, an organization that seeks to limit the influence of money and politics on fair and impartial courts,[19] and has expressed concern about the influence of private campaign contributions on judicial elections. "Human nature is that we help people if they help us," Moyer said. "And that's the problem with this system." [20]

Justice Paul E. Pfeifer has sat on the court since January 1993. Prior to his election in 1992, Pfeifer had been an attorney in both government and private practice. He had experience as an assistant county prosecutor and served in both houses of the Ohio General Assembly.[21] The last member of the "Gang of Four" left on the court, Pfeifer is widely recognized as the most "liberal" member of the court and its most frequent dissenter. By some, Justice Pfeifer has been criticized for "taking an average of 291 days to produce each of his 21 opinions in 2006—nearly two months longer than the next-slowest justice."[22] In one case, Pfeifer took nearly a year to pen a unanimous opinion reversing two criminal defendants' convictions, after each had already served sixteen years in prison.[23] In his defense, Pfeifer told the press "he's slow because he puts as much thought into writing opinions for the majority as he does in penning dissents, which he wants to be as entertaining as they are legally sound."[24] Pfeifer has also been publicly critical of judicial campaign financing and has suggested judges are unduly influenced by political contributions stating, "'I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race, ... Everyone interested in contributing has very specific interests. They mean to be buying a vote."[25]

Justice Evelyn Lundberg Stratton was appointed to the court in 1996 after seventeen years of legal experience as both a private practitioner and as the first female judge on the Franklin County Court of

Common Pleas. Based upon her approach to criminal sentencing then-Judge Stratton became known as the "Velvet Hammer."[26] Justice Stratton also earned the animosity of plaintiffs lawyer organizations and their allies for allegedly disfavoring trial attorneys, medical malpractice judgments, and class action lawsuits. During her first re-election run, Ohio Citizen Action filed a grievance as Election Day neared, complaining about comments Justice Stratton made during the campaign criticizing trial lawyers and her opponent, Janet Burnside. "[M]ost of them abuse the system," she told the *Mansfield News Journal*, adding that "[m]any, many trial lawyers are contributing to [Burnside's] campaign, so that makes it the trial lawyers against the rest of the state."[27] No action was taken and Justice Stratton was reelected.

Justice Maureen O'Connor was elected to the court in 2002 after an extensive career in both law and politics. After four years in private practice, O'Connor was appointed as a probate magistrate in Summit County. She then moved on to serve as both Common Pleas Judge and county prosecutor, where she "established a reputation as a no-quarter-given ballbuster."[28] Under her watch, crime rates fell and indictments rose," according to Cleveland's *Scene*. "She was following the route of ambitious prosecutors everywhere, pounding even low-level criminals with a dizzying array of charges"[29] After her successful career as a prosecutor, O'Connor was elected lieutenant governor in 1999, from which position she ran for the Ohio Supreme Court. When running for election O'Connor suggested that Ohio voters "should be concerned about an activist court whose decisions benefit special interest groups such as the one my opponent pledged allegiance to." In particular, O'Connor challenged her opponent's claim that a seat on the court "belongs to labor."[30] Asked about her duties if elected, O'Connor stated that her job is to "interpret the law, apply it to the facts, and render an opinion regardless of who the parties are," and that the court must "shift from an activist philosophy to a philosophy of judicial restraint."[31]

Justice Terrence O'Donnell was appointed to the court by Governor Taft in 2003 to replace Justice Deborah Cook, who had been confirmed to the U.S. Court of Appeals for the Sixth Circuit. Justice O'Donnell was re-elected in a special election in 2004, and again in 2006 for a full six-year term, defeating Judge William M. O'Neill both times. O'Donnell gained his first legal experience as an appellate law clerk, first for the Ohio Supreme Court and then for the 8th District Court of Appeals. After spending six years in private practice, he then began his twenty-two year judicial career as a judge on the Cuyahoga Court of Common Pleas and later returned to serve as a judge on the Eighth District Court of Appeals. While running for the Supreme Court, O'Donnell stressed that he was "rooted in law enforcement" and his prior work as a teacher.[32]

Justice Judith Ann Lanzinger was elected to the court in 2004 after twenty years of judicial experience. Prior to joining the Ohio Supreme Court, Lanzinger sat on the Sixth District Court of Appeals, the Lucas County Court of Common Pleas and the Toledo Municipal Court. Justice Lanzinger also spent seven years in private practice primarily as an environmental attorney and was only the second woman in the United States to earn a master's of judicial studies degree from the National Judicial College and University of Nevada, Reno. She now serves as Chair of the Commission on the Rules of Superintendence, which (among other things) is developing rules on public access to legal records. While running for a seat on the Supreme Court she advocated a "limited role" for the supreme court, explaining that she believes "That's what our country has stated—we have three branches of government. I'm not running for either of the other two branches."[33]

Justice Robert Cupp is the most junior member of the court. Justice Cupp began his legal career serving as a Lima City Prosecutor and Assistant Director of Law. Prior to being elected to the 3rd District Court of Appeals, Cupp served in the Ohio Senate for sixteen years. During his term as a senator, Cupp served on the Judiciary Committee and chaired the Civil Justice Subcommittee, among other things. Cupp also served as president pro tempore of the state Senate from 1997-2000. In addition to his extensive political background, Cupp also spent over 25 years in private practice. Presently, Justice Cupp serves by appointment of the Chief Justice as a member of the Ohio Commission on Dispute Resolution and Conflict.

In 2007, the court came under scrutiny for its "tortoise-like pace" in deciding cases. The *Cleveland Plain Dealer* editorialized that the court's delays in issuing opinions made a "mockery of the term 'justice.'"[34] A systematic review by the paper found the time taken by the court to decide cases had increased dramatically.[35] In 2004, the court averaged 157 days from oral arguments to the release of an opinion. By 2006, the number had increased to 214—nearly two months longer.[36] That year it took the court over 300 days to issue opinions in sixteen of the court's 130 cases.[37]

Justice Pfeifer took an average of 291 days to issue an opinion, followed by Justice Lanzinger who took an average of 240 days. The speediest justices, according to the study, were Justice Stratton and Chief Justice Moyer, who turned out opinions in an average of 180 days and 181 days respectively.[38] Chief Justice Moyer explained that he had no control over the length of time it takes the court to issue decisions, as he cannot force independently elected justices to work within a certain timetable.[39]

The *Plain Dealer* revisited its study in 2008, finding significant improvement in the court's performance. Other than the newly elected Justice Cupp, all of the justices had improved their turn-around times substantially.[40] Chief Justice Moyer explained it "is still a matter in which all of the justices are sensitive."[41] Justice Pfeifer attributed the change to the court's embarrassment and changes in its procedures for releasing opinions.[42] Among other things, the court releases decisions three days a week instead of one.[43]

In January 2006, the court created the Commission on the Rules of Superintendence chaired by Justice Lanzinger. Among other things, this Commission was tasked by Chief Justice Moyer with developing new rules governing public access to court records that would balance public access with privacy concerns. The first draft of these rules, released in November 2007, triggered a substantial public response.[44] The rules provided for the redaction of personally identifying information and the closing of some records without a public hearing, which some feared would reduce public access to court records.[45]

Open-government advocates criticized the draft rules for being too "far-reaching."[46] Some went farther, suggesting that the Commission overstepped its constitutional bounds.[47] In response, Justice Lanzinger noted the supreme court has the constitutional authority over court rules.[48] "The Supreme Court has the authority to make sure the courts are operating in a just fashion," she explained.[49] Chief Justice Moyer further added that, because of the principle of separation of powers, the Public Records Act does not govern the courts, so the judicial branch needed to develop its own rules governing court records.[50]

Due to public concern, the Commission elected to hold additional meetings and revise portions of the proposed rules. Among other things, the Commission's revised rules would explicitly provide that all court records should be presumed open, and can only be closed if there is "clear and convincing" evidence justifying restricting public access. Redaction of personal information would be limited, and there would be public notice and a hearing before court records are closed.[51] At the time of this writing the revised rules have been published for public comment and have yet to be adopted by the supreme court.

Educational Reform

Between 1997 and 2002, the supreme court struck down Ohio's system of school-financing four separate times, demanding in each decision that the legislature enact a "complete, systematic overhaul."[52] According to the so-called "Gang of Four"[53]—Justices Sweeney, Pfeifer, Douglas, and Resnick—the state's reliance upon local property taxes for the lion's share of school funding violated the Ohio Constitution. Article VI, section 2 of the Constitution provides that the General Assembly "shall make such provisions, by taxation, or otherwise" to "secure a thorough and efficient system of common schools throughout the state."[54] According to the four justices in the majority, this means the state may not rely on local property taxes for the bulk of public school financing, particularly given the regional disparities such financing may allow.

Three justices—Chief Justice Moyer and Justices Stratton and Cook—dissented on the grounds that school funding decisions were the province of the state legislature, not the judiciary. Chief Justice Moyer wrote in his dissent, "[t]he issues of the level and method of funding [Ohio schools], and thereby the quality

of the system, are committed by the Constitution to the collective will of the people through the legislative branch."[55]

The governor and state legislature made some reforms, but chose not to follow the court's prescriptions for education reform. Ohio voters likewise rejected the court's educational policy, voting down a $1.1 billion increase in the state's sales tax to fund public schools and reduce local property taxes.[56] Indeed, voters rejected the proposed tax hike in every single state county.[57] This did not alter the view of the court's majority, however. One of the court's members, Justice Pfeifer, reportedly wanted to force a "constitutional crisis" by shutting down the entire state government until the legislature complied with the court's demands.[58] The court did not go this far, but did go on to hold the state's school funding system unconstitutional three more times in the following five years nonetheless.[59]

The *DeRolph* litigation only ended after the court's fourth such decision, in which the majority dismissed the case rather than order a remedy.[60] Since Justice Douglas was retiring and would soon be replaced by Lieutenant Governor Maureen O'Connor, who had been critical of the Court's decisions, the court, according to the *Columbus Dispatch*, sought dismissal so as to prevent the reversal of its prior decisions.[61] As Justice Pfeifer told the paper,

> I concluded that... the best position in which we could leave the school districts of this state that brought this litigation was one final declaration that it's still unconstitutional, dismiss the case, and then (the state) can't come running back with a new court and suddenly get it blessed as constitutional.[62]

Had the court remanded the case back to the trial court, as it had previously, the state would have been able to appeal any adverse decision back to the supreme court, where a new majority might be less sympathetic to the previous majority's claims.

The court's approach to education policy in the *DeRolph* litigation stands in stark contrast to its more recent decisions. When asked to rule on the constitutionality of charter schools in 2006,[63] a majority of the court deferred to the legislature.

In *State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education*, the Court heard a multi-pronged challenge to the constitutionality of the Community Schools Act, which, among other things, provided for the creation and state funding of "community schools," aka "charter schools," throughout the state. A group of teachers' unions, parental groups and school boards challenged the law arguing the law violated several separate state constitutional provisions, including the Thorough and Efficient Clause.[64] Four justices—Lanzinger, Stratton, O'Connor and Chief Justice Moyer—rejected the claims on the merits, while one Justice (O'Donnell) thought the court should dismiss the case as premature. Two justices—Resnick and Pfeifer, the two remaining justices from the Court's *DeRolph* majorities—dissented.

Stressing that "legislative enactments are entitled to a strong presumption of constitutionality,"[65] the court rejected all of the plaintiffs' arguments. "The General Assembly is the branch of state government charged by the Ohio Constitution with making educational policy choices for the education of our state's children. Our personal choices are not relevant to this task," Justice Lanzinger explained in her majority opinion.[66] While the Thorough and Efficient Clause imposes some limitations on the legislature's discretion, Lanzinger explained, it does not prevent the state from allocating a portion of per-pupil funding to charter schools any more than it prevents the state from reducing funding of a given school system because its enrollment decreases. In either case, a school district "still receives state funding for the children actually attending the district traditional schools."[67] Nor does the Constitution prohibit the state from granting charter schools a degree of flexibility not enjoyed by traditional public schools.

In dissent, Justice Resnick argued that charter schools were inherently unconstitutional, as the Ohio Constitution requires "a uniform and coherent body of governmentally controlled schools," and that the "constitutional framers... rejected the idea of competition among school districts... as inefficient, divisive, and ineffective." This was hard-wired into the Constitution, Resnick argued, and could only be reversed through a constitutional amendment. Justice Pfeifer dissented separately, arguing that charter schools could be constitutional so long as they were part of

an overhauled system of state education funding such as that which the court had sought to require in the *DeRolph* cases.

Tort Reform

For well over a decade, the Ohio legislature has sought to enact various types of tort reform measures to reduce the burden of tort litigation on doctors, manufacturers, and employers, among others. These efforts were typically subject to legal challenge, and many tort reform measures had been struck down or curtailed by the supreme court.

In *Ohio Academy of Trial Lawyers v. Sheward*, decided in 1999, the court's majority asserted jurisdiction and summarily invalidate the legislature's tort reforms in their entirety.[68] Specifically, the court took up a blanket challenge to the law before it had even been enforced only to strike it down on "separation of powers" grounds and for violating the state constitution's "one-subject rule." The court's decision even attracted the attention of the *Harvard Law Review*, which published a note harshly critical of the court's reasoning.[69] The note concluded that the court "misappropriated" both doctrines upon which its decision was based and, as a consequence "may have undermined the Ohio Supreme Court's valued position as defender of the state's constitution."[70]

Tort reform remained politically popular within Ohio, however, and the state legislature proceeded to enact a new round of reforms between 2002 and 2004, including caps on non-economic and punitive damages, medical malpractice reforms, a ten-year statute of repose limiting how long consumers may wait before suing manufacturers in product liability actions, and revisions to the collateral source rule.[71] The legislature also adopted measures to prioritize asbestos claims filed within the state.[72]

Over the past year, the supreme court has rejected several challenges to the constitutionality of legislatively enacted tort reforms. Of particular significance, last December the court rejected constitutional challenges to caps on noneconomic and punitive damages in *Arbino v. Johnson & Johnson*.[73] In this case, Melisa Arbino challenged the constitutionality of the caps when she sued the manufacturers of a birth control patch she alleged caused serious adverse side effects. According to Arbino, damage caps facially violated several of her state constitutional rights, including the rights to trial by jury,[74] a remedy in open court,[75] due process,[76] and equal protection.[77] She further argued the caps violated the separation of powers and the single-subject rule.[78] By a vote of 5-2, the court rejected these claims, and strongly indicated that it was willing to limit, if not overturn, prior decisions striking down legislative tort reforms.

The legislative reforms at issue were significant. Under R.C. 2315.18, the legislature limited recovery of noneconomic damages to the greater of (a) $250,000 or (b) triple the economic damages up to $350,000 or $500,000 per single occurrence. These caps did not apply in all cases, however, as the legislature exempted cases in which the plaintiff suffered severe physical injuries.[79] Under R.C. 2315.21, the legislature capped punitive damages at double the compensatory damages awarded to a plaintiff per defendant.[80] The legislature adopted these provisions due to its belief that limits on noneconomic and punitive damages would make the tort system more efficient, predictable and fair, and therefore less costly to the state.

In key respects, Arbino argued, these tort reforms were "functionally identical" to various reform measures the court had invalidated in prior cases, and should thus be struck down again.[81] Yet the court rejected the claim it was compelled to invalidate the legislature's latest reform efforts on grounds of stare decisis. Explained Chief Justice Moyer, "We will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional." Given the General Assembly's repeated and continued efforts to tailor tort reform measures to the Court's prior judgments, subsequent reforms merit "a fresh review of their individual merits" with the "strong presumption of constitutionality" that all statutes should enjoy.[82] "A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is the ultimate arbiter of public policy," Moyer explained, adding "the legislature has the power to continually create and refine the laws to meet the needs of the citizens of Ohio."[83] In a concurring opinion, Justice Cupp, joined by Justices Stratton, O'Connor, and Lanzinger, went even farther, suggesting

that prior decisions limiting the legislature's ability to enact tort reforms were erroneously decided.

On the specifics of Arbino's claims, Chief Justice Moyer distinguished the new caps on noneconomic and punitive damages from previously invalidated tort reforms. While Ohio citizens enjoy the right to seek redress for grievances in state courts before a jury of their peers, Moyer explained, this does not preclude the legislature from limiting the extent of awards or otherwise regulating the way in such claims proceed. "So long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered *as a matter of law*."[84] Just as the legislature may increase a tort award, such as by specifying specific damage awards or applying a multiplier, it may impose reasonable limits on tort awards. "By limiting noneconomic damages for all but the most serious injuries, the General Assembly made a policy choice that noneconomic damages exceeding set amounts are not in the best interests of the citizens of Ohio."[85] Further, limiting the amount of damages available is not the same as denying or curtailing a prospective plaintiff's ability to seek redress for a harm, particularly in the case of noneconomic damages, which are "inherently subjective" and can be quite uncertain.[86] The legislature's discretion to limit or modify punitive damages is even greater, Moyer explained, because "regulation of punitive damages is discretionary" and such damages can be limited "as a matter of law without violating the right to a trial by jury," or other constitutional rights.[87] Curtailing punitive damage awards does not violate a defendant's constitutional rights because the purpose of punitive awards is not to compensate plaintiffs but punish and deter harmful conduct by defendants. Even if one were to question the wisdom of such measures, the court concluded, the caps easily survive judicial scrutiny.

> We appreciate the policy concerns Arbino and her amici have raised. However, the General Assembly is responsible for weighing those concerns and making policy decisions; we are charged with evaluating the constitutionality of their choices. Issues such as the wisdom of damages limitations and whether the specific dollar amounts available under them best serve the public interest are not for us to decide.[88]

In a concurring opinion, joined by a majority of the court, Justice Cupp stressed the "long-settled" constitutional principle that the legislature may "alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good."[89] "The power to alter or abolish a common-law cause of action necessarily includes the power to modify any associated remedy," Cupp explained, rejecting Arbino's constitutional claims.[90] The concurrence stressed "it is beyond the authority of any court to write into the Constitution that which was not installed there by the framers and ratified by the people."[91] Though not the court's majority opinion, Justice Cupp's concurrence indicated that a majority of the court rejects the activist approach to tort reform embraced by the court in recent times.

Justices O'Donnell and Pfeifer each wrote dissenting opinions. Justice O'Donnell dissented in part, on the grounds that he would have struck down the caps on noneconomic damages for violating the constitutional right to a jury trial. This right is "inviolate," Justice O'Donnell argued, and it necessarily entails a right to have damage awards determined by a jury.[92]

Justice Pfeifer objected more broadly, maintaining that the laws in question were flatly unconstitutional and inconsistent with prior precedent. Justice Pfeifer did not confine himself to constitutional arguments, however, as he also devoted substantial portions of his opinion to challenging the "objectivity" and validity of the research and testimony upon which the state legislature based its tort reforms.[93] Thus, while Justice Pfeifer would have subjected the reform measures to more stringent scrutiny than the court majority, he also maintained that damage caps could not withstand even rational basis scrutiny, the most relaxed and deferential form of scrutiny a court could provide.

The court followed up *Arbino* two months later with *Groch v. General Motors*, in which the court rejected an additional set of constitutional challenges to recently enacted tort reforms, 6-1.[94] After suffering an injury while operating some industrial equipment, Douglas Groch had sued his employer, General Motors, and the equipment's manufacturer, even though the equipment had been made more than ten years before the injury. In response, GM asserted a subrogation interest in Groch's workers' compensation benefits, among other things.

As part of the suit, Groch challenged several tort reform measures, including a workers' compensation subrogation provision[95] and a statute of repose that provided that "no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser."[96] Groch claimed each provision was unconstitutional on a wide variety of grounds. As in *Arbino,* the court did not read state constitutional provisions so broadly as to constrain the legislature's tort reform measures, and rejected Groch's facial challenges. Confronted with prior decisions that seemed to indicate that at least one of the provisions was unconstitutional, the court limited its prior conflicting precedents to their facts, and upheld the new legislative actions. Groch did not lose on every count, however, as the court did hold a portion of the statute of repose unconstitutional, as applied to him. Insofar as this provision afforded Groch an "unreasonably short period of time to file suit" for injuries prior to the law's enactment, the court held, it was unconstitutionally retroactive.[97]

Citing *Arbino*, the Court's majority opinion by Justice Maureen O'Connor stressed the importance of judicial deference to legislative judgments about the wisdom of particular tort reform measures. Wrote O'Connor, "[i]t is not this court's role to establish legislative policies or to second-guess the General Assembly's policy choices."[98]

Justice Pfeifer was the lone dissenter.[99] He decried the majority's "offensive" opinion for its "continued disdain for stare decisis and a propensity to engage in legal mumbo jumbo to obscure that fact."[100] According to Justice Pfeifer's *Groch* dissent, the court should not apply a "presumption of constitutionality" to all legislative acts, as such a presumption has "no basis in the Constitution."[101] According to Pfeifer, "[o]ur role is to determine constitutionality, and we undermine our constitutional role by accepting any impingement on that power by any other branch of government."[102]

Arbino and *Groch* were the court's most significant recent decisions on tort reform, but they are not alone. Other cases from the past few years further illustrate the court's newfound deference to legislative tort reform measures. In *Northern Southern Railway Co. v. Bogle*, for instance, the court held that a state statute requiring asbestos claimants to make a showing of physical impairment before their claim could proceed did not impose an unreasonable burden on prospective claimants and was not preempted by federal law.[103] Writing for the court's five-justice majority, Justice O'Donnell explained that the statute was a reasonable procedural reform that the legislature enacted to prioritize asbestos claims within the state and "conserve the scarce resources of the defendants so as to allow compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future."[104] Justice O'Donnell's opinion for the Court was joined by Justices Stratton, O'Connor, Lanzinger and Cupp. Chief Justice Moyer and Justice Pfeifer dissented.

In another significant case, *McCrone v. Bank One Corporation*, the Court upheld a statute, 5-2, excluding purely psychological injuries from coverage under the state's workers' compensation system when the injuries did not arise from a compensable physical injury.[105] In this case, the plaintiffs argued the exclusion violated the Equal Protection Clause of either the state or federal constitution (if not both). Because the exclusion did not implicate a suspect class (e.g. race, gender), the court upheld the law under rational basis scrutiny. As Justice Lanzinger wrote for the majority, the state legislature rather than the courts "is the branch of state government charged by the Ohio Constitution to make public policy choices for the Workers' Compensation Fund," and its choices should be presumed constitutional.[106]

> At some point, the General Assembly may determine that psychological or psychiatric conditions arising in the workplace are compensable without regard to attendant physical injury or occupational disease. Until then, however, claims for such conditions are limited to the extent that [the existing law] provides.[107]

Insofar as this decision was in tension with a 2001 decision barring exclusion of a psychological injury resulting from witnessing a co-worker's compensable physical injury,[108] the court "questioned" (although it did not explicitly overturn) the prior holding.[109] Chief Justice Moyer and Justices Stratton, O'Connor, and O'Donnell joined Justice Lanzinger's opinion for the court. Justice Stratton also wrote a separate concurrence

to acknowledge the potential severity of psychological injuries, but also stress her view that the court should not, as per the dissents "mandate coverage" for purely psychological injuries "by judicial fiat."[110] Justices Resnick and Pfeifer dissented.

Over the past several years the court has also exhibited a reluctance to expand tort liability through innovative legal theories. In *Schirmer v. Mount Auburn Obstetrics & Gynecologic Associates*, for instance, the court rejected a claim for consequential economic and noneconomic damages in a "wrongful birth" case.[111] In this case, the parents of a child born with a birth defect alleged that their doctor's prenatal diagnosis and counseling had been negligent. Had they known of their child's birth defect, the parents claimed, they would have chose to have an abortion. Nonetheless, the court reasoned in an opinion by Justice O'Connor, such damages were not recoverable. In this holding O'Connor was joined by Chief Justice Moyer, and Justices O'Donnell, Stratton and Lanzinger.

The court did not completely reject the possibility of a "wrongful birth" action, however, as Justice O'Connor and Chief Justice Moyer, joined by Justices Resnick and Pfeifer, held that parents could recover limited damages for the costs "arising from the pregnancy and birth of the child."[112] A limited suit for such costs "may be brought under traditional medical-malpractice principles," Justice O'Connor explained, but a suit for consequential damages, such as the increased costs of having to raise and care for a child with an improperly undiagnosed birth defect may not.[113] Justices Lanzinger, Stratton and O'Donnell rejected this argument, however, arguing such a "wrongful birth" action was uncognizable under traditional tort law principles "absent legislative authorization."[114]

The court has also scaled back its prior decisions that had greatly expanded insurance company liability for individuals and activities that they had never intended or consented to insure. Specifically, in *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, a divided court effectively rewrote standard insurance contract language so as to expand the scope of the uninsured/underinsured motorist provisions in general liability policies to cover all employees and their family members even when acting outside the scope of their employment.[115] The 1999 decision was widely derided by legal observers, but threatened to have substantial economic consequences.[116] Although the Ohio legislature rapidly revised state law governing uninsured/underinsured motorist coverage, and insurance companies rewrote the language of new insurance contracts, the *Scott-Pontzer* decision opened the door to thousands of claims based on prior injuries over the past ten years. As one paper noted, the decision "opened a $1.5 billion can of worms" for the insurance industry and created a virtual "cottage industry" for plaintiffs attorneys looking for easy paydays.[117]

In 2003, the supreme court reversed course and held that when an employer is insured for uninsured or underinsured motorist coverage, the insurance policy does not cover losses sustained by employees outside the scope of their employment and would not cover the family members of employees if the employees themselves were also among the named insured.[118] "An insurance policy is a contract," Justice O'Connor's majority opinion for the court explained, and there is no basis in law for judicial expansion of the contract's terms beyond the bounds of what the parties intended.[119] While a court may be required to resolve ambiguities in a contract's language, and construe an insurance contract in favor of the insured, it "is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties" or adopt a construction at odds with the contracts express terms.[120]

Justice O'Connor's opinion, joined by Chief Justice Moyer, Justice Stratton, and Judge DeGenaro (sitting by designation), declared that *Scott-Pontzer* had been erroneously decided because it deviated from existing precedent and ignored the intent of the contracting parties.[121] Acknowledging the importance of *stare decisis*, Justice O'Connor's opinion further noted that the *Scott-Pontzer* holding had proved unworkable and correcting the court's prior error would not unduly compromise settled expectations. "Limiting *Scott-Pontzer* will restore order to our legal system by returning to the fundamental principles of insurance contract interpretation," she explained.[122] On this basis, the court held that *Scott-Pontzer* would only apply to employees when they suffer losses while acting within the scope of their employment.

In *Marrone v. Philip Morris USA*, the court rejected a claim that cigarette manufacturers were on notice that the sale of "light" cigarettes constituted an unfair or deceptive trade practice under the Ohio Consumer Sales Practices Act and could thus serve as the basis for a class action lawsuit under the CSPA.[123] As Justice Stratton explained for the court's majority, "a consumer may qualify for class-action certification under Ohio's CSPA only if the defendant's alleged violation of the Act is substantially similar to an act or practice previously declared to be deceptive" by a court or through administrative action.[124] By itself, a plaintiff's allegation that the sale and marketing of "light" cigarettes is deceptive, no matter how well-founded, was not sufficient. Under the CSPA, companies must have "meaningful notice" that their actions violate the Act before they can be subject to class action suits. "A general rule is not sufficient to put a reasonable person on notice of the prohibition against a specific act or practice," Stratton explained.[125] To hold otherwise would effectively eliminate the statute's notice requirement, and subject any company allegedly involved in an unfair trade practice to the threat of a class action, even if the ultimate allegations were not well founded. Justice Lanzinger and Judge Grady, sitting by designation, concurred in part and Justice Pfeifer dissented.

The court did not always rule against plaintiffs seeking recompense for their injuries in close or difficult tort cases, however. In *State ex rel. Gross v. Industrial Commission of Ohio*, the court ruled that a former employee could receive workers' compensation benefits for an injury the worker received as a consequence of the worker's own failure to observe workplace safety rules.[126] In *Gross*, the employee in question repeatedly violated workplace safety rules, eventually resulting in an accident in which he was injured. After the injury, the employer conducted an investigation of the incident and, concluding that it was the employee's fault, fired him. As a consequence, the employer claimed, the employee's temporary total disability benefits should be terminated.

The court initially agreed with the employer and the state Industrial Commission, holding 5-2 that the employee voluntarily terminated his own employment through his failure to follow workplace safety rules after having been put on notice that such actions would result in his termination.[127] Upon rehearing, however, the court concluded that denying the employee temporary total disability benefits for his injury would introduce a measure of fault into the explicitly no-fault workers' compensation system. The worker in question was unable to work because of his injury, not because of his subsequent termination. Moreover, were it not for his injury (and those of his co-workers) he would not have been terminated from his job; the employee had violated the same rules on prior occasions without incident. Therefore, the employee could not be said to have "voluntarily" abandoned his job. "Except as expressly set out in the statute," Justice Stratton explained for the court's majority, "workers' compensation benefits may not be denied on the basis of fault to a claimant who was injured in the course and scope of employment."[128] Echoing the reasoning found in so many recent high-profile court decisions, she added: "[i]t is the role of the legislature, not the judiciary" to carve out exceptions to a claimant's eligibility for TTD compensation."[129] Joining Justice Stratton's opinion were Chief Justice Moyer and Justices Pfeifer, O'Donnell, and Cupp. Justices O'Connor and Lanzinger dissented.

A Sunday Suit

In 2007, the court was dragged into a particularly contentious political fight between the Republican legislature and incoming Governor Ted Strickland over whether he properly vetoed a tort reform bill that outgoing Governor Robert Taft had intended to let become law without his signature. The legislature passed the law in December 2006 at the end of its legislative session. Among other things, the bill sought to cap noneconomic damages in predatory lending suits and limit the ability of Ohio municipalities to sue paint manufacturers on the grounds that the prior use of lead paint constitutes a "public nuisance" for which paint manufacturers may be held responsible. Outgoing Governor Taft approved of portions of the bill, but was lukewarm about others. Rather than sign the bill he decided to allow it to become law without his signature by simply filing it with the Secretary of State.[130] When Ted Strickland became governor, a member of his administration suggested the bill could still be vetoed

on his first day in office, so Strickland did just that on January 8, and the legislature sued.

The litigation turned on how long a governor has to veto a bill after it is passed by the legislature and, in particular, how to measure the time period where, as here, the bill was not signed by an outgoing governor at the end of his term after the legislature had adjourned. As the bill had never been signed, Governor Strickland and incoming Secretary of State Jennifer Brunner argued, the bill had not yet become law, and could still be vetoed.

Section 16, Article II of the Ohio Constitution provides:

> If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state.[131]

The primary issues before the court were when the ten-day time limit began to run—the day the legislature adjourned (December 26), the day the bill was presented to the Governor (December 27), or some other day (such as when the legislative adjournment ended)—and how the ten-day period should be counted. While disagreeing over the proper analysis, five justices—Cupp, Stratton, O'Connor, O'Donnell, and Chief Justice Moyer – concluded the bill had become law and the veto was invalid.[132] Justices Lanzinger and Pfeifer dissented.

Initial press coverage over the controversy focused on whether Sundays were to be counted in the days after the legislature's adjournment. The court majority found the Sunday question irrelevant, however. Justice Cupp, himself a former state legislator, concluded that ten day period expired whether or not Sundays were counted, because the clock began running on December 26, when the legislature adjourned, rather than on December 27, when the bill was presented to the Governor. This means the ten day period expired no later than Saturday, January 6. So, when Strickland took office on January 8, it was too late, whether Sundays counted or not.

Not all five justices in the majority agreed with Justice Cupp's analysis, however. Justice Stratton (who joined the majority opinion) and Justice O'Donnell (who only concurred in the judgment), suggested an alternative basis for the court's holding. They suggested that once Governor Taft filed the bill with the Secretary of State, the Governor's authority over the bill terminated, and the bill could not be recalled by the successive Governor for a subsequent veto.

Justice Pfeifer dissented, calling the decision "the ultimate display of result-oriented justice" because "nothing in the law supports the majority opinion's conclusion."[133] Every other justice, including the other dissenter, Justice Lanzinger, joined one or more opinions that stressed the difficulty of the case. Justice O'Connor concurred separately to respond specifically to Justice Pfeifer's accusations of a result-oriented decision. She challenged Justice Pfeifer's abandonment of "civility" for "sarcastic scurrility,"[134] and suggested Justice Pfeifer was knowingly misrepresenting the court's deliberations over the case. She wrote:

> The dissent states that our holding in this case was reached in a result-driven process that was started on the day the case was argued and that has been fueled by political considerations since then. Nothing could be further from the truth.
>
> As the dissenter knows, our internal debate on this matter has been extensive. The outcome in this case was not preordained. As the dissenter knows, I, and at least one other member of this court, gave careful consideration to a former draft of an opinion he circulated more than ten weeks ago, notwithstanding its vitriolic invective. The fact that five separate opinions have been written on the merits of the claims raised here suggests, quite strongly, that the members of this court are not of one mind – or persuasion.[135]

After the court released its opinion, Secretary of State Brunner sought reconsideration or clarification of the court's decision to determine when the 90-day period for Ohio citizens to seek a referendum petition against the bill began to run. In a brief, and quickly released, per curiam opinion, the court held that the bill actually became law on August 1, 2007—the day the supreme court's prior opinion was released—and therefore the 90-day period for a referendum petition did not begin until then.[136] Chief Justice Moyer and

Justices Stratton, O'Connor, Lanzinger and Pfeifer concurred in the judgment.[137] Justices O'Donnell and Cupp dissented.

Criminal Sentencing

Over the past five years, no area of Ohio law has seen as much change as felony sentencing—but these changes did not arise from changes in Court personnel. Rather, these changes were prompted by a series of constitutional decisions from the U.S. Supreme Court. In *Blakely v. Washington*,[138] a case Justice Sandra Day O'Connor termed a "[n]umber 10 earthquake,"[139] the United States Supreme Court placed most state felony sentencing guideline systems in constitutional jeopardy, including that in Ohio. In *Blakely*, a five justice majority of the U.S. Supreme Court struck down the state of Washington's sentencing guidelines as unconstitutional for violating the criminal defendant's Sixth Amendment right to a jury trial because they required the judge rather than the jury to make findings of fact necessary to determine the length of a sentence. In the follow up case of *United States v. Booker*, the U.S. Supreme Court further determined that the remedy for such a violation was to make offending sentencing guidelines advisory rather than mandatory.[140]

In the wake of the *Blakely* decision, the Ohio Supreme Court was forced to examine the constitutionality of Ohio's sentencing scheme in *State v. Foster*.[141] Like many states, Ohio adopted a system of felony sentencing guidelines to ensure greater consistency in criminal sentences handed down by judges. After *Blakely* and *Booker*, however, it was not clear the guidelines enacted by the Ohio legislature in 1996 still passed constitutional muster. The court was further faced with devising a remedy for defendants sentenced under the old regime.

In *Foster*, the court unanimously held that portions of Ohio's criminal sentencing statute violate the Sixth Amendment to the U.S. Constitution by requiring judges to make findings not found by a jury or admitted by the defendant before imposing consecutive or maximum sentences, more than the minimum term on first time prison sentences, or additional sentences on repeat violent and major drug offenders. Having concluded such findings violated a defendant's right to a jury trial if they resulted in a longer sentence, the court considered three possible remedies: (1) requiring sentencing juries; (2) reducing all felony sentences to minimum terms until the state legislature acts; or (3) severing the offending statutory sections.[142]

The court majority found the first two possibilities unacceptable. The court explained it would not require sentencing juries as a "common pleas judge lacks jurisdiction to conduct a jury-sentencing before a jury in a noncapital case."[143] The court acknowledged the General Assembly had the ability to enact legislation to authorize these types of juries, but it had not yet chosen to do so.[144] Therefore, the court concluded, this remedy was not a viable option. The court likewise rejected the remedy of presumptive minimum sentences, explaining that the General Assembly provided a sentencing scheme of "guided discretion" for judges, allowing for sentencing within a given range of allowable prison terms." Taking this into account, the court stated, it did not believe "the General Assembly would have limited so greatly the sentencing court's ability to impose an appropriate penalty."[145]

The court ultimately decided to elect a severance remedy, converting the guidelines from mandatory to advisory through severance of the offending portions. In coming to this conclusion, the court stressed its need to defer to the state legislature on sentencing questions; "the remedial question for a *Blakely* violation is to be resolved by looking to legislative intent," the court explained.[146] Such a remedy allows for judges to sentence within the statutory range provided by the legislature, even if it would compromise the consistency and uniformity the legislature had sought to enact with the sentencing guidelines in the first place. However, the court suggested that trial courts need not provide much justification at all on the record for the sentences they impose.[147]

Although the decision may have made the trial courts' jobs easier, it has not come without expense. In addition to the inevitable delays caused by multiple resentencings, Ohio taxpayers will bear the legal and logistical costs involved with new proceedings for state convicts.[148] Yet the ultimate outcomes are unlikely to be much different for convicted felons. As Jeffrey Gamso, a Toledo defense attorney commented, "[t]he overall numbers will not change that much. Judges were pretty

much giving the sentences they wanted to give, and just making the findings to justify them," he said."The overwhelming number of inmates are getting exactly the same sentence that they got before."[149] Regardless, defense attorneys still fear that the option still remains open for trial courts to impose harsher sentences upon remand. Some like Lorin Zaner have even considered counseling clients not to appeal their sentences.[150]

Just as it is unclear what a defendant's outcome will be upon resentencing, it is equally unclear how appellate courts should review these new sentences. As explained by the Sixth Appellate District in *State v. Jenkins*, "[f]ollowing the Supreme Court of Ohio's decision in *Foster,* there was some confusion among the appellate districts regarding the standard of review to apply to maximum, consecutive, or more than minimum felony sentences."[151] At the time of this writing, Ohio appellate districts are split, with some (e.g. the Fifth and Ninth) concluding that an abuse of discretion standard should apply, while others (the Twelfth and Fourth) electing to apply a clear and convincing standard.

The court's response to *Blakely* is largely consistent with the pattern observed in other areas over the past several years. The court recognized the constitutional infirmity of the state's sentencing guidelines regime, but it nonetheless resisted creating a new sentencing regime of its own devising. Rather, the court left as much of the old sentencing system intact—albeit as guidance rather than mandates—and has deferred to the legislature to figure out how to design a sentencing regime that will produce the desired level of uniformity without compromising constitutional limits. Whereas one decade ago a slim court majority aggressively sought to restructure the entire state educational system, today the court is reticent to intrude on legislative prerogative when forced to modify the state's criminal sentencing regime.

Family Law & Sexual Liberty

The court's pattern of providing broad deference to legislative enactments has carried over into non-economic cases. In several high profile cases involving various privacy rights the court curtailed or invalidated legislative actions with apparent reluctance. In *Harrold v. Collier*, for example, a unanimous court upheld the state's nonparental visitation statute against a constitutional challenge.[152] While acknowledging that courts must afford "some special weight" to the wishes of a child's parents, and that any limitations on parental rights must be subjected to strict scrutiny, the court concluded that Ohio's nonparental visitation statute was narrowly tailored to serve the state's compelling interest in the best interests of minor children, and was constitutional.[153]

The court also turned away a constitutional challenge to the application of the state's incest statute to allegedly consensual sexual relations between a stepfather and his non-minor stepdaughter.[154] Paul Lowe alleged that such application of the incest statue was unconstitutional in his case because it violated his fundamental constitutional right under the Fourteenth Amendment to the U.S. Constitution to engage in consensual sexual relations with other adults. No such right has been recognized as fundamental by the U.S. Supreme Court, the Ohio Court's majority noted. When the U.S. Supreme Court struck down a Texas law prohibiting homosexual sodomy, the Court gave no indication that it did so on the grounds consensual sexual activity is, in itself, a fundamental right.[155] As a consequence, the statute only had to survive the mildest scrutiny: rational basis. This was a test the statute could easily pass, as the statute served legitimate state interests beyond the protection of minors from their stepparents, such as protecting the family.

The court also rejected Lowe's argument that the statute should be read only to apply to sexual relations between stepparents and minor stepchildren. This would contravene the plain text of the statute, the court explained, and would be inconsistent with legislative intent. As Justice Lanzinger explained for the six justice majority, "although the statute does indeed protect minor children from adults with authority over them, it also protects the family unit more broadly" by prohibiting sexual relations between stepparents and stepchildren.[156]

In *State v. Carswell*, the court was required to determine the effect of the recently enacted Defense of Marriage Amendment to the State constitution.[157] The Amendment, passed by voters in November 2004 as Issue 1, provides:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.[158]

At issue was whether adoption of this amendment effectively invalidated the state's domestic violence statute, particularly as it applies to non-married individuals. The domestic violence statute prohibits causing, or attempting to cause, physical harm to "a family or household member."[159] Among others, the terms "family or household member" apply to any "person living as a spouse."[160]

After he was indicted on one count of domestic violence, Michael Carswell challenged the statute on the grounds that the application of the law's prohibition to any "person living as a spouse" constituted the creation or recognition of a "legal status" for a relationship of unmarried individuals that approximates the "significance or effect of marriage."

The court rejected Carswell's argument 5-2 on the grounds that the domestic violence statute "does not create any special or additional rights, privileges, or benefits for family or household members."[161] Rather than create a legal status, the statute merely recognizes the living decisions made by individuals and applies the law accordingly. As Chief Justice Moyer explained for the court, joined by Justices Stratton, O'Connor, and O'Donnell, and Judge French sitting by designation, "the term 'living as a spouse,'" as defined by the statute "merely identifies a particular class of persons for the purposes of the domestic-violence statutes. It does not create or recognize a legal relationship that approximates the designs, qualities, or significance of marriage as prohibited by" the DOMA. The court also explained that repealing statutes by implication was disfavored, and there was no indication that the marriage amendment was intended to do anything other than prohibit same-sex marriage or its legal equivalents; "[i]t is clear that the purpose of Issue 1 was to prevent the state, either through legislative, executive, or judicial action, from creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman."[162]

In *State v. Talty*, the court struck down an antiprocreation condition imposed as part of a criminal convict's residential community control sanctions on the grounds that it was unconstitutionally overbroad.[163] In *J.F. v. D.B.*, the court also upheld a gestational-surrogacy contract, holding that such a contract did not violate the state's public policy given the lack of any legislation or prior court judgments against such arrangements.[164] Yet despite these decisions, the court has become more reluctant to expand constitutional rights or hold legislative enactments unconstitutional if they are subject to a potential saving construction or interpretation.

Private Property & Eminent Domain

In *City of Norwood v. Horney*,[165] a unanimous court struck down a city's planned use of eminent domain to foster urban renewal and economic development, adopting a more stringent review of such actions than was adopted by the U.S. Supreme Court. The decision invalidated portions of the state code governing eminent domain, and could have a significant impact on government-led urban redevelopment efforts. At the same time, key aspects of the court's holdings are quite narrow, which is consistent with the court's other opinions.

In *Kelo v. City of New London* the U.S. Supreme Court upheld the use of eminent domain for the purpose of economic development.[166] By a vote of 5-4, the U.S. Supreme Court held that economic development could constitute a "public use," and therefore such use of eminent domain did not violate the "Takings Clause" of the Fifth Amendment, which provides "nor shall private property be taken for public use without just compensation."

In *Norwood*, by contrast, a unanimous Ohio court held that potential economic benefit, standing alone, could not satisfy the "Takings Clause" of the Ohio Constitution. The court further held that state statutes governing the use of eminent domain should be subject to strict scrutiny and that such statutes should be struck down if unduly vague. Applying this test, the court rejected the City of Norwood's planned use of eminent domain, rejected the city's effort to justify eminent domain on the grounds that an area is "deteriorating" (as opposed to having already deteriorated), and limited

the "quick take" provisions of state eminent domain law, while leaving the remaining statutory structure in place.

The Court's unanimous opinion, written by Justice Maureen O'Connor, framed the case as a clash between two fundamental rights long recognized under Ohio law: the right of private property held by each individual, and the right of the people, as a whole, to exercise the power of eminent domain for the common good.[167] The court acknowledged—and then rejected—the deferential standard adopted in *Kelo*, explaining the court was "not bound" to limit the Ohio Constitution's Takings Clause as the U.S. Supreme Court had limited the Fifth Amendment to the U.S. Constitution. Citing the Ohio Supreme Court's own precedents on eminent domain, the court held that Ohio law "does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional roles as guardian of constitutional rights and limits."[168] "A *sine qua non* of eminent domain in Ohio is the understanding that the sovereign may use its appropriation powers only upon necessity for the common good," Justice O'Connor wrote, and this entails that eminent domain do more than benefit the government's interests, standing alone.[169] From this standpoint, the court reasoned, a government entity wishing to use eminent domain must do more than argue a taking will produce economic growth, increase tax receipts, and the like.

While the Ohio Supreme Court's *Norwood* decision went farther than had the U.S. Supreme Court in *Kelo*, key aspects of the Court's *Norwood* holding are quite narrow. The court allowed that local governments may take private property for redevelopment, even if the property is transferred to another private party.[170] All the court invalidated in this regard was the reliance upon economic development as the sole basis for a proposed use of eminent domain. As Justice O'Connor's decision for the court explained:

> We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution.[171]

The *Norwood* decision constrains the use of eminent domain for economic redevelopment, but should not prevent the use of eminent domain for needed public projects. It may also help and may ensure that local governments pay greater attention to private property rights when undertaking planning and redevelopment efforts.

The Political Thicket

On several occasions in recent years, the supreme court has been drawn into politically charged cases, including the "Sunday Suit" discussed above, as well as partisan battles over government records and the composition of county election boards. Additional election law cases are pending. As the court overwhelmingly consists of justices from a single political party, the court has been particularly susceptible to charges of political bias, despite the reasonableness of its decisions. In a case arising out of the infamous "Coingate" scandal, five of the justices recused themselves because they had received donations from Thomas Noe, the Republican fundraiser at the center of the scandal.

One series of cases involved Governor Robert Taft's assertion of executive privilege in response to lawsuits seeking disclosure of statehouse documents related to the "Coingate" scandal and the mishandling of funds by the Bureau of Workers' Compensation. Because Governor Taft, a Republican, resisted the release of potentially incriminating documents, a Democratic State Senator, Marc Dann (who was also running for Attorney General, and would later resign from the AG's office in a scandal of his own), sued as a "private citizen" to force the documents' release.

In a series of decisions, the court recognized the existence of a qualified gubernatorial communications privilege, and denied Dann's efforts to force disclosure.[172] At the same time, the court rejected Taft's claims of an absolute privilege and concluded that Governor Taft had been unduly aggressive and indiscriminate in asserting the privilege with respect to documents from his office. Although there is no specific mention of a gubernatorial privilege in the Ohio Constitution, it is widely accepted the state Executive does retain some such privilege, as does the President and other state governors, albeit that such privilege is not absolute.[173]

Nonetheless, the court's rejection of Dann's claims struck some observers as an effort to protect a besieged Republican Governor.

In 2008, the court was forced to adjudicate a dispute between a local Republican Party and Secretary of State Jennifer Brunner, a Democrat, over the composition of a county Board of Elections. The case arose after Secretary Brunner rejected the Summit County Republican Party's recommendation that she reappoint Alex Arshinikoff to the Summit County Board of Elections. Under the relevant statutes, this presented the local party with the choice of submitting a second name or challenging Brunner's decision in court. Given the likely difficulty of succeeding in such a suit, the party submitted another nominee for the Board, Brian Daley. Brunner rejected Daley as well, announcing she would instead appoint Donald Varian to a Republican seat on the Board of Elections, and the Summit County Republican Party sued.

The problem confronting the court in *State ex rel. Summit County Republican Party Executive Committee v. Brunner* was that the relevant statutes did not explicitly provide for how to resolve the dispute between the Secretary and the local GOP. The statute specifically provided the Secretary with authority to reject a local party's initial nomination to a county Board of Elections, and authorized her to name a replacement if the local party failed to submit an alternate nominee. But the statute did not address whether the Secretary could select a nominee herself if she concluded that a local party's second nominee was unfit for the position. This left the justices with little choice but to determine what the relevant rule *should* be, absent clear text.

In a brief per curiam opinion, the court held for the Summit County Republican Party, voided the Varian appointment, and ordered the Secretary of State to appoint Brian Daley. However the court was quite split, both as to result and rationale. Justices Stratton, O'Connor, O'Donnell, and Cupp concurred in the judgment, while Chief Justice Moyer, and Justices Pfeifer, and Lanzinger dissented.

The outcome prompted attacks on the court's political impartiality. Yet only a few months later the court was again required to adjudicate a dispute between a county's Republican Party and Secretary of State Brunner over the composition of a County Board of Elections and reached the opposite result. In *State ex rel. Lawrence County Republican Party Executive Committee v. Brunner*, a unanimous court upheld the Secretary of State's decision to reject the county Republican Party's recommendation for the Lawrence County Board of Elections and her subsequent appointment of another Republican of her choice after the local party failed to submit an alternate name.[174] In a brief per curiam opinion, a unanimous court rejected the Lawrence County Republican Party's claim that Secretary Brunner had abused her discretion.

CONCLUSION

Some have been quick to accuse the Ohio Supreme Court of adopting a knee-jerk "pro-business" posture or, worse, of aggressively working to enact a "conservative" or "pro-business" legal agenda. A review of the court's most prominent and consequential decisions of the past several years appears not to bear out such criticisms. The common thread in the Court's recent decisions is not a particular outcome, but a particular approach. The court's deferential review of state legislation could, and likely would, become quite "anti-business" were the legislature to repeal recent tort reforms or adopt costly new regulatory measures.

The court was once known for its willingness to recraft statutes, expand liability, and broaden constitutional provisions. Over the past several years this has begun to change, however. In a broad number of cases, covering a wide range of areas, the court has announced its intention to provide greater deference to legislative enactments and resist creating new causes of action or expanding existing bases for tort liability. The result is a more modest state supreme court.

Endnotes

1 Jonathan L. Entin, *Right, Wrong in* Lessin *Decision*, Cleveland Plain Dealer, Nov. 3, 1993.

2 State v. Burnett, 93 Ohio St.3d 419 (2001) (holding that Cincinnati drug-exclusion zone law violated fundamental right to intrastate travel under the due process clause of the Fourteenth Amendment to the U.S. Constitution). In this case only one Justice, Deborah Cook, refused to endorse the Court's rationale.

3 *See* David J. Owsiany, *The Ohio Supreme Court: A Court*

at the Crossroads (Federalist Society for Law & Public Policy, October 2004) at 1, *available at* http://www.fed-soc.org/doclib/20070325_ohio.pdf.

4 *See* Andrew Welsh-Huggins, *High Court Shows Signs of Shift in Outlook*, AP Alert-Political, Oct. 18, 2004 (describing the "Gang of Four").

5 *See* Owsiany, *supra* note 3, at 1-2.

6 *Id.* at 9.

7 *Judging Ohio: Legal Reforms Are Steering Ohio's Struggling Economy in the Right Direction*, Trial Lawyers Inc. Update (Manhattan Institute for Policy Research, August 2008), at 1.

8 Groch v. Gen. Motors Corp., 117 Ohio St. 3d 192 (2008); Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468 (2007).

9 McCrone v. Bank One Corp., 108 Ohio St. 3d 1476 (2006).

10 *See, e.g.,* Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., 108 Ohio St. 3d 494 (2006) (holding inter alia that some alleged consequential damages in a "wrongful birth" action were not recoverable); Marrone v. Philip Morris USA, 110 Ohio St. 3d 5 (2006) (rejecting claim that sale of "light" cigarettes was a deceptive or unfair sales practice); Cleveland Mobile Radio Sales v. Verizon Wireless, 114 Ohio St. 3d 1484, (2007) (rejecting effort to extend statute of limitations to allow treble-damages suit against cellular telcos); State ex rel. Ohio Gen. Assembly v. Brunner, 115 Ohio St. 3d 103 (2007)(rejecting claim Governor could retroactively veto tort reform measure).

11 Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006. Some of the *New York Times* study's other conclusions are questionable, however, particularly those relating to the potential effect of campaign contributions on outcomes in close cases. Among other things, the *Times* looked at a small subset of the Court's cases, and excluded contributions from lawyers in the study. *See How Information Was Collected*, N.Y. Times, Sept. 30, 2006. The *Times* justified excluding lawyers' contributions because lawyers "generally do not have the direct and consistent interest in the outcomes of the cases that their many and varied clients do." *Id.* This may be true for defense and corporate firms, but is highly dubious for plaintiffs' firms in tort cases, where plaintiffs' may share in a portion of any court-ordered awards.

12 State ex rel Ohio Congress of Parents & Teachers v. State Bd. of Edn., 111 Ohio St. 3d 568 (2006).

13 Harrold v. Collier, 107 Ohio St. 3d 44 (2005).

14 State v. Carswell, 115 Ohio St. 3d 1414 (2007).

15 State v. Lowe, 112 Ohio St. 3d 507 (2007).

16 City of Norwood v. Horney et al., 110 Ohio St. 3d 353 (2006).

17 State v. Talty, 103 Ohio St. 3d 177 (2004).

18 J.F. v. D.B., 116 Ohio St. 3d 363 (2007).

19 *See* http://www.justiceatstake.org.

20 Nina Totenburg, *Report: Spending on Judicial Elections Soaring*, National Public Radio, Morning Edition, May 18, 2007, *available at* http://www.npr.org/templates/story/story.php?storyId=10253213.

21 Ohio Supreme Court, Justice Paul E. Pfeifer, *available at* http://www.sconet.state.oh.us/Justices/pfeifer/default.asp.

22 Reginald Fields, *The Slow Wheels of Justice in Ohio*, Cleveland Plain Dealer, June 17, 2007.

23 *Id.*

24 Reginald Fields, *Ohio Supreme Court Writing Opinions Quicker*, Cleveland Plain Dealer, Jan. 27, 2008, *available at* http://blog.cleveland.com/openers/2008/01/ohio_supreme_court_writing_opi.html. According to Chief Justice Moyer, Pfeifer's speed could also be attributed to his employing only two law clerks, rather than the traditional three. Pfeifer uses the extra funds to employ an administrative assistant who assists in writing his speeches and his weekly newspaper column.

25 *See* Liptak and Roberts, *supra* note 11.

26 *Ohio Supreme Court* Justice Evelyn Stratton, *available at* http://www.sconet.state.oh.us/justices/stratton/default.asp.

27 Catherine Turcer, *Ohio Citizen Action Grievance*, Oct. 28, 2002, *available at* http://www.ohiocitizen.org/moneypolitics/pre2003/stratton_complaint.html.

28 Denise Grollmus, *Mo' Money, Mo' Justice,* Cleveland Scene, Mar. 19, 2008, *available at* http://64.233.167.104/search?q=cache:YssO3qJ4luEJ:clevescene.com/2008-03-19/news/mo-money-mo-justice+maureen+o%27connor+ballbuster&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a.

29 *Id.*

30 T.C. Brown & Sandy Theis, *Court to Say If O'Connor Misled Voters with Her Ad*, Cleveland Plain Dealer, October 30, 2002.

31 *Cincinnati Enquirer Endorses Stratton & O'Connor for Supreme Court*, Buckeye Firearms Association , October 22, 2002,*available at* http://www.buckeyefirearms.org/article-friend-57.html.

32 *See* Liptak and Roberts, *supra* note 11.

33 Jim Siegel, *Life Experiences Separate Supreme Court Candidates*, Cincinnati Enquirer, Oct. 26, 2004, *available at* http://www.enquirer.com/editions/2004/10/26/loc_elexsupcol.html.

34 *Your Honor, Wake Up* (editorial), Cleveland Plain Dealer, June 20 2007.

35 Fields, *Slow Wheels*, *supra* note 22.

36 *Your Honor, Wake Up*, *supra* note 34.

37 Fields, *Slow Wheels*, *supra* note 22.

38 *Id.*

39 *Your Honor, Wake Up supra* note 34.

40 Fields, *Writing Opinions Quicker*, *supra* note 24.

41 *Id.*

42 *Id.*

43 *Id.*

44 Reginald Fields, *The Public Questions the Ohio Supreme Court Rules on Open Records*, Openers: The Plain Dealer Politics Blog, Mar. 15, 2008, *available at* http://blog.cleveland.com/openers/2008/03/ohio_commission_on_the_rules.html.

45 *Id*.

46 Brian Rothenberg, *Court Undermines Public Access to Records*," Brian Rothenberg's Blog, Progress Ohio, December 7, 2007, *available at* http://www.progressohio.org/page/community/post/brianrothenberg/C3NT.

47 Reginald Fields, *Open-Government Advocate Calls Ohio Supreme Court Records Panel Unconstitutional*, Cleveland Plain Dealer, Mar. 23, 2008.

48 Article IV, Section 5(a) of the Ohio Constitution provides: "the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court."

49 Fields, *Open-Government Advocate*, *supra* note 47.

50 *Chief Justice Offers Historical Perspective on Public Records, Open Government*, Court News, The Supreme Court of Ohio, February 12, 2008.

51 Fields, *Public Questions*, *supra* note 44.

52 DeRolph v. State, 78 Ohio St.3d 193, 212 (1997) ("*DeRolph I*").

53 Joe Hallett, *What Went on in the Supreme Court*, Columbus Dispatch, May 6, 1998 (noting the four justices were dubbed the "Gang of Four" by the *Toledo Blade* as a consequence of these decisions).

54 Ohio Const. art. VI § 2.

55 *DeRolph I*, 78 OhioSt.3d at 264 (Moyer, C.J., dissenting).

56 Hallett, *supra* note 53 (noting "voters crushed the issue").

57 *See School Tax Hammered: Issue II Goes Down Everywhere*, Columbus Dispatch, May 6, 1998.

58 *See* Hallett, *supra* note 53.

59 In the third *DeRolph* decision, Chief Justice Moyer and Justice Stratton reluctantly joined a majority opinion that attempted to provide the legislature with sufficient guidance as to how the school system could be reformed so as to revolve the controversy and litigation. *See* DeRolph v. State, 93 Ohio St.3d 309 (2001) ("*DeRolph III*"). This effort was ultimately unsuccessful, however, and the two justices returned to dissent in the fourth and final decision.

60 *See* DeRolph v. State, 97 Ohio St.3d 628 (2001) ("*DeRolph IV*").

61 Hallett, *supra* note 53.

62 *Id*.

63 State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education, 111 Ohio St.3d 568 (2006).

64 Ohio Const., art. VI, § 2 ("The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising form the school trust fund, will secure a thorough and efficient system of common schools throughout the state.").

65 *Ohio Congress*, 111 Ohio St.3d at 573.

66 *Id.* at 578.

67 *Id.* at 579.

68 State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 87 Ohio St. 3d 1409 (1999).

69 Recent Cases, *State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, 113 Harv. L. Rev. 804 (2000).

70 *Id.* at 809.

71 Ohio Rev. Code § 2315.18; Ohio Rev. Code § 2315.21; Ohio Rev. Code § 2305.113; Ohio Rev. Code § 2305.131; Ohio Rev. Code § 2315.20.

72 Ohio Rev. Code §§ 2307.91-98.

73 116 Ohio St.3d 468 (2007).

74 Ohio Const., art. I, § 5.

75 Ohio Const., art. I, § 16.

76 Ohio Const., art. I, § 16.

77 Ohio Const., art. I, § 2.

78 Ohio Const., art. II, § 15(d).

79 Ohio Rev. Code § 2315.18 (B)(3)(a)-(b).

80 Ohio Rev. Code § 2315.21(D)(2)(a)-(b), (D)(6). The relevant provisions exempted some cases in which the injury was the result of felonious conduct.

81 *Arbino*, 116 Ohio St.3d at 471. Arbino also challenged tort reform measures concerning the admissibility of collateral-benefit evidence, but the Court declined to rule on this challenge due to Arbino's lack of standing.

82 *Id.* at 472.

83 *Id.* (internal quotation omitted).

84 *Id.* at 475 (emphasis in original).

85 *Id.* at 476.

86 *Id.* at 479.

87 *Id*. at 487.

88 *Id.* at 492.

89 *Id.* at 496 (Cupp, J., concurring).

90 *Id.*

91 *Id.*, at 497.

92 *Id.* at 501 (O'Donnell, J., dissenting).

93 *Id.* at 503 (Pfeifer, J., dissenting).

94 117 Ohio St.3d 192 (2008).

95 Ohio Rev. Code §§ 4123.93, 4123.931.

96 Ohio Rev. Code § 2305.10.

97 117 Ohio St. 3d 192, 227 (2007).

98 *Id.* at 230.

99 Justice Lanzinger wrote an opinion concurring in the judgment suggesting the court should have more directly overruled prior precedent regarding statutes of repose.

100 117 Ohio St.3d at 233 (Pfeifer, J., dissenting).

101 *Id.* at 235 (Pfeifer, J., dissenting).

102 *Id.* Interestingly enough, Justice Pfeifer has himself authored opinions upholding legislation, *inter alia*, on the grounds that legislative enactments *are* subject to a presumption of constitutionality. *See* Klein v. Leis, 99 Ohio St.3d 537, 538 (2003) ("It is fundamental that a court must presume the constitutionality of a lawfully enacted legislation.").

103 Norfolk S. Ry. Co. v. Bogle, 115 Ohio St.3d 455 (2007).

104 115 Ohio St.3d at 456.

105 McCronev. Bank One Corp., 107 Ohio St.3d 272 (2005).

106 *Id.* at 281.

107 *Id*.

108 *See* Bailey v. Republic Engineered Steels, Inc., 91 Ohio St.3d 38 (2001).

109 107 Ohio St.3d at 277.

110 107 Ohio St.3d at 282 (Lundberg Stratton, J., concurring).

111 Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc., 108 Ohio St.3d 494 (2006).

112 *Id.* at 501. In this case the parents could not recover, however, as they voluntarily dismissed their claim for such costs before the case reached the supreme court.

113 *Id.* at 494.

114 *Id.* at 508 (O'Donnell, J., dissenting).

115 Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St. 3d 660 (1999). Justice Douglas wrote the majority opinion, joined by Justices Sweeney, Resnick, and Pfeifer. Justices Moyer, Stratton, and Cook dissented.

116 *See, e.g.*, Ray Cooklis, *Ohio Court: Running a Reverse*, Cincinnati Enquirer, Nov. 7, 2003 (noting "the gales of derisive laughter this 1999 Ohio Supreme Court decision has elicited from observers across the nation"), *available at* http://www.enquirer.com/editions/2003/11/07/editorial_memocooklis.html. *See also* Westfield Insurance Co. v. Galatis, 100 Ohio St.3d 216, 221-222 (2003) (noting cases questioning the reasoning of the *Scott-Pontzer* decision).

117 Cooklis, *supra* note 116.

118 Westfield Insurance Co. v. Galatis, 100 Ohio St.3d 216 (2003).

119 *Id.* at 219.

120 *Id.* at 219-220.

121 Justices Sweeney, Resnick, and Pfeifer dissented.

122 *Westfield Insurance*, 100 Ohio St.3d at 231.

123 Marrone v. Philip Morris USA, Inc., 110 Ohio St.3d 5 (2006).

124 *Id.* at 6.

125 *Id.* at 10.

126 State ex rel. Gross v. Indus. Comm., 115 Ohio St.3d 249 (2007).

127 112 Ohio St.3d 65 (2006). The court issued a *per curiam* ruling in this case joined by Chief Justice Moyer and Justices Resnick, O'Connor, O'Donnell, and Lanzinger. Justices Stratton and Pfeifer dissented.

128 115 Ohio St.3d at 254.

129 *Id*.

130 *See* Posting of Sheryl Harris to PD Extra, http://blog.cleveland.com/pdextra/2007/08/shift_in_columbus_leaves_fastt.html. It was an unusual scenario that could easily have been avoided had Taft just signed (or even vetoed) the bill after he received it on December 27, 2006. Instead, he filed the bill with the Ohio Secretary of State's office on his last day in office, January 5, 2007, and issued a press release stating he had "decided to allow [the bill to] become law without [his] signature."

131 Ohio Const., art. II, § 16.

132 State ex rel. Ohio General Assembly v. Brunner, 114 Ohio St. 3d 386 (2007).

133 *Id.* at 421 (Pfeifer, J., dissenting).

134 *Id.* at 406 (O'Connor, J., concurring).

135 *Id.*

136 State ex rel. Ohio General Assembly v. Brunner, 115 Ohio St.3d 103 (2007).

137 Justice Pfeifer's opinion is captioned as an opinion "concurring in part and dissenting in part," but the basis for his "dissent" is that he believed the Court's opinion (properly) corrected a holding of the prior decision, and would not have started the 90-day period until August, 31, the day the latter decision was issued.

138 Blakely v. Washington, 542 U.S. 296 (2004).

139 Charles Lane, *Supreme Court to Consider Federal Sentencing Guidelines*, Washington Post, Oct. 3, 2004, at A10, *available at* http://www.washingtonpost.com/wp-dyn/articles/A2962-2004Oct2.html.

140 U.S. v. Booker, 543 U.S. 220 (2005).

141 State v. Foster, 109 Ohio St.3d 1 (2006).

142 *Id.* at 25.

143 *Id.* at 26.

144 *Id.*

145 *Id.* at 27.

146 *Id.* at 26.

147 Among other things, the decision provides that "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at 1.

148 Mark Reiter, *Sentencing law prompts delays, praise: Ohio ruling means defendants being resentenced – usually to same term*, The (Toledo) Blade, May 29, 2006.

149 *Id*.

150 *Id*.

151 State v. Jenkins, 2008 WL 1921747 (Ohio App. 6 Dist.) (Ohio App. 6 Dist., 2008).

152 Harrold v. Collier, 107 Ohio St.3d 44 (2005).

153 *Id.* at 47.

154 State v. Lowe, 112 Ohio St.3d 507 (2007).

155 Lawrence v. Texas, 539 U.S. 58 (2003).

156 *Lowe*, 112 Ohio St.3d at 509.

157 State v. Carswell, 114 Ohio St.3d 210 (2007).

158 Ohio Const., art. XV, §11.

159 *Carswell*, 114 Ohio St. 3d at 214.

160 *Id.*

161 *Id.* at 215.

162 *Id.* at 214.

163 State v. Talty, 103 Ohio St.3d 177 (2004).

164 J.F. v. D.B., 116 Ohio St.3d 363 (2007).

165 Norwood v. Horney, 110 Ohio St. 3d 353 (2006).

166 Kelo v. City of New London, 543 U.S. 1135 (2005).

167 *Norwood*, 110 Ohio St. 3d at 361, *citing* Proprietors of the Spring Grove Cemetery v. Cincinnati, Hamilton, & Dayton RR Co., 1 Ohio Dec. Reprint 316 (Super. 1849).

168 110 Ohio St. 3d at 374.

169 *Id.* at 365.

170 *Id.* at 355-56.

171 *Id.* at 356.

172 *See* State ex rel. Dann v. Taft, 110 Ohio St.3d 252 (2006); State ex rel. Dann v. Taft, 109 Ohio St.3d 364 (2006).

173 *See, e.g.*, Daniel Kohlmeyer, *Executive Privilege-The Ohio Supreme Court Finds the Existence of a Qualified Gubernatorial Communications Privilege Amid Separation Concerns and a "Particularized Need" Requirement*, 38 Rutgers L.J. 1395 (2007).

174 State ex rel. Lawrence Cty. Republican Party Executive Commt. v. Brunner, 119 Ohio St. 3d 92 (2008).

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