



# VIEWPOINT

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*The Ohio Supreme Court*

## Courting Disaster

By David J. Owsiany

This year's election is shaping up to be very consequential. Ohio is a key state in the presidential campaign. Voters will consider as many as five statewide ballot issues and there are several closely contested races for Congress and the Ohio House and Senate. Marc Dann's resignation created an unexpected election for the office of attorney general and, in communities across Ohio, voters will consider a slew of local issues and races for local offices.

Because of the number of important issues and races this year, the two Ohio Supreme Court races are not generating much attention. This is unfortunate, especially in light of the importance this election will have on the direction of the court.

It wasn't so long ago that the court regularly found itself mired in political controversy. During the 1990s up to 2002, a majority of the justices regularly substituted their own personal policy preferences for that of the legislature. For example, the court struck down the school funding system on four separate occasions, nearly creating a budget crisis for the state of Ohio. The court also went out of its way to strike down much needed reforms to Ohio's workers' compensation and civil liability systems as well.

Ohioans grew tired of the court acting as a super-legislature on such public policy matters and as the activist justices retired, voters elected new justices who pledged to apply the law in a neutral and fair manner consistent with the Ohio Constitution.

Today, a new majority exists on the court that exercises restraint by respecting the lawmaking function of the legislative branch and refuses to second-guess the General Assembly on public policy matters. For example, the court recently upheld Ohio's charter school law and statutes reforming the workers' compensation and civil liability systems. Regardless of their personal views on these matters, a majority of the current justices realize that their role is to apply these laws in a neutral and fair fashion, not to substitute their own personal policy preferences for that of the legislature.

A new report published by the Federalist Society entitled *A More Modest Court: The Ohio Supreme Court's Newfound Judicial Restraint*, documents the court's recent return to a more

traditional judicial role. The authors, Case Western Reserve law professor Jonathon Adler and Christina Adler, conclude that the court's commitment to providing "greater deference to legislative enactments" and resisting "expanding bases for tort liability" has resulted in a "more modest supreme court."

Similarly, a recent report from the Manhattan Institute, *Judging Ohio*, reports that "Ohio's once-threatening legal environment is looking friendlier and fairer, thanks in no small part to the electorate's decision to install new judges who are less willing to substitute their policy preferences for the legislature's political will."

While the transformation of the court is significant, it could be short-lived. Two of the justices who make up this new majority committed to restraint - Maureen O'Connor and Evelyn Lundberg Stratton - are up for reelection. O'Connor's opponent, Cuyahoga County Common Pleas Judge Joseph Russo, pledges "a different perspective" and Stratton's opponent, Cuyahoga County Juvenile Judge Peter Sikora, offers to bring "change" to the Ohio Supreme Court.

This "change" toward a "different perspective" might actually look very familiar. It would likely resemble the activist Ohio Supreme Court of days gone by. In fact, Sikora publicly criticized the court's current commitment to restraint, claiming the court got it wrong when it recently upheld statutory civil liability reforms, including caps on "pain and suffering" damages, which have helped to restore balance to Ohio's legal system.

If Stratton and O'Connor, who voted with the 5-2 majority, are replaced by activist justices, a new four-person majority hostile to such statutory reforms would likely emerge. And we would be back to the days of a politicized high court acting as a super-legislature from the bench.

As election day approaches, voters must decide whether they want to go back to the days when the Ohio Supreme Court regularly inserted itself into various political controversies or stay with the court's current approach of judicial restraint and modesty.

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