UNDERSTANDING THE TEXAS TORT CLAIMS ACT

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In 1969, the Texas Legislature passed the Texas Tort Claims Act (Act).[1] In doing so, the legislature joined a national judicial and legislative trend moving away from absolute immunity of the government for liability in tort that had been growing over the previous two decades[2] and waived sovereign

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1. Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 1, 1969 Tex. Gen. Laws 874, 874, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9, sec. 1, 1985 Tex. Gen. Laws 3242, 3322. Efforts to pass an act limiting sovereign immunity in Texas go back to, at least, 1953. Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 467 (1971) (citing S. Interim Comm., Report on Study of Governmental Immunity, TEX. S. REP. NO. 733, at 6 (1969)). Greenhill and Murto's article contains a useful but brief history of the 1969 Act's passage. *Id.*; *see* Tex. Dep't of Mental Health & Mental Retardation v. Kauffman *ex rel.* Petty, 848 S.W.2d 680, 685–87 (Tex. 1992) (Cornyn, J., dissenting) (discussing the 1969 Act). The federal government had abandoned absolute immunity in tort in 1948 with the passage of the Federal Tort Claims Act. Federal Tort Claims Act, 28 U.S.C.A. § 1346 (West 2019).

2. *See* Greenhill & Murto, *supra* note 1, at 465–67 nn.26–42.

immunity for Texas governmental units,[3] allowing lawsuits to the extent of that waiver.[4] In the intervening fifty years, there have been perplexing and often frustrating areas of change, in addition to some troublesome areas of stagnation.[5]

This Article discusses the Act in its present state and how it should be amended to avoid constitutional problems and better serve its purpose, as well as the public. Part I discusses the foundational principles of sovereign and governmental immunity and outlines in broad strokes the main provisions of the Act as it exists today. Where revisions, or a lack thereof, are of particular importance, they are discussed. Part II explores a number of Texas cases that have interpreted the Act and the movement from an expansive to a restrictive interpretation of it. Part III examines the 2003 amendments and argues that the damages caps added in 2003 violate an amendment to the Texas Constitution passed by referendum that year. Finally, Part IV argues that damages caps in the Act should be adjusted for inflation, as are other damages caps contained in Texas law.

I. SOVEREIGN IMMUNITY, GOVERNMENTAL IMMUNITY, AND THE TEXAS TORT CLAIMS ACT

The Texas Supreme Court recognized the longstanding principle of sovereign immunity at least as early as 1847 when it wrote "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent."[6] The doctrine of sovereign immunity serves the purpose of protecting government resources by providing immunity from payment of monetary damages. More specifically, sovereign immunity "leaves to the Legislature the determination of when to allow tax resources to be shifted 'away from their intended purposes toward defending lawsuits and paying judgments.'"[7] It must be noted, however, that policy decisions taken in service of this stated purpose have two pernicious effects. First, sovereign immunity shifts the burden of injuries onto individual tort victims, thus victimizing them a second time.[8] Second, it removes vital economic

3. Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 1, sec. 4, 1969 Tex. Gen. Laws 874, 875–76 (repealed 1985).

4. *Id.*; *see infra* Section I.A (discussing the distinction between waiver of immunity and the right to sue).

5. *Cf.* J. Bonner Dorsey, *Whither the Texas Tort Claims Act: What Remains After Official Immunity?*, 33 ST. MARY'S L.J. 235, 236–37 (2002) (describing the Act as "byzantine").

6. Hosner v. DeYoung, 1 Tex. 764, 769 (1847).

7. Brown & Gay Eng'g, Inc. v. Olivares, 461 S.W.3d 117, 121 (Tex. 2015) (citing Tex. Nat. Res. Conservation Comm'n v. IT–Davy, 74 S.W.3d 849, 853–54 (Tex. 2002) (plurality opinion)); *see* City of El Paso v. Heinrich, 284 S.W.3d 366, 368 (Tex. 2009) (stating sovereign immunity protects states).

8. First through the actual tort causing injury and again when the victim bears the entirety of the economic and noneconomic consequences of the injury without compensation. Even where sovereign immunity is waived, caps on damages against the state or political subdivisions mean even a successful tort victim who has been catastrophically injured is left with little, if anything, to compensate for the

incentives that would otherwise induce the state and its political subdivisions to undertake remedial actions to prevent such injuries in the future.[9] Sovereign immunity also protects governmental policymaking discretion from judicial (and litigant) second-guessing, but the purpose seems to have fallen by the wayside in recent judicial discussions of sovereign immunity.[10]

A. Distinctions in Immunity

At the outset, it is important to understand a number of related concepts and distinctions. The first distinction is that between sovereign immunity and governmental immunity. Sovereign immunity is simply immunity of state and state-level subdivisions.[11] Governmental immunity, on the other hand, is immunity held by political subdivisions, including municipalities, counties, hospital districts, and similar entities performing government functions.[12]

The latter, which is more difficult to grasp and is the source of extensive litigation, is the distinction between governmental functions (for which a political subdivision has governmental immunity) from proprietary functions (for which a political subdivision does not have governmental immunity).[13] However, this distinction is only applicable when discussing political subdivisions because the acts of the state and its state-level subdivisions are always deemed to be governmental acts.[14] The commonly expressed difference between governmental and proprietary functions is the former are those performed pursuant to state law, as an agent of the state, and for the benefit or welfare of the general public, whereas the latter are those performed for the benefit of a municipality's own residents rather than the public at large.[15] Nevertheless, this does not mean that all acts undertaken by the state receive immunity; states are not immune from suits alleging the violation of a self-enacting constitutional provision[16] or the commission of

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injuries, although these are often the victims who need the most assistance. *See infra* Part IV (discussing damages caps).

9. *See infra* Part IV (discussing damages caps under the Act).

10. *See Olivares*, 461 S.W.3d at 117 (stating it is the decision of the legislature to shift tax resources); *Heinrich*, 284 S.W.3d at 368.

11. *E.g.*, Travis Cent. Appraisal Dist. v. Norman, 342 S.W.3d 54, 57–58 (Tex. 2011).

12. *See infra* text accompanying notes 13–25 (discussing the different types of governmental immunity).

13. City of Houston v. Wolverton, 277 S.W.2d 101, 103 (Tex. 1955). As the Texas Supreme Court once wrote of the distinction, "language seems plain enough, but the rub comes when it is sought to apply the test to a given state of facts." *Id.*

14. *See, e.g.*, Gates v. City of Dallas, 704 S.W.2d 737, 739 (Tex. 1986); City of Galveston v. Posnainsky, 62 Tex. 118, 127 (1884).

15. *See, e.g.*, Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427, 433 (Tex. 2016); City of White Settlement v. Super Wash, Inc., 198 S.W.3d 770, 776 (Tex. 2006); City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997); *Gates*, 704 S.W.2d at 738–39.

16. *See* Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980). Self-enacting constitutional provisions are those that contain enough detail to "suppl[y] a rule sufficient to protect the right given or permit enforcement of the duty imposed." Ware v. Miller, 82 S.W.3d 795, 803 (Tex. App.—Amarillo

an ultra vires act.[17] In addition, the Texas Constitution grants the legislature the power to determine by statute which acts of a municipality are governmental and which are proprietary.[18] The legislature has done so, both in defining governmental functions as "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public"[19] and by specifically enumerating a number of such functions, including police- and fire-department services,[20] hospitals,[21] public transportation,[22] and recreational facilities,[23] including acts deemed to be closely related to or necessary for the carrying out of public acts.[24] In contrast, proprietary functions are "those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality."[25]

The third distinction, which is still more difficult to grasp, is the distinction between immunity from suit, which is a jurisdictional issue, and immunity from liability, which is merely an affirmative defense.[26] Fortunately, the Act is structured so that both immunity from suit and immunity from liability are waived at the same time and to the extent that immunity from liability is established by the provisions of the Act.[27] In other areas not covered by the Act and beyond the scope of this Article, however, it is essential to identify and plead both the source of the waiver from suit and the source of the waiver from liability.[28]

2002, pet. denied) (citing Frasier v. Yanes, 9 S.W.3d 422, 426 (Tex. App.—Austin 1999, no pet.)). Typically, such suits involve physical or regulatory takings and claims for equitable relief under the Texas Bill of Rights. *See, e.g.*, *Steele*, 603 S.W.2d at 791.

17. *See, e.g.*, Hous. Belt & Terminal Ry. v. City of Houston, 487 S.W.3d 154, 161 (Tex. 2016). These claims either allege a failure to perform a ministerial act (a duty defined with sufficient detail so that the public official lacks any discretion on whether or how to act) or allege that the official acted without lawful authority. *See, e.g.*, *id.* The converse is specified under the Act: immunity is maintained where there is an alleged "failure of a governmental unit to perform an act that the unit is not required by law to perform" or the law in question "leaves the performance or nonperformance of the act to the discretion of the governmental unit." TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West 2017).

18. TEX. CONST. art. XI, § 13.

19. CIV. PRAC. & REM. § 101.0215(a).

20. *Id.* § 101.0215(a)(1).

21. *Id.* § 101.0215(a)(8).

22. *Id.* § 101.0215(a)(22).

23. *Id.* § 101.0215(a)(23).

24. Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 1, sec. 13, 1969 Tex. Gen. Laws 874, 877 (repealed 1985).

25. CIV. PRAC. & REM. § 101.0215(b).

26. *See, e.g.*, Brown & Gay Eng'g, Inc. v. Olivares, 461 S.W.3d 117, 121 (Tex. 2015); State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009); Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex. 2006); Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003); Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam).

27. CIV. PRAC. & REM. § 101.022.

28. *See, e.g.*, Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 843 (Tex. 2009) (concluding that statutory language that a hospital district "may 'sue and be sued'" failed to establish a waiver of liability from suit).

B. Waivers of Immunity Under the Act

The Act expressly waives sovereign and governmental immunity to suits in limited circumstances.[29] At the same time, the Act waives immunity from liability through its substantive provisions.[30] Under the Act,

> [a] governmental unit . . . is liable for: (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> (B) the employee would be personally liable to the claimant according to Texas law; and
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.[31]

As discussed below, much of the caselaw interpreting this provision of the Act centers on subsection (2).[32]

The Act also contains a provision preserving individual employee immunity from a tort claim for damages to the extent that immunity would exist in the absence of the Act.[33] This provision should be understood in connection with a related provision of the Act that contains an irrevocable election of remedies.[34] The two main provisions read as follows:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.[35]

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29. CIV. PRAC. & REM. § 101.025. The Act uses the phrase "governmental unit," which includes both the state and state-level agencies and departments, and political subdivisions of the state. *Id.* § 101.025(b); *see id.* § 101.001(3).

30. *See* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 224 (Tex. 2004) (describing the Act as "a unique statutory scheme in which the two immunities [from suit and from liability] are co-extensive").

31. CIV. PRAC. & REM. § 101.021. Where the injury involves a premises defect, subsection (B) should also be read in conjunction with Texas Civil Practice and Remedies Code § 101.022. *Id.* § 101.022.

32. *See infra* Section II.A (focusing on the history of counterintuitive language used in the Act, much to the chagrin of the subsequent caselaw interpretation).

33. CIV. PRAC. & REM. § 101.026.

34. *Id.* § 101.106.

35. *Id.* § 101.106(a)–(b).

This irrevocable election of remedies has resulted in not only patently unjust results for injured parties but also judicial decisions in which the Texas Supreme Court has engaged in interpretive gymnastics, abandoning plain meaning statutory interpretation to which they otherwise give lip service.[36]

II. CASES INTERPRETING THE TEXAS TORT CLAIMS ACT

A. Condition or Use of Tangible Property

The meaning of "condition or use" has been a source of continuing contention since the original passage of the Act.[37] In fact, confusion over the definition has led more than one Texas Supreme Court justice to request legislative clarification in a judicial opinion.[38] For example, in 1976, Chief Justice Greenhill wrote a concurrence "to encourage the Legislature to take another look at the Tort Claims Act, and to express more clearly its intent as to when it directs that governmental immunity is waived," observing that the condition or use language from the predecessor statute was "particularly difficult to apply."[39] Later, Justice Doggett discussed at some length the difficulty with interpreting and applying this provision, writing that "[c]lear and practical guidelines for application of the waiver of governmental immunity . . . should be provided by the legislature" and "once again call[ing] on the legislature to clarify, as soon as possible, the extent to which it intended to waive governmental immunity."[40] In that same opinion, Justice Hecht also took the Act to task in the opening line of his dissent, declaring "[i]t may truly be said of the Texas Tort Claims Act that bad law makes hard cases."[41] He also took the majority to task for, in his words, construing "use" in the statute to mean "non-use."[42] Justice Hecht would later testify in the Texas Legislature about the Act, imploring the legislature to clarify the Act's language.[43]

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36. *See infra* Section II.B and accompanying notes (exploring the Texas Supreme Court's analyses, including in *Franka v. Velasquez*, of the Act).

37. CIV. PRAC. & REM. § 101.021.

38. Robinson v. Cent. Tex. MHMR Ctr., 780 S.W.2d 169, 170 (Tex. 1989); Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 301–02 (Tex. 1976) (Greenhill, C.J., concurring).

39. *Lowe*, 540 S.W.2d at 301. Chief Justice Greenhill was also the author of the scholarly work on sovereign immunity cited in *supra* note 1.

40. *Robinson*, 780 S.W.2d at 170.

41. *Id.* at 172 (Hecht, J., dissenting) (footnote omitted).

42. *Id.* The irony of this observation is apparently lost on Justice Hecht. Later, he would construe the word "could" in Texas Civil Practice and Remedies Code § 101.106(f) to mean "could not" in deciding that a suit "could" have been brought against a university hospital, even though the state had not waived immunity for the hospital. *See* Franka v. Velasquez, 332 S.W.3d 367, 375–79 (Tex. 2011). *Franka* is discussed *infra* Section II.B.

43. *Hearings on Tex. H.B. 1294 Before the H. Comm. on Civil Practices*, 79th Leg., R.S. (Mar. 2, 2005) (testimony of Texas Supreme Court Justice Nathan Hecht), http://tlchouse.granicus.com/mediaplayer.php?view_id=23&clip_id=5911.

To understand the confusion over the meaning of condition or use of property, as well as the evolution in interpretation over time, consider first *Salcedo v. El Paso Hospital District.*[44] There, it was alleged the decedent's death was the result of improper reading and interpretation of electrocardiogram results, and the Texas Supreme Court held that such improper reading was the use of property under the Act.[45] By 1994, the Texas Supreme Court began walking back this interpretation, holding that whenever the alleged tortious conduct is the result of use or misuse of *information*, that conduct does not amount to a use of property under the Act.[46]

In 1989, the Texas Supreme Court held that an MHMR center's failure to provide a life preserver to the decedent was a condition or use of property.[47] This decision was consistent with an earlier decision that held the failure to furnish or require the wearing of proper protective equipment was a condition or use of property.[48] There, the Texas Supreme Court wrote that if "furnishing defective equipment . . . states a case within the statutory waiver of immunity arising from some condition or some use of tangible property[,] . . . a failure to furnish proper protective equipment . . . is not distinguishable."[49] Yet in 1994, the Texas Supreme Court held that such non-use of property did not lead to a waiver of immunity under the Act.[50] In 1996, with circumstances very similar to *Lowe* and *Robinson*, the Texas Supreme Court held that "failure to administer an injectionable drug is non-use of tangible personal property and therefore does not fall under the waiver provisions of the Act."[51] All these decisions shift government-unit liability in tort from the traditional understanding of liability for acts *or omissions* to liability for acts only. In the context of medical malpractice, where nonfeasance is a common source of tort liability, these decisions drastically curtail an injured party's ability to recover damages when the negligent actor is a governmental entity.

Recently, the Texas Supreme Court has interpreted this provision even more restrictively, holding that even providing someone with property that causes an injury does not mean that the property is being "used" for the

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44. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 31–32 (Tex. 1983).

45. *Id.* at 31.

46. *See, e.g.*, Kassen v. Hatley, 887 S.W.2d 4, 14 (Tex. 1994); Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 178–79 (Tex. 1994).

47. *Robinson*, 780 S.W.2d at 171.

48. Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 300 (Tex. 1976).

49. *Id.*

50. *York*, 871 S.W.2d at 178–79. That same year, in *Kassen v. Hatley*, the Texas Supreme Court would disingenuously contend: "We have never held that a non-use of property can support a claim under the . . . Act." *Kassen*, 887 S.W.2d at 14. It had done precisely that in both *Lowe* and *Robinson*. *Robinson*, 780 S.W.2d 169; *Lowe*, 540 S.W.2d 297.

51. Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 584 (Tex. 1996).

purposes of the Act.[52] This trend toward a narrower, more conservative interpretation may be seen as part of a larger trend in favor of defendants by the Texas Supreme Court, where ambiguities previously resolved in favor of plaintiffs are now resolved in favor of defendants.[53] This trend stretched the very limits of credibility in *Franka v. Velasquez*.[54]

B. The Texas Supreme Court and Franka v. Velasquez

Stacey Velasquez was in labor at University Hospital, an entity owned and operated by the Bexar County Hospital District, and thus protected by the Act, when her unborn son's heart rate began slowing.[55] During their attempt to expedite delivery, the doctors broke the baby's shoulder and injured his brachial plexus.[56] Ms. Velasquez sued the doctors who delivered her son but not the government-unit hospital district where the incident occurred.[57] Because only the doctors had been sued, the Act's irrevocable-election-of-remedies provision was implicated.[58] Filing suit against the doctors "forever bar[red] any suit or recovery by the plaintiff against the governmental unit."[59] Difficulty arose because, in addition to the section of the Act containing the irrevocable election of remedies, the Act also provides:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[60]

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52. San Antonio State Hosp. v. Cowan, 128 S.W.3d 244, 245–46 (Tex. 2004). The importance of this further narrowing of the scope of "use" is made clear in the *Franka* decision, discussed *infra* Section II.B.

53. *Compare, e.g.*, Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 156 (W.D. Tex. 1972) (construing any ambiguity in favor of the plaintiff), *and York*, 871 S.W.2d at 177 n.3 (noting legislative acquiescence in prior constructions of § 101.021 of the Tort Claims Act), *with* Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1 (Tex. 2000) (considering whether Texas's anti-retaliation statute waived sovereign immunity), *and* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997) (considering whether the state waived its sovereign immunity by entering into contract with a private citizen).

54. Franka v. Velasquez, 332 S.W.3d 367, 375–79 (Tex. 2011).

55. *Id.* at 369–70.

56. *Id.* at 369. The brachial plexus is a network of nerves extending from the spinal cord through the child's arm that can be injured by excessive downward traction of the neck or shoulder during delivery. F. GARY CUNNINGHAM & J. WHITRIDGE WILLIAMS, WILLIAMS OBSTETRICS 636 (23d ed. 2010).

57. *Franka*, 332 S.W.3d at 370.

58. *See supra* Section I.B (discussing the implications of the Act's remedies provision).

59. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2017).

60. *Id.* § 101.106(f).

Another complication in the suit was the open question of whether the alleged injuries were the result of the condition or use of tangible property.[61] If the answer was yes, then immunity of the governmental unit—the hospital district—would have been waived under the Act.[62] If the answer was no, then the governmental unit's immunity would not have been waived.[63] However, given the Texas Supreme Court's increasingly restrictive interpretation of "use," it was likely that a subsequent decision would hold this injury was not a result of the condition or use of property as that clause had been interpreted.[64]

The central issue, then, was whether the suit "could have been brought" against the hospital district if immunity were not waived by the terms of the Act.[65] Prior to *Franka*, at least thirty-four Texas Supreme Court and intermediate-appeals-level judges had determined that, where immunity was not waived for the governmental entity, suit *could not* have been brought against a government entity, so it could proceed against the individual, alleged tortfeasor.[66] Breaking with this precedent, as well as the plain meaning of the phrase "could have been brought," the Texas Supreme Court held that suit "could have been brought" against the governmental entity even if it were immune from suit.[67] The Texas Supreme Court performed a cursory textual interpretation of the phrase "under this chapter," while simultaneously

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61. *Franka*, 332 S.W.3d at 370.

62. *Id.*

63. *See supra* Section II.A (discussing the difficulties of defining condition or use).

64. *See supra* Section II.A (discussing the difficulties of defining condition or use).

65. *Franka*, 332 S.W.3d at 375.

66. Texas Supreme Court: Justices David Medina and Debra Lehrman. *See generally Franka*, 332 S.W.3d 367 (Medina & Lehrman, J.J., dissenting). First District: Justices Sherry Radack, Tim Taft, and Sam Nuchia. *See generally* Williams v. Nealon, 199 S.W.3d 462 (Tex. App.—Houston [1st Dist.] 2006), *rev'd*, 332 S.W.3d 364 (Tex. 2011) (per curiam). Fourth District: Justices John Lopez, Karen Angelini, Sandee Marion, Rebecca Simmons, and Marialyn Barnard. *See generally* Terry A. Leonard, P.A. v. Glenn, 293 S.W.3d 669 (Tex. App.—San Antonio 2009), *rev'd*, 332 S.W.3d 403 (Tex. 2011) (per curiam); Bailey v. Sanders, 261 S.W.3d 153 (Tex. App.—San Antonio 2008, no pet.); Franka v. Velasquez, 216 S.W.3d 409 (Tex. App.—San Antonio 2006), *rev'd*, 332 S.W.3d 367. Fifth District: Justices Jim Moesely, Michael O'Neill, Kerry Fitzgerald, Molly Francis, and Douglas Long. *See generally* Lieberman v. Romero, No. 05-08-01636-CV, 2009 Tex. App. LEXIS 8414 (Tex. App.—Dallas 2009), *rev'd*, 332 S.W.3d 404 (Tex. 2011); Hall v. Provost, 232 S.W.3d 926, 928 (Tex. App.—Dallas 2007), *overruled by* 332 S.W.3d 367. Seventh District: Chief Justice Brian Quinn and Justices James Campbell and Mackey Hancock. *See generally* Clark v. Sell *ex rel.* Sell, 228 S.W.3d 873 (Tex. App.—Amarillo 2007), *rev'd*, 332 S.W.3d 366 (Tex. 2011) (per curiam). Eighth District: Chief Justice Ann McClure and Justices Kenneth Carr and Richard Barajas. *See generally* Kanlic v. Meyer, 230 S.W.3d 889, 892–94 (Tex. App.—El Paso 2007, pet. denied). Thirteenth District: Justices Linda Yanez, Nelda Rodriguez, and Gina Benavides. *See generally* Reedy v. Pompa, 310 S.W.3d 112 (Tex. App.—Corpus Christi 2010), *rev'd*, 332 S.W.3d 402 (Tex. 2011) (per curiam). Fourteenth District: Chief Justice Ken Frost and Justices Margret Mirabal, John Anderson, Wanda Fowler, Richard Edelman, Eva Guzman, Leslie Yates, Charles Seymore, and Marc Brown. *See generally* Illoh v. Carroll, 321 S.W.3d 711, 714–18 (Tex. App.—Houston [14th Dist.] 2010), *rev'd*, 351 S.W.3d 862 (Tex. 2011) (per curiam); Escalante v. Rowan, 251 S.W.3d 720, 727–28 (Tex. App.—Houston [14th Dist.] 2008) (Anderson, J., dissenting on other grounds), *rev'd*, 332 S.W.3d 365 (Tex. 2011) (per curiam); Phillips v. Dafonte, 187 S.W.3d 669 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

67. *Franka*, 332 S.W.3d at 385.

ignoring the textual import of the phrase "could have been brought."[68] The Court's paradoxical—and clearly erroneous—conclusion, in other words, was that a suit could have been brought even though the trial court lacked subject-matter jurisdiction over the claim. If the governmental entity were immune from suit, a suit "could have been brought" against it only in the most trivial sense—a reading of the text that stretches it beyond the limits of plausibility.[69] In *Franka*, the Texas Supreme Court ignored the unambiguous meaning of the Act's text, despite its insistence elsewhere that "[w]hen a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language,"[70] since "[w]here text is clear, text is determinative of [the legislature's] intent."[71]

III. STATUTORY LIMITATIONS ON ECONOMIC DAMAGES AGAINST INDEPENDENT-CONTRACTOR PHYSICIANS VIOLATE TEXAS CONSTITUTION ARTICLE III, § 66

In 2003, the Texas Legislature passed House Bill 4 (H.B. 4), a comprehensive tort reform bill that added, among other things, caps on noneconomic damages in medical malpractice cases and the provision of Texas Civil Practice and Remedies Code § 108.001(3), which added physicians in government-owned or -operated hospitals to the definition of "public servant."[72] As a result of this provision, the physicians to which the amendment applied received the limitations-on-damages protection provided by the Act.[73]

The passage of H.B. 4 was coupled with the submission of Proposition 12 to the Texas voters in a referendum.[74] Proposition 12, which narrowly passed and became Article III, § 66 of the Texas Constitution, provides in relevant part:

> Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, *other than economic damages*, of a provider of medical or health care with respect to treatment, lack of treatment, or other

68. *Id.* at 379–80.

69. *Id.* at 385.

70. City of Rockwall v. Hughes, 246 S.W.3d 621, 626 (Tex. 2008).

71. Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 437 (Tex. 2009); *see also* Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 177 (Tex. 2004) ("If the statutory text is unambiguous, a court must adopt the interpretation supported by the statute's plain language . . . .").

72. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 11.06, 2003 Tex. Gen. Laws 847, 886 (codified at TEX. CIV. PRAC. & REM. CODE 108.001(3)). "'Public servant' includes a licensed physician who provides emergency or postemergency stabilization services to patients in a hospital owned or operated by a unit of local government." *Id.*

73. *See infra* Part IV (discussing damages caps and cost of living).

74. *See generally* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

> claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability. The claim or cause of action includes a medical or health care liability claim as defined by the legislature.
>
> . . . .
>
> Except as provided by Subsection (c) of this section, this section applies to a law enacted by the 78th Legislature, Regular Session, 2003, and to all subsequent regular or special sessions of the legislature.[75]

A. Interpreting Article III, § 66 of the Texas Constitution

The submission and passage of Proposition 12, and the language of the amendment itself, must be considered in the context of a number of Texas Supreme Court opinions interpreting the medical malpractice damages caps from the predecessor statute to Chapter 74 of the Texas Civil Practice and Remedies Code, where the medical malpractice sections of the H.B. 4 were codified. First, in *Lucas v. United States*,[76] the Texas Supreme Court held that statutory damages caps in medical malpractice cases arbitrarily and unreasonably limited the rights of injured parties when balanced against the purpose of the damages caps, thus violating Article I, § 13 of the Texas Constitution, commonly known as the Open Courts Provision of the Texas Constitution.[77]

The Texas Supreme Court later clarified its holding in *Lucas* and the reach of Article I, § 13. In *Rose v. Doctors Hospital*,[78] the Texas Supreme Court held that because wrongful death claims were statutory causes of action unavailable at common law, the Open Courts Provision was not implicated, and the Texas Legislature could therefore enact damages caps for wrongful death claims.[79] Next, the Texas Supreme Court in *Horizon/CMS Healthcare Corp. v. Auld*,[80] held survival damages likewise could be capped without infringing on the Open Courts Provision because they too were created by statute.[81] At the time Article III, § 66 was enacted, then, it was clear that the Texas Legislature's power to limit wrongful death or survival damages in medical malpractice cases—or indeed to limit damages for any statutorily

75. TEX. CONST. art III, § 66 (emphasis added).
76. *See* Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).
77. *Id.* at 690–92.
78. *See* Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990).
79. *Id.* at 845–46.
80. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 903–04 (Tex. 2000).
81. *Id.* at 902–04.

created cause of action not available at common law—was not encumbered by the Open Courts Provision.[82]

This history is important because it shows that properly read, Article III, § 66 prospectively empowered the Texas Legislature to limit *non*economic damages, but at the same time restricted the legislature's power to limit economic damages, as explained below.

B. Texas Constitution Article III, § 66 Restricts Legislative Power to Limit Economic Damages

The Texas Supreme Court has announced a number of principles that aid in the interpretation of the Texas Constitution. First and foremost, in construing the Texas Constitution, a court must "rely heavily on its literal text and must give effect to its plain language."[83] A court should also endeavor to accomplish the intent of the text's adopters.[84] Third, a court should "construe constitutional provisions and amendments that relate to the same subject matter together and consider those amendments and provisions in light of each other."[85] Fourth, a court should avoid any interpretation "that renders any provision meaningless or inoperative."[86] Finally, where a particular provision grants some powers but excludes others, a court should interpret the provision as limiting the power to engage in the excluded activity.[87]

The plain meaning of Article III, § 66 grants the Texas Legislature the power to limit some damages, but the inclusion of the phrase "other than economic damages" clearly excludes from that power the authority to limit economic damages.[88] Given the Texas Supreme Court's opinion in *Lucas* and the provision's creation in reaction to that opinion, it is equally clear that the intent was to empower the Texas Legislature to enact caps on noneconomic damages, but not economic damages.[89] The weightier question is whether Article III, § 66 goes further and *precludes* the Texas Legislature from passing caps on economic damages. Given the interpretive principles listed above, the answer must be in the affirmative.

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82. *Id.*

83. Doody v. Ameriquest Mortg. Co., 49 S.W.3d 342, 344 (Tex. 2001) (citing Stringer v. Cendant Mortg. Corp., 23 S.W.3d 353, 355 (Tex. 2000); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 89 (Tex. 1997)).

84. *Id.* (citing *Stringer*, 23 S.W.3d at 355; City of El Paso v. El Paso Cmty. Coll. Dist., 729 S.W.2d 296, 298 (Tex. 1986)).

85. *Id.* (citing Purcell v. Lindsey, 314 S.W.2d 283, 284 (Tex. 1958); Duncan v. Gabler, 215 S.W.2d 155, 159 (Tex. 1948); Collingsworth County v. Allred, 40 S.W.2d 13, 15 (Tex. 1931)).

86. *Id.* (citing *Stringer*, 23 S.W.3d at 355; Hanson v. Jordan, 198 S.W.2d 262, 263 (Tex. 1946)).

87. ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858, 877 (Tex. 2018); Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422, 429 (Tex. 2017); Terrazas v. Ramirez, 829 S.W.2d 712, 732 (Tex. 1991); Parks v. West, 111 S.W. 726, 727 (Tex. 1908).

88. *See* TEX. CONST. art. III, § 66.

89. *See supra* Section III.A (interpreting Article III, § 66 of the Texas Constitution).

Construing Article III, § 66 as limiting the Texas Legislature's ability to cap economic damages is the only way to avoid rendering multiple sections of the provision superfluous. For example, if the provision merely empowered the legislature to limit noneconomic damages and did not also limit its power to cap economic damages, then the caveat that the provision "applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law" would be largely superfluous.[90] As explained above, *Lucas*, *Rose*, and *Auld* show the Open Courts Provision of the Texas Constitution only limits legislative authority to cap damages if the cause of action existed at common law.[91] It would be unnecessary to amend the Texas Constitution to empower the legislature to limit damages for causes of action derived from "statute" or "other law," as Article III, § 66 does, since the legislature already had this power.[92] The identical language on this matter in subpart (c) would likewise be superfluous. The proviso from subpart (c) that § 66 does not apply until after January 1, 2005,[93] would also be unnecessary for causes of action derived from "statute" or "other law"; the legislature would already have had the power to limit all damages from those causes of action *prior* to that time.[94] Finally, if the phrase "other than economic damages" merely reaffirmed powers the legislature already had rather than limiting legislative power, the identical provisos found at the beginning of both subparts (b) and (c) that the provision applies "[n]otwithstanding any other provision of this constitution" would also be superfluous for any cause of action derived from "statute" or "other law," since no other provision of the Texas Constitution limits the Texas Legislature's power as to those causes of action at the time of the provision's passage.[95]

Reading Texas Constitution Article III, § 66 to restrict the legislature's power to limit economic damages avoids these problems. If this provision limits such power, then the phrase "[n]otwithstanding any other provision of this constitution" is significant because it may be read to mean that, notwithstanding the Open Courts Provision of the Texas Constitution as interpreted in *Lucas*, *Rose*, and *Auld*, the legislature may not limit economic damages.[96] The references to causes of action derived from "statute" or "other law" take on similar meaning and reinforce that which is conveyed with "[n]otwithstanding any other provision of this constitution."[97] Thus, the legislature may not limit economic damages *even if* the legislation affects a

90. TEX. CONST. art. III, § 66.
91. *See supra* Section III.A (interpreting Article III, § 66 of the Texas Constitution).
92. TEX. CONST. art. III, § 66(b).
93. *Id.* § 66(c).
94. *Id.*
95. *Id.* § 66(b)–(c).
96. *See id.*; *supra* Section III.A (permitting damages caps).
97. TEX. CONST. art. III, § 66(b)–(c).

cause of action derived from "statute" or "other law" and is, therefore, not subject to the Open Courts Provision.

This reading is also consistent with the canon of construction that when a provision grants one power but withholds another, the provision should be read as affirmatively prohibiting the latter power.[98] The Texas Supreme Court reaffirmed this principle in *ConocoPhillips Co. v. Koopmann*,[99] although with the caveat that the doctrine "does not apply unless it is fair to suppose that [the Legislature] considered the unnamed possibility and meant to say no to it."[100] Given that the provision mentions economic damages, and in light of the circumstances in which it was put to Texas voters, the Texas Legislature undoubtedly considered, or was at least aware of, the possibility of adding the power to limit economic damages to the provision.[101] Since the legislature did not do so, the provision should be read to explicitly limit the power of the legislature to place a cap on such damages, which would render the limitation on damages for government-hospital physicians in the Act unconstitutional.[102]

IV. DAMAGES CAPS AND THE COST OF LIVING

When originally passed in 1969, liability damages under the Act were capped at $100,000 per person and $300,000 per occurrence.[103] Under the current iteration of the Act—and despite the intervening passage of fifty years and an increase in the consumer price index of between 400% and 700% depending on the metric used[104]—liability damages remain capped at

98. ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858, 868 (Tex. 2018).

99. *Id.* at 877.

100. *Id.* (alterations in original) (quoting Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013)).

101. Discussing the clear-statement rule in the context of sovereign immunity, then-Justice Hecht has written:

> The Legislature may have decided, reasonably, plausibly, and even probably, that the State should be liable for retaliating against an employee who seeks workers' compensation benefits just as a private person would be, but it has not said so with the clear and unambiguous language it has often used in many other contexts, and that until now we have required. As long as that is really to be the standard for waiver of immunity, judges' ideas about reasonableness and policy cannot meet it.

Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1, 14 (Tex. 2000) (Hecht, J., dissenting). However, as is clear from the *Franka* decision penned by then-Justice Hecht, he only embraces the clear-statement rule when it suits him. *See supra* Section II.B (discussing the Texas Supreme Court's break from precedent by permitting a claim brought under the Act where a governmental entity had not waived immunity). *See generally* Franka v. Velasquez, 332 S.W.3d 367 (Tex. 2011).

102. *See Fernandez*, 28 S.W.3d at 14.

103. Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 1, 1969 Tex. Gen. Laws 874, 874 (repealed 1985).

104. *Compare Databases, Tables, and Calculations by Subject: Inflation & Prices*, BUREAU LAB. STATISTICS https://www.bls.gov/data/ (last visited Apr. 13, 2019) (illustrating the metric used in the consumer price index), *with* Robert Hughes, *Everyday Prices Plunge Again in December*, AM. INST. FOR ECON. RES. (Jan. 11, 2019), https://www.aier.org/research/epi/everyday-prices-plunge-again-in-

those amounts for local government units[105] and emergency-service organizations.[106] For suits against municipalities or the State of Texas, liability-damages caps are only slightly better for negligence victims: $250,000 per person and $500,000 per occurrence.[107]

Elsewhere, the Texas Legislature has accounted for the passage of time—albeit in a slipshod fashion—by tying damages caps to consumer price indices.[108] For example, Chapter 74 of the Texas Civil Practice and Remedies Code, which deals with liability for medical malpractice and includes caps on damages for medical malpractice cases, contains a provision that allows the caps to be adjusted by reference to consumer-price-index data compiled by the Bureau of Labor Statistics of the United States Department of Labor.[109] As written, the statute caps some economic and all noneconomic damages—including punitive damages—at a combined $500,000.[110] However, because that amount is listed in the statute at 1977 dollars, and is tied to increases and decreases in consumer prices calculated by the United States Department of Labor,[111] the total amount of damages available for an individual in a wrongful death medical malpractice case in Texas at the time of this publication is $2,002,731.71.[112] Using this same metric to adjust damages caps contained in the Act, the damages available against local-government units and emergency-service providers would increase to $400,546.34 per person.[113] Similarly, damages available against municipalities or the State of Texas would rise to $1,001,365.85.[114]

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december (scroll down to the Microsoft Excel symbol and click to download chart for an illustration of the metric used for the everyday price index).

105. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.023(b), 102.003 (West 2017).

106. *Id.* § 101.023(d).

107. *Id.* §§ 101.023(a), (c).

108. *Id.* § 74.303(b).

109. *Id.*

110. *Id.* § 74.303(a). As written, subsection (a) applies to "all damages," but subsection (c) carves out "the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury." *Id.* §§ 74.303(a), (c).

111. *Id.* § 74.303(b):

> When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index . . . that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average—All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.

112. SOC. SEC. ADMIN., CPI FOR URBAN WAGE EARNERS AND CLERICAL WORKERS (2019), https://www.ssa.gov/oact/STATS/cpiw.html. In August 1977, the CPI-W was 61.5. *Id.* In August 2018, the CPI-W was 246.336, a difference of over 400%. *Id.*

113. *Id.*

114. *Id.* Admittedly, since the damages caps against municipalities or the State of Texas were passed in 1985, it could be argued that any cost-of-living or inflation adjustment should be calculated based on 1985 rather than 1977 rates.

This change would produce a number of benefits. First, it would ensure that tort victims are not doubly victimized by governmental negligence—the first instance of injury being the actual act of negligence suffered, and the second instance being the personal and financial ruin that such injury can inflict on an injured party. This is all the more true, and all the more important, where a victim's injuries are catastrophic. Those with catastrophic injuries are likely to have large future medical bills and future lost wages far beyond what a statutory damages cap would permit.[115] Yet there is presently no possibility they or their families will be fairly and adequately compensated when their injuries are subject to the Act.[116] Second, it would place tort victims on a more even (albeit hardly equal) footing with victims injured by the negligence of private parties.[117] As it presently stands, whether a tort victim even has an *opportunity* of full compensation depends entirely on whether the victim suffers the ill fortune to be injured by the negligence of a government employee, or in some circumstances, even an independent contractor for a government entity.[118] Third, adjusting the Act's damages caps would maintain fidelity to the policy intentions of its drafters, who determined that the amount specified in 1977 (or 1985, in the case of damages available against municipalities or the State of Texas) struck the proper balance between protection of the public fisc and compensation of tort victims as measured by 1977 or 1985 dollars.[119] Finally, limiting the amount of damages available against a governmental entity also limits the incentive the governmental entity has to prevent future torts from occurring, since the limitation on damages reduces the risk the entity faces from its future negligence or the negligence of its employees.[120]

V. CONCLUSION

The Texas Tort Claims Act originally functioned as a shield, protecting public funds and exercises of public policymaking discretion.[121] The Act has evolved into a sword, hacking away remedies that victims of negligence once held, even to the point of violating the Texas Constitution. A number of modifications to the Act would restore fidelity to its original purposes and the policy decisions motivating the Act's adoption, not least of which would

115. *See supra* notes 103–07 and accompanying text (discussing statutory damages caps in Texas). Of course, past medical bills and lost wages can easily exceed the statutory damages caps as well.

116. *See supra* notes 103–07 and accompanying text (discussing statutory damages caps in Texas).

117. *See supra* notes 105–07 and accompanying text (illustrating the difference in caps when injured by a governmental unit).

118. *See supra* Part III (arguing that damages caps violate the Texas Constitution).

119. *See supra* notes 112–14 and accompanying text (computing the current value of damages caps in today's dollars).

120. *See supra* notes 103–12 and accompanying text (discussing the statutory damages caps in Texas).

121. *See supra* Section I.A (articulating the purpose and function of immunity).

be adjusting the Act's damages caps so that they keep pace with increases in consumer price indices and the cost of living.