

THE LEGISLATURE VERSUS THE JUDICIARY: DEFINING “INJURY” UNDER THE TORT IMMUNITY ACT

INTRODUCTION

Illinois law currently leaves local governmental entities and their employees wondering whether and to what degree they enjoy immunity from lawsuits relating to their official duties. The governing statute seems clear on its face: the plain language of the Illinois Local Governmental and Governmental Employee Tort Immunity Act¹ (“Tort Immunity Act” or “Act”) grants local governmental entities and their employees immunity from both tort suits and certain other civil actions, including suits arising under the Illinois constitution. In fact, the Act’s text unambiguously provides that its coverage extends to “any injury alleged in a civil action, whether based upon the Constitution of the United States or the Constitution of the State of Illinois, and the statutes or common law of Illinois or of the United States.”² However, statutory interpretation has rendered the Act’s seemingly clear text ambiguous. In several recent decisions, Illinois courts have recognized only immunity from tort suits. The conflict between the plain language of the Act as written by the legislature and its interpretation by the judiciary arises from conflicting definitions of an “injury.” On one hand, the plain language of the Act explicitly mandates that local governmental entities and their employees are immune from actions under the Constitution of the State of Illinois.³ But, on the other hand, some Illinois courts have refused to recognize the full extent of this coverage, instead limiting the immunity afforded by the Act to protection against tort lawsuits alone.⁴

This conflict is improper, and courts should resolve it by acknowledging the full definition of immunity provided in the statute’s plain language. Courts should do so for several reasons. First, this inconsis-

1. The entire statute is codified at 745 ILL. COMP. STAT. 10/1-101 to 10/1-210 (2006). The Act was first enacted in 1965; section 1-204, which defines an injury for purposes of the Act, was amended in 1986.

2. 745 ILL. COMP. STAT. 10/1-204.

3. *Id.*

4. *See, e.g.,* *People ex rel. Birkett v. City of Chicago*, 758 N.E.2d 25, 30 (Ill. App. Ct. 2001) (stating that the Tort Immunity Act does not apply to claims brought under the Illinois state constitution).

tency weakens legal authority.⁵ Second, the functioning of the Illinois legal system is impaired by the conflict between two branches of its government.⁶ Third, it is more proper for the legislature to define this area of the law than for the judiciary to do so.⁷ Fourth, because the courts are meant to act as a check on the legislature, it is improper for courts to overlook the express intent of the legislature without either overturning the statute or excising part of it for some justifiable purpose.⁸

This Note argues that the Illinois Supreme Court should eliminate the contradiction between the Act's text and its interpretation by honoring the legislature's intent. Part II discusses the historical context of sovereign and local governmental immunity and traces the development of each in Illinois.⁹ Part III examines several Illinois court decisions limiting municipal immunity to protection solely against torts, consequently excluding actions under the Illinois constitution from coverage under the Act.¹⁰ Part III also critiques the courts' reasoning in those cases.¹¹ Part IV assesses the impact of the existing discrepancy and presents the benefits of resolving the contradiction by honoring the statute's plain language.¹² While recognizing the full definition intended by the legislature is the most straightforward and appropriate solution available to the courts, Part IV also considers other means by which the inconsistency could be eliminated.¹³ Many other states have enacted immunity statutes similar to Illinois's Act without creating similar inconsistency in their laws; Part IV references some of the means chosen by those states as options to which the Illinois legislature or judiciary might look for guidance in resolving this conflict.¹⁴ However, the Illinois Supreme Court should resolve this irregularity by following the established rules of statutory construction and honoring the legislature's intent, both of which would be accomplished by

5. *See infra* notes 141–161 and accompanying text.

6. *See infra* notes 179–194 and accompanying text.

7. *See infra* notes 220–232 and accompanying text.

8. *See* *United States v. Brown*, 381 U.S. 437, 442 (1965) (stating that the framers of the Constitution intended the Bill of Attainder Clause to implement the separation of powers among branches of government, thus acting as “a general safeguard against legislative exercise of the judicial function”); *see also* ILL. CONST. art. II, § 1 (1970) (separation of powers clause); *Harinek v. 161 N. Clark St. Ltd. P’ship*, 692 N.E.2d 1177 (Ill. 1998).

9. *See infra* notes 24–134 and accompanying text.

10. *See infra* notes 135–204 and accompanying text.

11. *Id.*

12. *See infra* notes 205–233 and accompanying text.

13. *Id.*

14. *Id.*

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recognizing the full meaning of injury clearly intended by the Act's authors.

II. BACKGROUND

To understand the current state of local governmental immunity in Illinois, it is helpful to study the doctrine's origins. This Part examines the common law doctrine of sovereign immunity,¹⁵ how it became the law in Illinois,¹⁶ and why Illinois ultimately replaced it with statutory immunity.¹⁷ First, it traces the development of local governmental immunity, starting with Illinois courts' initial adoption of common law sovereign immunity and its extension to municipalities, followed by courts' later decisions to overturn it, thus subjecting local governmental bodies and their employees to liability for acts undertaken while carrying out official duties.¹⁸ It then discusses the incorporation of this change into the Illinois constitution.¹⁹ Subsequently, this Part analyzes the legislature's response: the passage of the Tort Immunity Act, which created statutory immunity from certain lawsuits brought against local governmental bodies and their employees and the amendment of the Act to include actions under the Illinois constitution.²⁰ This Part next provides an overview of the Act's terms²¹ and cases properly applying those terms.²² Finally, it examines a number of early cases that interpreted the Act's scope using the original definition of injury and compares them with cases decided after the legislature amended injury to include actions under the Illinois constitution.²³

A. *Sovereign Immunity*

The roots of the governmental immunity provisions found in the Tort Immunity Act date back to precolonial England.²⁴ Specifically, the Illinois Supreme Court has traced the concept to the English doctrine of sovereign immunity, which protected the king from lawsuits,²⁵ as well as to an early English decision extending the doctrine to limit a

15. *See infra* notes 24–32 and accompanying text.

16. *See infra* notes 33–50 and accompanying text.

17. *See infra* notes 51–63 and accompanying text.

18. *See infra* notes 24–58 and accompanying text.

19. *See infra* notes 59–61 and accompanying text.

20. *See infra* notes 62–64 and accompanying text.

21. *See infra* notes 65–77 and accompanying text.

22. *See infra* notes 78–106 and accompanying text.

23. *See infra* notes 107–134 and accompanying text.

24. *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 93 (Ill. 1959).

25. *Id.* at 91.

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municipality's liability.²⁶ England created sovereign immunity to protect its king and to acknowledge his supremacy.²⁷ The doctrine, literally signifying that "the King can do no wrong,"²⁸ recognized that the king was exempt from suits against him to which he did not consent.²⁹ Considering the founders' hostility toward the idea of an untouchable ruler and their desire to place the government within the reach of its citizens, one wonders why they adopted such a provision.³⁰ Despite these tenets, the founders were sufficiently concerned that the federal government would interfere with the sovereignty of individual states at the time of the U.S. Constitution's ratification to revive the doctrine, which was seen as protecting against the federal threat.³¹ The Eleventh Amendment ultimately was passed to address these concerns.³²

Sovereign immunity became the law in Illinois at the state's inception, when Illinois adopted English common law and incorporated it into the state constitution.³³ Under this doctrine, governmental entities and their officers were immune from suit for many acts undertaken pursuant to their official duties. The doctrine rested in part on policy concerns regarding the monetary burden such suits would place on taxpayers.³⁴ For example, in *Craig v. City of Charleston*, the Illi-

26. *Id.* (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359).

27. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 458 n.1 (Cal. 1961); *see also* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (reviewing the history of sovereign immunity, pointing out its conflict with basic American democratic principles, criticizing its recent expansion, and arguing in favor of abolishing sovereign immunity).

28. *Muskopf*, 359 P.2d at 458 n.1.

29. Angela S. Fetcher, *Outdated, Confusing, and Unfair: A Glimpse at Sovereign Immunity in Kentucky*, 41 BRANDEIS L.J. 959, 960 (2003). *Cf.* Mark C. Niles, "Nothing but Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1283 (2002) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 102-03 (1996) (Souter, J., dissenting) (stating that sovereign immunity limited the law's power both substantively, because the King was effectively above the law, and jurisdictionally, because the King was the source of justice and therefore not to be judged by himself)).

30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The signers complained of the king's "long train of abuses and usurpations," including his "refus[al] to assent to [his own] laws" and his refusal to afford representation to all citizens, resulting of course in absolving "all allegiance to the British Crown." *Id.* at para. 2, 32. Much of the criticism of state and local immunity provisions stems from the sentiment that immunity is hostile to the American system. *See also* Chemerinsky, *supra* note 27, at 1201-02.

31. Fetcher, *supra* note 29, at 960-61.

32. *Id.*

33. *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 98 (Ill. 1959) (Davis, J., dissenting).

34. *Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15*, 763 N.E.2d 756, 760 (Ill. 2002) ("By providing immunity [to local governmental entities via the Tort Immunity Act], the General Assembly sought to prevent the dissipation of public funds on damage awards.").

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nois Supreme Court absolved the city and its mayor from liability for the actions of one of its police officers:

The same principle which absolves the city from liability for [the officer's] tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the state. If the [mayor's] appointment [of the officer] was a wrongful act, which resulted in injury to the appellant, the burdens of liability cannot be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the state and in excess of the legal powers of the city.³⁵

The Illinois Supreme Court recognized a similar exception to the usual rule of *respondeat superior* in *Wilcox v. City of Chicago*.³⁶ *Wilcox* dealt with fire protection, another municipal power.³⁷ In its reasoning, the court cited “a uniform line of decisions holding that cities are not liable for the negligent acts of officers or men employed in their fire departments whilst in the discharge of their duty.”³⁸ The court upheld this principle:

To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. . . . To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burdens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority.³⁹

Thus, sovereign immunity was an established doctrine in Illinois, having been implemented to protect society at large and property holders in particular.

Although such immunity was well supported in state decisional law, it was not without criticism.⁴⁰ Some of this criticism goes to the doc-

35. 54 N.E. 184, 184–85 (Ill. 1899). Immunity also barred municipal liability for police conduct in *President and Board of Trustees of the Town of Odell v. Schroeder*, 58 Ill. 353, 356 (1871).

36. 107 Ill. 334 (1883).

37. *Id.* at 336.

38. *Id.* at 338.

39. *Id.* at 339–40.

40. This criticism continues today and is reflected in substantial legal scholarship. Interesting recent developments include discussions of whether sovereign immunity might be available as a defense against government misconduct in the War on Terror, including offenses in Guantanamo Bay, Iraq, and Afghanistan. See, e.g., Susan Burke, *Accountability for Corporate Complicity in Torture*, 10 GONZ. J. INT'L LAW 81 (2006); Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 365 (2006); Kelly Mahon Tullier, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 887 (1992) (criticizing the use of immunity to shield government actors where the result is “a duty to none” where there ought to be a duty to all).

trine's core, including the fact that sovereign immunity principles were never extended to units other than those at the state level.⁴¹ Because municipalities and other entities—protected then by common law immunity and today by the Tort Immunity Act—technically are not distinct “sovereigns,” it is important to distinguish between state sovereign immunity and local governmental immunity.⁴² Some authority justifies extending sovereign immunity to municipalities under the theory that municipalities act as the sovereign's representatives or agents.⁴³ The Illinois Supreme Court found the justification for extending sovereign immunity to municipalities in the 1788 English decision *Russell v. Men of Devon*.⁴⁴ In *Russell*, suit against a municipality was disallowed on two main grounds.⁴⁵ First, there were no funds out of which to pay a judgment against the municipality.⁴⁶ Second, the court justified suppressing plaintiff's ability to sue, because doing so protected the public good, which it deemed superior to that of an individual plaintiff's ability to redress her grievance.⁴⁷

Similar logic persists today in many states—including Illinois—that have limited or eliminated the liability of local government units and their employees for certain acts undertaken within their official capacities.⁴⁸ In Illinois, courts have taken notice that, by passing the Act,

41. See *supra* note 40.

42. 18 EUGENE MCQUILLIN, MCQUILLIN MUN. CORP. § 53.02.10 (3d ed. 2003); Michael P. Taylor, Pohutski v. Allen Park: *The Michigan Supreme Court Concludes that the Michigan Government Tort Liability Act Does Not Allow for the Common Law “Trespass-Nuisance” Exception to Governmental Immunity, as Applicable to Municipalities*, 81 U. DET. MERCY L. REV. 91, 101 (2003) (distinguishing between sovereign and governmental immunity); see also *Caruso v. City of Milford*, 815 A.2d 167, 170 (Conn. App. Ct. 2003) (finding that, although municipalities do not have sovereign immunity, governmental immunity serves to protect them from liability for negligence in the performance of government functions).

43. W.E. Shipley, Annotation, *Municipal Immunity from Liability for Torts*, 60 A.L.R.2d 1198, § 2 (1958). For example, Maryland courts have used this rationale. See, e.g., *Whalen v. Mayor & City Council of Balt.*, 883 A.2d 228, 248–49 (Md. Ct. Spec. App. 2005).

44. *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 91 (Ill. 1959) (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359).

45. *Russell*, 100 Eng. Rep. at 359.

46. *Id.* at 362.

47. *Id.*; see also *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (en banc). In *Hargrove*, the Florida Supreme Court abolished sovereign immunity, making it the first state to do so. 96 So. 2d at 133. Florida's Supreme Court rested its decision on the following bases: (1) the courts had created the doctrine of sovereign immunity and therefore had the authority to abolish it; (2) abolishing the entire doctrine at once was easier and more efficient than chipping away at it slowly by creating limitations; and (3) modern cities acted more like businesses than sovereigns; thus, continuing to vest in them “sovereign divinity” would be to “predicate the law of the Twentieth Century upon an Eighteenth Century anachronism.” *Id.* at 132–33.

48. Compare *Merrill v. City of Manchester*, 332 A.2d 378, 383 (N.H. 1974) (justifying immunity on the grounds that municipalities exist only for the public good, because of equity concerns, and the fact that municipalities have a dual nature as both governmental and private entities), with Sigmund D. Schutz, *Time to Reconsider Nullum Tempus Occurrit Regi—The Applicability*

the legislature “sought to prevent the dissipation of public funds on damage awards in tort cases.”⁴⁹ In addition to the efficiency of inconveniencing scattered individuals rather than the public as a whole, another justification is the theory that public officials will carry out their duties more effectively if they need not fear tort liability for their acts.⁵⁰

B. The Illinois Supreme Court’s Abolition of Sovereign Immunity

In 1959, the Illinois Supreme Court abolished sovereign immunity in *Molitor v. Kaneland Community Unit District No. 302*.⁵¹ In *Molitor*, the plaintiff brought suit against a school district on behalf of a student who suffered injuries when the school bus in which the child was riding “left the road . . . hit a culvert, exploded and burned.”⁵² The *Molitor* court abolished sovereign immunity, despite its deep historical

of Statutes of Limitation Against the State of Maine in Civil Actions, 55 ME. L. REV. 373, 381 (2003) (finding that sovereign immunity in Maine was overruled when the courts determined it to be an incongruous remnant of English jurisprudence); *see also* Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1232 (Ariz. 1977) (extending immunity based on discretionary acts to governmental employees).

49. Kevin’s Towing, Inc. v. Thomas, 814 N.E. 1003, 1007 (Ill. App. Ct. 2004) (quoting Van Meter v. Darien Park Dist., 799 N.E. 2d 273 (Ill. 2003)).

50. This rationale underlies the statutory distinction between discretionary functions, for which municipalities and public officials are generally immune, and other acts, including proprietary acts, for which they may not be immune. Also, many statutes waive immunity for willful and wanton conduct. The Illinois statute codifies immunity for the exercise of governmental discretionary acts as 745 ILL. COMP. STAT. 10/2-201 (2006) and the willful and wanton exception to immunity in several specific contexts, including section 10/3-108, relating to the supervision and use of municipal property, and section 10/5-101, relating to rescue workers’ response to emergency calls. *See also* Matthews v. Martin, 658 S.W.2d 374, 375 (Ark. 1983) (finding that city officials were immune from tort liability for negligent acts undertaken in performance of official duties; although the courts abolished sovereign immunity, it now exists in Arkansas pursuant to a statute passed reinstating some municipal liability as a matter of public policy); Clayton v. Branson, 570 S.E.2d 253, 256–57 (N.C. Ct. App. 2002) (noting the importance of the fact that government officers and employees share the immunity afforded municipalities while performing governmental functions); City of Houston v. Vargas, 193 S.W.3d 143, 146 (Tex. App. 2006) (stating that sovereign immunity, unless waived, protects a municipality exercising governmental functions).

51. 163 N.E.2d 89 (Ill. 1959). The court framed that issue with the question, “should a school district be immune from liability for a tortiously inflicted personal injury to a pupil thereof arising out of the operation of a school bus owned and operated by said district?” *Id.* at 90. The case came to stand for the proposition that local governmental entities were no longer immune from suit. *See, e.g.*, Vill. of Bloomingdale v. C.D.G. Enters., Inc., 752 N.E. 2d 1090, 1095 (Ill. 2001) (“Traditionally, a governmental unit in Illinois was immune from tort liability pursuant to the common law doctrine of sovereign immunity. In 1959, however, this court abolished the doctrine in *Molitor*.” (citation omitted)).

52. 163 N.E.2d at 89.

roots, and held the district liable for damages resulting from the child's injuries.⁵³

The Illinois Supreme Court considered a number of factors when reaching its decision to overturn sovereign immunity and allow the suit against the district to proceed. First, it discussed the history of sovereign immunity and its extension to local government in *Russell v. Devon*; Illinois adopted *Russell's* immunity doctrine "with reference to towns and counties" in the 1870 case *Town of Waltham v. Kemper*.⁵⁴ Significantly, the court noted that the *Russell* decision was later overruled in England and that non-immunity continues there today.⁵⁵ Next, the court observed that a number of statutes then in existence authorized municipal liability in certain contexts.⁵⁶ The court also concluded that governmental immunity caused injustice; it cited *Hargrove v. City of Cocoa Beach*, the 1957 case in which Florida became the first state to abolish sovereign immunity.⁵⁷ Ultimately, the court held the school district liable and declared that "all prior decisions to the contrary are hereby overruled."⁵⁸

The Illinois Supreme Court had the authority to abolish sovereign immunity in *Molitor*, because it was a common law doctrine. The court did indicate, however, that the legislature could adopt statutory

53. *Id.* at 98. At the outset of its opinion, the *Molitor* court observed that, "while adhering to the old immunity rule, this court has not reconsidered and re-evaluated the doctrine of immunity of school districts for over fifty years." *Id.* at 90. Later, the court concluded that "none of the reasons advanced in support of school district immunity have any true validity today." *Id.* at 95. The court justified its departure from *stare decisis*, "because we believe justice and policy require such a departure." *Id.* at 96.

54. *Id.* at 91 (citing *Town of Waltham v. Kemper*, 55 Ill. 346 (1870)).

55. *Id.* (citing *Crisp v. Thomas*, 63 L.T.N.S. 756 (1890)).

56. *Id.* (specifically referring to the Workmen's Compensation and Occupational Disease Acts). Section 10/2-101 of the Act explicitly excludes various statutes from its coverage, including the Metropolitan Transit Authority Act, the Workers' Compensation Act, the Workers' Occupational Diseases Act, the Illinois Municipal Code, and the Illinois Uniform Conviction Information Act. 745 ILL. COMP. STAT. 10/2-101(b)-(f) (2006).

57. *Molitor*, 163 N.E.2d at 94 (citing *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (en banc)) ("[W]e agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."). Cf. Kelley H. Armitage, *It's Good to be King (at Least it Used to Be and Could Be Again): A Textualist View of Sovereign Immunity*, 29 STETSON L. REV. 599, 603 (2000) (discussing notions of injustice behind the abolition of sovereign and local governmental immunity provisions); John Martinez, *Hurry Up and Wait: Negative Statutes of Limitation in the Government Tort Liability Setting*, 19 ST. JOHN'S J. LEGAL COMMENT. 259, 273 (2005) (discussing the Florida Supreme Court's decision to "remove the shield of sovereign immunity" from state and local governments because, as stated in *Hargrove*, "[j]udicial consistency loses its virtue when it is downgraded by the vice of injustice"); Shipley, *supra* note 43 (discussing other reasons for the Florida Supreme Court's rejection of the sovereign immunity doctrine *in toto*).

58. *Molitor*, 163 N.E.2d at 98.

sovereign immunity if it chose. The 1970 Illinois constitution abolished common law sovereign immunity.⁵⁹ Article XIII, Section 4 of the Illinois constitution is the ultimate state authority on the issue; it abolishes sovereign immunity in Illinois, except as the legislature provides by statute.⁶⁰ Thus, current governmental immunity in Illinois is entirely statutory and no longer exists as a remnant of the common law tradition.⁶¹

*C. The Creation of the Tort Immunity Act by the Illinois
Legislature and the Act's Language*

Today, the Tort Immunity Act governs local governmental entities' immunity from liability for damages.⁶² The Illinois Supreme Court recognizes that "tort liability of a local public entity or employee is expressly controlled both by the constitutional provision and by legislative prerogative as embodied in the Tort Immunity Act."⁶³ The legislature passed the Act in response to *Molitor*, and the courts ultimately upheld it.⁶⁴

59. ILL. CONST. art. XIII, § 4 (1970) ("Except as the General Assembly may provide by law, sovereign immunity in this state is abolished.").

60. *Id.* (cited in *In re Chi. Flood Litig.*, 680 N.E.2d 265, 271 (Ill. 1997)).

61. Accordingly, it is improper to look to the common law to determine the scope of a local government entity's duty. *Vill. of Bloomington v. C.D.G. Enters., Inc.*, 752 N.E.2d 1090, 1096 (Ill. 2001) (stating that, when a court finds that the General Assembly has granted a public entity immunity, the court may not negate it by applying common law exceptions to common law rules). California's doctrines are similar. *Cf.* Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL'Y REV. 267, 281 (2004) (discussing California's entirely statutory governmental tort immunity policies). As in Illinois, California courts effectively abolished sovereign immunity, and the legislature subsequently re-established it by statute. *See id.*

62. *See Vill. of Bloomington*, 752 N.E.2d at 1095–96 (stating that Illinois courts must look to the Tort Immunity Act, not common law, to determine the presence or absence of local governmental immunity).

63. *Id.* at 1095 (citing *Burdinie v. Vill. of Glendale Heights*, 565 N.E.2d 654, 657–58 (Ill. 1990)).

64. *See Dewitt v. McHenry County*, 691 N.E.2d 388, 392 (Ill. App. Ct. 1998). In fact, there was a considerable amount of interaction between the legislature and the courts during the period immediately following *Molitor's* announcement. The legislature, attempting to quickly codify the immunities that had just been abolished, enacted several statutes that the courts overturned. First, almost immediately after *Molitor* was decided, the Illinois legislature "pass[ed] a series of acts granting absolute immunity to a number of specific types of municipal entities." *Id.* These statutes were overturned by the state supreme court, primarily because they applied only to some entities while other entities performed essentially the same functions, and the legislature gave no reason for distinguishing among them. *Id.* When overturning the statutes, the Illinois Supreme Court contemporaneously suggested that an act specifying immune municipal functions—rather than distinguishing a few immune entities among many that performed similar functions—might be upheld. *Harvey v. Clyde Park Dist.*, 203 N.E.2d 573, 577 (Ill. 1964). As a result, the Illinois Local Governmental and Governmental Employee Tort Im-

The Tort Immunity Act immunizes local governmental entities and their employees from a wide range of liability for injury to others. Its sections apply broadly to various governmental employees; specific sections address court volunteers,⁶⁵ police and correctional officers,⁶⁶ fire and rescue workers,⁶⁷ and medical personnel.⁶⁸ The Act generally bars liability for discretionary acts and policy determinations,⁶⁹ while in some circumstances preserving liability for willful and wanton conduct.⁷⁰ The Act also governs immunity relating to the use of public property.⁷¹

Prior to its more detailed substantive sections, the Act sets out general definitions and provisions applicable to the entire Act.⁷² It protects local governmental entities from some suits arising from injuries, as defined by section 10/1-204 of the Act.⁷³ The Act's original definition of an injury did not include actions under the Illinois constitution, but the plain language of the statute today states that the Act covers actions under the Illinois constitution.⁷⁴ Article I, Section 2 of Public Act 84-1431, effective Nov. 25, 1986, specifically amended the statutory definition of injury to include those injuries alleged in a civil action based on the Illinois constitution:⁷⁵

"Injury" means death, injury to a person, or damage to or loss of property. It includes any other injury that a person may suffer to his person, reputation, character or estate which does not result from circumstances in which a privilege is otherwise conferred by law and which is of such a nature that it would be actionable if inflicted by a private person. "Injury" includes any injury alleged in a civil action,

munity Act, 745 ILL. COMP. STAT. 10/1-101 to 10/1-210 (2006), was ultimately passed and upheld by the courts. *Dewitt*, 691 N.E.2d at 392. As this Note discusses below, the extensive contact between the courts and the legislature related to this particular statute strengthens the need for the courts to observe legislative intent and clearly communicate any deficiencies in the statute to the legislature should they refuse to enforce the letter of the statute.

65. 745 ILL. COMP. STAT. 10/2-214.

66. 745 ILL. COMP. STAT. 10/4-101.

67. 745 ILL. COMP. STAT. 10/5-101.

68. 745 ILL. COMP. STAT. 10/6-101.

69. 745 ILL. COMP. STAT. 10/2-201.

70. *See, e.g.*, 745 ILL. COMP. STAT. 10/3-108 (exception allowing liability for the willful and wanton supervision or use of publicly owned property); 745 ILL. COMP. STAT. 10/5-106 (providing a willful and wanton conduct exception for response to emergency calls by fire and rescue workers).

71. 745 ILL. COMP. STAT. 10/3-101 to 10/3-110 (governing the condition in which the owning municipality maintains the property, as well as the property's use by the owner and activities by non-owners on the land that are supervised by the owner).

72. 745 ILL. COMP. STAT. 10/1-201 to 10/1-210.

73. 745 ILL. COMP. STAT. 10/1-204. This same definition is repeated later in the Act; it was amended at the same time that section 10/1-204 was amended. 745 ILL. COMP. STAT. 10/8-101(c).

74. *Compare* 745 ILL. COMP. STAT. 10/1-204 (2006), *with* IL. ST. CH. 85 § 1-204 (1965).

75. 745 ILL. COMP. STAT. 10/1-204 (2006).

whether based upon the Constitution of the United States *or the Constitution of the State of Illinois*, and the statutes or common law of Illinois or of the United States.⁷⁶

The original text did not include the words “or the Constitution of the State of Illinois”; otherwise, it was identical.⁷⁷

D. Cases that Honor Legislative Intent When Interpreting the Act

The Tort Immunity Act provides limited, not blanket, immunity to local governmental entities and their employees. When creating the Act, the legislature intended to protect governmental entities with immunity, but only in certain contexts.⁷⁸ Limitations on the Act’s scope that are supported by the plain language of the statute and by historical principles are proper, because they honor legislative intent.⁷⁹

To begin with, courts have properly held that local governmental liability for contract claims lies outside the Act’s protections. Unlike constitutional claims, contract claims are not specifically included in the Act’s definition of injury.⁸⁰ In fact, the plain language of section 10/2-101 denies local governmental entities and employees immunity from them; it states, “Nothing in this Act affects the liability, if any, of a local public entity or public employee based on . . . Contract”⁸¹

In *Dewitt v. McHenry County*, the court considered whether the Act immunized local governmental entities from liability for claims arising from contract law.⁸² In *Dewitt*, the plaintiff sought municipal liability

76. *Id.* (emphasis added).

77. ILL. ST. CH. 85 § 1-204 (1965).

78. 745 ILL. COMP. STAT. 10/1-101.1(a) (2006) (“The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses.”). See *Van Meter v. Darien Park Dist.*, 799 N.E.2d 273, 279 (Ill. 2003) (stating that the Tort Immunity Act does not create any new duties; it merely codifies certain duties that the legislature wished to preserve).

79. This includes, for example, the exclusion of contract claims, which is supported by both the text of the Tort Immunity Act, section 10/2-101(a), and historical sovereign immunity principles. See, e.g., *Dewitt v. McHenry County*, 691 N.E.2d 388 (Ill. App. Ct. 1998). Contract claims and actions other than those for damages are excluded from immunity coverage at 745 ILL. COMP. STAT. 10/2-101. Because both exclusions are written into the Act’s text, they are distinguishable from the exclusion of immunity from claims under the Illinois state constitution, which is not supported by the Act’s text. “The surest and most reliable indicator of legislative intent is the language of the statute.” *People v. Bole*, 613 N.E.2d 740, 745 (Ill. 1993).

80. 745 ILL. COMP. STAT. 10/2-104 (making no mention of contract claims).

81. 745 ILL. COMP. STAT. 10/2-101.

82. 691 N.E.2d 388, 391 (Ill. App. Ct. 1998); see also *Chi. Limousine Serv., Inc. v. City of Chicago*, 781 N.E.2d 421, 425 (Ill. App. Ct. 2002). In *Chicago Limousine Service*, the Illinois Court of Appeals cited to *Dewitt* for the proposition that the Tort Immunity Act can be limited, but this citation is improper for failure to distinguish between the textual references to contract claims and claims under the Illinois constitution. 781 N.E.2d at 425. Also, when considering liability under the Act, *Dewitt* cited to the definition of injury in section 10/1-204, quoting only a partial definition—“death, injury to a person, or damage to or loss of property.” *Dewitt*, 691

for breach of his government employment contract.⁸³ The trial court had dismissed his claim, finding instead that it was barred by the Act's statute of limitations.⁸⁴ On appeal, the *Dewitt* court conducted a multi-step analysis to reach its ultimate conclusion. It looked first to the text of the Act, next to the history behind the Act's creation and passage, and finally to case law. The court first considered section 10/2-101 of the Act, which provides that the Act does not affect municipal liability based in contract.⁸⁵ The court determined that the text did not fully resolve the matter, because section 10/2-101 created a statute of limitations that merely shortens the amount of time in which a claim for liability may be raised rather than entirely precluding liability.⁸⁶ The court then noted that the Act's passage was a legislative response to *Molitor*, a tort case involving injury.⁸⁷ The court found "nothing in the history or structure of the Act to indicate that the legislature was concerned with allowing a governmental entity to limit its liability for breaching a contract."⁸⁸ Finally, the court noted other cases that had denied substantive liability for contract claims under the Act, including *DiMarco v. City of Chicago*, in which the court stated that "the legislature meant to exclude causes of action under contract theory" when it passed the Act.⁸⁹ Ultimately, the *Dewitt* court concluded that the Act did not immunize local governmental entities and employees from contract liability.⁹⁰ The thorough, well-developed analysis employed in *Dewitt* provides a definite rule that honors legislative intent and that other courts can follow.

N.E.2d at 391. While this quotation is sufficient for the facts in *Dewitt*, it is improper for cases such as *Chicago Limousine Service* that do involve constitutional liability; those cases should consider the full statutory definition of injury. Further, because of the factual distinctions between the cases, taking *Dewitt's* definition out of the context of its facts renders it incomplete and misleading.

83. *Dewitt*, 691 N.E.2d at 389.

84. *Id.*

85. *Id.* at 391.

86. *Id.* at 391-92.

87. *Id.* at 392.

88. *Id.*

89. *Dewitt*, 691 N.E.2d at 392 (quoting *DiMarco v. City of Chicago*, 662 N.E.2d 525, 529-30 (Ill. App. Ct. 1996)).

90. *Id.* at 393. Additionally, many state courts applying common law principles have found that sovereign immunity does not immunize local government entities from contract liability. 56 AM. JUR. 2D *Mun. Corps.* § 447 (2000) (citing *Montgomery County v. Revere Nat'l Corp.*, 671 A.2d 1 (Md. 1996); *Koenig v. City of South Haven*, 597 N.W.2d 99 (Mich. 1999); *Garcia v. Middle Rio Grande Conservancy Dist.*, 918 P.2d 7 (N.M. 1996); *Houpe v. City of Statesville*, 497 S.E.2d 82 (N.C. Ct. App. 1998)).

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Like actions arising from contract, actions for injunctive relief have been found to lie properly outside the Act's scope.⁹¹ The plain language of the statute supports this conclusion. The first sentence of section 10/2-101 states that "[n]othing in this Act affects the right to obtain relief other than damages against a local public entity or public employee."⁹² This limitation also helps protect public funds from exhaustion through payment for damage remedies, one of the policy reasons behind local governmental immunity.⁹³ Injunctions do not drain public funds⁹⁴ but rather can be used to prevent the government or its employees from committing ongoing injury, thus holding the government accountable to its citizens.⁹⁵

In *PACE, Suburban Bus Division of Regional Transportation Authority v. Regional Transportation Authority*, the court confirmed that the Act does not apply to actions seeking injunctive relief.⁹⁶ Although PACE sought to recover unpaid subsidies from RTA along with the injunction, the court concluded that the subsidies were not damages and that the Act does not apply absent an action for damages.⁹⁷

The Illinois Supreme Court reached a similar conclusion in *Raintree Homes v. Village of Long Grove*, which involved a claim for declaratory judgment.⁹⁸ The court first referred to the text of the statute, then elicited support from case law.⁹⁹ It also discussed in depth the proper definition of "damages" to determine whether the impact fees plaintiff sought fell within that category.¹⁰⁰ The court ultimately determined that the plaintiff sought restitution, not damages, rendering the Act inapplicable.¹⁰¹

Finally, in *Anderson v. Village of Forest Park*, the court noted that the Supremacy Clause of the U.S. Constitution excludes actions under

91. *PACE, Suburban Bus Div. of Reg'l Transp. Auth. v. Reg'l Transp. Auth.*, 803 N.E.2d 13, 29 (Ill. App. Ct. 2003).

92. 745 ILL. COMP. STAT. 10/2-101 (2006).

93. See *Bubb v. Springfield Sch. Dist.* 186, 657 N.E.2d 887 (Ill. 1995).

94. See *Romano v. Vill. of Glenview*, 660 N.E.2d 56, 60 (Ill. App. Ct. 1995).

95. See, e.g., *Limestone Dev. Corp. v. Vill. of Lemont*, 672 N.E.2d 763, 767 (Ill. App. Ct. 1996) ("The purpose of a preliminary injunction is to prevent a threatened wrong or a continuing injury pending a full hearing on the merits of the case.").

96. 803 N.E.2d at 29.

97. *Id.* The *PACE* court cited *Romano* and *Birkett* to support the proposition that the Act is inapplicable to actions other than those for damages. This conclusion ought not be criticized, because it is supported by Act's plain language, specifically section 10/2-101.

98. 807 N.E.2d 439, 441 (Ill. 2004).

99. *Id.* at 444 (citing *In re Consolidated Objections to Tax Levies of School Dist. No. 205*, 739 N.E.2d 508, 518 (Ill. 2000) (stating that the Act applies to actions for damages and not actions for injunctive relief)).

100. *Id.* at 443-47.

101. *Id.* at 444-46.

the federal constitution from coverage under the Act.¹⁰² Federal constitutional claims, necessarily distinct from claims under the Illinois state constitution, are controlled by federal law and cannot be limited or abolished by state law.¹⁰³ The Supremacy Clause bars any such result by restricting state laws to covering state matters.¹⁰⁴ Claims under the Illinois state constitution are not similarly constrained.¹⁰⁵ Both Illinois state and federal courts have recognized this limitation.¹⁰⁶

E. Early Cases Interpreting the Original Definition of Injury

Some cases broadly apply the Tort Immunity Act. For example, the court in *Emulsicoat, Inc. v. City of Hoopston* stated that the Act “deal[s] with many general potential liabilities.”¹⁰⁷ Also, a concurring opinion in *Tosado v. Miller* pointed out that section 8-101 of the Act “applies to any civil action, not just medical malpractice actions,” which were at issue in that case.¹⁰⁸ Further, in *Anderson*, the court noted that, “[a]lthough the Tort Immunity Act refers to torts in its title, ‘injury’ is defined in the Act as including any injury in a civil action, whether based on Illinois or United States law, including common law, statutes, and constitutions.”¹⁰⁹

Today’s problem exists because other courts have not uniformly adopted the interpretation of injury found in the above-mentioned cases. The existence of precedent applying the earlier definition of injury, which did not include actions under the Illinois state constitution, contributes to this problem. Several early cases excluded all non-tort actions from coverage under the Act without further inquiry, a result that is no longer supported by the text of the Act.¹¹⁰

102. 606 N.E.2d 205, 212 (Ill. App. Ct. 1992) (noting that “a state immunity defense cannot control a federal statute”).

103. *Id.*

104. See U.S. CONST. art. VI, cl. 2.

105. See ILL. CONST. art. VI, § 9 (1970) (jurisdiction of the courts).

106. See *Anderson*, 606 N.E.2d at 211–12 (finding the Act inapplicable to a section 1983 claim; although the statute would seem to cover such claims, a state statute cannot prevent liability for a federal cause of action); see also *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973) (holding that, due to the Supremacy Clause of the U.S. Constitution, a state law immunity provision cannot control a federal statute).

107. 425 N.E.2d 1349, 1352 (Ill. App. Ct. 1981). In *Emulsicoat*, the court found that the Act, due to its general nature and scope, was properly subjugated by a more specific statute: the Bond Act. *Id.*

108. 720 N.E.2d 1075, 1082 (Ill. 1999) (Heiple, J., specially concurring) (emphasis in original).

109. 606 N.E.2d at 212 (citation omitted).

110. See, e.g., *Firestone v. Fritz*, 456 N.E.2d 904 (Ill. App. Ct. 1983); *Streeter v. County of Winnebago*, 357 N.E.2d 1371 (Ill. App. Ct. 1976).

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In *Streeter v. County of Winnebago*, the plaintiff brought an action for damages against Winnebago County for vacating a county road abutting his property.¹¹¹ The plaintiff alleged that losing the benefit of the vacated road denied him access to other main roads and that the value of his property was reduced.¹¹² On appeal, the court considered the applicability of the Act's then-effective notice provision, section 10/8-102, which defined injury as section 10/1-204 does currently.¹¹³ The plaintiff argued that the instant case was outside that provision's scope, because the provision applied solely to actions in tort; plaintiff cited only dicta from a case decided in the Northern District of Illinois to support this proposition.¹¹⁴ The court noted that the Act's notice provisions had been applied to actions other than common law torts for negligence¹¹⁵ but ended this trend by refusing to apply the Act's notice provisions to the case at bar.¹¹⁶ Although the court referred to the Act's text, it ultimately elected to use the title of the Act, rather than its content, to conclude that the Act did not apply to the facts of the case.¹¹⁷

Seven years later, the court reached a similar conclusion. In *Firestone v. Fritz*, the plaintiff's property was damaged by overflow flooding caused partly by a retaining wall built on adjoining property.¹¹⁸ The plaintiff brought an action for damages against the owner of the adjoining land, an individual, and also against the City of Highland, claiming a denial of equal protection under the constitutions of both the United States and the state of Illinois.¹¹⁹ The trial court had dismissed plaintiff's claim as time-barred by the Act's notice provision.¹²⁰ The plaintiff argued that the notice provision did not bar his case, because the provision applied only to torts and not to constitutional claims.¹²¹ The court, noting that plaintiff "allege[d] a violation of constitutional rights by the city and not a tort," next stated that the Act applied exclusively to tort actions.¹²² It cited only two federal district

111. 357 N.E.2d 1371.

112. *Id.*

113. *Id.* at 1372–73. The statute of limitations for the Act is now codified. 745 ILL. COMP. STAT. 10/8-101(c) (2004) ("For purposes of this Article, the term 'civil action' includes any action, whether based upon the common law or statutes or Constitution of this State.").

114. *Streeter*, 357 N.E.2d at 1372–73 (citing *Luker v. Nelson*, 341 F. Supp. 111 (N.D. Ill. 1972)).

115. *Id.* at 1373. The cases listed include actions for false arrest, wrongful discharge, malicious prosecution, and wrongful demolition of a building. *Id.*

116. *Id.*

117. *Id.*

118. 456 N.E.2d 904, 906 (Ill. App. Ct. 1983).

119. *Id.* at 907–08.

120. *Id.* at 906.

121. *Id.* at 908.

122. *Id.*

court cases for support.¹²³ With this sweeping statement, the *Firestone* court effectively extended *Streeter*'s proclamation by applying the "tort only" limitation to the entire Act rather than merely the notice provision. The *Firestone* court ultimately affirmed the lower court's dismissal of the complaint, holding that, as to the city, plaintiff failed to state a cause of action under the equal protection or takings clauses of either the federal or state constitutions.¹²⁴

F. *The Courts' Current Interpretation of the Act's Scope*

Following this trend, some Illinois courts continue to limit the Act's definition of injury, thus subjecting local governmental entities to more lawsuits. A recent opinion, *People ex rel. Birkett v. City of Chicago*, demonstrates the limited interpretation some courts have given to the Act's scope.¹²⁵ *Birkett* involved a nuisance action against the City of Chicago for noise caused by O'Hare Airport.¹²⁶ In *Birkett*, the Roman Catholic Diocese of Joliet, which controlled a school near the airport that had been affected by the noise, and the State of Illinois each separately sued the city.¹²⁷ The trial court dismissed the actions based on the city's immunity under the Act.¹²⁸ On appeal, the diocese argued that the Act, by barring the diocese's claim, denied it "just compensation" for the governmental taking and damaging of private property guaranteed under Article I, Section 15 of the Illinois constitution.¹²⁹ Therefore, the diocese urged the court to find the Act unconstitutional, because a statute cannot override a constitutional right.¹³⁰ Alternatively, the diocese argued that the Act's definition of injury in sections 10/1-204 and 10/2-201 should be struck down as unconstitutionally vague, because neither section supplied the courts with any standards for determining which actions—or even which torts—the Act bars.¹³¹ The *Birkett* court rejected both arguments. The court first stated that the diocese "ignore[d] the distinction be-

123. *Id.* (citing *Luker v. Nelson*, 341 F. Supp. 111, 117–18 (N.D. Ill. 1972); *Skrapits v. Skala*, 314 F. Supp. 510, 511 (N.D. Ill. 1970)).

124. 456 N.E.2d at 908–09.

125. 758 N.E.2d 25 (Ill. App. Ct. 2001). It is not argued that *Birkett* is not generally analogous to *Streeter* and *Firestone*. All three cases deal with property claims in a situation where the Act's coverage is unclear. Rather, the argument is that *Birkett*'s reliance on *Streeter* and *Firestone* for the proposition that state constitutional claims are not covered by the Act is improper, because the *Streeter* and *Firestone* decisions predate the Act's amendment.

126. *Id.* at 26.

127. *Id.* at 28.

128. *Id.*

129. *Id.* at 29.

130. *Id.* at 29–30.

131. *Birkett*, 758 N.E.2d at 30.

tween a violation of a constitutional right and a tort” and that the Act “applies only to tort actions and does not bar claims for constitutional violations.”¹³² Next, the court declared that, despite the plain language of section 10/1-204, the Act’s title indicated that it was meant to bar only tort actions.¹³³ Ultimately, the court held that the trial court’s reliance on the Act was misplaced and that the Act did not bar the action against the city.¹³⁴

III. ANALYSIS

An undesirable discrepancy exists between the definition of injury in the plain language of the Tort Immunity Act written by the legislature and the definition of injury as applied by Illinois courts.¹³⁵ Specifically, Illinois courts have not consistently acknowledged that actions under the Illinois constitution lie within the scope of the Tort Immunity Act, despite the statute’s provision expressly granting immunity for just that type of injury and despite the courts’ own repeated mandates that a statute’s plain language, not its common law roots, should be used to ascertain the statute’s scope.¹³⁶ First, this Part examines the proper scope of the Act by reviewing the statute’s text, which manifests the legislature’s intent,¹³⁷ and comparing it to the analyses used and ultimate decisions reached by several courts.¹³⁸ Subsequently, this Part discusses a likely reason for the disagreement between them: courts’ failure to consider the Act’s definition of injury as revised by a 1986 legislative amendment.¹³⁹ It then examines the effect perpetuated by this incongruity—namely, that the failure to

132. *Id.*

133. *Id.*

134. *Id.*

135. Other courts have noted this tendency:

On its face, the Tort Immunity Act appears to include among the covered torts those arising from both the Illinois and United States Constitutions. . . . However, Illinois has narrowly interpreted the Tort Immunity Act to reach only claims arising from torts . . . despite the plain reference [in the text of the statute] to injuries arising from the Illinois Constitution.

Lanna Overseas Shipping, Inc. v. City of Chicago, No. 96-C-3373, 1997 WL 587662, at *20–21 (N.D. Ill. Sept. 18, 1997).

136. *E.g.*, *Doe ex rel. Ortega-Piron v. Chi. Bd. of Educ.*, 820 N.E.2d 418, 421 (Ill. 2004) (stating that, if the court can discern the legislative intent from the plain language of a statute, it should do so and should not depart from the plain language by reading into it “exceptions, limitations, or conditions that conflict with the express legislative intent”).

137. *See, e.g.*, *Harinek v. 161 N. Clark St. Ltd. P’ship*, 692 N.E.2d 1177, 1180 (Ill. 1998) (stating that it is proper for Illinois courts to examine the Act’s text first, and exclusively if possible, to ascertain legislative intent, and that it is the duty of the courts to then honor that intent).

138. *See infra* notes 147–161 and accompanying text.

139. *See infra* notes 162–178 and accompanying text.

apply the full statutory definition of an injury covered by the Act creates confusion and undermines the legislature's intent in adopting statutory immunity.¹⁴⁰

A. Denying Immunity from State Constitutional Claims Improperly Limits the Act's Scope

The *Birkett* court held that claims for violations of the Illinois constitution are not barred by the Act, because they lie outside its scope.¹⁴¹ This conclusion, and similar conclusions reached by courts in analogous cases, can be critiqued on several grounds. This Section discusses four such grounds. First, and most telling, the holding ignores the plain language of the statute, which *Birkett* and many other Illinois cases indicated should be central to any statute's interpretation.¹⁴² Second, when making its decision, the *Birkett* court relied on cases decided prior to the statutory amendment that brought constitutional injuries within the Act's scope.¹⁴³ Third, the Illinois Supreme Court has declined to adopt *Birkett*-type reasoning; instead, it has stated that the issue—whether the Act's scope is confined to actions in tort alone—remains open.¹⁴⁴ Fourth, the *Birkett* court criticized the Act but suggested no changes that might be made to correct it.¹⁴⁵ Departing from the plain language of the statute without pointing to a constitutional deficiency or indicating how the statute might be corrected by the legislature so as to receive full enforcement is contrary to the separation of powers doctrine.¹⁴⁶

1. Cases That Improperly Limit the Act's Scope Ignore Both the Plain Language of the Act and Established Rules of Statutory Construction

Birkett and similar cases ignore both the Act's text and, accordingly, the widely accepted rules of statutory construction. It is generally accepted in Illinois that the plain language of a statute dictates its interpretation.¹⁴⁷ Illinois courts repeatedly echo the common maxim of

140. See *infra* notes 179–204 and accompanying text.

141. *People ex rel. Birkett v. City of Chicago*, 758 N.E.2d 25, 30 (Ill. App. Ct. 2001).

142. See *infra* notes 147–161 and accompanying text.

143. See *infra* notes 162–178 and accompanying text.

144. See *infra* notes 179–194 and accompanying text.

145. See *infra* notes 195–204 and accompanying text.

146. *Id.*

147. This principle has been explained as follows:

Generally, to construe a statute, a court must ascertain the intent of the legislature and give it effect. The entire statute must be examined for guidance as to that intent. In considering the statute, language is given its plain and ordinary meaning. Also, the statute as a whole must be considered, and each word, clause and section should be

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statutory construction that “examining the statutory language provides the best means of ascertaining the legislature’s intent and that this language must be given its plain and ordinary meaning.”¹⁴⁸ *Dewitt v. McHenry County*, another case interpreting the extent of the Act’s coverage, likewise indicates that “[t]he statutory language is usually the best indication of the drafters’ intent, and the language should be given its plain, ordinary, and popularly understood meaning.”¹⁴⁹ The court made an even stronger statement in *Barnett v. Zion Park District*:

[O]ur primary goal is to ascertain and give effect to the intention of the legislature. We seek the legislative intent primarily from the language used in the Tort Immunity Act. We evaluate the Act as a whole; we construe each provision in connection with every other section. If we can ascertain the legislative intent from the plain language of the Act itself, that intent must prevail, and we will give it effect without resorting to interpretive aids. We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent.¹⁵⁰

The Illinois Supreme Court has made it clear that the Act is not treated differently because of its unique historical development. *Birkett* itself acknowledges that “[o]ur supreme court has recently held that courts must look to the Tort Immunity Act and not the common law to determine whether a governmental immunity exists.”¹⁵¹ Thus, courts must look to the face of the Act as written to assess the proper scope of immunity, not to common law tort liability. Regardless, the *Birkett* court ignores outright the express language of the Act defining a covered injury.

attributed some reasonable meaning. It is also a rule of construction that an interpretation that renders any part of a statute superfluous or produces an absurd result must be avoided.

Brief of Defendant-Appellant Vill. of Long Grove at *19–20, *Raintree Homes v. Vill. of Long Grove*, 2003 WL 23935792 (No. 95181) (Ill. 2004) (citing *In re Incorporation of Vill. of Godfrey*, 612 N.E.2d 870, 872 (Ill. App. Ct. 1993)).

148. *Schutzenhofer v. Granite City Steel Co.*, 443 N.E.2d 563, 564 (Ill. 1982); *accord* *Fields v. Chi. Transit Auth.*, 745 N.E.2d 102, 106–07 (Ill. App. Ct. 2001) (stating that it is proper to give effect to legislative intent when construing a statute, referring specifically to the Metropolitan Transit Authority Act).

149. 691 N.E.2d 388, 391 (Ill. App. Ct. 1998) (citing *Collins v. Bd. of Trs. of the Firemen’s Annuity & Benefit Fund*, 610 N.E.2d 1250, 1253 (Ill. 1993)).

150. 665 N.E.2d 808, 813 (Ill. 1996) (citations omitted).

151. *People ex rel. Birkett v. City of Chicago*, 758 N.E.2d 25, 29 (Ill. App. Ct. 2001) (citing *Vill. of Bloomington v. C.D.G. Enters., Inc.*, 752 N.E.2d 1090, 1096 (Ill. 2001)).

The *DiMarco* court did the same, refusing to include certain contract claims¹⁵² under the Act, because it was unwilling to infer the Act's applicability where it was not clearly intended by the legislature.¹⁵³ This contention was properly before the *DiMarco* court, because the parties disputed the nature of contract claims that lie within the Act's scope.¹⁵⁴ The same rationale cannot be properly asserted, however, in cases considering the Act's coverage of constitutional claims. The *DiMarco* court needed to examine the legislative intent behind the exclusion of contract claims to ascertain how the immunity prescribed by the legislature was meant to apply to the facts before it.¹⁵⁵ In contrast, there should be no dispute over the Act's coverage of constitutional claims, because the legislature has indicated its intent unequivocally. The legislature has drafted, debated, and passed a public law amending the statute so as to include constitutional claims in the statutory definition of injury.¹⁵⁶

Further, courts' refusal to recognize all of the immunities provided by the text of section 10/1-204 and echoed in other sections, such as section 10/8-101, also contravenes the legislature's implied intent as generally interpreted by courts when construing the Act. For example, the Illinois Supreme Court has stated that, "[b]y providing immunity, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims."¹⁵⁷ In accordance with this understanding of the legislature's underlying policy goals, the courts should not restrict the immunity the legislature intended by excluding state constitutional claims from immunity coverage.

Another established principle of statutory construction states that a statute must be interpreted such that "each word, clause or sentence is given reasonable meaning and not deemed superfluous or void."¹⁵⁸ Courts' assumption that the Act applies only to torts violates this principle by rendering section 10/2-101 of the Act meaningless.¹⁵⁹ Section 10/2-101 lists various exceptions to the Act's coverage; specifically, it preserves municipal liability for actions for relief other than damages,

152. The case referred to the claims as "negligence actions based on a voluntary undertaking which is evidenced by a contract." *DiMarco v. City of Chicago*, 662 N.E.2d 525, 529 (Ill. App. Ct. 1996).

153. *Id.* at 530.

154. *Id.*

155. *Id.* at 529-30.

156. 745 ILL. COMP. STAT. 10/1-204 (2006).

157. *Bubb v. Springfield Sch. Dist.* 186, 657 N.E.2d 887, 891 (Ill. 1995).

158. *Raintree Homes v. Vill. of Long Grove*, 807 N.E.2d 439, 444 (Ill. 2004).

159. *See* 745 ILL. COMP. STAT. 10/2-101.

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actions sounding in contract, and actions pursuant to various statutes.¹⁶⁰ As was argued in *Raintree Homes*, an interpretation of the Act automatically excluding all non-tort actions from coverage renders section 10/2-101 superfluous; if the Act only applied to torts, there would be no need to write a section of the statute preserving liability for contract actions.¹⁶¹ This further shows that the legislature did not intend the Act to exclude actions under the Illinois constitution from protection merely because they lie outside the category of traditional tort actions.

2. *The Cases Relied upon Should Not Limit the Act's Scope Because They Predate the Statute's Amendment*

Additionally, the reasoning used and holdings reached in appellate cases like *Birkett* and *Raintree Homes* are flawed by courts' reliance on cases decided before the passage of the relevant amendment expanding the statutory definition of a covered injury. The lack of strong supporting precedent further casts doubt on these courts' ultimate conclusions.¹⁶² For example, the *Birkett* court supports its conclusion about the Act's coverage by citing only two cases: *Streeter v. County of Winnebago*¹⁶³ and *Firestone v. Fritz*.¹⁶⁴ Although these authorities do lend some support to the proposition that the Act does not apply to constitutional claims, both cases were decided years before the statutory amendment of the relevant definition of an injury covered by the Act.¹⁶⁵ The *Birkett* court made no note of these facts.

Further, these cases offer only weak support notwithstanding the temporal discrepancy involved. *Streeter* merely held that "if no tort is involved the provisions of the Tort Immunity Act would not apply."¹⁶⁶ In its reasoning, the court focused narrowly on the applicability of a particular section of the Act: its notice provision.¹⁶⁷ The *Streeter* court determined that, under the facts of the case, prompt notice was

160. *Id.*

161. 807 N.E.2d at 443.

162. *See, e.g.,* *Kauk v. Matthews*, 426 N.E.2d 552, 558 (Ill. App. Ct. 1981) (noting that the absence of precedent supporting plaintiff's claim contributed to its failure).

163. 357 N.E.2d 1371 (Ill. App. Ct. 1976).

164. 456 N.E.2d 904 (Ill. App. Ct. 1983).

165. Section 1-204 of the Act was amended by P.A. 84-1431, art. I, § 2 (effective Nov. 25, 1986) (then codified at 745 ILL. COMP. STAT. 10/1-204 (2006)). *Streeter* was decided ten years before the relevant statutory amendment, while *Firestone* was decided three years before the amendment.

166. 357 N.E.2d at 1373.

167. *Id.* at 1372 (discussing 745 ILL. COMP. STAT. 10/8-102 (1973), which was repealed in 1986; it required that notice be given "within one year of a cause of action accruing against a local public entity").

not a “material element” and, therefore, it would be “very technical to bar to the plaintiffs’ action for lack of notice.”¹⁶⁸ Also, the notice provision considered in *Streeter* was repealed in 1986, further undermining the support the case offers.¹⁶⁹

Firestone likewise serves as an unsteady foundation for decisions like *Birkett*, and not only because it, like *Streeter*, was decided prior to the relevant statutory amendment. In *Firestone*, the court considered claims allegedly arising under the equal protection clause of either the state or federal constitution.¹⁷⁰ The *Firestone* decision has several noteworthy aspects. First, the court found that the plaintiffs failed to state a cause of action in tort, indicating a weak basis for its claim.¹⁷¹ Second, the court used no binding authority to support its statement that the Tort Immunity Act applied only to tort actions.¹⁷²

Instead, *Firestone* cited only two cases decided in the Northern District of Illinois.¹⁷³ The cases held that the Tort Immunity Act did not apply to section 1983 claims arising under the federal constitution.¹⁷⁴ The *Firestone* court essentially considered the likely result if plaintiff successfully stated claims under the federal constitution, found that they would be barred, because state law immunity is ineffective against federal constitutional rights, and extended its decision to plaintiff’s state constitutional claims without offering any apparent justification for doing so.¹⁷⁵ Furthermore, *Birkett* relies upon this language even though it is dictum;¹⁷⁶ the *Firestone* court actually affirmed

168. *Id.* at 1373. The court also noted that the complaint’s plea for “compensation,” not just damages, invoked the Illinois constitution’s takings clause; this distinction helped persuade the court that the claim, due to its lack of any “element of tort,” should not be barred by the Act. *Id.*

169. The provision was repealed by Pub. Act 84-1431, art. I, § 3, effective Nov. 25, 1986 (incidentally, the same public act that amended the Act’s definition of a covered injury).

170. 456 N.E.2d 904, 908 (Ill. App. Ct. 1983).

171. *Id.*

172. *Id.*

173. *Id.* (citing *Luker v. Nelson*, 341 F. Supp. 111 (N.D. Ill. 1972); *Skrapits v. Skala*, 314 F. Supp. 510 (N.D. Ill. 1970)).

174. *Firestone*, 456 N.E.2d at 908 (Ill. App. 1983). In *Luker v. Nelson*, the court stated, “not surprisingly, the defendants have cited and our research likewise has yielded no Illinois decision wherein the state courts have construed § 8-102 to be applicable to a § 1983 suit.” 341 F. Supp. at 116. Similarly, the court in *Skrapits v. Skala* denied coverage under the Tort Immunity Act, because the “plaintiff is complaining about an alleged deprivation of his federal constitution rights.” 314 F. Supp. at 511. Again, it should be emphasized that whatever support these cases might lend to the assertion that the legislature did not intend for the Tort Immunity Act to apply to causes of action under the state constitution, the legislature’s intent at the time of the Act’s initial passage is not determinative in this situation. The legislative intent exhibited by the amendment of the definition of a covered injury is the real issue here, and both federal cases were decided prior to that amendment.

175. 456 N.E.2d at 908.

176. 758 N.E.2d 25, 30 (Ill. App. Ct. 2001).

the lower court's ruling by finding that the plaintiff failed to state a cause of action under either the federal or Illinois constitution.¹⁷⁷ Finally, *Firestone* dealt strictly with the notice provisions of the Act, section 10/8-102, rather than the definition in section 10/1-204.¹⁷⁸ Therefore, the *Firestone* court was not actually considering the definition central to *Birkett*.

3. *The Illinois Supreme Court Has Indicated That the Issue Remains Open*

The reasoning used and conclusions reached about the Act's scope found in *Birkett* and similar decisions are flawed in that the Illinois Supreme Court has not approved of them or made similar findings. The Illinois Supreme Court has expressly indicated that the issue remains open; it stated in *Raintree Homes, Inc. v. Village of Long Grove* that "we do not adopt or approve of the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort."¹⁷⁹ The Illinois Supreme Court's statement in *Raintree Homes* responded to the appellate court's contrary assertion in its disposition of the case. The appellate court relied on two grounds for its finding that the Act barred torts exclusively: the Act's title and its historical context.¹⁸⁰ Neither assessment provides a solid foundation for that finding. The appellate court's decision to rely on the title of the Act for its claim that the legislature intended the Act to bar only tort claims ignores the more complete and obvious manifestation of legislative intent found in the 1986 amendment to the Act's definition of injury.¹⁸¹ While a statute's title is a helpful tool in determining the legislature's goals when enacting it, the title cannot serve as the sole basis for a decision regarding the statute's scope, especially if it is contradicted by the plain language of the statute.¹⁸²

177. 456 N.E.2d at 908.

178. *Id.*; see also *Luker*, 341 F. Supp. at 117; *Skrapits*, 314 F. Supp. at 511.

179. 807 N.E.2d 439, 447 (Ill. 2004).

180. 780 N.E. 2d 773, 775-76 (Ill. App. Ct. 2002).

181. See 745 ILL. COMP. STAT. 10/1-204 (2006).

182. The court similarly considered the Tort Immunity Act's title in *Dewitt v. McHenry County*. 691 N.E.2d 388, 391 (Ill. App. Ct. 1998) (noting that a statute's title may assist in, but not be entirely determinative of, its proper interpretation). In finding that the Act does not bar claims sounding in contract, the *Dewitt* court took into account the Act's title. *Id.* However, its decision was supported not only by the Act's title, but also by its text, which plainly excludes contract claims. *Id.* In contrast, the ultimate conclusion in *Birkett v. City of Chicago* is sharply contradicted by the Statute's actual text. 758 N.E.2d 25, 32-33 (Ill. App. Ct. 2001). Thus, it may be helpful for a court to consider a statute's title as a factor in determining its scope, but not as the exclusive factor. It is overly simplistic to assume that the title of a statute captures all of the intricacies contained in its text.

Second, the *Raintree Homes* appellate decision cites to the Act's historical context to support its claims as to the Act's limited applicability.¹⁸³ Relying only upon the Act's historical context for interpretation ignores both the Act's plain language and the Illinois Supreme Court's recent proclamation that legislative intent, not reference to the common law, should determine local governmental immunity.¹⁸⁴ The appellate court's assertion that the legislature did not intend the Act to apply to any non-tort action because no such intent appears in the Act's legislative history is meritless in light of the legislature's actual amendment of the Act.

The Illinois Supreme Court correctly refused to adopt this flawed approach. In fact, the court indicated in *Raintree Homes* that the Act may properly apply to non-tort actions by stating that "the Village [of Long Grove, the defendant in *Raintree Homes*] correctly asserts that *Village of Bloomingdale* [*v. C.D.G. Enterprises, Inc.*] may have implicitly found that the [Tort Immunity] Act applied to some nontort actions specifically at issue in that case, [but] such a holding does not imply that the Act applies to *all* non-tort actions against a government."¹⁸⁵

The court's discussion of the "implicit holding" of *Village of Bloomingdale* refers to a case decided by the Illinois Supreme Court three years before *Raintree Homes*.¹⁸⁶ In one of the claims raised in *Village of Bloomingdale*, a real estate developer attempted to recover damages from the Village for interference with business expectancy.¹⁸⁷ The Illinois Supreme Court first examined the developer's counterclaim in tort, which rested on the developer's assertion that the Act did not shield governmental actions undertaken for "corrupt or malicious motives."¹⁸⁸ The Illinois Supreme Court cited a long line of cases in which it repeatedly refused to read exceptions into the Act where they were not clearly intended by the legislature¹⁸⁹ and accord-

183. 780 N.E.2d at 775-76.

184. See *Vill. of Bloomingdale v. C.D.G. Enters., Inc.*, 752 N.E.2d 1090, 1095 (Ill. 2001) ("Today, therefore, the tort liability of a local public entity or employee is expressly controlled both by the constitutional provision [ILL. CONST. art XIII, § 4] and by legislative prerogative as embodied in the Tort Immunity Act," not the common law doctrine of sovereign immunity.).

185. *Raintree Homes*, 807 N.E.2d at 445-46 (emphasis in original).

186. *Id.* (citing *Vill. of Bloomingdale*, 752 N.E.2d at 1101-02).

187. 752 N.E.2d at 1094.

188. *Id.* at 1095.

189. *Id.* at 1096-98. First, *Barnett v. Zion Park Dist.*, in which the court dismissed a claim against the park district arising from a drowning in its swimming pool, the court found the district immune from liability under section 10/3-108 of the Act, which provides that "neither a local public entity nor a public employee is liable for an injury for failure to supervise an activity on or the use of any public property." 665 N.E.2d 808 (Ill. 1996) (citing 745 ILL. COMP. STAT. 10/

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ingly refused to do so in the case at bar.¹⁹⁰ Next, the court considered the developer's second counterclaim, which was based on a quasi-contract theory. The developer framed its second counterclaim in such a way as to "avail itself of section 2-101 of the [Tort Immunity] Act, which states that the Act does not affect liability based on contract."¹⁹¹ The court considered the theory and determined that the quasi-contract claim was not based in contract, but rather on a theory of unjust enrichment; therefore, the claim was barred by the Tort Immunity Act and had been properly dismissed by the trial court and improperly reversed by the appellate court.¹⁹²

The key aspect of the Illinois Supreme Court's decision is that it even considered the developer's non-tort claim. The court did not ask simply whether the claim was based in tort, as it might have if it assumed that only actions in tort are affected by the Act.¹⁹³ Rather, it considered the nature of the counterclaim in quasi-contract to determine whether or not the Act applied. One can assume that this key mode of analysis is what the Illinois Supreme Court alluded to in *Raintree Homes* as the "implied holding" in *Bloomingtondale*. Certainly, it lent important support to the *Raintree Homes* court's refusal to find that the Act "categorically excludes actions that do not sound in tort."¹⁹⁴

3-108(b)). The court refused to find an exception limiting immunity, because the legislature had not unambiguously done so. *Id.* at 814. Second, in *In re Chicago Flood Litigation*, the court held that the City of Chicago was immune from suit alleging its failure to supervise a construction contractor, even though the bridge workers' efforts caused flooding and water damage to some homes. 680 N.E.2d 265, 268, 273 (Ill. 1997). Again, the court dismissed the complaint, because it was not willing to limit immunity beyond the clearly intended bounds established by the legislature. *Id.* at 273. Third, in *Harinek v. 161 North Clark Street Partnership*, the court found that the fire marshal's acts, though allegedly negligent, were properly characterized as "acts or omissions in determining policy and exercising discretion [under section 2-201]." 692 N.E.2d 1177, 1182 (Ill. 1998). Again, acting according to the interpretation of the Act most faithful to the words written by the legislature, the court ruled the claim to be barred by the city's immunity. *Id.* at 1183-84. Finally, in *Henrich v. Libertyville High School*, the court again abided by the plain language of section 10/3-108 in upholding the school's immunity. 712 N.E.2d 298, 305-06 (Ill. 1998).

190. *Vill. of Bloomingtondale v. C.D.G. Enters., Inc.*, 752 N.E.2d 1090, 1095-99 (Ill. 2001).

191. *Id.* at 1101.

192. *Id.* at 1101-02.

193. This was effectively the rationale employed by the dissent in the appellate court decision. *Vill. of Bloomingtondale v. C.D.G. Enters., Inc.*, 732 N.E.2d 633, 642 (Ill. App. Ct. 2000) (Bowman, J., dissenting), *rev'd*, 752 N.E.2d 1090 (Ill. 2001).

194. 807 N.E.2d 439, 447 (Ill. 2004).

4. *It Is Improper for Courts to Depart from the Legislature's Intent without Sufficient Justification*

Finally, the courts lack persuasiveness when they selectively enforce the Act without suggesting express changes that the legislature might make to ensure enforcement of the Act's full text. Rather than directly addressing the issue by overruling the statute in part and invalidating some of its content, the courts have simply criticized the Act and refused to implement it as written.¹⁹⁵ This treatment not only contravenes the legislature's proclamations but likewise contravenes rules established by higher courts.

For example, the Illinois Supreme Court has refused to negate statutory immunity by applying exceptions from another source. In *Harinek v. 161 North Clark Street Ltd. Partnership*, the court relied upon the Act's plain text to reach its conclusions about municipal immunity for exercises of discretion and policy determinations.¹⁹⁶ Ultimately, it held that it would "not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent."¹⁹⁷ Many Illinois courts likewise have continued to refine the proper interpretation of the statute's intricacies, such as by further clarifying the distinction between policy decisions and discretionary acts¹⁹⁸ and by resolving the influence of other statutes with converging coverage.¹⁹⁹ Nevertheless, they have not, and should not, depart from their duty to honor legislative intent.

As previously described, local governmental immunity in Illinois no longer exists under the common law. Its common law basis was overturned and replaced by two legislative acts: revisions to the Illinois constitution and the enactment of the Tort Immunity Act.²⁰⁰ Thus, the issue has been taken out of courts' hands and placed in those of the legislators. Courts should recognize their proper role as enforcers of legislative enactments, not rewriters of the same. As the Illinois Supreme Court indicated in *Harinek*, judges should show particular

195. See generally ILL. CONST. art. 2, § 1 (1970) (separation of powers clause).

196. 692 N.E.2d 1177, 1180 (Ill. 1998).

197. *Id.*

198. *Van Meter v. Darien Park Dist.*, 799 N.E.2d 273, 279 (Ill. 2003) (noting the importance of strictly construing the Tort Immunity Act).

199. *Moore v. Green*, 848 N.E.2d 1015, 1020 (Ill. 2006) (holding partial immunity under the Domestic Violence Act of 1986 proper in the instant case rather than absolute immunity under the Tort Immunity Act; the court quoted the relevant sections of the Tort Immunity Act and noted that the text should be honored "[i]n a typical case").

200. See ILL. CONST. art. 8, § 4 (1970); *Harinek*, 692 N.E.2d at 1182 ("The ratification of the Illinois Constitution of 1970 validated both *Molitor* and the Tort Immunity Act.").

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deference to the legislature regarding local governmental tort immunity, because the Illinois constitution mandates such deference.²⁰¹

The court explained as follows:

[W]hen a court finds . . . that the General Assembly has granted a public entity immunity from liability, the court may not then negate that statutory immunity by applying a common law exception to a common law rule. Doing so would violate not only the Illinois Constitution's provision governing sovereign immunity, but also the Constitution's separation of powers clause, which provides that no branch of government "shall exercise powers properly belonging to another."²⁰²

To further emphasize the error courts commit when usurping the legislature's powers, the court also quoted *People v. Garner*, in which it stated, "Under the doctrine of separation of powers, courts may not legislate, rewrite or extend legislation. If the statute as enacted seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to the court."²⁰³ Despite the absolute clarity of these mandates from the Illinois Supreme Court and the Illinois constitution, appellate courts have done precisely the opposite by refusing to uphold municipal immunity from actions under the state constitution.

The need for clear communication between the courts and the legislature is especially significant in this context. Just as the legislature responded to *Molitor* by passing the Tort Immunity Act, the legislature responded to other case law—such as *Streeter* and *Firestone*—by amending the definition of a covered injury to include actions for which the courts were denying coverage. If the enactment somehow was improper, the legislature must be given a chance to further amend or otherwise alter the statute to accomplish its intended goals; the courts deny the legislature this opportunity if they simply refuse to recognize the full statutory definition without giving a convincing reason for their actions, indicating why the statute as written is unenforceable or suggesting how it might be corrected.²⁰⁴

201. *Harinek*, 692 N.E.2d at 1180 ("In construing the [Tort Immunity] Act, our primary goal is to ascertain and give effect to the intention of the legislature.").

202. *Id.* at 1183 (citations omitted).

203. *Michigan Ave. Nat'l Bank v. County of Cook*, 732 N.E.2d 528, 544 (Ill. 2000) (quoting *People v. Garner*, 590 N.E.2d 470, 476 (Ill. 1992)).

204. See Mark C. Miller, *Conflicts between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage*, 4 PIERCE L. REV. 279, 315–16 (2005–2006) (addressing the importance of inter-institutional dialogue between the courts and the legislature and specifically suggesting that each needs "greater communication with and respect for the other body" in order to best serve its goals and the legal system). See also Hon. Daniel E. Wathen, *When the Court Speaks: Effective Communication As a Part of Judging*, 57 ME. L. REV. 449 (2005) (providing an interesting discussion of a judge's duty not only to decide

IV. IMPACT

The Illinois Supreme Court should make a definitive ruling resolving this discrepancy in tort immunity law. A number of options are available. Looking to other states helps assess the full range of possibilities. First, and most preferably, the Illinois Supreme Court could recognize the full statutory definition of a covered injury as it exists in the text of the Act.²⁰⁵ Alternatively, Illinois courts might reject the injury definition or part of it for some valid reason, thus giving the legislature the information necessary to amend the definition to the courts' satisfaction.²⁰⁶

This Note argues that the courts' best option is to recognize the full coverage of the Tort Immunity Act as written.²⁰⁷ There are several reasons why this option is preferable: it honors the maxims commonly used to construe statutes;²⁰⁸ it serves the policy rationales underlying the Act;²⁰⁹ and it gives control to the legislature, which is better equipped to examine all relevant facts and determine the statute's scope.²¹⁰ Courts regularly state that legislative intent should guide statutory construction; here, legislative intent unquestionably supports the plain language of the Act.²¹¹ Ultimately, the legislature's role is to draft laws that serve the public it represents, and it is the courts' role to interpret and enforce those laws as they have been written.

Second, the same rationales underlying the Act as a whole also support extending the Act's enforced scope to include actions under the Illinois constitution.²¹² To begin with, expanding the scope of immunity granted by the Act further protects municipal funds.²¹³ Offering immunity to local governmental entities recognizes the special nature of those entities as bodies existing primarily for the public good, not to create profit.²¹⁴ The Act itself was created in part to protect these

cases but also to convey those decisions to others, including the parties, their counsel, and the media).

205. See *infra* notes 211–226 and accompanying text.

206. See *infra* notes 230–233 and accompanying text.

207. See *infra* notes 214–232 and accompanying text.

208. See *infra* notes 211, 218, and 219 and accompanying text.

209. See *infra* notes 214–219 and accompanying text.

210. See *infra* notes 220–223 and accompanying text.

211. See, e.g., *Schutzenhofer v. Granite City Steel Co.*, 443 N.E.2d 563, 564 (Ill. 1982) (“This court has consistently held that examining the statutory language provides the best means of ascertaining the legislature’s intent and that this language must be given its plain and ordinary meaning.”); see also *Fields v. Chi. Transit Auth.*, 745 N.E.2d 102, 106–07 (Ill. App. Ct. 2001) (stating that it is proper to give effect to legislative intent when construing a statute).

212. See *supra* notes 34–50 and accompanying text.

213. See *infra* notes 214–218 and accompanying text.

214. 56 AM. JUR. 2D *Mun. Corps.* § 178 (2000); 1 McQUILLIN *Mun. Corps.* § 2.08 (3d ed. 1999).

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entities and prevent them from burdening residents with additional costs.²¹⁵ If courts recognize immunity from damages for Illinois constitutional injuries, units of local government will be afforded the full protection that the legislature envisioned when it created the Act. The costs of litigation and judgments relating to claims under the Illinois constitution would be avoided instead of being passed to taxpayers. Similarly, the courts' time would be conserved, another efficiency. Further, offering protection against lawsuits encourages public employees to perform their duties to the fullest extent possible, without hindrance or hesitance caused by the fear of legal liability.²¹⁶

Also, there is no reason to suspect that barring constitutional claims will overreach any more than barring tort claims might. All claims that fall within the Act's definition of a covered injury remain subject to the Act's other requirements and limitations, such as the distinction between discretionary acts and proprietary acts²¹⁷ and the distinction between claims alleging negligence, which the Act bars, and claims alleging willful and wanton conduct, which the Act does not bar.²¹⁸ These and other built-in safeguards control the Act's scope.

Further, there is no basis for treating tort injuries and constitutional injuries differently, because courts have not distinguished between them. Courts have not, for example, contrasted the importance and role of constitutional rights with tort claims, which might be considered less significant. Such a distinction, if offered, could explain courts' reasoning and create a basis for departure from the statute.²¹⁹ However, no rationale has in fact been offered, so it remains best for courts to enforce the Act's plain language.

Finally, the legislature is better equipped to examine all of the facts and make policy decisions about immunity.²²⁰ Courts' investigative abilities are more restricted, because their inquiries are limited to the

215. See, e.g., *Kevin's Towing, Inc. v. Thomas*, 814 N.E.2d 1003, 1007 (Ill. App. Ct. 2004) (citing *Van Meter v. Darien Park Dist.*, 799 N.E.2d 273 (Ill. 2003)).

216. *Valentino v. Hilquist*, 785 N.E.2d 891, 899 (Ill. App. Ct. 2003) ("The possibility of incurring multimillion dollar liability could chill [the civil servants'] willingness [to carry out their duties] and deter them from providing such a service.").

217. 745 ILL. COMP. STAT. 10/2-201 (2006) (providing immunity for the acts of government entities and employees involving the determination of policy or exercise of discretion).

218. See, e.g., 745 ILL. COMP. STAT. 10/3-108; 745 ILL. COMP. STAT. 10/5-106. Both of these provisions include exceptions from immunity coverage for willful and wanton conduct; many sections of the Act include the same.

219. See *supra* note 218.

220. See, e.g., *Anderson v. Vanderslice*, 126 So. 2d 522, 523 (Miss. 1961) ("If any change is to be made it should be brought about by legislation so that all aspects of the problem could receive consideration."); *Fette v. City of St. Louis*, 366 S.W.2d 446, 447 (Mo. 1963) ("We think . . . this is properly a matter for the legislature.").

facts of each case before them.²²¹ In contrast, the legislature can choose what it investigates²²² and has broader power to conduct independent inquiries and examine issues in depth.²²³ Additionally, the legislature is directly accountable to the public that elects it and is subject to more direct control by citizens, making it a better servant of the public than, for example, appointed judges.

Municipalities and other local bodies are important, because they form the basis for local government. Statutes such as the Tort Immunity Act prevent the dissipation of these entities' funds that might otherwise be used to serve citizens directly and foster community, such as by establishing and offering police and fire services,²²⁴ repairing sidewalks,²²⁵ and maintaining parks.²²⁶ Few would argue that the safety, self-governance, and recreation of all members of a community should be subordinate to a few isolated individuals' ability to seek tort damages.²²⁷

Without question, extending immunity creates some tension in the law. Granting broader immunity to units of local government and their employees means that some plaintiffs who would have a successful cause of action against an individual may be left without a remedy if the harm was inflicted by a public body or employee who qualifies for statutory immunity.²²⁸ Nonetheless, all law is the product of a se-

221. See, e.g., *Holzrichter v. County of Cook*, 595 N.E.2d 1237, 1241 (Ill. App. Ct. 1992) (stating that a court is limited by the specific set of facts presented in the case before it).

222. 33A ILL. LAW & PRACTICE *State Government* § 21 (2005) (stating that legislative bodies have the authority to conduct investigations to acquire the information needed to legislate knowledgeably and effectively (citing *Du Bois v. Gibbons*, 118 N.E.2d 295 (Ill. 1954); *Greenfield v. Russel*, 127 N.E. 102 (Ill. 1920); *Murphy v. Collins*, 312 N.E.2d 772, 785 (Ill. App. Ct. 1974))).

223. *Id.*

224. 1 McQUILLIN *Mun. Corp.* § 2.08 (3d ed. 1999); see also *DeSmet ex rel. Estate of Hays v. County of Rock Island*, 848 N.E.2d 1030, 1045 (Ill. 2006) (granting immunity under the Act against allegations of failure to provide adequate police service); *Randich v. Pirtano Const. Co.*, 804 N.E.2d 581, 591 (Ill. App. Ct. 2003) (holding in part that firemen are immune under the Act from liability for their own negligent acts).

225. 7A McQUILLIN *Mun. Corp.* § 24.570; see also *Burlingame v. Chi. Park Dist.*, 689 N.E.2d 234, 237 (Ill. App. Ct. 1997) (affirming the Park District's immunity under the Act against allegations of failure to repair a cracked sidewalk).

226. 1 McQUILLIN *Mun. Corp.* § 2.30.10; see also *Helms v. Chi. Park Dist.*, 630 N.E.2d 1016, 1021 (Ill. App. Ct. 1994) (affirming the Park District's immunity under the Act against negligence claims for failure to warn about the danger posed by exercise equipment).

227. See *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 459 (Cal. 1961); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (en banc).

228. For an interesting discussion of this idea in the context of the conflict between state immunity doctrines and the taking clause, see Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006). The article discusses how a remedy's availability is affected by the opposing principles of protection of the law against injury, as voiced by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to

ries of decisions; many times, a course of action is followed because it works toward the good of a larger group of people, although at some cost to others. Historical authority created municipal immunity and, after its temporary abolition by the judiciary, modern legislators reenacted it. The democratically elected legislature makes these policy decisions. Aggrieved individuals left without remedy are free to lobby the legislature for change if they see fit.

Changes to the Act ought to come from the legislature, perhaps at the invitation or urging of the courts or citizens.²²⁹ The legislature has several options should it choose to scale back the Act's coverage. For example, it might provide that only limited damages can be awarded for constitutional claims against local governmental entities,²³⁰ or it could require a separate implementing statute in order for constitutional claims to be brought against municipalities.²³¹ Interaction between the courts and the legislature is key. Because these two governmental branches are to act as checks on one another, more extensive interaction between them might further the public good.²³² In this context, interaction between the branches could clarify the law through amendment or explanation of the statute. The current option of non-enforcement neither honors the legislature's intent nor legitimizes the courts' role as statutory interpreters. Illinois courts are on the verge of taking the final step toward resolving the inconsistency surrounding the Act; doing so will be a welcome change.

V. CONCLUSION

Many other states have overturned sovereign immunity without encountering the problems Illinois now faces. Illinois law currently contains a discrepancy between the local governmental immunity apparently authorized by the Tort Immunity Act and that recognized by case law. The problem arose from a failure to recognize the statu-

claim the protection of the laws, whenever he receives an injury."), and other external limits placed on recovery, including sovereign immunity, jurisdiction, and democratic ideas, such as the proper placement of the right to control public funds. Berger, *supra*, at 528–29.

229. See *supra* notes 220–223 and accompanying text.

230. For example, in Montana, the state is not immune from lawsuits, but the recoverable damages are limited. 18 McQUILLIN *Mun. Corps.* § 53.02.10 n.2 (citing Mackin v. State, 621 P.2d 477 (Mont. 1980)).

231. See T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions against State Governments*, 50 VAND. L. REV. 1525, 1547 (1997).

232. For example, extensive interaction has taken place between the legislature and judiciary in Iowa. This includes several situations in which the courts have responded to legislative action by reading exceptions into the Iowa Tort Claims Act. Jason E. McCollough, *State Tort Liability for Failure to Protect Against Bioterrorism*, 8 DRAKE J. AGRIC. L. 743, 751–65 (2003).

tory amendment to the definition of injury, which defines the types of cases from which local governmental entities are immune. Legal scholarship is built on reference to precedent, but, occasionally, reliance on precedent is misleading, such as when changes have been enacted since that precedent was established. In 1986, the Illinois legislature amended the definition of a covered injury to include actions under the Constitution of the State of Illinois. However, case law sometimes restricts the Tort Immunity Act to supplying local governmental immunity against torts alone. The role of the courts in this context is straightforward: “Simply put, it is not within the purview of [a] court to rewrite portions of the Tort Immunity Act.”²³³

The state of this area of Illinois law, although currently imperfect, is promising. Municipal law is not as fast-moving as some other areas of law, and, judging from the number of reported decisions, cases are not often brought against local governmental bodies for causes of action arising under the Illinois constitution. Nonetheless, Illinois is on the verge of repairing the glitch in its interpretation of the Tort Immunity Act. The Illinois Supreme Court has already indicated that the scope of the Tort Immunity Act is not necessarily restricted to torts alone. Illinois is poised to uniformly apply the Tort Immunity Act’s provisions as written, perhaps beginning as soon as the next proper case arises.

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233. Mich. Ave. Nat’l Bank v. County of Cook, 732 N.E.2d 528, 544 (Ill. 2000).

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