

TORT REFORM AND TERM LIMITS: THE 2004 OHIO EXPERIENCE

JAMES T. O'REILLY*

I. INTRODUCTION

The absence from a legislative body of a pool of experienced members' expertise and commitment on issues is one of the byproducts of the "term limits" revolution in American legislative selection. New members' ideals and energy should, in theory, displace old ways of governance, according to term limits proponents. A tradeoff results, however. The "new blood" may have only an anemic grasp of the difficult issues that members and committee chairs learn over years of legislative debate and drafting.

The periodic departure of veteran legislators and committee leaders means the election of individuals who, as novice legislators, have no prior exposure to complex issues confounding modern governmental bodies. Data supporting policies may be neutral, but its presentation will not be. Inevitably, lobbyists increase in power as individual members rotate out and into the legislative body. Complex public policy choices, such as the allocation of injury losses in products liability law, will require that the new legislator's "learning curve" be filled with information on the particular topic. Getting that information in an easy, impressive format facilitates the outcome desired by the lobbyist, especially when the legislative body lacks a deep and experienced staff of subject matter specialists.

In Congress, the depth and detail of the permanent career research and analysis professionals assures stability in the institutional memory. Bills proposing regulations on complex technical issues appear regularly, lessons of the past are employed in analysis, and debates recur with comparable sets of questions. But in states like Ohio, a relatively thin supporting staff exists to analyze and describe the consequences of certain legislative choices.

One consequence is that those lobbyists most interested in particular outcomes become the key source of legislators' information. The 2004 Ohio "Tort Reform" statute was a paradigm of bad decisional processes culminating in forced last-minute decisions, inartful draftsmanship, massive exercises of industry self-interest, and collective hubris among the

Copyright © 2005 James T. O'Reilly.

* Professor of Law, University of Cincinnati. Author of ANDERSON'S 2005 OHIO TORT REFORM LEGISLATION (Lexis 2005).

dominant members of the electoral majority. Ohio is worse off with this unforeseen consequence of the term limits experience. The student of legislative history sees throughout the 2004 Ohio experience that the Senate sponsors put into the bill exactly the pages given to them by Washington and Columbus lobbyists, so this legislation was virtually “on autopilot” from the American Tort Reform Association and other national lobbying groups for the insurance and manufacturing industries. Whether that is a proper way to consider public laws is for the reader to decide; nonetheless, the absence of strong institutional safeguards against private sector overreaching is a systemic weakness of the post-term limits Ohio legislature.

This Article begins with the historical context of tort reform in the legislature and the courts. Next, this Article addresses the specific history of Ohio Senate Bill 80, which was adopted in 2004. Finally, this Article examines an illustrative issue of pharmaceutical immunity and draws several lessons from the Ohio experience that may be useful in other state “tort reform” debates.

II. BACKGROUND

The outlook for “tort reform” in the United States in 2003 was optimistic, according to the industry coalition of insurers and manufacturers allied in the American Tort Reform Association, Products Liability Advisory Council, and their local affiliate, the Ohio Alliance for Civil Justice. Efforts to win national products liability changes in Congress had been diminished with several constraints and limits, so the action shifted to the states. Ohio was viewed as a critically important venue for the challenge to the plaintiffs’ bar. Jobs creation was the national rallying cry for state tort reform advocates, and that was their theme in Ohio as well.¹

Ohio’s legislature and the Ohio Supreme Court have clashed over tort law issues for almost three decades.² Tort law was a branch of judicially determined common law for centuries. Codification and statutory adoption

¹ See Press Release, American Tort Reform Association, Ohio General Assembly Passes Meaningful Civil Justice Reform (Dec. 9, 2004), at <http://www.atra.org/show/7842> (stating that “[t]he American Tort Reform Association (ATRA) praised the Ohio General assembly for passing a comprehensive civil justice reform bill that will create a more hospitable legal environment, which will help to create jobs and promote economic growth in the Buckeye state”).

² See Editorial, *Tort Reform IV*, PLAIN DEALER (Cleveland), June 13, 2003, at B8 (reporting that “[t]he Ohio Senate seems to relish opportunities to sponsor tort-reform legislation that will be overturned by the courts. . . . [I]t passed a fourth bill that might be destined for the same fate”).

of “strict liability” norms is a relatively recent phenomenon.³ Defendants in tort cases are more likely to be institutions and corporations with economic power and the political attributes that accompany that power. When tort law became statutory, rather than simply a judicial field of endeavor, astute defendants in the tobacco, chemical, food, pharmaceutical, and other industries came to recognize that intervention on statutory changes could preserve assets that otherwise would have been at risk from juries making common law decisions regarding specific facts. Removal of these vulnerabilities through legislation became a paramount objective of those industries that were repeatedly sued.

The electoral connection of tort law to political funding was never as close as it appeared in 1987 when Governor Richard Celeste promised at the Teamsters Union annual meeting that the products liability legislation moving through the legislature “must be good for workers and consumers.”⁴ The union’s first priority was the codification of the pro-plaintiff standard of liability known as the “consumer expectation” theory.⁵ The 1987 tort reform law was a milestone of union and plaintiffs’ counsels’ efforts to preserve what had been won in the Ohio Supreme Court’s tort decisions of the 1970s and 1980s⁶ against encroachment by the business enterprises who wished to alter the then-existing balance of products liability power in Ohio.⁷ It is important to begin to recognize that unions as well as heavy industries already knew how to play the game of products liability “reform.”

The political dynamic in Ohio changed with the collapse of the large, unionized “rust belt” employers in steel, rubber, and other industrial commodities during the 1980s and 1990s. The political imperatives shifted to the state and local agencies’ efforts to help the service industries, smaller employers, and suburban white collar job creation in a post-industrial economy. Throughout the 1995-96 debates on the 1996 statute and the 2003 debates on the 2004 statute, proponents again and again emphasized job creation and manufacturing job retention as critical reasons why Ohio industry should be free from risks of tort liability. The Ohio General Assembly leadership and the state offices tilted heavily to the

³ See, e.g., OHIO REV. CODE ANN. § 2307.75 (Anderson Supp. 1987) (amended 1997, 2001).

⁴ *Celeste Reaffirms Opposition to Changes in HB 1 Draft*, 58 GONGWER OHIO REPORTS 170 (Gongwer News Service, Inc.), Sept. 4, 1987, at 2.

⁵ D.J. Lauridsen on Behalf of AFSCME, Testimony Before Senate Select Committee on Civil Justice Reform (Apr. 23, 1987).

⁶ See generally JAMES T. O’REILLY & NANCY C. CODY, OHIO PRODUCTS LIABILITY MANUAL §§ 1.03-1.05 (1992) (providing an in depth history of products liability cases).

⁷ See *id.* § 8.10.

Republican Party. The post-census reapportionment of districts was used adroitly to expand the party's majority position.⁸

Among the initiatives linked to the job creation agenda was the desire to bring into Ohio industrial companies that would hire displaced workers. The products liability exposure of industrial companies for defective products is either a minor item on a long checklist of relocation incentives, or a vitally important attribute for relocation decisions, depending on which advocacy group is addressing the issue. Governor Robert Taft handwrote on a letter encouraging the chair of the House Judiciary Committee to expedite products liability legislation, stating, "[T]his is the number 1 thing we can do to improve the manufacturing climate in Ohio!"⁹ From this perspective, the reduction in the crisis of rapidly increasing tort suits would aid the jobs creation imperative.

The flaw that Republican House members saw in this logic was that there has not been a surge in products liability filings. House Judiciary Committee hearings, statistics offered by the Ohio Supreme Court,¹⁰ and specific testimony that Ohio has had only one significant (non-asbestos) punitive damage award¹¹ tended to undercut the claim of a crisis in tort law warranting legislative haste.

III. LEGISLATIVE AGENDAS

Ohio has had tort law remedies in its common law for two centuries. Strict products liability for defects in unreasonably dangerous products arrived in 1977.¹² The political nexus for the statutory reform of products liability law arose in the mid-1980s after Ohio Supreme Court decisions in 1982 favoring plaintiffs in strict products liability cases¹³ and workplace

⁸ Accomplishments: Ohio Republican Party, at <http://www.ohiogop.org/Accomplishments.aspx?Section=82> (last visited May 15, 2005). In 2002, "the party again controlled the apportionment process, which enabled a three-seat gain in the Ohio House (matching the record set in 1966) and a one-seat gain in the Ohio Senate for a 22-seat advantage (the largest margin since 1967)." *Id.*

⁹ Handwritten Note by Gov. Robert Taft to Ohio Rep. Scott Oelslager, Oct. 16, 2003 (on file with author).

¹⁰ In response to a request by House Committee Chair W. Scott Oelslager to Chief Justice Thomas Moyer, the Supreme Court produced data showing virtually the same numbers of tort filings in Ohio courts in 2002 as in 1992.

¹¹ Pete Weinberger on Behalf of Ohio Academy of Trial Lawyers, Testimony Before the Senate Judiciary Committee Regarding S.B. 80 (May 21, 2003) (on file with author) [hereinafter Weinberger Testimony].

¹² *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 271 (Ohio 1977).

¹³ *See, e.g., Knitz v. Minster Machine Co.*, 432 N.E.2d 814 (Ohio 1982).

“intentional torts [cases].”¹⁴ Governor Richard Celeste vetoed the legislature’s effort to enact a 1986 product liability and insurance reform law, in part because of the legislature’s refusal to include the “consumer expectations” design defect test.¹⁵ After further bargaining, a 1987 compromise tort reform law was passed.¹⁶ But the controversies flared up again in the mid-1990s, and the political battle reached its ultimate level of smoke and fire in December 2004 with the passage of Senate Bill 80.¹⁷

The 2004 legislation was supported by overwhelming numbers of conservative Republicans who dominated both houses of the 125th General Assembly,¹⁸ but the flow that produced the bill did not run smoothly from a single source. Three separate lobbying efforts came together. The Washington-based “tort reform” groups, including the American Tort Reform Association¹⁹ and the Product Liability Advisory Council (PLAC),²⁰ which drafted the text and supporting papers, were financially dominant.²⁰ The PLAC and other national law advocates equipped a Columbus lawyer and a lobbyist to manage the effort under the umbrella “Ohio Alliance for Civil Justice.”²¹

¹⁴ See, e.g., *Blankenship v. Cincinnati Milacron Chems., Inc.*, 433 N.E.2d 572 (Ohio 1982).

¹⁵ See Note, *Ohio’s New Products Liability Law*, 14 U. DAYTON L. REV. 229, 243 (1988).

¹⁶ O’REILLY & CODY, *supra* note 6, § 1.05.

¹⁷ Am. Sub. S.B. 80, 125th Gen. Assemb., Reg. Sess. (Ohio 2004).

¹⁸ For party affiliations, see <http://www.ohiotravel.org/legislators.pdf> (last visited May 15, 2005) (listing the representatives and senators at the 125th General Assembly by county).

¹⁹ For a list of the affiliated state organizations, see <http://www.atra.org/links.php> (last visited May 23, 2005).

²⁰ Word processing code numbers on the supporting documents demonstrate that they were sequentially prepared by the same system, apparently in a Washington law firm whose members worked extensively on multiple state “tort reform” bills.

²¹ See Bricker & Eckler, Attorneys: Kurtis A. Tunnell, <http://www.bricker.com/legalservices/attorney/bios/KTUNN.asp> (last visited May 15, 2005). The Bricker & Eckler web site for Kurtis Tunnell states,

Kurt has unique expertise in the development and operation of legislative coalitions to advocate public policy goals through the Ohio General Assembly, including serving as legislative and legal counsel to the Ohio Alliance for Civil Justice, a non-profit corporation consisting of over 200 businesses, medical providers, local political subdivisions, and charitable organizations and their related trade organizations, which was formed to advocate the passage of meaningful tort reform legislation and he assisted the Alliance in establishing a statewide CourtWatch program to monitor state constitutional challenges to tort

(continued)

The second source of tort reform initiatives came from Ohio insurers and companies impacted by tens of thousands of asbestos injury claims. The asbestos cases are difficult and time consuming reminders of heavy manufacturing plants and shipyards that once dominated northeast Ohio. Asbestos-using companies (or their corporate purchaser successors) mounted an effort to obtain immunity by statute.²² Their stalled immunity provisions were added into Senate Bill 80, but then were later detached for separate passage after Senate Bill 80 slowed down.²³

The third and most unusual leg of the effort to obtain the 2004 tort reform bill was the National Restaurant Association's effort to obtain tort immunity from claims that certain foods caused obesity and related health effects to persons who ate those foods.²⁴ The news media loves unusual lawsuits. In 2002-2003, federal courts rejected several high-visibility claims for obesity damages against food sellers.²⁵ The National Restaurant Association's highest legislative priority in 2004 was derided by critics as the Cheeseburger Act, but Congress swiftly moved the statutory immunity through the House.²⁶ The bill stalled behind other priority bills in the Senate and was not enacted.²⁷ The Ohio version, proposed by Representative Bob Gibbs, was strongly backed by food and farm groups and won easy passage in the House.²⁸ When it did not seem likely that the Senate would pass the free-standing bill providing the desired immunity, it was inserted into Senate Bill 80 at the very last stage of clearance on the final day of the legislative session.²⁹

reform and coordinate the filing of *amicus* briefs to defend the new statutes.

Id.

²² See S.B. 80, 125th Gen. Assemb., Reg. Sess. §§ 2307.91-97 (Ohio 2004) (as introduced).

²³ See H.B. 292, 125th Gen. Assemb., Reg. Sess. (Ohio 2004).

²⁴ See Am. Sub. S.B. 80, 125th Gen. Assemb., Reg. Sess. § 2305.36 (Ohio 2004).

²⁵ See, e.g., News Release, National Restaurant Association Maintains Position on Alleged Class-Action Lawsuits (Sept. 12, 2002), at <http://www.restaurant.org/pressroom/-pressrelease.cfm?ID=487> (illustrating the National Restaurant Association's position that lawsuits grounded on obesity are frivolous).

²⁶ Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1; see also H.R. 339, 108th Cong. (1st Sess. 2003).

²⁷ For the progress of H.R. 339 in 2004, visit <http://thomas.loc.gov>.

²⁸ See H.B. 350, 125th Gen. Assemb., Reg. Sess. (Ohio 2004).

²⁹ See Am. Sub. S.B. 80, 125th Gen. Assemb., Reg. Sess. § 2305.36 (Ohio 2004).

IV. JURISTS AND LOBBYISTS

The Ohio Supreme Court election races in 2004 were a virtually unprecedented contest. Since there were four justices to be elected on a seven-member court, the stakes were enormous.³⁰ Ohio elects all judges, and their partisan ties often aid their rise—the Governor’s aide became Chief Justice,³¹ the Lieutenant Governor became a Justice,³² and a powerful former Senator joined the court and ran unopposed for re-election.³³ A state that elects its judges, as Ohio does, is likely to have campaign donors who can assert substantial influence over judicial discretion on controversial issues by probing the candidates’ views in party caucuses and meetings before nominations are made.

Where does the money to elect Ohio judges come from? In 2004, an Ohio Supreme Court candidate had called for more open disclosure of donor identities because “the nastiness of some of the ads has been demeaning to the dignity of the court.”³⁴ The electoral allegiance of judges to views held by their sources of funding has been debated in other journals.³⁵ But, in general, the Ohio political scene has frequently observed conflicts among candidates and their funding sponsors on issues such as tort law and jury verdicts for damages.³⁶ The bitter 2000 campaign to defeat Justice Alice Robie Resnick and the turbulent Supreme Court races in 2004, when \$1,900,000 in campaign contributions was raised in

³⁰ See 2004 Ohio Supreme Court Candidate Voter Guide, <http://www.lwvohio.org/voterguide/voterguide.html> (last visited May 23, 2005). One justice ran unopposed, one ran as a long time incumbent for re-election, one was a recent appointee in his first Supreme Court race, and one seat was open. See *id.*

³¹ See *id.* (stating that Chief Justice Moyer served as executive assistant to the Governor between 1969 and 1971).

³² See Supreme Court of Ohio, Justices of the Supreme Court of Ohio, Maureen O’Connor, at <http://www.sconet.state.oh.us/Justices/OConnor/default.asp> (last visited May 23, 2005) (stating that Justice O’Connor served with Governor Taft as Lieutenant Governor).

³³ See Supreme Court of Ohio, Justices of the Supreme Court of Ohio, Paul E. Pfeifer, at <http://www.sconet.state.oh.us/Justices/Pfeifer/default.asp> (stating that Justice Pfeifer served as an Ohio Senator between 1976 and 1988).

³⁴ See Tim Bonfield, *Court Has Role in Health Costs: Malpractices Caps Among Issues in Election*, CINCINNATI ENQUIRER, Oct. 12, 2004, at A6 (quoting Judge Nancy Fuerst).

³⁵ See James T. O’Reilly, *Writing Checks or Righting Wrongs: Election Funding & the Tort Decisions of the Ohio Supreme Court*, 51 CLEV. ST. L. REV. 643, 644 (2004).

³⁶ See *id.*

July 2004 alone,³⁷ had been focused on judicial review of products liability and malpractice jury verdicts.

The Ohio Supreme Court's tort law decisions appear to have been influenced in the past by pressures from financial contributors who sought to unseat controversial members. In 2000 and 2004, the battle over members' allegiance was fought with political contributions to "independent" committees' television media advertising.³⁸ Who actually donates, and what do they expect to gain? As a result of elections law litigation, the sponsoring entities that funded much of the 2004 Ohio Supreme Court election effort through a committee were revealed on the internet, with disclosures occurring in several stages just prior to the election.

The prospect of diminished power of the courts, and especially juries, was a recurring theme of opponents of the 2004 legislation. Altering the judicial system through the imposition of mandatory caps on damages was one of the most important changes in many years, said opponents. "We are limiting the rights of every citizen in Ohio so we can have some kind of economic development."³⁹ The bill was said "to transfer power from independent jurors who hear ALL of the facts in a case to 132 members of the General Assembly who will hear NONE of the facts in ANY of the cases."⁴⁰ Legislative opponents marked the bill the "granddaddy" of "frivolous legislation" and offered thirty Senate floor amendments—that were rejected⁴¹ when the bill passed on a 19-13 vote.⁴² Both sides evoked the term "balanced," opponents in support of the existing balanced system⁴³ and proponents in their legislative speeches⁴⁴ and press statements supporting what they described as a "balanced" bill.

³⁷ Jeremy Holden, *Integrity Impugned by Comments as Candidates Raise Millions*, THE DAILY REPORTER (Columbus), Aug. 9, 2004, at 2.

³⁸ See Jon Craig, *Back to Work on Campaign Financing: Legislators Are Told All Political Groups Should Have to List Contributors Names*, COLUMBUS DISPATCH, Nov. 5, 2004, at B7.

³⁹ T. C. Brown, *Ohio Senate OKs Justice Reform in Quick Vote that Angers Lawyers*, PLAIN DEALER (Cleveland), June 12, 2003, at A24 (quoting Senator Leigh Herington).

⁴⁰ Weinberger Testimony, *supra* note 11.

⁴¹ Jeffrey Sheban, *Senate Republicans Pass Bill to Limit Damages in Lawsuits*, COLUMBUS DISPATCH, June 12, 2003, at 6C.

⁴² Brown, *supra* note 39, at A24.

⁴³ Weinberger Testimony, *supra* note 11.

⁴⁴ Senator Steve Stivers, Floor Statement at Ohio Senate (June 11, 2003), available at Ohio Gov't Communications Archive, <http://www.ogtv.org>.

V. THE 2004 TWIN CAMPAIGNS: COURTS AND TORTS

The campaign to win legislative majorities in the 2004 Ohio House and Senate involved themes of economic recovery and job creation.⁴⁵ The tort reform legislation was part of the Republican Party themes in raising funds for candidates and in expressing its platform.⁴⁶ The theme in Ohio Supreme Court races was seen by some as adherence to the desires of the legislature, with one appellate court judge saying, “It’s not our job to be super legislators.”⁴⁷ The business organizations praised another incumbent for his “strong respect for the separation of powers.”⁴⁸ Cynics might call these code words for the candidate to mask promises to defer to the legislature’s choice.

During the same campaign season that returned the Republican incumbents to Congress and the Presidency,⁴⁹ the Ohio Republicans swept all four seats on the Supreme Court,⁵⁰ retained most state elective offices,⁵¹ and preserved majorities in both Houses of the legislature.⁵² By winning all of the open Ohio Supreme Court seats and a majority of Ohio House and Senate seats, the Republican Party won greater assurance that its desired tort law changes would be passed and upheld on judicial review. After the election, when legislators reconvened, industry proponents were “optimistic that state lawmakers, *no longer fearful of an activist Supreme Court rejecting legislative enactments that some justices didn’t personally like*, will now go forward with confidence” and pass Ohio Senate Bill 80.⁵³ Critics could observe that the state constitutional role of the Ohio Supreme Court would become subservient to the current legislature’s majority, if legislators had “no fear” of the reins on their powers being pulled back by the court.

⁴⁵ Debra Jasper & Spencer Hunt, *Gov. Taft Stresses Jobs, Tax Overhaul*, CINCINNATI ENQUIRER, Jan. 29, 2004, at A1.

⁴⁶ See Capital Notes, *State Republicans Pushing for Lawsuit-Reform Bill*, COLUMBUS DISPATCH, Oct. 26, 2004, at 5B.

⁴⁷ Julie A. Washburn, *Ohio Chamber Endorses Three for Supreme Court*, OHIO MATTERS, July/Aug. 2004, at 4 (quoting Judge Lanzinger).

⁴⁸ *Id.* at 5 (referring to Chief Justice Moyer).

⁴⁹ Adam Nagourney, *Mandate Seen for 2nd Term with Gains in Congress*, N.Y. TIMES, Nov. 4, 2004, at A1.

⁵⁰ Jon Craig, *Ohio Supreme Court: Voters Giving GOP 6th Justice: 3 Republicans Easily Defeat Their Opponents*, COLUMBUS DISPATCH, Nov. 3, 2004, at B1.

⁵¹ Election 2004, *National, Ohio, Franklin County and Municipal Returns*, COLUMBUS DISPATCH, Nov. 3, 2004, at A4.

⁵² Keith Lake, *Election 2004: Ohio Businesses Propel Candidates to Victory*, OHIO MATTERS, Nov./Dec. 2004, at 5.

⁵³ *Id.* (emphasis added).

VI. THE HOT BUTTON ISSUES

Tort “reform” is a misnomer for a prolonged economic struggle among adversaries who happen to use tort cases and tort statutes to obtain advantage. Strict liability tends to empower injured persons, and opponents sought to constrain its adoption by state courts. Contingent fee contracts between the lawyer and the client are the economic engine for the remedial work done by attorneys for injured persons. Plaintiff’s attorneys determine whether the prospective plaintiff’s case is valid. Their likelihood of success is essential to the financial survival of the solo practitioner or small law firm representing the injured person. Plaintiffs’ lawyers will cease suing defendants if it is made unprofitable for them to do so. A defense effort to take the profits out of the plaintiff’s side of the products liability system would shut down the flow of tort cases. However, to remove the funding of plaintiffs requires a well directed strategy, using a combination of legislative power and post-enactment judicial deference. In 2004, the optimal combination seemed to have been in place to make personal injury law an unprofitable enterprise for plaintiffs’ lawyers.

The strategy to undercut profitability of the plaintiffs’ bar was evident in the web sites, documents, and testimony offered by the defendant groups who organized the Senate Bill 80 coalition. First, the coalition aimed to reduce the fee award percentages and vigorously pressed for a statutory change to require courts to hold down the percentage that the plaintiffs’ bar could receive from a tort case.⁵⁴ Second, the sponsors reduced the potential size of awards of punitive damages through a combination of caps and procedural barriers.⁵⁵ Third, the sponsors reduced non-economic damages, such as for pain and suffering, and capped the amounts that could be awarded for each occurrence and for each plaintiff.⁵⁶ These are addressed briefly below.

First, caps on Ohio legal fees and imposition of a mandatory disclosure to clients were framed by lobbyists for the American Tort Reform Association in Washington D.C. as a “bill of rights” like those offered in Colorado,⁵⁷ Nevada,⁵⁸ and Missouri⁵⁹ and were offered as a consumer

⁵⁴ See S.B. 80, 125th Gen. Assemb., Reg. Sess. (Ohio 2003) (as introduced). The initial Senate version of Senate Bill 80 included caps on attorney’s fees, but these caps were subsequently removed. Compare S.B. 80, 125th Gen. Assemb., Reg. Sess. (Ohio 2003) (as introduced), with Am. Sub. S.B. 80, 125th Gen. Assemb., Reg. Sess. (Ohio 2004) (as enrolled).

⁵⁵ See S.B. 80, 125th Gen. Assemb., Reg. Sess. §§ 2307.80, 2315.21, (Ohio 2003) (as introduced).

⁵⁶ See *id.* § 2323.43.

⁵⁷ See H.B. 1081, 64th Gen. Assemb., 2d Reg. Sess. (Colo. 2004).

protection measure.⁶⁰ Ohio Supreme Court precedent seemed to squarely place the governance of lawyer-client relationships in the Court's constitutional authority.⁶¹ This provision was pulled from the text by the Senate sponsor's omnibus amendment in June 2003⁶² and inserted in hortatory encouragement terms in section 4(B) in the back of the bill to "request" the Ohio Supreme Court to act.⁶³

Second, damage limitation caps were hotly debated until literally the last day. A conservative Republican in the House called the Senate-passed bill "wretched and grotesquely unfair."⁶⁴ Another Republican asked, "How is it being pro-business to pass a bill we know is going to be declared unconstitutional?"⁶⁵

Third, caps on non-economic damages raised the same concerns. Proponents warned that the pain and suffering damage awards would be "twisted into a covert punitive damages substitute" and said the awards of non-economic damages were "erratic" and "excessive."⁶⁶ Lobbyists warned that limits on non-economic damage caps were a "bottom line" issue⁶⁷ and that sponsors "would walk away from this bill if they don't have a defined outer limit on non-economic damages."⁶⁸ Critics said there would be a two-tier system that awards non-economic damages to wage earners, but discriminates against elders, children, and women not working outside the home.⁶⁹ This was said to be arbitrary since it places a limited

⁵⁸ See Assemb. B. 1, 70th Gen. Assemb., 18th Special Sess. (Nev. 2002).

⁵⁹ See S.B. 994, 91st Gen. Assemb., 2d Reg. Sess. (Mo. 2002). For a detailed description of the national campaign against lawyers' fees, see Consumer Rights, http://www.halt.org/reform_projects/consumer_rights (last visited May 15, 2005).

⁶⁰ S.B. 80, 125th Gen. Assem., Reg. Sess. (Ohio 2003) (as introduced). This provision was dropped from the main text to the "findings" in June 2003 omnibus amendment by Senator Stivers. *Id.* (as enrolled).

⁶¹ See *State ex rel. Buck v. Maloney*, 809 N.E.2d 20, 22 (Ohio 2004); *Melling v. Straika*, 465 N.E.2d 857, 859-60 (Ohio 1984); see also OHIO CONST. art. IV, § 5.

⁶² Amendment by Senator Steve Stivers, June 11, 2003.

⁶³ Am. Sub. S.B. 80, 125th Gen. Assemb., Reg. Sess. (Ohio 2003).

⁶⁴ Andrew Welsh-Huggins, *House Votes to Limit Jury Awards to Workers*, PLAIN DEALER (Cleveland), Dec. 10, 2004, at B4 (quoting Rep. Bill Seitz).

⁶⁵ *Id.* (quoting Rep. Jamie Callender).

⁶⁶ Ohio Business for Legal Reform, *Non-Economic Damage Caps*, at <http://www.ohiochamber.com/OBLR/noneco.asp> (last visited May 14, 2005).

⁶⁷ T.C. Brown, *Caps Pulled from Damages Bill: Action by House Likely to Spark Battle with Senate*, PLAIN DEALER (Cleveland), Dec. 2, 2004, at B4.

⁶⁸ *Id.* (quoting Tim Maglione, a spokesperson for the Ohio Alliance for Civil Justice).

⁶⁹ *E.g.*, Ohio Business for Legal Reform, *supra* note 66.

value on the worth of non-employer individuals such as full-time mothers or fathers.⁷⁰

Past Ohio Supreme Court decisions holding caps unconstitutional caused concern among the conservative legislators.⁷¹ Medical malpractice legislation with caps had recently been passed.⁷² House Committee Chair Bill Seitz, looking for a constitutionally acceptable basis for enacting the cap, stated that “[i]t depends on the case the proponents make as to whether there is a rational reason to cap non-economic damages at the levels specified in the bill.”⁷³ Former Ohio Supreme Court Justice Craig Wright explained in House hearings that the caps were “patently unconstitutional.”⁷⁴ The Ohio State Bar Association testified against the caps as well.⁷⁵

VII. THE SENATE PASSES 2003 REFORMS

The Senate sponsor of the tort reform bill, Senator Steve Stivers, was appointed to that office in 2003 to fill an unexpired term.⁷⁶ He had been a lobbyist in Columbus and treasurer of the local Republican Party.⁷⁷ His elevation by the Republican Party to fill the vacant seat afforded an opportunity for him to serve as the sponsor of the Party’s tort reform objectives. Stivers is not an attorney, but the Washington and Columbus

⁷⁰ Weinberger Testimony, *supra* note 11.

⁷¹ *See, e.g.*, Brown, *supra* note 67 (noting that the Ohio Supreme Court has struck down similar legislation three times).

⁷² *See* Am. Sub. S.B. 281, 124th Gen. Assemb., Reg. Sess. (Ohio 2002).

⁷³ *House Expected to Take Close Look at Constitutionality of Senate Lawsuit Limits Bill*, 72 OHIO REPORTS 113 (Gongwer News Service, Inc.), June 12, 2003, at 3.

⁷⁴ *Id.* at 4.

⁷⁵ Statement of the Ohio State Bar Association to Provisions Contained in Senate Bill 80 (125th General Assembly) Pertaining to Ohio’s Civil Justice System, Testimony Before the House Regarding S.B. 80.

⁷⁶ About Senator Steve Stivers, at <http://www.american-strategies.com/stivers/about.php> (last visited May 14, 2005).

⁷⁷ *Id.*

Before being appointed to the Ohio Senate, Senator Stivers’ professional career included seven years with Bank One, three years at the Ohio Company, two years as Finance Director for the Franklin County Republican Party and five years as a staff member in the Ohio Senate. His last position at Bank One was as Vice President of Government Relations.

Id.

lawyers for the tort reform coalition wrote the legislative drafting and the statements in support.⁷⁸

Stivers introduced Senate Bill 80 on May 1, 2005.⁷⁹ When one reads the original documents sent to the Senate sponsor by the law firm representing the “tort reform” industry coalition, the behind the scenes effort of the coalition is impressive. These extensive papers included comparative tables, analyses of case decisions, draft language, and draft supporting statements that are remarkably focused and effective. These pre-packaged tort reform documents arrived at the Ohio Senate and moved relatively quickly. The few targeted amendments that were made on the day of the Senate adoption came from the same sources as the original text had come.⁸⁰

Things got messy in the House, where term limits had replaced veteran lawmakers, but the Republican civil justice committee members and leaders asked their own questions and probed behind the assumptions written into the Senate’s script. Ultimately, it was a battle among Republican conservatives being argued at the margins, at the extremes of how much change would be tolerable because the question of whether there would be change in tort law had arguably been resolved in the elections.

The Senate Judiciary Committee passed Senate Bill 80 on June 11, 2005, and it passed the full Senate that afternoon by 19-13.⁸¹ After its passage, Stivers worked diligently to press the House to adopt Senate Bill 80, earning a news editorialist’s criticism that “Stivers sounds more and more like the business lobbyists who want to get SB 80 passed than a legislator who is looking out for citizens’ interests.”⁸²

VIII. THE HOUSE DEMURS

The term “grotesque” is rarely used to describe the top legislative project of one’s own party. When powerful Republican Representative

⁷⁸ Senator Stivers’ staff provided the author with two cartons of copies of his files on S.B. 80.

⁷⁹ Senate Bill—Status Report of Legislation—125th General Assembly, Senate Bill 80, at <http://lsc.state.oh.us/coderev/sen125.nsf/Senate+Bill+Number/0080?OpenDocument> (last visited May 15, 2005).

⁸⁰ Comparison of document format and word processing markings supports this observation.

⁸¹ *Lawsuit Reform Bills*, PLAIN DEALER (Cleveland), Mar. 8, 2004, at B3.

⁸² *What Happened to Stivers’ Patience?*, CANTON REPOSITORY, Dec. 9, 2003. Stivers was activated for military service in 2004 and was not present for the eventual passage of the bill. See Matthew Marx, *Senator Called to Military During Election*, COLUMBUS DISPATCH, Sept. 9, 2004, at B1.

Bill Seitz blasted the Senate-passed bill as “grotesquely unfair,”⁸³ the depth of disenchantment with the Senate-passed bill became evident. The Senate-passed bill was called by its national-level opponents “by far the broadest attack on the civil justice system—it certainly rivals Texas.”⁸⁴ House committee chair Representative W. Scott Oelslager, a conservative with strong business support,⁸⁵ studied the bill during fifteen weekly hearings⁸⁶ and concluded the proponents had exaggerated the need for the bill to address a “crisis.”⁸⁷ He said the Senate-passed bill was “draconian” and “clearly unconstitutional.”⁸⁸ Extensive presentations by witnesses for opposing sides were heard on each of the principal issues. Asbestos issues were so controversial that they were extracted from Senate Bill 80, renumbered House Bill 292, and passed as a stand-alone bill in October 2003.⁸⁹ The tort reform bill proceeded with a much smaller set of claims to be affected.⁹⁰

IX. THE LOBBYING INTENSIFIES

Future generations studying this legislation will find that internet web sites are invaluable glances into the contemporaneous intentions of the constituencies that press for certain state legislation. The proponents of Ohio tort reform, law firms in Washington D.C. and Columbus lobbying groups, were particularly focused, directed, and aggressively vocal in their pressures on legislators. Their web sites recorded many of their vehement

⁸³ Welsh-Huggins, *supra* note 64 (quoting Rep. Bill Seitz).

⁸⁴ Denise G. Callahan, *Ohio's Tort Limits Could Be Strictest in Country: Opponents See 'Solution in Search of a Problem,'* OHIO LAWYERS WEEKLY, July 28, 2003, at 1 (quoting Joanne Doreshow, the executive director of the Center for Justice and Democracy in New York).

⁸⁵ Term limits forced former Senator Oelslager to step down to the House in 2002, and in a prior election, Oelslager had been quite friendly to business, with 66% of his campaign funds coming from business donors. OH Senator Scott Oelslager, Open Secrets Ohio, at <http://www.opensecrets.org/oh/gets/st/index/250.htm> (last visited May 23, 2005).

⁸⁶ Brown, *supra* note 67.

⁸⁷ *Skeptics in the House: Representatives Give a Senator an Appropriately Tough Time*, AKRON BEACON JOURNAL, Oct. 7, 2003, at B2. “House members discovered that proponents do not have hard evidence to back up the claim that large jury awards and hefty attorney’s fees have such a deleterious effect on the business climate.” *Id.*

⁸⁸ Brown, *supra* note 67 (quoting Ohio Senator Scott Oelslager).

⁸⁹ H.B. 292, 125th Gen. Assemb., Reg. Sess. (Ohio 2003); *see also Governor Taft Sets Trip to Cincinnati, Dayton Urging House to Pass Single, Comprehensive Civil Justice Overhaul*, 72 OHIO REPORTS 197, (Gongwer News Service, Inc.), Oct. 7, 2003, at 3.

⁹⁰ Senate Bill 80 amended section 2307.97 of the Ohio Revised Code, but most of the remaining asbestos provisions were extracted and filed separately in the House legislation. *See* H.B. 292, 125th Gen. Assemb., Reg. Sess. (Ohio 2003).

expressions insisting that the House preserve sections of the Senate bill that lawyers among the House members considered unconstitutional.⁹¹ One can speculate that term limits had a significant role here; the lack of an institutional memory about the prior tort law's unconstitutionality and about the aftermath of the 1996 legislation's flaws made the majority of the House members receptive to the insistence that the package prepared by the lobbyists must be passed. Representatives Bill Seitz and Scott Oelslager held the bill to a higher standard but were subjected to great pressure to accept what was being offered.

When the House Judiciary Committee on December 1, 2004 voted 6-5 to adopt the modified bill, its changes removed the most constitutionally vulnerable considerations, and, in doing so, angered the lobbyists.⁹² The response on the constituency web sites was immediate and dramatic: suddenly the legislation was unacceptable, and it would be dropped unless its modified provisions were removed and the original provisions restored. The press reported that "Senate Republicans, who stuck far closer to the wishes of the business alliance, indicated they might not agree with the House overtures to the trial lawyers."⁹³ This was a potent threat at the end of the session, as many legislators wanted to have some results to show for their two years of debates on this complex issue. Ratcheting up the stress on House members to pass a bill acceptable to the constituencies, the lobbying intensified immediately after Thanksgiving 2004.⁹⁴

The passage of the tort bill was still in doubt on the last day of the legislative session. E-mail alerts went out to Ohio manufacturers warning that House committee changes "greatly weaken the bill and make it less effective for manufacturers" and urged calls to the House members.⁹⁵ Each member of the House received a "stern letter" calling on members to "pass the bill in its original form, without changes," a move that conservative friends of the industry called "high handed."⁹⁶ Only by forcing the conservative House speaker to press on the two reluctant committee leaders in the last hours of the legislative session could the even

⁹¹ See generally <http://atra.org>; <http://www.atra.org/links.php> (listing other organizations with information on civil justice reform) (last visited May 14, 2005).

⁹² See Brown, *supra* note 67.

⁹³ Lee Leonard, *Battle Over Jury Awards: Ohio House Republicans Push Their Own Version of Civil-Justice Reform*, COLUMBUS DISPATCH, Dec. 2, 2004, at C12.

⁹⁴ The newspaper articles cited in this Article reflect the post-election dynamics, as the sponsors had the option to return for another tougher bill when even more Republican members would return in the 126th General Assembly in 2005-2006.

⁹⁵ The Ohio Manufacturers' Association, www.ohiomfg.com/printertemplate.cfm?Section=Home&Template=/Content (last visited May 23, 2005).

⁹⁶ John Byczkowski, *Ohio Sets New Lawsuit Limits: Legislators Put Caps on Damages, Punitive Awards*, CINCINNATI ENQUIRER, Dec. 10, 2004, at D1.

more conservative Republican Senate President force the bill to a conclusion in the House. The Senate President had previously sought to force the tort bill through by adding its provisions onto a House-passed version of the restaurant tort immunity legislation,⁹⁷ but this effort failed.

On the next to last scheduled day of the two-year session, the President of the Senate showed great frustration with the House committee leaders whom he deemed to be responsible for the House Judiciary Committee changes.⁹⁸ In order to get the Senate version of Senate Bill 80 passed by the House and to defeat the House Judiciary Committee changes, he suddenly announced that the Senate was adjourning at midnight, had finished its session, and would not reconvene—so the bill would die if a deal were not completed by that evening.⁹⁹ The pressure that this placed on the House Speaker was intense. The lobbyists feared that their work would melt away. The Senate bluff forced the House Speaker into a stormy meeting, leading to his decision in favor of adopting many of the Senate positions. The final bill was approved just before midnight, 65-32, and was passed in the early morning by the Senate, 19-11.¹⁰⁰ Bismarck was correct—people who like sausages or legislation should not watch either being made.¹⁰¹

X. THE DRUG IMMUNITY CONFLICT

The special immunity from punitive damages that Senate Bill 80 provides to pharmaceutical companies illustrates the influence of lobbyists on a relatively inexperienced body of legislators. Since 1987, no punitive damage awards against prescription drug makers have been reported in Ohio case reports, and none are permitted under the 1987 statute.¹⁰² The drug industry apparently spent large sums and devoted large resources to support the 2004 tort reform law, though no specific figures are available.¹⁰³ The existing Ohio exception clause, taken from the 1987

⁹⁷ H.B. 350, 125th Gen. Assemb., Reg. Sess. (Ohio 2003). Later, this bill was wrapped into Senate Bill 80 and passed as part of the last minute inclusions.

⁹⁸ See Leonard, *supra* note 93.

⁹⁹ Byczkowski, *supra* note 96.

¹⁰⁰ *Id.*

¹⁰¹ “There are two things you don’t want to see being made—sausage and legislation.” Alan Rosenthal, *The Legislature as Sausage Factory: It’s About Time We Examine this Metaphor*, STATE LEGISLATURES, Sept. 2001, at 12 (attributed to Otto von Bismarck (1815-1898)).

¹⁰² See OHIO REV. CODE ANN. § 2307.80(C) (Anderson 1987).

¹⁰³ See Office of the Legislative Inspector General, Joint Legislative Ethics Committee, Lobbyist Information, <http://www.jlec-olig.state.oh.us> (last visited May 23, 2005) (providing lobbying reports listing five registered lobbyists for the pharmaceutical trade association, seven for Pfizer, five for Merck, etc.).

statutory compromise language, stated that punitive damages could not be awarded against the maker of a prescription drug if the drug had received Food and Drug Administration (FDA) approval, unless the approval had been obtained fraudulently.¹⁰⁴ Unfortunately for the industry's public image at this critical legislative juncture, the fall 2004 final negotiations over the pharmaceutical exception occurred while the national news media were full of news about deaths and illness allegedly caused by highly advertised prescription drugs such as Pfizer's Celebrex.¹⁰⁵

The 1996 tort reform law used similar language and also expanded the 1987 immunity, reaching medical devices and nonprescription drugs.¹⁰⁶ That change failed when the Ohio Supreme Court ruled the entire 1996 bill unconstitutional in 1999.¹⁰⁷

In 2003, the industry sponsors came back to the legislature and asked for re-enactment of the 1996 language. This was then included into Senate Bill 80 and adopted in the Ohio Senate in 2003 with minor changes, including the 1996 expansion to devices and nonprescription drugs,¹⁰⁸ and including the 1987 provision allowing punitive damages if the approval had been fraudulently obtained or maintained.¹⁰⁹

Then, on November 24, 2004, just as the tort bill was to complete its Ohio House Judiciary Committee review and move to the House floor, Pfizer intervened with a request that the exceptions clause allowing punitive damages for "fraudulently" approved drug products be removed. This is a most intriguing episode, for it involved a primary sponsoring member of the industry coalition targeting a group of conservative Republican legislators with a last-minute presentation that argued for an outcome suggesting that a drug company's misconduct would no longer be a basis for punitive damages. Much of the contemporaneous debate about drug problems revolved around what the drug company should have told the FDA about the drug risks and when the reports to the FDA were required to have been submitted. This was precisely the context that put Pfizer in a bad light to be arguing for elimination of an anti-fraud

¹⁰⁴ OHIO REV. CODE ANN. § 2307.80(C) (Anderson 1987).

¹⁰⁵ Newswire, *Pfizer Pulling Advertising for Celebrex*, ASSOCIATED PRESS, Dec. 20, 2004.

¹⁰⁶ H.B. 350, 125th Gen. Assemb., Reg. Sess. (Ohio 2003) (adopting OHIO REV. CODE ANN. § 2307.801(C)).

¹⁰⁷ *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

¹⁰⁸ H.B. 350 (adopting OHIO REV. CODE ANN. § 2307.801).

¹⁰⁹ FDA drug approval requirements include the drug application sponsor's ongoing prospective duties to report data about the drug's effects. 21 C.F.R. § 314.50(5)(vi). The wording of the 1996 and 2003 statutes covered post-approval failure to report such adverse information.

safeguard in the Ohio legislation. Pfizer wanted the term “fraudulently” removed in the House¹¹⁰ and deleted entirely from the bill.¹¹¹ A sophisticated argument about implied preemption of state law through federal enforcement powers was being made, but at the worst possible time and in the worst possible context. Pfizer argued that only the FDA could make a finding of fraud, and the state courts could not lawfully do so without taking an action (policing fraud on federal bureaucrats by applicants for a federal license) that was impliedly preempted by federal powers.¹¹² Pfizer wanted punitive damages to apply “only where the FDA itself has found a violation.”¹¹³ But Pfizer’s reasoning that the FDA should be allowed to make administrative findings of fraud was disingenuous since the FDA does not make such administrative findings concerning fraud. The fraud findings are only made by federal criminal trials or guilty pleas after the FDA initiates a criminal prosecution.¹¹⁴

Lobbyists for the trial lawyers strongly disagreed with Pfizer’s claims. With little or no time left and no hearings having been held, the House managers of the bill declined to make the changes that Pfizer sought. So the punitive damages law stands as it has been since 1987 with the “fraudulently” exception. There have been no reported cases applying this Ohio exception and no recent cases have awarded punitive damages to persons harmed by prescription drugs. This may be of concern in the future if a court refuses punitive damage awards and the plaintiff has shown on the record a basis for civil fraud claims regarding improper withholding of required submissions.

XI. ANALYSIS OF THE KEY LESSONS

The “tort reform” movement is, at base, a calculated corporate investment of substantial financial resources, seeking the rebalancing of a set of external economic forces. One of the external economic forces that is of concern to insurance carriers, automobile manufacturers, and consumer goods sellers is that of liability for dangerously defective products. The external force that is of interest to construction and building forces is the liability for injuries arising from latent defects in the premises when the defects show up after years of use. Proponents of the tort bill

¹¹⁰ Pfizer Amendment Titled S.B. 80 as Passed by the Senate, Amending Lines 1472-1498, Sent to Rep. Bill Seitz by Pfizer Representative K. O’Reilly (Nov. 24, 2004).

¹¹¹ Letter from Pfizer Representative K. O’Reilly (no relation to author) to Rep. Bill Seitz (Nov. 24, 2004).

¹¹² *Id.* (citing *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961 (6th Cir. 2004)).

¹¹³ *Id.*

¹¹⁴ 1 JAMES T. O’REILLY, FOOD & DRUG ADMINISTRATION § 8.14 (West 2d ed. Supp. 2004).

asserted that if these external threats were abated, businesses would presumably be aided in their growth and development.

The public choice literature in law is too extensive to digest here. But tort reform advocacy should be seen as a private choice capturing both critical elements of post-accident remediation, the *amount* of payment to compensate injured persons, and the *barriers* to achieving individual remediation of tort activity. The tort bill means it would be harder to win damages; when damages are won, they would be smaller awards.

The proponents of the 2004 tort reform law have done an excellent job of perceptual advocacy, creating media perceptions of a tort crisis in Ohio. This was done even though astute and loyal Republicans in the Ohio House could not find statistical support for the crisis. Against such a formidable array of private cash and private advocacy, plaintiffs' advocates had too little coordination and inadequate funds to fight the expensive lobbying battles.

The reader who studies the web sites for the national groups such as the American Tort Reform Association¹¹⁵ and the Product Liability Advisory Council¹¹⁶ can understand the movement of the Ohio branch of the insurance and manufacturing industry's "tort reform" effort. This movement is best visualized as a pincers, two metal arms cutting to the core of the personal injury remedies available in Ohio. It is a pincers of two political forces—the preferred legislative candidates must advance a protective shield of statutory immunities around companies that make, market, or sell products that may cause injury, and the coalition's favored judicial candidates must renounce judicial activism that underlay some of the tort liability exposure of insurers and companies. The constraint on *both* statutory and common law recognition of tort remedies is the ideal outcome for the coalition of forces seeking tort law restrictions.

The interdependence of the pincer analogy is apt. The Ohio Supreme Court majority view of remedies is not enough alone, as there must also be statutory controls on the procedures and substance of the lower court decision-makers, where most cases are settled without appeal. The pincers designed by the tort reform alliance must close firmly against the plaintiff and must induce an easier settlement. Their new shield of legislative armor is valueless if the courts reject statutory restraints on plaintiffs' ability to recover damages. With courts aligned to approve the legislative changes, the defendants' collective investment in Ohio political efforts has earned its rewards.

¹¹⁵ Visit the American Tort Reform Association's web site at <http://www.atra.org> (last visited May 23, 2005).

¹¹⁶ Visit the Product Liability Advisory Counsel's web site at <http://www.plac.com> (last visited May 23, 2005).

The subtlety with which this is accomplished in Ohio is significant. The individual disabled worker or child is never likely to connect to the coalition member company the person's dissatisfaction with the compensation that they might receive. The disabled person may feel rage at "the system" without ever connecting their frustration to the dramatic television commercials touting a brave candidate's courage in voting for tort "reform." Perception is reality in political advertising, and tort law is no exception.

XII. WHITHER JUDICIAL ACTIVISM

Judicial "activism" has several meanings, all of them polemical or political, and ultimately the beauty or lack thereof is in the eye of the beholder. In torts, it refers to judicial use of common law norms to recognize a remedy in compensation for an injury. Judicial "activism" was the code word for constraints on the creation of new remedial opportunities for injured plaintiffs.

Stare decisis principles usually hold an appellate court to follow that court's own interpretations on comparable facts in a later case. Upsetting precedents of an appellate court, as each election brings new appellate judges into the majority, would diminish stare decisis as a jurisprudential model. Ohio Chief Justice Thomas Moyer has said it best when he stated, "I firmly believe in stare decisis—that a judge is required to follow legal precedent. . . . If citizens believe the courts are unpredictable; if they believe court decisions do not rest on principle, they will lose faith and the ability to maintain the rule of law will suffer."¹¹⁷

For activist judges, changing "mistakes" of past judges makes sense. The acceptance of the "findings" in section three of Senate Bill 80 with great deference to the legislature would undo such precedents as the 1999 decision that struck down Ohio's former tort reform legislation.¹¹⁸ In section three, with words identical to those prepared in the law firm of the coalition, the precedents of the Ohio Supreme Court were being directly challenged by the new majority in the legislature, as the legislators asked the court to abandon its own precedents and reverse course to an opposite direction.¹¹⁹ The doctrine of stare decisis would preserve the prior decisions so disliked by the sponsors. Thus, activism to override stare decisis will be needed to sustain the new "tort reform" legislation, as the text of section three of Senate Bill 80 demonstrated hostility to the existing

¹¹⁷ Washburn, *supra* note 47, at 5 (quoting Chief Justice Moyer).

¹¹⁸ See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (striking down the 1996 tort reform legislation).

¹¹⁹ See Am. Sub. S.B. 80, 125th Gen. Assemb., Reg. Sess. § 3 (Ohio 2004).

precedents.¹²⁰ Which of the philosophies will prevail when the Supreme Court reviews Senate Bill 80?

XIII. CONCLUSION

Ohio legislative creation of new tort law policies might have been better served by a legislature with longer tenure, more diverse perspectives, and more collaborative dialogue concerning complex public choices. But democracy is a challenging process when it functions at all. In 2005-2006, the legislature has moved on to other issues, and it is up to the Ohio Supreme Court to deliver its verdict on the product of this most unusual process. For the Justices who renounced activism on their way to election, the fate of Ohio tort law and of the underlying *stare decisis* hangs in the balance. For the constituencies that won the legislative outcome they desired, the fate of future job creation in Ohio remains to be decided. Tort reform's next round in Ohio will be fascinating to watch, but hard to predict.

¹²⁰ *See id.*

