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Illinois Courts: Vital Developers of Tort Law As Constitutional Vanguards, Statutory Interpreters, and Common Law Adjudicators

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I. INTRODUCTION

The legislative package, euphemistically entitled the Civil Justice Reform Amendments of 1995 (the "Reform Act"),[1] was the most draconian anti-tort law ever passed. While a constitutional challenge to the Reform Act was under advisement by the Illinois Supreme Court, tort reform lobbyists published an article that openly attacked the right of the court to exercise its mandate of judicial review.[2] The authors

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+Each of the authors is a graduate of Loyola University Chicago School of Law. All are active members of the Illinois Trial Lawyers Association (ITLA) and are ardent foes of tort reform or any legislation which erodes the right to trial by jury. Mr. Corboy and Mr. Rodin have served as president of ITLA. Mr. Rodin was chairman of ITLA's Constitutional Challenge Committee, which participated in the preparation of plaintiff's briefs in the constitutional attack on the Civil Justice Reform Amendments of 1995.

1. *See* Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7 (codified in chs. 430, 730, 735, 740, 745, 815, and 820 of ILL. COMP. STAT. ANN. (West 1996)).

2. *See* Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J. 745, 746 (1997). In their article, Mr. Schwartz et al. maintained that the General Assembly created tort law by adopting the Illinois reception statute. *See id.* This enactment delegated to state courts the authority to develop English common law in accordance with the public policy of Illinois. *See id.* at 746-47. The legislature retained the right to retrieve its power to develop or rescind any part of the common law at any time. *See id.* at 747. The Reform Act was a legislative policy determination regarding tort law. *See id.* at 749. Tort reform statutes in other states were alleged to have been reversed on the assumption that state courts have a "fundamental and exclusive right to make state tort law." *Id.* The authors argued that these decisions were not constitutional because they not only failed to recognize the reception statutes, but they also were written by judges who merely substituted their personal opinions regarding public policy for that of the legislature. *See id.* at 761. As a matter of history and public policy, the authors posited that the Reform Act should be respected by Illinois courts. *See id. passim.* This article is written in response to Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature*, 28 LOY. U. CHI. L.J.

boldly opined that the Illinois Supreme Court is subservient to the Illinois General Assembly in its development and interpretation of the Illinois system of tort law.[3] This suggested emasculation of the court's right to subject the Reform Act to the protective check of judicial review violates the institutional separation of powers.[4] Under the separation of powers doctrine, Illinois courts have the affirmative duty to invalidate special legislation.[5] This duty precludes courts from granting any deference to the legislature when the courts deem a statute impermissibly arbitrary.[6]

The Illinois Supreme Court succinctly dismissed the authors' assertion of an unfettered legislative supremacy in tort law in *Best v. Taylor Machine Works*.[7] Holding that the Reform Act was unconstitutional, the court's scholarly and compelling opinion identified specific aspects of this comprehensive amalgamation that violated the Illinois Constitution.[8] The court found violations of several constitutional provisions, including the special legislation clause,[9] the doctrine of separation of powers[10] and the right to privacy.[11]

This article maintains that the Illinois Supreme Court was correct when it concluded that the Reform Act failed judicial review. We caution that the court's opinion should be examined on its merits. This careful scrutiny will demonstrate that the public should be wary of the reform advocates' definition of judicial activism as any decision antithetical to their agenda of lobbying for corporate America.[12] The

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745 (1997).

3. *See id.* at 746, 761.

4. *See infra* Parts II, IV.C.

5. *See infra* Part V.A.1.a-b; *see also* Part IV.B (discussing special legislation, or special law as it is frequently called, as any law that confers a particular benefit to a person or limited group of people to the exclusion of others who are similarly situated).

6. *See* ILL. CONST. art. II, § 1.

7. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1063 (Ill. 1997).

8. *See infra* Part V.

9. *See Best*, 689 N.E.2d at 1071-76; *infra* Part V.A.1.a.

10. *See Best*, 689 N.E.2d at 1078-79; *infra* Part V.A.1.b.

11. *See Best*, 689 N.E.2d at 1096-1100; *infra* Part V.A.4 (discussing *Best v. Taylor Machine Works*).

12. The primary author of the article we counter, Victor E. Schwartz, is not only a torts professor and author of torts treatises, but he has also served as a chief spokesperson and general counsel for the Product Liability Coordinating Committee (PLCC), a coalition of Washington representatives of Forbes 100 Companies and business trade groups, funded by the Business Roundtable, a trade association of the nation's largest companies. He is also general counsel for the American Tort Reform Association (ATRA), which openly seeks to change the public's perception of tort reform.

opposing authors claim that legislative supremacy in the tort arena hinges on the alleged creation of tort law by the colonial and territorial legislatures' adoption of reception statutes.[13] As we discuss in Part III, nothing in these declaratory enactments shackles the exercise of judicial review.[14] Further, courts have interpreted that these statutes have adopted the common law, except where it has been repealed by legislation or the decisions of common law courts.[15]

Although some tort reform advocates label the invocation of state constitutional guarantees and prohibitions to overrule tort reform as unprecedented and evidence of state constitutionalism run wild, there is no need for judicial restraint.[16] Part IV urges that as state courts grapple with constitutional issues wrought by tort reform statutes, it is only natural that they look to state law, including state constitutions, for resolution.[17]

Part V of this article discusses the decision of the Illinois Supreme Court in *Best v. Taylor Machine Works*.[18] Scrutiny of this decision compels the conclusion that the court—in the exercise of judicial review—exercised judicatory judgment and applied the rule of law, which was grounded in the text, history, and case law of the Illinois Constitution.[19] Illinois has a strong history of holding invalid as special legislation any statute that discriminates in an arbitrary manner between similarly situated individuals without adequate justification or connection to the purpose of the statute.[20] Part V maintains that when the legislature chose to act in defiance of well-established constitutional common law, it placed the Reform Act at peril because Illinois courts are expressly vested with the responsibility to determine whether any

13. *See infra* Part II (challenging Schwartz's proposition regarding the scope of the legislature's ability to "retrieve" tort law); *see also* Schwartz et al., *supra* note 2, at 746-752. The authors stated that the reception statutes have been "largely overlooked" in the debate about who should determine state tort law. *See id.* at 746. They claimed that state legislatures "did not have the time" nor "the inclination" to formulate an exhaustive tort code. *Id.* at 747. The power to develop common law was delegated to the judiciary only temporarily and could be retrieved at any time. *See id.*

14. *See infra* Part III.

15. *See infra* Part III; *see also* Ney v. Yellow Cab Co., 117 N.E.2d 74, 79 (Ill. 1954) (interpreting reception statutes as having adopted the common law except where repealed by statute or courts); Fidelity & Deposit Co. of Md. v. Stanford, 15 N.E.2d 616, 616-17 (Ill. App. Ct. 1st Dist. 1938) (generally stating the same); Kinross v. Cooper, 224 Ill. App. 111, 115 (Ill. App. Ct. 1st Dist. 1922) (stating the same).

16. *See* Schwartz et al., *supra* note 2, at 748.

17. *See infra* Part IV.

18. *See infra* Part V; Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1103 (Ill. 1997).

19. *See infra* Part V.

20. *See infra* Part V.A.1.a.2.

law, tort or otherwise, is special legislation.[21] The *Best* court acted appropriately in holding the Reform Act unconstitutional.

Our state judges do not abandon their oaths to uphold the law when rendering their opinions. Part VI demonstrates how judges, reined by the institutional constraints of the judicial process, are accountable, and precluded from reaching decisions solely as a matter of personal choice.[22]

The authors to whom we respond originally posed the question, "[s]hould tort law be decided by courts or legislatures?"[23] Part VII shows that the answer supplied by historical enunciation of tort law in Illinois demonstrates that both branches have and should contribute to its development.[24] This article concludes by stating that the courts will continue to mold the common law by embracing their role as the constitution's ultimate vanguard and interpreter.

II. BE WARY OF CALCULATED REFORM RHETORIC: WHERE'S THE PROOF?

The article to which we reply was developed from an *amicus curiae* brief submitted on behalf of the Product Liability Advisory Council, Incorporated[25] to the Illinois Supreme Court for consideration in its constitutional review of Public Act 89-7.[26] Since 1982, this organization has written more than 450 *amicus curiae* briefs as part of a concerted effort to shape the development of the common law to limit the liability exposure of its diverse manufacturer members.[27] Their Illinois brief was designed to present its proponents' fundamental argument that the legislature, as the creator of tort law, has the supreme power to enact any tort law, including tort reform.[28]

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21. *See infra* Part V.

22. *See infra* Part VI.

23. Schwartz et al., *supra* note 2, at 745.

24. *See infra* Part VII.

25. *See* Schwartz et al., *supra* note 2, at 745. The Product Liability Advisory Council, Inc. has a membership of over 100 major manufacturers, representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. In addition, 300 sustaining members include product liability defense attorneys from across the country. *See* Amicus Curiae Brief of Product Liability Advisory Council, Inc. for the Defendants-Appellants at 1, Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (Nos. 81890, 81891, 81892 and 81893 (Consolidated)).

26. *See* Schwartz et al., *supra* note 2, at 745.

27. Hugh F. Young, *The Product Liability Advisory Council: Who We Are and What We Do*, THE METROPOLITAN CORPORATE COUNSEL, Jan. 8, 1998, at 30, available in LEXIS, News Library, Mcc file.

28. *See id.*

The article[29] is also the core of another publication, a monograph distributed by the Legal Studies Division of the Washington Legal Foundation.[30] This think tank is dedicated to exploration of legal policy questions in the corporate community.[31] It markets its publications to federal and state jurists and their clerks, members of state and federal legislatures and their legal staff, journalists, government attorneys, business leaders and corporate general counsel.[32]

The monograph, written by the same authors whom we counter, concludes that the legislature is the *only* governmental body that should make any major change in tort law.[33] It asserts that the balance of power is now tipped in favor of the courts, because courts have declared themselves the "exclusive oracle" of who can and should decide tort law.[34] They claim that legislators have been silenced by judges who "know better" and have used provisions in state constitutions to nullify attempts by state legislatures to reform American tort law.[35]

Careful scrutiny of these three partisan writings reveals their true message: *any* decision that declares tort reform invalid requires a judge, or panel of judges, to stray from their legitimate authority and to review that legislation on the basis of policy preferences, rather than the rule of law.[36] Tort reformers claim that these judges are legislating from the bench.[37] Under the guise of questionable constitutional rulings, they maintain that judges have improperly substituted personal choice in place of the policy judgment of the politically accountable legislature.[38]

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29. *See* Schwartz et al., *supra* note 2, at 745.

30. Victor E. Schwartz et al., *Who Should Make America's Tort Law: Courts or Legislatures?*, Washington Legal Foundation, Washington, D.C. (1997) [hereinafter Schwartz et al., *America's Tort Law*].

31. *See id.* at afterward (setting forth the mission statement of the Legal Studies Division of the Washington Legal Foundation).

32. *See id.*

33. *See id.* at 22. The monograph discusses the American Legislative Exchange Council ("ALEC"), a bipartisan group that developed model legislation entitled the "Adoption of Common Law Act." *See id.* The group believed that this act, which makes the legislature, not the judiciary, the source for creating new tort law, "reaffirms the historic right of legislatures to make a state's tort law." *Id.*

34. *Id.* at 1-2.

35. *Id.* at 2, 21.

36. *See id.* at 21.

37. *See id.* at 21, 26-27.

38. *See id.* at 21.

We ask, why is it axiomatic that *all* judicial invalidation of *any* tort reform measure is illegitimate? Decisions invalidating tort reform have been castigated as unwarranted judicial activism.[39] Is it not equally tenable that judges, who find tort reform unconstitutional, are motivated by a principled commitment to their state constitutions?

The legislative process is not purely democratic. The General Assembly does not conduct statewide plebiscites, nor should it act upon the volatile results of each new opinion poll. Bicameralism[40] and the governor's veto guarantee that not all legislation supported by a majority of citizens at a given time will become law.[41] We elect representatives to determine what is best for all citizens. Ideally, we delegate and entrust to our state legislators the responsibility to exercise independent judgment for the good of all citizens.

When an Illinois statute is challenged on constitutional grounds, the Illinois Supreme Court reviews that legislative determination with great care, exercising diligence to avoid substituting its judgment for the wisdom of the General Assembly.[42] In exercising this judicial review, the court is not the critic of the legislature, but the guardian of both the Federal and Illinois Constitutions. The fundamental law of these Constitutions is not subject to the whim of the legislature and may not be circumvented by lawmakers under the guise of exercising police power for the good of the people.[43]

What is the basis for the assertion that state constitutionalism has run wild? First, the authors acknowledge that since 1983, forty-four states, including Illinois,[44] have determined that a wide spectrum of

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39. *See id.* at 2, 26-27.

40. *See* ILL. CONST. art. IV, § 1.

41. *See* ILL. CONST. art. V, § 8.

42. *See* Bernier v. Burris, 497 N.E.2d 763, 769 (Ill. 1986) (stating that the court's task is, "limited to determining whether the legislation in question is constitutional, not whether it is wise and well.").

43. *See* People v. Tumminaro, 465 N.E.2d 90, 92 (Ill. 1984). The court stated:

> To constitute a legitimate exercise of the police power, the legislative enactment must bear a reasonable relationship to the public interest intended to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective. Once the legislature determines that a problem exists and acts to protect and promote the general welfare of its citizens, the legislation is presumed to be a valid exercise of the State's police power. Furthermore, the due process clauses of the State and Federal constitutions, insofar as they operate to limit the exercise of the State's police power, prohibit only its arbitrary or unreasonable use.

Id.

44. The Illinois Supreme Court concluded several tort reform measures enacted by the General Assembly in 1985 passed constitutional muster, as they were rationally related to a legitimate governmental interest and did not offend any constitutional guarantee.

tort reform measures have withstood scrutiny under judicial review.[45] What piques them is that twenty-six states have invalidated various tort reform measures in over *sixty* decisions, on diverse state constitutional grounds.[46] Apparently, the number *sixty* is meant to startle the uncritical reader. The already identified problem is now characterized by size, demonstrating its allegedly compelling nature. The authors merely compiled the sixty cases as citations in an appendix, with reference to the tort reform measures nullified and the state constitutional provisions invoked.[47] No effort was made to analyze these decisions. No reasoning from these opinions was supplied to expose improper application of the rule of law. They were aggregated as if the fact they exist speaks for itself: these are the courts that have defied the popular will as expressed by the legislature.

We note, however, that social scientists and academics—who have analyzed the available, albeit limited, empirical data—find little evidence to support tort reform as a public policy problem requiring a governmental response.[48] The perception that change is necessary persists because highly partisan interest groups do not care what

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See Bernier, 497 N.E.2d at 767-79. Among those provisions affirmed were: limitations on attorneys' fees in healing art malpractice cases did not violate the equal protection and special legislation clauses, *see* 735 ILL. COMP. STAT. ANN. 5/2-1114 (originally ILL. REV. STAT. 1985, ch. 110, ¶ 2-1114); periodic payment of future damages did not interfere with the right to trial by jury, violate the equal protection or due process clause, or constitute special legislation, *see* 735 ILL. COMP. STAT. ANN. 5/2-1701 to 2-1719 (originally ILL. REV. STAT. 1985, ch. 110, ¶ 2-1701 to 2-1719); modification of the collateral source rule in medical negligence cases was not a violation of the equal protection or special legislation clause, nor did it offend due process or result in the impairment of contracts, *see* 735 ILL. COMP. STAT. ANN. 5/2-1205 (originally ILL. REV. STAT. 1985, ch. 110, ¶ 2-1205); and elimination of awards for punitive damages in actions for medical malpractice did not violate equal protection, due process or special legislation clauses, *see* 735 ILL. COMP. STAT. ANN. 5/2-1115 (originally ILL. REV. STAT. 1985, ch. 110, ¶ 2-1115). *See id.*

45. *See* Schwartz et al., *America's Tort Law*, *supra* note 30, app. at B9-B24.

46. *See id.* at 2, app. at A1-A14.

47. *See id.*

48. *See* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 252 (1995) (discussing how different research agendas are "likely to also point to a different set of policy problems than those offered by the reform rhetoric."); Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 99 (noting that the success of interest groups in changing the civil justice system "results not from a reasoned set of arguments based on systematic empirical research, but from a sophisticated appeal to emotion and the tactical use of passion."); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1149 (1992) (demonstrating the "inadequacy of empirical . . . [evidence] for drawing trustworthy conclusions about the way the [tort litigation] system actually performs . . . .").

systematically collected and analyzed data might say.[49] Truth is not their agenda.[50] Their goal is to change the way people think about a particular issue.[51]

No Illinois court has ever arrogated the exclusive right to make state tort law. Nothing in the Illinois Supreme Court's rejection of the Reform Act invokes the rationale that when state courts invalidate tort reform measures on state constitutional grounds, they substitute their own judgment for that of the legislature.

Rather, the representative legislature and the judiciary exist side by side, each performing their own functions, but also sharing some of the same functions. That was the plan. The proper relationship between the legislature and the courts is, has been, and should be "one of cooperation and assistance in examining and changing the common law to conform with the ever changing demands of the community."[52]

One of the central premises of our constitutional division of powers is that primary lawmaking authority belongs to the general assembly.[53] If separation of powers means anything, it must be conceded that the task of creating law belongs to the legislature. Courts must enforce constitutionally legitimate laws passed by the legislature lest they arrogate to themselves the ultimate power to make public policy.

Legislative supremacy, however, must be distinguished from legislative exclusivity. Legislatures are not and have never been the sole lawmakers. Rather, state courts have the authority to create common law doctrines which embody their own view of public policy, subject to constitutional legislative modification.[54]

Legislative supremacy is really a doctrine of statutory interpretation.[55] The premise is that courts are subordinate to the legislature in making public policy except when exercising the power

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49. *See* Daniels, *supra* note 48, at 99.

50. *See id.*

51. *See id.*

52. Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981) (abolishing the doctrine of "last clear chance"). The *Alvis* case was superseded by statute as stated in *King v. Petefish*, 541 N.E.2d 847, 849 (Ill. App. Ct. 4th Dist. 1989), which held that to escape liability for negligence, the defendant must prove that the intervening act was unforeseeable.

53. *See* ILL. CONST. art. IV, § 1.

54. *See infra* Parts III, VII.

55. *See* William N. Eskridge Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 320 (1989). Eskridge observed that the term "legislative supremacy" has become an idiosyncrasy in as much as statutory interpretation has become a conceptual battleground for determining what the precept means and how much policy making discretion is left for those interpreting or implementing the legislature's statutes. *See id.* at 320-22.

of judicial review.[56] Yet, the power of the people—the constitution—is superior to both the legislature and the judiciary. Despite the legislature's authority to create laws, it may not violate the constitution. Thus, legislative supremacy is not an effective objection to judicial review. Judges have the authority and the obligation to enforce and interpret the constitution.[57] The courts were empowered as an intermediary between the people and the legislature, to keep the latter within the limits of its authority.[58] The judiciary must say what the law is.[59] There is a distinction between a judicial decision that establishes a principle of common law, one that interprets a legislative act, and one that declares a statute unconstitutional. All are appropriate exercises of judicial power.

III. THE ILLINOIS RECEPTION STATUTE SUPPLIES NO BASIS FOR ERADICATION OF JUDICIAL REVIEW

The prerogative of state legislatures to decide tort law is not sustained on the existence of reception statutes.[60] Reception statutes addressed the extent of recognition that should be given by state courts to English statutes.[61] These declaratory enactments were first adopted by the colonial and territorial legislatures, and later by the majority of states. Reception statutes, however, did not "create" tort law.[62] While interpreting the Illinois reception statute,[63] one jurist candidly observed

56. *See* Schwartz et al., *America's Tort Law*, *supra* note 30, at 21.

57. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); People *ex rel.* Billings v. Bissel, 19 Ill. 229, 231 (Ill. 1857).

58. *See* THE FEDERALIST No. 78 at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

59. *See Marbury*, 5 U.S. at 177; *Billings*, 19 Ill. at 231.

60. *See* Schwartz et al., *supra* note 2, at 746-47 (noting that the state legislature's acts to "receive" the English common law provided, in the same legislation, the court's authority to develop it).

61. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 816 (1951) (noting that while some state legislatures left determinations of the binding effect of English law to the courts, other legislatures directed courts to recognize as binding all English statutes only until a statutorily specified date).

62. *See* Schwartz et al., *supra* note 2, at 746 (stating that "[s]tate legislatures . . . were the first to create state tort law" when they delegated the authority to create common law to the states by adopting reception statutes).

63. The Illinois reception statute has read as follows since 1874:

> The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of

that if the statute had adopted the common law of England as of 1607 for state courts, the fourth year of James the First, there would be no recognition of negligence as a basis of tort liability because negligence did not emerge until more than two hundred years later.[64] Clearly, the legislature could not "receive," let alone create, law that did not already exist.

A. History of the Illinois Reception Statute

From the limited legal history available, judges, not legislative bodies, first declared that English common law would govern the persons and the region that would later be known as Illinois.[65] In 1787, the United States Congress passed an ordinance applicable to the territory of the United States northwest of the Ohio River.[66] This ordinance established a temporary government, headed by a governor and three judges; judicial proceedings in the territory were governed specifically by the common law.[67] These government officers were directed to "adopt and publish . . . civil and criminal [laws] . . . best suited to the circumstances of the district."[68] They were given authority to adopt preexisting state laws and declare these laws binding on the territory, but no authority to author laws that did not already exist in the original state.[69] The governor and judges adopted "a copy of the original reception statute passed by Virginia in 1776," which recognized English Acts of Parliament of a general nature passed before 1607.[70] The Illinois territorial legislature later enacted the same reception statute practically verbatim.[71]

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decision, and shall be considered as of full force until repealed by legislative authority.

5 ILL. COMP. STAT. ANN. 50/1 (West 1993). *See generally* Amann v. Faidy, 114 N.E.2d 412, 418 (Ill. 1953) (discussing the Illinois reception statute).

64. *See* 5 ILL. COMP. STAT. ANN. 50/1 (West 1993) (providing the Illinois reception statute).

65. *See* Hall, *supra* note 61, at 801 (noting this authority was derived from the Northwest Ordinance). This well-annotated article supplies a comprehensive review of the legal history behind the reception statutes, and the broad range of problems that confronted jurists who attempted to determine the extent to which the common law of England was received and applied in America. *See id.* at 797-822 (discussing adoption of English common law and problems in its implementation and interpretation).

66. *See id.* at 801.

67. *See id.*

68. *Id.*

69. *See id.*

70. *Id.* at 799.

71. *See id.* at 802.

B. Illinois Courts' Interpretation of the Reception Statute

The few Illinois decisions directly interpreting the Illinois reception statute have found that it constitutes a declaratory enactment.[72] Those decisions consistently reiterate that Illinois courts adopted a system of elementary rules and general guidelines which are continually expanding with society's progression, adapting to the "gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country."[73] The common law of England is the law of Illinois except where it has been repealed by legislation or modified by custom as found in the decisions of Illinois courts.[74]

This interpretation of the reception statute is appropriate. Since the original colonies and later Illinois territory became states, political and cultural attributes have changed. New waves of immigrants have arrived, society has industrialized, and we await the unknown adjustments that an unbounded computerized world may impose. The people governed by today's judicial decisions bear little resemblance to those who yielded their sovereign power to our state and federal governments. They still cherish, however, the freedom of their common law heritage.

The court specifically invoked the Illinois reception statute to restrain judicial expansion of the common law in *Amann v. Faidy*.[75] At issue was a fifty-year-old precedent, which, if followed, would have denied a wrongful death cause of action as a result of negligently inflicted prenatal injuries.[76] In conformity with more recent decisions

72. *See* Amann v. Faidy, 114 N.E.2d 412, 418 (Ill. 1953) (stating that the Illinois reception statute adopted "not just those doctrines which happened to have already been announced by English courts at the close of the Middle Ages, but rather a system of law whose outstanding characteristic is its adaptability and capacity for growth."); Welch v. People, 30 Ill. App. 399, 408-09 (Ill. App. Ct. 1st Dist. 1889) (stating that the Illinois reception statute "is declaratory of what has been the law by which the inhabitants of Illinois have been governed . . . .").

73. Ney v. Yellow Cab, 117 N.E.2d 74, 79 (Ill. 1954); *see also* Kreitz v. Behrensmeyer, 36 N.E. 983, 984 (Ill. 1894) (discussing how "[j]udicial decisions of common-law courts are the most authoritative evidence of what constitutes the common law.").

74. *See Kreitz*, 36 N.E. at 984 (recognizing the court's role in changing the common law); *see also Ney*, 117 N.E.2d at 79; Fidelity & Deposit Co. of Md. v. Stanford, 15 N.E.2d 616, 616-17 (Ill. 1938); Kinross v. Cooper, 224 Ill. App. 111, 113-14 (Ill. App. Ct. 2d Dist. 1922).

75. Amann v. Faidy, 114 N.E. 2d 412 (Ill. 1953). In *Amann*, the defendant negligently drove his car and collided with plaintiff's car, injuring plaintiff who was pregnant. *See id.* at 413-14. The plaintiff-mother alleged that the defendant caused her unborn child's prenatal injuries, which, in turn, caused his death. *See id.*

76. *See id.*

from courts of last resort in six jurisdictions,[77] the court overruled prior precedent and allowed a cause of action, finding that the former reasoning underlying the court's fifty-year precedent failed to carry conviction.[78] The defendant, however, still insisted that the Illinois reception statute supplied an impediment to the court's holding, and that the legislature was the only proper body to make this determination.[79] In response, the court noted that credence to this contention would mandate that courts could only consider Illinois statutes and English decisions rendered before 1607 in reaching any decision.[80] Writing for the majority, Justice Shaefer prudently observed that this construction would drastically change Illinois law.[81] He also noted that this contention was decided over a century before, when, also interpreting the Illinois reception statute, the court held:

> [I]f we are to be restricted to the common law, as it was enacted at fourth James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age.[82]

C. The Illinois Reception Statute Does Not Prohibit Judicial Development of the Common Law

The article to which we respond provided no support for the contention that in Illinois and the forty-two other states that repealed reception statutes,[83] state courts' power to develop tort law was ceded to them by these arcane legislative fiats.[84] Decisions across the

77. *See id.* at 414-17 (citing Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. 1946); Tucker v. Howard L. Carmichael & Sons, Inc., 65 S.E.2d 909, 910 (Ga. 1951); Damasiewicz v. Gorsuch, 79 A.2d 550, 560 (Md. 1951); Verkenries v. Corniea, 38 N.W.2d 838 (Minn. 1949); Woods v. Lancet, 102 N.E.2d 691, 695 (N.Y. 1951); Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334 (Ohio 1949)).

78. *See id.* at 417-18 (overruling Allaine v. St. Luke's Hospital, 56 N.E. 638, 640 (Ill. 1900)).

79. *See id.* at 418 (noting the defendant's argument that the Illinois reception statute acts as a statutory bar to this action).

80. *See id.*

81. *See id.* ("It is at once apparent that defendant's contention that the only available materials for decision are our own statutes and English decisions rendered before 1607 would, if adopted, drastically change our law.").

82. *See id.* (citing Penny v. Little, 4 Ill. 301, 305 (1841)).

83. *See* Schwartz et al., *American Tort Law*, *supra* note 30, app. at C, pp. C1-C13.

84. *See* Schwartz et al., *supra* note 2, at 746-47; Steven Brostoff, *State Reformers Find Hope In Arcane Principle*, NATIONAL UNDERWRITER LIFE & HEALTH/FINANCIAL SERVICES EDITION, December 16, 1996, at 6, *available in* LEXIS, News Library, Nulife File.

country affirm the principle that the reception statutes were never intended as a bar to a common law court's power to alter or amend the common law.[85] These decisions, including those in Illinois,[86] demonstrate that the reception statutes established an initial body of law on which the particular state would operate, but were never meant to limit the courts in their historic role of developing the common law.[87]

For example, many reception statutes provide that the legislature may alter or amend the common law, without expressly stating that the courts have that power.[88] This silence, however, has never been interpreted to mean courts could not alter the common law, as this construction would abrogate the very essence of the common law's judicial evolution.[89] As one court observed, requiring a reception statute to read "until altered or repealed by the legislature *or the courts*" would be redundant because courts have historically always had the power to evolve and alter the common law.[90]

The authors, whose views we counter, have suggested that in Illinois and the forty-two other states with unrepealed reception statutes, the state courts' power to develop tort law was temporarily ceded and delegated to them by these arcane legislative fiats.[91] They

85. For an excellent discussion and compilation of these cases, *see Morningstar v. Black and Decker Mfg. Co.*, 253 S.E.2d 666, 671-74 (W. Va. 1979) (citing Chilcott v. Hart, 45 P. 391, 395-98 (Colo. 1896); Amann v. Faidy, 144 N.E.2d 412 (Ill. 1953); Ketelsen v. Stilz, 111 N.E. 423 (Ind. 1916); City of Louisville v. Chapman, 413 S.W.2d 74 (Ky. 1967); Latz v. Latz, 272 A.2d 435, 441 (Mo. 1971); Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903); Trustees of Town of Bookhaven v. Smith, 80 N.E. 665, 666-67 (N.Y. 1907); Carson v. Blazer, 8 Pa. (2 Binn.) 475, 484 (1810); Baring v. Reeder, 11 Va. (1 Hen. & M.) 154, 161-3 (1806); Bielski v. Schulze, 114 N.W.2d 105 (Wis. 1963)).

In *Bloom v. Richards*, 2 Ohio St. 387 (1853), the court held English common law was part of the common law of Ohio, to the extent it is "suitable to the condition and business" of its people and the "letter and spirit of our Federal and State constitutions and statutes." *Id.* at 390. "But wherever it has been found wanting, in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or, if necessary, wholly to depart from it." *Id.*

86. *See* Fidelity & Deposit Co. of Md. v. Stanford, 15 N.E.2d 616, 616-17 (Ill. App. Ct. 1st Dist. 1938) (declaring that Illinois law is based on the common law of England except where it has been changed by the legislature or judiciary); *see also* People v. Gersch, 553 N.E.2d 281, 286 (Ill. 1991) (recognizing judiciary's role in changing established principles of common law).

87. *See Stanford*, 15 N.E.2d at 616-17; *Gersch*, 553 N.E.2d at 286.

88. *See* Schwartz et al., *American Tort Law*, *supra* note 30, at app. C (listing state reception statutes).

89. *See Morningstar*, 253 S.E.2d at 674-75.

90. *See id.* at 674.

91. *See* Schwartz et al., *supra* note 2, at 746-7; Brostoff, *supra* note 84, at 6.

assert that when legislatures retrieve their power to change existing tort law, courts must defer to that authority.[92]

This argument must fail because common law judicial authority is not a grant from the legislature, but an inherent judicial power protected by the separation of powers principle.[93] State courts have been the articulators and the keepers of the common law since the founding of the republic. The judiciary has never needed the authorization of the legislature to fulfill this role.[94]

In the wake of the Illinois Supreme Court's resounding rejection of the Reform Act, general counsel for the Product Liability Advisory Council has claimed that the court ignored this group's request in its *amicus curiae* brief to address the reception statute and its express grant of authority to the legislature to change the common law.[95] This is incorrect. Not only did the court acknowledge that the General Assembly has the power to change Illinois common law, but the plaintiffs did not dispute that fact.[96] Justice McMorrow, writing for the majority, however, cogently observed that "[t]he legislature is not free to enact changes to the common law [for which there is no] rational relat[ionship] to a legitimate governmental interest."[97] The court found that the tort reform's statutory cap for recovery of non-economic losses[98] was arbitrary and violated the prohibition of the special legislation and separation of powers provision in the Illinois Constitution.[99] The reception statute does not shackle the exercise of

92. *See* Schwartz et al., *supra* note 2, at 749, 761.

93. *See infra* Part IV.C.

94. The United States Supreme Court has recognized that the work of federal courts "is more modest than that of state courts, particularly in that, a state court has the freedom to create new common-law liabilities." United States v. Standard Oil Co., 332 U.S. 301, 313 (1947) (holding that whether the United States can recover for negligent injury of its soldiers is fundamentally derived from federal sources and governed by federal authority, as opposed to state authority, even though Congress had not prescribed a rule).

95. *See* Victor E. Schwartz & Barry M. Parsons, *State High Court Takes on Tort Reform: Judicial Nullification of Legislative Action Continues*, LEADER'S PRODUCT LIABILITY LAW & STRATEGY, April 1998, at 4, 6.

96. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1077 (Ill. 1997).

97. *Id.*

98. *See* 735 ILL. COMP. STAT. ANN. 5/2-1115.19(a) (West 1997).

> In all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damages to property based on negligence, or product liability based on any theory or doctrine, recovery of non-economic damages shall be limited to $500,000. There shall be no recovery for hedonic damages.

Id.

99. *See Best*, 689 N.E.2d at 1077-79 (holding that the legislature's ability to alter common law and limit remedies available is dependent on the nature and scope of special

judicial review, because nothing in the legal heritage of Illinois allows respect to be afforded to any legislative act which is unconstitutional.

IV. STATE COURTS SHOULD DECIDE TORT REFORM ISSUES ON STATE CONSTITUTIONAL GROUNDS

The federal and state constitutions are the heart of American political theory. As founding documents of our body politic, constitutions are direct acts of the sovereign people and speak with an authority no other law can ever attain. Constitutions allow the people to communicate the scope of the authority that may be wielded by the government on their behalf.[100] It is to these constitutional values which the people are bound—values that transcend current preferences and are guaranteed from erosion by any branch of government.[101]

This constitutional heritage has determined that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[102] Because interpreting statutes and determining their constitutional validity is an inherently judicial function vested in the courts,[103] the judiciary has the power to decide whether any given law is within the scope of the constitutional powers of the legislature.[104] Adherence to these precepts relies on three separate, yet interdependent, mechanisms of judicial review: (1) the federal judicial interpretation and enforcement of the United States Constitution, (2) each state's judicial interpretation and enforcement of the United States Constitution, and (3) each state's judicial interpretation and enforcement of its own respective state constitution.

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legislation, and that the separation of powers doctrine prohibits laws that unduly infringe on the judiciary's inherent powers); *see also* discussion *infra* Parts V.A-C.

100. *See* James A. Gardener, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 813-14 (1992) (advocating for a more activist approach to state constitutional law because a conservative United States Supreme Court was solidified during the 1990-91 term).

101. *See* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 421 (1987) (emphasizing the importance of adhering to the U.S. Constitution).

102. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

103. *See* People v. Brunei, 175 N.E. 400, 405 (Ill. 1931) (holding that a statute that vested the jury in a criminal case with the power to decide fact and law violated the separation of powers doctrine because determining the law either by interpretation of statutes or application of common law is inherently a function of the judiciary).

104. *See* Henson v. City of Chicago, 114 N.E.2d 778, 782 (Ill. 1953) ("The power of the judiciary in determining the constitutionality of laws or ordinances is limited to deciding whether or not the law is within the scope of the legislative department.").

A. The Illinois Constitution's Vital Role in Tort Reform

The tort reformers' urgent call for judicial restraint objects to the use of state constitutional guarantees to invalidate legislative tort reform.[105] They assert that judges who rule against tort reform improperly read personal values into state constitutions to overrule legislative policy decisions.[106] This oversimplification ignores the ample and unique state constitutional provisions that limit legislative authority. Although the general contours may be similar, the language used and the values expressed in each state's constitution actually differ. No two are identical, and none mirrors the federal outline.

The vast majority of cases in this country are filed in state courts.[107] State legislatures and courts create the bulk of the laws which govern the lives of American citizens. It is only natural, then, that state courts have primary jurisdiction in these matters and the obligation to enforce the rule of law in their respective states.

State courts have recognized that their individual state constitutions can be legitimate sources of distinctive rights or prohibitions beyond those provided in the Federal Constitution.[108] When faced with a

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105. *See* Victor E. Schwartz, *Tort Reform: Public Interest and Public Policy in Civil Justice Reform: What Now?*, National Center for the Public Interest, Nov. 1986; *States Have Gutted Tort Reform, Lawyer Tells Alliance*, A.M. BEST COMPANY, INC., BEST WIRE, April 29, 1998, at 1, *available in* LEXIS, News Library, Bestwr File. *See generally* Gavin E. Souter, *Proposed Model Act Would Give States More Power to Reform Common Law*, BUSINESS INSURANCE, August 26, 1996, at 25.

106. *See* Schwartz et al., *supra* note 2, at 746.

107. Figures indicate that tort suits are a relatively small part of the overall civil caseload. *See* CONFERENCE ON STATE COURT ADMINISTRATORS, THE STATE JUSTICE INSTITUTE, AND THE NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1989 (1990) (discussing state court caseloads and trends in 1989). The report acknowledges that the data collection is not perfect. Not all states are included and statistics for some states are incomplete. Nevertheless, data is represented to be the "most comprehensive picture available." *Id.* at 3. The report indicates that 17.3 million civil cases were filed in state courts in 1989. *See id.* In addition, there were 223,113 civil filings in federal courts. *See id.* A "civil case" is defined in the study as including "all torts, contracts, real property rights, small claims, domestic relations, mental health, and estate cases" as well as "all appeals of administrative agency decisions." *Id.* at 7. It should be noted that almost half of civil cases, approximately 8.5 million, are filed in the limited jurisdiction courts, which, in many states, handle small claims, landlord-tenant, and family law. *See id.* at 5. In other states, these, along with tort and contract suits, are handled by the courts of general jurisdiction. *See id.* at 7. According to the report, while the number of tort cases filed in state courts in 1989 is listed at 447,374, the number of tort filings in federal court was only about 44,961 (Statistical Abstract, 1988 figure). *See id.* (referring to charts).

108. *See* Moore v. Mobile Infirmary Ass'n, 592 So.2d 156 (Ala. 1991) (holding that the statute setting $400,000 limit on non-economic damages violated right to trial by jury and equal protection provisions of state constitution); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) (holding that a $500,000 limitation on health care liability

claim by a litigant who raises a state constitutional challenge to a statute which adversely affected him or her, the court must decide the constitutional question in the absence of some other means of disposing of the case. Nothing exists to bar these courts from deciding constitutional issues in tort cases on adequate and independent state law grounds.[109]

The Illinois Supreme Court stated long ago:

> To the judiciary is confided the power and the duty of interpreting the laws and the constitution whenever they are judicially presented for consideration. Hence it becomes our duty to determine what is the meaning of the laws passed by the legislature, and, also, whether those laws are such as the legislature was authorized by the constitution to pass.[110]

It is this general rule which the Illinois Supreme Court embraced when it accepted its responsibility to determine the plaintiffs' constitutional challenge in *Best v. Taylor Machine Works.*[111]

There is no proof that when state courts overrule tort reform that those judges are rogues, who rampantly and routinely trample the alleged will of the majority on tort reform. If the Illinois Supreme Court was adamantly against tort reform, then how did the 1986 measures—except for a damages cap on malpractice actions and mandatory pretrial review panels in those cases—pass constitutional muster?[112]

We, the people, include the electorate and the disenfranchised. The electorate consists of many constituencies, all clamoring to be heard and striving to prevail on a given issue. The disenfranchised includes minority groups, the unborn, resident aliens, the illiterate, and the apathetic. Our constitutions protect all, even those who do not or cannot participate in the election of legislative lawmakers.[113]

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damages violated the open courts provision of the state constitution).

109. *See generally* People v. Duncan, 530 N.E.2d 423 (Ill. 1988).

110. People *ex rel.* Billings v. Bissell, 19 Ill. 229, 230-31 (Ill. 1857).

111. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1063-64 (Ill. 1997) ("It is the court's duty to interpret the law and to protect the rights of individuals against acts beyond the scope of the legislature . . . . If a statute is unconstitutional, this court is obligated to declare it invalid."); *see also infra* Part V (discussing *Best*).

112. *See* Bernier v. Burris, 497 N.E.2d 763, 767 (Ill. 1986).

113. *See* Joshua Seth Lichtenstein, *Abbott v. Burke: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429, 486 (1991) (citing John Hart Ely, DEMOCRACY AND DISTRUST 82-88, 100-04 (1980) ("The United States Constitution frequently protects the interests of those persons who are politically powerless — either because they actually lack the right to vote within a jurisdiction or because they are consistently outvoted by a hostile majority — and therefore cannot protect themselves.").

Government *should* seek to reconcile the views of all citizens. It *must* act to safeguard the constitution.[114] When it does not, it is the court that must protect all, even those who may not know they need its umbrage. The Illinois Supreme Court accepted its responsibility to safeguard the constitution in *Best* when it found that certain provisions of the Reform Act violated the special legislation clause,[115] the separation of powers doctrine,[116] the prohibition against arbitrary or superfluous legislation,[117] and the prohibition against invasion of privacy.[118]

B. History and Interpretation of the Special Legislation Clause

A prohibition against special legislation in Illinois can be traced to the Constitution of 1848, which restricted the power of the General Assembly to pass private, local, or special laws.[119] Illinois and other states which enacted special legislation prohibitions were responding to "perceived manipulation of [the legislative process] by corporate and other powerful minority interests seeking to advance their [private] interests at the expense of the public."[120] Despite this ban on special legislation, small groups of wealthy and influential persons were able to obtain franchises, subsidies and rule privileges for turnpikes, canals, river improvements, toll bridges, and railroads.[121]

Recognizing the ineffectiveness of the 1848 prohibition, John Scholfield, a delegate at the constitutional convention of 1870, introduced a resolution,[122] which became the special legislation clause, explaining:

> It was not, however, the people that demanded special laws . . . . It was in most instances individuals who demanded these special

114. *See* Peabody v. Russel, 134 N.E. 150, 154 (1922) ("In a constitutional government, no injury can come to a state greater than the destruction of the safeguards provided in its Constitution.").

115. *See infra* Part V.A.1-2.

116. *See infra* Part V.A.4.

117. *See infra* Part V.A.3.

118. *See infra* Part V.A.4.

119. *See* ILL. CONST. of 1970 art. IV, § 13 (Smith-Hurd 1993).

120. Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1253 (1996) (supporting the Washington Supreme Court's move toward independent analysis of special privileges and immunities claims under the Washington state constitution).

121. *See id.* at 1253, n.31.

122. *See* People v. Wilcox, 86 N.E. 672, 673 (Ill. 1908). Later, Judge Scholfield as a member of the Illinois Supreme Court, "did much towards settling the construction [of the Illinois constitution]." *Id.* at 674.

> laws—individuals who were not satisfied to do business upon a broad and honest basis upon which all might be equal, but who wanted special favoritism—chances to plunder the public treasury or their fellow men—covered up by a private charter to avoid detection and punishment. Those were the men who demanded these special laws, and at their bidding and by their behests they were passed.[123]

Agreeing with this sentiment, delegate Jonathan Merriam added, "[i]f there be any one thing that the people are agreed upon, it is that the whole foul system of special legislation shall be wiped out . . . . It gives to corporations and individuals extraordinary powers, benefiting the few at the expense of the many."[124]

Other delegates at the convention also criticized special legislation:

> [I]nstead of establishing and enforcing general principles, equally applicable to every class of our citizens, giving equal rights and executing equal duties to and from all, it is little else than a mass of laws to promote individual or sectional interests—to enrich particular classes at the expense of others.[125]

As adopted by the convention and subsequently ratified by the people, Illinois' first special legislation provision spelled out twenty-three categories in which the General Assembly was prohibited from passing a local or special law.[126] Among them was a provision that barred the passage of a law which gave a "corporation, association or individual any special or exclusive privilege, immunity or franchise."[127]

This constitutional ban remained unchanged until 1970, when section 13 of article IV of the Illinois Constitution of 1970 eliminated the laundry list of specific instances of special legislation but retained the principle that the General Assembly may not pass a local or special act when a general act may be made applicable.[128] The present special

123. I DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 512 (1870) (convened in Springfield, Illinois on Tuesday, December 13, 1869).

124. *Id.* at 576.

125. *Id.* at 578. William Anderson spoke in support of Jonathon Merriam's proposal to adopt a total prohibition of special legislation. *See id.*

126. *See* GEORGE D. BRADEN & RUBIN G. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED & COMPARATIVE ANALYSIS 203-06 (1969).

127. ILL. CONST. of 1870, art. IV, § 22.

128. *See In re* Belmont Fire Protection Dist., 489 N.E.2d 1385, 1387 (Ill. 1986) (holding unconstitutional as special legislation a statute based on arbitrary population classifications relating to fire protection district); Anderson v. Wagner, 402 N.E.2d 560, 568-69 (Ill. 1979); *see also* BRADEN & COHN, *supra* note 126, at 225-26 (suggesting replacing the list of specific legislation with general prohibition of special legislation).

legislation clause states that "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."[129]

This provision is unique. It is the single express limitation in the legislative article that specifically restricts the lawmaking power of the General Assembly.[130] More important, however, the new constitution clearly abrogated the legislature's previous authority to determine whether a general law could be made applicable.[131] Instead, the judiciary was exclusively vested with this responsibility.[132] This would include review of *any* tort law enacted by the legislature because any tort law could be considered special legislation.

Further support for the vitality and historical significance of the special legislation clause may be inferred from the inclusion of an equal protection clause for the first time in the 1970 Constitution.[133] Prior to this enactment, the Illinois Supreme Court set forth that the special legislation clause supplemented "the equal protection provision of the Fourteenth Amendment of the Federal Constitution by prohibiting the passage of a special law granting to any corporation or association or individual any special or exclusive privilege, immunity or franchise."[134] The framers made an intentional decision that "the prohibition against the enactment of special legislation should be retained in the Constitution in general terms to guard against any attempt" to pass special legislation,[135] despite the fact that they "also recommended including in the new Constitution an equal protection

129. ILL. CONST. of 1970, art. IV, § 13.

130. *See* Samuel K. Grove & Richard K. Carlson, *The Legislature, in* CON-CON, ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 103 (1970) (describing the prohibition against special legislation as "the one provision in the legislative article that specifically limits the lawmaking power of the General Assembly").

131. *See* Bridgewater v. Hotz, 281 N.E.2d 317, 321 (Ill. 1972) (stating Section 13 "specifically rejects the rule that whether a general law can be made applicable is for the legislature to determine").

132. *See id.*; *see also supra* note 129 and accompanying text (stating that deciding whether a general law can apply in lieu of a special law is "a matter for judicial determination.").

133. *See* ILL. CONST. of 1970, art. I, §2. "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." *Id.*

134. Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 132 (Ill. 1952) (holding unconstitutional a statutory provision that arbitrarily granted one class of tortfeasors immunity from liability for negligence without regard to the nature of the acts of the tortfeasor).

135. Anderson v. Wagner, 402 N.E.2d 560, 568 (Ill. 1979).

clause."[136]

The special legislation clause, however, differs from the equal protection clause, regarding the separate requirement that a *court* must determine whether a general law "can be made applicable"—for example, whether there is a sufficient justification for a law's narrow scope when it is given a full and general application.[137] As a result of this requirement, the Illinois Supreme Court has repeatedly "reject[ed] [the] . . . suggestion that the General Assembly has authority to address a problem by degree" under the special legislation clause.[138] Illinois jurisprudence has a strong history of holding invalid as special legislation statutes which discriminate between similarly situated individuals in the exercise of police power, without adequate justification or connection to the purpose of the statute. The Illinois Supreme Court has consistently held that the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound rational basis related to a legitimate state interest.

After local governmental immunity was judicially abolished,[139] the legislature enacted a maze of legislation to resurrect the shield of immunity.[140] Some of these statutes were held unconstitutional as special legislation because they created an arbitrary and irrational pattern for imposing tort liability on governmental entities. For example, in *Harvey v. Clyde Park District*,[141] the Illinois Supreme Court struck a statute that attempted to establish tort immunity for park districts but failed to protect other governmental units.[142] The court

136. *Id.*

137. *See* Grace v. Howlett, 283 N.E.2d 474, 479 (Ill. 1972).

138. *In re* Belmont Fire Protection Dist., 489 N.E.2d 1385, 1391 (Ill. 1986) (rejecting the General Assembly's "authority to address a problem by degree"). *See, e.g., Grace*, 283 N.E.2d at 479 (refusing to rule "that the legislature is free to enact special legislation simply because 'reform may take one step at a time'" [citation omitted]); Wright v. Central DuPage Hosp. Assoc., 347 N.E.2d 736, 743 (Ill. 1976) (rejecting the argument that the General Assembly "may select one phase of one field and apply a remedy there, neglecting others.").

139. *See infra* Part VII.C (discussing the judiciary's role in the creation and abolition of governmental immunity).

140. *See infra* Part VII.C.

141. Harvey v. Clyde Park District, 203 N.E.2d 573 (Ill. 1964). In *Harvey*, a minor sued to recover damages for injuries caused by the negligence of the Park District in maintaining a children's slide. *See id.* at 573.

142. *See id.* at 577. Section 12.1 of the Park District Code provided:

> Any park district shall not be liable for any injuries to person or property, or for the death of any person heretofore or hereafter caused by or resulting from the negligence of its agents, servants, officers or employees in the operation or maintenance of any property, equipment or facility under the jurisdiction,

observed that more was involved than mere differentiation of governmental subdivisions. Persons injured by the negligence of a particular governmental entity, a park district, were also classified.[143] The statute was held arbitrary in the way it permitted or denied recovery, making it impermissible under the special legislation clause.[144] The court found that there was no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to prevail.[145]

Haymes v. Catholic Bishop of Chicago[146] determined the constitutionality of the School Tort Liability Act,[147] which limited tort liability of a not-for-profit private school to $10,000.[148] An identical cap for public schools had been previously declared unconstitutional.[149] The Supreme Court affirmed that "[t]he courts of this State must be open to all those similarly situated upon the same conditions, and where procedures are provided which are applicable to some and not applicable to others under substantially like circumstances, and there are no discernible logical reasons apparent for the variations, they must fall . . . ."[150]

The cap in question violated the special legislation provision.[151] A contrary holding would have created an arbitrary classification among students, whereby those attending public schools could recover the full measure of their damages, but those attending private schools would be entitled to only a limited recovery. This was purely an arbitrary classification with no rational basis.[152]

A statute which arbitrarily divided injured workers into two classes

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control or custody of the park district, or otherwise occasioned by the acts or conduct of such agents, servants, officers or employees.

Id. at 574.

143. *See id.* at 576.

144. *See id.* at 576-77.

145. *See id.* at 576.

146. Haymes v. Catholic Bishop of Chicago, 243 N.E.2d 203 (Ill. 1968).

147. The statute states: "The amount recovered in each separate cause of action against a non-profit private school shall not exceed $10,000.00." ILL. REV. STAT. ch. 122, ¶ 825(b) (1967).

148. *See Haymes*, 243 N.E.2d at 207. In *Haymes*, a minor sued to recover damages for injuries sustained when he slipped in an unlit cloakroom at school. *See id.* at 203-04. The cap on his recovery at $10,000 was appealed. *See id.*

149. *See* Treece v. Shawnee Community Unit Sch. Dist., 233 N.E.2d 549, 554 (Ill. 1966).

150. *Haymes*, 243 N.E.2d at 207 (quoting Lorton v. Brown County Community Unit Sch. Dist., 220 N.E.2d 161, 163 (1960)).

151. *See* ILL. CONST. of 1870, art. IV, § 22; *see also* ILL. CONST. of 1970, art. IV, § 13.

152. *See Haymes*, 243 N.E.2d at 207.

and differentiated the amount of damages they could recover against a third-party tortfeasor was also found to be unconstitutional.[153] *Grasse v. Dealer's Transport Co.* examined a provision of the Workers Compensation Act that automatically transferred an employee's common law right of action against a third-party tortfeasor to the plaintiff's employer.[154] The Illinois Supreme Court held that the statute violated the special legislation ban.[155] In explaining the holding of *Grasse*, the Illinois Supreme Court in *Best* set forth:

> [T]he statute [in *Grasse*] created unreasonable classifications in which the plaintiff's ability to recover complete compensation was determined by fortuitous circumstances. The statute divided injured employees into two arbitrary classes based solely on the fortuity of whether or not the third-party tortfeasor was also bound by the provision. One class was deprived of the right to collect compensatory damages from the tortfeasor and the other class, which was similarly situated, was conferred such right. This Court concluded that there was no substantial or rational difference between the injured employees in the two classes and, therefore, the statute offended the prohibition against special legislation.[156]

In addition to its unequal treatment of injured employees, *Grasse* found the statute arbitrary in its division of third-party tortfeasors into two classes.[157] The first included those bound by the new provision of the Workers' Compensation Act, who were immune from liability for negligence to employees under the Act and were required only to reimburse the employer for workers' compensation payments.[158] The second included all other tortfeasors, who were not immune from liability for negligence, and were responsible for the full amount of

153. *See* Grasse v. Dealor's Transp. Co., 106 N.E.2d 124 (Ill. 1952). The court ruled that the Workers' Compensation Statute which transferred an employee's cause of action against a third-party tortfeasor to employer was an unconstitutional, arbitrary classification of employer and employee. *See id.* at 135.

154. *See id.* at 126.

155. *See id.* at 135. The statute provided:

> Where an injury or death for which compensation is payable by the employer [under Workmens' Compensation statute] was not proximately caused by the negligence of the employer or his employees, [but caused by the negligence of another person bound by the Workers' Compensation Act] then the right of the employee or personal representative to recover against such other person shall be transferred to his employer. . . .

ILL. REV. STAT. ch. 48 §166 (1947).

156. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1073-74 (Ill. 1997).

157. *See Grasse*, 106 N.E.2d at 135.

158. *See id.*

compensatory damages assessed under the common law.[159]

The court again affirmed the principle that no judicial deference need be afforded to legislative judgment when the exercise of police power is arbitrary in *Begich v. Industrial Commission*.[160] This case took exception to a provision of the Workers' Compensation Act which differentiated between persons suffering traumatic loss of an appendage and those incurring the same loss through surgical necessity.[161] The court held that the distinction between traumatic loss of an arm or surgical removal of the upper extremity after loss of a hand to facilitate use of an artificial limb was arbitrary and unreasonable.[162] The court ruled that the loss due to injury was identical, but the compensation awards were unequal.[163] The classification, based on the situs of trauma, without reference to functional disability as a result of the injury, had no reasonable basis.[164]

Grace v. Howlett[165] considered a challenge to Illinois' first attempt at a no-fault provision for motor vehicle accidents. The amendment to the Illinois Insurance Code[166] sought to compensate accident victims more efficiently by classifying insurance coverage on the basis of various categories of motor vehicles and their usage.[167] The amount recoverable depended on whether a person was injured by a private or commercial vehicle.[168] Only owners of private passenger automobiles were required to purchase no-fault insurance.[169] Additionally,

159. *See id.*

160. Begich v. Industrial Comm'n., 245 N.E.2d 457 (Ill. 1969).

161. *See id.* at 459. The statute read, "When an accidental injury sustained is limited to a hand and results in amputation thereof, and such amputation is performed at the point of election on the forearm for the purpose of permitting the use of an artificial member, such injury shall be compensated as the loss of a hand." ILL. REV. STAT, ch. 48, §138.8(e)(9) (1967).

162. *See Begich*, 245 N.E.2d at 459.

163. *See id.*

164. *See id.* The court stated that it could not "find a reasonable basis for differentiating between the appellant's class and those who lost the use of an arm solely through trauma." *Id.* at 459.

165. Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972).

166. ILL. REV. STAT. ch. 73, ¶¶ 1065.150-1065.163 (1971).

167. The statute provided that "every policy insuring against . . . liability . . . for accidental bodily injury or death suffered by any person arising out of the ownership, maintenance or use of any private passenger automobile registered or principally garaged in this State" must provide certain minimum coverage. ILL. REV. STAT. ch. 73 ¶1065.150(a) (1971).

168. *See Grace*, 283 N.E.2d at 478.

169. *See id.*; ILL. REV. STAT. ch. 73 ¶1065.150(c) (1971) (listing vehicles "not used primarily in the occupation, profession or business of the insured").

substantial limitations were imposed on tort recoveries of persons injured by any other type of vehicle.[170] Except in cases of death, dismemberment, permanent disability or serious disfigurement, the amount recoverable for pain, suffering, mental anguish and inconvenience could not exceed the total of a sum equal to fifty percent of the reasonable medical treatment expenses, if the total of such reasonable expenses was less than $500.[171] If in excess of $500, a sum equal to those expenses could be awarded.[172]

Defendants in *Grace* claimed that these changes were rationally connected to a legitimate governmental interest, which included the "inequitable distribution of compensation among personal injury claimants," the expense of the judicial process and the excessive burden on limited judicial resources.[173] The court held the no-fault classification invalid because it created special legislative treatment for certain motor vehicle users, where a general law could be made more applicable.[174] Although there were many purposes for which differences between private passenger automobiles and commercial vehicles would justify dissimilar legislative treatment, the amount to be recovered by persons injured by commercial vehicles was not one of these purposes.[175]

Justice Shaefer affirmatively recognized that the 1970 Constitution required increased judicial responsibility for determining whether a general law is or can be made applicable. He also stated:

> Unless this court is to abdicate its constitutional responsibility to determine whether a general law can be made applicable, the available scope for legislative experimentation with special legislation is limited, and this court cannot rule that the legislature is free to enact special legislation simply because "reform may take one step at a time."[176]

In *Best*, all parties placed particular reliance on the ruling in *Wright v. Central DuPage Hospital Association.*[177] At issue in *Wright* was the legislature's attempt to cap damages at $500,000 "on account of injuries by reason of medical, hospital, or other healing art

170. *See* Ill. REV. STAT. ch. 73 ¶1065.150 (1971); *Grace*, 203 N.E.2d at 478.

171. *See* ILL. REV. STAT. ch. 73 ¶1065.158(a) (1971).

172. *See id.*

173. *Grace*, 283 N.E.2d at 477-78.

174. *See id.* at 479.

175. *See id.*

176. *Id* (citing Williamson v. Lee Optical of Okla., Inc. 348 U.S. 483 (1955)).

177. Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976); *see infra* Part V.A (discussing *Best v. Taylor Mach. Works*).

malpractice."[178] Plaintiff argued that this limit arbitrarily classified and unreasonably discriminated against the most seriously injured victims of malpractice, but did not limit recovery for those who suffered minor or moderate injuries because their losses would never reach the limit of $500,000.[179] Defendants attempted to analogize the cap to limitations imposed on recoveries in statutorily created actions, and claimed that the legislature's policy decision that unequal treatment was necessary to deal with an alleged malpractice crisis should be respected.[180] Defendants maintained "that the General Assembly can set limits on recoveries by plaintiffs even if the result of such limits is to deny certain plaintiffs full compensation for their injuries."[181] Further, "the General Assembly may effect reform 'one step at a time' [and] in so doing it 'may select one phase of one field and apply a remedy there, neglecting the others,'"[182] such that the resulting classifications are "not unreasonable or arbitrary."[183]

The court responded by striking the damages cap, holding that "limiting recovery only in medical malpractice actions to $500,000 is arbitrary and constitutes a special law in violation of section 13 of article IV of the 1970 Constitution."[184] This decision clearly rejected any justification for special legislation, which seeks to effect reform "one step at a time." [185]

The primary bases on which defendants in *Best* sought to justify section 2-1115.1 were the same arguments that the court found unpersuasive in *Wright* two decades before.[186] As the damages cap in section 2-1115.1 shared the same constitutional flaws as the limit in *Wright*, the court correctly concluded on both occasions that the legislature's action violated the special legislation prohibition.[187]

All of these cases affirm that Illinois courts invoke the special legislation provision to determine whether a law discriminates between different classes of individuals by using an arbitrary classification

178. *Wright*, 347 N.E.2d at 738 (quoting ILL. REV. STAT. ch. 73 ¶58.2 (1975)).

179. *See id.* at 741.

180. *See id.* (citing Hall v. Gillins, 147 N.E.2d 352 (Ill. 1958); Cunningham v. Brown, 174 N.E.2d 153 (Ill. 1961)).

181. *Id.*

182. *Id.* at 743 (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

183. *Id.* (citing Davis v. Commonwealth Edison Co., 336 N.E.2d 881 (Ill. 1975)).

184. *Id.* (citing the special legislation clause, ILL. CONST. of 1970, art. IV, § 13 (1970)).

185. *Id.* (citing *Williamson*, 348 U.S. at 489 (1955)).

186. *See supra* note 177 and accompanying text.

187. *See infra* Part V.A.1.

which is not rationally related to a legitimate governmental interest.[188] In each case, the court determined that the proposed legislation treated similarly situated individuals differently, with no rational basis for the classification. In *Best*, the court followed the rationale of its predecessors to determine that parts of the Reform Act contravened the constitutional interdiction against special legislation.[189]

C. The Separation of Powers Doctrine

Each branch of government, be it the legislative, executive, or judicial, has its own realm of authority, and one branch shall not exercise the powers that properly belong to a different branch.[190] The authority to determine when the separation of powers doctrine has been violated rests with the judiciary.[191]

The separation of powers doctrine is violated when a legislative enactment unduly encroaches upon the inherent power of the judiciary.[192] The legislature may regulate the court's procedure and practice, as long as it does not dictate to the court how it must adjudicate and apply the law or conflict with the court's right to control its procedures.[193]

Rendering judgment is exclusively a judicial function.[194] The United States Supreme Court has recognized that remittitur is a question of law.[195] By tradition, and as an inherent power of the judicial branch, Illinois courts are to order remittitur when appropriate.[196] Nevertheless, assessment of damages is primarily an

188. *See supra* Part IV.A.1.b.

189. *See infra* Part V.A.1.

190. ILL. CONST. art. II, § 1; *see also* Murneigh v. Gainer, 605 N.E.2d 1357, 1366-67 (Ill. 1997) (holding invalid an attempt to delegate to the judiciary an exclusively administrative program for collection of blood samples from sex offenders for an executive purpose).

191. *See* People v. Warren, 671 N.E.2d 700, 704-05 (Ill. 1996).

192. *See* People v. Walker, 519 N.E.2d 890, 892-93 (Ill. 1988) (noting that although the branches do not act in isolation of one another, there is a limit to "shared" authorities).

193. *See* O'Connell v. St. Francis Hosp., 492 N.E.2d 1322, 1326 (Ill. 1986).

194. *See* Agran v. Checker Taxi Co., 105 N.E.2d 713, 715 (Ill. 1952) (finding that a statute requiring every attorney of record be notified at least five days before date of dismissal order in an ex parte action was too restricting on the court's discretion, and therefore unconstitutional).

195. *See* Dimick v. Scheidt, 293 U.S. 474, 484 (1935) (holding that the district court was without power to condition the denial of plaintiff's motion for a new trial upon the defendant's consent to increase damages to a specified amount). Remittitur is "[t]he procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY, 1295 (6th ed. 1991).

196. *See* Richardson v. Chapman, 676 N.E.2d 621, 628 (Ill. 1997) (per curiam)

issue of fact for the jury.[197] If a trial judge determines that a verdict is excessive, she must act to correct the injustice, as remittitur is "a *judicial determination* of recoverable damages."[198] In fact, a trial court's failure to order a remittitur where required is reversible error.[199]

D. The Protection Against Invasion of Privacy

The Illinois Constitution contains two specific references regarding the expectation of privacy by Illinois citizens.[200] The first provides that the "people shall have the right to be secure in their persons, houses, papers and other possessions against . . . invasions of privacy or interceptions of communications by eavesdropping devices or other means."[201] The Illinois Bill of Rights declares that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation."[202]

Debate from the Sixth Illinois Constitutional Convention that led to these explicit provisions noted the latter[203] was intended to protect an individual's privacy from invasions or injuries caused by another non-governmental individual or company.[204] The Bill of Rights Committee, whose proposed language was adopted by the Convention, explained in an accompanying report that "it was essential to the dignity and well-being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review."[205] On the floor of the convention, Delegate Dvorak listed an "information bank"

(reducing the recovery for expected medical costs while attempting to represent departure from the findings of the trier of fact).

197. *See* Lee v. Chicago Transit Auth., 605 N.E.2d 493, 509 (Ill. 1992) (per curiam) (finding that the jury did not abuse its discretion in awarding a trespasser's estate $3 million).

198. Carter v. Kirk, 628 N.E.2d 318, 324 (Ill. App. Ct. 1st Dist. 1993) (emphasis added) (holding that the defendants who were granted their request for remittitur in personal injury case did not have standing to appeal trial court's decision not to grant their alternative motion for a new trial on damages only).

199. *See* Haid v. Tingle, 579 N.E.2d 913, 916 (Ill. App. Ct. 1st Dist. 1991) (per curiam) (stating that if a trial judge determines that a jury verdict is excessive, "the judge must act to correct the injustice.").

200. *See* ILL. CONST. art. I §§ 6, 12.

201. ILL. CONST. art. I, § 6.

202. ILL. CONST. art. I, § 12.

203. *See* 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1733-34 (Dec. 8, 1969-Sept. 3, 1970) (providing verbatim transcripts of the convention).

204. *See In re* A Minor, 595 N.E.2d 1052, 1056 (Ill. 1992).

205. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 32.

that "may have all pertinent information about every citizen" as an arguable "invasion of one's privacy."[206] The Constitutional Commentary on this provision explains that "[t]he protection against 'invasion of privacy' is new and is stated broadly" and "expand[s] upon the individual rights which were contained in Section 6 of Article II of the 1870 Constitution and the guarantees of the Fourth and Fourteenth Amendments to the United States Constitution."[207]

The "privacy rights of individual patients" and "the confidential and fiduciary relationship existing between patients and their physicians" are "compelling" interests.[208] "[P]atients in Illinois possess . . . the right to rely on physicians to faithfully execute their ethical duties and thereby protect the confidentiality of the physician-patient relationship."[209] Prior to *Best*, a constitutional right to privacy has been recognized regarding disclosure of less personal items, including bank records[210] and telephone records.[211]

V. *BEST V. TAYLOR MACHINE WORKS:* THE ILLINOIS SUPREME COURT AS GUARDIAN OF THE CONSTITUTION, NOT CRITIC OF THE LEGISLATURE

In *Best v. Taylor Machine Works*,[212] the Illinois Supreme Court held that several provisions of the Reform Act failed judicial review. Because these unconstitutional provisions could not be severed from the remainder, Public Act 89-7, as a whole, was held invalid.[213]

A. The Reform Act Failed Judicial Review

On December 18, 1997, in *Best v. Taylor Machine Works*, the Illinois Supreme Court determined Public Act 89-7, the Civil Justice Reform Amendments of 1995, failed judicial review.[214] In its opinion, the court did not reweigh legislative findings, but identified specific aspects of the Reform Act which violated several provisions of the

206. *Id.* at 1530.

207. ILL. CONST. of 1970, art. I, § 6.

208. Petrillo v. Syntex Lab., Inc., 499 N.E.2d 952, 969 (Ill. App. Ct. 4th Dist. 1986).

209. *Id.* at 960.

210. *See* People v. Jackson, 452 N.E.2d 85, 88-89 (Ill. App. Ct. 1st Dist. 1983).

211. *See* People v. DeLaire, 610 N.E.2d 1277, 1282 (Ill. App. Ct. 2d Dist. 1993) (stating that regarding privacy, "the Illinois Constitution provides greater protection than the Federal Constitution").

212. Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

213. *See id.* at 1069-1100 (holding that the key provisions of the Act were so interconnected and mutually dependent as to be inseparable).

214. *See id.*

Illinois Constitution.[215] The 5-1 decision[216] represents a broad consensus. The specific holdings were:

(1) The $500,000 limitation on compensatory damages for non-economic injury[217] was special legislation[218] and violated the doctrine of separation of powers;[219]

(2) The abolition of joint and several liability[220] violated the constitutional prohibition against special legislation;[221]

(3) The credit set forth in Section 3.5(a) of the Joint Tortfeasor Contribution Act[222] was arbitrary, and thus unconstitutional or superfluous;[223]

(4) The discovery statutes, which mandated unlimited disclosure of plaintiff's medical information and records,[224] violated the separation of powers doctrine and was an invasion of privacy.[225]

Best was a consolidated appeal from two tort actions filed in the circuit court of Madison County, Illinois.[226] In both cases, plaintiffs sought declaratory and injunctive relief against enforcement of the

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215. *See id.* at 1069-1100.

216. *See id.* at 1057. The majority opinion was written by Justice McMorrow. *See id.* at 1062. Justice Miller concurred in part and dissented in part. *See id.* at 1106. Justice Heiple did not participate. *See id.*

217. *See* 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (West Supp. 1998).

218. *See Best*, 689 N.E.2d at 1076-78; *infra* Part V.A.1.

219. *See Best*, 689 N.E.2d at 1080-81; *infra* Part V.A.1.

220. *See* 735 ILL. COMP. STAT. ANN. 5/2-1116, 2-1117 (West 1993 & Supp. 1998).

221. *See Best*, 689 N.E.2d at 1088-89; *infra* Part V.A.2.

222. *See* 740 ILL. COMP. STAT. ANN. 100/3.5(a) (West Supp. 1998). Tortfeasors receive a credit which is applied toward their liability to the Plaintiff for the amount of contribution attributable to Plaintiff's employer, even if this amount exceeds the employer's liability under the Workers' Compensation Act or the Workers' Occupational Diseases Act. *See id.*

223. *See Best*, 689 N.E.2d at 1083-84; *infra* Part V.A.3.

224. *See* 735 ILL. COMP. STAT. ANN. 5/2-1003, 8-802, 8-2001, 8-2003 (West 1996 & Supp. 1998) (providing that any person who claims "bodily injury or disease" is deemed to waive any privilege between the injured person and the health care provider).

225. *See Best*, 689 N.E.2d at 1093-1100; *supra* Part IV.D.

226. *See Best*, 689 N.E.2d at 1062. On July 24, 1995, Vernon Best was severely injured while operating a forklift to move heavy slabs of hot steel. *See id.* at 1064. When the forklift's mast and support assembly collapsed, flammable hydraulic fluid spilled, was ignited and engulfed Best in a fireball, forcing him to jump from the forklift's cab. *See id.* He suffered fractures to both heels and second and third degree burns over 40% of his body, including his face, upper torso, and both arms and hands. *See id.* The second case arose out of the death of twenty-year-old Steven Kelso on December 22, 1995, as a result of injuries sustained when a train struck his car. *See id.* at 1064-65.

Reform Act, and partial summary judgment on the ground that several provisions of the Reform Act violated the Illinois Constitution of 1970.[227] The trial court held that fourteen provisions of the Reform Act were unconstitutional.[228] The matter was appealed directly from the trial court to the Illinois Supreme Court.[229]

1. The $500,000 Cap on Non-economic Damages Violated the Special Legislation Clause.

The core provision of Public Act 89-7 was section 2-1115.1, which imposed a $500,000 cap on non-economic damages in any strict liability or negligence case, involving death, bodily injury, or physical damage to property.[230] Thus, the limitation affected only those individuals for whom a compensatory damage award in excess of the cap was otherwise found necessary to provide full, fair, and reasonable compensation by not only the jury, but the trial judge and any reviewing court.[231] Clearly, the more severely a plaintiff was injured, the greater the disparity and distortion wrought by the cap.[232]

Citing the journal article to which we reply, defendants argued that because the General Assembly has the power to change the common

227. *See id.* at 1064.

228. *See id.* at 1065. Judge Herndon of the circuit court of Madison County held the following unconstitutional: the $500,000 limit on compensatory damages for non-economic injuries, 735 ILL. COMP. STAT. ANN. 5/2-1115.1; the allocation of joint and several liability provisions, 735 ILL. COMP. STAT. ANN. 5/2-1116, 2-1117; the amendments to the Joint Tortfeasor Contribution Act, 740 ILL. COMP. STAT. ANN. 100/3.3(a), 5; select jury instructions, 735 ILL. COMP. STAT. ANN. 5/2-1107.1; the certification of merit for product liability actions, 735 ILL. COMP. STAT. ANN. 5/2-623; the statute of repose for product liability cases, 735 ILL. COMP. STAT. ANN. 5/13-213 (b); the product liability presumptions, 735 ILL. COMP. STAT. ANN. 5/2-2103, 2-2104, 2-2106; and the discovery statutes mandating required disclosure of all of a patient's medical records, 735 ILL. COMP. STAT. ANN. 5/2-1003, 8-802, 8-2001, and 8-2003. *See id.* at 1062.

229. *See* ILL. SUP. CT. R. 302(a) (providing that circuit court cases are directly appealable to the Illinois Supreme Court when a state statute has been invalidated).

230. *See* 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (West Supp. 1998).

231. *See Best*, 689 N.E.2d at 1069.

232. *See id.*; *see also infra* Part V.A.1.a. for specific examples of the discriminating effect of the damages cap. Ironically, although section 2-1115.1 was applicable to all tort litigation, its proponents did not seek to limit recovery of damages in all cases. Excluded from the cap were causes of action dealing with damage to reputation, breach of fiduciary duty, business interruption loss, intentional interference with prospective economic advantage, and other business controversies. Even though the most active group of litigants in Illinois were business entities, whose commercial litigation dwarfs personal injury claims by a rate of 7 to 1, the Reform Act did nothing to cap damages in those cases or reduce the incidence of suits brought by these concerns. *See* Cargill v. Waste Management, Inc., No. 95 L 7867 at 15 (Cook Cnty. Cir. Ct. May 22, 1996) (trial court opinion of Judge Kenneth Gillis).

law, it was constitutional for the legislature to place a limit on compensatory damages.[233] They relied on *Grand Trunk Western Railway Co. v. Industrial Commission*,[234] which affirmed the legislature's exercise of its police power to establish a statutory scheme of workers' compensation to limit liability against an employer when an employee is injured in the course of employment.[235] However, the *Best* court stated that:

> [D]efendants' argument assumes too much. The legislature is not free to enact changes to the common law which are not rationally related to a legitimate government interest. The General Assembly's authority to exercise its police power by altering the common law and limiting available remedies is also dependent upon the nature and scope of the particular change in the law.[236]

The court found that the statutory cap on compensatory damages for non-economic losses produced arbitrary effects that in no way related to legitimate legislative goals.[237]

It is critical to emphasize that nothing in *Best* or plaintiffs' constitutional challenge to the Reform Act maintained that the General Assembly did not have the power to change the common law.[238] The special legislation clause, however, expressly prohibits the General Assembly from conferring a special benefit on a person or group to the exclusion of others similarly situated.[239] As the court has noted in the past, "to the extent that a recovery is permitted or denied on an arbitrary basis, a special privilege is granted," which is a violation of the Illinois Constitution.[240]

The legislature and the proponents of the cap should have known it would be subject to scrutiny by the Illinois Supreme Court, which honors its obligation to conduct meaningful judicial review, including its explicit constitutional mandate under the special legislation provision of the Illinois Constitution. When faced with any constitutional question, including determining whether a particular statutory provision constitutes special legislation, the court has no duty

233. *See Best*, 689 N.E.2d at 1077 (citing Schwartz et al., *supra* note 2, at 745).

234. Grand Trunk Western Ry. Co. v. Industrial Comm'n,125 N.E. 748 (Ill. 1919).

235. *See id.* at 750-52.

236. *Best*, 689 N.E.2d at 1077.

237. *See id.* at 1076-78.

238. *See id.* at 1077.

239. *See id.* For a discussion of the special legislation clause, *see supra* Part IV.B.

240. Grace v. Howlett, 283 N.E.2d 474, 479 (Ill. 1972) (quoting Harvey v. Clyde Park Dist., 203 N.E.2d 573, 576 (Ill. 1964) (finding that a special privilege granted on an arbitrary basis violates section 22 of article IV of the Illinois Constitution)).

to defer to the judgment of the legislature.[241]

a. Specific Examples of the Discriminatory Effect of Section 2-1115.1's Damages Cap

To demonstrate that the cap was disconnected from the stated legislative purpose of providing rationality and consistency to jury verdicts, the *Best* court carefully documented three examples of arbitrary classifications created by section 2-1115.1's damages cap.[242]

The first classification divided injured individuals into those who were slightly injured and those who were severely injured.[243] It did not guarantee substantially similar treatment of persons sustaining injuries for which compensation was assessed at less than $500,000. For example, a jury could award hypothetical plaintiff A $100,000 in compensatory damages for one month of pain and suffering and plaintiff B $100,000 for one year of pain and suffering.[244] These inconsistent determinations demonstrated that section 2-1115.1's legislative purpose of providing consistency to jury awards was not met.[245] Rather, moderately injured plaintiff A could receive the same sum as severely injured plaintiff B. Also consider the situation where plaintiff C was awarded $1 million in compensatory damages for a lifetime of pain and suffering from a permanent disability.[246] Section 2-1115.1 automatically and arbitrarily reduced the award for this permanent disability to $500,000, regardless of whether the verdict was reasonable or fair before the reduction.[247] Tortfeasors were also arbitrarily treated inconsistently under this classification. The tortfeasor who injured plaintiff C paid only a part of the damages for which he was responsible, while the tortfeasors who injured plaintiffs A and B were liable for the full compensatory amount.[248]

The second legislative classification distinguished between persons who suffered identical injuries.[249] A hypothetical plaintiff, who lost a

241. *See supra* notes 128-32 and accompanying text (discussing the court's role in the special legislation clause).

242. *See Best*, 689 N.E.2d at 1075-76. These classifications and the examples illustrating them were offered by plaintiffs at oral argument to demonstrate how the cap is disconnected from the stated legislative purpose. *See id.* at 1075.

243. *See id.* at 1075.

244. *See id.*

245. *See id.* The preamble to the Reform Act contains eighteen specific "findings" and eight listed "purposes," as identified in the *Best* decision. *See id.* at 1067.

246. *See id.* at 1075.

247. *See id.*

248. *See id.*

249. *See id.*

leg in one accident and later had his other leg amputated as a result of a different incident, could recover in full two jury awards of $400,000 in non-economic damages in separate, unrelated actions, totaling $800,000.[250] On the other hand, if the same individual suffered the exact same injury, the loss of two legs, but sustained his injury in a single accident, would be unable to recover an $800,000 award for non-economic compensatory damages because of the arbitrary limit imposed by the cap.[251]

The third classification irrationally discriminated among different types of injuries.[252] The alleged purpose of the Reform Act in limiting non-economic damages was general in nature and supposedly applicable to all tort litigation.[253] Nevertheless, section 2-1115.1 mandated that the cap applied only to non-economic loss in tort claims dealing with death, bodily injury or property damage.[254] Other claims involving non-economic loss remained unaffected by the statute, including invasion of privacy, defamation, negligent infliction of emotional distress, breach of fiduciary duty and damage to reputation.[255] The speculative nature of non-economic damages for these torts was not addressed by the cap. Therefore, the statute arbitrarily discriminated against plaintiffs incurring personal injury, while the cap did not affect recoveries in these other tort actions.[256]

As the above examples demonstrate, the arbitrary classifications created by section 2-1115.1 violated the special legislation prohibition.[257] It was entirely proper for the *judiciary* to determine that this provision of the Reform Act was unconstitutional.[258] Summarizing its holding, the court found:

> [T]he arbitrary and automatic cap on compensatory damages for non-economic injuries in only certain tort cases parallels the harm of the arbitrary classifications stricken by this court in

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.* at 1067. The court noted that "Public Act 89-7 states legislative 'purposes' which relate to the limit on [all] non-economic damages." *Id.* Also, the court summarized the general purposes of the Act to include such things as "proximate consistency in awards . . . reestablish the credibility of the civil justice system, [and] establish parameters or guidelines for non-economic damages." *Id.*

254. *See* ILL. COMP. STAT. ANN. 5/2-111.1 (West Supp. 1998); 735 ILL. COMP. STAT. ANN. 5/2-1115.1(a) (West Supp. 1998).

255. *See Best*, 689 N.E.2d at 1076.

256. *See id.*

257. *See id.*

258. *See supra* notes 128-32 and accompanying text (stating that it is up to the judiciary to decide whether or not special legislation is contrary to current general law).

> *Wright*, *Grace*, and *Grasse*. Therefore, the $500,000 limit does not reestablish the credibility of the tort system, and does nothing to assist the trier of fact in determining appropriate damages for non-economic injuries. The limitation actually undermines the stated goal of providing consistency and rationality to the civil justice system.[259]

b. The Damages Cap Violated the Separation of Powers Doctrine as Courts Are Authorized to Reduce Excessive Verdicts

The substantive limit imposed on the General Assembly by the special legislation prohibition was not the only basis invoked by the Illinois Supreme Court to invalidate the arbitrary non-economic damages ceiling.[260] Plaintiffs argued,[261] and the court agreed, that the cap imposed a legislative remittitur.[262] By fiat, the legislature automatically reduced as a matter of law any determination of non-economic damages by a jury in excess of $500,000.[263]

The General Assembly's attempt to mandate legal conclusions was firmly rebuked.[264] The mandatory $500,000 cap on compensatory damages for non-economic injuries undercut the judges' traditional remittitur power.[265] It operated to directly alter outcomes by substituting a predetermined formula for the jury's determination. As the courts are constitutionally empowered and obligated to reduce excessive verdicts when appropriate in light of the evidence adduced in a particular case, legislative reduction, by operation of law, violated the separation of powers clause.[266] This holding is significant because it circumscribes the authority of the legislature to limit damages, even if a non-arbitrary, nondiscriminating scheme was developed that could pass the rational basis test.

2. Abolition of Joint and Several Liability Violated the Special Legislation Clause

For more than a century, Illinois has recognized the common law

259. *Best*, 689 N.E.2d at 1076. For a discussion of *Grasse*, *see supra* notes 154-159 and accompanying text. For a discussion of *Grace*, *see supra* notes 165-76 and accompanying text. For a discussion of *Wright*, *see supra* notes 177-87 and accompanying text.

260. *See Best*, 689 N.E.2d at 1081.

261. *See id.* at 1078.

262. *See id.* at 1080. *See also supra* note 195 (for a definition of remittitur).

263. *See* 735 ILL. COMP. STAT. ANN. 5/2-1115.1(a) (West Supp. 1998).

264. *See Best*, 689 N.E.2d at 1081 (recognizing that the legislature is precluded from enacting laws that infringe upon the inherent powers of judges).

265. *See id.* at 1080.

266. *See id.* at 1081.

doctrine of joint and several liability, which allows an injured plaintiff to recover full compensation from any, some, or all responsible tortfeasors.[267] In 1883, the Illinois Supreme Court stated that:

> [T]he long and well established principle that where one has received an actionable injury at the hands of two or more wrong-doers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such an injury, and the plaintiff in such case has his election to sue all jointly, or he may bring his separate action against each or any one of the wrong-doers.[268]

Illinois' tort reform in 1986 narrowed the application of joint and several liability for tortfeasors in negligence and strict liability cases, by substituting a greater than twenty-five percent rule of several liability.[269] "Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendant sued by the plaintiff, and any third-party defendants who could have been sued by the plaintiff" is jointly and severally liable for all damages.[270] An exception was made for wrongdoers in medical, hospital and other healing art malpractice cases and malfeasants in environmental claims.[271]

The Reform Act abolished joint liability for any tortfeasor in all actions "brought on account of death, bodily injury to person, or physical damage to property in which recovery is predicated upon fault."[272] A defendant would be held severally liable "only for that proportion of recoverable economic and non-economic damages, if any, that the amount of that defendant's fault, if any, bears to the

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267. *See* Coney v. J.L.G. Industries Inc., 454 N.E.2d 197, 204 (Ill. 1983), *superseded by statute as stated in* Henry v. St. John's Hosp., 536 N.E.2d 221 (Ill. App. Ct. 4th Dist. 1989). In defining joint and several liability, the court in *Coney* stated "[t]he common law doctrine of joint and several liability holds joint tortfeasors responsible for plaintiff's entire injury, allowing plaintiff to pursue all, some, or one of the tortfeasors responsible for his injury for the full amount of the damages." *Id.* at 204.

268. Wabash, St. Louis & Pac. Ry. Co., v. Shacklett, 105 Ill. 364, 381 (Ill. 1883).

269. *See* Pub. Act No. 84-1431, art. 5, § 1 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1117 & 1118 (West 1992)). In view of the holding in *Best*, the constitutionality of the twenty-five percent rule is questionable but that will surely be the subject of future litigation and appellate review.

270. 735 ILL. COMP. STAT. ANN. 5/2-1117 (West 1992).

271. *See* § 5/2-1118 (stating that any defendant found liable for medical malpractice or environmental claims will be jointly and severally liable notwithstanding the greater than 25% rule).

272. § 5/2-1117 (West Supp. 1998) ("Several Liability"). Prior to the Reform Act this section was entitled "Joint Liability," and since the Reform Act was invalidated, this provision is reinstated, as well as § 5/2-1118 ("Exceptions").

aggregate amount of fault of all other tortfeasors."[273] A provision was included for the restoration of joint and several liability in healing art malpractice actions if the non-economic damages cap was deemed invalid.[274]

Proponents of abolition asserted that while it may be unfair for a plaintiff to go uncompensated for an injury, it is equally unfair to require a defendant to pay for more than the part of the injury he or she caused.[275] Responding to this argument, the court set forth that joint liability is only imposed when *all the defendants proximately cause the injury*.[276] Therefore, it is more fair that one of the tortfeasors should pay the entire cost of damages, if necessary, than for the innocent victim to go uncompensated.[277]

Furthermore, the court explained that the doctrine of comparative fault, which allocates fault among the defendants and the plaintiff, does not detract from the fact that "[a] concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage,"[278] and the allocation of fault among defendants "does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury."[279] Therefore, *Best* affirmed the theoretical justification for the imposition of joint and several liability. The court was unswayed that the existence of a comparative fault scheme could be asserted to absolve any defendant, who was a proximate cause of the harm, from responsibility for the entire injury.[280]

The court did not rely on the analysis of joint and several liability when invalidating section 2-1117.[281] Instead, it based its decision upon the violation of the special legislation clause.[282] The preamble to the Reform Act states that one purpose of the Act is that each party bear any loss proportionate to its degree of fault.[283] Peculiarly, joint

273. *Id.* § 2-1117(a).

274. *See id.* § 2-1117(b).

275. *See Best*, 689 N.E.2d at 1085 n.7.

276. *See id.* at 1086 (citing Coney v. J.L.G. Indus. Inc., 454 N.E.2d 197, 205 (Ill. 1983)).

277. *See id.* at 1086-87.

278. *Id.* at 1086 (quoting *Coney*, 454 N.E.2d at 205.

279. *Id.*

280. *See id.* at 1086-87.

281. *See id.* at 1087.

282. *See id.* The court's holding was based on its interpretation of Article IV, § 13 of the Illinois Constitution, which prohibits the passage of a "special or local law when a general law is or can be made applicable." ILL. CONST. OF 1970, art. IV, § 13.

283. *See* Civil Justice Reform Amendments of 1995, Pub. Act. No. 89-7, preamble, 1995 Ill. Laws 284, 287.

and several liability was not abolished in all actions. First, it was preserved for non-physical injuries, such as defamation, intentional or negligent infliction of emotional distress, or invasion of privacy.[284] Clearly, this was not a general law, but one that provided a special benefit for defendants in certain types of tort cases.

Second, joint liability in medical malpractice cases was automatically reinstated if the non-economic damages cap was found invalid.[285] Since the cap was held unconstitutional, this provision was activated. The court concluded that there was no justifiable reason to reinstate joint liability only in medical malpractice cases.[286] Restoration would supply medical malpractice plaintiffs an exclusive benefit.[287] Unlike other personal injury claimants, medical malpractice plaintiffs would not bear the risk of an insolvent or unavailable tortfeasor.[288] Defendants in those cases, however, were placed at a disadvantage when compared with other wrongdoers. In the absence of a damages cap, this differential treatment was exacerbated, and failed to meet the proposed legislative goal of proportionate several liability.[289] For these reasons, the court held section 2-1117(b) preferentially and arbitrarily discriminated in favor of a select group in violation of the prohibition against special legislation.[290]

3. The Credit in Section 3.5 of the Joint Tortfeasor Contribution Act Was Arbitrary or Superfluous

The Reform Act amended section 3.5(a) of the Joint Tortfeasor Contribution Act[291] to modify the court's statutory interpretation and

284. *See* 735 ILL. COMP. STAT. ANN. 5/2-1117(a) (West 1992), 1995 Ill. Laws at 299 (replacing joint liability with several liability only in actions for death, bodily injury, or physical damage to property).

285. *See* § 2-1117(b), 1995 Ill. Laws at 300.

286. *See Best*, 689 N.E.2d at 1088-89.

287. *See id.* at 1088 (stating that "§ 2-1117(b)'s abatement of proportionate several liability in the context of medical malpractice arbitrarily benefits only medical malpractice plaintiffs.").

288. *See id.*

289. *See id.* 1088. The preamble of Pub. Act. No. 89-7 states that "it is the public policy of this State that a defendant should not be liable for damages in excess of its proportional share of fault." Civil Justice Reform Amendments of 1995, Pub. Act. No. 89-7, preamble, 1995 Ill. Laws 284, 287.

290. *See Best*, 689 N.E.2d at 1088-89. For a discussion on the special legislation clause, *see supra* Part IV.B.

291. 740 ILL. COMP. STAT. ANN. 100/3.5(a) (West Supp. 1998). "If a tortfeasor brings an action for contribution against the plaintiff's employer, the employer's liability for contribution shall not exceed the amount of the employer's liability to the plaintiff under the Workers' Compensation Act or the Workers' Occupational Diseases Act." *Id.*

resolution of the competing interests between that statute and the Workers' Compensation Act, known as the *Kotecki* Doctrine.[292] The court's statutory construction provided that if a third-party tortfeasor brings a contribution action against a plaintiff's employer, the employer's liability is limited to the amount of workers' compensation benefits paid.[293] Under section 3.5(a), the tortfeasor receives a credit against his or her liability to the plaintiff equal to the amount of the employer's percentage of fault, even if the amount exceeds the employer's liability under the Workers' Compensation Act.[294]

Initially, the court noted that this provision was fundamentally inconsistent with the abolition of joint liability, which had been replaced by proportionate several liability.[295] Section 2(b) of the Joint Tortfeasor Contribution Act sets forth that "[t]he right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability."[296] Yet, under proportionate several liability, contribution claims against employers should never be filed since no tortfeasor would be liable for more than his or her percentage of fault.[297] The court found it unnecessary to resolve this conflict between the abolition of joint liability and section 3.5(a), because even if the two provisions could coexist, section 3.5(a), on its own, was invalid as arbitrary and unconstitutional.[298]

Next, the court addressed internal inconsistencies in section 3.5(a).[299] The first sentence limited the employer's liability for contribution to the amount of the employer's workers' compensation liability,[300] while the second and third sentences set forth that a tortfeasor seeking contribution would receive a credit for the total amount of contribution for which the employer was found liable.[301]

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292. *See* Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1028 (Ill. 1991) (per curiam) (holding that it is most consistent and fair with the "various statutory schemes" to mandate that an employer only contribute equal to the statutory benefits under the Workers' Compensation Act, even though a tortfeasor would potentially not receive full contribution).

293. *See id.*

294. *See* 740 ILL. COMP. STAT. ANN. 100/3.5(a) (West Supp. 1998).

295. *See Best*, 689 N.E.2d at 1081-82.

296. 740 ILL. COMP. STAT. ANN. 100/2(b) (West 1992).

297. *See Best*, 689 N.E.2d at 1082.

298. *See id.* "We need not resolve this issue, however, for even if we assume that the two provisions can coexist, we determine that section 3.5(a) is invalid." *Id.*

299. *See id.*

300. *See id.*; *supra* notes 293-294 and accompanying text.

301. *See Best*, 689 N.E.2d at 1082. Pertinent portions of the statute read:

> The tortfeasor shall receive a credit against his or her liability to the plaintiff in an amount equal to the amount of contribution, if any, for which the

This credit is then applied against the tortfeasor's liability to the plaintiff.[302] The final clause of the third sentence set forth that the amount of the contribution credit may exceed the employer's workers' compensation liability.[303] "Thus, section 3.5(a) is not only inconsistent with section 2-1117,[304] it is also internally inconsistent: if the second and third sentences of section 3.5(a) are given effect, the first sentence is rendered meaningless," and a "consistent and intelligible construction" of section 3.5(a) may not be possible.[305]

Even if section 3.5(a) were given an interpretive reconciliation, the result would give some tortfeasors a "double reduction."[306] The amendments permitted a tortfeasor to assert its section 3.5(a) credit in addition to the allocation of fault supplied under section 2-1117,[307] producing a "double reduction" of a plaintiff's recovery as a result of his employer's fault.[308] The court illustrated this effect with a hypothetical.[309] Assume that an injury, which warranted a $500,000 recovery, was caused equally by the injured's employer and a third-party tortfeasor. As the tortfeasor was 50% at fault, his liability was reduced to $250,000, in accordance with the principle of proportionate liability. This same tortfeasor was then entitled to a section 3.5(a) credit equal to the employer's 50% share of fault, which was an additional $250,000.[310] The "double reduction" completely eliminated plaintiff's recovery.[311] The court could find no guidance in the House

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> employer is found liable to that tortfeasor, even if the amount exceeds the employer's liability under the Workers' Compensation Act or the Workers' Occupational Diseases Act. 740 ILL. COMP. STAT. ANN. 100/3.5(a) (West 1996).

Id.

302. *See Best*, 689 N.E.2d at 1082.

303. *See* 740 ILL. COMP. STAT. ANN. 100/3.5(a) (West 1996). The clause states, "even if the amount exceeds the employer's liability under the Workers' Compensation Act or the Workers' Occupational Diseases Act." *Id.*

304. *See supra* notes 267-90 and accompanying text. The act states that "any defendants found liable shall be jointly and severally liable . . . ." Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7, § 2-1117(b), 1995 Ill. Laws 284, 300.

305. *Best*, 689 N.E.2d at 1082.

306. *See id.* at 1083.

307. *See supra* notes 299-305 and accompanying text. "[A] defendant is severally liable only and is liable only for that proportion of recoverable economic and non-economic damages, if any, that the amount of that defendant's fault, if any, bears to the aggregate amount of fault of all other tortfeasors." 735 ILL. COMP. STAT. ANN. 5/2-1117 (West 1996).

308. *See Best*, 689 N.E.2d at 1083.

309. *See id.*

310. *See id.*

311. *See id.*

proceedings to aid it in interpretation to resolve this issue.[312] Any other construction would lead to the section never being applied.[313] This would render the law a nullity and entirely superfluous.[314] Thus, the court held that the credit in section 3.5(a) was "arbitrary and unconstitutional."[315]

4. Mandatory Disclosure of Medical Records Violated the Separation of Powers Provision and the Right of Privacy

Finally, the court held unconstitutional certain physician-patient disclosure requirements.[316] Prior to the Reform Act, Illinois adhered to the *Petrillo* Doctrine,[317] which is a common law rule that bars a defense attorney from engaging in *ex parte* discussions with a plaintiff's treating physicians.[318] This tactic was condemned in recognition of a strong public policy interest in preserving the sanctity of the confidential and fiduciary physician-patient relationship.[319]

Section 2-1003(a) of the Reform Act attempted not only to circumvent this rule, but to mandate that every patient who filed a personal injury lawsuit agree to unlimited disclosure of any medical information to any party who requested it.[320] *Best* found that these

312. *See id.* at 1084 (stating that section 3.5(a) was only briefly discussed by the House and that the comments "provide no guidance").

313. *See id.* (stating that the credit under section 3.5(a) could not exist under proportionate several liability of section 2-1117).

314. *See id.* (stating that in construing a statute, a court's interpretation cannot render portions of legislation superfluous).

315. *Id.* at 1084.

316. *See id.* at 1089-1100.

317. The *Petrillo* doctrine is referenced in *Almgren v. Rush-Presbyterian St. Luke's Medical Center*, 642 N.E.2d 1264, 1269 (Ill. App. Ct. 2d Dist. 1997); *see also* Ruperd v. Ryan, 683 N.E.2d 166 (Ill. 1994); Karsten v. McCray, 509 N.E.2d 1376 (Ill. App. Ct. 2d Dist. 1987) (citing the *Petrillo* doctrine).

318. *See* Petrillo v. Syntex Lab., 499 N.E.2d 952, 971 (Ill. App. Ct. 1st Dist. 1986) (holding that a physician's ethical duty not to speak to third parties about a patient, as well as alternatives sanctioned by discovery rules, prohibit a defense counsel from engaging in *ex parte* discussions with a plaintiff's treating physicians).

319. *See* Philip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 LOY. U. CHI. L.J. 1001, 1002 (1990) (discussing the role of the courts in defining the scope of the rule against *ex parte* contacts within the constraints of confidentiality in the adversary system, the confidential and fiduciary physician-patient relationship and the "practical realities of modern personal injury litigation"); *see also infra* note 351 (providing a definition of fiduciary relationship).

320. *See* 735 ILL. COMP. STAT. ANN. 5/2-1003(a) (West 1992 & West Supp. 1998) (found unconstitutional in Best v. Taylor Mach. Works, 179 Ill. 2d 367, 689 N.E.2d 1057 (Ill. 1997)). The requirements listed were incorporated into numerous amendments to the Code of Civil Procedure, chapter 735, including section 8-802, privilege between health care practitioner and patient; section 8-2001, inspection of hospital records;

alterations of discovery practice in Illinois violated the separation of powers doctrine and a patient's privacy interest in confidential medical information.[321]

Specifically, section 2-1003(a) provided that a person making a claim "for bodily injury or disease . . . shall be deemed to waive any privilege between the injured person and each health care provider who has furnished care at any time."[322] This mandatory consent operated as a waiver of any privilege between the plaintiff-patient and any health care provider, including disclosure of irrelevant confidential medical records.[323] Section 2-1003(a) also required that if a plaintiff failed to supply the requested consent form in a timely manner, "the court, on motion, shall issue an order authorizing disclosure to the party or parties requesting said consent of all records and information mentioned herein or order the cause dismissed."[324] This mandatory language obligated the court to force a party to disclose confidential medical information, and if the party refused, to enter an order of involuntary dismissal.[325]

While *Best* was under advisement, the Illinois Supreme Court addressed section 2-1003(a) of the Reform Act and found it unconstitutional in *Kunkel v. Walton*.[326] In *Kunkel*, defendants served a request for the mandatory consents.[327] In response, plaintiff

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section 8-2003, inspection of physician records; and section 8-2004, inspection of clinical psychology records. *See* 735 ILL. COMP. STAT. ANN. 5/8-802, 5/8-2001, 5/8-2003, 5/8-2004 (West 1992 & West Supp. 1998) (mandating release of documents to persons holding consents pursuant to §5/2-1003(a)). Since the origin of the challenged medical disclosure is in section 2-1003(a), this article, like *Best*, will address that section. *See Best*, 689 N.E.2d at 1089 n.9.

321. *See Best*, 689 N.E.2d at 1094, 1100. The court stated that, "section 2-1003(a) impermissibly interferes with the inherently judicial authority to manage the orderly discovery of information relevant to specific cases. Therefore, the statute violates the separation of powers clause of the Illinois Constitution." *Id.* at 1094. "[T]he privacy interest referred to in the 'certain remedy' clause of section 12 provides a constitutional source for the protection of the patient's privacy interest in medical information and records that are not related to the subject matter of the plaintiff's lawsuit." *Id.* at 1100; *see also infra* notes 348-59 and accompanying text (discussing the *Best* court's determination that section 2-1003(a) violated a patient's right to privacy).

322. 735 ILL. COMP. STAT. ANN. 5/2-1003(a) (West 1992 & West Supp. 1998).

323. *See Best*, 689 N.E.2d at 1094.

324. 735 ILL. COMP. STAT. ANN. 5/2-1003(a) (West 1992 & West Supp. 1998).

325. *See Best*, 689 N.E.2d at 1094.

326. Kunkel v. Walton, 689 N.E.2d 1047, 1049 (Ill. 1997).

327. *See Kunkel*, 689 N.E.2d at 1049. Sandra and Robert Kunkel brought suit seeking recovery for medical malpractice occurring in the course of Mrs. Kunkel's treatment. *See id.* Mr. Kunkel sued under the Right of Married Persons Act, 750 ILL. COMP. STAT. ANN. 65/15 (West 1994), for loss of consortium. *See id.* Defendants served plaintiffs with a request pursuant to section 2-1003 for consent to release medical

requested a protective order.[328] The trial court held that these unlimited disclosure provisions violated the separation of powers doctrine and invaded the fundamental right of privacy.[329]

Defendants appealed directly from the circuit court of Macon County to the Illinois Supreme Court.[330] That court determined that the absolute and unqualified language of section 2-1003,[331] which did not restrict the consent requirement to the injury of the underlying suit or a related condition, acted as a "condition of proceeding with [a] lawsuit"[332] and went "well beyond the legitimate objectives of discovery."[333] The court observed that, "section 2-1003(a) seems to be designed to discourage tort victims from pursuing valid claims by subjecting them to the threat of harassment and embarrassment through unreasonable and oppressive disclosure requirements."[334]

In a complete circumvention of the relevance requirements of the Supreme Court Rules, there was "no reference whatsoever to any form of judicial oversight or any discretionary power to safeguard against abuse of the consent procedure."[335] This impermissibly encroached "upon the authority of the judicial branch."[336] The right to privacy[337] was also violated because irrelevant confidential medical information was required to be furnished, with no judicial control over its scope.[338]

Best expands upon the reasoning supplied in *Kunkel.* The court bluntly stated that section 2-1003(a) created "an irreconcilable conflict with the inherent authority of the judiciary."[339] The court has

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information. *See id.* Plaintiffs challenged the constitutionality of section 2-1003(a). *See id.*

328. *See id.*

329. *See id.*

330. *See id.*

331. *See supra* text accompanying notes 322-25 (discussing waiver of privilege by injured person).

332. *Kunkel*, 689 N.E.2d at 1053.

333. *Id.*

334. *Id.*

335. *Id.* at 1054.

336. *Id.* at 1055; *see also* ILL. CONST. art., 2 § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

337. *See* ILL. CONST. art. 1, § 6 ("The people shall have the right to be secure . . . against unreasonable searches, seizures [and] invasions of privacy. . . ."); *infra* notes 348-59 (discussing the right to privacy).

338. *See Kunkel*, 689 N.E.2d at 1056. The *Kunkel* court held that "section 2-1003(a) makes no provision for any judicial control of the scope of disclosure [and] disclosure of highly personal medical information having no bearing on the issues in the lawsuit is a substantial and unjustified invasion of privacy." *Id.*

339. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1092 (Ill. 1997); *see Kunkel*,

constitutional rulemaking power to regulate the judicial system.[340] It also has authority to manage the court system by prohibiting abuse of its procedures.[341] Illinois judges have the right to control the scope of discovery in order to balance the interests of parties and to prevent the compulsory disclosure of medical information irrelevant to the lawsuit.[342] The mandatory language of section 2-1003(a) obligated the court to become a party to the forced disclosure of irrelevant medical information.[343] The court would be compelled to order an involuntary dismissal, which is an adjudication on the merits, as the sole sanction if plaintiff refused to comply.[344] Accordingly, *Best* held that evaluating the relevance of discovery requests and the limitation of these requests to prevent abuse or harassment was a "uniquely judicial function."[345] Section 2-1003(a) interfered with the "judicial authority to manage the orderly discovery of information relevant to specific cases."[346] Therefore, section 2-1003(a) violated the separation of powers clause of the Illinois Constitution.[347]

Best further determined that section 2-1003(a) violated a patient's right to privacy.[348] Specifically stating that "because the legislative decision to eviscerate" the *Petrillo* Doctrine was questioned by plaintiffs in their challenge to section 2-1003 (a), the *Best* court found

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689 N.E.2d at 1052.

340. *See* O'Connell v. St. Francis Hospital, 492 N.E.2d 1322, 1327 (Ill. 1986) (holding that a statute requiring dismissal by the trial court under certain circumstances violated judicial authority to decide cases).

341. *See* Gibellina v. Handley, 535 N.E.2d 858, 866 (Ill. 1989) (holding that a motion which results in a final determination of a case can be heard before a motion to voluntarily dismiss the suit in order to curtail abuse of voluntary dismissals).

342. Judicial authority to limit discovery requests and to impose sanctions for discovery violations is expressly embodied in the Illinois Supreme Court rules, which mandate that all discovery requests must be relevant to the subject matter of the litigation. *See* ILL SUP. CT. R. 201.

343. *See Best*, 689 N.E.2d at 1093.

344. Illinois Supreme Court Rule 273 states that involuntary dismissal, with certain exceptions, operates as an adjudication on the merits. *See* ILL SUP. CT. R. 273. As explained in *Best*, enforcement of the mandatory disclosure could result in plaintiff, injured through the fault of another, losing his or her right to recover as a sanction for failure to provide "the blanket disclosure of all confidential medical information, irrespective of how irrelevant to the lawsuit and however personal, sensitive or embarrassing, the confidential medical information may be to the plaintiff." *Best*, 689 N.E.2d at 1093.

345. *Best*, 689 N.E.2d at 1093.

346. *Id.* at 1094.

347. *See id.* at 1094; *see also supra* text accompanying notes 45-59, 88-89 (discussing separation of powers).

348. *See Best*, 689 N.E.2d at 1100.

it "appropriate to examine the rationale" of that decision.[349] The *Best* court held that the "privacy rights of individual patients"[350] and "the confidential and fiduciary relationship[351] existing between patients and their physicians"[352] were deemed compelling interests worthy of protection.[353] "[P]atients in Illinois possess . . . the right to rely on physicians to faithfully execute their ethical duties and thereby protect the confidentiality of the physician-patient relationship."[354] For example, in Illinois, a physician may be held liable for invasion of privacy for revealing confidential patient information to a third party.[355] The physician-patient privilege is strongly based in medical ethics, as well as the fiduciary relationship between the parties.[356]

The court concluded that section 2-1003(a) was unconstitutional on privacy grounds because it required the disclosure of private medical information not related to the plaintiff's claim.[357] Involuntary waiver of the physician-patient privilege is limited to methods of discovery authorized by the Illinois Supreme Court Rules and not to *ex parte* discussions among defendants and physicians.[358] "Therefore, . . . patients in Illinois have a privacy interest in confidential medical information, and . . . the *Petrillo* court properly recognized a strong public policy in preserving patients' fiduciary and confidential

349. *See id.* at 1098.

350. *See supra* Part IV.D (discussing the right to privacy).

351. In *Petrillo*, the court explained that a fiduciary relationship exists when "there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence." Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 961 (Ill. App. Ct. 1st Dist. 1986) (alteration in original) (quoting Neagle v. McMullen, 165 N.E. 605, 608 (Ill. 1929)).

352. *Petrillo*, 499 N.E.2d at 970. The sanctity of the fiduciary physician-patient relationship was also explored in Miles v. Farrell, 549 F. Supp 82 (N.D.Ill. 1982); Witherell v. Weimer, 421 N.E.2d 869 (Ill. 1981); Scheueter v. Barbeau, 634 N.E.2d 1325 (Ill. App. Ct. 5th Dist. 1994); Testin v. Dreyer Medical Clinic, 605 N.E.2d 1070 (Ill. App. Ct. 2d Dist. 1992); Karsten v. McCray, 509 N.E.2d 1376 (Ill. App. Ct. 2d Dist. 1987).

353. *See Best*, 689 N.E.2d at 1100.

354. *Petrillo*, 499 N.E.2d at 960.

355. *See* Renzi v. Morrison, 618 N.E.2d 794, 797 (Ill. App. Ct. 1st Dist. 1993) (holding that a psychiatrist may be held liable for damages for voluntarily disclosing private patient communications as a witness for the victim's spouse during divorce proceedings).

356. *See Petrillo*, 499 N.E.2d at 957-61.

357. *See Best*, 689 N.E.2d at 1100. The court stated that "we further believe that the privacy interest . . . provides a constitutional source for the protection of the patient's privacy interest in medical information and records that are not related to the subject matter of the plaintiff's lawsuit." *Id.*

358. *See Petrillo*, 499 N.E.2d at 959.

relationship with their physicians."[359]

B. Severability

After ruling on these four specific components of the Reform Act,[360] the *Best* court concluded its opinion by considering whether these unconstitutional provisions could be severed from the remainder.[361] Severability is a matter of legislative intent,[362] which is determined by the following test:

> The settled and governing test of severability is whether the valid and invalid provisions of the Act are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently. The provisions are not severable if they are essentially and inseparably connected in substance.[363]

Although the Reform Act included a severability clause, its presence was not conclusive, but "serve[d] only to establish a presumption that the legislature intended for an invalid statutory provision to be severable."[364]

Finding that the Reform Act was a comprehensive piece of legislation, in which the individual pieces were inseparable from the whole, the court initially noted the speed with which Public Act 89-7 was pushed through the legislative process.[365] Additionally, transcripts showed that the Reform Act was "presented to the full

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359. *Best*, 689 N.E.2d 1100.

360. *See supra* notes 213-25. The four components are (1) violation of the special legislation clause by the $500,000 cap on non-economic damages, (2) violation of the special legislation clause by the abolition of joint and several liability, (3) that the credit in section 3.5 was arbitrary and superfluous, and (4) violation of the separation of powers provision and the right to privacy by the mandatory disclosure of medical records. *See id.*

361. *See Best*, 689 N.E.2d at 1100-04.

362. *See id.* at 1101.

363. *Id.* at 1101 (citations and internal quotes omitted) (quoting Fiorito v. Jones, 236 N.E.2d 698, 704 (Ill. 1968) (voiding all 1967 amendments to the Service Occupation Tax Act upon finding one amendment unconstitutional and the class of amendments unseverable)).

364. Jacobson v. Department of Public Aid, 664 N.E.2d 1024, 1031 (Ill. 1996) ("The presumption will be overcome and the entire provision held unconstitutional if the legislature would not have passed the statute with the validated portion eliminated.").

365. *See Best*, 689 N.E.2d at 1103 ("It is undisputed that the bill was distributed to the full membership of the house minutes before midnight on the evening before the floor debates were to be held . . . . This lengthy piece of legislation was presented to the full house for discussion just hours after its distribution, and was put to a vote the next day.").

house for vote as a whole, integrated piece, and the presentation of any modifications or amendments was discouraged."[366] Taking into consideration the manner in which it was passed, and after examining the preamble and legislative history, the court concluded that the cap on non-economic damages was the "centerpiece" of the legislation.[367] In support of that proposition, the court cited the exception to the abolition of joint liability, which provided that if the damages cap was found unconstitutional, joint liability would not be abolished in medical malpractice cases.[368] *Best* found that "this legislative attempt to single out one class of plaintiffs or tortfeasors for separate treatment, based on the eventuality that the cap was invalidated, demonstrates that the key provisions of the Act are interconnected and mutually dependent upon each other."[369]

The court concluded that the creation of a damages cap and the abolition of joint liability were the central purposes of the Reform Act and that "[t]he removal of these two central goals of [the Reform Act] . . . defeats, in large part, its *raison d'etre*."[370] The core provisions were declared unconstitutional, and because they were essential and inseparable from the remainder of the Reform Act, the court held that the legislation must fail *in toto*.[371]

VI. THE ACCOUNTABILITY OF JUDGES PROHIBITS THEM FROM DECISIONS BASED SOLELY ON PERSONAL VALUES

As careful scrutiny of *Best* demonstrates, the court premised its opinion on well-established principles of Illinois constitutional adjudication. Whether the conclusion reached coincides with or diverges from the "personal" opinion of any particular justice is unknown. After all, how does one verify that any particular judge or panel of judges has ruled on any issue solely as a matter of individual choice? The authors whose views we counter hinge their answer solely on the result.[372] In essence, they claim that any decision which upholds tort reform under judicial review represents sound neutral constitutional adjudication, while any decision which invalidates tort

366. *Id.*

367. *See id*; *see also supra* Part V.A.1 (discussing the invalidity of the non-economic damages cap provision).

368. *See Best*, 689 N.E.2d at 1103.

369. *Id.*

370. *Id.* at 1104.

371. *See id.*

372. *See* Schwartz et al., *supra* note 2, at 749-50; Schwartz et. al, *America's Tort Law*, *supra* note 30, at 2, 14, 15.

reform evinces inappropriate skewing of principles of constitutional interpretation.[373] We suggest some basis other than result must be used. A debate that is end-oriented will merely champion a preference, most likely dependent on the one whose "ox is being gored."[374]

Assume, for the moment, however, that judges do invoke idiosyncratic beliefs as part of their decision making process. Does this make these judges rabid counter-majoritarian outsiders? Clearly not, for while judges try to see issues objectively, they must still examine them with their own eyes. In observing with their eyes, judges do not abandon their communities, experiences or ideas. Necessity requires judges to make value judgments when interpreting the law, but judges must make these assessments in considered and thoughtful ways.[375] This balancing is not a fundamental flaw, it is simply a description of what judges do—they judge! If balancing is viewed as an illegitimate function of the judiciary, the process is misperceived.[376]

Exclusion of judges from the lawmaking process should not be

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373. *See* Schwartz et al., *supra* note 2, at 749-50; Schwartz et al., *America's Tort Law*, *supra* note 30, at 2, 14, 21.

374. Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 618 (1992) (discussing constitutional and other legal issues in terms of categorization and balancing and how courts move from one approach to the other).

375. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12-13 (1921).

376. *See id.* Justice Benjamin Cardozo supplied insight into the methods utilized by judges to reach decisions, describing the subconscious element of the judicial process. On this issue the Justice stated:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, is giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes the uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

Id.

premised on their lack of accountability, as opposed to the notion that the legislature is accountable to the electorate. Judges' accountability is supplied by the institutional constraints of the judicial and appellate process,[377] which serve to rein in judicial activism and ensure that judges do not reach results by lottery or whim.[378]

First, judges have canons of ethics[379] and an oath of office, which require them to adhere to the rule of law and to uphold their state and federal constitutions. Second, the structure of the appellate system requires consensus to meet the required concurrence for majority.[380] Judges on these panels confer amongst themselves, sometimes before and often after hearing oral arguments. Diversity among judges fosters the development of the law through cross-pollination of ideas. Out of this "attrition of diverse minds" there is created something which is "greater than its component elements."[381] If not, the decision will be indeterminate because the court will explain how an opposite conclusion might be reached by an informed impartial observer.[382] In that case, the opinion provides the seeds of dialogue, not an imprimatur.

Third, the record limits decisions based on facts pleaded or proven and legal arguments raised and shaped by counsel.[383] If a decision is

377. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19 (1960). There are "steadying factors" built into the judicial decision making process which constrain judges in the adjudication of cases. The final safety valve in the adjudicative system is that courts can and do correct their own mistakes, and, if they do not, the legislature can modify or reject their decisions. *See id.* at 48.

378. *See id.* at 29.

379. *See, e.g.*, ILLINOIS CODE OF JUDICIAL CONDUCT, ILL. S. CT. R. 61-67 (West 1993 & West Supp. 1998). The canons are:

> A judge should uphold the integrity and independence of the judiciary; a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities; a judge should perform the duties of judicial office impartially and diligently; a judge may engage in activities to improve the law, the legal system, and the administration of justice; a judge should regulate his or her extrajudicial activities to minimize the risk of conflict with the judge's judicial duties, nonjudicial compensation, and annual statement of economic interests; a judge or judicial candidate shall refrain from inappropriate political activity.

Id.

380. *See* ILL. SUP. CT. R. 22(c) (West 1993 & West Supp. 1998) ("Three judges must participate in the decision of every case, and the concurrence of two shall be necessary to a decision.").

381. CARDOZO, *supra* note 375, at 177.

382. *See* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH L. REV 827, 847, 891 (1988) (indicating that the modern, heterogeneous American judiciary often makes judgments on the basis of ethics or policy).

383. *See* County Board of School Trustees of DuPage County v. Bendt, 174 N.E.2d 404, 406 (Ill. App. Ct. 2d Dist. 1961) (stating that a reviewing court is bound by the

not supported by strong legal, and relevant factual arguments, the chance of valid criticism and reversal increases.[384] Fourth, and perhaps most importantly, courts usually supply written opinions. Unlike legislators, they must demonstrate that their conduct is not the product of caprice or a back room deal.[385] Combined with the doctrine of *stare decisis*, judges' obligation to articulate their rationale controls judicial arbitrariness and promotes consistency among courts. When applicable, existing case law must be addressed. When necessary to overrule precedent and invoke public policy concerns, courts must explain their perception of the public good. Any member of the tribunal may set out an issue the majority failed to address, or delineate matters of dispute in a dissenting or concurring opinion. Thus, judicial opinions are subject to scholarly criticism from the bench, the bar, the parties and even the press. This dialectic works to restrain judges and to clarify issues.

Fifth, outside the area of constitutional adjudication, any decision is subject to reversal or alteration by statute. History demonstrates, however, that few common law tort decisions are afforded any attention whatsoever by the legislature. Examples of some decisions that were given attention are discussed below. These decisions demonstrate the dialogue that can occur between courts and the legislature.

VII. THE JUDICIAL ROLE IN DEVELOPING ILLINOIS TORT LAW

Those who sought to persuade the Illinois Supreme Court to uphold the Reform Act began their argument by asking, "[s]hould tort law be decided by courts or legislatures?"[386] We suggest the only logical answer is that both branches are integral to its development. History clearly demonstrates that formulation of tort law has never been the exclusive province of either branch. Nevertheless, tort law's development has, in large measure, been the courts' domain.[387]

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record of proceedings in the trial court). *But see* Heb v. Beegle, 481 N.E.2d 846, 848 (Ill. App. Ct. 5th Dist. 1985) (stating that only rarely, when an injustice might otherwise result, may questions of law not argued at trial be considered on appeal).

384. *See* Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 983 (1993).

385. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 599 (1993).

386. Schwartz et al., *supra* note 2, at 745.

387. *See* Victor E. Schwartz et al., *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, LEGAL TIMES, Feb. 10, 1997, at S34 ("Traditionally most of America's tort law has been common law, developed by courts through judicial decisions.").

A. *The History of Interaction Between the Courts and the Legislature*

Legislative incursion into tort law occurs infrequently, and is hardly preeminent. Between 1853 and 1911, the General Assembly established only five purely statutory causes of action. The common law provided no remedy for those plaintiffs whose causes of action are now permitted by the Wrongful Death Act of 1853,[388] the Survival Act of 1873[389] and the Dram Shop Act of 1874[390] (now the Illinois Liquor Control Act). The now repealed Structural Work Act of 1907[391] and the Workers' Compensation Act of 1911[392] supplied a right of recovery for injured workers whose actions were previously barred by the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule.

Other subsequent legislative codifications of tort actions include the Animal Control Act,[393] the Domestic Animals Running at Large Act[394]

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388. 1853 ILL. LAWS p. 97, § 1 (codified at 740 ILL. COMP. STAT. 180/1 (West 1993 & West Supp. 1998)). The statute reads:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof . . . company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Id.

389. 1871-72 ILL. LAWS 77 (codified at 755 ILL. COMP. STAT. ANN. 5/27-6 (West Supp. 1998)). The statute provides:

> In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 6-21 of An Act Relating to Alcoholic Liquors.

Id.

390. 1873-74 ILL. LAWS 262 (codified at 235 ILL. COMP. STAT. 5/1-1 to 12-2 (West 1993 & West Supp. 1998)) (providing a right of action to persons injured while intoxicated against a party licensed to sell liquor, who caused the intoxication of the injured persons).

391. 1907 Ill. Laws 312, § 0.01-9 (codified at 740 ILL. COMP. STAT. 150/0.01-9 (West 1993 & West Supp. 1998)) repealed by Pub. Act. No. 89-2 §5 (1995) (providing rights of action to persons employed in building and other structural work).

392. 1911 ILL. LAWS 315 (codified at 820 ILL. COMP. STAT. 305/1-30 (West 1993 & West Supp. 1998)) (providing a purely statutory remedy for employees accidentally injured at work).

393. 510 ILL. COMP. STAT. 5/1-28 (West 1993 & West Supp. 1998) (providing a cause of action for individuals attacked and injured by vicious dogs).

394. 510 ILL. COMP. STAT. 55/1-6 (West 1993 & West Supp. 1998) (providing for liability for owners of unrestrained livestock that cause damage).

and the Nursing Home Care Reform Act.[395] The existence of these statutory actions neither precludes nor preempts a common law negligence claim.[396]

There is no comprehensive tort code in Illinois, nor do we suggest that there should be. The common law of torts is a rich heritage of judicial decisions, filled with historical and philosophical perspectives, examined, explored, and developed by generations of judges. Deterrence, risk utility, compensation, corrective justice, social control, and other policy considerations have fostered lively debate, and because of their dynamism, are difficult to capture in uniform pronouncements. Certainly, the rancor which has sprung up over the development of the *Restatement (Third) of Torts: Product Liability* should give pause to anyone who would seek to establish black letter tort rules.[397]

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395. 210 ILL. COMP. STAT. 45/1-101 to 3-806 (West 1993 & West Supp. 1998) (setting out the rights of nursing home residents and a cause of action for damages when those rights are violated).

396. *See* Philip H. Corboy, *The Not -So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043 (1994).

397. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (defining design defect, formerly the subject of rich judicial development, as "when the foreseeable risk of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe.").

The American Law Institute's proposal has been criticized for failing to adequately reflect the legitimate interests of consumers. Further, there is no proof real changes to §402A were required. *See* Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261 (1997). This author observed:

> It is not a restatement of the law and does not rest on an evaluation of cases and policies. It exists merely because it gathered sufficient votes . . . The ALI has changed and so, apparently, has its mission. The ALI's mission is no longer to state the law, but rather to issue pro-manufacturer political documents.

Id. at 279.

See also Marshall S. Shapo, *A New Legislation: Remarks on the Draft Reinstatement of Products Liability*, 30 U. MICH. J.L. REFORM 215 (1997) (questioning the role of the ALI in products liability law and pointing to alternative considerations not listed in ALI); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 636 (1995) (urging that the restatement "preserve the flexibility of judging and the creativity accompanying it that have been the hallmarks of the judicial development of American products liability law."); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Product Liability Design Defects—A Survey of States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996) (asserting that the majority of jurisdictions do not require proof of a reasonable alternative design as part of a plaintiff's *prima facie* case, and thus the Restatement 3d does not accurately reflect existing law). Professor Vandall also notes the alignment of some parts of Restatement

The bulk of substantive tort law in Illinois is found in the common law. Every day, our state courts delineate the limits of tort liability. The facts of each case are different and the answers vary, but the court's function is always the same: to examine the relation of the parties, and to weigh and balance the nature of the risk and the public interest. Because issues of negligence and proximate cause are debatable with the possibility of fair minded persons reaching different conclusions, the jury has been charged as the tribunal to decide these questions of fact.[398]

The development of product liability in Illinois and every state was a remarkable triumph for the common law tradition. No other nation that made the transition from a rural agrarian society to an industrialized mass market economy has given a strong voice to ordinary citizens in determining product safety as has been vested in our civil juries.[399] Who could have foreseen that new forces of production and transportation, provision of public utilities, and burgeoning rapid growth in the manufacture of pharmaceutical products would result in devastating injury which required fundamental changes in tort law? These principles, now called product liability, emerged slowly, one case at a time, molded by reasoned appellate decision, state by state, allowing tort law to address the realities of life outside the courtroom.[400]

Judges, scholars, and advocates devoted the better part of a century to dismantling the barrier to trial by jury in product liability cases.[401] The conceptual revolution it wrought was dramatic, and demonstrated that common law, even in an age of statutes, could still be a dynamic instrument of social change.[402]

This achievement alone represents tacit acceptance of the reality that judges make law — and judges should not apologize for making law. When judges make this type of policy, they are not abandoning judicial restraint, but are performing an accepted and necessary judicial function.[403]

3d with long-standing tort reform goals. *See* Vandall, *supra*, at 273.

398. *See* Ney v. Yellow Cab, 117 N.E.2d 74, 80 (Ill. 1954) (calling the jury function of deciding questions of negligence and proximate cause a fundamental right) (citing Bailey v. Central Vermont Railway, 319 U.S. 350, 354 (1943)).

399. *See* Corboy, *supra* note 396, at 1048 (heralding the growth of product liability causes of action over the last seventy-five years).

400. *See id.* at 1049.

401. *See id.*

402. *See* Judith S. Kaye, *The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 734-35 (1992).

403. *See* CARDOZO, *supra* note 375, at 11-12 (recognizing the reality of judge-made

Illinois jurisprudence allows both the General Assembly and the courts to alter the common law.[404] Although courts have this power, they do not routinely exercise it to promulgate broad, sweeping changes. In fact, reluctance or refusal to act is more common. When a court is asked to recognize a new cause of action or to abandon a prior precedent, it does not act *sua sponte*. Rather, the court makes the decision to adjudicate the case before it. The parties invite the court to ignore precedent, overrule a statute or recognize a new frontier. In these circumstances, the court reviews the origin of the applicable existing common law rule or statute and examines its own decisions and those of other jurisdictions, including the reasons advanced for retention or rejection.[405]

A change in circumstances upon which the law is based has always been a justification for updating law by the legislature or the courts, as neither is the only body which can effect a change.[406] Nevertheless, the court does not always accept the invitation. For example, the Illinois Supreme Court steadfastly resisted a request to abolish the common law premises liability doctrine, whose multiple classifications arose in a feudal age when land, as a source of wealth, was held supreme so that landowners were protected.[407] Although other states had elected to eliminate the medieval classifications,[408] Illinois did not find that circumstances had changed sufficiently to warrant judicial intervention.[409] The General Assembly responded soon after, and allowed general negligence principles to govern the duty owed by an owner or occupant of property to persons entering the premises, regardless of whether they were trespassers, invitees, licensees or

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law, and the subconscious elements involved in the judicial decision-making process); *see also* Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 765 (1965) (describing the uniquely American gap-filling role of the courts in lawmaking).

404. *See* People v. Gersch, 553 N.E.2d 281, 286-87 (Ill. 1990).

405. *See, e.g.*, Dini v. Naiditch, 17 N.E.2d 881, 888 (Ill. 1960) (analyzing an old rule with new reasoning and holding that a wife may maintain an action for loss of consortium due to the negligent injury of her husband).

406. *See, e.g.*, Pashinian v. Haritonoff, 410 N.E.2d 21, 22 (Ill. 1980); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1252 (Ill. 1977); Darling v. Charleston Community Mem'l Hosp., 211 N.E.2d 253, 260 (Ill. 1965) (rejecting a social guest's cause of action against homeowner for personal injuries sustained in a fall because the court was "not persuaded that conditions have so changed as to require a change in the [premises liability doctrine].").

407. *See Pashinian*, 410 N.E.2d at 22.

408. *See id.* (citing Gerchberg v. Loney, 576 P.2d 593, 597-98 (Kan. 1978); McMullan v. Butler, 346 So. 2d 950, 951-52 (Ala. 1977); Werth v. Ashley Realty Co., 199 N.W.2d 899, 906-07 (N.D. 1972); Mooney v. Robinson, 471 P.2d 63, 65 (Idaho 1970); Astleford v. Milner Enterprises Inc., 233 So. 2d 524, 525 (Miss. 1970)).

409. *See Pashinian*, 410 N.E.2d at 22.

children.[410]

If present day realities require a departure from a long-standing common law principle, there is no wisdom in blindly adhering to the words and analysis of prior courts to embalm for posterity the legal concepts of the past.[411] These principles were eloquently expressed by Justice Bristow, writing for the majority in *Dini v. Naiditch*[412] where the court removed a judge-made obstacle at common law that had granted a husband, but not a wife, the right to sue for loss of consortium.[413]

In contrast, the Illinois Supreme Court was urged to depart from precedent and to implement a negligence cause of action arising out of the service of liquor by an adult host to a minor resulting in an alcohol related injury or death.[414] Finding this type of claim preempted by the Illinois Dram Shop Act,[415] the court held there was no common law action against any provider of alcoholic beverages for injuries arising out of the sale or gift of alcoholic beverages.[416] The Illinois legislature had created a limited statutory "no fault" liability for dram-shops.[417]

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410. *See* Premises Liability Act, 740 ILL. COMP. STAT. 130/1-5 (West 1993 & West Supp. 1998).

> The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished . . . . The duty owed to such entrants is that of reasonable care under the circumstances.

Id. § 130/2 (originally enacted as P.A. 83-1398 (1984)).

411. Dini v. Naiditch, 170 N.E.2d 881, 892 (Ill. 1960).

412. *Id.*

413. *See id.* at 893.

414. *See* Charles v. Seigfried, 651 N.E.2d 154, 155 (Ill. 1995). The plaintiff's sixteen-year-old daughter was killed in a car crash following a party at defendant's house. Defendant served alcohol to minors, including plaintiff's decedent who was legally drunk at the time of her death. *See id.* at 156.

415. *See* Liquor Control Act of 1934, 235 ILL. COMP. STAT. 5/1-1 to 12-2 (West 1993 & West Supp. 1998); Cunningham v. Brown, 174 N.E.2d 153, 157 (Ill. 1961) (established the rule of law that in Illinois the General Assembly preempted the entire field of alcohol related liability through passage and amendment of the Dram Shop Act); *see also* Hopkins v. Powers, 497 N.E.2d 757, 760 (Ill. 1986) (holding that the Dram Shop Act precludes a cause of action under the Contribution Act); Wimmer v. Koenigseder, 484 N.E.2d 1088, 1092 (Ill. 1985) (noting that the statutory "liability imposed . . . does not depend upon fault or negligence, and the damages recoverable are expressly and exclusively defined in the Act"); Demchuck v. Duplancich, 440 N.E.2d 112, 114 (Ill. 1982) (citing *Cunningham* in support of its holding that the Dram Shop Act "provides the only remedy against tavern operators and owners of tavern premises for injuries to persons, property, or means of support by an intoxicated person or in consequence of intoxication.").

416. *See Seigfried*, 651 N.E.2d at 165.

417. *See* Nelson v. Araiza, 372 N.E.2d 637, 639 (Ill. 1977) (finding that the Dram Shop Act does not base liability on negligence or fault).

The court, however, had consistently ruled that the Dram Shop Act did not impose liability on social hosts.[418] Further, it was not a tort at common law to sell or give intoxicating liquor to an adult.[419] Thus, the court refused to extend civil liability to social hosts, holding that any move to enlarge the scope of the Dram Shop Act should be undertaken by the legislature.[420]

Even in the absence of a statute, courts have demonstrated reluctance to allow every request to expand the limits of tort liability. For example, the court has refused to recognize a claim for wrongful life on behalf of congenitally or genetically defective children, who would not have been born but for the negligence of a health care provider.[421] Plaintiff bystanders are not allowed to recover damages for emotional distress injuries in a strict liability action,[422] even though they may recover them in a negligence suit.[423] In a DES case, where the identification of the drug manufacturer was not possible, the court refused to recognize the theory of market share liability,[424] holding it was too great a deviation from the requirement of causation in fact.[425]

B. Public Policy Considerations Guide the Formulation of Tort Law

Illinois law maintains there is no precise definition of the term "public policy." In general, it concerns "what is right and just and what affects the citizens of the State collectively."[426] It is found in our constitution and statutes and, when they are silent, in our judicial decisions.[427]

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418. *See Seigfried*, 651 N.E.2d at 159 ("[F]or over one century, this court has construed the Dram Shop Act as inapplicable to a social host situation . . . .").

419. *See, e.g.*, Howlett v. Doglio, 83 N.E.2d 708, 712 (Ill. 1949) ("It was not an actionable tort at common law to either sell or give intoxicating liquor to 'a strong and able-bodied man,' and such an act was not deemed to be culpable negligence imposing liability for damages upon the vendor or donor of the liquor."); Cruse v. Aden, 20 N.E. 73, 76 (Ill. 1889).

420. *See Seigfried*, 651 N.E.2d at 165.

421. *See* Siemeniec v. Lutheran General Hosp., 512 N.E.2d 691, 702 (Ill. 1987).

422. *See* Pasquale v. Speed Products Eng'g, 654 N.E.2d 1365, 1373 (Ill. 1995).

423. *See* Rickey v. Chicago Transit Authority, 457 N.E.2d 1, 5 (Ill. 1983).

424. *See* Smith v. Eli Lilly & Co., 560 N.E.2d 324, 330 (Ill. 1990) (defining market share theory as an apportion of damages, according to the likelihood that any of the named defendants supplied the product, and according to each defendants share of the market).

425. *See id.* at 324.

426. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 879 (Ill. 1981).

427. *See* Illinois Bankers Life Ass'n v. Collins, 173 N.E. 465, 466 (Ill. 1930) (citing People *ex. rel.* Franchere v. City of Chicago, 152 N.E. 141 (Ill. 1926); Merchants Trust Co. v. City of Chicago, 105 N.E. 726 (Ill. 1914); Zeigler v. Illinois Trust & Sav. Bank, 91 N.E. 1041 (Ill. 1910); People *ex rel.* Healy v. Shedd, 89 N.E. 332

Nevertheless, courts do not frequently recognize a new tort to achieve recognized public policy goals. In one instance where the Illinois Supreme Court chose to act, it exercised judicial restraint to narrowly construe the right to recover. We refer to courts' adherence to the long standing rule that an at-will employee may be discharged by the employer at any time, for any reason.[428] A limited exception was first recognized in *Kelsay v. Motorola. Inc.*[429] In *Kelsay*, the court allowed a cause of action for retaliatory discharge when the reason for discharge was the employee's assertion of his rights under the Workers' Compensation Act, which provides a "comprehensive scheme . . . for efficient and expeditious remedies for injured employees."[430] That "scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act."[431] To insure the public policy behind the Act was not frustrated, the employee needed to be protected from the dilemma of choosing between keeping her job or claiming statutory benefits to which she was lawfully entitled.[432]

In Illinois, the tort of retaliatory discharge was extended outside the workers' compensation arena in *Palmateer v. International Harvester Co.*[433] There, a tortious action was allowed against an employer that fired an employee for volunteering information about another employee's possible criminal activities to law enforcement authorities.[434] The court supported its decision by citing a public policy which favors the investigation and prosecution of crime.[435] In *Zimmerman v. Buchheit of Sparta, Inc.*[436] however, the court declined to expand this tort to judicially create a cause of action for retaliatory

(Ill. 1909); Harding v. American Glucose Co., 55 N.E. 577 (Ill. 1899)).

428. *See* Hartlein v. Illinois Power Co., 601 N.E.2d 720, 728 (Ill. 1992); Palmateer, 421 N.E.2d at 878; Pleasure Driveway and Park Dist. of Peoria v. Jones, 367 N.E.2d 111, 117 (Ill. App. Ct. 3d Dist. 1977).

429. Kelsay v. Motorola. Inc., 384 N.E.2d 353 (Ill. 1978).

430. *Id.* at 357. Furthermore, the decision manifests the legislative intent of the Act, as the court states: "[I]n light of its [the Act's] beneficent purpose, [as] a humane law of a remedial nature." *Id.* at 357 (quoting Shell Oil Co. v. Industrial Co., 119 N.E.2d 224 (Ill. 1954)). By providing employees with such protection and remedies, the Act "promotes the general welfare of this State." *Kelsay*, 384 N.E.2d at 357. "Consequently, its enactment by the legislature was in furtherance of sound public policy." *Id.* (citing Deibeikis v. Link-Belt Co., 104 N.E. 211 (Ill. 1914)).

431. *Kelsay*, 384 N.E.2d at 357.

432. *See id.*

433. Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981).

434. *See id.* at 880.

435. *See id.*

436. Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877 (Ill. 1994).

demotion.[437]

C. *Overcoming Stalemates Between the Courts and the Legislature*

Infrequently, "the court awaits action by the legislature and the legislature awaits guidance from the court."[438] When a stalemate occurs, which results in manifest injustice to the public, the court has held it must act to reform the law to be responsive to the demands of society.[439] It was this mandate that led to judicial adoption of comparative negligence[440] in *Alvis v. Ribar,*[441] which abolished the law of contributory negligence. By the time of the *Alvis* case, the legislature had failed to remove the bar of contributory negligence on six occasions between 1976 and 1981.[442] Defendants, who opposed removal of the common law restriction, urged that this inaction reflected a deliberate intent of the General Assembly to maintain the *status quo.*[443] The court noted an equally plausible explanation was legislative belief that the bar to contributory negligence was appropriate, considering the history of the doctrine and its judicial origins, and to wait for the judiciary to act.[444]

In replacing the common law doctrine of contributory negligence with the doctrine of comparative negligence, the court explained:

> [Where] the legislature has, for whatever reason, failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society.[445] Clearly, the need for stability in law must not be allowed to obscure the changing needs of society or to veil the injustice resulting from a doctrine in need of reevaluation . . . [W]e cannot continue to ignore the plight of plaintiffs who, because of some negligence on their part, are forced to bear the entire burden of their

437. *See id.* at 882.

438. Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981).

439. *See id.* at 893.

440. The definition of comparative negligence states: "[A] plaintiff free from all negligence may recover from a defendant who has failed to use such care as ordinarily prudent men generally employ; or, a plaintiff who is even guilty of slight negligence may recover of a defendant who has been grossly negligent, or whose conduct has been wanton or willful." *Id.* at 889 (quoting Illinois Cent. R.R. Co. v. Hammer, 72 Ill. 347 (Ill. 1847)).

441. Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981).

442. *See id.* at 895 (providing legislative history).

443. *See id.*

444. *See id.* (citing Maki v. Frelk, 239 N.E.2d 445, 450 (Ill. 1968) (Ward, J., dissenting)).

445. *Alvis*, 421 N.E.2d at 896.

> injuries. Neither can we condone the policy of allowing defendants to totally escape liability for injuries arising from their own negligence on the pretext that another party's negligence has contributed to such injuries.[446]

The legislature did not remain idle. Five years later, as part of Illinois' 1986 tort reform package, the General Assembly substituted a fifty percent rule of modified comparative negligence and a twenty-five percent rule of several liability.[447]

Illinois entered the world of comparative fault by judicial adoption of contribution among joint tortfeasors in *Skinner v. Reed-Prentice Division Package Machinery Co.*[448] The legislature ratified this decision two years later by codifying *Skinner* in the Joint Tortfeasor Contribution Act.[449]

While deference to the legislature to initiate a change in public policy may be appropriate, it is not required, especially when the concept demanding change is judicial in origin.[450] The medieval rule of sovereign immunity was a judicially created doctrine to confront the reality that the king could not be sued in his own court without consent.[451] As there was no court with authority over the king, the doctrine that the king could do no wrong led to an early enunciation of governmental immunity.[452] Local governmental immunity was first adopted in Illinois in 1844,[453] when the Supreme Court held a county immune from liability for failure to maintain a bridge. It was not until

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446. *Id.*

447. *See* 735 ILL. COMP. STAT. ANN. 5/2-1107.1, 1116, 1117 (West Supp. 1998) (held unconstitutional by the Illinois Supreme Court in *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997)); *see also supra* notes 220-21, 269-70, 272-74 and accompanying text (discussing these provisions).

448. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977).

449. *See* 740 ILL. COMP. STAT. 100/0.01-5 (West 1993 & Supp. 1998); *supra* Part V.A.3 (discussing the Joint Tortfeasor Contribution Act). Section 100/2 of the Act provides in part:

> [E]xcept as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment had not been entered against any or all of them.

§ 100/2(a). However, a tortfeasor's right of contribution exists only if he has paid more than his apportioned share of the common liability and his recovery is limited to that which he has paid over and above his apportioned share. *See id.* at § 100/2(b).

450. *See Alvis*, 42 N.E.2d at 886; Molitor v. Kaneland Community Unit School District No. 302, 163 N.E.2d 89, 91 (Ill. 1959).

451. *See Molitor*, 163 N.E.2d at 91.

452. *See* Russell v. Men of Devon, 2 Term. Rep. 671, 100 Eng. Rep. 359 (1788) (holding that an unincorporated town was immune from liability for damage caused by a defective bridge).

453. *See* Hedges v. County of Madison, 6 Ill. 567 (Ill. 1844).

1959, that Illinois boldly marched into the modern age of torts when our highest court abolished local governmental immunity, finding the doctrine unsupported by any valid reason and with no rightful place in modern society.[454] At issue was the immunity of a school district.[455]

In response to defendant's urging that abrogation was a matter solely for the legislature, the court held the doctrine of school district immunity had been judicially created.[456] Having found the doctrine "unsound and unjust," the court had more than just the power to abolish that immunity, it had a duty to do so.[457] As courtroom doors had been closed without legislative help, the court was free to open them.[458]

In the wake of this decision, the General Assembly has acted many times to erect a pervasive wall of government immunity,[459] resulting in what is now known as the Local Governmental and Governmental Employees Tort Immunity Act (the "Tort Immunity Act").[460] Although Illinois courts and commentators continue to question the illogical imposition of liability on individuals and private corporations, while shielding local governmental entities,[461] courts continue to exercise judicial restraint and leave the bounds of local governmental immunity to the legislature.[462]

Certainly, if the Illinois Supreme Court was determined to adjudicate by invoking personal values, a compelling case was *Barnett v. Zion Park District*.[463] A ten-year-old boy, while swimming at a public pool, hit his head on a diving board, fell in the water and sank

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454. *See Molitor*, 163 N.E.2d at 96.

455. *See id.* at 90.

456. *See id.* at 96.

457. *Id.*

458. *See id.*

459. *See* STEVEN M. PUISZIS, ILLINOIS MUNICIPAL TORT LIABILITY §§ 1-1, -5, -6 (1996).

460. 745 ILL. COMP. STAT. ANN. 10/1-101.1 (West 1993) which reads:

> (a) 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.
>
> (b) Any defense or immunity, common law or statutory, available to any private person shall likewise be available to local public entities and public employees.

Id.

461. *See generally* David A. Decker, *When the King Does Wrong: What Immunity Does Local Government Deserve?*, 86 ILL. B.J. 138, 139 (1998) (questioning the imposition of the entire burden of damage due to government's wrongful acts upon a single injured person, rather than distributing it among an entire community where it justly belongs).

462. *See* Barrett v. Zion Park Dist., 665 N.E.2d 808, 810 (Ill. 1996).

463. 665 N.E.2d 808 (Ill. 1996).

to the bottom.[464] Two pool patrons alerted lifeguards that the boy was in trouble.[465] They were ignored, because the guards had not seen the boy fall.[466] However, a swimmer dove in to bring the boy to the surface.[467] Although resuscitative measures were then instituted, the boy died.[468]

The Illinois Supreme Court held that the plain language of the Tort Immunity Act[469] totally immunized the park district from any responsibility, not only for negligence, but also for willful and wanton misconduct in its provision for supervision.[470] The statute did not refer to the quality, level or degree of supervision required, nor did it contain an express exception for willful and wanton conduct. The majority, recognizing the absurd effect of its literal interpretation, bluntly asked the legislature to articulate what constitutes "supervision" or to exempt willful and wanton misconduct from the immunity.[471]

Two dissents observed the legislature could never have intended such an "unjust and unreasonable result."[472] Under the majority analysis, the law, which should be a haven for children, would allow any lifeguard to stand by and let a minor drown.[473] The legislature could not have meant to immunize conduct that was not a mere lapse of

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464. *See id.* at 810.

465. *See id.*

466. *See id.*

467. *See id.*

468. *See id.*

469. 745 ILL. COMP. STAT. ANN. 10/3-108(b) (West 1993); *see also infra* note 477 (discussing a proposed amendment to the Tort Immunity Act).

470. *See Barnett*, 665 N.E.2d at 813. The court stated that the plaintiff had inappropriately relied upon §2-202 which states "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILL. COMP. STAT. ANN. 10/2-202 (West 1993 & West Supp. 1998). This "plain language" does not provide public employees with immunity for every act or omission *while on duty*. *Barnett*, 665 N.E.2d at 814 (emphasis added). Instead, section 2-202 only provides immunity for a public employee who "is negligent while *actually* engaged in the execution or enforcement of a law." *Id.* at 814 (original emphasis).

471. *See Barnett*, 665 N.E.2d at 815.

472. *Id.* at 818 (Harrison, J., dissenting). The dissent stated:

> When a duty to supervise will be imposed under the law is separate and distinct from the question of what standard of care is required once the duty to provide supervision has attached . . . . [T]he duty to supervise must be construed to mean a duty to provide supervision that is adequate. Otherwise, public entities could cloak themselves with immunity merely by providing nominal oversight. As long as someone was present to watch the pool, the statute would be satisfied.

Id. at 817 (Harrison, J., dissenting).

473. *See id.* at 817-18 (Harrison, J., dissenting).

attention, but failure to respond to a life and death situation for which lifeguards are trained![474]

If the Illinois Supreme Court was prone to slavishly overrule legislation purely on the basis that the judges comprising the court disagreed with the result mandated by its application, the court would have interpreted the Tort Immunity Act in some way to carve out an exception for liability, or, as tort reformers suggest they are wont to do, found some constitutional infirmity. Although the court did not overrule the legislation, it did use its intimate view of the interaction between the interpretation of the statutory text and the facts surrounding the death of an innocent child to urge its lawmaking partner to remedy an obvious inequitable and egregious result mandated by literal interpretation of the immunity statute.[475]

As evidence of the true cooperation in forming tort law that the dialogue of a common law decision can achieve between the courts and the legislature, the General Assembly responded. House Bill 1151, which was overwhelmingly endorsed by the House of Representatives and the Senate, would have amended the Tort Immunity Act to create an exception in cases where there is both a duty to provide supervision and willful and wanton conduct.[476] The approved changes did not create a duty to supply supervision, unless that duty was already imposed by common law, statute, ordinance, code or regulation.[477]

On August 17, 1998, this legislation was vetoed by Illinois Governor James Edgar. In his veto message, he suggested a more

474. *See id.* at 818-19 (McMorrow, J., dissenting) (stating that an employee's failure to act in such a situation for which he is specifically trained is not a matter of simple negligence).

475. *See id.* at 815.

476. The amendment to 745 ILL. COMP. STAT. 10/1-210 changed section 1-210 to define willful and wanton conduct as used in the Act to mean "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."

477. The amendment to Section 3-1108, 745 ILL. COMP. STAT. 10/3-108 provided:

> (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.
>
> (b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.

Id.

precise amendment to apply only to public swimming pools during designated hours of operation.[478] As this chronology demonstrates, even the executive branch, at times, exercises "lawmaking power." Whether our state legislature will override the veto remains to be seen.

This cursory review of the enunciation of Illinois tort law illuminates that the allocation of lawmaking power to both the courts and the legislature not only works, but usually serves well the citizens of Illinois. The continued common law development of torts should not be thwarted because proponents of tort reform secured passage of a legislative package that the Illinois Supreme Court found invalid under well settled principles of Illinois constitutional jurisprudence.

VIII. CONCLUSION

We could briefly sum up our position and state: the good guys won! Instead, we make a plea for the legislature and tort reformers to afford our Illinois courts the respect that they have earned, and to which they are entitled under the law.

Courts are the bulwark that protect our constitutionally guaranteed rights and powers from dilution and abrogation by the custodians of legislative power. In the exercise of judicial review, courts are not the critics of the legislature, but the guardians of the constitution. In this vital function, courts must not exercise judicial restraint by deferring to the elected lawmakers. Constitutional protections are not subject to legislative change in the guise of altering the common law.

Courts exercising judicial review prevent the politically influential from sweeping away the rights of those with less clout in the legislative chamber. They maintain a tense balance between popular will and long-term values. This institution does not need fixing, as it is not broken. Using the Constitution as their measure, courts can resist any effort to "constitutionalize" the value system of any single partisan segment of our society.

Our state constitution serves well our institutional and substantive values. Illinois Supreme Court decisions interpreting its dictates should be supported even if one disagrees, and disagrees vehemently, with a particular result. Judicial review which would sustain special legislation is a more subtle blow to our freedom than passage of the statute itself. We cannot allow the adjudication of constitutional law issues to become a sycophant of partisan interests.

The Illinois Constitution is not an artifact for display. Its continued

478. *See* David Heckelman, *Bill Modifying Tort Immunity Act Draws Veto*, Vol. 144 CHI. DAILY L. BULL., NO. 160, August 17, 1998 at 1, 22.

vibrancy should not be circumscribed by a political debate. It is inappropriate to attack the judiciary for having ruled a certain way on a particular issue. This is a blatant attempt to diminish the independence of the judiciary. It also erodes public confidence in our judges and a common law system, which deserve much better.

The *Best* decision was not premised on a mere "precatory relic" of an earlier state constitution.[479] Nor is it the decision of an activist judiciary which overreached to ensure a policy it preferred. Our state constitutional guarantees are not hortatory irrelevancies.[480] In its haste to adopt any proposal labeled tort reform, the General Assembly failed to consider the known constitutional impediments.

Common law is a legal pragmatism and necessity, which enters the third millennium as it has the centuries before, enthralled to no particular ideology. Ancient principles of corrective justice combine with modern considerations of individual autonomy, social efficiency, and fairness to ensure that our history has a role in forming our current laws. Our common law courts, as adjudicators, statutory interpreters and constitutional vanguards, will continue to flourish in the tension between active democracy, constitutional values and judicial judgment. The dialectic of this process is our uniquely American legacy.

479. The Washington Legal Foundation lost no time in regrouping after the *Best* decision. A Working Paper was disseminated to send this message. *See* JOHN E. MUENSCH & ROBERT M. DOW, WHEN JUDICIAL ACTIVISM TRUMPS TORT REFORM: THE ILLINOIS EXPERIENCE (Washington Legal Foundation, Critical Legal Issues, Working Paper Series, No. 85 (June 1998)).

480. *See id.*