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People ex rel. Daley v. Joyce: Death Knell for the Lockstep Doctrine?

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Notes

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> [A]lthough we think we govern our words, and prescribe it well . . . yet certain it is that words, as a Tartar's bow, do shoot back upon the understanding of the wisest, and mightily entangle and pervert the judgment.
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> -Bacon, ADVANCEMENT OF LEARNING, BK II, IV.

I. INTRODUCTION

Under the leadership of Chief Justice Burger, the United States Supreme Court sought to limit constitutional protections previously expanded under the Warren Court.[1] In response to this change, commentators suggested that state constitutions should assume a greater importance in protecting state citizens against government abuses.[2] By 1984, these suggestions became the general rule defining the role of state constitutions in protecting citizens against government abuses.[3] By contrast, the Illinois Supreme Court adopted a "lockstep" approach: state constitutional provisions were to be construed identically to parallel provisions of the federal Constitution.[4]

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1. Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1141 (1978); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 421 (1974). This change was particularly evident in the field of criminal procedure. *See* United States v. Havens, 446 U.S. 620 (1980) (permitting admission of illegally seized evidence for impeachment purposes); Stone v. Powell, 428 U.S. 465 (1976) (cutting back on availability of federal forum for state court litigated fourth amendment claims); O'Shea v. Littelton, 414 U.S. 488 (1974) (condemning intrusion of federal court equitable powers into state criminal proceedings); Apodaca v. Oregon, 406 U.S. 404 (1972) (allowing nonunanimous jury verdicts in state criminal cases); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972) (granting immunity in return for compelled testimony).

2. *See* Douglas, *supra* note 1; Seng, *Freedom of Speech, Press and Assembly and Freedom of Religion Under the Illinois Constitution*, 21 LOY. U. CHI. L.J. 91 (1989); Wilkes, *supra* note 1, at 444-50; *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 282-312 (1973).

3. *See* Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi, viii (1985).

4. People v. Jackson, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961), *cert. denied*, 368 U.S. 985 (1962).

Increasingly, however, the Illinois Supreme Court has been producing opinions that may be perceived as mounting straws on the lockstep doctrine's back.[5] The most recent illustration is *People ex rel. Daley v. Joyce*,[6] in which the Illinois Supreme Court ruled invalid a state statute on the grounds that it violated article I, section 13 of the 1970 Illinois Constitution.[7] In doing so, the court departed from Federal constitutional analysis of the parallel federal provision, and instead based its decision on independent state constitutional grounds, thereby creating a considerable crack in the ever-weakening foundation of the lockstep doctrine.

This Note provides an analysis of the *Joyce* decision. First, this Note considers the various approaches taken toward interpreting state constitutions and provides a brief history of the Illinois Supreme Court's approach. This Note also discusses *Joyce*'s majority, concurring and dissenting opinions in detail. It then analyzes the problems inherent in the majority's approach and reasoning. Finally, the Note views *Joyce*'s probable impact on future considerations of Illinois constitutional analysis.

II. BACKGROUND

A. Approaches to State Court Decision Making

Prior to the enactment of the fourteenth amendment, the guarantees of the federal Bill of Rights restricted only federal encroachment against civil liberties.[8] The primary source for protection against state encroachment on civil liberties was the state constitutions. This changed during the Warren Court era as a process of selective incorporation made a significant part of the Bill of Rights applicable to the states.[9] As federal decisions affording protections of civil liberties proliferated, the utility of state constitutional law

5. *See e.g.*, People v. Duncan, 124 Ill. 2d 400, 530 N.E.2d 423 (1988), discussed *infra* at notes 39-45 and accompanying text.

6. 126 Ill. 2d 209, 533 N.E.2d 873 (1988).

7. *Id.* at 222, 533 N.E.2d at 879.

8. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). In *Barron*, the Court held that the takings clause of the fifth amendment "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." *Id.* This view generally maintained even after the fourteenth amendment was enacted. *See* O'Neill v. Vermont, 144 U.S. 323 (1892). *But see* Chicago B & Q R.R. v. Chicago, 166 U.S. 226, 241 (1897). In *Chicago B & Q R.R.*, the Court held that the highest state court's affirmance of taking without just compensation was a denial of fifth amendment rights as guaranteed by the fourteenth amendment. *Id.*

9. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493-494 (1977) (listing cases).

waned.[10] During the Burger era, and now under Chief Justice Rehnquist, the United States Supreme Court has withdrawn from an expansive use of the federal Bill of Rights;[11] as a result, state constitutions have new strength and vitality.[12]

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10. *See generally* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1147 (1985); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 874, 878 (1976).

11. Brennan, *supra* note 9, at 495. *See, e.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). In *PruneYard*, the Court refused to apply first amendment protections against the state action in question; however, the Court did propose that "a state [may] exercise its police power or sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81.

12. *See* Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 188 (1984), in which Judge Skelley Wright, a one-time critic of federalism, discusses his appreciation for "the contributions state courts and state judges have made . . . in vindicating our liberties." *Id.* For extensive historical review of the role of state constitutions and the various debate as to what exactly that role should be, see Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959, 959-1318 (1985).

Many states have used their state constitutions to expand on Federal analysis; the following cases exemplify such expansion. *AL* Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974) (rejecting Williams v. Florida, 399 U.S. 78 (1969)); *CA* People v. Hannon, 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885 (1977) (rejecting United States v. Marion, 404 U.S. 121 (1959)); *CO* People v. Paulsen, 198 Colo. 458, 601 P.2d 634 (1974) (rejecting United States v. Scott, 437 U.S. 82 (1978)); *CT* State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985) (rejecting Illinois v. Gates, 462 U.S. 213 (1983)); *FL* State v. Glosson, 462 So.2d 1082 (Fla. 1985) (rejecting Hampton v. United States, 425 U.S. 484 (1976)); *HW* State v. Miyasaki, 62 Haw. 269, 614 P.2d 915 (1980) (rejecting Kastigar v. United States, 406 U.S. 441 (1972)); *KA* State v. Morgan, 3 Kan. App. 2d 667, 669, 600 P.2d 155, 158 (1979) (rejecting by implication South Dakota v. Opperman, 428 U.S. 364 (1976)); *LA* State v. Hernandez, 410 So.2d 1381 (La. 1982), *overruled by* State v. Brooks, 452 So.2d 149 (La. 1984) (rejecting New York v. Belton, 453 U.S. 454 (1981)); *ME* State v. Collins, 297 A.2d 620, 626 (Me. 1972) (rejecting Lego v. Twomey, 404 U.S. 477 (1972)); *MA* Commonwealth v. Uton, 394 Mass. 363, 476 N.E.2d 548 (1985) (rejecting Illinois v. Gates, 462 U.S. 213 (1983)); *MI* People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976) (rejecting Bartkus v. Illinois, 359 U.S. 121 (1959)); *MN* Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (1967) (rejecting Green v. United States, 356 U.S. 165 (1957)); *MT* State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978) (rejecting United States v. White, 401 U.S. 745 (1971)); *NH* State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983) (rejecting Texas v. Brown, 460 U.S. 730 (1983)); *NJ* State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (rejecting Schenckloth v. Bustamonte, 412 U.S. 218 (1973)); *NY* People *ex rel.* Donohoe v. Montanye, 35 N.Y.2d 221, 318 N.E.2d 781, 360 N.Y.S.2d 619 (1974) (rejecting Gagnon v. Scarpelli, 411 U.S. 778 (1973) *and later superceded by statute*); *NC* State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), *cert. denied*, 414 U.S. 1160 (1974); *OR* State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982) (rejecting United States v. Robinson, 414 U.S. 218 (1973)); *PA* Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032 (1980) (rejecting United States v. Miller, 425 U.S. 435 (1976)); *RI* State v. Benoit, 417 A.2d 895 (R.I. 1980) (rejecting Chambers v. Maroney, 399 U.S. 42 (1970)); *SD* State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (rejecting South Dakota v. Opperman, 428 U.S. 364 (1976)); *TN* Drinkard v. State, 584 S.W.2d 650 (Tenn. 1979) (rejecting South Dakota v. Opperman, 428 U.S. 364 (1976));

When interpreting state provisions that mirror provisions found in the federal Bill of Rights, state courts have, for the most part, adopted one of three approaches.[13] First, at one end of the continuum, is independent state court decision-making.[14] Under this approach, a state court may grant rights broader than those found under similar provisions in the federal Constitution.[15] Second, at the center of the continuum, is the interstitial approach, which requires state courts to depart from Federal analysis only when it does not fulfill the particular state needs of the case.[16] This approach combines deference to the United States Supreme Court together with a perceived role for the states to fill in the gaps left open by Federal constitutional doctrine.[17] Finally, farthest from the independent decision-making approach is the lockstep doctrine,[18] which requires that state courts turn absolutely to the decisions of the Supreme Court when interpreting state constitutional

UT State v. Hugh, 711 P.2d 264 (Utah 1985) (rejecting United States v. Roth, 456 U.S. 798 (1982)); *VT In re* E.T.C., 141 Vt. 375, 449 A.2d 937 (1982) (rejecting Fare v. Michael C., 442 U.S. 707 (1979)); *WA* State v. Fain, 94 Wash. 2d 387, 617 P.2d 720 (1980) (rejecting Rummel v. Estelle, 445 U.S. 263 (1980)); *WV* Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W. Va. 1981)); *WI* State *ex rel.* Arnold v. County Court, 51 Wis. 2d 434, 187 N.W.2d 354 (1971) (rejecting United States v. White, 401 U.S. 745 1971)).

13. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 898-899 (1976); Comment, *Interpreting the Illinois Constitution: Illinois Supreme Court Plays Follow the Leader*, 18 LOY. U. CHI. L.J. 1270, 1275 (1987).

14. *See* 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 (1987).

15. *See* Brennan, *supra* note 9, at 495. Proponents of federalism may also espouse this approach because the Supreme Court does not have jurisdiction over cases decided on truly adequate and independent state grounds. Herb v. Pitcairn, 324 U.S. 117, 125 (1945). The standard for determining whether the case has been decided on adequate and independent state grounds is the "plain statement" rule of Michigan v. Long, 463 U.S. 1032 (1983). In *Long*, the Court stated that it will presume jurisdiction over state law based decisions unless such decisions expressly disavow reliance on federal law. *Id.* at 1044. An example of an appropriate plain statement is as follows: "In this case, as in all cases, any reference to Federal law is for illustrative purposes only and in no way compels the result reached." State v. Kennedy, 666 P.2d 1316, 1321 (Ore. 1983).

16. *See* Development, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356-1359 (1982).

17. *Id.* at 1356. This approach has been criticized on several grounds. One commentator feels that the interstitial approach is pragmatic rather than principled. He believes that it incorrectly presumes that the Supreme Court's answer is the right answer, and such a presumption will stunt the coherent development of a state's law under its own constitution. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984). Another commentator further criticizes the interstitial approach for its failure to square with the current Court's active withdrawal from the expansive protections proffered by the Warren Court. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 405-406 (1984).

18. *See* People *ex rel.* Daley v. Joyce, 126 Ill. 2d 209, 223, 533 N.E.2d 873, 879 (1988) (Clark, J., concurring).

provisions that parallel federal Bill of Rights provisions. It is this approach that the Illinois Supreme Court has pursued for some time.[19]

B. The History of the Lockstep Doctrine in Illinois

An early expression of the lockstep doctrine is found in *People v. Jackson*.[20] In *Jackson*, as in other cases of its era,[21] the Illinois Supreme Court used the lockstep doctrine without explaining or justifying its use.[22] In 1984, however, the Illinois Supreme Court decided three cases that, for the first time, attempted to defend the doctrine's application. The first two, *People v. Rolfingsmeyer*[23] and *People v. Hoskins*,[24] rejected defendants' arguments based on the Illinois Constitution and instead adopted the Federal standard.[25] In both of these cases, the court justified its reliance on the lockstep

19. *See, e.g.*, People v. Tisler, 103 Ill. 2d 226, 469 N.E.2d 147 (1984), People v. Hoskins, 101 Ill. 2d 209, 461 N.E.2d 941, *cert. denied*, 469 U.S. 840 (1984); People v. Rolfingsmeyer, 101 Ill. 2d 137, 461 N.E.2d 410 (1984).

20. 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961). The *Jackson* court faced the issue whether the warrant issued for defendant's arrest constituted an unreasonable search and seizure. *Id.* at 385, 176 N.E.2d at 804. Because the *Jackson* court stated that "we will follow the decisions of the United States Supreme Court on identical State and Federal constitutional problems" it considered the Supreme Court's Jones v. United States, 362 U.S. 257, 267-271 (1960) decision to be determinative. *Jackson*, 22 Ill. 2d at 387, 176 N.E.2d at 805.

21. *See* People v. Gray, 69 Ill. 2d 44, 370 N.E.2d 797 (1977), *cert. denied*, 435 U.S. 1019 (1978) (applying Supreme Court interpretation of double jeopardy clause); People *ex rel.* Hanrahan v. Powers, 54 Ill. 2d 154, 295 N.E.2d 472 (1973) (applying Supreme Court interpretation of privilege against self-incrimination); People v. Williams, 27 Ill. 2d 542, 150 N.E.2d 303 (1963) (overruling Illinois case law in favor of Federal approach regarding search and seizure issues).

22. *See* McAffee, *supra* note 14. Professor McAffee asserts that *Jackson* and its ilk did not explain the lockstep doctrine because the doctrine's use had not yet been questioned. *Id.* at 8. For states to follow the Supreme Court's lead was the national trend until rather recently; therefore, both the bar and the bench found the bald assertion of the doctrine to be acceptable. *Id.*

23. 101 Ill. 2d 137, 461 N.E.2d 410 (1984).

24. 101 Ill. 2d 209, 461 N.E.2d 941, *cert. denied*, 469 U.S. 840 (1984).

25. *Rolfingsmeyer*, 101 Ill. 2d at 141, 461 N.E.2d at 412-13; *Hoskins*, 101 Ill. 2d at 217, 461 N.E.2d at 945. In *Rolfingsmeyer*, the court considered a claim that challenged the implied consent provision of the Illinois Vehicle Code. *Rolfingsmeyer*, 101 Ill. 2d at 138-139, 461 N.E.2d at 411. ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(c) (1981) states, in pertinent part, that evidence of refusal to submit to a breath test "shall be admissable in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person under the influence of alcohol . . . was driving." *Id.* The defendant had been asked to take a breath test and refused. *Rolfingsmeyer*, 101 Ill. 2d at 139. Arguing that he had a right to remain silent in this instance, the defendant attempted to invoke article I, section 10 of the Illinois Constitution. *Id.* at 140. The court elected to follow the Supreme Court's holding in South Dakota v. Neville, 459 U.S. 553 (1983). *Id.* at 141. In *Neville*, the Court held that a breath test was physical evidence and

doctrine by looking at the intent of the framers of the 1970 Illinois Constitution.[26] Both courts positied that the Federal standard must be followed when nothing in the proceedings of the 1970 Constitutional Convention indicates an intention to provide protections broader than those provided by the United States Constitution.[27]

The Illinois Supreme Court proffered a second argument for the lockstep doctrine in *People v. Tisler*.[28] In *Tisler*, the court considered whether defendant's motion to suppress evidence obtained through an allegedly illegal search or seizure was properly denied.[29] The defendant claimed that the state had violated his rights under article I, section 6 of the Illinois Constitution and the fourth amendment to the United States Constitution.[30] As in *Rolfing-*

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not communicative evidence. A state, therefore, may compel breath tests based on the absence of a federal constitutional right to refuse such a test.

In *Hoskins*, the court held that a warrantless search of the defendant's purse was lawful when made directly pursuant to a lawful arrest. *Hoskins*, 101 Ill. 2d at 217, 461 N.E.2d at 945. In so holding, the court rejected the defendant's argument based on Article I, section 6 of the Illinois Constitution and instead chose to follow United States v. Robinson, 414 U.S. 218 (1973). *Id. Robinson* had reasoned that a custodial arrest based on probable cause was a constitutional intrusion under the fourth amendment. Accordingly, the search incidental to the arrest was similarly a constitutional intrusion. *Robinson*, 414 U.S. at 235. According to *Hoskins*, *Robinson* allowed for the search in this case. *Hoskins*, 101 Ill. 2d at 218, 461 N.E.2d at 945.

26. *Rolfingsmeyer*, 101 Ill. 2d at 142, 461 N.E.2d at 412-13. *Hoskins*, 101 Ill. 2d at 218, 461 N.E.2d at 945.

27. *Id.* In *Rolfingsmeyer*, Justice Simon wrote a special concurrence in which he offered an alternative view. 101 Ill. 2d at 143, 461 N.E.2d at 413 (Simon, J., specially concurring). He stated that the text of the Illinois Constitution and the intent of the delegates to the 1970 Constitutional Convention clearly recognized the state court's role as interpreter of state rights. Moreover, Justice Simon noted that under the lockstep doctrine, both the supreme court and the lower courts had been forced to follow blindly United States Supreme Court decisions. Justice Simon argued that this is detrimental to Illinois citizens whose laws are subject to Federal constitutional analysis without regard for local distinctions. Furthermore, Justice Simon asserted that the Supreme Court often establishes minimum standards under the Bill of Rights in deference to federalism considerations; therefore, the lockstep doctrine deprives Illinois citizens of the federally granted opportunity to expand minimum standards of protection as guaranteed by the fourteenth amendment. *Id.* at 144-46, 461 N.E.2d at 413-414 (Simon, J., specially concurring).

28. 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

29. *Id.* at 231, 469 N.E.2d at 150. In *Tisler*, an informant had tipped the police about a drug deal that was to take place on a weekend night. *Id.* at 231-32, 469 N.E.2d at 150. Unable to obtain a warrant in time, the police acted on the tip and made the arrest. *Id.* at 233-34, 469 N.E.2d at 151-152.

30. *Id.* at 235-36, 469 N.E.2d at 152. Article I, section 6 of the Illinois Constitution states in pertinent part: "No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the person or things to be seized." ILL. CONST. of 1970 art. I, § 6. The fourth amendment to the federal Constitution states in pertinent part: "The rights of the people . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

smeyer and *Hoskins*, the court considered the nexus between the parallel state and federal provisions.[31] The court followed the Federal standard, stating that there was an absence of legislative history showing intent to confer state constitutional rights broader than those granted under Federal constitutional analysis.[32] In addition, the court found that, while the provisions in question differed somewhat in wording, they had a shared meaning; therefore, the court concluded it would accept the pronouncements of the Supreme Court.[33] The *Tisler* court, however, suggested a willingness to depart from Federal standards upon finding "something which will indicate that the provisions of our constitution are intended to be construed differently."[34] Despite *Tisler*'s result, the court's language seemed to canker the heart of the lockstep doctrine.

In 1988, in *People v. Geever*,[35] the court once again used the lockstep doctrine to strike down a defendant's invocation of rights under the Illinois Constitution. The defendant in *Geever* claimed that a state statute proscribing the knowing possession of child pornography in the home violated the first and fourteenth amendments to the United States Constitution and article I, sections 4 and 6 of the Illinois Constitution.[36] The court did not even address the Illinois constitutional claim; rather, it merely framed *Geever*'s issue in terms of the federal constitutional provisions.[37] The court, against Justice Clark's strong dissent, held that the state statute did not violate the defendant's rights under Federal analysis of the first

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supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized." U.S. CONST. amend IV.

31. *Tisler*, 103 Ill. 2d at 235-236, 469 N.E.2d at 152.

32. *Id.* at 242, 469 N.E.2d at 152. *See supra* notes 23-27 and accompanying text.

33. *Id.* at 244-245, 469 N.E.2d at 157. In *Tisler*, however, the court found that both provisions were designed to protect individuals against unreasonable search and seizure and that both provisions barred the issuance of warrants without probable cause. As a result, the court stated that "the two provisions differ in semantics rather than in substance." *Id.*

34. *Id.* at 245, 469 N.E.2d at 157.

35. 122 Ill. 2d 313, 330, 522 N.E.2d 1200, 1208, *appeal dismissed*, 109 S. Ct. 299 (1988).

36. *Geever*, 122 Ill. 2d at 315, 522 N.E.2d at 1201. *See infra* notes 122-27 for a discussion of the way in which *Geever* would likely be decided after *Joyce*.

37. *Geever*, 122 Ill. 2d at 315, 522 N.E.2d at 1201. Oddly enough, the court gave no explanation for this approach. This is particularly perplexing given the lengthy analysis found in the 1984 cases and that the criticism of the lockstep doctrine was quite extensive prior to this decision. *See* McAffee, *supra* note 14, at 51-68; Comment, *supra* note 13; Note, *United States v. Leon & Illinois v. Gates: A Call for State Courts to Develop State Constitutional Law*, 1987 U. ILL. L. REV. 311, 328-36 (1987).

and fourteenth amendments to the United States Constitution.[38]

Geever appeared to have strengthened the lockstep doctrine's foothold. However, *People v. Duncan*,[39] another case decided in 1988, suggested that the court would be willing to use the Illinois Constitution as grounds for independent decision making, even when the same result would be reached using the Federal analysis.[40] In *Duncan*, the court found that the introduction of a nontestifying codefendant's statements into evidence at a joint trial violated the defendant's federal confrontation right.[41] This finding, however, did not end the court's approach. The court extended its analysis to hold that the activity in question "violated established Illinois case law that is independent of [Federal] constitutional doctrine."[42] In a special concurrence, Justice Miller noted that this further analysis was unnecessary and seemed indicative of the court's desire to find Illinois constitutional grounds for its holding.[43] Perhaps sensing the untoward implications of the lockstep approach,[44] Justice Miller, joined by Chief Justice Moran, urged that once the court determined federal law mandated a new trial, it should have had no occasion to consider whether an independent state constitutional analysis required the same result.[45]

III. Discussion

A. *Factual Background of* People ex rel. Daley v. Joyce

In a number of cases before the circuit court of Cook County, Illinois, which involved narcotics violations, the defendants sub-

38. *Geever*, 122 Ill. 2d at 330, 522 N.E.2d at 1208. *Geever*'s holding was based on the United States Supreme Court's holding in New York v. Ferber, 458 U.S. 747, 764 (1982). *Ferber* held that the first amendment does not protect child pornography so long as applicable state law, as written or as authoritatively construed, adequately defined the prohibited conduct. *Id.* In his dissent, Justice Clark argued that in many instances the language of the Illinois Constitution and federal Bill of Rights differ dramatically, in both form and substance. *Geever*, 122 Ill. 2d at 338, 522 N.E.2d at 1211-12 (Clark, J., dissenting). This was such a case, argued Justice Clark, because article I, section 6 of the Illinois Constitution contains a specific reference to the right to privacy. The dissent urged the court to recognize that "citizens of Illinois enjoy greater protection from governmental invasions of privacy under the Illinois Constitution than they enjoy under the Federal Constitution." *Id.* at 339, 522 N.E.2d at 1212 (Clark, J., dissenting).

39. 124 Ill. 2d 400, 530 N.E.2d 423 (1988).

40. *Id.* at 415, 530 N.E.2d at 430.

41. *Id.* at 411, 530 N.E.2d at 428-429.

42. *Id.* at 415, 530 N.E.2d at 430.

43. *See id.* at 416-417, 530 N.E.2d at 430-431 (Miller, J., specially concurring).

44. Considering that he has never joined an opinion criticizing the lockstep approach, Justice Miller's dissents in *Joyce* and special concurrence in *Duncan* lend support to the contention that he advocates the doctrine.

45. *Duncan*, 122 Ill. 2d at 416-17, 530, N.E.2d at 430-431.

mitted jury waivers.[46] Notwithstanding these jury waivers, the State requested jury trials pursuant to section 115-1 of the Illinois Code of Criminal Procedure,[47] which conferred upon the State, in certain narcotics cases, the right to try a case before a jury, even when the defendant has waived his right to a jury trial.[48] At trial, Judge Joyce denied the State's jury trial motions.[49] Shortly thereafter, the State moved for leave to file a petition for a writ of *mandamus* and a prohibition or supervisory order compelling Judge Joyce to adhere to section 115-1.[50] The Supreme Court of Illinois consolidated these petitions in *People ex rel. Daley v. Joyce*.

The defendants contested the petitions by challenging the constitutionality of the subject statute on three grounds: first, that the statute violated the defendants' right to trial by jury as guaranteed by article I, section 13 of the 1970 Illinois Constitution; second, that the statute violated the due process and equal protection guarantees of the state and federal Constitutions; and third, that the statute violated the *ex post facto* clauses of the state and federal constitutions.[51] Because the court found article I, section 13 of the Illinois Constitution to be determinative, the court declined the opportunity to address the due process, equal protection and *ex post facto* issues.[52]

B. The Majority Opinion

1. State Constitution Should be Given Independent Meaning

The Illinois Supreme Court held that the jury trial protection provided by the Illinois Constitution encompasses a criminal defendant's unilateral right to demand a bench trial.[53] More specifically, the court struck down the provision of the Illinois Code of Criminal Procedure requiring government consent for a jury trial

46. *Id.* at 211, 533 N.E.2d at 874.
47. *Id.*
48. ILL. REV. STAT. ch. 38, para. 115-1 (1987) states in full:

> All prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives such jury trial in writing or, in a criminal prosecution where the only offenses charged are felony violations of the Cannabis Control Act or the Illinois Controlled Substances Act, or both, the State and the defendant waive such jury trial in writing.

Id.
49. *Joyce*, 126 Ill. 2d at 211, 533 N.E.2d at 874.
50. *Id.*
51. *Id.*
52. *Id.* at 212, 533 N.E.2d at 874.
53. *Id.* at 222, 533 N.E.2d at 879.

waiver.[54] The court began its analysis by acknowledging that the right to a jury trial is an important safeguard against the arbitrary use of government power and that it has an extensive history with strong ties to the common law.[55] The court then recognized that the Federal constitutional standard permits a requirement of governmental consent to a jury waiver.[56] The court declared its freedom from that standard whenever the language of the Illinois Constitution, the Constitutional Convention debates, or the Convention Committee reports indicate that the similar provisions in the state and federal constitutions were intended to be construed differently.[57]

In the next step of its analysis, the court examined whether there was any indication that the state constitutional provision governing the right to a jury should be interpreted differently than its federal counterpart.[58] First, the court looked at the references to trial by jury found in article I, section 8[59] and article I, section 13[60] of the 1970 Illinois Constitution.[61] The court reasoned that, because the text refers to trial by jury twice, both times in the state bill of rights, the Illinois Constitution clearly guarantees this right to the people, not to the state.[62] The court then examined the right to a jury trial found in the federal Constitution.[63] This examination revealed that only the sixth amendment guarantees to the accused a trial by jury and that it is mentioned in Article III, section 2, not as

54. *Id.*

55. *Id.* at 212-213, 533 N.E.2d at 874-875.

56. *Id.* at 213, 533 N.E.2d at 875. This recognition is based on the Supreme Court's holding in Singer v. United States, 380 U.S. 24 (1965). *Joyce*, 126 Ill. 2d at 213, 533 N.E.2d at 875. In *Singer*, the Court considered the constitutional validity of Rule 23(a) of the Federal Rules of Criminal Procedure, which provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." This rule differs slightly from section 115-1 because it requires government and court consent to a defendant's jury waiver in federal prosecutions. The Court held the statute to be valid, reasoning that, even if the government and the court were to deny consent to a jury waiver, the defendant would still get a trial by an impartial jury, which is exactly what the Constitution guarantees to the defendant. *Singer*, 380 U.S. at 36.

57. *Joyce*, 126 Ill. 2d at 213, 533 N.E.2d at 875.

58. *Id.*

59. Article I, section 8 provides in pertinent part: "[i]n criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury." ILL. CONST. of 1970, art. I, § 8.

60. Article I, section 13 provides: "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." ILL. CONST. of 1970, art. I, § 13.

61. *Joyce*, 126 Ill. 2d at 213-214, 533 N.E.2d at 875.

62. *Id.* at 214, 523 N.E.2d at 875.

63. *Id.*

a guarantee to the people, but as an element of judicial power.[64] Based on its comparison, the court concluded that the Illinois constitutional provision has meaning independent of the construction the federal courts have placed on the jury trial provisions of the federal Constitution.[65]

2. Meaning of Right to Trial By Jury "as heretofore enjoyed"

Having decided to depart from the Federal constitutional analysis, the court considered what the drafters of the 1970 Illinois Constitution meant by guaranteeing the right to trial by jury "as heretofore enjoyed."[66] The court determined that the common law right to trial by jury as it stood in 1970 would guide its analysis; therefore, it set upon an extensive examination of prior rulings that examined the issue of jury waiver.[67]

The court began its review by noting that, beginning around the turn of the century, there was considerable debate on the permissibility of jury waivers because, at that time, a jury was required for jurisdiction.[68] The *Joyce* court then noted that *People ex rel. Swanson v. Fisher*[69] initially resolved this issue when the Illinois Supreme Court held that because the accused possessed the right to a jury trial, the accused also had the right to waive a jury trial.[70] *Joyce* also noted that, one year after the holding in *Fisher*, the Illinois Supreme Court in *People v. Scornavache*[71] determined that there is "no good reason for holding that a right to waive a jury trial means a right to deprive the prosecution of it"[72] if the state

64. *Id.*

65. *Id.* at 214-15, 533 N.E.2d at 875.

66. *Id.* at 215, 533 N.E.2d at 875.

67. *Id.* at 215, 533 N.E.2d at 876. The court found that "heretofore enjoyed" referred to the common law right to jury trial as enjoyed at the time of the adoption of the 1970 Constitution. *Id.* The court reached this concludsion because the committee that reported to the Constitutional Convention delegates in 1970 recommended no change to jury trials in criminal cases. *Id.*

68. *Id.* at 216, 533 N.E.2d at 876 (citing People v. Brewster, 183 Ill. 143, 55 N.E. 640 (1899) (defendant's jury waiver in felony trial precluded by jurisdictional mandates)); People v. Zarresseller, 17 Ill. 101 (1855) (defendant's jury waiver permissible in misdemeanor cases)).

69. 340 Ill. 250, 172 N.E. 722 (1930).

70. *Id.* In *Fisher*, the court expressly overruled the law as stated in *Brewster* and *Harris* that a jury was required for jurisdiction. *Fisher* brought Illinois into line with the Supreme Court's decision in Patton v. United States, 281 U.S. 276 (1929), which was based on the federal Constitution.

71. 347 Ill. 403, 179 N.E. 909 (1931).

72. *Joyce*, 126 Ill. 2d at 217-218, 533 N.E.2d at 876-877. The *Joyce* court noted that it reached this conclusion in spite of the absence of the State's constitutional right to a jury trial. *Id.*

objects to the defendant's waiver. The *Joyce* court observed that, in response to *Scornavache*, the Illinois legislature passed a state statute[73] allowing a defendant who pled guilty or who waived the right to a jury trial to have the cause heard without a jury. The Illinois Supreme Court in *People v. Scott*[74] determined that this provision failed to pass constitutional muster because it violated separation of powers.[75]

In *Joyce*, however, the majority found that *People v. Spegal*,[76] which reaffirmed *Fisher* in recognizing the defendant's right to waive a jury trial, contained the definitive ruling on the issue of a defendant's right to a jury trial and waiver.[77] The *Spegal* court stated that there is no need for a specific statutory or constitutional guarantee of a right to waive a jury trial. This is so, according to *Spegal*, because the existence of a right to trial by jury unquestionably includes the right to waive a trial by jury. Because *Spegal* was the law in Illinois at the time of the 1970 Constitutional Convention and the Convention did nothing to alter its status as precedent, the court concluded that the statutory provision requiring government consent for a jury waiver was unconstitutional and therefore invalid.[78]

The court dismissed the State's various contentions. First, the State argued that it had a constitutional right to a jury trial; the court summarily rejected this claim as "turn[ing] the concept of a bill of rights on its head."[79] Next, the State contended that the right to trial by jury "as heretofore enjoyed" referred only to its definition in the early common law. The court, however, disagreed, noting that when "as heretofore enjoyed" was first inserted into the 1870 Illinois constitution, it referred to the colonial experience and to the nearly 100 years of trial by jury as experienced by the people of Illinois, not to the jury trial practices developed early in the common law.[80] The court concluded, therefore, that the common law underpinnings of the right to trial by jury need not be considered when determining the meaning of "as heretofore enjoyed" as found in the 1870 Illinois Constitution and retained in

73. 1941 Ill. Laws 574.

74. 383 Ill. 122, 48 N.E.2d 530 (1943).

75. *Joyce*, 126 Ill. 2d at 218, 533 N.E.2d at 877.

76. 5 Ill. 2d 211, 125 N.E.2d 468 (1943).

77. *Joyce*, 126 Ill. 2d at 218, 221-222, 533 N.E.2d at 877, 879. In *Spegal*, the Illinois Supreme Court expressly overruled *Scott* and *Scornavache*.

78. *Id.* at 219, 533 N.E. at 877.

79. *Id.*

80. *Id.* at 221, 533 N.E.2d at 879.

the 1970 Illinois Constitution.[81] Finally, the State asserted that the reasoning set forth in *Spegal* was not based on constitutional principles.[82] In response to this argument, the court cited the analyses in *Fisher* and *Spegal* as clear enunciation of the constitutional dimension of the right to trial by jury.[83]

C. The Concurring Opinion

In a concurring opinion, Justice Clark undertook an analysis of the majority's approach, which he excoriated as "not good constitutional law."[84] Justice Clark's criticism of the majority's analysis began by stressing that it was based on an "untenable premise: that state constitutional provisions are to be construed in 'lockstep' with parallel provisions of the federal constitution."[85] Justice Clark also observed that the majority's uneasiness with the lockstep doctrine could be inferred from its limiting of the lockstep doctrine to situations in which there is no indication that the state constitutional provision was intended to be construed differently than a similar provision of the federal Constitution.[86]

Next, Justice Clark outlined the majority's "cumbersome" four-step approach. First, the court must determine whether the state and federal provisions are similar; if not, the state provision may be interpreted independently.[87] Second, if they are similar, the lockstep doctrine controls.[88] Third, the lockstep doctrine can be defeated by evidence that the state provision is intended to be construed differently.[89] Fourth, the state provision must be construed in the context of the case presented.[90]

The concurrence also examined the way in which the majority applied its four-step approach to the case at hand.[91] Justice Clark noted that because the majority had determined that the language "as heretofore enjoyed" meant that the framers of the 1970 Illinois Constitution wanted to leave the right to a jury trial as it existed at common law and in previous state constitutions, the court was obliged to follow *Spegal*. *Spegal*, however, held that a requirement

81. *Id.*
82. *Id.* at 221, 533 N.E.2d at 878.
83. *Id.*
84. *Joyce*, 126 Ill. 2d at 223, 533 N.E.2d at 879 (Clark, J., concurring).
85. *Id.*
86. *Id.*
87. *Id.* at 224, 533 N.E.2d at 879.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 224-225, 533 N.E.2d at 879-880 (Clark, J., concurring).

of State consent to jury waiver is unconstitutional. It illogically follows, therefore, that the jury trial right "as heretofore enjoyed" does *not* include government consent.[92] Justice Clark pointed out that were the lockstep approach at full strength, *Spegal* would have been overruled by *Singer*, in which the Supreme Court upheld a requirement of government consent to a jury trial waiver.[93] To get around that obstacle, the majority had to explain away why it was interpreting the right to a jury trial in the 1970 Illinois Constitution differently from the identical right guaranteed in the sixth amendment to the federal Constitution. The concurrence noted that to reach the desired result, the majority had to rely on amorphous differences between the "jury experience" of the State of Illinois and the common law traditions relied upon in *Singer* to support the independent status given to article I, section 13 of the Illinois Constitution.[94] Justice Clark saw the majority's procrustean approach as support for the proposition that *Joyce* "has tacitly repudiated [the lockstep doctrine]."[95]

Finally, the concurrence argued in favor of an independent state decision-making approach.[96] Citing the court's "long tradition of liberal construction in the service of individual rights," Justice Clark called for an end to the lockstep approach and for adoption of independent decision-making.[97] This approach would consider Federal precedent, not as *stare decisis*, but as a companion guide to be considered along with the state precedents, convention records, and other state rulings.[98] If this approach were used in *Joyce*, Justice Clark contended, the court simply could hold that *Spegal* was more persuasive than *Singer*; indeed, he claimed that this is the majority's approach although couched in lockstep language.[99]

Justice Clark found further support for an independent decision-making approach in the very existence of parallel guarantees granted by the federal Bill of Rights and the state constitution.[100] The inclusion of parallel guarantees in the state constitution, ac-

92. *Id.* at 224, 533 N.E.2d at 880.

93. *Id.* For further discussion of the *Singer* decision, see *supra* note 56 and accompanying text.

94. 126 Ill. 2d at 224, 533 N.E.2d at 880 (Clark, J., concurring).

95. *Id.* at 226-227, 533 N.E.2d at 881 (listing Illinois cases providing broader rights than under Federal constitutional analysis). Justice Clark conceded that the doctrine may not be fully abrogated in search and seizure cases. *Id.*

96. *Id.* at 226, 533 N.E.2d at 881.

97. *Id.*

98. *Id.* at 225-226, 533 N.E.2d at 880.

99. *Id.*

100. *Id.* at 226, 533 N.E.2d at 880-881.

cording to the concurrence, is a clear message that the drafters "wanted the 'double protection' that only state constitutional guarantees could provide."[101] By pursuing this double protection, the "court would bring to bear on every important constitutional issue their independent resources of wisdom, judgment and experience."[102]

D. The Dissenting Opinion

Justice Miller wrote a dissenting opinion in which he exhorted that the *Singer* analysis should have been used in this case.[103] He began with an historical review of the three Illinois Constitutions and the provisions concerning the right to trial by jury.[104] Based on this review, the dissent stressed that the language did not indicate the jury trial guarantees even encompassed a right to waive a jury in favor of a bench trial.[105]

The dissent also undertook its own historical review of the pertinent case law.[106] Citing constitutional commentary, Justice Miller stated that the term "as heretofore enjoyed" has been noted to be "unquestionably ambiguous"; accordingly, he was unconvinced that a review of the case law supports its wholesale adoption by the 1970 Illinois Constitution.[107] Justice Miller stated further that even if "as heretofore enjoyed" could be given the interpretation that the majority gave it, the majority's conclusion was wrong because it was based upon an incorrect reading of the *Spegal* decision.[108] The dissent reasoned that *Spegal* cannot stand for the proposition that the right to a jury trial includes the right to jury waiver as a constitutional matter. Otherwise, *Spegal* would not have resurrected the 1941 law granting that right as a statutory matter because it would have been unnecessary to the court's decision.[109]

In his parting words, Justice Miller explained that the majority's approach would lead to the anomalous situation in which a bench trial in criminal cases would require prosecutorial consent in federal courts, but should a criminal defendant cross the street to state

101. *Id.* at 226, 533 N.E.2d at 881.
102. *Id.*
103. *Id.* at 231, 533 N.E.2d at 883 (Miller, J., dissenting).
104. *Id.* at 227-228, 533 N.E.2d at 881 (Miller, J., dissenting).
105. *Id.* at 228, 533 N.E.2d at 881.
106. *Id.* at 229-231, 533 N.E.2d at 882.
107. *Id.* at 233-234, 533 N.E.2d at 884.
108. *Id.* at 234, 533 N.E.2d at 884.
109. *Id.* *See supra* note 73 for a discussion of the 1941 jury waiver statute.

court, the accused would be permitted to "call the shots" and unilaterally compel a bench trial.[110]

IV. ANALYSIS

A. The Problems With a Doctrine of Judicial Legerdemain

1. An Unclear Standard

The threshold issue before the court in *Joyce* was whether its analysis would be guided by the Federal constitutional principles as announced in *Singer v. United States*[111] or by the court's own construction of article I, section 13 of the 1970 Illinois Constitution.[112] Clearly, if the *Joyce* court were to adhere to the *Singer* tenets, government consent would be required in certain criminal cases. In contrast, if the court had pursued independent construction, the court might have ruled that a defendant has the unitlateral right to waive a jury trial. Having set out the ramifications of the *Singer*-independent construction dichotomy, the court chose the latter as the way to a more principled result.[113]

In making this choice, however, the court also was compelled to create a facade of accommodating language to hide its casuistic application of the lockstep doctrine, for a direct approach would have meant explicit repudiation. Such judicial sleight-of-hand may well have accommodated the court's needs for this particular case, but this approach confounds the familiar with the necessary and leaves lingering problems. The question still confronting the Illinois judiciary is, what is the proper approach for deciding claims based on Illinois constitutional provisions with parallels in the federal Constitution?

In *Joyce,* the court focused its attention on differences between article I, section 13 of the Illinois Constitution and article III, section 2 of the federal Constitution which, in the course of defining judicial powers, provides for criminal jury trial.[114] The court found that, because article I, section 13 grants a right to the accused, whereas article I, section 2 of the United States Constitution defines judicial powers, there was a significant difference between the language of the two provisions.[115] The court also considered

110. 126 Ill. 2d at 234-235, 533 N.E. 885 (Miller, J., dissenting).

111. 380 U.S. 24 (1965). The *Singer* holding is discussed *supra* note 56 and accompanying text.

112. *See Joyce*, 126 Ill. 2d at 211-213, 533 N.E.2d at 874-875.

113. *Joyce*, 126 Ill. 2d at 214-215, 533 N.E.2d at 875.

114. *See supra* notes 58-65 and accompanying text.

115. *Joyce*, 126 Ill. 2d at 214-215, 533 N.E.2d at 875.

distinguishable the fact that the Illinois Constitution refers to jury trial twice, but the federal Bill of Rights refers to it only once.[116]

Justice Clark's concurrence[117] and Justice Miller's dissent[118] each stated ways of interpreting the majority's approach. There are other possible interpretations as well. For example, one could reasonably interpret the majority opinion in *Joyce* as requiring Illinois courts to compare the language of the Illinois bill of rights to the language of the Federal grant of judicial powers and to decide which language controls. Such a test would be unworkable. There will always be a difference in the meaning of the language using such a comparison. The federal provision defines state powers; the Illinois provision protects individuals against state powers. The provisions just do not lend themselves to comparison.

Another reasonable interpretation, given the court's approach, is that courts are to count the number of times the language at issue appears in the Illinois Constitution versus the federal Constitution. If the language appears in the Illinois Constitution more frequently than in the federal Constitution, the reasoning in *Joyce* suggests that the Illinois Constitution was intended to provide broader protection. Such a test based on mere quantitative analysis is unsupported by the legislative history of the Illinois Constitution. Nor, one can easily conclude, would this test square with constitutional jurisprudence as practiced anywhere in the American system. The inherent difficulties in these interpretations, like the difficulties pointed out by Justice Clark's interpretation[119] and Justice Miller's interpretation,[120] highlight the majority's failure to define a workable approach for asserting its role as a decision maker independent of Federal constitutional analysis.

2. How Words Can Pervert Judgment

Justice Clark argued that *Joyce* all but explicitly rejected the lockstep doctrine; however, he also suggested that in the context of constitutional prohibitions upon government search and seizures,

116. *Id.* The right to a jury trial appears in the Illinois Constitution in two places: article I, section 8, regarding criminal prosecutions, and article I, section 13 as set forth *supra* notes 59-60. The right to a jury trial in the federal Constitution is referred to in the sixth amendment and again in the seventh amendment. Only the sixth amendment, however, refers to criminal trials; but, by the same token, only article I, section 8 of the Illinois Constitution refers to criminal actions. The court offers no explanation for this oversight.

117. *See supra* notes 87-90 and accompanying text.

118. *See supra* notes 106-10 and accompanying text.

119. *See supra* notes 91-95 and accompanying text.

120. *See supra* note 110.

the doctrine may still have a foothold.[121] An examination of the way iin which the *Joyce* approach might work in future search and seizure cases supports the proposition that even this foothold may weaken after *Joyce*.

In *People v. Geever*,[122] a search and seizure case, the Illinois Supreme Court upheld a state statute barring the knowing possession of child pornography in the home.[123] As a pre-*Joyce* case, *Geever* relied solely on Federal constitutional analysis in its holding. In light of the *Joyce* approach, if the issue presented in *Geever* were before the Illinois Supreme Court today, it probably would be decided differently.

As noted in the concurrence, the first step of the *Joyce* approach is to determine whether the state and federal provisions are similar.[124] Comparing the first amendment to the federal Constitution with the article I, section 6 of the Illinois Constitution, it is clear that the Illinois Constitution provides a protection against "invasions of privacy"—a protection noticeably absent from the first amendment.[125] Whenever state and federal provisions differ, the *Joyce* approach requires that a court interpret the state provision independently.[126] Thus, the *Joyce* approach would end here.

Because the *Geever* court would be compelled by its own standard to address whether the Illinois Constitution intended to confer broader rights than its federal counterpart, the dissent could argue with greater force that the statute violates the Illinois Constitution.[127] As in *Joyce*, the court would have to engage in circumlocution to evade the dissent's strong argument and to arrive at what it finds to be the principled result. If *Joyce* is used in future cases, this example shows how this self-perpetuating analysis may, in effect, result in the court being hoisted by its own petard.

The dangerous possibility of this unintended effect highlights the benefits of independent decision-making to judicial pragmatism and judicial principle. If independent decision-making were applied in *Geever*, its outcome would be determined by considering persuasive Federal precedent in light of the provisions of the Illi-

121. *See supra* note 95.

122. 122 Ill. 2d 313, 522 N.E.2d 1200 (1988).

123. *Id.* at 330, 522 N.E.2d at 1208.

124. *Joyce*, 126 Ill. 2d at 224, 533 N.E.2d at 879 (Clark, J., concurring).

125. *See supra* notes 36-37 and accompanying text. In *Geever*, Justice Clark also suggested that the state's law enforcement officials violated article I, section 4 of the Illinois Constitution. 122 Ill. 2d at 331, 522 N.E.2d at 1208 (Clark, J., concurring).

126. *See supra* note 87 and accompanying text.

127. *See supra* note 38 and accompanying text.

nois Constitution.[128] The *Geever* outcome would not have to change. This approach would be most desirable in three respects. First, an Illinois court would be able to draw on the wisdom of the United States Supreme Court to guide its independent analysis; unlike *Joyce*, in which *Singer* is simply rejected without recognizing that it may be useful precedent. Second, future courts would have a clear, common sense approach to constitutional issues, rendering unnecessary the need for murky analysis. Finally, the courts would be less restricted when Federal analysis cannot be applied soundly to unique needs of Illinois citizens.

V. IMPACT

A. Effects on Illinois Practice

People ex rel. Daley v. Joyce has been called "the most significant case in the area of Illinois constitutional law in many, many years."[129] Relaxing the Illinois lockstep doctrine would hold considerable portent for both the theory under which cases are brought in the state, and the outcome resulting from application of new, and often broader standards.[130] State constitutions have been used as independent sources of protection for a panoply of individual rights including the right to refuse medical treatment,[131] the right to education,[132] the right to abortion,[133] the right to bear arms,[134] property rights[135] and environmental rights.[136] In Illinois,

128. *See supra* notes 96-102 and accompanying text.

129. Interview with Ralph Ruebner, Council for Respondent and Professor of Law, The John Marshall Law School, in Chicago, Il (September 27, 1989). This statement finds support in a recent survey of state judges from across the country. Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 602-603 (1986). In the survey, forty-one states (Illinois did not respond) reported no decrease in litigation based on state constitutions. *Id.* This report concludes, without doubt, that the use of state constitutional claims is increasing across the country. *Id.*

130. Although, independent decision-making does not mean that the state court must expand on Federal analysis. As Justice Clark suggested, where the Supreme Court's "reasoning persuades us we should follow them. Where they do not, we should not." *Joyce*, 121 Ill. 2d at 225, 533 N.E.2d at 880 (Clark, J., concurring).

131. *See e.g.*, Large v. Superior Court, 148 Ariz. 229, 235, 714 P.2d 399, 405 (1986). Kempic, *The Right to Refuse Medical Treatment Under the State Constitutions*, 5 COOLEY L. REV. 313 (1988).

132. *See, e.g.*, Kirby v. Edgewood Indep. School Dist., 761 S.W.2d 859 (Tex. Ct. App. 1988), *rev'd*, 777 S.W.2d 391 (1989); Hubsch, *Education and Self Government: The Right to Education Under State Constitutional Law*, 18 J. L. & EDUC. 93 (1989).

133. *See, e.g.*, *In re* T.W., No. 74,143 (S. Ct. Florida Oct. 5, 89) (LEXIS, States library, Fla. file); Developments, *State Constitutions: The New Battlefield For Abortion Rights*, 10 HARV. WOMEN'S L.J. 284 (1987).

134. *See e.g.*, State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981). Dowlut & Knoop,

however, arguments based on the Illinois Constitution have not been used so widely.[137] *Joyce* was particularly unique because counsel for the respondents' based their primary argument on the Illinois Constitution.[138] Moreover, these attorneys acknowledged that they intentionally fashioned their arguments to "go against the grain" of the manner in which these arguments typically are made.[139] This approach suggests that attorneys now need be cognizant of the new strength in arguments based primarily on Illinois constitutional analysis. The Illinois Constitution will not necessarily provide the main argument in all cases, but failure to include it and to use it to its fullest would be a significant oversight for attorneys practicing before the Illinois bar.[140]

B. A Return to Popular Sovereignty

Opponents of independent decision-making argue that it will encourage result-oriented jurisprudence and will favor an over-ex-

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State Constitutions and the Right to Keep and Bear Arms, 7 OKLA. CITY U.L. REV. 177 (1982).

135. Berdon, *Protecting Liberty and Property Under the Connecticut and Federal Constitutions: The Due Process Clauses*, 15 CONN. L. REV. 41 (1982).

136. Pollard, *A Promise Unfulfilled: Environmental Provisions In State Constitutions and the Self-Execution Question*, 5 VA. J. NAT'L RES. 351 (1986).

137. *See* People v. Geever, 122 Ill. 2d 313, 337, 522 N.E.2d 1200, 1211 (1988) (Clark, J., dissenting), noting that "this case clearly cited the Illinois constitution in the[] briefs. Moreover, the[] invocation of it was not merely the usual curt appendix to an argument relying on the Federal Constitution and Federal precedents . . . but a separate argument contained under a separate heading which cited separate authorities." *Id.* Although arguments premised on state constitutional grounds are atypical in the criminal procedure context, Illinois has expressly used its own constitution in some areas outside the criminal area. *See* People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974).

138. *See* Brief for Respondents at 1-7, People *ex rel.* Daley v. Joyce, 126 Ill. 2d 209, 533 N.E.2d 873 (1988).

139. Interview with Ralph Ruebner, Counsel for Respondents and Professor of Law, The John Marshall Law School, in Chicago, Il (September 27, 1989). In several states, case law mandates that the state constitutional law claim not only be made, but be made first. *See* People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981). *The National Law Journal*, in a special edition on state constitutions, suggested the following order for issue consideration in criminal cases: 1) is there a violation of an agency rule or guideline? 2) is there a statutory violation? 3) is there a violation of any state constitutional provision? 4) is there a violation of any federal law? and 5) is there a violation of any provisions of the federal Constitution. *Methodology*, The National Law Journal, March 12, 1984, at 30, col. 2. *See also, The Unique Role of State Constitutions: Raising State Issues in New Hampshire*, 28 N.H. B.J. 309, 323-24 (1987) (for a similar methodological approach).

140. Bamberger, *Boosting Your Case With Your State Constitution*, A.B.A. J. March 1, 1986, at 49, col. 1 (quoting a state judge's warning that a lawyer who does not argue the state constitution is skating on the edge of malpractice).

pansion of civil liberties.[141] This argument might posit that, although there is merit in state constitutionalism, shifting too much power to state judiciaries creates another equally serious problem. Too powerful a state judiciary, according to this argument, should be as offensive to federalism proponents as an overly powerful federal judiciary.[142]

This argument fails to recognize the unique structure of state constitutional systems and the power of popular sovereignty. The Illinois Constitution, itself the fourth organic law of the state,[143] has an accessible and efficient amendment process that gives Illinois citizens recourse against state constitutional abuses. Illinois has constitutional provisions for legislative amendment proposals,[144] for voter initiative amendment proposals,[145] for legislative or initiative calls for constitutional conventions,[146] and for periodic submission of constitutional convention call questions to the electorate.[147] The use of these provisions would be greater given an increased citizen awareness of the strength that the Illinois Constitution preserves for them.[148] Increased citizen awareness would accompany the increased state responsibility that is part of the independent decision-making package.[149] The Illinois Constitution, and the popular determination to give it effect, are the swords that arm the legislature and the people against judicial action repugnant to popular conviction.

VI. CONCLUSION

The majority approach in *Joyce* leaves state courts with many

141. *See* People *ex rel.* Daley v. Joyce, 126 Ill. 2d 209, 230, 533 N.E.2d 873, 882 (Miller, J., dissenting).

142. *See generally*, Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DEN. U.L. REV. 85, 90-98 (1985) (discussing the problems of independent state decision-making in unprincipled state courts).

143. Colantuono, *Pathfinder: Methods of State Constitutional Revision*, 7 LEGAL REFERENCES SERV. Q. 45, 51 (1987).

144. ILL. CONST. of 1970, art. XIV, § 2.

145. *Id.* at art. XIV, § 3.

146. *Id.* at art. XIV, § 1.

147. *Id.*

148. G. ANASTOPLO, THE CONSTITUTIONALIST 603 (1971). Professor Anastoplo reasons that citizen awareness is essential to the preservation of a federalist system: "[m]any of the problems with state governments could be easily handled by a people determined to do so—by a people that appreciates that unless the states fashion their constitutions in response to the problems of today, more and more power will inevitably go to Washington." *Id.*

149. Collins, *Foreword: The Once "New Federalism" & Its Critics*, 64 WASH. L. REV. 5, 36-40 (1989) (giving examples of citizen reactions to state court decisions based on state constitutions).

questions regarding the proper process to use when interpreting the Illinois Constitution. Moreover, the decision's diffuse approach toward a question that could have been confronted directly sets a dangerous precedent. *Joyce*'s problematic aspects, joined with its clear divergence from the lockstep doctrine's tenets, may signal the doctrine's final descent into desuetude. Both the citizens served by the Illinois Constitution, and the courts interpreting it would benefit if the anachronistic lockstep doctrine were to perish upon the gibbet of judicial condemnation.

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