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Abuse of Power: Certain State Courts are Disregarding Standing and Original Jurisdiction Principles so They can Declare Tort Reform Unconstitutional

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ABUSE OF POWER: CERTAIN STATE COURTS ARE DISREGARDING STANDING AND ORIGINAL JURISDICTION PRINCIPLES SO THEY CAN DECLARE TORT REFORM UNCONSTITUTIONAL*

I. INTRODUCTION

Tort reform is on the agenda of many state legislatures across the United States.[1] New bills are subject to a court test to verify their constitutionality. Tort reform legislation has triggered both an external clash between the legislature and the judiciary, and internal strife within the judiciary, over the proper scope of judicial power. In Ohio, for instance, both branches fired their best shots in stubborn attempts to assert their respective fortitude. When the dust settled, a substantial portion of Ohio tort reform law was struck down as unconstitutional.[2] State legislatures, meanwhile, were left pondering their next move and wondering if the "statutory age"[3] was beginning to wane. The judiciary, at least those judges who promote extensive judicial power, won round one, but the war over judicial power, in the context of tort reform, is only beginning.

Financial responsibility plays an integral role in tort law across the nation. Tort reform legislation, which curbs this responsibility by establishing statutory damage caps, is a direct attack on plaintiff attorneys' financial self-interests. The conflict between state legislatures and plaintiff bars can be phrased in simple terms. Lawmakers firmly

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1. *See, e.g.*, H.B. 1070, 145th Leg., 1st Sess. (Ga. 1999); H.B. 1695, 20th Leg., 1st Sess. (Haw. 1999); H.B. 2878, 78th Legis., 1st Sess. (Kan. 1999); H.B. 4662, 181st Leg., 1st Sess. (Mass. 1999); L.R. 204, 96th Leg., 1st Sess. (Neb. 1999); A.B. 7545, 222nd Leg., 1st Sess. (N.Y. 1999); H.B. 1980, 47th Leg., 2d Sess. (Okla. 1999); S.B. 1065, 183rd Leg., 1st Sess. (Pa. 1999); S.B. 533, 113th Leg., 1st Sess. (S.C. 1999); H.B. 2088, 56th Legis., 1st Sess. (Wash. 1999). *See generally* William C. Smith, *Prying Off Tort Reform Caps,* 85 A.B.A. J. 28 (Oct. 1999).

2. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1072, *recons. denied,* 716 N.E.2d 1170 (Ohio 1999).

3. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions,* 70 N.Y.U. L. REV. 1, 20 (1995).

believe in a policy limiting financial punishment of wrongdoers, while attorneys who receive contingency fees want to maximize potential profits. Judges enter the mix because many believe in the common law principle of expanded liability.[4] Currently, the Ohio Supreme Court is illustrative of this three-dimensional struggle.[5] Justice Resnick of the Ohio Supreme Court points out that "for more than a decade, Ohio has been home to an ongoing conflict over the necessity and propriety of transforming the civil justice system."[6] Professor Stephen J. Werber adds that the Ohio Constitution "forms the battleground" for the war between the legislative and judicial branches of the state government.[7] Wisconsin, along with every other state, should look to Ohio as an example of blatant judicial violation of jurisdictional doctrine.

The casualties in this war are, at a practical level, long-standing constitutional and statutory jurisdictional principles, standing and original jurisdiction, and at a more theoretical level, the separation of powers doctrine. These three casualties, since they represent legal principles that embody the traditional goals of the American legal system, make tort reform an issue of national concern.

Supreme courts in Ohio and Missouri recently exercised jurisdiction over constitutional attacks on tort reform despite admitting that the respective challenging parties did not suffer a concrete injury.[8] Although other states have declared tort reform statutes unconstitutional,[9] they have not inappropriately relaxed standing requirements to do so.[10] The Ohio decision also involved an improper

4. *See* Stephen J. Werber, *Emerging Issues in State Constitutional Law: Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155, 1157 (1996).

5. *See id.* at 1156.

6. *Sheward*, 715 N.E.2d at 1071; *see also* Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539, 539 (1997).

7. Werber, *supra* note 4, at 1156.

8. *See Sheward*, 715 N.E.2d at 1119 (Moyer, C.J., dissenting); *see also* Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 68 (Mo. 1999) (White, J., dissenting).

9. *See* Mark Thompson, *Letting the Air out of Tort Reform*, 83 A.B.A. J. 64, 65 (1997). "Through the end of 1996, high courts in 24 states had handed down 61 different decisions overturning all or parts of laws that attempted to limit damages or erect other hurdles to discourage law suits." *Id. See generally* Victor E. Schwartz & Barry M. Parsons, *State High Courts Take on Tort Reform: Judicial Nullification of Legislative Action Continues*, PRODUCT LIABILITY L. & STRATEGY, April 1998, at 10.

10. *See, e.g.*, Best v. Traylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (declaring entire Illinois Tort Reform Bill unconstitutional); Van Dusen v. Stotts, 712 N.E. 2d 491 (Ind. 1999); Morris v. Savoy, 576 N.E.2d 765, 767 (Ohio 1991) (plurality opinion) (voiding statute setting damage cap for medical malpractice actions under due process grounds); Lakin v. Senco Prod., Inc., 987 P.2d 463 (Or. 1999). Other states have declared non-economic damage caps unconstitutional. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So.2d 156 (Ala. 1991);

recognition of original jurisdiction.[11] Ohio courts are the leading proponents of judicial activism and have not refrained from invalidating legislative acts of the Ohio General Assembly, even where the executive branch concurred that such legislation was vital.[12]

Tort reform advocates may argue that the Ohio judiciary is essentially vetoing legislative acts.[13] At the other end of the spectrum, judicial activists contend that judges are acting within their power and in the best interest of society as a whole.[14] Unlike federal courts, Ohio does not foster a policy of conservative review of legislative activity.[15] Although the Ohio Supreme Court, as a state instrument, is not bound by the federal constitutional requirement that a dispute must present a case or controversy,[16] the court violated Ohio jurisdictional principles by recognizing original jurisdiction in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.[17]

This Comment discusses the impact of judicial activism in Ohio and Missouri on the validity of contemporary jurisdictional principles. Is the expansive approach to standing simply a means for the judiciary to

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Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991). Victor Schwartz, General Counsel for the American Tort Reform Association, asserts that there have been roughly 90 court decisions overturning tort reform over the past few years. *See* Jean Hellwege, *Ohio Supreme Court Axes Tort 'Reform' Law*, 35 Trial 13 (Oct. 1999).

11. *See Sheward*, 715 N.E.2d at 1114-15 (Moyer, C.J., dissenting).

12. *See* Werber, *supra* note 4, at 1157.

13. Professor Martin H. Redish of Northwestern calls this trend "an open and blatant judicial second-guessing of the wisdom and morality of a legislative policy judgment, something that is totally unacceptable in a constitutional democracy." Thompson, *supra* note 9, at 66 (citing Professor Martin H. Redish of Northwestern). Werber calls the Ohio Supreme Court a "super legislature." Werber, *supra* note 6, at 540.

14. Robert S. Peck suggests that state legislatures are to blame. In discussing House Bill 350, Peck argues that "the new law was nothing less than a bold assault on the authority, responsibilities, and prerogatives of the judiciary that also substantially interfered with the rights of injured people to seek access to the courts." Robert S. Peck, *Ohio Tort 'Reform' Measure Overturned*, 35 Trial 66 (Nov. 1999). Moreover, courts are not overturning all tort reform. *See, e.g.*, Leiker v. Gafford, 778 P.2d 823 (Kan. 1989) (upholding $100,000 limit on non-economic damages for wrongful death). *Leiker* was, however, subsequently overruled by *Martindale v. Terry*, 829 P.2d 561 (Kan. 1992).

15. Federal courts generally give deference to congressional discretion. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995).

16. *See infra* Part II.B.1 for an overview of the federal case or controversy requirement.

17. 715 N.E.2d 1062, 1119, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999) (Moyer, C.J., dissenting). *See also infra* Part III for a discussion of the Ohio Supreme Court's improper recognition of original jurisdiction.

manipulate the tort reform movement? Do standing and original jurisdiction principles sufficiently check the potential for judicial abuse of power? Most importantly, is bending jurisdictional doctrine an inappropriate exercise of judicial power? Part II discusses the controversial grant of standing by the Ohio Supreme Court in *Sheward* and by the Missouri Supreme Court in *Rodriguez v. Suzuki Motor Corp.*[18] It includes an overview of the concept of standing, a description of why standing is problematic in state court, and a discussion of why careless neglect of standing principles can have severe consequences. Part III explores the Ohio Supreme Court's grant of original jurisdiction in *Sheward.* This part reveals how that court blatantly disregarded Ohio common law when it granted both a writ of prohibition and a writ of mandamus.

This Comment reaches two conclusions. First, state legislatures, at least those in Ohio and Missouri, that wish to reform tort law must advocate a shift in their respective state's standing policy toward the stricter federal requirements. Absent this necessary change, state supreme courts will still have the power to invalidate tort reform statutes in cases where there has not been a specific injury demonstrating how the statute is unconstitutional. Second, the Ohio Supreme Court clearly abused their power when they granted original jurisdiction in *Sheward.*

II. A NEW DOCTRINE OF STANDING

A. Introduction

1. Injury-in-Fact

Constitutional challenges to tort reform legislation fall into two distinct categories. The first category consists of parties who are personally affected by an allegedly unconstitutional statute. For instance, if a court reduced a jury-determined damage award because of a statutory limit on punitive damages, the adversely affected plaintiff could appeal the award by contesting the constitutionality of the statute.[19] Courts grant standing in these situations because the litigant

18. 996 S.W.2d 47 (Mo. 1999).

19. *See, e.g.,* Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483 (Fla. 1999) (holding that state statutory damage cap should not have been enforced and jury damage award should be reinstated); Owens Corning Fiberglas Corp. v. Cobb, 714 N.E.2d 295 (Ind. Ct. App. 1999) (ruling that damage award was subject to state's statutory damage cap); Crowe

has a personal stake in the controversy at hand.[20] The party's clear injury[21] is the reduced damage award that could be rectified by a court reinstating the original award.

2. Extraordinary Writ

The second category, far less frequent than the first, includes parties who at the time of the claim have not suffered a concrete injury from the allegedly unconstitutional statute. These claims typically involve third party writ of mandamus or writ of prohibition actions challenging the constitutionality of one or more tort reform statutes.[22] These writs are generally brought by a large group of people who contend that the issue is sufficiently important for the court to grant original jurisdiction.[23]

B. General Overview of Standing

Rodriguez and *Sheward* are dangerous precedents that have the potential to encourage judicial abuse of power, trigger a flood of litigation, and severely weaken state legislatures. In order to appreciate and understand the severity of this Comment's conclusions, however, it is important to clarify pertinent standing principles of both the federal and state court systems. This background section illustrates the following: (1) the fundamental discrepancies between federal and state standing policies; (2) that relaxed standing policy in Ohio, Missouri and Wisconsin is problematic; and (3) that this topic should be of concern to the nation and to the several states, including the state of Wisconsin.

1. Federal Requirements

Federal courts generally incorporate standing principles into the case or controversy requirement of Article III of the United States Constitution.[24] Courts also incorporate prudential standing

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v. Owens-Corning Fiberglas, No. 73-206, 1998 Ohio App. LEXIS 5075, at *1 (Oct. 29, 1998).

20. *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

21. *See infra* Part II.B. for an explanation of the injury-in-fact requirement.

22. *See, e.g., Sheward*, 715 N.E.2d at 1085.

23. *See infra* Part III for a discussion of original jurisdiction.

24. *See* U.S. CONST. art. III, § 2, cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737 (1984); Flast v. Cohen, 392 U.S. 83, 94-101 (1968) (noting that the complaint failed to satisfy the threshold requirement imposed by Article III of the United States Constitution by failing to allege an actual case or controversy). For a general overview of the federal standing policy *see* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 83-107 (2000); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

requirements to supplement the constitutional principles. Standing in federal court is a mandatory prerequisite to the court's exercise of jurisdiction.[25]

The constitutional requirements are binding on all federal courts. First, the litigant must suffer an injury-in-fact that is concrete and particularized.[26] The injury must be "actual or imminent."[27] The injury must be individuated. In other words, a prospective litigant cannot merely show that she "suffer[ed] in some indefinite way in common with people generally."[28] If an injury has not yet become sufficiently concrete or is not readily imminent, the issue is not ripe for judicial review.[29] Second, there must be a causal connection between the injury and the conduct alleged to be improper.[30] Third, the issue must be redressible: it must be likely that the litigant's injury will be remedied by a favorable decision.[31] Finally, the issue must be ripe[32] and not moot.[33] For instance, if a statute has not yet harmed a party but may do so in the future, the case is not ripe for judicial review. Alternatively, if a prospective party has been redressed for his or her injury by the time the party brings the suit, then the case is moot and the court is precluded from exercising jurisdiction.

Prudential standing requirements include court rules barring people from raising claims of third parties,[34] precluding parties from litigating "generalized grievances,"[35] and requiring that the injury fall within the "zone of interest" intended by Congress.[36]

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25. *See* NOWAK & ROTUNDA, *supra* note 24, at 89-90.

26. *See* Warth v. Seldin, 422 U.S. 490, 508 (1975).

27. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (citing Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983)).

28. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

29. *See Lujan*, 504 U.S. at 564 ("Where there is no actual harm, however, its imminence . . . must be established.").

30. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

31. *See id.*

32. *See* United Pub. Workers of Am. Org. v. Mitchell, 330 U.S. 75 (1947).

33. *See* Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); St. Pierre v. United States, 319 U.S. 41, 42 (1943); *Ex parte* Baez, 177 U.S. 378, 390 (1900).

34. *See* Singleton v. Wulff, 428 U.S. 106, 124 (1976).

35. Warth v. Seldin, 422 U.S. 490, 499 (1975) (citing Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221-27 (1974)).

36. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

2. Ohio Requirements

Standing in Ohio is a common-law doctrine.[37] The *Ratchford* court articulated a three-part test similar to the federal doctrine. That test set forth the following:

> (1) the litigant has suffered or will suffer a specific injury;
> (2) injury resulted from the action/inaction being challenged; and
> (3) the injury is likely to be redressed if the court invalidates the action/inaction being challenged.[38]

Litigants do not have standing in situations where their injury is merely abstract or suspected.[39] For an association to have standing, they must establish that its members have suffered an actual injury-in-fact.[40] Ohio case law also mandates that the injury be individual.[41] The *Masterson* court patterned this requirement on the federal decision in *Massachusetts v. Mellon.*[42] The *Masterson* court articulated that "[a] private citizen may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally."[43] Further, in *State ex rel. Dallman v. Court of Common Pleas,* the court also followed federal standing doctrine.[44]

3. Missouri Requirements

Standing issues have arisen in Missouri courts in cases involving constitutional questions. In Missouri, "not just anyone has standing to attack the constitutionality of a statute."[45] The rationale behind the standing requirement is to assure there is a sufficient controversy between parties so the case can be adequately presented to the court.[46] Moreover, when challenging the validity of a statute, "a litigant must himself be hurt by the unconstitutional exercise of power before he may

37. *See* State *ex rel.* Consumers League v. Ratchford, 457 N.E.2d 878, 883 (Ohio Ct. App. 1982).

38. *Id.*

39. *See id.*

40. *See* Ohio Contractors Ass'n v. Bicking, 643 N.E.2d 1088, 1090 (Ohio 1994).

41. *See* State *ex rel.* Masterson v. Ohio State Racing Comm'n, 123 N.E.2d 1, 1 (Ohio 1954).

42. 262 U.S. 447, 488 (1923).

43. 123 N.E.2d at 2 (citations omitted).

44. 298 N.E.2d 515, 516 (Ohio 1973).

45. Ryder v. County of St. Charles, 552 S.W.2d 705, 707 (Mo. 1977).

46. *See id.*

be heard to complain."[47]

At a more general level, litigants in Missouri courts must be "*adversely affected by the statute in question.*"[48] Another Missouri court, adopting language from the federal courts, noted that in order to invoke the court's jurisdiction, the party must allege "such a personal stake in the outcome of the controversy."[49]

4. Wisconsin Requirements

Standing in Wisconsin, although not a jurisdictional requirement per se, is a matter of "sound judicial policy."[50] Courts will generally discuss whether the challenged action caused an injury-in-fact.[51] Some Wisconsin courts hold that even a "trifling" interest in the issue is sufficient to establish standing.[52] Yet, other cases hold that the litigant needs a direct and personal pecuniary interest in the litigation.[53]

Since the Wisconsin courts have not reached a consensus with regard to a concrete standing doctrine, some courts have looked to the federal courts for guidance. For instance, *Bank of Coloma* relied extensively on federal case law when it stated that "[t]o meet the requirement of an injury, a plaintiff must allege 'such a personal stake in the outcome of the controversy.'"[54] However, the court in *Wisconsin's Environmental*

47. State *ex rel.* Reser v. Rush, 562 S.W.2d 365, 369 (Mo. 1978) (citing Blue Bank v. State Banking Bd., 509 S.W.2d 763, 766 (Mo. Ct. App. 1974)).

48. W.R. Grace & Co. v. Hughlett, 729 S.W.2d 203, 206 (Mo. 1987) (citing *Ryder*, 552 S.W.2d at 707) (emphasis added).

49. Harrison v. Monroe County, 716 S.W.2d 263, 266 (Mo. 1986) (citing Warth v. Seldin, 422 U.S. 490, 498-99 (1975)).

50. Schmidt v. Dep't of Res. Dev., 158 N.W.2d 306, 314 (Wis. 1968); *see also* State *ex rel.* Rosenhein v. Frear, 119 N.W. 894, 895 (Wis. 1909) ("Sound judicial policy precludes the court from considering the question of the constitutionality of a legislative act unless a decision respecting its validity is essential to the determination of some controversy calling for judicial solution."). *See generally* Pedrick v. First Nat'l Bank of Ripon, 66 N.W.2d 154, 156 (Wis. 1954); State *ex rel.* Ford Hopkins Co. v. Mayor and Common Council of Watertown, 276 N.W. 311, 316 (Wis. 1937); *In re* Heinemann's Will, 230 N.W. 698, 700 (Wis. 1930).

51. *See* Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n, 230 N.W.2d 243, 248 (Wis. 1975); *see also* Bence v. Milwaukee, 320 N.W.2d 199, 204 (Wis. 1982).

52. City of Madison v. Town of Fitchburg, 332 N.W.2d 782, 785 (Wis. 1983); State *ex rel.* First Nat'l Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma, 290 N.W.2d 321, 325-26 (Wis. 1980).

53. *See* City of Appleton v. Town of Menasha, 419 N.W.2d 249, 254 (Wis. 1988). *See also City of Madison*, 332 N.W.2d at 784 ("In order to have standing to sue, a party must have a personal stake in the outcome of the controversy.") (citations omitted); O'Donnell v. Reivitz, 424 N.W.2d 733, 735 (Wis. Ct. App. 1988).

54. *Bank of Coloma*, 290 N.W.2d at 325 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

Decade noted that "[t]he federal law of standing is not binding on Wisconsin."[55] The *Wisconsin's Environmental Decade* court did add that "recent federal cases are certainly persuasive as to what the [standing] rule should be."[56]

5. Observations

The main difference between the federal standing requirements and standing doctrine in Ohio, Missouri, and Wisconsin is the fact that standing in federal court is required by the case and controversy requirement of Article III of the United States Constitution.[57] By contrast, Wisconsin courts have never established standing as a jurisdictional prerequisite.[58] Furthermore, standing is not required by Ohio or Missouri courts as a condition of jurisdiction.[59] Clearly state courts are not bound by Article III of the U.S. Constitution. Even federal courts concede that the federal standing requirements are not binding on state courts.[60]

Under the federal standing doctrine, the parties in *Sheward* and *Rodriguez* would never have had their day in court, because they did not suffer an injury-in-fact.[61] Since standing is a self-imposed jurisdictional

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55. *Wisconsin's Envtl. Decade*, 230 N.W.2d at 248.

56. *Id.*

57. *See* Warth v. Seldin, 422 U.S. 490, 498-99 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Flast v. Cohen, 392 U.S. 83, 101 (1968).

58. *See Bank of Coloma*, 290 N.W.2d at 325 n.5. Wisconsin Circuit Courts have jurisdiction "in all matters civil and criminal." WIS. CONST. art. VII, § 8. Wisconsin Courts of Appeals and the Wisconsin Supreme Court have "appellate jurisdiction." WIS. CONST. art. VII, §§ 3, 5.

59. Ohio Courts of Common Pleas have jurisdiction over all "justiciable matters." OHIO CONST. art. IV, § 4(B). Ohio Courts of Appeals and the Ohio Supreme Court have original and appellate jurisdiction over various matters. *See* OHIO CONST. art. IV, §§ 2(B)(1)(2), 3(B)(C). Furthermore, the Ohio General Assembly has no power or authority to limit or increase jurisdiction. *See* State v. Mansfield, 104 N.E. 1001, 1002 (Ohio 1913). In Missouri, circuit courts have original jurisdiction over all cases and matters, civil and criminal. *See* MO. CONST. art. V, §14.

60. *See* Dep't of Labor v. Triplett, 494 U.S. 715, 723 (1990) (Marshall, J., dissenting); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243 (1982) (asserting that the Massachusetts Supreme Judicial Court is not bound by the prudential limitations of *jus tertii* (right of third parties) that apply to federal courts); *see also* Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989).

61. Since federal standing principles are not binding on state courts, the *Rodriguez* and the *Sheward* courts could find a way to hear the respective cases. The *Rodriguez* court recognized jurisdiction because the challenge was "real and substantial" and because the case raised constitutional questions of general interest or importance. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 52 (Mo. 1999). The *Sheward* court granted original jurisdiction even though the "relators themselves [had] no personal or private right to secure judicial review by

restraint in state courts, however, the cases were heard. Although recognition of jurisdiction by the *Rodriguez* and *Sheward* courts was not per se unconstitutional, this practice of judicial activism creates a dangerous precedent with respect to tort reform specifically, and state jurisprudence in general.

Standing is of nation-wide concern for several reasons. First, in relation to tort reform, a relaxed standing doctrine impairs the legislature's ability to get laws implemented. If standing is not strictly enforced, courts have greater ability to invalidate legislative acts. Since tort reform is currently on the table of several state legislatures across the country,[62] legislatures should consider adopting the federal standing doctrine, or overly active courts, such as the *Rodriguez* and the *Sheward* courts, will continue to exploit a power they should not have.

Second, vague judicial interpretation of standing, especially when state court judges are willing to overturn precedent,[63] frustrates any possibility of consistency. Hypothetically speaking, one Missouri state court might choose to follow or adopt the federal standing doctrine, while another Missouri state court might only require a "slight" interest in the controversy and recognize jurisdiction. In this latter example, a stricter interpretation of standing would persuade the court to conclude that the case was not appropriate for judicial review.

Finally, cavalier judicial attitude toward standing by state courts might discourage parties from litigating in federal courts and flood state courts with frivolous and improper actions. Lax standing requirements burden potential defendants because they encourage parties with arguably no standing to file suit nonetheless.

C. Rodriguez v. Suzuki Motor Corporation

1. Procedural Posture of *Rodriguez*

Rodriguez involved a Missouri statute requiring that fifty-percent of

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way of the ordinary trial and appeals process." State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1108, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999) (Moyer, C.J., dissenting).

62. *See supra* note 1.

63. The *Rodriguez* court, for example, chose not to follow the *Hughlett* decision, which held that "for a party to have standing to challenge the constitutionality of a statute he must demonstrate that he is adversely affected by the statute in question." W.R. Grace & Co. v. Hughlett, 729 S.W.2d 203, 206 (Mo. 1987). The *Rodriguez* court heard the case because the challenge brought was "real and substantial" and "brought in good faith." *Rodriguez,* 996 S.W.2d at 52.

all punitive damage awards be paid to the state's tort victims' compensation fund.[64] A Missouri trial court found Suzuki guilty and awarded actual and punitive damages to the plaintiff.[65] On retrial, Suzuki, *inter alia*, challenged Missouri's split recovery statute.[66] The Missouri Supreme Court recognized jurisdiction over the constitutional issue because the corporate defendant demonstrated that it was "adversely affected by the statute in question."[67] Oddly, the court did not address the merits of the constitutional claim because those issues were "not essential to the disposition of the case."[68] Suzuki used the constitutional argument as a means to invoke the court's jurisdiction over the other issues of the case.[69]

2. Improper Recognition of Standing

In hearing Suzuki's constitutional challenge of Missouri's split recovery statute, the Missouri Supreme Court erroneously expanded the doctrine of standing, squandered valuable judicial resources, and infringed upon legislative power. The dissent argued that the defendant lacked standing because "Suzuki would have to pay the entire punitive damage award to the plaintiff even if the statute is declared unconstitutional."[70] Since Suzuki was already found liable for punitive damages,[71] the recipient of the award, whether the plaintiff or the state of Missouri, was irrelevant. Therefore, Suzuki did not have a redressible claim because even if the court declared the statute unconstitutional Suzuki would not have derived any benefit.

3. Improper Recognition of Jurisdiction in General

Not only did Suzuki lack standing, its allegation was not "real and substantial."[72] The court based its jurisdictional authority on article V, section 3 of the Missouri Constitution. That constitutional provision

64. *See Rodriguez*, 996 S.W.2d at 47.

65. *See id.* at 50.

66. *See id.* at 51; *see also* MO. REV. STAT. § 537.675(2) (1994).

67. *Rodriguez*, 996 S.W.2d at 53; *see also Hughlett*, 729 S.W.2d at 206; Harrison v. Monroe County, 716 S.W.2d 263, 266 (Mo. 1986) (outlining standing requirements for litigants who wish to challenge the constitutionality of a statute).

68. *Rodriguez*, 996 S.W.2d at 53.

69. *Id.* at 51.

70. *Id.* at 53.

71. *See id.* at 50.

72. The *Rodriguez* court concluded, erroneously in the opinion of this author, that the claim was real and substantial. *See id.* at 51.

gives "the supreme court . . . exclusive appellate jurisdiction in all cases involving the validity of . . . a statute or provision of the constitution of this state."[73] However, allegations concerning the constitutionality of Missouri statutes must be real and substantial, not merely colorable.[74] Missouri courts generally define colorable as "feigned, fictitious or counterfeit."[75] Since the statute does not harm the defendant in question,[76] its allegation in *Rodriguez* is colorable at best.

4. Supplemental Jurisdiction

The majority in *Rodriguez* cited article V, section 10 of the Missouri Constitution as a supplemental justification for their exercise of jurisdiction.[77] This provision allows the supreme court to transfer a case *sua sponte* from the court of appeals before or after an opinion has been endorsed "because of the general interest or importance of a question involved in the case."[78] Obviously, the *Rodriguez* court was not confident in its exercise of jurisdiction if it chose to cite this supplemental justification. The citation to article V, section 10 was an attempt by the *Rodriguez* court to cover its footsteps.

5. Observations

The Missouri Supreme Court abused its judicial power. *Rodriguez* is, in effect, an advisory opinion because Suzuki neither had a personal stake[79] in the outcome of the case nor was it adversely affected[80] by the challenged statute. The opinion will carry significant precedential weight in Missouri state courts since it comes from the highest court in the state.[81] Even though the court did not actually strike down tort reform legislation, they did hold that the constitutional claim would be heard—despite the aforementioned arguments suggesting that the party

73. MO. CONST. art. V, § 3.

74. *See* AG Processing, Inc. v. S. St. Joseph Indus. Sewer Dist., 937 S.W.2d 319, 322 (Mo. Ct. App. 1996).

75. *Rodriguez*, 996 S.W.2d at 52.

76. The majority in *Rodriguez* did not demonstrate how Suzuki was "harmed by a statute that d[id] not cause it to pay a single penny more in punitive damages that it would without the statute." *Id.* at 66 (White, J., dissenting).

77. *See id.* at 54.

78. MO. CONST. art.V, § 10.

79. *See* Harrison v. Monroe County, 716 S.W.2d 263, 266 (Mo. 1986).

80. *See* W.R. Grace & Co. v. Hughlett, 729 S.W.2d 203, 206 (Mo. 1987).

81. Already one Missouri Court of Appeals case has followed *Rodriguez*. *See* Lopez v. Three Rivers Elec. Coop., Inc., 1999 Mo. App. LEXIS 2295, at *4-5 (Nov. 23, 1999) ("We are bound by [the *Rodriguez*] holding.").

did not have standing.[82]

Standing is an important check on judicial reviewability of legislative acts.[83] If a court waives standing requirements to hear constitutional challenges to statutes, the court comes close to usurping legislative power, which leads to aggrandizement of the judicial branch.

Future courts that follow *Rodriguez* and hear colorable constitutional allegations will essentially be permitted to veto any legislation they disagree with. Moreover, courts will be able to refrain from rigidly enforcing standing requirements because they are not accountable to anyone. There is no way to force a state supreme court to adopt rigid standing requirements since the United States Supreme Court cannot hear cases relating to tort reform.[84] If standing is not followed by the courts, and courts cannot be forced to follow standing, state judiciaries will essentially have the power to veto legislative action, including any tort reform measures. The *Rodriguez* decision is not an isolated incident. A few months after the *Rodriguez* decision came out, the Ohio Supreme Court ignored standing requirements and heard a challenge to similar tort reform legislation. This time, however, the court addressed the merits of the claim—and struck down an entire tort reform bill as unconstitutional.[85]

D. State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward

1. Ohio's Checks on Judicial Power

Ohio courts of law, much like other state courts across the country,[86]

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82. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 53 (1999).

83. *See generally* Sandra Day O'Connor, *The Seventh Anglo-American Exchange: Judicial Review of Administrative and Regulatory Action: Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643 (1986); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996); Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990).

84. *See* 28 U.S.C. § 1257(a) (2000). The United States Supreme Court can only grant *certiorari* to hear cases from state supreme courts when the issue pertains to the U.S. Constitution, federal statutes, or federal treaties. *See id.*

85. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1072, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999).

86. In Georgia, for example, "[l]egislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them." GA. CONST. art I, § 2, para. V. Other state constitutions have similar language. *See, e.g.*, N.Y. CONST. art. VI, § 3(b)(2) (conferring jurisdiction on the New York Court of Appeals to review judgments declaring that a state statute violates the New York constitution); VA. CONST. art. VI, § 1 (granting "appellate jurisdiction in cases involving the constitutionality of a law under [the Virginia] constitution"). *See generally* 16 AM. JUR. 2D *Constitutional Law* §

have the power to review the constitutionality of a legislative act.[87] This power of constitutional adjudication is secured exclusively in the judiciary as a check upon the other branches of government.[88] In turn, Ohio law proscribes two checks to curb judiciary abuse of power. The first one is the "policy and wisdom" check articulated in *State ex rel. Bishop v. Board of Education.*[89] Courts should only review questions of legislative power.[90] Issues surrounding legislative policy are non-justiciable, no matter how foolish the policy may appear.[91] A legislature that is subordinated to the judiciary frustrates the objectives surrounding the three branches of government. The second check, and a major aspect of the *Sheward* controversy, is the policy of standing.[92]

2. Ohio's Trouble Spots

Ohio's standing policy is problematic for two reasons. First, although Ohio has a common-law standing doctrine,[93] standing is one area of civil procedure where the states are not bound by federal law. "Unlike the federal courts, state courts are not bound by constitutional strictures on standing... [but] state courts... are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."[94] This procedural oddity encourages courts to favor convenience over justice. Justice Resnick pointed out in her opinion that "in state courts[,] standing is a self-imposed rule of restraint."[95] Commenting on its reasons for recognizing standing and

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129 (1998); 52 AM. JUR. 2D *Mandamus* § 94 (1998).

87. *See, e.g.,* State *ex rel.* Bowman v. Allen City Bd. of Comm'rs, 177 N.E. 271, 278 (Ohio 1931); OHIO CONST. art. IV.

88. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1079, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999).

89. 40 N.E.2d 913, 919 (Ohio 1992).

90. *See id*; Johnson v. BP Chems., Inc., 707 N.E.2d 1107, 1111 (Ohio 1999); Brady v. Safety-Kleen Corp., 576 N.E.2d 722, 728 (Ohio 1991).

91. *See* Superior Dairy, Inc. v. Stark County Milk Producers' Ass'n, 100 N.E.2d 695, 700 (Ohio Ct. App. 1950).

92. For a general overview of standing in Ohio jurisprudence, *see* Ohio Contractors Ass'n v. Bicking, 643 N.E.2d 1088, 1089 (Ohio 1994); State *ex rel.* Consumers League of Ohio v. Ratchford, 457 N.E.2d 878, 883 (Ohio Ct. App. 1982); Fortner v. Thomas, 257 N.E.2d 371, 372 (Ohio 1970). For the federal guidelines on standing, *see* Flast v. Cohen, 392 U.S. 83, 102 (1968) (holding that taxpayer has standing to sue to overturn a federal tax or spending program). For further review of standing *see supra* Part II.A, II.B.

93. *See supra* Part II.B.2.

94. 59 AM. JUR. 2D *Parties* § 30 (1987). In federal courts, the necessity of proving injury-in-fact remains whether the party is seeking to enforce a private or public right. *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Sierra Club v. Morton, 405 U.S. 727 (1972).

95. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1081, *recons.*

hearing the case, the *Sheward* court noted that a "denial of jurisdiction would force a piecemeal determination over time of the various provisions of the bill"[96] and that such delay would damage the public by "protect[ing] this legislation from any timely, meaningful and inclusive review."[97]

The second problem in Ohio stems from the state's active judiciary.[98] The Ohio Supreme Court frequently recognizes standing and hears cases with issues of great importance and interest to the public.[99] Other state courts similarly situated might refrain from hearing the case. A closer look at *Sheward* reveals the consequences of these two problems.

3. The *Sheward* Facts

Sheward involved a constitutional attack on Ohio's Tort Reform Bill House Bill 350[100] brought by the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO.[101] The parties filed a writ of mandamus and a writ of prohibition in the Ohio Supreme Court.[102] The relators[103] sought to have the supreme court prohibit Ohio trial court judges from enforcing any aspect of the tort reform bill.[104] They argued that the bill "intrudes upon judicial power by declaring itself constitutional, by reenacting legislation struck down as unconstitutional, and by interfering with [the Ohio Supreme Court's] power to regulate court procedure."[105] The Ohio Supreme Court found standing and recognized that it had original jurisdiction.[106] In a 5-4 decision, the court struck down the entire tort reform bill as unconstitutional.[107]

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denied, 716 N.E.2d 1170 (Ohio 1999).

96. *Id.* at 1109.

97. *Id.*

98. *See* Werber, *supra* note 6, at 576 ("[I]n some instances... the [supreme] court has taken unto itself the task of speaking for the people where that role is more appropriately assigned to the General Assembly.").

99. *See id; see also* State *ex rel.* Newell v. Brown, 122 N.E.2d 105, 107 (Ohio 1954) ("Where a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship.").

100. Am. Sub. H.B. 350, 121st Gen. Assem. (Ohio 1997).

101. *See Sheward*, 715 N.E.2d at 1062.

102. *See id.*

103. A relator is an "applicant for a writ." BLACK'S LAW DICTIONARY 1292 (7th Ed. 1999).

104. *See generally Sheward*, 715 N.E.2d at 1062.

105. *Id.* at 1076.

106. The original jurisdiction issue will be discussed *infra* Part III.

107. *Sheward*, 715 N.E.2d at 1072.

The *Sheward* court addressed the two checks on the judiciary's abuse of power. Although the relators' claim involved legislative policy, the court heard the case under the public-right doctrine, despite strong court discussion that would suggest otherwise.[108] For instance, the court acknowledged that "all arguments going to the soundness of legislative policy choices . . . are directed to their proper place, which is outside the door to this courthouse."[109] Furthermore, the *Trauger* court wrote that "[t]here are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed unless under circumstances when the public injury by its refusal will be serious."[110] The *Sheward* court further admitted that the claim should not be allowed as a private action.[111] Nevertheless, the court enforced the public-right doctrine because the claim was of great public importance.[112]

4. Impact of the Public-Right Doctrine

In light of the public-right doctrine, the *Sheward* court waived all standing requirements.[113] The court admitted that the "[r]elators themselves have no personal or private right to secure judicial review."[114] Ohio frequently grants taxpaying citizens standing to bring a writ of mandamus action to enforce a public duty, even though the citizen has no special interest in the procurement of the right.[115] Underneath the surface, the relators do have a special interest at stake in *Sheward*. The

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108. *See Sheward*, 715 N.E.2d at 1104.

109. *Id.* at 1072.

110. State *ex rel.* Trauger v. Nash, 64 N.E. 558, 559 (Ohio 1902).

111. *See Sheward*, 715 N.E.2d at 1084.

112. *See id.* at 1104 (explaining that the court felt obliged to protect the people's interest in keeping the judicial power of the state in whom they vested it).

113. *See id.* at 1084. The *Sheward* court noted the following:

> [W]here the object of an action in mandamus . . . is to procure the enforcement or protection of a public right, the relator need not show any legal interest . . . it being sufficient that [the] relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.

Id.

114. *Id.* at 1108.

115. *See Trauger*, 64 N.E. at 559 (holding that private citizen may be plaintiff in a mandamus action to enforce the performance of a public duty affecting himself as a citizen and the citizens of the state at large); State *ex rel.* Newell v. Brown, 122 N.E.2d 105,107 (Ohio 1984). *But see* State *ex rel.* v. Henderson, 38 Ohio St. 644, 650 (Ohio 1883) (holding that plaintiff seeking to enforce private rights must show some special interest in the subject matter).

party bringing the action in *Sheward* consisted mainly of trial attorneys.[116] If punitive damage caps are declared unconstitutional, these lawyers will benefit from increased damage awards since most work on a contingency fee basis.[117] It is not a stretch of the imagination to argue that these lawyers appear to be primarily motivated by the potential of pecuniary gain, not by a desire to enforce a public right.

The existence of the public-right doctrine to challenge legislative policy frustrates the principle of separation of powers. In addition, the court's exercise of this doctrine in *Sheward* is clearly improper.

5. Aftermath of the *Sheward* Decision

Sheward should raise awareness of this tort reform war across the country. State courts should not be free to reject procedural frustrations[118] and should, at the very least, use federal court standing policy as a guiding principle. States should not be forced into strict compliance of federal court procedures. However, current state standing policies,[119] particularly in Ohio and Missouri, are too moderate. State courts are creatures of their respective state constitutions and do not have plenary power. Exercising jurisdiction whenever a court sees fit frustrates the judicial policy that the wisdom of a statute "is the exclusive concern of the legislative branch of the government."[120] This propensity encourages judicial activism and frustrates the legislature's ability to formulate policy.[121] Ohio's historical inclination to apply the public-right doctrine[122] encourages more lawsuits. Courts that apply the public-right doctrine also run the risk of issuing advisory opinions.

In addition to the arguments in favor of eliminating the public-right doctrine, *Sheward* did not involve a public interest of great

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116. *See Sheward*, 715 N.E.2d at 1068 n.1.

117. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 526 (1986).

118. *See supra* Part II.D.2.

119. *See supra* Part II.B.2-4; *see, e.g.*, Wimberly v. Ettenberg, 570 P.2d 535, 539 (Colo. 1977); *In re* Estate of Wellman, 673 N.E.2d 272, 276 (Ill. 1996); State v. Baltimore, 495 N.W.2d 921, 925 (Neb. 1993); Morse Bros. Prestress, Inc. v. City of Lake Oswego, 640 P.2d 650, 651 (Or. Ct. App. 1982).

120. State *ex rel.* Bishop v. Bd. of Educ., 40 N.E.2d 913, 919 (Ohio 1992).

121. Alexander M. Bickel asserts that "when the Supreme Court declares unconstitutional a legislative act... it thwarts the will of representatives of the actual people... and... exercises control, not in behalf of the prevailing majority, but against it." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986).

122. *See, e.g.*, State *ex rel.* Carter v. N. Olmsted, 631 N.E.2d 1048, 1054 (Ohio 1994) (holding that taxpayer has standing to enforce the public's right to proper execution of city charter removal provisions, regardless of any private or personal benefit).

importance.[123] Attacking the constitutionality of the bill is not a public duty. Furthermore, refusal of jurisdiction will not cause public injury.[124] Since the impact of the tort reform bill is unknown, concluding that it is an issue of great public importance is erroneous. Since the bill is still in infancy, there is insufficient evidence to prove that a refusal of standing will result in a serious public injury. The court should not grant jurisdiction based on an anticipated injury to the public. Otherwise, causes of action would seemingly never end.

Second, there was no public duty to be enforced because the impact of House Bill 350 could not have been predicted until there was more evidence of the impact of the statute. *Sheward* prematurely expressed a desire to "protect the people's interest in keeping the judicial power of the state in whom they vested it."[125] Prohibiting a legislative act, which is the relief sought in *Sheward*, is not a public duty, and the court's waiver of the injury-in-fact requirement was inappropriate.

Although the public-right doctrine is rooted in Ohio jurisprudence, extending the doctrine "so as to equate public duty with enforcement of the doctrine of separation of powers, or with preservation of judicial power within the judiciary"[126] is a revolutionary act. Moreover, the supreme court struck down the *entire* statute, which encompassed over 246 pages, instead of nullifying certain provisions.[127] It is the constitutional duty of the Ohio Supreme Court to use all *legal* means to preserve the integrity and independence of the judiciary—but not to abuse it.[128]

III. *SHEWARD*: IMPROPER GRANT OF ORIGINAL JURISDICTION

A. Introduction

Not only were the relators in *Sheward* the wrong parties, "they sought the wrong relief in the wrong court."[129] Their petitions for writs of mandamus and prohibition were clearly masked requests for an

123. The *Sheward* court enforced the public-right doctrine because it argued the issue was of great public importance. *See* 715 N.E.2d 1062, 1104, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999).

124. *See supra* Part II.D.2.

125. 715 N.E.2d at 1104.

126. *Id.* at 1116 (Moyer, C.J., dissenting).

127. *See* Peck, *supra* note 14.

128. *See, e.g.*, Beagle v. Walden, 676 N.E.2d 506, 508 (Ohio 1997) ("Interpretation of the state and federal Constitutions is a role exclusive to the judicial branch.").

129. *Sheward*, 715 N.E. 2d at 1079.

injunction, which cannot be heard by the Ohio Supreme Court.[130] The Ohio Supreme Court's willingness to grant original jurisdiction in *Sheward* is a grave danger to the separation of powers and, furthermore, it compromises the integrity of the Ohio legal system.

The Ohio Supreme Court has original jurisdiction for any writ of mandamus or writ of prohibition action.[131] In *Sheward,* the relators sought a writ of prohibition to prevent the trial court judges from implementing the provisions of Ohio's Tort Reform Bill.[132] Additionally, they sought a writ of mandamus ordering respondents (the judges) to follow "'the rules of civil procedure, the rules of evidence, the relevant constitutional decisions and common law notwithstanding contrary provisions in [House Bill 350]."[133] The court granted the writs.[134] The facts in *Sheward,* however, do not satisfy the common law requirements for a writ of mandamus or a writ of prohibition.[135] The relators disguised their request for declaratory relief as a writ of mandamus, and since the Ohio Supreme Court has no jurisdiction to grant an injunction,[136] the grant of the writ of mandamus was erroneous. In *State ex rel. Governor v. Taft,* the court held that a mandamus action, challenging the constitutionality of a bill, cannot be maintained in the Supreme Court of Ohio where the actual relief sought is in the nature of a declaratory judgment or injunction.[137] Finally, the relators lacked standing to bring the prohibition and mandamus actions.[138]

B. The Writ of Prohibition

1. Requirements

Ohio case law establishes a specific test for a writ of prohibition. The requirements are as follows:

(1) the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power;
(2) the exercise of such power is unauthorized by law; and

130. *See* OHIO CONST. art. IV, § 2.
131. *See* OHIO CONST. art. IV, § 2(B)(1)(b)(d).
132. 715 N.E.2d at 1062.
133. *Id.*
134. *See id.* at 1111.
135. *See infra* Part III.A, III.B.
136. *See* OHIO CONST. art. IV, § 2.
137. 640 N.E.2d 1136, 1138 (Ohio 1994).
138. For a discussion of standing in the *Sheward* case, see *supra* Part II.D.

(3) that refusal of the writ will result in injury for which there is no other adequate remedy in the ordinary course of the law.[139]

Clearly "[p]rohibition is not available to determine the constitutionality of a statute or ordinance, where the relator has . . . an adequate remedy at law by way of appeal."[140] Prohibition is an extraordinary remedy reserved for exceptional circumstances and "will not lie to prevent an anticipated erroneous judgment."[141] In other words, a writ of prohibition should only be granted as a last legal resort.

2. Applying the test to *Sheward*

Sheward did not involve any potential exercise of unauthorized judicial power by the respondents.[142] As trial court judges, respondents are authorized to decide cases filed in their courts.[143] The trial courts can hear cases involving allegations that statutes are unconstitutional;[144] they have not yet been presented with an opportunity to decide the constitutionality of the tort reform bill.[145] Even if the trial courts had ruled on House Bill 350, "a writ of prohibition is not a substitute for appeal."[146]

Furthermore, the relators clearly had alternative adequate remedies available at the trial court level, although the trial courts have no

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139. State *ex rel.* Susi v. Flowers, 330 N.E.2d 662, 664 (Ohio 1975); State ex rel. McKee v. Cooper, 320 N.E.2d 286, 288 (Ohio 1974).

140. State *ex rel.* Crebs v. Court of Common Pleas, 309 N.E.2d 926, 927 (Ohio 1974). *But see* Franchise Developers, Inc. v. Cincinnati, 505 N.E.2d 966, 969 (Ohio 1987) (holding that a court may hear the appeal where there remains a debatable constitutional question to resolve, or "where the matter appealed is one of great public or general interest").

141. State *ex rel.* Mansfield Tel. Co. v. Mayer, 215 N.E.2d 375, 376 (Ohio 1966); State *ex rel.* Bier v. Court of Common Pleas, 194 N.E.2d 849, 850 (Ohio 1963); *see also* State *ex rel.* Zakany v. Avellone, 387 N.E.2d 1373, 1374 (Ohio 1979) (arguing that prohibition, an extraordinary remedy entertained with caution, "will not lie to prevent an anticipated erroneous judgment").

142. Parts one and two of the three-part test for the issuance of a writ of prohibition require that a court or official against whom the writ is sought must be about to exercise judicial power that is unauthorized by law. *See Flowers*, 330 N.E.2d at 662; *Cooper*, 320 N.E.2d at 286.

143. *See* OHIO CONST. art. IV, § 4.

144. *See* OHIO REV. CODE ANN. § 2721.02 (Anderson 2000); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1116, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999) (Moyer, C.J., dissenting).

145. *See Sheward*, 715 N.E.2d at 1116 (Moyer, C.J., dissenting) ("Relators are, in effect, improperly pursuing interlocutory appeals of rulings that the trial courts have not yet made, but that the relators suspect they may make.").

146. State *ex rel.* Ellis v. McCabe, 35 N.E.2d 571, 572 (Ohio 1941).

jurisdiction to grant extraordinary writs.[147] Trial courts have general jurisdiction and the authority to declare a statute unconstitutional.[148] For example, a "declaratory judgment action offers an adequate remedy to challenge the constitutionality of a statute, initially in the trial courts, followed by appellate review."[149] Thus, the proper route would be to file a declaratory judgment suit in an Ohio trial court.

C. The Writ of Mandamus

1. Requirements

Mandamus, like prohibition, is not a substitute for appeal.[150] The unenvious prospect of maintaining an action through a lengthy appeal process "does *not* entitle the relator to such an extraordinary writ."[151] Requirements for the issuance of a writ of mandamus are similar to those needed for a writ of prohibition. The court must find "that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law."[152]

2. Applying the test to *Sheward*

The relators had no legal right to have the judges "follow 'the rules of civil procedure, the rules of evidence, the relevant constitutional decisions and common-law... notwithstanding contrary provisions in [House Bill 350]'"[153] because they lacked standing, although the *Sheward* court did grant standing.[154] Moreover, the relators had the right to file suit at the trial court level, which would have ensured that their claims

147. *See* State *ex rel.* Bernges v. Common Pleas Court, 260 N.E.2d 839, 840-41 (Ohio 1970) (holding that the court of common pleas does not have jurisdiction to issue a writ of prohibition).

148. *See* OHIO CONST. art. IV, § 4.

149. *Sheward*, 715 N.E.2d at 1116 (Moyer, C.J., dissenting).

150. *See* State *ex rel.* Keenan v. Calabrese, 631 N.E.2d 119, 121 (Ohio 1994).

151. State *ex rel.* Zupancic v. Limbach, 568 N.E.2d 1206, 1210 n.2. (Ohio 1991) (emphasis added); *see also* State *ex rel.* Willis v. Sheboy, 451 N.E.2d 1200, 1201 (Ohio 1983) ("[W]here a constitutional process of appeal has been legislatively provided, the sole fact that pursuing such process would encompass more delay and inconvenience than seeking a writ of mandamus is insufficient to prevent the process from constituting a plain and adequate remedy in the ordinary course of law.") (citations omitted).

152. State *ex rel.* Westchester Estates, Inc. v. Bacon, 399 N.E.2d 81, 83 (Ohio 1980).

153. *Sheward*, 715 N.E.2d at 1069 (citations omitted).

154. *Id.* at 1084-85.

potentially could be heard at all three levels of the Ohio court system.[155] Mandamus is an improper cause of action to challenge the constitutionality of House Bill 350.

Even if a mandamus action could be maintained, the relators' request in *Sheward* is for injunctive relief. A writ of mandamus remedy is problematic because it bears a striking resemblance to injunctive relief.[156] Thus, citizens might disguise an injunction as a writ of mandamus in order to get their claim heard quickly by the Ohio Supreme Court.[157] The *Zupancic* court noted that "[it] will scrutinize pleadings in order to assure that actions filed by parties requesting mandamus relief are consistent with . . . prior decisions as to the form and substance of the relief sought."[158] The *Pressley* court, meanwhile, set out to determine the type of relief the plaintiff actually desired. That court wrote the following:

> Where a petition filed in the supreme court or in the court of appeals is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the supreme court nor the court of appeals has original jurisdiction in injunction the action must be dismissed for lack of jurisdiction.[159]

Yet, the Supreme Court did not dismiss the petition in *Sheward,* even though the relators in reality sought an injunction barring the Common Pleas court judges from enforcing the provisions of House Bill 350. In summary, the grant of original jurisdiction was an abuse of power by the Ohio Supreme Court,[160] which compromised the principle

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155. *See id.* at 1114 (Moyer, C.J., dissenting).

156. Chief Justice Moyer elaborates on this controversy in his dissent. Moyer states that "an order prohibiting an official from carrying out a duty imposed by a current statute, because it is unconstitutional, is of no substantive difference from an order mandating that the official carry out duties established by preexisting law, because the current statute is unconstitutional." *Id.* at 1116 (Moyer, C.J., dissenting).

157. Injunctions and declaratory judgments disguised as a writ of mandamus cannot be heard by the Ohio Supreme Court. *See* State *ex rel.* Governor v. Taft, 640 N.E.2d 1136, 1138 (Ohio 1994).

158. State *ex rel.* Zupancic v. Limbach, 568 N.E.2d 1206, 1208 (Ohio 1991).

159. State *ex rel.* Pressley v. Indus. Comm'n, 228 N.E.2d 631, 631 (Ohio 1967) (syllabus).

160. The grant of original jurisdiction violates the separation of powers because the court is exercising jurisdiction when it has no statutory authority to do so. Since I discussed the effects of this violation in Part I, I will focus on the impact of the violation of the tri-level judiciary in this section.

of a tri-level judiciary because it is an improper waiver of standard civil procedures.

3. The Proper Avenue

The Ohio Academy of Trial Lawyers should have brought the action in trial court, so the suit could be subject to the appeal process. Parties are legally required to follow the ordinary course of judicial review absent certain circumstances. In addition, with more judges hearing the case and greater time and scope of fact finding, the Ohio courts as a whole would be better situated to reach a prudent legal conclusion. Most importantly, given the scope of House Bill 350, granting original jurisdiction will place future tort reform under immense scrutiny. The relators in effect bypassed standard jurisdictional channels to challenge the entire tort reform enactments.[161] Future bills will be susceptible to attack through the granting of extraordinary writs, despite ready access to "'standard trial and appellate avenues.'"[162]

IV. CONCLUSION

A. Options

State governments have several options to alleviate controversy surrounding this tort reform war. Wisconsin, or any other state for that matter, should take the initiative in hope of creating a "domino effect" in which all states would clarify the judiciary-legislature relationship.

First, state representatives could establish a Uniform Tort Law. A major problem right now is that state legislatures are trying to outdo their peers. Why did Ohio feel it was necessary to pass a bill five times longer than the recent Illinois tort bill?[163] Recent tort reform bills cannot help but create controversy. Although torts are common law causes of action, states have passed other uniform acts, such as the Uniform Commercial Code, which deals in areas traditionally governed by common law.[164] Even at a rudimentary level, uniformity might facilitate more reasonable tort reform statutes that might not be

161. *See* Recent Cases, *State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, 113 HARV. L. REV. 804, 806 (2000).

162. *Id.* at 806 (quoting State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1114, *recons. denied*, 716 N.E.2d 1170 (Ohio 1999)).

163. *See* Peck, *supra* note 14, at 66.

164. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1 (5th ed. 2000).

challenged as readily as they were in Ohio.

Second, legislatures can codify standing requirements, much like they have for personal and subject-matter jurisdiction. Courts receive their power from state constitutions; legislatures can propose constitutional amendments.[165] Similarly, the legislature can also limit the availability of original jurisdiction.

Third, both the courts and the legislature could tone down their respective aggressiveness. A main theme of this Comment is the "war" over tort reform and judicial power. This does not have to be the case. Unfortunately, "both sides in the tort law debate may be guilty of exaggerating the promises and perils of reform measures."[166] If both sides soften their stance, the retaliatory element in the struggle might subside.

B. Aftermath of Rodriguez *and* Sheward

Ohio and Missouri's lax standing requirements and Ohio's controversial recognition of original jurisdiction in *Sheward*[167] present daunting obstacles to the preservation of the separation of powers. Courts should eliminate the dangerous practice of allowing citizens to intrude into affairs traditionally reserved for the legislature. Citizens who have not suffered an injury-in-fact should follow the proper route if they are upset with new legislation, by petitioning the legislature to voice their concerns, not burden the courts with their grievances. Furthermore, *Rodriguez* and *Sheward* did not express confidence in their opinions. *Rodriguez* offered a supplemental justification for its exercise of jurisdiction.[168] The *Sheward* court included the "anatomy" of the dissents[169] in its opinion.

Additionally, both cases establish new standing doctrines and are examples of abusive judicial power. *Rodriguez* ignores the standing requirement. *Sheward* overrules Ohio case law and permits a party to obtain a writ of mandamus to enforce a public right without the relator proving a special interest in the subject matter.[170] The judiciary cannot act with such indiscretion.

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165. *See, e.g.*, OHIO CONST. art. XVI, § 1; MO. CONST. art. 12, § 2; WIS. CONST. art. XII, § 1.

166. Thompson, *supra* note 9, at 69.

167. 715 N.E.2d at 1084-85.

168. 996 S.W.2d 47, 54 (Mo. 1999).

169. At the end of its opinion, the majority addressed several of the dissenters' arguments. *See Sheward*, 715 N.E.2d at 1103-11.

170. 715 N.E.2d at 1116 (Moyer, C.J., dissenting).

Other states, including Wisconsin, that will undoubtedly face a tort reform controversy in the future, must not make the same mistakes. The three-branch system of government is not perfect. On many issues one of the branches must have the final word. The judiciary, under our current legal system, has the power to find loopholes in the system and exercise its discretion. The legislative and executive branches must limit this discretionary power. Otherwise, the future of the separation of powers and any possibility of tort reform are at stake. If other state courts choose to follow the reasoning of the Ohio and the Missouri supreme courts, they will trigger similar legislative-judicial tension and place an eternal obstacle in the path of tort reform.

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