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The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois

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* Circuit Judge, Twelfth Judicial Circuit of Illinois; Juris Doctor, The John Marshall Law School; Master of Business Administration, University of Notre Dame; Master of Science, University of Illinois-Springfield; Bachelor of Science, Illinois State University. This Article does not aim to persuade the Illinois Supreme Court to adopt or reject any particular principle of law. Rather, this Article discusses rulings the Illinois Supreme Court has already made, factors that have potentially played a part in those rulings, and the impact the court's rulings may have on future cases. This Article is intended as an addition to the legal discourse in Illinois, and not as a criticism of any court, judge, or ruling.

> It remains a mystery to me how [the lockstep] principle ever came into being, and why once in existence, it has remained embedded, seemingly indelible, in the body of our law.[1]
>
> – Former Illinois Supreme Court Justice William G. Clark

INTRODUCTION

Over the past several decades, the legal community has witnessed state courts increasingly rely upon their state constitutions as independent sources of individual rights.[2] This phenomenon, called "judicial federalism" or the "new judicial federalism," has resulted in many states extending greater protections to individual liberties under their respective state constitutions than are recognized under the Federal Constitution.[3] Other state courts largely reject the call for judicial federalism and instead engage in a "lockstep" analysis that requires judges to interpret their state constitutions dependently on the United States Supreme Court's interpretation of analogous federal provisions.

Illinois rulings have generally fallen into the latter category. Indeed, in a majority of cases involving article I of the Illinois Constitution of 1970 (the Illinois Bill of Rights),[4] our state's high court has followed the lockstep approach. The most recent significant case from the Illinois Supreme Court is *People v. Caballes*, where the court sought to

1. People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 879 (Ill. 1988) (Clark, J., concurring).

2. Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: The Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 143 (1984) (citing G. Alan Tarr, *Bibliographic Essay*, *in* STATE SUPREME COURTS 203, 206–08 (1982), and *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328–30 (1982)).

3. *Id.* at 143.

4. All references herein to the "Illinois Constitution" pertain to the Illinois Constitution of 1970 unless otherwise stated.

reconcile prior rulings and formally adopted a "limited lockstep" approach.[5] However, few things in Illinois are ever simple. One could certainly argue that the Illinois Supreme Court's jurisprudence on this issue is fraught with inconsistency.[6] Perhaps the most evident lesson offered by the case law is that members of the court have expressed passionately divergent views about whether the Illinois Constitution should be interpreted dependent on, or independent of, the United States Constitution. The discourse among Illinois Supreme Court justices regarding this "dependent-independent" debate has been turbulent and sometimes even testy.

This Article seeks to shed light on the mystery of the lockstep approach's application in Illinois, as Justice Clark alluded to in *People ex rel. Daley v. Joyce*.[7] Part I evaluates judicial federalism's national evolution and the arguments on both sides of the debate. Next, Part II examines the factors that may have influenced some state courts, and in particular the Illinois Supreme Court, to adopt a predominately lockstep approach. Part II also reviews the most significant Illinois Supreme Court rulings on this issue. Finally, Part III discusses the impact of the seminal *Caballes* case on the lockstep approach, as well as the future of the lockstep doctrine in Illinois.

I. THE JUDICIAL FEDERALISM DEBATE

A. Evolution of Judicial Federalism in the United States

Many observers believe that judicial federalism emerged in the early 1970s when Justice Earl Warren departed from the United States Supreme Court.[8] These commentators argue that, while the Warren

5. People v. Caballes, 851 N.E.2d 26, 42 (Ill. 2006). Under the limited lockstep approach, Illinois courts may apply an independent analysis when "a specific criterion—for example, unique state history or state experience—justifies departure from federal precedent." *Id.* at 43 (internal quotation marks and citation excluded). Additional criteria used by the court to justify an independent analysis include situations involving the state's values, traditions, pre-existing law, specific language in the state constitution, or statements from the constitutional convention committee reports. *See, e.g.*, *id.* at 42–43.

6. *See id.* at 57 (Freeman, J., dissenting) (acknowledging that confusion has "animated our application of the 'lockstep doctrine'").

7. People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 879 (Ill. 1988) (Clark, J., concurring).

8. *See, e.g.*, Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 877 (2007) ("A renaissance of judicial federalism began in the 1970s. Some commentators have indicated that this renaissance started as the result of a perceived retrenchment by the U.S. Supreme Court on individual rights during the Warren E. Burger era (1969–86), which followed the more progressive Earl Warren era (1953–69). During this period of retrenchment, some state courts looked to their own constitutions to either maintain or provide greater protection for individual rights." (citations omitted)). *See also*

Court (1953–1969) issued numerous groundbreaking decisions expanding individuals' constitutional rights, the Burger Court (1969–1986) subsequently eroded those rights.[9] Justice William Brennan, an early pioneer of state constitutionalism, feared that an "increasingly conservative federal judiciary would decline to protect liberty as vigorously as in the past."[10] He encouraged state courts to respond to the Burger Court's reach by looking to their own constitutions for protection.[11] Justice Brennan further declared that the "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our time."[12]

Eventually, judicial federalism spread, and many state supreme courts began basing rulings on their own constitutions despite the existence of alternative authority in the Federal Constitution.[13] In 1986, two researchers discovered only ten cases decided between 1950 and 1969 in which state judges relied on state grounds to provide greater protection than those afforded by the Federal Constitution.[14] Between 1970 and 1986, the number of such cases skyrocketed to 300.[15]

Despite an increase in state constitutionalism, other research suggests that this growing trend has not yet displaced state courts' general preference to base individual rights rulings predominately on federal grounds. For example, one study indicated that in 78% of the cases examined, state courts relied entirely on federal grounds to rule on self-incrimination cases, despite the existence of self-incrimination

Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998) (discussing Justice Brennan's "strategic effort . . . to highlight the value of plumbing the states for individual rights protections in the face of conservative retrenchment"); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 420 (1998) ("The renewed interest in state constitutions was prompted by the desire to entrench and advance the accomplishments of the Warren Court at a time when the federal judiciary was becoming hostile to the expansion of certain claims of individual rights.").

9. *See supra* note 8 and accompanying text.

10. Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935, 935 (1994).

11. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

12. NAT'L L.J., Sept. 29, 1986, at S1 (quoting Justice William J. Brennan, Jr.).

13. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1098 (1997).

14. Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS: J. FEDERALISM 111, 111 (1986).

15. *Id.* State courts decided most of the cases from 1977 onward. *Id.*

protection in nearly every state constitution.[16] Only eight state supreme courts relied upon state grounds in more than 50% of such cases.[17] Thus, even though the judicial federalism movement has become an emerging force in American jurisprudence, it may be too early to identify the scope and scale of its impact on states' rights and constitutional discourse.

B. The Arguments in the Dependent-Independent Debate

Proponents of judicial federalism contend that independent interpretation of state constitutions provides a valuable source of rights and liberties.[18] They further argue that "constitutional interpretation is far from a science and certainly does not have a single correct answer"; and given that United States Supreme Court Justices routinely disagree, the Court itself shifts over time despite a stated preference for stare decisis.[19] Some advocates assert a "states as laboratories" theory, whereby "states can be innovative in their constitutional interpretation without burdening the rest of the country."[20] One commentator notes that federal courts are restrained in matters of constitutional interpretation because the Supreme Court must formulate uniform national standards of conduct.[21] Moreover, reliance on state grounds can shield state court rulings from federal review.[22] As discussed below, some members of the Illinois Supreme Court have presented additional arguments in favor of a federalist approach that were, at times, blistering.

Judicial federalism is not, however, free from criticism. Opponents claim that: (1) reliance upon state law is generally result-oriented and usurps executive and legislative power; (2) reliance on state

16. Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 28 (1994).

17. *Id.* at 29.

18. Jeff Hicks, Note, *The* Effler *Shot across the Bow: Developing a Novel State Constitutional Claim under the Threat of Ineffective Assistance of Counsel*, 59 DRAKE L. REV. 931, 945–46 (2011).

19. *Id. See also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–12 (2010) (stating that stare decisis is a principle of policy and that "precedent is to be respected," but also identifying considerations that justify departure from stare decisis); O'Casek v. Children's Home & Aid Soc'y of Ill., 892 N.E.2d 994, 1006–07 (Ill. 2008) (discussing principles of vertical and horizontal stare decisis and the bases for following or departing from same).

20. Hicks, *supra* note 18, at 946.

21. Lawrence Gene Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226–27 (1978).

22. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (stating that the United States Supreme Court will not disturb a ruling that is based solely on independent state grounds). However, it is incumbent on the state court to clearly identify its ruling as one that rests on sole or independent state grounds. *Id.* at 1038–43.

constitutional law is improper because it shields those constitutional claims from federal review; (3) most decisions protecting individuals' rights cannot be reconciled with historical intent; and (4) absent clear historical or textual support, state law decisions deviating from federal case law are either illegitimate per se or illegitimate to the extent that they are not the result of "neutral criteria" stemming from historical and textual considerations.[23]

The arguments against judicial federalism rely, in turn, on several premises: (1) federal case law is the most appropriate analytical yardstick to measure the legitimacy of state constitutional case law; (2) the United States Supreme Court bears the ultimate constitutional responsibility to determine individuals' rights; (3) state courts should assign paramount jurisprudential weight to historical intent; (4) state constitutional provisions analogous to federal provisions are functionally irrelevant; (5) no essential differences exist between the various models or theories of new judicial federalism; and (6) federal supremacy and minimum standards notwithstanding, uniformity is more essential to constitutional jurisprudence than to other legal areas.[24]

Professor James Gardner of SUNY-Buffalo Law School is one of the most vocal critics of state constitutionalism. In 1992, he published an article contending that state constitutional law is a "vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[25] He further asserted that responsibility for this problem rests at the feet of state courts' failure to "develop a coherent discourse of state constitutional law," and ultimately a failure of state constitutionalism itself based on several factors.[26] Gardner's seminal article has been called provocative[27] and "controversial but influential."[28] Over 300 law reviews have cited his article, several of which express a contrary viewpoint.[29] The Illinois Supreme Court even

23. Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5, 6 (1989).

24. *Id.*

25. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

26. *Id.* at 763–64. *See also infra* Part II.A (providing further details about these factors).

27. Robert F. Williams, *Introduction*, 24 RUTGERS L.J. 907, 908 (1993).

28. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 362 (2011).

29. *See, e.g.*, Rex Armstrong, *State Court Federalism*, 30 VAL. U. L. REV. 493 (1996) (expounding that Gardner's theory is contrary to the nature of federalism and detrimental to the benefits of diverse development of law, and that state constitutions can be relied upon in meaningful ways without disregarding the importance of the Federal Constitution); Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927 (1993) (asserting that Gardner's article is overly theoretical and does not

referenced Professor Gardner's article in its landmark lockstep ruling, *People v. Caballes*.[30]

II. ANALYZING THE LOCKSTEP DOCTRINE IN ILLINOIS JURISPRUDENCE

This Part contains three Sections and focuses on why courts—and in particular Illinois courts—have ruled the way they have when it comes to state constitutional interpretation. Section A reviews Professor Gardner's attempts to identify and discuss factors that may lead certain states toward a more robust state constitutional discourse than other states. Section B details a five-year analysis of Illinois Supreme Court cases, from 2006 through 2010, that tests Gardner's theories and considers whether Illinois jurisprudence supports his hypotheses and observations. Section C discusses theories on why the Illinois Supreme Court has decided to generally reject the judicial federalist approach and includes three Subparts: (1) a review of the prevailing political and legal theories behind the judicial decision-making process, and discussion regarding how these theories may, if at all, help explain the court's limited lockstep approach; (2) consideration of other factors external to the court that may impact its rulings; and (3) an analysis of the court's major rulings and individual statements by justices who have been particularly outspoken on whether the Illinois Constitution should be subject to a dependent or independent interpretation.

A. Gardner's Hypothesized Influences over a State Court's Decision to Accept or Reject Judicial Federalism

Professor Gardner's influential 1992 article included an effort to identify factors that may lead a state supreme court to develop its own robust constitutional discourse.[31] Gardner chose a sample consisting of seven states: New York, Massachusetts, Virginia, Louisiana, California, Kansas, and New Hampshire.[32] He also limited his research to those rulings setting forth a substantive analysis (rather than mere cursory discussion) from the highest courts of these states.[33] Finally, he reviewed only cases decided in 1990, giving him a sample size of 1208

address the practical day-to-day implications of new federalism); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992) (arguing that although some state constitutional jurisprudence has been poorly conceived, Oregon offers an example of individual protections based on consistent and intelligible interpretation of a state constitution grounded in the particular history of the state and text).

30. People v. Caballes, 851 N.E.2d 26, 41 (Ill. 2006) (referencing Gardner's argument that the lockstep approach reduces state constitutional language "to a redundancy").

31. *See* Gardner, *supra* note 25, at 779–80.

32. *Id.* at 779.

33. *Id.*

cases.[34]

Gardner hypothesized that five factors may influence a state court's ruling in the dependent-independent debate: (1) the state's size; (2) its age; (3) the existence of an unusual founding history; (4) the continuity of its constitutional traditions; and (5) the nature of its constitutional text.[35] For example, Gardner hypothesized that a state's size is important due to the sheer number of cases litigated.[36] That is, he believed that a large state handling numerous constitutional cases would likely develop an independent body of constitutional law.[37] Similarly, he deemed a state's age important because older states have had sufficient time to develop their constitutional jurisprudence.[38] Gardner also felt that a state's unique founding history would be relevant because such uniqueness might be reflected in its constitution, thereby providing the state's courts an opportunity to develop independent constitutional doctrine.[39] He deemed the continuity of a state's constitutional traditions important because a constitution with a lengthy history is likely to be construed more often than a newer constitution; and a history of repeated constitutional amendments could indicate a unique attitude toward state constitutional doctrine.[40] Finally, Gardner opined that the length of the constitutional text might be conducive to independent interpretation.[41]

Gardner's study produced several general findings. First, the sample states' high courts ruled on state constitutional issues infrequently, totaling only about 20% of their cases.[42] Second, the sample results demonstrated a general unwillingness among state supreme courts to engage in any significant analysis of their respective constitutions.[43] Third, the courts addressing constitutional issues often failed to specify whether they based their decisions on the federal or state constitution.[44] Fourth, states specifically interpreting their constitutions often used a lockstep approach.[45] Fifth, state courts rarely examine their state's

34. *Id.* at 779–80.
35. *Id.* at 779 n.64.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 780.
43. *Id.* at 781.
44. *Id.* at 785.
45. *Id.* at 788.

constitutional history when analyzing state constitutional claims.[46]

Overall, Gardner concluded that "the overwhelming impression left by an examination of state constitutional decisions is that state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law."[47]

Gardner's conclusions regarding a general reluctance to reach state constitutional issues are supported by other empirical research. For example, a 1991 study by Professor Barry Latzer confirmed state courts' tendency to interpret their constitutions in lockstep with the Federal Constitution.[48] Latzer reviewed all state supreme court rulings between 1960 and 1989 that decided criminal procedure issues on state constitutional grounds. Latzer found that state courts routinely rely upon United States Supreme Court analysis when interpreting analogous provisions of their own constitutions.[49] Other commentators have similarly noted state courts' historic preference to interpret their constitutions in lockstep with federal precedent.[50]

46. *Id.* at 793.

47. *Id.* at 804. Gardner continues:

> With a handful of exceptions, the decisions fail to address state constitutional issues squarely and independently from federal constitutional jurisprudence, and show no sign of any discourse of distinctness that would allow participants in the legal system to craft intelligible arguments about the nature of any differences between the state and federal constitutions.
>
> By engaging in extensive lockstep analysis, many courts have also created an atmosphere in which it is unnecessary to distinguish between the state and federal constitutions because they are generally held to have the same meaning. This reduces state constitutional law to a redundancy and greatly discourages its use and development. . . .
>
> Furthermore, the lesson of *Michigan v. Long* seems not to have penetrated the jurisprudence of any state other than New Hampshire. By failing to specify when holdings rest on state constitutional grounds and by borrowing extensively from federal case law when construing their state constitutions, state courts not only confuse participants in the state legal system but also leave themselves highly vulnerable to Supreme Court review of decisions that may rest on adequate and independent state grounds.

Id. at 804–05.

48. BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 160–61 (1991).

49. *Id.* State courts relied on United States Supreme Court doctrine in over two-thirds of such cases. *Id*.

50. *See, e.g.*, Sue Davis & Tanya Lovell Banks, *State Constitutions, Freedom of Expression, and Search and Seizure: Prospects for State Court Reincarnation*, 17 PUBLIUS: J. FEDERALISM 13, 13 (1987); Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305 (1985).

B. Does Illinois Jurisprudence Support Gardner's Hypotheses and Observations?

This Section replicates Gardner's study, but focuses on the Illinois Supreme Court's state constitutional jurisprudence from 2006 through 2010.[51] Returning to Gardner's five hypothesized factors that could impact whether a state takes a lockstep or federalism approach,[52] it is difficult to conclude that Illinois—which generally adopts a lockstep analysis—supports Gardner's hypothesis. The first two factors can be dealt with fairly easily. First, Gardner hypothesized that a large state is more likely to have its own body of constitutional law. By most relevant measures, Illinois is a large state—it is ranked fifth nationally in population, twelfth in population density, and fifth in gross domestic product.[53] Illinois is also home to Cook County, which is one of the busiest state trial court systems in the country. Second, Gardner theorized that older states have had sufficient time to develop a state constitutional discourse. He also pointed to two other factors, namely the state's founding history and the continuity of its state constitutional traditions. Here, the analysis gets dicey. Illinois became the twenty-first state in 1818, making it among the older states. However, the current Illinois Constitution was adopted in 1970, with prior constitutions having been adopted in 1870, 1848, and 1818. Some provisions of article I are completely new, but a significant portion of the Illinois Bill of Rights as contained in article I is substantively carried over from earlier Illinois constitutions.[54] Moreover, some have argued that Illinois's original Bill of Rights was based on the Virginia Bill of Rights and the Northwest Ordinance, and not just the federal Bill of Rights.[55] In any event, it is fair to say that Illinois's passage of four state constitutions, influenced from sources not limited to the Federal Constitution, demonstrates its robust history of state constitutional discourse at the political level, if not the judicial level. Finally, Gardner opined that the length of the state constitutional text might facilitate the independent development of state constitutional jurisprudence. There is nothing particularly unusual about the Illinois Constitution's text. It is

51. Gardner's findings are set forth above. *See supra* notes 42–47 and accompanying text.

52. *See supra* notes 35–40 and accompanying text.

53. *Resident Population Density: Population Density, 2010*, U.S. CENSUS BUREAU, http://www.census.gov/2010census/data/apportionment-dens-text.php (last visited Feb. 15, 2013); *Top 10 State GDPs in the United States*, ECONPOST (Feb. 4, 2011), http://econpost.com/unitedstates economy/largest-state-gdps-united-states (explaining gross domestic product).

54. *See generally* ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION: A REFERENCE GUIDE 39–70 (2010) (discussing the Illinois Bill of Rights).

55. Thomas B. McAffee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1, 20 (1987).

not peculiar or unduly lengthy. Based on the foregoing, it appears that Illinois falls into a category of states that Gardner deemed more likely to take a judicial federalist approach. Yet, the Illinois Supreme Court's preference for a predominately lockstep analysis seems contrary to Gardner's hypothesis.

Beyond his hypotheses, Gardner also made several observations: (1) state courts rarely reach state constitutional decisions, with decisions comprising 7% to 31% of the cases decided; (2) a lack of substantive analysis or discussion in state constitutional cases; (3) a failure to identify or distinguish between state and federal constitutional analyses; (4) a preference for lockstep analysis; and (5) an absence of discussion regarding state constitutional history.[56] Illinois Supreme Court jurisprudence is consistent with some, but not all, of Gardner's observations.

First, Illinois is consistent with Gardner's findings insofar as the percentage of cases resolving state constitutional questions is fairly low. Between 2006 and 2010, the Illinois Supreme Court substantively ruled on just over 500 cases[57] and referenced a "constitution" in only 275 of such cases (equal to 55% of the time).[58] However, the court referenced the Illinois Constitution of 1970 in approximately 120 cases, leaving 155 cases that focused entirely on the Federal Constitution or made merely passing references to the Illinois counterpart. Of the 120 cases involving a state constitutional issue, around two-thirds involved claims arising under article I's Bill of Rights.

Second, like Gardner's findings, a review of the case law from 2006 through 2010 demonstrates there is generally a lack of discrete analysis or discussion of state constitutional issues. This is not always the case, however, as the court has in numerous instances engaged in a thoughtful and analytical discussion of state constitutional claims involving individual rights.[59] But this is not the norm, nor should it be since Illinois is generally a lockstep state and its courts have been expressly directed to "'look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a

56. Gardner, *supra* note 25, at 780–94.

57. This excludes non-substantive rulings, such as supervisory orders, attorney disciplinary cases, and rulings on petitions for leave to appeal.

58. Gardner did not state whether he expressly limited his inquiry to state constitutional decisions on individual rights cases, and so this analysis is similarly not limited. *See* Gardner, *supra* note 25, at 779–80. Further, it is admittedly problematic to identify those instances where a court addresses a "constitutional issue." Cases range from those including meaningful discussion of a disputed constitutional question, to the passing reference of the constitution as a source of authority or other basic point of law.

59. *See infra* Part III.B.1–8.

specific criterion . . . justifies departure from federal precedent.'"[60]

Third, Gardner's sample of state court rulings often failed to identify or distinguish between state and federal constitutional analyses. This is often true in Illinois as well. Between 2006 and 2010, the Illinois Supreme Court analyzed the interplay between the Illinois and Federal Bill of Rights in approximately 3% of the 500 cases it decided.[61] In several of those cases, however, the court merely acknowledged that a litigant failed to adequately raise the issue, and then proceeded to analyze the issue solely on federal grounds.[62] Illinois case law supports Gardner's conclusion that state courts often do not frame their rulings as

60. People v. Caballes, 851 N.E.2d 26, 42–43 (Ill. 2006) (quoting Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 104 (2000)).

61. *See, e.g.*, People v. Boeckmann, 932 N.E.2d 998, 1007 (Ill. 2010) ("The proportionate penalties clause in [article I, section 11] [of] the Illinois Constitution is coextensive with the federal constitution's prohibition of cruel and unusual punishment." (citation omitted)); People *ex rel.* Birkett v. Dockery, 919 N.E.2d 311, 314 (Ill. 2009) (recognizing that Illinois provides broader protections to the right to a jury trial than are afforded by the Federal Constitution); Pooh-Bah Enters., Inc. v. Cnty. of Cook, 905 N.E.2d 781, 805 (Ill. 2009) (refusing to extend the reach of article I, section 4 of the Illinois Constitution beyond the boundaries of the First Amendment); People v. Bailey, 903 N.E.2d 409, 418 (Ill. 2009) (refusing to find a violation of the Fourth Amendment to the United States Constitution or article I, section 6 of the Illinois Constitution); *In re* Lakisha M., 882 N.E.2d 570, 581 (Ill. 2008) (finding that a buccal swab given by law enforcement officials, along with a lowered privacy expectation as a consequence of a delinquency finding, violated neither state privacy nor state and federal search and seizure protections); People v. Colon, 866 N.E.2d 207, 224 (Ill. 2007) (refusing to extend the state's protection against double jeopardy beyond that afforded under the Federal Constitution, and overruling *People v. Grayson*, 319 N.E.2d 43 (Ill. 1974)); *In re* Rodney H., 861 N.E.2d 623, 628 (Ill. 2006) (stating that the proportionate penalties clause in article I, section 11 is coextensive with the cruel and unusual punishment provisions of the Federal Constitution).

62. *See, e.g.*, City of Chicago v. ProLogis, 923 N.E.2d 285, 291 (Ill. 2010) (refusing to consider bondholders' claim that the "Illinois takings clause provides them greater protection than the federal takings clause provides" on the basis that litigants failed to raise this argument in their petition for leave to appeal); *In re* Marriage of Miller, 879 N.E.2d 292, 296–99 (Ill. 2007) (noting that although the litigant raised a violation of due process under the Illinois and Federal Constitutions, he presented no argument that state due process afforded him greater rights; and further noting that because the appellate court did not distinguish these two sources of rights in its ruling, it would treated the two clauses coextensively and governed by federal case law); People v. Molnar, 857 N.E.2d 209, 218 (Ill. 2006) ("[N]either party has argued that the state due process clause provides greater protection than that provided by the federal constitution" and "we find no compelling reason to do so in this case"); People v. Sutherland, 860 N.E.2d 178, 209–10 (Ill. 2006) (acknowledging that although defendant invoked protections under both state and federal search and seizure clauses, he did not argue that the state constitution provided broader protection); People v. Driggers, 853 N.E.2d 414, 417 (Ill. 2006) (noting that the defendant based his search and seizure arguments solely on the Fourth Amendment and not on the Illinois Constitution); People v. Garvin, 847 N.E.2d 82, 89 (Ill. 2006) (stating that the defendant based his challenge on both state and federal search and seizure clauses but failed to "offer any arguments specifically addressing the unique aspects of our state constitutional privacy provisions, and therefore we do not consider those elements in our analysis").

resting solely on state law.[63] Indeed, the Illinois Supreme Court does not appear to be particularly interested in shielding its rulings from federal review. Under *Michigan v. Long*, a state court "can insulate its decision from Supreme Court review by stating 'clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent [state] grounds.'"[64] The Illinois Supreme Court has cited *Michigan v. Long* for this proposition only a handful of times, and almost never to clearly delineate a ruling as resting solely on state grounds.[65] Former Illinois Supreme Court Justice James Heiple expressed his dismay regarding the absence of a *Michigan v. Long* statement in *People v. Brownlee*,[66] stating:

> In failing to declare explicitly that the Illinois Constitution constitutes an independent ground for its decision, the court's opinion places the rights of Illinois citizens in the hands of the federal judiciary. If an independent state law basis is not clearly apparent from a state court's opinion, the United States Supreme Court will treat the decision as if based solely on federal law. The Supreme Court is therefore free to reverse this court's judgment if it disagrees with our view of the protections which should be afforded to criminal defendants, in this as well as in other cases.
>
> The responsible approach in this and other similar cases is to preclude federal review of the issue in question by clearly basing our holding on the Illinois Constitution. If this court truly believes that the right announced today is an essential component of the protection against unreasonable searches and seizures, we should take the simple steps necessary to prevent its possible curtailment by the United States Supreme Court. By failing to be specific, this court has neglected an important "opportunity to develop state jurisprudence unimpeded by federal interference."[67]

The absence of *Michigan v. Long* statements in Illinois Supreme Court rulings suggests that the court is not only willing to give deference to the United States Supreme Court on bill of rights matters, but is also willing to be reversed on such issues if the federal high court deems it appropriate.

Fourth, Illinois is consistent with Gardner's analysis of his sample states' preferences for a lockstep approach pursuant to *Caballes*. As

63. *See* Gardner, *supra* note 25, at 804.

64. *Caballes*, 851 N.E.2d at 42 (citing Michigan v. Long, 463 U.S. 1032, 1041 (1983)).

65. One possible exception is *People v. McCauley*, 645 N.E.2d 923, 933 (Ill. 1994). In that case, the court expressly identified a prior ruling, *People v. Griggs*, 604 N.E.2d 257 (Ill. 1992), as resting solely on state grounds in the spirit of *Michigan v. Long*.

66. People v. Brownlee, 713 N.E.2d 556, 567 (Ill. 1999) (Heiple, J., concurring).

67. *Id.* (citing, inter alia, Michigan v. Long, 463 U.S. 1032, 1040–41).

discussed below, however, Illinois's preference for a lockstep approach is not absolute.

Fifth, Illinois is contrary to Gardner's conclusion that state courts rarely examine their states' constitutional history when analyzing state constitutional claims. On the contrary, and as discussed herein, a review of the Illinois Constitution's legislative history is a basic tenet of the lockstep analysis in Illinois.[68]

C. Why Does Illinois Prefer a Lockstep Approach?

Illinois is generally consistent with the behavioral observations Gardner made in his seven-state study. However, Illinois is inconsistent with the characteristics that Gardner hypothesized would make a state court more likely to adopt an independent constitutional analysis. If Gardner's factors do not influence the Illinois Supreme Court, what conditions *have* caused the court to prefer a lockstep approach? This Section discusses the possibilities and includes (1) an examination of legal and political theories of judicial decision-making and whether they explain the court's approach; (2) a discussion of external factors that may influence the court's decision; and (3) an analysis of the court's major lockstep rulings.

1. Theories of the Judicial Decision-making Process

For years, political scientists, lawyers, and the legal academy have attempted to analyze, explain, and even predict judicial decision-making behavior. The viewpoints generally taken by the political science and legal fields have often contradicted one another, often sharply. Indeed, Professor Milligan notes that political scientists "assume that judges use their office to maximize the implementation of a broad platform of individual policy preferences," while constitutional theorists assume that judges, "if policy-driven at all, use their office[s] to promote only those 'high' policies concerning the structure, limits, and role of government."[69] Professor Barry Friedman similarly recognizes the existence of a virtual wall between law professors and political scientists.[70] He explains that, in the legal academy, the scholarship is primarily "normative" and focuses on how judges ought to decide cases, as well as the posture they should take toward other institutions. Political scientists, in contrast, study "positive" theory, which seeks to

68. *See infra* notes 138–49 and accompanying text.

69. Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 213–14 (2010).

70. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 257–58, 267 (2005).

understand the factors that motivate judges to rule in particular ways and the forces that are likely to impact judges' rulings. Commentators like Judge Richard Posner seek a common ground or, at least, a common understanding of these approaches. Judge Posner identifies nine theories of judicial behavior,[71] of which the attitudinal, strategic, and legal models are most often discussed by commentators on this subject.[72]

The attitudinal model contends that judicial behavior is best explained by a judge's ideology and policy preferences.[73] This theory rejects or minimizes the constraining effect of law on judicial decision-making, thus identifying judges as "freewheeling" ideologues that reach conclusions based on their own values.[74] "The attitudinal model tends to array judges from 'liberal' to 'conservative;' political scientists use ideological proxies—usually, judge's political party affiliation at the time of nomination or election—to explain and predict decisional outcomes."[75] Most studies involving the attitudinal model have concentrated on the behavior of United States Supreme Court Justices—empirical research applying this model to high-court judges at the state level is sparse.[76] Two pioneers in the attitudinal field are Jeffrey Segal and Harold Spaeth, who claim that they can predict roughly three-quarters of all United States Supreme Court Justices' votes using

71. Judge Posner's identified bases are: (1) attitudinal; (2) strategic; (3) sociological; (4) psychological; (5) economic; (6) organizational; (7) pragmatic; (8) phenomenological; and (9) legalist. RICHARD A. POSNER, HOW JUDGES THINK 19–56 (2008).

72. Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 132 (2007) (characterizing these three models as the most predominate); CYNTHIA OSTBERG & MATTHEW WETSTEIN, ATTITUDINAL DECISION-MAKING IN THE SUPREME COURT OF CANADA 9–10 (2007) (drawing the same conclusion).

73. *See generally* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 7–8 (2006) (examining attitudinal and quasi-attitudinal theories); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–10 (1998) (opining that commentators have incorrectly focused on the attitudinal model of judicial behavior); VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 30–31 (2006) (discussing the attitudinal theory); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 196–97 (1996) (explaining that the Court accounts for public opinion). For criticism of the attitudinal theory, see Barry Friedman, *Taking Law Seriously*, *in* 4 PERSPECTIVES ON POLITICS 261, 263 (2006). *See also* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257 (1995) (concluding that personal characteristics and the political affiliation of the president appointing a judge are not meaningful predictors of judicial decisions).

74. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 965 (2011). *See also* Friedman, *supra* note 70, at 272 (2005) ("The central tenet of the attitudinal model is that the primary determinant of much judicial decisionmaking is the judge's own values.").

75. Hershkoff & Loffredo, *supra* note 74, at 965–66 (internal footnotes omitted).

76. *Id.* at 966.

ideological determinants.[77]

In contrast, the strategic theory of judicial behavior (sometimes called the positive political theory of law) posits that "judges do not always vote as they would if they did not have to worry about the reactions to their votes of other judges (whether their colleagues or the judges of a higher or a lower court), legislators, and the public."[78] In other words, the strategic view holds (much like game theory) that judges are strategic actors who are influenced by the choices of other actors as well as by institutional settings.[79] Strategic theorists believe that, rather than deciding a particular case in accordance with personal beliefs or preferences, judges act strategically to support long-term aspirations, such as career advancement, reputation enhancement, or other goals like a desire to avoid reversal or an attempt to influence future panels.[80]

Finally, the classic legal model "suggests that the path of the law can be identified through reasoned analysis of factors internal to the law."[81] "This model [leaves] no room for any judicial individuality, much less any expression of judicial ideology."[82] Ideology or long-term goals are not typically relevant under the classic model, and judicial decisions focus on legal doctrine, pure adherence to precedent, and indifference toward policy consequences.[83] Many commentators have embraced a

77. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 229 (1993). Messrs. Segal and Spaeth updated their research in THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

78. POSNER, *supra* note 71, at 29.

79. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–18 (1998); Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735 (2008). "Game theory is the interdisciplinary study of human behavior focusing on rational choices of strategies and treating different interactions between and among individuals as if it were a game with known rules and payoffs and in which all participants are trying to win." Michael N. Widener, *The Five-Tool Mediator: Game Theory, Baseball Practices, and Southpaw Scouting*, 12 PEPP. DISP. RESOL. J. 97, 105 n.57 (2012) (citing Roger A. McCain, GAME THEORY: A NONTECHNICAL INTRODUCTION TO THE ANALYSIS OF STRATEGY 19 (rev. ed. 2010)).

80. *See* BAUM, *supra* note 73, at 6–7 (contending that a judge's long-range goals impact her decision-making); FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 94–122 (2007) (discussing institutional influences on judicial rulings); HETTINGER ET AL., *supra* note 73, at 60–61; Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1056 (2006) (arguing that judges are often influenced by two factors: a desire to improve the world and a need to play the "judicial game"); POSNER, *supra* note 71, at 29. A state supreme court's decision to not include a *Michigan v. Long* statement in its ruling could suggest it is unconcerned with reversal by the United States Supreme Court.

81. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997).

82. *Id.*

83. Oldfather, *supra* note 72, at 132; Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 839–40; Cross, *supra* note 81, at 255 ("This model left no room for any judicial

cousin of the classic legal model[84] called "legal realism." The legal realism perspective acknowledges that judges make a good-faith effort to follow the law, but that their view of the law is shaped by their political, societal, and philosophical beliefs.[85] Legal realists further believe that judges are "influenced by their education, upbringing, ambitions, experiences, and values to no less an extent than anyone else."[86]

Identifying the most appropriate and accurate model of judicial behavior is of course subject to debate. The bulk of scholarship regarding the attitudinal and strategic models has emanated from political scientists, while the legal model was largely born of law professors;[87] this may explain some of the distrust that many believe exists between the two fields.[88] While recent years have seen some movement toward a common ground, both sides have been historically entrenched in their respective views and equally dismissive of the other.[89] Judge Posner believes that "[l]egalism drives most judicial

individuality, much less any expression of judicial ideology.").

84. *See* Cross, *supra* note 81, at 262 ("The legal model remains ill defined, characterized by various, often contradicting theories.").

85. *See* K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 157 (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 53 COLUM. L. REV. 809, 845–46 (1935).

86. Charles Gardner Geyh, *Straddling the Fence between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 435, 438 (2008).

87. David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT'L L. REV. 687, 690–91 (2005). Landau echoes the previously-discussed tension between the two disciplines:

> These legal academics have made assertions about the nature of law in a non-formalized manner and in a way that shows little concern for the intermingling of positive and normative argument. This obvious intermingling with normative argument has made legalistic theory an easy target for the seemingly less biased, more purely descriptive attitudinalist and strategic models, while the failure to make any attempts at formalizing legalist theory has left it in a muddled state, easy prey as a foil for the other two theories, and unsupported by much of the formalized empirical evidence that is generally considered acceptable in political science.

Id. at 697–98 (internal footnotes omitted).

88. Milligan, *supra* note 69, at 213.

89. *See id.* at 213 n.1 ("[F]or decades these two divergent orientations have talked past each other rather than recognize the possible connections between their research agendas." (quoting FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 151 (2000))). *See also* Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 783 (2003) ("It has been in only the last few years that law professors have shown much interest in political science approaches to judging . . . ."); Keith Whittington, *Crossing Over: Citation of Public Law Faculty in Law Reviews*, LAW & CTS., Spring 2004, at 5, 9 (stating that political scientists have only limited influence on the legal academy); Charles Gardner Geyh, *Judicial Politics, the Rule of Law and the Future of an Ermine Myth* 1, 19 (Ind. Univ. Maurer Sch. of

decisions, though generally they are the less important ones for the development of legal doctrine or the impact on society."[90] Indeed, Judge Posner suggests that many of the "isms" of decision-making theory are often inapplicable to the work of trial judges, most of whom lack the time and latitude to consider the long-term impact of their decisions when most cases are routine and may be resolved through a straightforward review of statute or precedent.[91] Other observers believe that all three theories work collaboratively, like legs under a table:

> Collectively these theories constitute three of the most prominent accounts used in explaining judicial decision making and conflict in US appellate courts. Although advocates of each theory might contend that their perspective provides the best description of judicial behaviour, we believe that each of the approaches can be perceived as different layers of a large onion, with each school providing an added element of explanation for how justices arrive at their final legal outcomes.[92]

Can any of these models be used to suggest why the Illinois Supreme Court would adopt a "limited lockstep" approach to the Illinois Constitution? Regarding the attitudinal model and its ideological considerations, one would be hard-pressed to identify a partisan divide in Illinois's dependent-independent debate. For example, former Illinois Supreme Court justices aligned with the federalist approach include Justices Clark, Goldenhersh, and Simon (elected as Democrats), and Justices Nickels and Heiple (elected as Republicans). The bigger lockstep advocates, such as former Justices Bilandic and Miller, were from opposite parties. Geographical distinctions appear to be equally nonexistent. Justices Bilandic, Simon, and Clark all hailed from Cook County, while Justices Heiple, Miller, and Goldenhersh were from downstate. Even at the national level, it cannot be said that the

Law-Bloomington, Legal Studies Research Paper Series, Research Paper No. 165, 2010), *available at* http://ssrn.com/abstract=1598454 ("[A]s the twentieth century drew to a close, the sweeping conclusions of attitudinal studies that were causing a cacophonous din in political science circles were being greeted in the legal profession by the sound of crickets."). *But see* Friedman, *supra* note 73, at 262 ("[L]egal scholars now are pursuing the same sort of empirical inquiries as positive scholars, creating exciting opportunities for true interdisciplinary collaboration."); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 876 (2008) (reviewing Frank B. Cross, DECISIONMAKING IN THE U.S. COURTS OF APPEALS (2007)) (discussing the "Quantitative Moment" in legal academia).

90. POSNER, *supra* note 71, at 8.

91. David J. Dansky, How Judges Think *by Richard A. Posner*, 39 COLO. LAW. 92, 93 (May 2010) (book review).

92. OSTBERG & WETSTEIN, *supra* note 72, at 9–10.

divisions between judicial federalists and lockstep advocates fall strictly along party or geographical lines. Retired Oregon Supreme Court Justice Hans Linde is considered a major pioneer of judicial federalism[93] and built a reputation for his independent thinking,[94] while former United States Supreme Court Justice William Brennan—another innovator[95]—is often regarded as being liberal-minded.[96] Both men led the charge for constitutional interpretation on a states' rights theory—an issue that historically is a Republican talking point.[97] However, conservative jurists, like Pennsylvania Supreme Court Chief Justice Ralph Cappy, are also considered leaders in the judicial federalism movement.[98] Former California Supreme Court Justice Stanley Mosk explains that state constitutionalism offers something of value to both liberal and conservative judges:

> For the liberal, there is the prospect of continued expansion of individual rights and liberties; the work of the Warren Court can be carried on at the state level. For the conservative, state constitutionalism represents the triumph of federalism; crucial decisions about the apportionment of rights and benefits are decided by state courts responsive to local needs, rather than by a distant United States Supreme Court, perceived as insensitive.[99]

The foregoing suggests that the attitudinal model, at least as it concerns partisan ideology, is not a helpful predictor of decision-making behavior on this particular issue.

Katharine Goodloe's study of the reasons state courts are more or less likely to adopt a lockstep approach appears to comport with the strategic model.[100] She analyzed state constitutional search-and-seizure rulings to determine whether five factors influenced the court: (1) the presence or absence of an intermediate appellate court; (2) the age of the state's

93. Ken Gormley, *The Forgotten Supreme Court Justices*, 68 ALB. L. REV. 295, 298–303 (2005).

94. Patricia M. Wald, *Hans Linde and the Elusive Art of Judging: Intellect and Craft are Never Enough*, 75 TEX. L. REV. 215, 216 (1996).

95. *See supra* note 11 and accompanying text (noting Brennan's encouragement for judicial federalism).

96. *See generally* Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261 (1991).

97. *See generally* Paul Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711 (2005).

98. Gormley, *supra* note 93, at 299–300.

99. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081 (1985).

100. Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. REV. L. & SOC. CHANGE 749, 791–92 (2011). Ms. Goodloe's analysis focused on the process of judges keeping, rather than obtaining, their judgeships.

own constitution; (3) the prevailing political ideology of state voters; (4) the procedure required to enact state constitutional amendments; and (5) the degree of electoral accountability that the state's judges have toward voters.[101] She concluded that only the fifth factor was statistically significant in determining a state court's approach.[102] Specifically, she identified seven variations of how judges keep their positions, with levels of electoral accountability from highest to lowest: partisan elections, nonpartisan elections, retention elections, reappointment by the legislature, reappointment by the governor, reappointment by a judicial nominating commission, and systems where judges serve for life or until a mandatory retirement age.[103] According to her research, states with judges retained in partisan elections (i.e., judges who are most electorally accountable) were most likely to adopt a lockstep approach.[104] States with judges retained in nonpartisan elections were second most likely to adopt a lockstep approach.[105] States with judges retained in retention elections, like Illinois, were third most likely to follow the lockstep doctrine.[106] This relationship continued for the remaining four methods of retention, with judges appointed for life or until a mandatory retirement age being the least likely to embrace a lockstep analysis.[107] Ms. Goodloe theorizes that judges who are more electorally accountable tend to gravitate toward a lockstep approach to insulate themselves from controversy.[108]

It is very difficult to conclude that the Illinois Supreme Court's members made a conscious or even subconscious decision in *Caballes* to embrace a "limited lockstep" approach based on an imminent retention race. Two of the seven justices who ruled on *Caballes* did not even seek retention. Further, at the time *Caballes* was decided, every

101. *Id.* at 769.

102. *Id.* at 769–73.

103. *Id.* at 769.

104. *Id.* at 770–71.

105. *Id.*

106. *Id.* Illinois Supreme Court justices are elected to ten-year terms. At the conclusion of their term, they may run for retention on a nonpartisan ballot item that simply reads, hypothetically, "Shall John Doe Be Retained In Office as Judge of the Supreme Court First Judicial District?" A justice obtaining at least 60% affirmative votes is retained.

107. *Id.*

108. *Id.* at 773. Ms. Goodloe arguments are supported by a 1991 survey in which 645, or 60.5%, of responding judges expressly acknowledged the existence of political and personal pressure in connection with issuing a decision. *Id.* at 772 n.132. Even the classic fictional movie, *Miracle on 34th Street*, featured a judge who heeded his political advisor's warning: "Alright, then. Go ahead and rule there's no Santa Claus. But, I'm warnin' ya here, Henry. If ya do, you couldn't be elected dog catcher, let alone be re-elected judge!" MIRACLE ON 34TH STREET (Twentieth Century Fox 1947).

member of the court (with the exception of Justice Kilbride) had, or would have at the end of their term, over twenty-year judicial careers with fully vested pensions. As for Justice Kilbride, it is unlikely that an imminent retention race played a role in his decision-making. For example, despite threats that he would face an organized campaign against his 2010 retention bid if he voted to strike down medical malpractice caps in *Lebron v. Gottlieb Memorial Hospital*,[109] Justice Kilbride followed his conscience and voted to strike down the caps.[110] Further, no Illinois Supreme Court justice has ever lost a retention bid. If Ms. Goodloe's conclusion is that self-preservation is a major factor in determining whether a judge votes to adopt a lockstep approach, Illinois does not support her theory.

Nonetheless, some judges have not only acknowledged the existence of political influence in their rulings, but have seemingly embraced it. Former Illinois Supreme Court Justice James Heiple published an article responding to many of the politics-based criticisms of state constitutional interpretation.[111] First, Justice Heiple rejected criticism that judicial federalism is "a partisan enterprise concerned only with expanding rights" by explaining that "such an enterprise can produce results supported by either end of the political spectrum."[112] Justice Heiple further rejected criticism that judicial federalism is a result-oriented political endeavor. He noted that all judicial rulings—including those at the highest level in both state and federal courts—are influenced in some fashion by the policy preferences of judges. Indeed, he declared it "undeniable that, as a general rule, judges tend to render decisions consistent with their political sympathies or affiliations."[113] In other words, Justice Heiple argues, the rulings of United States Supreme Court Justices are likewise influenced by political ideology, making a federal high-court ruling no more or less political than a state high-court ruling.[114] With this in mind, he contended, a state supreme court is better suited to render a constitutional interpretation that is most consistent with the needs and values of its citizens.[115] "Thus," he wrote, "the political nature of constitutional interpretation is actually an

109. Lebron v. Gottlieb Memorial Hosp., 930 N.E.2d 895, 895 (Ill. 2010).

110. *Id.* at 917.

111. James D. Heiple & Kraig J. Powell, *Presumed Innocent: The Illegitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1510 (1998).

112. *Id. See also* Milwaukee Safeguard Ins. Co. v. Selcke, 688 N.E.2d 68, 73 (Ill. 1997) (finding that statute determining tax status based on insurance company's state of incorporation violated the Illinois Constitution).

113. Heiple & Powell, *supra* note 111, at 1511.

114. *Id.*

115. *Id.*

argument which favors state over federal constitutional jurisprudence."[116]

The Illinois approach toward this debate has been fueled by judges with powerful personalities, some of whom have jealously guarded their ultimate authority over state constitutional issues, while others have adhered to textual interpretation, precedent, and cohesiveness over all other considerations. Despite Justice Heiple's broad personal assumptions, the divergent views on this topic from jurists on both sides of the political spectrum demonstrate that "political sympathies or affiliations" play no direct role in Illinois's dependent-independent debate. While some Illinois judges may share Justice Heiple's view, the vast majority of judges (including me) feel that political affiliations and sympathies should not influence a judge's decision. My own philosophy is similar to that of United States Supreme Court Chief Justice John Roberts's notion of a judge's role being limited to that of an umpire calling balls and strikes.[117] In his confirmation hearing, Roberts claimed that his judicial philosophy would be one of minimalism.[118]

Yes, Illinois judges are people too. As individuals, we each view the world through our own eyes, which are colored by our personal experiences, backgrounds, and personalities. In keeping with Chief Justice Roberts's baseball analogy, some Illinois judges cheer for the White Sox, some for the Cubs. Some like neither team, while others, like me, are just content when the Chicago sports team beats the out-of-town team. Nonetheless, most of us endeavor to avoid letting these differences, or our "political sympathies or affiliations," threaten the legitimacy of our limited role as "umpires."

116. *Id.*

117. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

118. *See id.* at 158–59 (discussing judicial philosophy). Justice Roberts declared:

> I resist the labels. I have told people, when pressed, that I prefer to be known as a modest judge. . . . It means an appreciation that the role of the judge is limited; the judge is to decide the cases before them; they're not to legislate; they're not to execute the laws.
>
> Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*. . . .
>
> . . .
>
> . . . [A]nd to the extent they go beyond their confined limits and make policy or execute the law, they lose their legitimacy, and I think that calls into question the authority they will need when it's necessary to act in the face of unconstitutional action.

Id. at 158.

2. Other Commonly Asserted Factors External to the Court

Gardner also examines—and rejects—some of the common theories offered by observers regarding state courts' apparent reluctance to interpret their own constitution. One such theory involves law schools' common failure to teach state constitutional law to students.[119] Gardner argues that law schools rarely offer state constitutional law courses, and he contends that law schools typically ignore state nuances when teaching common-law theories of contracts, torts, and property. "Somehow law school graduates are able to work effectively . . . after a legal education in general principles of . . . law, and [state] constitutional law is no different," he states.[120] This argument is questionable, however, because some Illinois law schools indeed offer classes on the Illinois State Constitution.[121] Further, while it is true that law schools generally focus on common-law principles of contracts, torts and property law, those areas of law are generally not codified.[122]

Gardner contends that the real problem is not the lack of state constitutional training offered by schools, but rather, the lack of guidance given by state courts.[123] He further contends that attorneys "will make the arguments they need to make to win cases. If lawyers are not making state constitutional arguments, it is because doing so does not help them win."[124] This conclusion is also questionable. While the reasons are unknown, it is clear that Illinois lawyers indeed fail to raise state constitutional issues. My five-year study of Illinois cases identifies several cases where state constitutional arguments were not adequately presented,[125] and courts rarely raise issues that the parties did not raise on behalf of litigants. Professor Timothy O'Neill similarly notes that "the pernicious effect of lockstep [in Illinois] may . . . be seen empirically."[126] He examined the history of the Illinois Supreme Court's search-and-seizure jurisprudence following the

119. Gardner, *supra* note 25, at 810.

120. *Id.* at 810–11.

121. For instance, Loyola University Chicago School of Law offers a course on search and seizure law and practice in Illinois, while DePaul University College of Law and Northwestern University School of Law offer a course titled "State Constitutional Law."

122. An exception, of course, is contract law as it relates to the sale of goods. However, the Uniform Commercial Code is just that—a *uniform* code that has no state nuance (except for the few instances where states have declined to adopt the code in its entirety).

123. Gardner, *supra* note 25, at 810–11.

124. *Id.* at 810.

125. *See supra* note 62 and accompanying text (citing examples of cases where the litigants failed to raise constitutional issues).

126. Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 919 (2005).

adoption of the Illinois Constitution of 1970 and found that the first Illinois Case to cite article I, section 6 of the Illinois Constitution was decided on March 14, 1973.[127] He further found, however, 1494 cases citing the Fourth Amendment to the Federal Constitution during that same three-year period.[128]

Empirical data from other studies likewise suggests that litigants commonly fail to raise state constitutional issues. Craig Emmert and Carol Traut reviewed all state and federal constitutional challenges to state laws addressed by state supreme courts between 1981 and 1985.[129] Their research indicated that only 22% of the parties in such cases based their claims solely on state constitutional grounds.[130] They further noted that, when analogous state and federal constitutional provisions existed to support litigants' claims, state constitutional challenges were particularly unusual.[131] Most claims based under state constitutional theories did not involve civil liberties, but rather, state-specific issues such as restrictions on special legislation and spending and debt limitations.[132] Of those litigants challenging state laws on civil liberties grounds, over 50% relied solely on the Federal Constitution,[133] while less than 17% relied exclusively on state grounds. My analysis of Illinois cases from 2006 through 2010 demonstrated numerous instances where the Illinois Supreme Court expressly refused to consider an independent state constitutional claim because the litigant failed to adequately raise it.[134] Admittedly, though, we cannot completely lay the adoption of lockstep analysis at the feet of the bar.

Some commentators contend that state courts' reluctance to develop a state constitutional discourse is deeply rooted in American jurisprudence and goes back at least to the 1930s. Indeed, throughout much of our history, the United States Supreme Court opined that the federal Bill of Rights constrained only the federal government.[135] Claimants seeking redress for state infringements were forced to rely upon state constitutional guarantees. However, beginning in the 1930s, the Court began to interpret the Fourteenth Amendment as incorporating

127. *Id.*

128. *Id.*

129. *See generally* Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37 (1992) (analyzing the findings from the review of cases).

130. *Id.* at 41.

131. *Id.* at 42 tbl.1, 46 tbl.3.

132. *Id.* at 41.

133. *Id.* at 44 tbl.2.

134. *See supra* note 62 and accompanying text.

135. Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243 (1883).

many of the protections found in the federal Bill of Rights as limitations on state power.[136] These commentators argue that "by making states enforce federal constitutional standards, incorporation 'obscured the functional independence' of state courts."[137] In other words, the argument seems to be that lockstep constitutional analysis has been so common for so long that it is now permanently ingrained in our culture and jurisprudence.

3. What Does the Illinois Supreme Court Say?

No serious analysis of judicial decision-making is complete without a thorough examination of the Illinois Supreme Court's own statements. This Article's discussion of Illinois lockstep jurisprudence includes: (a) the legislative history of the Illinois Bill of Rights because, as discussed below, this history constitutes the most commonly stated basis for Illinois courts to depart from lockstep analysis; (b) a review of major Illinois Supreme Court rulings from the adoption of the 1970 Illinois Constitution through the present, detailing the tension between court members on both sides of this debate; and (c) an analysis of the Illinois Supreme Court's ruling in *People v. Caballes*, where the court held that Illinois shall take a "limited lockstep" approach to this issue.

a. Legislative History of the Illinois Bill of Rights

The Illinois Bill of Rights is set forth in article I of the Illinois Constitution. Advocates on both sides of Illinois's dependent-independent debate, including members of the Illinois Supreme Court, regularly and repeatedly point to the legislative history behind the Illinois Constitution of 1970 and, in particular, comments made by the constitutional delegates. Judicial federalists argue that these statements demonstrate that the framers envisioned a scheme that could operate independent of the United States Supreme Court.

For example, the Bill of Rights Committee of the Illinois Constitutional Convention rejected four proposals that set forth language mirroring the Federal Constitution's Bill of Rights.[138]

136. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 394–406 (5th ed. 1995).

137. Gardner, *supra* note 25, at 806; A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976) (questioning the extent to which state courts were developing bodies of state constitutional law). State courts are then required "to look to federal law in order to resolve a wide variety of constitutional issues." Gardner, *supra* note 25, at 806. "As a result, the argument goes, state courts have simply gotten into the habit of looking to federal constitutional law for the answer to constitutional questions, whether state or federal." *Id.*

138. 6 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, COMMITTEE ON BILL OF RIGHTS

Moreover, in drafting an Illinois Bill of Rights, several committee members expressly abandoned the notion of mirror-image clauses. Indeed, Delegate Lennon, when questioned about the scope of section 2 (due process) and whether it was intended to "incorporate the recent interpretations" of the Due Process Clause of the Federal Constitution, stated: "Well, I don't think anybody is trying to incorporate, by reference, anything."[139] Similarly, Delegate Foster, in discussing section 4 (free speech rights), explained: "[T]he committee strongly feels there is a State of Illinois. It's the purpose of the Constitution of Illinois to describe the shape of Illinois government, and, therefore, if we simply relied on the Federal Bill of Rights we would end up with a document that was grossly incomplete."[140] Likewise, Chairman Gertz, responding to an inquiry regarding the meaning of article I, section 3 (religious freedom), stated that the committee "stood by the language of the 1870 Constitution . . . . In Illinois, those rights have been spelled out more fully . . . . We felt there were certain elements added by the more expansive language in the Illinois bill of rights."[141]

In particular, judicial federalists argue that the drafters appeared to place significant emphasis on the 1970 Illinois Constitution's privacy and search and seizure protections, stressing that they exceeded those first recognized by the United States Supreme Court. Commentators, and even the Illinois Supreme Court,[142] have placed considerable weight on the comments of Committee Member Dvorak, who at one point during the constitutional convention proceedings communicated the proposal of the Bill of Rights Committee on Search and Seizure.[143] The Bill of Rights Committee proposed breaking down section 6 into three ideas or concepts: (1) "searches and seizures as traditionally known,"[144] (2) "eavesdropping or wiretapping or bugging,"[145] and (3)

REPORT, PROPOSAL NO. 1, at 22 (1970) (religious freedom); *id.* at 23–25 (freedom of speech); *id.* at 35–36 (bail and habeas corpus); *id.* at 42 (after indictment); *id.* at 46 (penalties after conviction).

139. 3 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS 1501 (1970) [hereinafter 3 RECORD OF PROCEEDINGS], *available at* http://www.idaillinois.org/cdm/compoundobject/collection/isl2/id/3982.

140. *Id.* at 1403.

141. *Id.*

142. People v. Mitchell, 650 N.E.2d 1014, 1018 (Ill. 1995).

143. 3 RECORD OF PROCEEDINGS, *supra* note 139, at 1523–25.

144. *Id.*

> For the purpose of explanation, section 6 as proposed by the Bill of Rights Committee, can be broken down into three clauses or ideas or concepts, the first being that of searches and seizures as traditionally known in the 1870 Constitution and the Fourth Amendment of the United States Constitution. Braden and Cohn, in their dissertation on the constitution, speak of the traditional concept of the Fourth Amendment as quote, "designed to prevent feared and hated governmental infringement on freedom."

"the right of privacy."[146] The committee noted that there were interactions between all three concepts and modern constitutional understanding must include all three in the Illinois Bill of Rights.[147]

Echoing Mr. Dvorak's statements, Chairman Gertz added that the views of the committee were consistent with public opinion.[148]

Id. at 1523 (statement of Mr. Dvorak).

145. *Id.* at 1524.

> The second concept that the Bill of Rights Committee dealt with—and probably the most important in terms of contemporary concern—is that of eavesdropping or wiretapping or bugging or whatever the phrase is that applies to the particular instance. We intended, by including an eavesdropping prohibition, to create a minimum guarantee against governmental interceptions of communications. We intended also to create a right akin to the prohibition against unreasonable searches and seizures. So in doing so we caused the term "un-reasonable" to be applicable to searches, seizures, interception of their communications by eavesdropping devices, or other means. Therefore, we inserted into this section the generic, flexible concept of an unreasonable interception of communications to be decided on a case-by-case basis as was searches and seizures; and we allow, we think, to provide for the flexibility of the ideological pendulum.

Id. (statement of Mr. Dvorak).

146. *Id.* at 1525.

> The third concept which we added into this section was that of the right of privacy, and it reads that the right of the people to be secure in their persons, houses, papers, and other possessions—going on with the search and seizure and interception section—and then it says, "or invasions of their privacy shall not be violated."
>
> The cases that I have noted that deal with eavesdropping have pretty much intruded into the area of privacy because now the area privacy that once was thought to be a complete area in and of itself is the reason given for why eavesdropping, wire-tapping, and bugging activities are unconstitutional. But there is the area of privacy still existing in very particular instances. For instance, we have now the concept of a general information bank whereby the state government or the federal government can take certain pertinent information about each and every one of us based on, for instance, our social security number—know our weight, height, family ages, various things about us—and this is not acceptable to—was not acceptable—or the theory or the thought of such a thing—to the majority of our committee in approving section 6.

Id. (statement of Mr. Dvorak).

147. *Id.*

> There is an interaction of all three of these sections, and no one can stand alone as I believe the majority of our committee sees them. The search and seizure provision on a federal basis has been made to include violations of interceptions of communications, thereby including, of course, the theories of eavesdropping, wire-tapping, and more generic concepts or more futuristic things that some inventor may come up with. And this search and seizure provision also goes to include right of privacy, so the result then is that while the Federal Constitution has been made—or has been judicially interpreted—to include all these concepts, we felt that we would be very progressive and very thorough and very proper if we would include all three theories into section 6 of our bill of rights.

Id. (statement of Mr. Dvorak).

148. *Id.*

> I would like to say only one word. We felt that while we had changed the language slightly to add these new concepts, we were really simply abreast of public opinion.

Delegate Foster further felt that the courts would ultimately draw the proper balance given the technology of the time.[149]

The foregoing comments from the constitutional convention delegates are important because, as discussed below, Illinois courts view such commentary as a key consideration in whether to apply the lockstep doctrine and such passages are regularly quoted in Illinois case law.

b. Major Illinois Supreme Court Cases Considering the Lockstep Doctrine Prior to *Caballes*

The lockstep doctrine has had a turbulent childhood in Illinois courts. Its roots trace back at least to *People v. Tillman*, where the Illinois Supreme Court held that the Illinois Constitution of 1870's search and seizure clause should be interpreted lockstep with its federal counterpart.[150] However, those roots fork dramatically at times. A handful of commentators have advocated for or against the application of the lockstep doctrine in Illinois, but those discussions occurred prior to the Illinois Supreme Court's examination of the doctrine in *People v. Caballes*.[151] Those authors largely opined—perhaps justifiably—that Illinois courts were walking down a path toward rejecting the lockstep doctrine.[152] Justice Clark of the Illinois Supreme Court similarly predicted that lockstep analysis was "on its last legs."[153] History would

> We had gauged public opinion, we thought, through the witnesses before us and through the literature; and it seems clear that the public wants this kind of protection. It's become part of search and seizure by accretion—by the passage of time.

Id. (statement of Mr. Gertz).

149. 5 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS 4277 (1970).

> As to what constitutes an unreasonable invasion of privacy, certain forms of visual surveillance, such as taking an apartment across the street and taking pictures and using field glasses are one thing. Following a man around in a car at a distance of never more than twenty feet is another thing. I am sure somewhere between them, the courts would draw a line.

Id. (statement of Mr. Foster).

150. People v. Tillman, 116 N.E.2d 344 (Ill. 1953).

151. *See, e.g.*, McAffee, *supra* note 55, at 1; James H. Reddy, *1996 Illinois Supreme Court Criminal Law Opinions: Not Marching in Lockstep*, 85 ILL. B.J. 270 (1997); Rick A. Swanson, *Regaining Lost Ground: Toward a Public Forum Doctrine under the Illinois Constitution*, 18 S. ILL. U. L.J. 453 (1994); Matthew S. Wilzbach, *Search and Seizure and the Lockstep Doctrine—Illinois Deviates from the Lockstep Doctrine in Telling the Police They Cannot Rely on Illinois' Laws*, 22 S. Ill. U. L.J. 181 (1997).

152. *See, e.g.*, McAffee, *supra* note 55, at 3 ("[I]ncreasingly [the lockstep doctrine] has been challenged by dissenting justices who contend that it is contrary to the state's independent legal tradition."); Reddy, *supra* note 151, at 270 ("[T]he Illinois Supreme Court [has] made it clear that it is not going to follow the U.S. Supreme Court in lockstep into the 21st century.").

153. People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 881 (Ill. 1988) (Clark, J., concurring).

show, however, that this was simply not the case.

On the Illinois Supreme Court, the tension between judicial federalism and lockstep application has involved powerful personalities—and powerful language—on both sides of the argument. This Subsection examines the court's more significant discussion on this issue leading up to *Caballes*. However, this examination does not focus solely on the background and holding of the cases, since the court in *Caballes* already did just that. Rather, this Subsection focuses more on the verbal tug-of-war that has existed between court members, including some of whom may have been too quick to declare victory for their position, and others who declared that lockstep analysis amounted to dereliction of a judge's oath of office.

Perhaps the first major post-1970 case to address this issue was *People v. Rolfingsmeyer*.[154] There, the court considered the lockstep doctrine in the context of whether the Illinois Vehicle Code's implied-consent section violated the self-incrimination provisions of the Illinois and Federal Constitutions. The court analyzed the proceedings from the 1970 constitutional convention and found no basis to conclude that the drafters intended article I, section 10 of the Illinois Constitution to have a broader sweep.[155] Indeed, the court concluded that the "record of proceedings reflects a general recognition and acceptance of interpretations by the United States Supreme Court."[156] The court further noted the following regarding the constitutional debates:

> There had been proposals to alter the language of the section that were "designed primarily to have the language of the self-incrimination clause perhaps reflect the substance of some court decisions on this subject," but the bill of rights committee, speaking through Delegate Bernard Weisberg, decided that "whichever phrasing were to be put into . . . section 10, that the existing state of the law would remain unchanged."[157]

Accordingly, the court interpreted the Illinois provision in lockstep with its federal counterpart.

Justice Simon concurred with the *Rolfingsmeyer* majority but disagreed with its specific analysis regarding article I, section 10 of the Illinois Constitution. First, Justice Simon explained the importance of independent state review, stating, "As justices of the highest court of the State of Illinois we take an oath of office to faithfully uphold the provisions of the State Constitution. We cannot delegate that duty to

154. People v. Rolfingsmeyer, 461 N.E.2d 410 (Ill. 1984).

155. *Id.* at 412–13.

156. *Id.* at 412.

157. *Id.* at 412–13 (quoting 3 RECORD OF PROCEEDINGS, *supra* note 139, at 1367–77).

anyone—not to the legislature, nor the Governor, nor to any federal court."[158] He then criticized the majority for assuming that the rights of the Illinois Constitution are coextensive with those of the Federal Constitution unless the constitutional convention's proceedings dictate a contrary intent.[159] He argued that this presumption served to invert the proper relationship between the Illinois and Federal Constitutions, and noted that until 1868, Illinois residents had few federal rights that were enforceable against the state government.[160] Justice Simon also took issue with the majority's reliance on the legislative history of the 1970 constitutional convention, contending that no evidence existed to suggest the framers of article I, section 10 intended to limit the scope of the self-incrimination clause so that it paralleled its federal counterpart.[161] He also quoted Delegate Elmer Gertz, Chairman of the Bill of Rights Committee:

> "We don't have closed minds here. We are simply trying to resolve these knotty problems; and in an area where, when you take the specific language of the Federal Bill of Rights or our bill of rights or any other bill of rights, the language seems to say something, and then the cases interpret sometimes beyond the language in interpreting the community mores and a growing sense of what constitutes justice—what constitutes due process of law—*that's the process that's going on, and it isn't going to stop with our proceedings*. Unfortunately, there are sometimes half-way times when you recognize that something has to be done, and you are not quite sure what ought to be done. Whenever we weren't quite sure what ought to be done, we refrained from doing anything."[162]

Justice Simon further relied on the comments of delegate Bernard Weisberg, who stated that the revised version of article I, section 10 would leave the existing state of the law unchanged.[163] These comments, Justice Simon believed, demonstrated that the framers did not intend to reject further development of the law by the Illinois Supreme Court.[164]

Just weeks after the Illinois Supreme Court decided *Rolfingsmeyer*, the court issued its opinion in *People v. Hoskins*.[165] *Hoskins* involved a

158. *Id.* at 413 (Simon, J., concurring).

159. *Id.* Justice Simon's characterization of the majority's opinion would ultimately frame the test on whether to apply the lockstep doctrine. *Id.*

160. *Id.*

161. *Id.* at 414–15.

162. *Id.* at 414 (quoting 3 RECORD OF PROCEEDINGS, *supra* note 139, at 1379) (emphasis added by *Rolfingsmeyer* court).

163. *Id.*

164. *Id.*

165. People v. Hoskins, 461 N.E.2d 941 (Ill. 1984).

search and seizure issue and, again, the court rejected the notion that the Illinois Constitution should be interpreted differently than the Fourth Amendment of the United States Constitution.[166] The court based its conclusion on the absence of any indication from the constitutional debates that broader protection was contemplated.[167] Justice Simon dissented, in part on the grounds set forth in *Rolfingsmeyer*.[168]

The next landmark lockstep ruling appeared in *People v. Tisler*.[169] *Tisler*, decided only a few months after *Hoskins*, involved a probable cause issue under the Fourth Amendment to the United States Constitution and article I, section 6 of the Illinois Constitution. The Illinois Supreme Court rejected the defendant's request to apply broader protections under the Illinois provision, noting in part its previous reliance on federal jurisprudence.[170] The split decision observed the existence of long-standing precedent that article I, section 6 be construed lockstep with the Fourth Amendment, and to justify a departure from federal precedent, a defendant must present a basis other than a perceived narrowing of constitutional rights at the hands of the United States Supreme Court. Rather, a defendant must identify "in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned."[171] Justices Clark, Goldenhersh, and Simon, however, separately expressed their views that the Illinois courts should not be bound to rulings of their federal counterparts.

Justice Clark, while concurring in the judgment, opined that the majority's position was "dangerous because it limits our power to interpret our own State Constitution in the future."[172] He urged the seven-member court to join what he viewed as a majority of other states that have interpreted their state constitutions independent from the United States Supreme Court, and warned of a "crushing degree of uniformity" associated with lockstep interpretation.[173] Justice Goldenhersh likewise admonished that the Illinois Supreme Court is not required to "blindly follow" the dictates of the federal courts on state

166. *Id.* at 945.
167. *Id.*
168. *Id.* at 953 (Simon, J., dissenting).
169. People v. Tisler, 469 N.E.2d 147 (Ill. 1984).
170. *Id.* at 157.
171. *Id.* at 156–57
172. *Id.* at 163–64 (Clark, J., concurring).
173. *Id.* at 164–66.

constitutional matters.[174] At this point, it appeared that Justice Simon's position on judicial federalism, as set forth in *Rolfingsmeyer*, was gaining traction in the Illinois Supreme Court.

Proponents of judicial federalism lost another round in *People ex rel. Daley v. Joyce*, but likely received a boost of confidence from Justice Clark's concurrence in the case, where he boldly declared that the "lockstep principle is on its last legs."[175] *Joyce* involved the interplay between the state and federal guarantees to a trial by jury. The majority acknowledged its prior ruling in *Tisler*, but characterized *Tisler* as though it set forth a bright-line test:

> If we find in the language of our constitution, or in the debates or committee reports of the constitutional convention, an indication that a provision of our constitution is intended to be construed differently than similar provisions of the Federal Constitution, then this court should not follow or be bound by the construction placed on the Federal constitutional provision.[176]

In the context of a criminal defendant's right to a trial by jury, the *Joyce* court found that the language contained in the Illinois and Federal Constitutions contained substantive differences, thus requiring the court to give independent meaning to the Illinois Constitution's provisions.[177] Taking into consideration the common law, the court concluded that the Illinois Constitution conferred broader jury trial protections than its federal analogue.[178]

In a separate opinion, however, Justice Clark rejected the majority's common-law analysis as unnecessary, and noted the absence of evidence that the drafters of the 1970 Illinois Constitution intended the document to be interpreted by the United States Supreme Court rather than the Illinois Supreme Court.[179] He refuted the *Tisler* analysis as being cumbersome, and opined that lockstep contradicts the Illinois Supreme Court's "long tradition of liberal construction in the service of individual rights."[180] Justice Clark further urged the court to simply conclude that all state constitutional provisions are to be construed independently from their federal counterparts, and that federal jurisprudence may be taken as persuasive rather than authoritative.[181] Justice Clark observed the existence of analogous protections in the

174. *Id.* at 166 (Goldenhersh, J., dissenting)
175. People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 881 (Ill. 1988) (Clark, J., concurring).
176. *Id.* at 875 (majority opinion).
177. *Id.*
178. *Id.* at 875–76.
179. *Id.* at 879 (Clark, J., concurring).
180. *Id.* at 880.
181. *Id.*

federal and state constitutions and questioned why anyone would "spill ink uselessly" by intending parallel interpretations between the two documents.[182] He further concluded that the inclusion of these analogous guarantees demonstrates that the drafters wished to have the security in knowing that the Illinois Supreme Court would serve as a second and independent layer of protection.[183] He cited numerous cases (outside the context of search and seizure) where the Illinois Supreme Court construed the state constitution independently, and stressed that that this "crescendo of recent cases suggests that while the majority may pay lip service to the [lockstep] principle, it has tacitly repudiated it."[184]

Next, judicial federalists saw a favorable outcome in *People v. McCauley*.[185] In that case, the Illinois Supreme Court held that the right to counsel under article I, section 10 of the Illinois Constitution, as well as the due process clause under article I, section 2,[186] are broader than analogous federal provisions. In an apparent jab at the inconsistency of federal right-to-counsel jurisprudence, the Illinois court stated, "Regardless of the United States Supreme Court's *current* views on waiver of the right to counsel under the Federal Constitution, the law in Illinois remains [unchanged]."[187] The Illinois court expressly refused to "blindly follow the reasoning of a United States Supreme Court decision at all costs," and, instead, appeared to favor an independent trend.[188] Perhaps most interestingly, however, the *McCauley* court placed the full weight of the majority behind Justice Simon's concurring remarks in *Rolfingsmeyer*:

> "It is the nature of the Federal system that we, as the justices of the Illinois Supreme Court, are sovereign in our own sphere; in construing the State Constitution we must answer to our own consciences and rely upon our own wisdom and insights." 'If we would guide by the light of reason, we must let our minds be bold.'"[189]

The *McCauley* court abandoned federal precedent not just out of judicial independence principles, but also in part on the strength of

182. *Id.* at 880–81.

183. *Id.* at 881.

184. *Id.*

185. People v. McCauley, 645 N.E.2d 923 (Ill. 1994).

186. The court noted that it "has not consistently applied the so-called lockstep doctrine as an assist in interpreting article I, section 2, the due process clause in our State constitution. In fact, this court has expressly asserted its independence in interpreting this particular provision of our constitution." *Id.* at 937.

187. *Id.* at 930.

188. *Id.* at 936.

189. *Id.* (quoting People v. Rolfingsmeyer, 461 N.E.2d 410, 415 (Ill. 1984) (Simon, J., concurring)).

comments found in the 1970 Illinois constitutional debates.[190] This reliance was met, however, with harsh criticism by dissenting Justice Miller, who viewed the majority as "laboring mightily" to re-characterize prior rulings as having been made on state grounds.[191] Indeed, Justice Miller concluded that the majority's reliance on statements by the framers was "fundamentally flawed" and that "none of the sources cited by the majority opinion demonstrate that the drafters of the State constitution intended to adopt the specific rule of law announced here."[192]

In *People v. Mitchell*, the Illinois Supreme Court again examined the interplay between section 6 and the Fourth Amendment.[193] Mitchell examined the issue of whether section 6 prohibited a "plain touch" pat-down search for contraband.[194] Relying largely on *Tisler*, the court determined that section 6 confers search and seizure protections that are "nearly parallel" to those in the Fourth Amendment.[195] The court also emphasized the comments of Committeeman Dvorak, who stated that "there is nothing new or no new concepts that the Bill of Rights Committee intended to provide insofar only as the search and seizure section—or the search and seizure concept—is concerned if, in fact, we break [section 6] down in three concepts—as I originally stated."[196] Justice Heiple joined the federalist side of the lockstep debate by rejecting the notion that the Illinois Supreme Court is bound to follow the United States Supreme Court on search and seizure issues. He opined that there existed no reason for deference to the federal courts, and that the Illinois Supreme Court's responsibility to interpret the state constitution is nondelegable.[197]

In *People v. Krueger*,[198] the Illinois Supreme Court considered

190. *Id.*

191. *Id.* at 945 (Miller, J., concurring in part and dissenting in part). Justice Bilandic likewise concluded that the statements made at the constitutional convention upon which the majority relied were taken out of context. *Id.* at 942 (Bilandic, J., concurring in part and dissenting in part).

192. *Id.* at 945 (Miller, J., concurring in part and dissenting in part).

193. People v. Mitchell, 650 N.E.2d 1014 (Ill. 1995).

194. *Id.* at 1015.

195. *Id.* at 1018.

196. *Id.* The defendant in *Mitchell* pointed to other comments by Mr. Dvorak, specifically that the committee "did not intend in any way to legalize or deal with or make legally constitutional—or constitutionally—a constitutional question, the 'stop and frisk' concept, for instance." *Id.* The court rejected the defendant's position, stating that "[t]he import of Dvorak's statement is not entirely clear" and that it did not "negate Dvorak's prior statement of the drafters' intent concerning the search and seizure clause." *Id.*

197. *Id.* at 1025 (Heiple, J., dissenting).

198. People v. Krueger, 675 N.E.2d 604 (Ill. 1996).

whether the good-faith exception to the exclusionary rule, announced by the United States Supreme Court in *Illinois v. Krull*,[199] violated the search and seizure clause of the Illinois Constitution. The court began its analysis by recognizing that it "unquestionably has the authority to interpret provisions of [the] state constitution more broadly than the United States Supreme Court interprets similar provisions of the federal constitution."[200] The court further acknowledged that it had "long applied the lockstep doctrine" in Fourth Amendment cases but now declined to do so.[201] Interestingly—and as noted by Justice Miller in dissent—the majority did not discuss any historical basis for this departure from the lockstep doctrine.[202] Rather, the majority seemed to operate under the conclusion that *Krull* was simply wrongly decided and served to bend article I, section 6 of the Illinois Constitution beyond its breaking point.[203]

In *People v. Washington*, the court again departed from the lockstep doctrine without relying on commentary from the constitutional convention.[204] Indeed, in this due process case, the court expressly noted that the record of proceedings did not reveal the drafters' intent.[205] Nonetheless, the court concluded that a claim of actual innocence is cognizable as a matter of due process under article I,

199. Illinois v. Krull, 480 U.S. 340 (1987).

200. *Krueger*, 675 N.E.2d at 611.

201. *Id.* In *People v. Caballes*, the court rejected the notion that *Krueger* truly represents a departure from the lockstep approach. The court stated:

> We rejected that reading . . . in *People v. Bolden*, in which we explained that:
>
> > "We do not construe *Krueger* as suggesting that the search and seizure clause of article I, section 6, of the Illinois Constitution must be interpreted more expansively than the corresponding right found in the fourth amendment. The exclusionary rule is a judicially created remedy, and its history in Illinois may be traced to this court's decision in *People v. Brocamp*."
>
> Thus, in *Krueger*, we did not depart from lockstep interpretation—the challenged statute was unconstitutional under both the state and federal constitutions. *Krueger* was a case about remedies. We construed state law as providing a remedy for the constitutional violation even though the federal constitution did not require one.

People v. Caballes, 851 N.E.2d 26, 39 (Ill. 2006) (internal citations omitted). However, also in *Caballes*, the court expressly stated that *Krueger* constituted a "modification" of its lockstep approach. *Id.* at 45. Further, in the *Krueger* case (and as quoted in *Caballes*), the court expressly declared that it "'knowingly depart[ed]' from the lockstep tradition." *Id.* at 39 (quoting *Krueger*, 675 N.E.2d at 611). *See also* People v. Glorioso, 924 N.E.2d 1153, 1159–60 (Ill. App. Ct. 2010) (noting the "serious difficulty with both the soundness and the continued vitality of the court's statement [in *Caballes*] that *Krueger* did not depart from lockstep," and noting two instances where the *Caballes* court "treated *Krueger* as indeed having been a lockstep case").

202. *Krueger*, 675 N.E.2d at 613 (Miller, J., dissenting).

203. *Id.* at 612 (majority opinion).

204. People v. Washington, 665 N.E.2d 1330 (Ill. 1996).

205. *Id.* at 1335.

section 2 of the Illinois Constitution.[206] Justice Miller, joined by Justice Bilandic, dissented and argued that the lockstep doctrine should be followed absent some "legitimate, objective ground for distinguishing the language of the state constitution from that of the United States Constitution."[207]

Justice Nickels joined the federalist camp in *In re P.S.*,[208] in which the court found no double jeopardy violation under either the Illinois or United States Constitution. Justice Nickels, in his dissent, urged that the court reconsider the wisdom of the lockstep doctrine.[209] He noted, among other matters, his displeasure that the determination of whether to follow United States Supreme Court precedent rested on similarity in language, rather than quality of analysis.[210] Justice Heiple joined Justice Nickels's dissent, but also wrote separately, claiming that lockstep analysis amounts to a "dereliction of our duties as Illinois judges."[211] The majority opinion, written by Justice Miller, addressed this criticism directly:

> The dissent apparently believes that the mere inclusion of a particular guarantee in the state Bill of Rights, without more, demonstrates that the provision means something different from the corresponding provision of the Bill of Rights of the United States Constitution. This approach leads to the conclusion that similar provisions of the federal and state constitutions mean different things, even though they are expressed in the same terms. Under this view, the Illinois drafters did not adopt well-established meanings when they used familiar words and phrases but instead always meant something different. Notably, the dissenting opinion offers no citation to the proceedings of the 1970 constitutional convention in support of this novel theory.[212]

In *People v. Bull*, the court spent little time analyzing or discussing the lockstep doctrine and merely mentioned in passing the notion that the court, as a general rule, "looks to the United States Supreme Court's interpretation of the fourth amendment" when construing the Illinois search and seizure provision.[213] What is interesting, however, is that Justice Heiple wrote separately that he viewed the use of the lockstep doctrine as erroneous in the wake of *Krueger*, which "firmly establish[ed] the principle that article I, section 6, of the Illinois

206. *Id.* at 1335–37.
207. *Id.* at 1341–42 (Miller, J., dissenting).
208. *In re* P.S., 676 N.E.2d 656 (Ill. 1997).
209. *Id.* at 664 (Nickels, J., dissenting).
210. *Id.*
211. *Id.* at 662–63 (Heiple, J., dissenting).
212. *Id.* at 661–62 (majority opinion) (internal citation omitted).
213. People v. Bull, 705 N.E.2d 824 (Ill. 1998).

Constitution is to be interpreted in a manner independent of the United States Supreme Court jurisprudence."[214] Evidently, Justice Heiple's take on *Krueger* and the continuing viability of the lockstep doctrine was contrary to that of the majority.

c. *People v. Caballes*

People v. Caballes is the most recent significant case regarding the tension between the lockstep doctrine and judicial federalism.[215] In *Caballes*, the Illinois Supreme Court considered whether a canine sniff during a traffic stop violated article I, section 6 of the Illinois Constitution[216] even though the United States Supreme Court deemed this action permissible under the Fourth Amendment to the United States Constitution.[217] In a detailed analysis, the Illinois court observed three typical scenarios when analyzing the interplay between the state constitution and Federal Constitution: (1) provisions that are completely unique to the state constitution; (2) provisions in the state constitution that may be similar to a federal version, but nonetheless different in some significant respect, requiring the provision to be given effect; and (3) provisions in the state constitution that have similar language and are functionally identical to an analogous federal provision.[218] The court concluded that the first scenario requires no reference to a federal counterpart whatsoever, while the second scenario requires that the language unique to the state constitution "be given effect."[219] The third scenario, the court reasoned, raises the question of whether or not to apply the lockstep doctrine.[220]

The *Caballes* court observed that, when faced with this third scenario, state courts have generally taken one of three approaches when construing analogous language in the federal and state constitutions. First, some states have followed the lockstep approach whereby the court ties its analysis to that of the United States Supreme Court's interpretation of the federal provision.[221] According to the Illinois Supreme Court, a true lockstep approach means that "deviation is for all intents and purposes impossible."[222] Second, some state courts have followed the "interstitial approach," whereby their interpretation

214. *Id.* at 846 (Heiple, J., concurring).
215. People v. Caballes, 851 N.E.2d 26 (Ill. 2006).
216. *Id.* at 26.
217. *See* Illinois v. Caballes, 543 U.S. 405 (2005).
218. *Caballes*, 851 N.E.2d at 31–32.
219. *Id.* at 31.
220. *Id.* at 31–32.
221. *Id.* at 41.
222. *Id.*

relies on the application of criteria to determine whether "factors unique to the state weigh in favor of departing from the Supreme Court's interpretation of the same constitutional language."[223] The Illinois Supreme Court referenced an explanation of this approach set forth by the New Mexico Supreme Court as follows:

> "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."[224]

Under the third approach, called the "primacy" or "primary" approach, "the state court undertakes an independent [state] constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance."[225]

The *Caballes* court sought to reconcile its lockstep doctrine rulings by characterizing its approach as "either the interstitial approach, or perhaps a 'limited lockstep'" approach.[226] However, as discussed in Part III below, the court's meaning of "limited lockstep" is open to interpretation and does not quite harmonize the Illinois Supreme Court's vast, and at times conflicting, jurisprudence on this issue.

The limited lockstep approach was ultimately adopted on principles of stare decisis and because it reflected the court's understanding of the intent of the 1970 Illinois Constitution's framers.[227] Indeed, in the context of search and seizure cases, the court has followed a lockstep approach since at least 1963—a fact that would have been known to the drafters of the 1970 Constitution.[228] Finally, the court rejected criticism of its approach, including arguments that lockstep analysis equates to an abandonment of the judicial function and a surrender of state

223. *Id.* at 42.

224. *Id.* (quoting State v. Gomez, 932 P.2d 1, 4 (N.M. 1997) (internal citations omitted)). The *Caballes* court also noted with approval alternative descriptions of the interstitial approach as one where the court looks to the state constitution only if "federal constitutional law approves the challenged state action, or is ambiguous." *Id.* (quoting Gardner, *supra* note 25, at 774–75). Under either formulation, the court explained, the focus of constitutional analysis is on "the ways in which the state and federal constitutions differ." *Id.* In other words, "[f]ederal constitutional decisions are the starting point, and the party urging greater protection than federal law affords must argue that the state and federal constitutions 'differ in dispositive ways.'" *Id.* (quoting Gardner, *supra* note 25, at 777–78).

225. *Id.* at 42 (internal quotations and citation omitted).

226. *Id.*

227. *Id.* at 44–45.

228. *Id.* at 33.

sovereignty.[229] Applying "limited lockstep" analysis to the context of the Illinois Constitution's search and seizure provision, the court concluded that the delegates and drafters of the 1970 Constitution intended the phrase "search and seizure" to be interpreted synonymously with the protections found in the Federal Constitution.[230]

III. WHERE DO THE ILLINOIS COURTS GO FROM HERE?

Having discussed the historical, philosophical, and analytical underpinnings of *Caballes*, the remaining questions involve the manner in which *Caballes* will be interpreted and applied in disputes going forward, and whether *Caballes* will cause the Illinois Supreme Court to reevaluate prior rulings involving the dependent-independent debate.

A. Application of the "Limited Lockstep" Doctrine

In 1985, California Supreme Court Justice Stanley Mosk wrote about the future of judicial federalism:

> Where does this leave the development of state constitutional law in these volatile times? It is difficult to evaluate the competing trends. If thoughtful liberals and conservatives, both of whom appear to urge that states are appropriate protectors of individual rights, can subordinate their traditional antipathy for each other and unite on this one issue, it would appear that state constitutionalism may prosper. But if the fear that use of state doctrine might thwart a conservative trend on the Supreme Court inspires further restrictive legislative or initiative action by political demagogues and neanderthals, then the future of state constitutionalism is clouded.[231]

In his dissenting opinion in *Caballes*, Justice Freeman seemed to suggest that the clouds had lifted over Illinois when he wrote that the decision "puts to rest the confusion that has animated our application of the 'lockstep doctrine.'"[232] But does it? After all, Justice Clark once declared—incorrectly—that the lockstep doctrine was "on its last legs" in Illinois.[233]

One could argue that *Caballes* is just as contradictory as the case law it sought to reconcile. Justice Freeman's tacit acknowledgement of inconsistency—or at least a *perception* of inconsistency—in applying the lockstep doctrine could be viewed as being contrary to the majority's *repeated* references to its "decades-long history of lockstep

229. *Id.* at 45.
230. *Id.* at 45–46.
231. Mosk, *supra* note 99, at 1093.
232. *Caballes*, 851 N.E.2d at 57.
233. People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 881 (Ill. 1988) (Clark, J., concurring).

interpretation of cognate provisions of the state and federal constitutions," with only "occasional" exceptions.[234] Indeed, the court's own recitation of instances where it departed from the lockstep doctrine seems lengthy and difficult to square with the characterization of these instances as "occasional." This "decades-long history of lockstep interpretation" is similarly difficult to reconcile with the majority's acknowledgement that it is "an overstatement to describe our approach as being in strict lockstep with the Supreme Court."[235]

One remaining potential area for confusion relates to the meaning and application of "limited lockstep." The court cautioned that it "ha[d] not unequivocally adopted the interstitial approach as it has been broadly defined by the New Mexico court" in *State v. Gomez*.[236] The court did, however, expressly embrace "at the very least" a narrow version of the interstitial view under which:

> [W]e recognize several justifications for departing from strict lockstep analysis. This approach has been described as one under which a court will "assume the dominance of federal law and focus directly on the gap-filling potential: of the state constitution. Under this approach, this court will "look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion—for example, unique state history or state experience—justifies departure from federal precedent." To avoid confusing this court's approach with the very broad definition of the interstitial approach adopted by some courts, we shall refer to it, for lack of a better term, as our "limited lockstep approach."[237]

Finally, the court observed that the criteria it has used in the past to evaluate the state constitution's gap-filling potential includes language in the state constitution itself, the debates and committee reports,[238] or in the state's values, traditions, and pre-existing law.[239]

The court's attempt to carve a "limited lockstep" analysis from the interstitial approach is interesting. For example, the court's cautious reference to the absence of an "unequivocal adoption" of *Gomez*, and the adoption of "at least" a narrow lockstep view, might suggest that the

234. *Caballes*, 851 N.E.2d at 39.

235. *Id.* at 42.

236. *Id.*

237. *Id.* at 42–43 (quoting Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 104 (2000)). The court stated that it actually adopted the limited lockstep view in *Tisler* and "modified it in *Krueger* and *Washington* to allow consideration of state tradition and values as reflected by long-standing state case precedent." *Id.* at 45 (internal citations omitted).

238. *Id.* at 43.

239. *Id.*

court is open to a broader adoption of the interstitial approach in the future. Moreover, questions may arise regarding the substantive differences between the "limited lockstep" analysis and the interstitial approach as defined in *Gomez*.[240] Again, under the *Gomez* description, a state court "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."[241] One could argue that Illinois jurisprudence (including pre-*Caballes* cases) already fits perfectly within this framework. For example, when analyzing identical or analogous provisions, the most prevalent test has been whether the report of the constitutional convention identifies an intent to deviate from federal precedent.[242] This consideration—much like *Caballes*'s discussion of state values, tradition, and pre-existing state law—falls within the "distinctive state characteristics" test discussed in *Gomez*. Likewise, in some cases, the court has based its rulings not on legislative history, but rather a basic disagreement with the United States Supreme Court's rationale.[243] This rejection of federal precedent is, again, consistent with the interstitial approach's reference to a "flawed federal analysis." Moreover, the interstitial approach's inclusion of this justification for divergence addresses critics' claims that deference to federal precedent constitutes an abandonment or improper delegation of judicial duty.[244]

Or could it be that *Caballes* and its lukewarm embrace of the *Gomez*-style interstitial approach signaled an intention to change course on previously accepted bases for departing from the lockstep approach? In other words, did *Caballes*'s discussion of unique state history or state experience foreclose an independent analysis on other grounds, such as instances where the court believes the federal precedent was wrongly

240. *Id.* at 42.

241. *Id.* (quoting Gomez v. State, 32 P.2d 1, 7 (1997)).

242. *See, e.g.*, People v. Tisler, 469 N.E.2d 147, 157 (1984).

243. *See, e.g.*, People v. Washington, 665 N.E.2d 1330 (Ill. 1996); People v. Krueger, 675 N.E.2d 604 (Ill. 1996). In *Washington*, the court observed that "the Record of Proceedings does not reveal anything as to what the drafters intended for the Illinois protection different from the federal counterpart." 665 N.E.2d at 1335. To be sure, the court could deem a federal decision to be "fundamentally flawed" on the basis of unique aspects of Illinois's values, traditions, and pre-existing law. *See Caballes*, 851 N.E.2d at 43.

244. *See, e.g.*, People v. Mitchell, 650 N.E.2d 1014, 1025 (1995) (Heiple, J., dissenting). *See also In re* P.S., 1676 N.E.2d 656, 662–63 (Ill. 1997) (Heiple, J., dissenting) ("The Illinois Bill of Rights [was] intended to serve as an additional protection against abuses of power by state government, supplemental to the safeguards provided by the United States Constitution. In light of this fact, I consider it a dereliction of our duties as Illinois judges to delegate the function of interpreting our state constitution to the United States Supreme Court.").

decided?[245] This conclusion seems like a bit of a leap, given that the "unique state history or state experience" is identified as merely "an example."[246]

Nonetheless, one appellate court panel seemed to conclude that *Caballes* prohibits a court from considering whether the federal court acted erroneously, as was the case in *People v. Washington* and *People v. Krueger*. Specifically, in *People v. Fitzpatrick*, the Illinois Appellate Court, Second District, concluded that *Caballes* used the term "'limited lockstep' for the express purpose of avoiding confusion 'with the very broad definition of the interstitial approach adopted by some courts.'"[247] The *Fitzpatrick* court further stated that the "lockstep doctrine would be largely meaningless if Illinois courts interpreting state constitutional provisions followed only those United States Supreme Court decisions with which they agreed" and the "*Caballes* court did not suggest that a 'flawed federal analysis' would ordinarily be a valid basis for departing from United States Supreme Court precedent.'"[248]

Would the Illinois Supreme Court, when interpreting a state constitutional question, agree with the appellate court in *Fitzpatrick* and deem itself obligated to follow a United States Supreme Court ruling that the Illinois court viewed as fundamentally flawed? *Washington*, *Krueger*, and even *Caballes*, suggest not.[249] The Illinois Supreme Court recently affirmed *Fitzpatrick* but did not expressly address the appellate court's rejection of a "flawed federal analysis" justification to depart from lockstep.[250] Instead, the court framed the issue as whether departure from lockstep could be justified by "state tradition and values as reflected by long-standing state case precedent."[251] Ultimately, the court rejected the defendant's argument to disregard the United States Supreme Court's ruling in *Atwater v. City of Lago Vista*[252] and to analyze the search and seizure provisions of the Illinois Constitution[253] independent of the Fourth Amendment. In rebuffing the defendant's

245. *See, e.g.*, *Washington*, 665 N.E.2d at 1330; *Krueger*, 675 N.E.2d at 604.

246. *Caballes*, 851 N.E.2d at 42–43.

247. People v. Fitzpatrick, 960 N.E.2d 709, 714 (Ill. App. Ct. 2011), *aff'd* No. 113449, 2013 WL 1342846 (Ill. Apr. 4, 2013).

248. *Id. But see Caballes*, 851 N.E.2d at 43 (stating that a court can deviate from lockstep analysis based on unique aspects of Illinois's values, traditions, and pre-existing law).

249. *See Washington*, 665 N.E.2d at 1330; *Krueger*, 675 N.E.2d at 604; *Caballes*, 851 N.E.2d at 42–43.

250. *Fitzpatrick*, 2013 WL 1342846.

251. *Id.* at *3 (citing *Caballes*, 851 N.E.2d at 43); *id.* at *2–6.

252. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

253. *See* ILL. CONST. art. 1, § 6.

argument, the court found that Fitzpatrick had simply "not provided [the] court with an example of a long-standing state history and tradition[] as strong as those that were identified in *Krueger*."[254] Reading *Washington*, *Krueger*, *Caballes*, and *Fitzpatrick* together, it is fair to conclude that a "flawed federal analysis" may be abandoned in favor of an independent analysis when—at a minimum—the "flaw" runs afoul of Illinois's tradition, values, or pre-existing law; or where departure is supported by a unique state history or experience, or an intent gleaned from the committee reports or the constitutional text itself.

Perhaps the next major test in Illinois's dependent-independent debate will occur in the context of same-sex marriage. The United States Supreme Court recently heard oral arguments on the question of whether restrictions on same-sex marriage violate the Federal Constitution.[255] Concurrently, cases are pending in the Illinois Circuit Court, Cook County, which challenge Illinois's same-sex marriage prohibitions exclusively on state constitutional grounds.[256] Hypothetically, if the United States Supreme Court expressly finds that the Due Process Clause and Equal Protection Clause of the Federal Constitution do not protect same-sex couples hoping to marry, will Illinois deem itself bound to follow? As discussed herein, the Illinois Supreme Court has generally applied the lockstep doctrine on due process and equal protection matters.[257] Or will the Illinois Supreme Court be willing to recognize enhanced due process and equal protection rights in the same-sex marriage context? Note too, the

254. *Fitzpatrick*, 2013 WL 1342846, at *2–6.

255. The first case will decide whether the Equal Protection Clause of the Fourteenth Amendment prohibits California from defining marriage as between a man and a woman. Hollingsworth v. Perry, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144); Petition for a Writ of Certiorari at i, Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144), 2012 WL 3109489, at *i. The second case will decide whether section 3 of the Defense of Marriage Act, which defines "marriage" as "only a legal union between one man and one woman as husband and wife" for all purposes under federal law, including federal benefits, violates the Fifth Amendment's Equal Protection Clause. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert. granted sub nom.*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-307); Petition for a Writ of Certiorari before Judgment at I, United States v. Windsor, 133 S. Ct. 786 (2012) (No. 12-307) [hereinafter Windsor Petition], 2012 WL 3991414, at *I.

256. Complaint for Declaratory and Injunctive Relief at 27–34, Darby v. Orr (Cook Cnty., Ill., Ch. Div. May 30, 2012) (No. 12-CH-19718) [hereinafter Darby Complaint], *available at* http://www.lambdalegal.org/sites/default/files/darby_il_20120530_complaint-declaratory-injunctive-relief.pdf; Complaint for Declaratory Judgment and Injunctive Relief at 29–36, Lazaro v. Orr (Cook Cnty., Ill., Ch. Div. May 30, 2012) (No. 12-CH-19719) [hereinafter Lazaro Complaint], *available at* http://www.aclu-il.org/wp-content/uploads/2012/06/Lazaro-v-David-Orr-Complaint.pdf.

257. *See infra* Part III.B.1.

plaintiffs in the Illinois cases raise additional claims unique to the Illinois Constitution, such as the right to privacy in article I, section 6, and the prohibition against special legislation in article I, section 13.[258] Yet another possibility is that the United States Supreme Court could invalidate section 3 of the federal Defense of Marriage Act on states-rights grounds, thus leaving the Illinois Supreme Court with a rather blank slate to consider the same-sex marriage issue.[259] What happens if the Illinois Supreme Court finds that Illinois's equal protection clause protects same-sex marriage, and the United States Supreme Court subsequently finds that the federal provisions does not? Would Illinois same-sex couples be stripped of their rights under the lockstep doctrine?

B. Will Caballes *Impact Previously Issued Rulings?*

Caballes may potentially impact cases and rulings beyond "flawed federal analysis" rulings, such as *Washington* and *Krueger*.[260] This Section sets forth a discussion of the more salient provisions of the Illinois Constitution's Article I Bill of Rights that are analogous to provisions of the United States Constitution's Bill of Rights.[261] Some of these provisions (almost exclusively those dealing with searches) have been examined by reviewing courts post-*Caballes*, but most have not been, and thus *Caballes*'s impact may remain unclear.

1. Section 2: Due Process and Equal Protection

Article I, section 2 of the Illinois Constitution[262] sets forth equal protection rights that have generally been regarded as being coextensive with the Equal Protection Clause of the Fourteenth Amendment.[263] The due process clause in article I, section 2, however, involves case law that is somewhat inconsistent.[264] In *People v. Molnar*, for example, the

258. *See* Darby Complaint, *supra* note 256, at 31–32 (prohibition against special legislation); Lazaro Complaint, *supra* note 256, at 34–36 (right to privacy).

259. *See generally* Windsor Petition, *supra* note 255.

260. In fairness, the *Caballes* court did not expressly or implicitly overrule *Washington* or *Krueger*, nor suggest that they are in danger. *But see* People v. Glorioso, 924 N.E.2d 1153, 1159–60 (Ill. App. Ct. 2010) (considering whether *Caballes* implicitly overruled *Krueger* and answering the question in the negative). The point is that if an Illinois court, such as the appellate court in *Fitzpatrick*, concludes that a state court may not reject a United States Supreme Court ruling on matters of state constitutional law—even if the decision is perceived as being flawed—one must question how such a view can be reconciled with *Washington* and *Krueger*.

261. For a more thorough discussion, see LOUSIN, *supra* note 54, at 39–75.

262. Article I, section 2 states, "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. 1, § 2.

263. Nevitt v. Langfelder, 623 N.E.2d 281, 284 (Ill. 1993).

264. *See* LOUSIN, *supra* note 54, at 43 (stating that the "case law on the due process clause is more complicated and nuanced" and that "courts apply a "markedly different" analysis in the context of a minimum contacts analysis).

Illinois Supreme Court stated that "while it is true that this court may construe the Illinois due process clause independently of its federal counterpart, and in appropriate cases will interpret the state due process clause to provide greater protections . . . we find no compelling reason to do so in this case."[265]

2. Section 3: Religion

The case law discussing the interplay between the protections of the First Amendment to the United States Constitution and article I, section 3 (religion) of the Illinois Constitution[266] also reflects a lockstep approach.[267] In *Board of Education, School District No. 142, Cook County v. Bakalis*, the Illinois Supreme Court considered the constitutionality of a statute requiring the plaintiff to provide bus transportation for nonpublic school students.[268] The court examined this issue in the context of the First Amendment as well as article I, section 3 of the Illinois Constitution. The court noted that earlier cases, heard under the Illinois Constitution of 1870, had interpreted the worship provisions of the Illinois and Federal Constitutions in lockstep,[269] and the legislative reports from the 1970 constitutional convention demonstrated an intent to maintain that course.[270] In *People ex rel. Klinger v. Howlett*, the Illinois Supreme Court—in another article I, section 3 case—broadly stated that "any statute which is valid under the [F]irst [A]mendment is also valid under the constitution of Illinois."[271]

265. People v. Molnar, 857 N.E.2d 209, 218 (Ill. 2006).

266. Article I, section 3 provides as follows:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

ILL. CONST. art. 1, § 3.

267. For further discussion, see Michael P. Seng, *Freedom of Speech, Press and Assembly, and Freedom of Religion under the Illinois Constitution*, 21 LOY. U. CHI. L.J. 91, 93 (1989) (describing the freedoms enumerated in the Illinois Constitution compared to the United States Constitution).

268. Bd. of Educ. v. Bakalis, 299 N.E.2d 737 (Ill. 1973).

269. *Id.* at 744–45.

270. *Id.* at 744–46.

271. People *ex rel.* Klinger v. Howlett, 305 N.E.2d 129, 130 (Ill. 1973).

3. Section 4: Free Speech and Press

There may be some potential for a federalist approach in the context of article I, section 4 (speech and press) of the Illinois Constitution.[272] As early as 1940, the Illinois Supreme Court concluded that the "constitution of Illinois is even more far-reaching than that of the constitution of the United States in providing that every person may speak freely, write and publish on all subjects, being responsible for the abuse of that liberty."[273] While the Illinois Constitution of 1970 was not in existence at that time, the textual differences between that constitution and its predecessor are fairly minor.[274]

In *People v. DiGuida*, the Illinois Appellate Court considered whether section 4 requires state action before free speech guarantees are triggered.[275] The court further considered whether DiGuida could satisfy the state action requirement when his alleged conduct and free speech defense to a criminal trespassing charge involved his persistence in circulating political petitions on private property.[276] The court found that the state action requirement had been satisfied, and further found that the "debates connected with the adoption of the 1970 Illinois Constitution clearly show that the delegates intended [a]rticle I, [s]ection 4 to be independent of the Federal Constitution" and that "the Illinois speech and press provisions could be interpreted more expansively than their federal counterparts."[277] On further appeal, the Illinois Supreme Court concluded that there existed a state action requirement, but disagreed with the appellate court's conclusion that this requirement was satisfied and reversed on that basis.[278] In doing so, the Illinois Supreme Court acknowledged the argument of various amici curiae urging a more inclusive interpretation of section 4, and signaled an inclination to accept this invitation. Indeed, despite finding that the federal and state free speech guarantees share a state action requirement, the court stated, "[W]e reject any contention that free speech rights under the Illinois Constitution are in all circumstances

272. Article I, section 4 provides as follows: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." ILL. CONST. art. 1, § 4.

273. Vill. of S. Holland v. Stein, 26 N.E.2d 868, 871 (Ill. 1940).

274. *See* LOUSIN, *supra* note 54, at 45 ("[T]he earlier cases are still persuasive and may be precedential.").

275. People v. DiGuida, 576 N.E.2d 126 (Ill. App. Ct. 1991), *rev'd* 604 N.E.2d 336 (Ill. 1992).

276. *Id.*

277. *Id.* at 134.

278. *DiGuida*, 604 N.E.2d at 345.

limited to those afforded by the Federal Constitution . . . ."[279] However, the court never specifically identified what additional protection, if any, the state provision provides.

City of Chicago v. Pooh Bah Enterprises, Inc. represents another case where the Illinois Supreme Court considered whether the scope of article I, section 4 exceeds the scope of the First Amendment.[280] In that case, the city brought a liquor license and nuisance action against a bar that featured "expressive" nude dancing. The court began its analysis by again acknowledging "the framers[']recogni[tion] that the Illinois Constitution may provide greater protection to free speech than does its federal counterpart."[281] Nonetheless, the court declined to find that the Illinois Constitution conveys a "greater protection to nude and seminude dancing in establishments licensed to sell alcohol than is provided by the federal constitution."[282]

In sum, although the Illinois Supreme Court has rejected the notion that the protections of article I, section 4 extend no further than those afforded by the First Amendment of the United States Constitution, the court has not completely identified the full scope and scale of section 4's reach.

4. Section 6: Searches, Seizures, Privacy, and Interceptions

Article I, section 6 sets forth marked changes from the privacy protections of the Illinois Constitution of 1870,[283] and the cases predominately involve four major issues: the "right to privacy," prohibition against "unreasonable interceptions of communications," the "search and seizure" provisions, and the relationship between section 6 and the Fourth Amendment.[284]

Perhaps the most hotly contested use of the lockstep doctrine exists in

279. *Id.* at 344. *See also* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003) (holding that article I, section 4 (speech) and article I, section 5 (assembly) of the Illinois Constitution provide broader protection than there exists under the federal version).

280. City of Chicago v. Pooh Bah Enters., Inc., 865 N.E.2d 133, 168 (Ill. 2006).

281. *Id.*

282. *Id.* at 169.

283. Article I, section 6 provides as follows:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

ILL. CONST. art. 1, § 6.

284. *See* LOUSIN, *supra* note 54, at 49–52 (describing each of the four predominate issues that arise under article I, section 6 case law).

the context of search and seizure jurisprudence. The seminal case on this issue is *People v. Tisler*.[285] *Tisler* involved a probable cause issue under the Fourth Amendment to the United States Constitution and article I, section 6 of the Illinois Constitution. The Illinois Supreme Court rejected the defendant's request to apply broader protections under the Illinois provision, noting, in part, its previous reliance on federal jurisprudence. In *People v. Fitzpatrick*, the Illinois Supreme Court reiterated that the framers of the Illinois Constitution intended that the search and seizure provisions of article I, section 6 "have the same scope" as the Fourth Amendment.[286]

Not surprisingly, criminal defendants invoking their rights against unlawful search and seizure will likewise assert a right to privacy. In 1965, the United States Supreme Court recognized a constitutional right to privacy in *Griswold v. Connecticut*.[287] The framers of the Illinois Constitution of 1970 sought to create an independent and broader source of privacy rights than those identified in *Griswold* and its progeny.[288] The Illinois Supreme Court recognized this achievement in *In re May 1991 Will County Grand Jury*, where the court observed that "the Illinois Constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy [and] [t]he protection of that privacy is stated broadly and without restrictions."[289] That case examined the privacy interests connected to taking biometric samples, such as hair. The court held that "a person has a reasonable expectation that he will not be forced to submit to a close scrutiny of his personal characteristics, unless for a valid reason."[290]

Despite the broad language of *In re May 1991 Will County Grand Jury*, criminal defendants failing to prevail on their search and seizure

285. People v. Tisler, 469 N.E.2d 147, 152 (Ill. 1984).

286. People v. Fitzpatrick, No. 113449, 2013 WL 1342846, at *3 (Ill. Apr. 4, 2013).

287. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). In *Griswold*, the Court recognized that various constitutional guarantees create zones of privacy. For example, the First, Third, Fourth, and Fifth Amendments identify explicit guarantees that touch on privacy interests and the implicit language of those provisions, or "penumbras," along with the Ninth Amendment, guarantees basic privacy interests. *Id.* at 484–85.

288. *See* LOUSIN, *supra* note 54, at 49 (discussing the difference between the "right to privacy" in the Illinois Constitution and the "privacy right" found in the United States Constitution, noting that Illinois's right is broader).

289. *In re* May 1991 Will County Grand Jury, 604 N.E.2d 929, 934 (Ill. 1992). The court has, however, inferred restrictions on this right, stating that it is not absolute, but rather prohibits only unreasonable invasions of privacy. Kunkel v. Walton, 689 N.E.2d 1047, 1055 (Ill. 1997). "Reasonableness, with regard to [the] privacy clause, depends[] largely[] on the extent of one's expectation of privacy under the circumstances presented, as well as the degree of intrusiveness of the invasion of privacy." *In re* Lakisha M., 882 N.E.2d 570, 582 (Ill. 2008) (citation omitted).

290. *In re May 1991 Will County Grand Jury*, 604 N.E.2d at 935.

arguments often do little better when asserting privacy claims. Such was the case in *People v. Mitchell*, where the court likewise rejected the defendant's argument that the "plain touch" doctrine does not violate the privacy protections of section 6.[291] The *Mitchell* court also seemed to roll back the broad language of *In re May 1991 Will County Grand Jury*, stating as follows:

> Apparent from the convention debates is that the drafters intended no change in the categorization of conduct traditionally covered by the search and seizure clause. By adding the right-to-privacy clause, the drafters merely intended to make our constitution a more progressive and contemporary document. We note additionally that it is not generally held that privacy clauses are an additional source of protection in the criminal context beyond those rights already afforded by more specific clauses governing search and seizure.[292]

Justice Heiple dissented, expressing his disagreement with the majority's decision to follow the United States Supreme Court in lockstep and stating that the court's duty to interpret the Illinois Constitution is a nondelegable duty.[293] Most recently, in *Caballes*, the court observed that cases in which the privacy clause has been found to apply include those dealing with private documents or records, or a physical invasion of the body.[294] Cases not invoking the right to privacy often include those entailing traffic stops or police investigative techniques that did not involve the removal of physical evidence from a person's body.[295] Moreover, in *Hope Clinic for Women Ltd. v. Adams* and *People v. Nesbitt*, the appellate court held, post-*Caballes*, that the lockstep approach does not apply to the right to privacy under the Illinois Constitution.[296]

5. Section 8: Rights after Indictment

Article I, section 8 was amended by voter referendum in 1994.[297]

291. People v. Mitchell, 650 N.E.2d 1014, 1025 (Ill. 1995).

292. *Id.* at 1019.

293. *Id.* at 1025 (Heiple, J., dissenting).

294. People v. Caballes, 851 N.E.2d 26, 52–53 (Ill. 2006).

295. *Id.*

296. Hope Clinic for Women Ltd. v. Adams, 955 N.E.2d 511, 529 (Ill. App. Ct. 2011); People v. Nesbitt, 938 N.E.2d 600, 603–05 (Ill. App. Ct. 2010).

297. Article I, section 8, in its current form, provides as follows:

> In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to be confronted with the witnesses against him or her and to have process to compel the attendance of witnesses in his or her behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

ILL. CONST. art. 1, § 8.

The original language contained a confrontation clause that provided, "In criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face."[298] The catalyst for the change was the Illinois General Assembly's passage of the Child Shield Act, which permitted a minor victim of sexual abuse to testify against an accused via closed-circuit television.[299] In *People v. Fitzpatrick*, the Illinois Supreme Court found that the statute was an unconstitutional violation of section 8's confrontation clause.[300] In reaching its conclusion, the court rejected the State's argument that "the essence of confrontation under the Illinois Constitution is identical to the essence of confrontation afforded by the [S]ixth [A]mendment of the United States Constitution."[301] Prosecutors relied primarily on *Maryland v. Craig*, which involved a similar closed-circuit testimony procedure.[302] In *Craig*, the United States Supreme Court held that the Sixth Amendment's confrontation clause does not confer an absolute right to a face-to-face meeting between the accuser and the accused, and that the right to confrontation must sometimes yield to public policy and other considerations.[303] The *Fitzpatrick* court distinguished *Craig* on the basis of the additional protections contained in the confrontation clause of then-existing section 8, which "clearly, emphatically and unambiguously require[d] a 'face-to-face' confrontation."[304] The court also noted that it was not required to follow the United States Supreme

298. The constitutional amendment was proposed by the 88th General Assembly in Senate Joint Resolution 123.

299. The Child Shield Act provided in relevant part as follows:

> (a)(1) In a proceeding in the prosecution of an offense of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse or aggravated criminal sexual abuse, a court may order that the testimony of a child victim under the age of 18 years be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate or that the child will suffer severe emotional distress that is likely to cause the child to suffer severe adverse effects.
>
> (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

Ill. Rev. Stat. 1991, ch. 38, ¶ 106B-1, *repealed by* Pub. Act 88-674, § 5 (Dec. 14, 1994).

300. People v. Fitzpatrick, 633 N.E.2d 685, 688–89 (Ill. 1994).

301. *Id.* at 687–88.

302. *Id.* at 688. *See also* Maryland v. Craig, 497 U.S. 836 (1990) (holding that the Confrontation Clause does not confer an absolute right to an in-person meeting between the accuser and the accused).

303. *Craig*, 497 U.S. at 844–49.

304. *Fitzpatrick*, 633 N.E.2d at 688.

Court in lockstep fashion, and indeed declined to do so.[305]

In the aftermath of *Fitzpatrick*, voters chose to amend section 8 to remove its "face-to-face" guarantee. Today, testimony via closed-circuit television is permitted.[306] Moreover, in *People v. McClanahan*, the Illinois Supreme Court declared—apparently without an argument offered to the contrary—that it would apply the same analysis to both the federal and state provisions.[307]

6. Section 10: Self-Incrimination and Double Jeopardy

The issue of whether the right against self-incrimination set forth in article I, section 10[308] is broader than the protections of the Fifth Amendment is well settled in Illinois. In *People v. Perry*, the Illinois Supreme Court considered "whether defendant's acceptance of the assistance of counsel at his arraignment . . . was an invocation of his rights under [section 10] that precluded police-initiated interrogation of an unrelated, uncharged homicide while the defendant was in continuous custody."[309] While the court acknowledged that it "has the right and the obligation to interpret [the] State Constitution more liberally than similar provisions of the Federal Constitution,"[310] it declined to do so. The court concluded that the safeguards identified by the United States Supreme Court in *McNeil v. Wisconsin* made it unnecessary to broaden the scope of section 10.[311]

Illinois jurisprudence on the issue of double jeopardy similarly mirrors that of the federal courts. In *In re P.S.*,[312] *People v. Levin*,[313] and *People v. 1988 Mercury Cougar*,[314] the Illinois Supreme Court found no double jeopardy bar under the Illinois Constitution or Federal Constitution.

305. *Id.*

306. 725 ILL. COMP. STAT. 5/106B-5 (2010).

307. People v. McClanahan, 729 N.E.2d 470, 473 n.1 (Ill. 2000). *See also* People v. Lofton, 740 N.E.2d 782, 790 (Ill. 2000).

308. Article I, section 10 provides: "No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense." ILL. CONST. art. 1, § 10.

309. People v. Perry, 590 N.E.2d 454, 454 (Ill. 1992).

310. *Id.* at 456.

311. *Id.* (citing McNeil v. Wisconsin, 501 U.S. 171 (1991)).

312. *In re* P.S., 676 N.E.2d 656, 661–62 (Ill. 1997).

313. People v. Levin, 623 N.E.2d 317, 327–28 (Ill. 1993).

314. People v. 1988 Mercury Cougar, 607 N.E.2d 217, 223–24 (Ill. 1992), *overruled by In re* P.S., 661 N.E.2d 329, 341 (Ill. 1996), *reinstated by In re P.S.*, 676 N.E.2d at 662.

7. Section 13: Right to Trial by Jury

In the context of a criminal trial, article I, section 13[315] supplements the guarantees found in section 8. Because the Seventh Amendment's right to a jury trial does not apply to the states,[316] section 13 provides the sole constitutional right to a civil jury trial.[317] Illinois courts recognize a substantive difference in the right to jury trial provided under the federal and state constitutions, and hold that Illinois provides broader and enhanced protections.[318]

8. Section 22: Right to Bear Arms

Prior to 2008, the vast majority of federal reviewing courts opined that the Second Amendment conveyed a collective, rather than individual, right.[319] At the time of the 1970 constitutional convention, delegates were apparently mindful of the then-status of Second Amendment jurisprudence and set out to ensure that Illinois citizens had an individual, rather than collective, right to bear arms.[320] Thirty-eight years later, the United States Supreme Court's landmark ruling in *District of Columbia v. Heller* changed everything.[321] In *Heller*, the Court held that the Second Amendment conferred an individual right to keep and bear arms.[322] Illinois jurisprudence in this area is still

315. Article I, section 13 provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate." ILL. CONST. art. 1, § 13.

316. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.13 (2010) (expressly stating that the Seventh Amendment has not been incorporated into the Fourteenth Amendment for application to the states); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) ("Seventh Amendment . . . governs proceedings in federal court, but not in state court.").

317. LOUSIN, *supra* note 54, at 60 ("[T]he only right to a jury trial an Illinoisan has in civil cases is that in Article I, Section 13.").

318. People *ex rel.* Birkett v. Dockery, 919 N.E.2d 311, 314 (Ill. 2009).

319. *See, e.g.*, Cases v. United States, 131 F.2d 916, 921–23 (1st Cir. 1942); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 122 (4th Cir. 1995); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); United States v. Hale, 978 F.2d 1016, 1019–20 (8th Cir. 1992); Silveira v. Lockyer, 312 F.3d 1052, 1092 (9th Cir. 2002); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Wright, 117 F.3d 1265, 1273–74 (11th Cir. 1997). *But see* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (recognizing an individual right).

320. *See* LOUSIN, *supra* note 54, at 69 (describing the intention of the delegates to grant citizens a clear individual right to keep and bear arms, for fear that the "collective right" was perhaps limited to militia purposes). Interestingly, however, the right conferred in section 22 is expressly subject to the police power, and the Second Amendment has no such express restriction. *See* ILL. CONST. art. 1, § 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.").

321. District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008). The Second Amendment was incorporated into the Fourteenth Amendment in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

322. *Heller*, 554 U.S. at 595.

developing.[323] There is no Illinois Supreme Court case comparing the reach of article I, section 22 with the Second Amendment post-*Heller*.[324] Some argue that the Second Amendment's right to bear arms may now be more liberal than the more express provisions in the Illinois Constitution.[325]

CONCLUSION

For over forty years, commentators have encouraged the expansion of individual rights through independent interpretation of state constitutions. With some exceptions, the Illinois Supreme Court has generally declined to accept the invitation of judicial federalism, opting instead for a "limited lockstep" approach. The most direct method of identifying the court's basis for following this approach is to simply examine the justices' written opinions. But is there a story behind the story? It is difficult to conclude that these rulings are a result of Illinois's size, age, founding history, constitutional traditions, or the length of its constitutional text, as Gardner suggested. Nor do Goodloe's observations regarding self-preservation seem persuasive.

Are these opinions shaped by personal biases, experiences, or philosophical or personal differences? In Illinois, it may be fair to say that the Illinois Supreme Court's lockstep approach is largely a product of divergent judicial philosophies among the court's jurists. Some current and past members of the court seem primarily concerned with federal overreaching and their duty to interpret the Illinois Constitution rather than delegate that duty to the federal courts. Jurists on the lockstep side appear to believe that their duty to interpret the Illinois Constitution includes an acknowledgement that the document's plain text does not require a different interpretation. At this point, the issue is largely one of stare decisis. Had Justices Clark, Simon, and Goldenhersh been able to sway one more member of the court in *Tisler*, the landscape today could be markedly different.

Reasonable arguments appear on both sides of the dependent-

323. For example, in *Heller*, the Court cautioned "the right[s] secured by the Second Amendment [are] not unlimited." *Id.* at 626. *See also McDonald*, 130 S. Ct. at 3047 ("[I]ncorporation does not imperil every law regulating firearms.").

324. Only one major firearms case has reached the Illinois Supreme Court since *Heller*. While that case involved the Second Amendment, the court did not discuss article I, section 22 of the Illinois Constitution. *See* Wilson v. Cnty. of Cook, 968 N.E.2d 641, 653–55 (Ill. 2012).

325. *See* LOUSIN, *supra* note 54, at 70. *See also* People v. Aguilar, 944 N.E.2d 816, 828 (Ill. App. Ct. 2011) (finding that section 22 "appears to provide less protection" than the Second Amendment); People v. French, No. 1-11-1570, 2012 WL 6962184, at *8 (Ill. App. Ct. Nov. 2, 2012) (stating that the defendant presented no authority suggesting Illinois's protections are broader than the Second Amendment).

independent debate, and this Article does not advocate for any one approach in Illinois. The Illinois Supreme Court made that determination in *Caballes*. At this point, the Illinois Supreme Court has characterized its preferred approach as a "limited lockstep" analysis—that is the law and it must be followed by lower courts. While *Caballes* was a 4-3 decision, the source of disagreement was not whether "limited lockstep" was the preferred analysis, but rather, whether the facts of the case supported a departure from the limited lockstep approach.

This Article does, however, observe that Illinois's lockstep jurisprudence can be confusing and difficult to reconcile. *Caballes* attempted to harmonize the cases on this issue but stopped just short of achieving that goal. Instead, the court left the door open to a broader interpretation of the interstitial lockstep approach—one that most cogently blends the case law on this issue. Indeed, one could argue that the New Mexico Supreme Court's recitation of the interstitial approach in *State v. Gomez* is sufficiently broad to reconcile virtually every post-1970 Illinois Supreme Court case involving the lockstep doctrine, and would provide a bright-line test for trial courts going forward. It remains to be seen whether the court will swing that door open, or slam it shut. Justice Linde wrote that states "demystify constitutional law" and that state constitutions "have little mystique."[326] Not so in Illinois, where the mystery remains.

326. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 197 (1984).