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Michael P. Seng
Prof., John Marshall Law School

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Freedom of Speech, Press and Assembly, and Freedom of Religion under the Illinois Constitution

*Michael P. Seng**

The first amendment¹ acts as a limitation on all governmental action in the United States, whether it be federal, state or local and as a limitation on private action for, or supported by, the government.² Quite literally, our status as the world's greatest democracy is coterminous with the first amendment. We judge our government and we judge other governments largely on the extent to which "first amendment" freedoms are recognized and respected. The first amendment is the bedrock upon which all of our other liberties are built.³

The central role of the first amendment in protecting freedom of thought and speech in the United States is of relatively recent origin. As originally drafted and applied, the first amendment limited only the federal government.⁴ Although Congress adopted the fourteenth amendment in 1868 to protect individual liberties from state interference, the United States Supreme Court continued for many years to hold that the states were the primary protectors of

* Professor, The John Marshall Law School. The author wishes to thank Professor Diane Geraghty for her helpful comments and Nils Von Keudell and Robert Voltl, students of the John Marshall Law School, for their research assistance.

1. The first amendment to the federal Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

2. See *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Marsh v. Alabama*, 326 U.S. 501 (1946).

3. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("the First Amendment has a penumbra where privacy is protected from governmental intrusion"); cf. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) ("freedom of thought, and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom"); see also A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948) (describing why speech on matters of public interest is unregulated in a free society).

4. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). The first major cases dealing with restrictions by the federal government on freedom of speech did not reach the Supreme Court until World War I. See *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

civil liberties.⁵ Not until 1925 did the Supreme Court first consider whether a state law abridging free speech could violate the first and fourteenth amendments,⁶ and not until the 1940s did the Court first find state laws to violate the first amendment's⁷ free exercise⁸ and establishment of religion⁹ clauses. Thus, throughout the nineteenth and into the twentieth century, state constitutional law protected freedom of thought and speech from state interference.

Illinois constitutional law consistently has protected freedom of thought and speech independently, without questioning the first amendment's applicability. The first law applicable to the Illinois territory was the Northwest Ordinance of 1787. Article I of the Ordinance provided: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories."¹⁰ Article III linked religion with the subject of education: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and means of education shall forever be encouraged."¹¹ The Ordinance did not specifically refer to freedom of speech, press or assembly.

Illinois' first constitution, ratified in 1818, broadly protected the right to worship according to one's conscience and also provided that no one shall "be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent."¹² These provisions have carried forward to subsequent Illinois Constitutions.¹³ For example, the 1870 Constitution added a clause specifically forbidding any public funds to be used for sectarian purposes; the 1970 Constitution contains the same provi-

5. *E.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

6. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("freedom of speech and of the press . . . are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the State").

7. As applied to the states through the fourteenth amendment.

8. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

9. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

10. U.S. REV. STAT. 15 (2d ed. 1878).

11. *Id.* Significantly, this provision seems to refer to a type of government sponsored religion in the schools. According to the Illinois Supreme Court, however, in *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 342-43, 92 N.E. 251, 253 (1910), "this ordinance did not impose upon states the duty of religious instruction in the schools which were to be encouraged." Rather, it recognized "education as a means promotive of religion and morality by the increase of knowledge." *Id.* For a further discussion of *Ring*, see *infra* notes 86-89 and accompanying text.

12. ILL. CONST. of 1818, art. VIII, § 3.

13. See ILL. CONST. of 1970, art. 1, § 3; ILL. CONST. of 1870, art. II, § 3; ILL. CONST. of 1848, art. XIII, § 3.

sion.¹⁴ Each successive Illinois Constitution has contained clauses protecting freedom of speech,¹⁵ press¹⁶ and assembly.¹⁷ Thus, regardless of federal law, Illinois citizens have always enjoyed, as a matter of state constitutional law, the basic freedoms of thought and speech.

I. THE INDEPENDENCE OF THE ILLINOIS CONSTITUTION FROM THE FEDERAL CONSTITUTION.

When the legion of cases litigated under the first amendment are considered, it is surprising to notice the dearth of cases litigated under the comparable provisions of the Illinois Constitution. The nineteenth century produced very few reported cases at either the federal level under the first amendment or the state level under the freedom of speech and thought provisions of the Illinois Constitution. The explanation for this is unclear. It may be that government did not touch most people's lives much, and when government regulation infringed upon rights, people were more likely to resort to political rather than to judicial remedies. Or, it may be that nineteenth century citizens were less sensitive to free thought and free speech issues and that attorneys were less available to litigate these types of claims.

After the 1920s, the first amendment was available to use as a check on state and local power.¹⁸ Because federal judges are more insulated from political and parochial pressures than their counterparts in state courts, litigants probably felt comfortable framing their complaints to allege federal constitutional violations in federal courts.¹⁹ Also, the eloquence of such federal judges as Holmes, Brandeis, Black and Douglas may have caused lawyers and litigants to automatically associate speech and religion issues with the first amendment, thereby neglecting similar provisions in their own state constitutions.

The absence of suits alleging violations of the Illinois Constitu-

14. See ILL. CONST. of 1970, art. X, § 3; ILL. CONST. of 1870, art. VIII, § 3.

15. See ILL. CONST. of 1970, art. I, § 4; ILL. CONST. of 1870, art. II, § 4; ILL. CONST. of 1848, art. XIII, § 23; ILL. CONST. of 1818, art. VIII, § 22.

16. See ILL. CONST. of 1970, art. I, § 4; ILL. CONST. of 1870, art. II, § 4; ILL. CONST. of 1848, art. XIII, § 23; ILL. CONST. of 1818, art. VIII, § 22.

17. See ILL. CONST. of 1970, art. I, § 5; ILL. CONST. of 1870, art. II, § 17; ILL. CONST. of 1848, art. XIII, § 21; ILL. CONST. of 1818, art. VIII, § 19.

18. See *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

19. See Seng, *Federalism, the Courts and Individual Liberties*, 75 ILL. BAR J. 310 (1987) (stressing the value of an independent federal judiciary in upholding the protection of individual freedoms).

tions does not mean that free speech and freedom of religion issues have not arisen in Illinois. Since the 1920s, Illinois has spawned many of the most important precedents decided by the United States Supreme Court under the first amendment.²⁰ All of these issues could have been litigated under the Illinois Constitution, but in many of these cases, state law based claims were ignored.

Beginning in 1977 with the publication of Justice Brennan's *Harvard Law Review* article, "State Constitutions and the Protection of Individual Rights,"²¹ there has been a rethinking of state constitutional law throughout the United States,²² and some state courts have expanded state constitutional protections beyond those provided in the federal Constitution.²³ Although the 1970 Illinois Constitution contains one of the most progressive bill of rights in the nation, the Illinois Supreme Court has not been a leader in this rethinking process²⁴ This may be caused, in part, by many lawyers who continue to think in terms of federal rights and who have pro-

20. See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980) (picketing); *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980) (solicitation); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (marching); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (picketing); *Grayned v. Rockford*, 408 U.S. 104 (1972) (demonstrations); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (distribution of literature); *Gregory v. Chicago*, 394 U.S. 111 (1969) (marching); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967) (association); *In re Anastaplo*, 366 U.S. 82 (1961) (thought); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (motion picture censorship); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (speech); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (speech); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (religion).

21. 90 HARV. L. REV. 489 (1977).

22. See, e.g., Mosk, *The Power of State Constitutions in Protecting Individual Rights*, 8 N. ILL. L. REV. 651 (1988); Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985); *Developments in State Constitutional Law: The Williamsburg Conference* (1985) (cosponsored by Conference of Chief Justices, National Center for State Courts).

23. See, e.g., *Blue v. State*, 558 P.2d 636 (Ala. 1977) (right to attorney at preindictment lineup); *People v. Bustamante*, 30 Cal.3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981), *superseded by statute as stated in* *People v. Morehead*, 197 Cal. App.3d 292, 238 Cal. Rptr. 570 (1981) (right to attorney); *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977) (equal protection); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (equal protection); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973) (equal protection).

24. See McAfee, *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). The 1970 Illinois Constitution specifically expands protection by prohibiting unreasonable "invasions of privacy or interceptions of communications by eavesdropping devices or other means," ILL. CONST. of 1970, art. I, § 6; prohibiting discrimination in employment or in the sale of rental of housing, ILL. CONST. of 1970, art. I, § 17; prohibiting the state and local governments from discriminating on account of sex, ILL. CONST. of 1970, art. I, § 17; prohibiting discrimination in the sale or rental of property or in employment on the basis of a physical or mental handicap, ILL. CONST. of 1970, art. I, § 19; and prohibiting communications inconsistent with human dignity, ILL. CONST. of 1970, art. I, § 20.

vided little critical analysis of their own state's bill of rights.²⁵

Most of the Illinois cases that have addressed whether the Illinois bill of rights provides protections different from the federal Bill of Rights have involved criminal prosecutions.²⁶ By holding many state practices involving searches and seizures and the privilege against self-incrimination to violate the fourth and fifth amendments to the federal Constitution, courts have rendered interpretation of state constitutional provisions irrelevant.²⁷ Recent United States Supreme Court opinions have eroded some of the protections accorded to criminal defendants under the fourth and fifth amendments. Thus, the question has arisen whether the Illinois Constitution could provide greater protection than the federal Constitution. The Illinois Supreme Court has approached this question with considerable caution.

In one of the first cases that presented an opportunity for the Illinois Supreme Court to take an independent stance, the court elected to follow the United States Supreme Court. In *People v. Rolfingsmeyer*,²⁸ the court addressed whether article I, section 10 of the 1970 Illinois Constitution, which provides protection against self-incrimination, is broader than the fifth amendment of the United States Constitution. The court held that the Illinois law requiring a driver to submit to a breath test for intoxication vio-

25. See *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985). In *Jewett*, the Vermont Supreme Court chided attorneys for inadequately analyzing and arguing state constitutional issues and ordered the attorneys in a pending case to file supplemental briefs on the state constitutional issues presented, stating "[t]his generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow." *Id.*

26. See *infra* notes 28-45.

27. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). See *infra* note 164 and accompanying text (for additional discussion of *Robins*). Because the Federal Constitution establishes the base for the protection of individual rights, the Illinois Supreme Court has reversed the normal order of deciding state issues prior to deciding federal issues. The court first decides whether an Illinois law violates federal constitutional rights. If it does, then the court will find it unnecessary to determine whether the law also offends the Illinois Constitution. *Chicago Tribune Co. v. Downers Grove*, 125 Ill. 2d 468, 472, 532 N.E.2d 821, 822 (1988). The Oregon Supreme Court, which has a tradition of independence in deciding state constitutional issues, has taken the opposite approach and has held that state courts have a duty to determine state constitutional issues before they tackle federal constitutional issues. *Salem College & Academy, Inc. v. Employment Div.*, 298 Or. 471, 495, 695 P.2d 25, 34 (1985) (holding that certain religious schools could be taxed to support unemployment benefits). See also *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987) (holding that obscenity is a form of speech protected by the Oregon Constitution).

28. 101 Ill. 2d 137, 461 N.E.2d 410 (1984).

lated neither the fifth amendment nor article I, section 10.²⁹ Furthermore, it found that the Record of Proceedings for the Sixth Illinois Constitutional Convention reflected a general recognition and acceptance of Supreme Court fifth amendment interpretations.³⁰

In a special concurring opinion, Justice Simon argued that the Illinois courts have an obligation to take an independent look at the Illinois Constitution and, in doing so, are not limited to United States Supreme Court precedents.³¹ He suggested that even though "the language of the self-incrimination clause in the Illinois Constitution is almost identical to the comparable clause in the federal Constitution, it does not follow it must have the same content."³²

Not long after, the Illinois Supreme Court upheld a warrantless search of an arrestee, after his arrest for a traffic violation, under the fourth amendment of the United States Constitution and article I, section 6 of the 1970 Illinois Constitution.³³ Once again the court presumed an interdependent construction between the Illinois and federal constitutions and found that "[t]he constitutional debates do not indicate any wish or intent to provide protections against unreasonable searches and seizures broader than those existing under decisional interpretations under the fourth amendment to the United States Constitution."³⁴

When the court confronted a case requiring it to assess the reliability of an informant's tip used to secure a search warrant, it again chose to follow the United States Supreme Court's lead. In *People v. Tisler*,³⁵ the court adopted the totality-of-circumstances approach enunciated in Supreme Court's *Illinois v. Gates*³⁶ decision.

29. *Id.* at 142, 461 N.E.2d at 412.

30. *Id.* at 142, 461 N.E.2d at 412-13 (citing RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1376-80 (1970)). This convention drafted the 1970 Illinois Constitution.

31. *Id.* at 145, 461 N.E.2d at 414 (Simon, J., specially concurring).

32. *Id.* at 146, 461 N.E.2d at 415 (Simon, J., specially concurring). According to Justice Simon, similar language in the federal and state constitutions rather "indicates that the intention was to protect the same interests. . . ." *Id.*

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

34. *Id.* at 218, 461 N.E.2d at 945. Justice Clark dissented on the ground that the Illinois Code of Criminal Procedure invalidated the search. *Id.* at 225-28, 461 N.E.2d at 949-50 (Clark, J., dissenting). Justice Simon again dissented on the ground that the Illinois Supreme Court has an independent obligation to interpret its own bill of rights. *Id.* at 236, 461 N.E.2d at 954 (Simon, J., dissenting).

35. 103 Ill. 2d 226, 252-53, 69 N.E.2d 147, 160 (1984).

36. 462 U.S. 213 (1983).

In a special concurring opinion, Justice Clark argued that the Illinois courts should not be precluded from protecting the individual liberties of Illinois citizens should the United States Supreme Court consistently decide to favor police efficiency over the rights of the accused.³⁷ Speaking for the majority, Justice Ryan disagreed and established what has become known as the “lockstep” doctrine:

After having accepted the pronouncements of the [United States] Supreme Court in deciding fourth amendment cases as the appropriate construction of the search and seizure provisions of the Illinois Constitution for so many years, we should not suddenly change course and go our separate way simply to accommodate the desire of the defendant to circumvent what he perceives as a narrowing of his fourth amendment rights under the Supreme Court's decision in *Illinois v. Gates*. Any variance between the Supreme Court's construction of the provisions of the fourth amendment in the Federal Constitution and similar provisions in the Illinois Constitution must be based on more substantial grounds. *We must find 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.*³⁸

Not until 1988, in *People ex rel. Daley v. Joyce*,³⁹ did the Illinois Supreme Court conclude that comparable provisions in the Illinois and federal constitutions have independent meanings. The *Joyce* court addressed whether the state could request a jury trial in a criminal case after the defendant had waived his right to a jury trial.⁴⁰ The United States Supreme Court previously had upheld a federal rule that allowed the prosecutor to request a jury trial over the defendant's objection.⁴¹ In *Joyce*, the Illinois court stated that language in the 1970 Illinois Constitution, as well as in the drafter's debates, distinguished the “right to a jury trial” provisions in the Illinois Constitution from those in the federal Constitution. This difference, according to the court, was “one of substance and not merely one of form.”⁴²

The court also determined that the committee proposals, the

37. *Tisler*, 103 Ill. 2d at 259, 469 N.E.2d at 164 (Clark, J., specially concurring).

38. *Id.* at 245, 469 N.E.2d at 157 (emphasis added).

39. 126 Ill. 2d 209, 533 N.E.2d 873 (1988).

40. *Id.* at 211-12, 533 N.E.2d 874.

41. *Singer v. United States*, 380 U.S. 24 (1965).

42. *Joyce*, 126 Ill. 2d at 214, 533 N.E.2d at 875.

floor debates and the explanation to the voters indicated no intent to change the right to trial by jury as that right was enjoyed in Illinois at the time of the 1970 Constitutional Convention.⁴³ In 1970, Illinois law viewed the waiver of a jury as a constitutionally protected personal right of the defendant.⁴⁴ Although concurring in result, Justice Clark argued against the majority's lockstep approach to constitutional construction:

Instead of assuming that similar State and Federal provisions are to be construed similarly, we could simply assume that *all* State constitutional provisions are to be construed *independently* of their Federal counterparts. By 'independently' I do not mean that the State constitutional provision must in every instance be given a broader or more liberal construction. All I mean is that as to our State constitutional provisions, Federal precedents are not *stare decisis*. They are persuasive and not determinative. Where their reasoning persuades us, we should follow them. Where they do not, we should not.⁴⁵

Despite its ruling in *Joyce*, a majority of the Illinois Supreme Court continues to take a narrow approach toward Illinois constitutional interpretation. At least in criminal cases, the court will follow the United States Supreme Court's lead, unless the language or history of the Illinois provision counsels a different result. The alternative approach urged by Justices Simon and Clark is more consistent with the Founding Father's envisionment of the states' important role in protecting individual liberties.

II. FREEDOM OF RELIGION UNDER THE ILLINOIS CONSTITUTION⁴⁶

A. *Legislative History*

The legislative history of the freedom of religion provisions in

43. *Id.* at 215, 533 N.E.2d at 875-76.

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

45. *Id.* at 225, 533 N.E.2d at 880 (Clark, J., concurring).

46. As compared to the first amendment, the Illinois Constitution is quite detailed with regard to freedom of religion. See ILL. CONST. of 1970, art. I, § 3 and art. X, § 3. For example, article I, section 3 of the 1970 Illinois Constitution provides:

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.

the Illinois Constitution is minimal. Their precursor, the Northwest Ordinance, had protected persons who conducted themselves in a peaceable or ordinary manner from being molested on account of their mode of worship or religious sentiments.⁴⁷ This provision was similar to that found in some of the colonial documents securing religious freedom.⁴⁸

The broader provisions included in sections 3 and 4 of the 1818 Illinois Constitution were similar to provisions found in other states' earlier constitutions.⁴⁹ Delegates to the 1847 Convention made several proposals to amend section 4, which prohibited religious tests as a qualification for public office. The delegates defeated a proposal to add a clause to section 4, which stated "no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion."⁵⁰ The delegates similarly defeated a rider that provided "that the civil rights, privileges, or capacities of any citizen shall in no-wise be diminished or enlarged on account of religion."⁵¹ They also rejected proposals to disqualify persons from holding public office or employment or from being competent wit-

ILL. CONST. of 1970, art. I, § 3. Article II, section 3 of the 1870 Illinois Constitution was identical. ILL. CONST. of 1870, art. II, § 3.

Article XIII, sections 3 and 4 of the 1848 Illinois Constitution are identical to article VIII, sections 3 and 4 of the 1818 Illinois Constitution:

§ 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience, and that no preference shall ever be given by law to any religious establishments or modes of worship.

§ 4. That no religious test shall ever be required as a qualification to any office or public trust under this state.

ILL. CONST. of 1848, art. XIII, §§ 3, 4; ILL. CONST. of 1818, art. VIII, §§ 3, 4.

47. Northwest Ordinance, art. I (1787), *reprinted in* U.S. REV. STAT. 15 (2d ed. 1878). *See supra* note 10 and accompanying text (text of article I).

48. *E.g.*, Charter of Rhode Island and Providence Plantations, para. 2 (1663) ("no person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony").

49. *See, e.g.*, Declaration of Rights and Fundamental Rules of the Delaware State, § II (1776) *reprinted in* DEL. CODE ANN. vol. 1, at 109 (1975); CONST. OF PA. of 1776, § II. *See also* J. CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818-1970 (1972).

50. PROCEEDINGS OF THE 1847 ILLINOIS CONSTITUTIONAL CONVENTION, Aug. 23, 1847, *reprinted in* THE CONSTITUTIONAL DEBATES OF 1847, 854-55 (A.C. Cole ed. 1919) [hereinafter PROCEEDINGS IN 1847].

51. *Id.* at 855.

nesses in any court proceeding in the state if they denied the existence of God or had religious views incompatible with the freedom or safety of the state.⁵² The defeat of these proposals gives us little insight beyond that the delegates generally must have been satisfied with the protections contained in sections 3 and 4.

The debates in the 1869-70 Convention were more lively.⁵³ One delegate argued that sections 3 and 4 of the 1848 Constitution should be retained "as is":

They are comprehensive, clear, one-fourth shorter, and protect the religious liberty of every citizen of the State, beyond peradventure. They make the declaration broadly, without any proviso or 'if' or 'and,' and leave no excuse for future generations to persecute anybody.⁵⁴

The delegates, however, redrafted the provisions securing religious freedom, with many objecting to the qualification placed on liberty of conscience that exempted licentiousness and other acts inconsistent with the peace or safety of the state.⁵⁵

Supporters of the limitation on freedom of conscience argued that groups like the Mormons should not be permitted to come to Illinois to practice polygamy and other licentiousness.⁵⁶ Delegates debated at length whether religion meant only the "Christian" religion and whether non-Christian religions were to be included and, if so, how the term "religion" was to be defined.⁵⁷ The convention defeated a proposal to protect all opinion, not merely "religious" opinion.⁵⁸

The 1870 Constitution contained a new provision specifically prohibiting the expenditure of public funds for sectarian purposes.⁵⁹ This provision was included in the education article and

52. *Id.*

53. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS OF 1869-70, 1559-67 (1870) [hereinafter DEBATES OF 1870].

54. *Id.* at 1563.

55. *Id.*

56. *Id.* at 1560, 1564-65. The constitutions of California, New York and New Hampshire contained limitations on freedom of conscience.

57. *Id.* at 1560, 1563-64.

58. *Id.* at 1565-66. The Illinois Supreme Court later interpreted the 1870 Constitution to do away with religious tests. *Hroneck v. People*, 134 Ill. 139, 152-53, 24 N.E. 861, 865 (1890) (under the 1870 Illinois Constitution, "there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice.")

59. Article VIII, section 3 provided that:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, uni-

not in the bill of rights.⁶⁰ The delegates rejected a proposal to substitute language patterned after the first amendment⁶¹ and, after spirited debate, one that would have prevented school officials from excluding the Bible from schools.⁶²

The language or interpretation of the first amendment played no real part in the debates about religious freedom in these earlier constitutional conventions. Reference to "other constitutions" was inevitably to other state constitutions. Nothing in the Illinois provisions' language or in the constitutional debates leading to their adoption would cause one to conclude that Illinois simply should adopt the federal model or that Illinois courts should blindly follow the lead of the United States Supreme Court's interpretation of the first amendment when interpreting the Illinois Constitution's freedom of religion clauses.

The 1970 Illinois Constitution adopted without modification the freedom of religion clauses in the 1870 Constitution. In an analysis of the 1870 Illinois Constitution prepared for the Illinois Constitution Study Commission in 1969,⁶³ George D. Braden and Rubin G. Cohn commented upon the more detailed language regarding freedom of religion in the Illinois Constitution as compared to the federal Constitution. They speculated that it was unlikely any of the specific limitations in article I, section 3 went "beyond the more

versity, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose.

ILL. CONST. OF 1870 art. VIII, § 3.

60. The provision is similar to the prohibition against public funding for sectarian schools found in the 1846 New York Constitution. N.Y. CONST. of 1846, art. IX. The New York constitutional provision was adopted in reaction to requests by Catholics for public funds for parochial schools. Tarr, *Church and State in the States*, 64 WASH.L.REV. 73, 91-92 (1989). A similar amendment was proposed for the Federal Constitution in 1875. The so-called "Blaine Amendment" would have prohibited state funds from being used to support sectarian schools. The House and Senate debates reflected a pronounced anti-Catholic bias. 4 CONG. REC. 5580, 5587-91 (1876). For further discussion of the New York Constitution, see *infra* notes 70, 135, 163 and accompanying text.

61. 1 DEBATES OF 1870, *supra* note 53, at 62. In *Board of Educ. v. Bakalis*, 54 Ill. 2d 448, 474, 299 N.E.2d 737, 750 (1973) (Ryan, J., concurring), Justice Ryan stated that the rejection of this proposal "as a substitute for section 3 of Article VIII indicates to me that the framers of the constitution of 1870 did not intend that this section have the same meaning as the first amendment but that it be more restrictive insofar as public aid to sectarian schools is concerned." For further discussion of *Bakalis*, see *infra* notes 100-07, 110 and accompanying text.

62. 2 DEBATES OF 1870, *supra* note 53, at 1739-45, 1749-58.

63. G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* (1969).

general First Amendment's proscription on governmental power."⁶⁴ Nonetheless, they saw "the merit of defining with a fair degree of certainty the essential principles of religious freedom while expressing the principle of a reserved governmental power to protect the public interest."⁶⁵

Braden and Cohn suggested that the Illinois Supreme Court's interpretation of article VIII, section 3 seemed to allow more public support of sectarian institutions than might be permitted under the first amendment.⁶⁶ Additionally, they urged the delegates to take a fresh look at article VIII, section 3 and not to "abdicate" to the Bill of Rights simply because it might provide comparable protection.⁶⁷

On several occasions in the convention debates, delegates raised as an issue the relationship of the Illinois religion provisions to the first amendment. In response to a question whether article I, section 3 should be read the same as the first amendment, Leonard Foster, a delegate on the Bill of Rights Committee, noted that "if anything, this provision is somewhat more restrictive than the one in the Federal constitution."⁶⁸ Yet, when asked whether the courts had read section 3 the same as the first amendment, Foster replied, "It was our feeling that they were closely parallel, but not necessarily exactly the same."⁶⁹

More debate took place over the provision prohibiting public aid for sectarian purposes, currently found in article X, section 3 of the 1970 Constitution. New York's experience made an impact on the delegates and provided the reason for their decision to retain the language of the 1870 Constitution. The New York Constitution was similar to the Illinois Constitution, but it was changed to read like the first amendment. Fearing that this change signaled the allowance of greater aid to sectarian schools in the future, voters in New York defeated the entire constitution.⁷⁰

In Illinois, the issues surrounding article X, section 3 were similarly controversial. Betty Howard, a delegate on the Education Committee, reviewed the options available to the Committee and commented:

64. *Id.* at 16. *But see infra* text accompanying note 68.

65. G. BRADEN & R. COHN, *supra* note 63, at 18.

66. *Id.* at 405-08. *See infra* text accompanying notes 70-77.

67. G. BRADEN & R. COHN, *supra* note 63, at 408-09.

68. 3 RECORD OF PROCEEDINGS OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1372 (1972) (verbatim transcripts) [hereinafter RECORD OF 1970].

69. *Id.* at 1373.

70. *Id.* at 780. *See supra* note 60 and accompanying text.

Thus, our Education Committee decided to retain the present language and leave it unchanged in the belief that the present language is no more restrictive than the federal language, but rather it yields the same substantive results. Any program which is constitutional under the federal establishment clause is constitutional under the present wording of article VIII, section 3. Whether any particular program constitutes "aid" or "support" for prohibited sectarian purposes or is in the furtherance of non-sectarian purposes is a factual matter to be left to court determination.⁷¹

She conceded that some legal experts held the position that the Illinois language was less restrictive than the first amendment.⁷² Other delegates did not want to be too specific about the meaning of article X, section 3 and preferred to leave its construction to the courts. Voicing his disagreement with the Committee report's interpretation, Delegate Bernard Weisberg commented:

I do not believe that this Convention has authority to make any statement about the intention of the present constitutional provision which will be entitled to any weight in the courts. If, however, the courts do, some day, look to our debates, they should note that many of the delegates who vote today to retain Article VIII, Section 3, do so because we believe that it means what it says, and because we believe that it expresses wise policy.⁷³

The debates concerning the relationship between the Illinois provisions on religious freedom and the first amendment must be viewed in their historical context. The Sixth Illinois Constitutional Convention occurred at the end of the Warren Court era, a time when the United States Supreme Court had given perhaps the most expansive scope to the federal protection of individual liberties in that institution's long history. The delegates recognized that the Supreme Court's interpretation of the first amendment's establishment clause was more restrictive than the Illinois Supreme Court's interpretation of article VIII, section 3 of the 1870 Illinois Constitution. The delegates premised their comments about the relationship between the Illinois provisions and the federal provisions on that understanding.

The delegates also had to confront whether the Illinois provisions' interpretation would be changed if the United States Supreme Court changed its interpretation of the first amendment. In response to a question whether a decision by the Supreme Court

71. 6 RECORD OF 1970, at 780-81 (committee proposals).

72. *Id.* at 781.

73. *Id.* at 845.

in *Lemon v. Kurtzman*⁷⁴ would furnish a construction for article X, section 3, Delegate Malcolm Kamin responded:

We would have no express guideline except - and as the committee can only do - to the extent that our legal experts have said that the great likelihood is that the United States Supreme Court is going to be followed by the Illinois Supreme Court because of the similar past interpretations of the language. We can presume that they probably will follow the United States Supreme Court. There is no compulsion upon them to do so except as they are passing upon the matter as a federal question.⁷⁵

Kamin's response prompted a question as to whether article X, section 3 was a potential time bomb. If federal decisions became less restrictive, the Illinois Supreme Court still could hold that article X, section 3 prohibited public aid to sectarian schools. Kamin acknowledged this possibility.⁷⁶ An effort to prevent this result by deleting article X, section 3 from the Illinois Constitution failed.⁷⁷

B. Illinois Supreme Court Decisions

1. Pre-1970

Illinois Supreme Court decisions prior to 1970 show the court's willingness to grapple with the difficult legal issues presented in freedom of religion cases. In an early case involving both article II, section 3 and article VIII, section 3 of the 1870 Constitution, complainants sought to strike down a law that permitted the directors of a public school to allow a school house, when not occupied as a school, to be used "for religious meetings and Sunday schools, for evening schools and for literary societies, and for such other meetings as the directors may deem proper."⁷⁸ The court held that the law allowing an incidental use of the building that did not in-

74. 403 U.S. 602 (1971). *Lemon* was then pending and subsequently has supplied the legal framework for all establishment clause debate under the first amendment. The action challenged the constitutionality of state aid to, or for the benefit of, nonpublic schools. The Court's opinion in *Lemon* provides the analysis for cases involving state aid to religious schools. For further discussion of *Lemon*, see *infra* notes 103, 111 and accompanying text. For a further discussion of the meaning of article 3, § 4 see *infra* note 102 and accompanying text.

75. RECORD OF 1970, *supra* note 68, at 787.

76. *Id.* at 788.

77. *Id.* at 841-55. The effort to delete article X, section 3, failed by a 35 to 79 vote. *Id.* at 854.

78. *Nichols v. School Directors*, 93 Ill. 61, 62 (1879) (quoting ILL. REV. STAT. ch. 122, para. 39 (1874)). *Cf.* *Widmar v. Vincent*, 454 U.S. 263 (1981) (Supreme Court rejected the defendant's separation of church and state defense under the first amendment and held that a university could not bar a group that wanted to use its facilities for religious worship and discussion).

terfere with school purposes did not violate article VIII, section 3. The law conferred only an incidental benefit on religion and, hence, did not compel anyone to contribute without consent to the support of a ministry or place of worship.⁷⁹ In a subsequent case, the court held that in order to hold public school, a board of education could temporarily lease the basement of a Catholic church so long as the board continued to control the school, to select the teachers, and to prescribe the system of instruction.⁸⁰

In *Reichwald v. Catholic Bishop*,⁸¹ the Illinois Supreme Court held that article VIII, section 3 did not forbid a county from allowing the Catholic bishop to erect a chapel on a poor farm located on county land to be used for religious worship and funeral services. The bishop was to pay for the chapel, but the title to the building was to vest in the county. The court held that the county did not make a grant or donation but only a license to construct a building and permission, revocable at any time, to have religious and funeral services in the building.⁸²

Perhaps the most important case interpreting article VIII, section 3, *Dunn v. Chicago Industrial School for Girls*,⁸³ involved a request for an injunction to prevent the county from paying for the care and maintenance of girls committed by the juvenile court to a school under the Roman Catholic Church's control and management. All of the girls committed to the school were members of the Church. The school received fifteen dollars a month for each girl, less than it cost the state to maintain children in state institutions. The school's cost per girl exceeded fifteen dollars, an amount made up by donations, largely from the archbishop. In upholding the grant, the Illinois Supreme Court stated that

[t]he constitutional prohibition against furnishing aid or preference to any church or sect is to be rigidly enforced, but it is contrary to fact and reason to say that paying less than the actual cost of clothing, medical care and attention, education and training in useful arts and domestic sciences, is aiding the institution where such things are furnished.⁸⁴

Relying solely on the 1870 Illinois Constitution, the Illinois

79. *Nichols*, 93 Ill. at 63.

80. *Millard v. Board of Educ.*, 121 Ill. 297, 10 N.E. 669 (1887).

81. 258 Ill. 44, 101 N.E. 266 (1913).

82. *Id.* at 48, 101 N.E. at 267.

83. 280 Ill. 613, 117 N.E. 735 (1917).

84. *Id.* at 618, 117 N.E. at 737. The delegates to the 1970 Convention were warned that the *Dunn* decision was probably less restrictive and therefore may conflict with more recent United States Supreme Court decisions interpreting the First Amendment. G. BRADEN & R. COHN, *supra* note 63, at 405-08.

Supreme Court banned Bible reading in the public schools more than fifty years before the United States Supreme Court did so under the first amendment.⁸⁵ In *People ex rel. Ring v. Board of Education*,⁸⁶ members of the Roman Catholic faith objected to Bible reading, the singing of hymns and the repeating of the Lord's prayer in the public schools.⁸⁷ The court recognized that "[t]he free enjoyment of religious worship includes freedom not to worship."⁸⁸ The court reviewed the constitutional provisions and court decisions of a number of states and finally concluded that "the exercises mentioned in the petition constitute religious worship and the reading of the Bible in the school constitutes sectarian instruction" in violation of the Illinois Constitution.⁸⁹

85. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

86. 245 Ill. 334, 92 N.E. 251 (1910). See *infra* notes 95, 175 and accompanying text (additional discussion of *Ring*).

87. The claim alleged that this conduct violated the first amendment, article II, section 3 and article VIII, section 3 of the 1870 Illinois Constitution.

88. *Id.* at 340, 92 N.E. at 252.

89. *Id.* at 352, 92 N.E. at 257. The Illinois Supreme Court eloquently described the relationship between religion and the state:

It is true that this is a Christian State. The great majority of its people adhere to the Christian religion. No doubt this is a Protestant State. The majority of its people adhere to one or another of the Protestant denominations. But the law knows no distinction between the Christian and the Pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differences, because the constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. There can be no distinction based on religion. The State is not, and under our constitution cannot be, a teacher of religion. All sects, religious or even anti-religious, stand on an equal footing. They have the same rights of citizenship, without discrimination. The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. No one denies their importance. No one denies that they should be taught to the youth of the State. The constitution and the law do not interfere with such teaching, but they do banish theological polemics from the schools and school districts. This is done, not from any hostility to religion, but because it is no part of the duty of the State to teach religion, - to take the money of all and apply it to teaching the children of all the religion of a part, only. Instruction in religion must be voluntary. Abundant means are at hand for all who seek such instruction for themselves or their children. Organizations whose purpose is the spreading of religious knowledge and instruction exist, and many individuals, in connection with such organizations and independently, are devoted to that work. Religion is taught, and should be taught, in the churches, Sunday schools, parochial and other church schools and religious meetings. Parents should teach it to their children at home, where its truths can be most effectively enforced. Religion does not need an alliance with the State to encourage

With *Ring* as ammunition, complainants attacked many other school boards' policies. In *People ex rel. Latimer v. Board of Education*,⁹⁰ the Illinois Supreme Court upheld a school board policy allowing pupils to be excused for one hour each week to attend religious instruction off the school grounds. The court rejected arguments based on the first amendment, article II, section 3 and article VIII, section 3 of the 1870 Illinois Constitution.⁹¹ Distinguishing *Ring*,⁹² the court stated that, "[t]here is no charge that the action of the school board here is discriminatory or that any particular denomination or religious faith is favored, or that any part of the religious instruction is held in the schoolroom or on school property."⁹³

In another case, the Illinois Supreme Court also held that it did not violate the Illinois Constitution to invite outside teachers into the public schools to offer religious instruction during the hours when the public schools were regularly in session.⁹⁴ The school administration did not require the students to attend the classes, and the school board provided no moneys in connection with the classes. The court again distinguished *Ring*,⁹⁵ this time reasoning that the classes were voluntary and not part of the public school program.⁹⁶ The court instead found the program to be analogous in all respects to the program upheld in *Latimer*.⁹⁷ Any incidental expense connected to the program was *de minimis* and, hence, did

its growth. The law does not attempt to enforce christianity. Christianity had its beginning and grew under oppression. Where it has depended upon the sword of civil authority for its enforcement it has been weakest. Its weapons are moral and spiritual and its power is not dependent upon the force of a majority. It asks from the civil government only impartial protection and concedes to every other sect and religion the same impartial civil right. 'United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated the better it is for both.'

Id. at 349-50, 92 N.E. at 255-56 (quoting *Board of Educ. v. Minor*, 23 Ohio St. 211 (1872)).

90. 394 Ill. 228, 68 N.E.2d 305 (1946).

91. *Id.*

92. 245 Ill. 334, 92 N.E. 251.

93. *Latimer*, 394 Ill. at 234, 68 N.E.2d at 309. The United States Supreme Court reached the same result under the First Amendment in *Zorach v. Clauson*, 343 U.S. 306 (1952).

94. *People ex rel. McCollum v. Board of Educ.*, 396 Ill. 14, 71 N.E.2d 161 (1947), *rev'd*, 333 U.S. 203 (148). See *infra* note 99 and accompanying text (for additional discussion of *McCollum*).

95. 245 Ill. 334, 92 N.E. 251.

96. *McCollum*, 396 Ill. at 20-21, 71 N.E.2d at 164.

97. *Id.* at 23, 71 N.E.2d at 165.

not violate article VIII, section 3.⁹⁸ Although the Illinois Supreme Court's interpretation of the Illinois Constitution was final, its interpretation of the first amendment was not, and the United States Supreme Court ultimately held that the program violated the establishment clause of the first amendment.⁹⁹

All of these cases are significant because the Illinois Supreme Court gave careful analysis to the Illinois constitutional provisions at issue. Eschewing rigid tests and slogans, the court pragmatically considered the facts of each case against the language used in the Illinois Constitution.

2. After 1970

Since 1970, the Illinois Supreme Court has shown less independence from the United States Supreme Court. In *Board of Education v. Bakalis*,¹⁰⁰ the court considered the constitutionality of a state law that required a school board to provide the same transportation along its regular school bus routes for non-public school pupils as it did for public school pupils. The plaintiffs argued that the school busing law violated article I, section 3 because it granted a preference to Catholic schools, the chief beneficiaries of the law. The Illinois Supreme Court took its cue from the United States Supreme Court¹⁰¹ and held that the opinion expressed by the Education Committee of the Sixth Constitutional Convention, as well as the understanding of the convention and of the voters who adopted the 1970 Constitution, was that the Illinois school busing law did not violate article X, section 3.¹⁰² Refusing to apply any

98. *Id.* at 24-25, 71 N.E.2d at 165-66.

99. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) ("This is beyond all question a utilization of the tax established and tax supported public school system to aid religious groups to spread their faith.")

100. 54 Ill. 2d 448, 299 N.E.2d 737 (1973). *See supra* note 61 and accompanying text (for additional discussion of *Bakalis*).

101. *Everson v. Board of Educ.*, 330 U.S. 1 (1947) holding that governmental reimbursement to parents for the transportation of students to and from parochial schools does not violate the first amendment).

102. *Bakalis*, 54 Ill. 2d at 464-65, 299 N.E.2d at 745. The Illinois Supreme Court quoted at length the Committee on Education's report. *Id.* at 462-64, 299 N.E.2d at 744-45. The report stated in part that:

The Committee is of the opinion that the Illinois Supreme court in the cases of *Dunn v. Chicago Industrial School for Girls* [281 Ill. 352, 117 N.E. 993 (1917)], *Trost v. Ketteler Manual Training School* [282 Ill. 504, 118 N.E. 743 (1918)], and *St. Hedwig's Industrial School for Girls v. Cook County* [289 Ill. 432, 124 N.E. 629 (1919)] has interpreted the words 'aid,' 'support or sustain,' and 'secular purpose' to yield the same results as the United States Supreme Court's interpretation of the word 'establish' in the Federal First Amendment. In addition, since the testimony of legal authorities . . . has indicated that the present

independent analysis, the court concluded:

The same secular purpose, primary neutral effect and absence of excessive government entanglement which place section 29-4 outside the prohibition of section 3 of Article X against the use of public funds for sectarian purposes also place it outside the prohibition of Section 3 of Article I against any preference being given by law to any religious denomination.¹⁰³

In a special concurring opinion, Justice Ryan stated that although he agreed with the result, he did not equate article X, section 3 with the first amendment.¹⁰⁴ He noted the extensive debates which accompanied the provision's addition to the constitution in 1870.¹⁰⁵ The delegates' rejection of a substitute clause that read like the first amendment indicated to Justice Ryan "that the framers of the constitution of 1870 did not intend that this section have the same meaning as the first amendment but that it be more restrictive insofar as public aid to sectarian schools is concerned."¹⁰⁶ Regarding the more ambiguous debates that occurred in 1970, Justice Ryan concluded that "this subject was a controversial issue which the delegates were reluctant to face"; therefore they sidestepped the issue by indicating that someday the court might say that article X, section 3 means no more than the first amendment.¹⁰⁷

The Illinois Supreme Court was even more explicit about the relationship between article X, section 3 and the first amendment in *People ex rel. Klinger v. Howlett*,¹⁰⁸ a case involving financial assistance for non-public elementary and secondary schools. Finding *Bakalis* controlling, Justice Schafer stated that:

[S]ection 3 of article X of the Illinois Constitution of 1970 imposes restrictions concerning establishment of religion that are

language is no more restrictive than the Federal language but rather yields the same substantive results, the Committee has concluded that any program which is constitutional under the Federal 'establishment' clause is constitutional under the present word of ARTICLE VIII, Section 3.

Id. at 463-64, 299 N.E.2d at 744-45 (quoting RECORD OF 1970, *supra* note 68, at 252-53) (citation omitted).

103. *Id.* at 466, 299 N.E.2d at 746. The court applied the same test used by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *infra* 111 note and accompanying text (for further discussion of the *Lemon* decision).

104. *Bakalis*, 54 Ill. 2d at 472-73, 299 N.E.2d at 749 (Ryan, J., specially concurring).

105. *Id.* at 473, 299 N.E.2d at 750 (Ryan, J., specially concurring). For a discussion of the 1869-70 Convention debates, see *supra* notes 53-62 and accompanying text.

106. 54 Ill. 2d at 474, 299 N.E.2d at 750 (Ryan, J., specially concurring).

107. *Id.* at 476, 299 N.E.2d at 751 (Ryan, J., specially concurring). For a discussion of the Sixth Illinois Constitutional Convention debates, see *supra* notes 68-77 and accompanying text.

108. 56 Ill. 2d 1, 305 N.E.2d 129 (1973).

identical to those imposed by the first amendment to the constitution of the United States. Thus, any statute which is valid under the first amendment is also valid under the constitution of Illinois.¹⁰⁹

Significantly, in construing article I, section 3 in *Bakalis*,¹¹⁰ the court had used the three-part *Lemon v. Kurtzman*¹¹¹ test which the United States Supreme Court employed to interpret the establishment clause of the first amendment. The court applied the same test in *Preschool Owners Association v. Department of Children and Family Services*,¹¹² a case in which the plaintiffs argued that the Child Care Act of 1969, which exempted sectarian day care programs from coverage, provided a preference for religious day care centers. Because the Act satisfied all three parts of the *Lemon* test,¹¹³ the court concluded that it did not violate the establishment clause of the first amendment or provide an "invalid religious preference under the State Constitution."¹¹⁴

III. FREEDOM OF SPEECH, PRESS AND ASSEMBLY UNDER THE ILLINOIS CONSTITUTION

There has been even less activity under the speech, press, and assembly provisions of the Illinois Constitution than under the religion provisions. Article I, section 4 of the 1970 Illinois Constitution provides: "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 mo-

109. *Id.* at 3-4, 305 N.E.2d at 130.

110. Board of Educ. v. Bakalis, 54 Ill. 2d 448, 465, 299 N.E.2d 737, 745-46 (1973). See *supra* note 100-07 and accompanying text (for further discussion of *Bakalis*).

111. 403 U.S. 602 (1971). The Supreme Court in *Lemon* held that

[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'

Id. at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citations omitted). See *supra* note 74, 103 and accompanying text (for further discussion of *Lemon*).

112. 119 Ill. 2d 268, 518 N.E.2d 1018, *appeal dismissed*, 108 S. Ct. 2861 (1988).

113. 119 Ill. 2d at 281, 518 N.E.2d at 1025. The statute had several secular purposes, including alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. *Id.* at 279-81, 518 N.E.2d at 1024-25. The statute's effect neither advanced nor inhibited religion because a number of non-religious institutions enjoyed the same benefit and the statute avoided state entanglement with religion. *Id.*

114. *Id.* at 281, 518 N.E.2d at 1025.

tives and for justifiable ends, shall be a sufficient defense."¹¹⁵ The only difference between the 1970 and the 1870 Constitution is that the 1870 provision was more specific: "Every person may freely speak, write and publish on all subjects."¹¹⁶

The 1848 Illinois Constitution's provisions on free speech were substantively identical to the 1818 provisions governing the same area.¹¹⁷ Both granted broad protections to freedom of speech and press. The provision granting the right of assembly has remained virtually unchanged since 1818: "[t]he people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances."¹¹⁸ The 1818 and 1848 Constitutions provided for the people's right "to instruct their representatives, and to apply to the general assembly for redress of grievances," but in 1870 this was broadened to "to make known their opinions to their representatives and to apply for redress of grievances."¹¹⁹

A. Legislative History

Given the primacy of speech, press, and assembly rights in our constitutional framework, it is surprising that these rights have received so little discussion in the various Illinois constitutional conventions. Instead of developing a new provision, the delegates in

115. ILL. CONST. OF 1970, art. I, § 4.

116. ILL. CONST. OF 1870, art. II, § 4. In 1970, the delegates eliminated the last three words, "on all subjects."

117. § 23. The printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly, or of any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty.

ILL. CONST. OF 1848, art. XIII, § 23.

§ 24. In prosecutions for the publication of papers investigating the official conduct of officers, or of men acting in a public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the jury shall have the right of determining both the law and the fact, under the direction of the court, as in other cases.

ILL. CONST. OF 1818, art. VIII, § 24.

118. See ILL. CONST. OF 1970, art. I, § 5; ILL. CONST. OF 1870, art. II, § 17; ILL. CONST. OF 1848, art. XIII, § 21; ILL. CONST. OF 1818, art. VIII, § 19. The 1970 Constitution inserted a comma after the word "manner" that previously was not there. For further discussion of this change see *infra* text accompanying note 136.

119. *Id.* Each of these clauses differs substantially in wording from the first amendment, which provides succinctly that: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

1818 borrowed largely from the Ohio, Kentucky, Tennessee and Indiana constitutions.¹²⁰ Some of the discussion that did occur concerned the issue of race. Delegates to the 1847 Convention attempted to amend article VIII, section 19 of the 1818 Constitution to include provisions that interracial marriage would be illegal and that black persons would be prohibited from holding public office in the state, but this amendment was soundly defeated.¹²¹

Most of the freedom of speech and press debate in the 1970 Convention centered upon the relationship between federal and state constitutional restrictions on the law of libel. In the seminal case on libel law, *New York Times v. Sullivan*,¹²² the Court held that state tort actions for libel were subject to federal review under the first amendment. Under the *New York Times* test, a public official could not recover damages for a defamatory falsehood relating to official conduct unless the plaintiff proved "that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹²³ The Court subsequently extended that opinion to protect "public figures."¹²⁴

In *Farnsworth v. Tribune Co.*,¹²⁵ the Illinois Supreme Court considered the impact of *New York Times* on article II, section 4 of the 1870 Illinois Constitution. The plaintiff was an osteopathic physician who claimed that she was libelled by a newspaper article that labelled her a "quack." She argued that the trial court erred by refusing to give the following instruction to the jury based on article II, section 4: "Truth is a defense in a libel action only when published with good motives and for justifiable ends."¹²⁶ The court held that medical quackery was an area of "critical public concern" and that the trial court correctly refused the instruction because article II, section 4 was "federally unconstitutional . . . to the extent that it would require a defendant who had published state-

120. J. CORNELIUS, *supra* note 49, at 16.

121. PROCEEDINGS IN 1847, *supra* note 50, at 871. Article VIII, section 19 of the 1818 Constitution concerned freedom of assembly.

122. 376 U.S. 254 (1964).

123. *Id.* at 279-80.

124. *See* *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The subsequent development of the "public figure" standard was not without controversy in the Supreme Court. In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), a plurality led by Justice Brennan suggested that the determination should be based on the subject matter of the publication rather than on the status of the plaintiff. Yet, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that the individual's status is determinative and that "private individuals" do not have to meet the *New York Times* "actual malice" standard.

125. 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

126. *Id.* at 288, 253 N.E.2d at 409.

ments about public affairs or of public interest and concern to prove that they were true, and published with good motives and for justifiable ends.”¹²⁷

Despite the *Farnsworth* opinion, a majority of the Bill of Rights Committee recommended to retain the language of article II, section 4 of the 1870 Constitution in the 1970 Constitution.¹²⁸ A minority of the committee argued that because the libel clause of article II, section 4 was not federally constitutional, it should be deleted from the 1970 Constitution, or, in the alternative, the language should be changed to shift the burden to the plaintiff to establish lack of truth and deliberate malice.¹²⁹ One of the delegates questioned whether it might not be better simply to adopt the language of the first amendment, but Elmer Gertz, the chair of the Bill of Rights Committee, responded that because the fourteenth amendment incorporated the Bill of Rights,

it may be that we are reaching a day when, except to create additional rights, we'll all be governed by the Federal Bill of Rights; but that day has not been reached, and I think it is still well to give individual citizens those rights afforded by the Illinois bill of rights.¹³⁰

The delegates defeated a minority proposal to delete the libel

127. *Id.* at 292, 253 N.E.2d at 411.

128. Leonard Foster, a delegate who served on the Committee, explained the Committee's reluctance to change the law and its preference to let the law "follow its course":

It is not our intent, as was suggested in committee debate, to thumb our noses at the Supreme Court of either Illinois or the United States, but rather since this provision carries with it that load of baggage which the courts have added to it and since the courts are still actively dealing with this subject, the majority felt that rather than try to rewrite the section in terms of today's court opinions, we would just leave it alone and let the courts deal with it as they may.

RECORD OF 1970, *supra* note 68, at 1400.

129. *Id.* at 1401-02.

130. *Id.* at 1403. Gertz indicated that the committee considered incorporating the first amendment, but

for various reasons - some practical and some a matter of principle - we stood by the language of the 1870 Constitution, in some instances the 1848 and 1818 Constitutions. In Illinois, those rights have been spelled out more fully. We felt - we had, for example, a matter of great moment as to whether or not we would have section 3 [freedom of religion] remain. We felt that we would unleash an unnecessary controversy and get the Convention involved in troubles that went beyond the troubles we already have, and so we stood by it.

We felt that there were certain elements added by the more expansive language in the Illinois bill of rights, and we felt that every protection that the citizen has by reason of the First Amendment, of course, he would continue to have by reason of the Illinois language and perhaps added protections in the field of libel and perhaps in other fields.

Id. Delegate Foster added that "the committee strongly feels there is a state of Illinois. It's the purpose of the Constitution of Illinois to describe the shape of Illinois govern-

clause from section 4.¹³¹ Delegate Dawn Clark Netsch then moved to insert the phrase "involving private matters and private persons," after the word "libel."¹³² This provision would have made section 4 consistent with current United States Supreme Court decisions on the first amendment, but the proposal was defeated overwhelmingly.¹³³

The debates clearly show that the delegates intended article I, section 4 of the 1970 Illinois Constitution to be independent of the federal Constitution.¹³⁴ Though the delegates recognized the federal Constitution's supremacy in the event of a conflict, they also recognized that the Illinois speech and press provisions could be interpreted more expansively than their federal counterparts.¹³⁵

The right to assemble contained in article I, section 5 of the 1970 Constitution was the subject of some debate in the 1970 Constitutional Convention. The delegates agreed to insert a comma after "the right to assemble in a peaceable manner,"¹³⁶ and before "to consult for the common good," to ensure that the right to assemble was an independent right, not subject to qualification by any of the succeeding phrases.¹³⁷ The Bill of Rights Committee also proposed to insert the phrase "to associate freely" as part of section 5 to substitute for an even more specific proposal that gave an illustra-

ment, and, therefore, if we simply relied on the Federal Bill of Rights we would end up with a document that was grossly incomplete." *Id.*

131. *Id.* at 1412.

132. *Id.* at 1413.

133. *Id.* In opposing the amendment, Delegate Foster stated that:

The [bill of rights] committee feels that it is not necessary or desirable to attempt to bring the existing provision fully into accord with yesterday's court decision, but rather to let it ride by itself and let the courts do with it what they may; and if they decide to go in another direction and go back toward what we had in 1870, we will not have embalmed and interred in our constitution what appears to be the current thinking in the state of the law, which as far as we can tell is an extreme state of flux. We would oppose the restrictions suggested by the amendment.

Id.

134. *See supra* text accompanying notes 120-33.

135. Similarly, the New York Court of Appeals has held that, independent of the federal Constitution, newspaper reporters enjoy a qualified privilege under the New York Constitution to withhold materials which, although the product of newsgathering, were not obtained in confidence. Accordingly, these materials are not protected under New York's Shield Law. *O'Neill v. Oakgrove Constr., Inc.*, 72 N.Y.2d 910, 528 N.E.2d 1231, 532 N.Y.S.2d 758 (1988).

136. *See supra* note 118 and accompanying text.

137. RECORD OF 1970, *supra* note 68, at 1480 (1970). One delegate, Father Lawlor, explained that the "new version assures that the people have the right to assemble in a peaceable manner, even though their purpose is other than to consult for the common good, or to make *known* their opinions to their representatives, or to apply for redress of grievances." *Id.* (emphasis added).

tive list of protected groups and parties.¹³⁸ Some committee members had been fearful that the clause might be used to sanction discriminatory housing practices.¹³⁹ After receiving assurances that this was not the case, the committee unanimously supported the “to associate freely” provision.¹⁴⁰ The delegates, nevertheless, finally voted to delete the words “to associate freely” from section 5.¹⁴¹

In addition, the delegates proposed to insert the words “to organize and bargain collectively,” following the word “good” in section 5, but this amendment failed in a voice vote. The delegates felt that existing language already protected that right.¹⁴² All of these amendments and proposed amendments demonstrate that the delegates were interested in expanding, and not diminishing, freedom of assembly in section 5 of the 1970 Constitution.

B. *Illinois Supreme Court Decisions*

The Illinois Supreme Court has analyzed the freedom of speech, press, and assembly provisions of the Illinois Constitution in relatively few cases. In an early case, *People v. Apfelbaum*,¹⁴³ the court held that a state law making advertising under a false name reason for refusing or revoking a medical license did not violate article II, section 4 of the 1870 Constitution because

[a] citizen may advertise his business in any legitimate manner,

138. The original proposal stated that

[t]he affirmative right of individuals, without prejudice to the common good, to publicly and privately communicate, freely organize, and associate with others for the purpose of protecting their inherent and inalienable rights of life, liberty, ownership of property, and the pursuit of happiness for maintaining or furthering their common-group cultural, social, and economic interests and standards shall forever be guaranteed by law. This affirmative right shall be understood to apply to all types of legitimate unions, guilds, societies, sects, parties, clubs, and other units to which the members freely and for honest and just purposes mutually choose to be identified with or to cooperate with each other, in particular civic, political, religious, patriotic, intellectual, esthetic, scientific, professional, trade, racial, ethnic, athletic, geographical, or similarly oriented groups. Malicious, deliberate, and unreasonable discrimination or exclusion based on prejudice such as race, color, religious belief, political creed, national origin, sex, or other factors totally unrelated to the purpose of the association shall be unlawful.

Id.

139. *Id.* at 1481.

140. *Id.*

141. *Id.* at 1487. The debate indicates that the delegates considered the right to associate freely to be protected by existing language in the Illinois Constitution. *Id.*

142. *Id.* at 1489. The debate made clear that the delegates were not opposed to collective bargaining when they defeated this amendment. *Id.*

143. 251 Ill. 18, 26-27, 95 N.E. 995, 998 (1911).

but it is a legitimate exercise of the police power in protecting the public against the deception and fraud practiced by irresponsible pretenders and quack doctors to require every physician to have the license of the State Board of Health granted in his own name and to practice or advertise under no other.¹⁴⁴

The court provided no analysis to support this assertion, and it did not refer to the federal Constitution. Although the court implied that advertising is a form of speech protected by the Illinois Constitution,¹⁴⁵ it held that due process does not require a judicial hearing when that speech is questioned.¹⁴⁶

In *People v. Lloyd*,¹⁴⁷ defendants were convicted of conspiracy to advocate the violent overthrow of the United States government in violation of an extremely broad Illinois statute passed in 1919 making such advocacy illegal.¹⁴⁸ The defendants argued that the statute violated article II, section 9 of the 1870 Illinois Constitution because it did not sufficiently define what constituted an abuse of the right of free speech.¹⁴⁹ The Illinois Supreme Court, however, held that the "clear and present danger" test, enunciated by the United States Supreme Court in *Schenck v. United States*, limited freedom of speech and press under section 4.¹⁵⁰

Significantly, the court analyzed the case only under section 4

144. *Id.* at 26-27, 95 N.E. at 998.

145. The court stated that "[t]he part of section 6 which makes advertising under a false name a reason for refusing or revoking a certificate does not violate sections 1, 2 or 4 of article 2 or section 22 of article 4 of the State constitution or the fourteenth amendment of the Federal constitution." *Id.* The Illinois Supreme Court did not further develop the right to advertise as an Illinois freedom of speech issue, after the *Apfelbaum* opinion and before more recent Supreme Court opinions holding that the first amendment protects commercial advertising. *E.g.*, *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). *But see* *Cordak v. Reuben H. Donnelly, Corp.*, 20 Ill. 2d 153 (1960), *appeal denied*, 365 U.S. 299 (1961) (Illinois Supreme Court upheld Dental Practice Act that restricted nature and content of advertisements by dental laboratory technicians); *People ex rel. Chicago Dental Soc'y v. A.A.A. Dental Laboratories, Inc.*, 8 Ill. 2d 330, 134 N.E.2d 285, *appeal dismissed*, 352 U.S. 863 (1956); *Lasdon v. Hallihan*, 377 Ill. 187, 36 N.E.2d 227 (1941).

146. *Apfelbaum*, 251 Ill. at 27, 95 N.E. at 998. The United States Supreme Court has held that a judicial determination is required when first amendment rights are to be restrained. *See Freedman v. Maryland*, 380 U.S. 51 (1965).

147. 304 Ill. 23, 136 N.E. 505 (1922).

148. *Lloyd*, 304 Ill. at 29, 136 N.E. at 510 (citing 1919 ILL. LAWS 420).

149. *Id.* at 34-35, 136 N.E. at 512.

150. *Id.* at 38, 136 N.E. at 513 (citing *Schenck v. United States*, 249 U.S. 47 (1919)). In following *Schenck*, the court adopted the reasoning of similar holdings of the New Jersey Supreme Court and the New York Court of Appeals. *See State v. Boyd*, 86 N.J.L. 75, 91 A. 586 (1914), *aff'd*, 93 A. 599 (1915) (freedom to advocate sabotage during a strike not protected by the constitution); *People v. Most*, 171 N.Y. 423, 64 N.E. 175 (1902) (state constitutional rights not violated by conviction for publishing an article advising revolution and murder).

and not under the first amendment. It is not clear, therefore, whether the "clear and present danger" test is still the standard for analyzing these issues in Illinois, especially because the Supreme Court has called the "clear and present danger" test into question under the first amendment, at least in cases involving the advocacy of violence.¹⁵¹

One year after *Lloyd*, the Illinois Supreme Court held that no person could be prosecuted, either in a civil or a criminal action, for libel against the government.¹⁵² While recognizing that any person who, by speech or writing, seeks to persuade others to violate the law or to overthrow the government by force can be punished, the court held that all other utterances or publications against the government must be considered absolutely privileged.¹⁵³ Once again, the court premised its decision on article II, section 4 of the 1870 Illinois Constitution and not on federal law.

In 1940, the Illinois Supreme Court explicitly recognized, for the first time, the independence of article II, section 4 in the 1870 Illinois Constitution from the first amendment. In *Village of South Holland v. Stein*,¹⁵⁴ the court found it unconstitutional for a village to require door-to-door solicitors to obtain a license.¹⁵⁵ After examining Supreme Court opinions that analyzed whether the first amendment invalidated similar licensing requirements, the Illinois Supreme Court noted that "[t]he 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."¹⁵⁶

Similarly, in *Montgomery Ward and Company v. United Retail Wholesale and Department Store Employees*,¹⁵⁷ the court held that article II, section 4 prohibited the courts from enjoining the publi-

151. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Court failed to discuss *Schenk* in knocking down statute outlawing speech that advocated violence as a means to obtain reform). See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment"); *Dennis v. United States*, 341 U.S. 494, 510-11 (1951) (a conspiracy to advocate overthrow of the government, even with no chance of success, constitutes the requisite danger).

152. *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923) (newspaper reported that city was "broke" and was "headed for bankruptcy").

153. 307 Ill. at 606-07, 139 N.E. at 90.

154. 373 Ill. 472, 26 N.E.2d 868 (1940).

155. *Id.* at 480, 26 N.E.2d at 871. In *Stein*, the solicitors were book canvassers who solicited subscriptions for books for future delivery.

156. *Id.* at 479, 26 N.E.2d at 871.

157. 400 Ill. 38, 79 N.E.2d 46 (1948).

cation of defamatory matters.¹⁵⁸ The court again proclaimed that article II, section 4 "is broader than that of the constitution of the United States, which merely prohibited Congress from making any law abridging freedom of speech or of the press. It will be noted that [in Illinois] the person may speak, write, or publish, being responsible for an abuse."¹⁵⁹

Merely because Illinois courts had interpreted article II, section 4 of the 1870 Illinois Constitution more broadly than the first amendment did not mean that Illinois viewed obscenity as a protected form of speech. In *Cusack v. Teitel Film Corp.*,¹⁶⁰ defendants had argued that the Illinois Constitution protected obscenity as a form of free expression. The defendants contended that although obscenity is exempt from first amendment protection under *Roth v. United States*,¹⁶¹ the Illinois Constitution allows a "broader and more permissive approach" to obscenity.¹⁶² The Illinois Supreme Court not only disagreed, it went a step further and stated "we herewith specifically adopt the reasoning set down by the United States Supreme Court in *Roth* and hold that the language of section 4 of article II of the Illinois constitution does not extend to a protection of obscenity."¹⁶³ *Cusack* is significant be-

158. *Id.* at 46, 79 N.E.2d at 50. The court suggested that persons could be punished for libel by way of damages or criminal penalties, but the language of section 4, article II did not adjust itself to preventive relief from a libel by way of an injunction. *Id.*

159. *Id.*

160. 38 Ill. 2d 53, 230 N.E.2d 241 (1967), *rev'd*, *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968). See *infra* note 174 and accompanying text (additional discussion of *Cusack*).

161. 354 U.S. 476 (1957).

162. 400 Ill. 38, 79 N.E.2d 46.

163. *Id.* at 59, 230 N.E.2d at 246. Actually, the Illinois Supreme Court had held in a pre-*Roth* opinion that the censorship of obscene motion pictures did not violate either the federal Constitution or article II, section 4 of the 1870 Illinois Constitution. *ACLU v. Chicago*, 3 Ill. 2d 334, 121 N.E.2d 585 (1954), *appeal dismissed*, 348 U.S. 979 (1955). The standard articulated in *ACLU* anticipated the standard adopted in *Roth* by the United States Supreme Court three years later.

The Illinois Supreme Court also refused to protect obscenity under the right to privacy, contained in article I, section 6 of the 1970 Constitution, holding that this right confers no right to possess child pornography in one's own home. *People v. Geever*, 122 Ill. 2d 313, 522 N.E.2d 1200 (1988), *appeal dismissed*, 109 S. Ct. 299 (1988). Although this is the majority view under state constitutions, at least two states differ. The Oregon Supreme Court has held that obscenity is a form of speech protected by the Oregon Constitution, *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987), and the Hawaii Supreme Court has relied on its state constitutional right to privacy to uphold the sale of pornographic magazines. *State v. Kam*, 69 Hawaii 483, 748 P.2d 372 (1988).

Interestingly, in *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844, *rev'd*, 478 U.S. 697 (1986), the New York Court of Appeals held that an order closing a business that sold adult books and that showed sexually explicit movies, in order to curtail the illegal acts of the store's customers, violated the

cause the Illinois Supreme Court again acknowledged that article II, section 4 of the 1870 Constitution is independent of the first amendment. The court simply held that in the area of obscenity, Illinois law is the same as federal law.

With regard to free expression while on private property, some state courts have found that the right to exercise free speech in a modern shopping center complex exists as an independent state constitutional right.¹⁶⁴ Nevertheless, the Illinois Supreme Court has held that persons have no right to distribute leaflets in a privately-owned shopping center.¹⁶⁵ The court focused, however,

right to freedom of expression found in the New York Constitution. The court stated that

in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.

Id. at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846. The court indicated that the Bill of Rights is merely a minimal standard, and that “[t]he function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State.” *Id.* According to the court, the Supreme Court’s rulings on obscenity are governed by community standards, and “New York has a long history of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community.” *Id.*

In *People v. Dietz*, 1989 N.Y. LEXIS 4417, the New York Court of Appeals struck down the state’s anti-harassment statute, which prohibits “abusive” language with the intent to “harass” or “annoy” another person. The court held that the New York Constitution provided an independent basis for its holding. *Id.* at *1 n.1 (citing N.Y. PENAL LAW § 240.25 (2) (McKinney 1989)). See N.Y. Times, Jan. 8, 1990, at 12, col. 1.

164. See, e.g., *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff’d*, 447 U.S. 74 (1980); *Batchelder v. Allied Stores*, 388 Mass. 83, 445 N.E.2d 590 (1983) (relying on state constitutional provision protecting access to the ballot rather than free speech). Cf. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* (1982), *Princeton University v. Schmid*, 455 U.S. 100 (1982) (access to private school campus); *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981) (access to private school campus).

Other state supreme courts, however, have refused to interpret their constitutions to confer such a right. *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Woodland v. Michigan Citizens’ Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *State v. Folmet*, 302 N.C. 173, 273 S.E.2d 708 (1981); *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

165. *People v. Sterling*, 52 Ill. 2d 287, 287 N.E.2d 711 (1972) (no federal constitutional right to distribute leaflets regarding racial situation in completely enclosed private shopping mall). Although in *PruneYard*, the Supreme Court allowed protection of expression in a privately-owned mall to flow from state constitutional provisions, the Court has held that the right does not exist under the first amendment. See *Hudgens v. NLRB*, 424 U.S. 507 (1976).

solely on property rights and did not independently analyze article I, sections 4 and 5 of the 1970 Illinois Constitution.¹⁶⁶

In *Troman v. Wood*,¹⁶⁷ the Illinois Supreme Court chose to follow the minimum standard allowed by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*¹⁶⁸ by applying the negligence standard to non-public figure plaintiffs in defamation actions. *Gertz* held that a publisher of a defamatory falsehood against a private individual cannot claim a constitutional privilege against liability. Furthermore, *Gertz* stated that so long as states do not impose liability without fault, they may define for themselves the appropriate standard of liability for the publisher of a defamatory falsehood against a private individual.¹⁶⁹

In *Troman*, the court stated that from the outset Illinois Constitutions had recognized a person's "reputation" as a fundamental interest and that both the 1870 and the 1970 Illinois Constitutions "recognize the interest of the individual in the protection of his reputation, for they provide that the exercise of the right to speak freely shall not relieve the speaker from responsibility for his abuse of that right."¹⁷⁰ Thus because of its independent analysis of the Illinois Constitution, the court chose to follow *Gertz*.

The Illinois Supreme Court may have gone beyond the Supreme Court in defining who a public official is for purposes of public interest discussion under *New York Times v. Sullivan*.¹⁷¹ For example, the court unambiguously has classified a police patrolman as a "public official" because his duties are "highly charged with the public interest."¹⁷²

IV. CONCLUSION

The language of the Illinois Constitution, its legislative history,

166. *Sterling*, 52 Ill. 2d at 292, 287 N.E.2d at 714.

167. 62 Ill. 2d 184, 195, 340 N.E.2d 292, 297 (1975).

168. 418 U.S. 323 (1974). The Illinois Supreme Court decided to follow *Gertz* even though it was not required to do so.

169. *Gertz*, 418 U.S. at 347.

170. *Troman*, 62 Ill. 2d at 194-95, 340 N.E.2d at 297.

171. 376 U.S. 254 (1964). Illinois libel law, however, receives less protection under the state constitution than under the federal Constitution. See *infra* text accompanying note 173.

172. *Coursey v. Greater Niles Twp. Publishing Corp.*, 40 Ill. 2d 257, 265, 239 N.E.2d 837 (1968). See M. POLELLE & B. OTTLEY, ILLINOIS TORT LAW 138-40 (1985). The Illinois Supreme Court has not resolved whether teachers are "public officials" for purposes of applying the *New York Times* standard. But see *Colson v. Stieg*, 89 Ill. 2d 205, 213, 433 N.E.2d 246, 249 (1982) (court applied the *New York Times* malice standard to a statement concerning a professor's teaching ability that was made to a four-man faculty evaluation committee).

and some case law indicate that the protections given to freedom of speech, press and assembly and freedom of religion in Illinois do not parrot the first amendment. As to whether truth is a defense in a libel action, the Illinois Constitution may provide less protection than the first amendment, and in this regard, Illinois law must yield to federal law.¹⁷³ In other areas such as the regulation of obscenity, the Illinois Constitution may track federal law.¹⁷⁴ There may be other areas, however, where Illinois law will provide greater protection than federal law.¹⁷⁵ Particularly for advocates wary of the current majority on the Supreme Court, the untapped Illinois Constitution could be an invaluable source to protect civil liberties.

As evidenced by the Supreme Court decision on flag burning,¹⁷⁶ freedom of thought and speech issues can evoke lively and spirited debate. The balance struck in first amendment cases is necessarily tentative and uneasy.¹⁷⁷ The broad sweep of federal precedents ensures that in many instances it is unnecessary to reach Illinois constitutional issues. In most cases since 1970, Illinois lawyers apparently have argued only federal law and federal cases.¹⁷⁸ Moreover, the Illinois Supreme Court has stated that it will first decide speech, press and assembly issues under federal law; it will decide Illinois constitutional issues only if the Illinois laws or prac-

173. See *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

174. See *Cusack v. Teitel Film Corp.*, 38 Ill. 2d 53, 230 N.E.2d 241 (1967). For further discussion of the way in which Illinois treats obscenity see *supra* notes 160-63 and accompanying text.

175. See *Village of South Holland v. Stein*, 373 Ill. 472, 26 N.E.2d 868 (1940); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 400 Ill. 38, 79 N.E.2d 46 (1948). See *supra* notes 160-67 and accompanying text. Logically, it would be inconsistent for the Illinois Supreme Court to hold that Bible reading in the public schools does not violate the Illinois Constitution when, some fifty years before the Supreme Court decided the issue under the federal Constitution, the Illinois Supreme Court held such action did violate the state constitution. *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910). The Illinois Supreme Court would have to make such a contradictory decision solely because the United States Supreme Court had changed its mind about the issue or because an amendment to the federal Constitution allowed the practice. See *supra* text accompanying note 86 for a discussion of *Ring*.

176. *Texas v. Johnson*, 109 S.Ct. 2533 (1989) (Texas flag desecration statute violated flag-burning political protestor's first amendment rights).

177. See generally H. KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

178. Illinois lawyers should be alert that in cases involving freedom of speech, press and assembly and freedom of religion, independent analysis should be given to the Illinois Constitution. Illinois judges hardly can be expected to stake out an independent course if lawyers do not direct them to do so in the first instance.

tices are found not to violate the first amendment.¹⁷⁹

The people of the State of Illinois, as well as all free people, will be better off if the Illinois courts enter the debate to grapple independently with these issues. Illinois lawyers and judges have a responsibility to approach freedom of thought and freedom of speech issues with logic and fresh insight. Rather than simply reacting to Washington action, Illinois lawyers and judges should use their own experience and analysis when deciding the exciting and challenging issues presented by the Illinois constitutional provisions protecting freedom of speech, press, and assembly, and freedom of religion.¹⁸⁰ These freedoms are too precious, and the issues concerning them too complex, for Illinois to abdicate to the United States Supreme Court the exclusive power to set standards for their exercise. Illinois judges and lawyers have a duty, not only to protect federal rights, but also to protect the rights articulated in the Illinois Constitution, independent of the federal Constitution.

179. *Chicago Tribune v. Downers Grove*, 125 Ill. 2d 468, 472, 532 N.E.2d 821, 822 (1988).

180. A state is not bound by the same constraints as is the Supreme Court when adopting innovative interpretations of constitutional rights that expand individual liberties. As Justices Brandeis and Stone commented, "[it] is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, Stone, J.J., dissenting).