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Interpreting the Illinois Constitution: Understanding the Rights Afforded by a Modern Charter

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Interpreting the Illinois Constitution: Understanding the Rights Afforded by a Modern Charter

Brett Legner*

Every state has its own constitution. But state constitutions are frequently overlooked or misunderstood as independent sources of civil rights, as the emphasis tends to be on the rights guaranteed by the Federal Constitution. This Article seeks to examine the important role that a state constitution may play in creating important rights for a state's citizens. In particular, the modern Illinois Constitution of 1970 provides an excellent illustration of the ways that a state constitution can differ in scope and purpose from its federal counterpart and can embody changed or evolved social values or concerns.

Moreover, even where the state constitution appears to cover the same ground as the Federal Constitution, the state charter may be interpreted to provide more protection than the federal document. Over the course of the last three decades, the Illinois Supreme Court has refined its interpretive approach to analyze Illinois constitutional provisions in this situation. Tracing the development of the court's approach reveals significant points about the relationship between the federal government and the states, and examining the approach in practice sheds light on a number of important state constitutional rights.

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INTRODUCTION

Under the unique system of federalism inherent in the American form of government, states are accorded the status of sovereigns.¹ In recognition of this sovereignty, a federal court often relies on federalism as the basis for it declining to undertake some action, often through the application of an abstention doctrine,² or in cabining the preemptive reach of a federal law.³ Other times, lower federal courts recognize that they do not have the power to review the judgments of the state courts;⁴ that power is reserved for the Supreme Court, and then, only when no independent and adequate state law ground for the state court decision exists.⁵

1. See *McCulloch v. Maryland*, 17 U.S. 316, 350–51 (1819) (discussing areas of federal and state sovereignty in the American system of federalism).

2. See, e.g., *Rohm & Haas Co. v. Local 367, United Steel Workers Int'l Union*, No. 3:06CV-278-H, 2007 WL 855007, at *1 (W.D. Ky. Mar. 15, 2007) (“Generally, abstention is a doctrine founded upon the principles of comity and federalism under which federal courts may decline to interfere with ongoing state proceedings of various types.”).

3. See *Johnson v. Fankell*, 520 U.S. 911, 922 (1997) (“When pre-emption of state law is at issue, we must respect the principles that are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.” (internal quotation marks and brackets omitted)).

4. See generally *Long v. Shorebank Dev. Corp.*, 182 F.3d 548 (7th Cir. 1999) (explaining that “lower federal courts do not have subject matter jurisdiction over claims seeking review of state court judgments”).

5. See *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (recognizing “respect for the

One brilliant aspect of American federalism is that every state has a state constitution. Each state's constitution enumerates rights held by citizens of that particular state and restrictions placed on that state government. Accordingly, citizens typically have *two* sets of constitutional rights: those provided by the Federal Constitution and those provided by their state's constitution. To be sure, the Supremacy Clause ensures that the federal constitutional rights provide a floor below which no government can sink.⁶ Therefore, if a state constitution in a certain circumstance provided lesser protection than the Federal Constitution, the state constitution would be ineffective.⁷

On the other hand, one can read state constitutions to augment or expand individual liberties, as Justice Brennan wrote: "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."⁸ One way state constitutions may provide greater individual protections is that they often contain more enumerated protections than the Federal Constitution.⁹ States have likely adopted their respective constitutions after the Federal Constitution, but some may have been overhauled much more recently, so, state constitutions reflect more modern understandings of individual liberties that may have been expressed vaguely, if at all, in the United States Constitution. That holds true in Illinois, where the current constitution was adopted in 1970 and includes, for instance, explicit protection against discrimination on the basis of sex¹⁰ as well as a guarantee of a "healthful environment."¹¹

independence of state courts," as well as the "desire to avoid advisory opinions' as the "cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground").

6. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

7. See generally John Shaw, *Principled Interpretations of State Constitutional Law—Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1026 (1993) (discussing the variations between state constitutions and the Federal Constitution and the consequences of these disparities).

8. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

9. As one example, the bill of rights of the Illinois Constitution contains twenty-five separate provisions, and several of those provisions provide for multiple rights. ILL. CONST. of 1970 art. I. For instance, article I, section 6 of the Illinois Constitution protects against unreasonable searches and seizures as well as unreasonable invasions of privacy and unreasonable interceptions of communications. *Id.* art. I, § 6.

10. *Id.* art. I, § 18.

11. *Id.* art. XI, § 2.

Furthermore, state constitutions may be more easily amended than the Federal Constitution and, in that way, can express modern conceptions of individual liberties.¹² And state constitutions do not need to reflect a national consensus, as does their federal counterpart. Instead, a state constitution may reflect concerns or values that may not be held nationally, but are important to the citizens of that state.¹³

The focus on the interpretation of state constitutions and the rights guaranteed thereunder was reignited in the late 1970s, shortly after Illinois adopted its current charter.¹⁴ The Illinois Constitution of 1970 contains provisions for which there is no counterpart in the Federal Constitution as well as provisions that mirror the language or meaning of the federal charter. Therefore, for the last forty-six years, Illinois courts have interpreted and applied Illinois constitutional guarantees that are unknown to federal law. And for the last three decades, Illinois courts have expressly grappled with the question of whether, and when, to interpret Illinois constitutional provisions differently than federal courts interpret cognate provisions of the Federal Constitution.

This Article explores the method by which the Illinois courts interpret the Illinois Constitution, especially when deciding whether to read an Illinois provision more broadly than the Supreme Court has interpreted a similar provision contained in the United States Constitution. It also examines the practical effect of that methodology as well as highlights some protections that are unique to the Illinois Constitution and courts' interpretation of those protections. In short, this Article serves as an introduction to Illinois constitutional interpretation and the rights that

12. Logically, only the state's voters need to approve an amendment to their state's constitution. But to ratify an amendment to the United States Constitution, thirty-eight states must approve. See U.S. CONST. art. V. Article XIV of the Illinois Constitution governs "constitutional revision" and provides for amendment through constitutional convention on the initiative of the General Assembly, or for structural or procedural subjects—amendments to the legislative article—by popular initiative. ILL. CONST. of 1970 art. XIV. Amendments to the Illinois Constitution require a three-fifths majority.

13. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 195 (1984); see Shaw, *supra* note 7, at 1027 (discussing the permissible variations between state constitutions and the Federal Constitution). Of course, Justice Linde points out that the fact that the Illinois Constitution has an environmental clause and the Oregon Constitution does not, may not reflect a heightened environmental awareness in Illinois, but rather the fact that the Illinois Constitution was adopted in 1970 and the Oregon Constitution was adopted before the Civil War. Linde, *supra*, at 195.

14. Credit for this is often given to Justice Brennan, who finding himself in the minority on the Burger Court during a retrenchment of the Warren Court's civil rights expansion, wrote an influential article calling upon states to interpret their constitutions to provide civil liberty protections. See Brennan, *supra* note 8, at 502–04 (discussing the important role state constitutions play in protecting civil liberties); see *People v. Caballes (Caballes I)*, 851 N.E.2d 26, 40–41 (Ill. 2006) (discussing Justice Brennan's article and referring to Justice Brennan's "call to action").

may be located in a state constitution. Part I of this Article examines the 1970 Illinois Constitution, considering its structure and some of its unique provisions. Part II of this Article explores how the Illinois Supreme Court determined its method of interpreting the provisions of the Illinois Constitution that have a federal constitutional counterpart. And Part III of this Article looks at the application of this interpretative paradigm as applied to some specific provisions of the Illinois Constitution.

I. THE ILLINOIS CONSTITUTION OF 1970

Before turning to the way the Illinois Constitution is interpreted, it is important to gain some background information regarding its provisions. The 1970 Illinois Constitution is Illinois' fourth constitution,¹⁵ and it is comprised of fourteen articles.¹⁶ Unlike the Federal Constitution—where most of the protections of individual rights are found in the amendments that follow the initial constitutional text—the Illinois Constitution places many of its individual guarantees at the front, in article I.¹⁷ The bill of rights article contains twenty-five sections.¹⁸ Among other things, this article provides for due process and equal protection;¹⁹ has separate sections for religious freedom, freedom of speech, and the right to assemble and petition for redress of grievances;²⁰ provides extensive

15. Illinois' initial constitution is from 1818, when the state joined the Union. Thereafter, Illinois adopted a constitution in 1848, and one in 1870. For a discussion of those three constitutions and the circumstances in which they were adopted, see ANN LOUSIN, *THE ILLINOIS STATE CONSTITUTION—A REFERENCE GUIDE* 3–21 (2010).

16. For further background on the historical context in which the 1970 constitutional convention debates (and subsequent approval of the constitution) took place, see LOUSIN, *supra* note 15, at 17–29.

17. ILL. CONST. of 1970 art. I. The constitution that the current document replaced, the Illinois Constitution of 1870, placed its bill of rights in article II. ILL. CONST. of 1870 art. II. Many of the provisions of the current bill of rights were copied verbatim, or else with minor changes, from the 1870 version. LOUSIN, *supra* note 15, at 40 (2010).

18. The first section of the Illinois Constitution's bill of rights is the "inherent and inalienable rights" clause. This clause, which has not been read to provide judicially enforceable rights, states: "All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty, and the pursuit of happiness. To secure these rights and the protections of property, governments are instituted among men, deriving their just powers from the consent of the governed." ILL. CONST. of 1970 art. I, § 1; see *Kunkel v. Walton*, 689 N.E.2d 1047, 1056 (Ill. 1997) (finding that the inherent and inalienable rights clause does not provide judicially enforceable rights). The Illinois Supreme Court has held that this provision "is not generally considered, of itself, an operative constitutional limitation on governmental powers" and is not "an independent source of constitutional law." *Kunkel*, 689 N.E.2d at 1056 (quoting GEORGE D. BRADEN & RUBIN G. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 8 (1969)); see also LOUSIN, *supra* note 15, at 41–42 (discussing the inherent and inalienable rights clause of the Illinois Constitution).

19. ILL. CONST. of 1970 art. I, § 2.

20. *Id.* art. I, §§ 3–5. The First Amendment to the United States Constitution reads: "Congress

protections for criminal defendants;²¹ prohibits *ex post facto* laws;²² grants a right to keep and bear arms;²³ and provides for just compensation for a public taking of private property.²⁴ Article I also contains explicit protections against discrimination “on the basis of race, color, creed, national ancestry and sex” as well as on the basis of “physical or mental handicap” in hiring and promotion practices or the sale or rental of property.²⁵ The Illinois bill of rights also broadly bans the denial of equal protection of the laws on the basis of sex.²⁶ In addition to these express protections, article I also “condemns” communications that incite hatred or violence toward a person by reference to religious, racial, ethnic, national, or regional affiliation,²⁷ and it reminds citizens to “recognize their corresponding individual obligations and responsibilities.”²⁸

The Illinois Constitution contains other individual rights and protections throughout. For instance, in 2014, the Illinois voters amended article III—which governs suffrage and elections—to prohibit voter discrimination.²⁹ Under that provision, no person shall be denied the right to register to vote or to cast a ballot “based on race, color, ethnicity, status as a member of a language minority, national origin, religion, sex, sexual orientation, or income.”³⁰ That constitutional amendment demonstrates how society’s concern with different types of discrimination has evolved over the last forty years from the concerns and motivations of the framers and voters in 1970. While the protections against discrimination based on race, ethnicity, and sex have remained consistent over that time, this amended provision manifests an additional concern with discrimination on the basis of sexual orientation, which the framers did not discuss at the 1970 constitutional convention.

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

21. ILL. CONST. of 1970 art. I, § 6–13.

22. *Id.* art. I, § 16.

23. *Id.* art. I, § 22.

24. *Id.* art. I, § 15.

25. *Id.* art. I, §§ 17, 19.

26. *Id.* art. I, § 18.

27. *Id.* art. I, § 20. The full text of the individual dignity clause reads: “To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.” *Id.*

28. ILL. CONST. of 1970 art. I, § 23. The fundamental principles clause states: “A frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty. These blessings cannot endure unless the people recognize their corresponding individual obligations and responsibilities.” *Id.*

29. *Id.* art. III, § 8.

30. *Id.*

Discrimination on the basis of sexual orientation was simply not on the framers' collective consciousness in 1970, but in the intervening years social attitudes and understandings have changed dramatically. The Illinois Constitution, at least in this specific instance, now expressly reflects that social evolution.³¹ This illustrates that one element of a state constitution's unique vitality is that a state can more easily amend it to adapt to changing local and societal concerns.

Two other examples of how the Illinois Constitution reflects its citizens' values that do not appear in the Federal Constitution are through its provisions governing public education and the environment. With regard to public education, the United States Supreme Court has "long recognized that education is primarily a concern of local authorities."³² Understanding that education is traditionally left to the states, article X of the Illinois Constitution provides an explicit constitutional right to a free public education.³³ That article declares that "[a] fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities,"³⁴ and requires the State to "provide for an efficient system of high quality public educational institutions and services" that shall be free through the secondary level.³⁵

Addressing another local matter that is not found in the Federal Constitution,³⁶ article XI of the Illinois Constitution is devoted to the

31. Another way that the Illinois Constitution has been amended since 1970 to reflect changing societal values is the addition of the crime victim's rights provision to the bill of rights in 1992 and the amendment of that same provision in 2014. *Id.* art. I, § 8.1.

32. *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995).

33. ILL. CONST. of 1970 art. X. The express constitutional right to a free public education first appeared in the 1870 Illinois Constitution. ILL. CONST. of 1870 art. VIII. Illinois, however, did statutorily provide for a general school system since 1845. *See* BRADEN & COHN, *supra* note 18, at 399 (discussing article X of the Illinois Constitution and the State's dedication to education).

34. ILL. CONST. of 1970 art. X, § 1. In rejecting an argument that this clause imposed a duty on boards of education to place students in special education classes, the Illinois Supreme Court explained that this provision "is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form." *Pierce v. Bd. of Educ. of City of Chi.*, 370 N.E.2d 535, 536 (Ill. 1977). This is not the only clause or provision of the Illinois Constitution to be interpreted as a "statement of general philosophy" that does not confer judicially enforceable rights. *See, e.g., Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989) (explaining that article I, section 12, which provides that "[e]very person shall find a certain remedy for all injuries and wrongs," "merely expresses a philosophy, and does not mandate a certain remedy be provided in any specific form").

35. ILL. CONST. of 1970 art. X, § 1. In *Committee for Educational Rights v. Edgar*, the Illinois Supreme Court rejected a claim that disparities in public education funding between school districts violated the requirement that the State provide an "efficient" system of free public education. 672 N.E.2d 1178, 1184–88 (Ill. 1996). The court also held that whether the State fulfilled its constitutional obligation to provide "high-quality" educational institutions was solely a legislative matter beyond the competency of the judiciary. *Id.* at 1189–92.

36. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 828 (1976) (Brennan, J., dissenting).

environment.³⁷ Similar to the education article, this article declares a public policy, this time “to provide and maintain a healthful environment for the benefit of this and future generations.”³⁸ This article grants the General Assembly the power to implement and enforce this guarantee through enactment of laws,³⁹ which the General Assembly has done in the form of the Illinois Environmental Protection Act.⁴⁰ The environment article also provides that “[e]ach person has the right to a healthful environment” and may enforce that right against any party “through appropriate legal proceedings.”⁴¹

An additional feature of the Illinois Constitution is that it requires the General Assembly to periodically present to the Illinois voters the question of whether to call a new constitutional convention. Under that article, three-fifths of the members of each house of the General Assembly may call for the question of whether a constitutional convention should be submitted to the voters.⁴² If the General Assembly does not present the constitutional convention question to the voters for a period of twenty years, the secretary of state must submit the question to the voters.⁴³ A constitutional convention must be called if approved by three-fifths of those voting on the question or a majority of those voting in the general election at which the question is presented.⁴⁴

The 1970 Illinois Constitution, in many ways, is a progressive document that reflects modern values and principles. And since it was adopted by the Illinois voters, it has evolved through amendments as modern society has changed. The Illinois Constitution thus continues to embody the unique and changing set of values held by the citizens of this state.

II. INTERPRETING THE ILLINOIS CONSTITUTION: AN EVOLUTION TO THE LIMITED LOCKSTEP DOCTRINE

Broadly speaking, there are three approaches to interpreting state constitutional provisions that have a counterpart in the Federal Constitution.⁴⁵ First, is the primacy approach in which a state court

37. ILL. CONST. of 1970 art. XI. This article was new to the 1970 Illinois Constitution.

38. *Id.*

39. *Id.*

40. 415 ILL. COMP. STAT. 5/2 (2016).

41. ILL. CONST. of 1970 art. XI, § 2. This provision “does not create any new causes of action but, rather, does away with the ‘special injury’ requirement typically employed in environmental nuisance cases.” *City of Elgin v. Cty. of Cook*, 660 N.E.2d 875, 890 (Ill. 1996).

42. ILL. CONST. of 1970 art. XIV, § 1(a).

43. *Id.* art. XIV, § 1(b).

44. *Id.* art. XIV, § 1(c).

45. This question is different than the interpretative principles or canons a court uses in deriving

analyzes the issue under the state constitutional provision without resort to federal law; and if a state court finds no violation of the state constitution, only then does the court look to federal law to see if a federal right has been violated.⁴⁶ The second approach is the interstitial approach in which the state court first examines the federal challenge and only reaches the question under the state constitution if it finds no federal violation. Under this approach, a state court “may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.”⁴⁷ The third approach is the lockstep doctrine in which “the state court binds itself to following prior Supreme Court interpretation of the federal constitutional text.”⁴⁸

The debate in Illinois courts over the proper way to interpret provisions of the Illinois Constitution that have cognate provisions in the Federal Constitution arose in the early 1980s in a series of criminal cases.⁴⁹ This debate was sparked when the United States Supreme Court changed the Fourth Amendment’s standard for assessing the credibility of a confidential informant used to support the request for a search warrant. Since the 1960s, the question of whether a warrant was properly issued based on information provided by a confidential informant was governed, for Fourth Amendment purposes, by the two-pronged *Aguilar-Spinelli* test.⁵⁰ In *People v. Gates*, the Illinois Supreme Court was presented a

the meaning of a constitutional provision’s language. In Illinois, courts apply the same general principles to construe constitutional provisions as statutory provisions, and the primary purpose is to give effect to the “common understanding of the persons who adopted it—the citizens of this state.” *Walker v. McGuire*, 2015 IL 117138, ¶ 16, 39 N.E.3d 982, 987. If the provision’s language is unambiguous, the court will interpret it without resort to the drafting history, including the constitutional convention debates. *Id.*; *Kanerva v. Weems*, 2014 IL 115811, ¶ 36, 13 N.E.1228, 1238; *see Hooker v. Ill. State Bd. of Elections*, 2016 IL 121077, ¶¶ 35–36, 63 N.E.3d 824, 834–37 (holding that a constitutional provision’s language should be interpreted by the intent of its plain language). In construing the language of a constitutional provision, “it is proper to consider constitutional language ‘in light of the history and condition of the times, and the particular problem which the convention sought to address.’” *Kanerva*, 2014 IL 115811, ¶ 36, 13 N.E.1228, 1238 (quoting *Client Follow-Up Co. v. Hynes*, 390 N.E.2d 847, 850 (Ill. 1979) (internal ellipsis omitted)).

46. *People v. Caballes (Caballes II)*, 851 N.E.2d 26, 41–43 (Ill. 2006).

47. *Id.* at 41–42 (quoting *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997)).

48. *Id.* at 41.

49. This debate arose shortly after Justice Brennan’s article was published. *See generally* Brennan, *supra* note 8.

50. This test was derived from *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Under the test, the magistrate issuing a warrant must establish both the confidential informant’s knowledge and the informant’s credibility. *See Aguilar*, 378 U.S. at 114 (“[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was ‘credible’ or his information ‘reliable.’”).

motion to quash a search warrant obtained on the basis of information supplied by a confidential informant.⁵¹ Without elaboration, the court noted that both the Fourth Amendment and article I, section 6 of the Illinois Constitution “provide assurance against unreasonable searches and seizures of person and property.”⁵² The court then applied the *Aguilar-Spinelli* test and held the warrant invalid.⁵³

The Illinois Supreme Court subsequently received another question regarding whether there was probable cause to support a search warrant in *People v. Exline*.⁵⁴ But while *Exline* was pending, the United States Supreme Court reversed the *Gates* decision and moved away from the “rigid” *Aguilar-Spinelli* test to a totality-of-the-circumstances analysis.⁵⁵ One motivating concern for the Court was that the “strictures that inevitably accompany the ‘two-pronged test’ cannot avoid seriously impeding the task of law enforcement.”⁵⁶ The Illinois Supreme Court in *Exline* did not decide whether the new *Gates* test should be given retroactive effect, for it determined that the challenged warrant survived under either test.⁵⁷ Justice Goldenhersh dissented, explaining that the *Aguilar-Spinelli* test provided the better analysis and that it should be retained as the test under article I, section 6 of the Illinois Constitution.⁵⁸ Justice Goldenhersh’s comments are notable because the majority did not reference any challenge under the Illinois Constitution,⁵⁹ but he clearly viewed the state constitution as a means to halt a trend in federal constitutional jurisprudence that he did not favor.⁶⁰

51. 423 N.E.2d 887 (Ill. 1981), *rev'd*, 462 U.S. 213 (1983).

52. *Id.* at 889. The appellate court, by contrast, made no mention of article I, section 6 as it framed the matter as arising solely under the Fourth Amendment. *People v. Gates*, 403 N.E.2d 77, 80–81 (Ill. App. Ct. 1980), *aff'd*, 423 N.E.2d 887 (Ill. 1981).

53. *Gates*, 423 N.E.2d at 890–93.

54. 456 N.E.2d 112 (Ill. 1983).

55. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983); *see Exline*, 456 N.E.2d at 114 (“Since this case was taken under advisement, the United States Supreme Court rendered a decision in *Illinois v. Gates* . . . , abandoning the frequently cited *Aguilar-Spinelli* test.”).

56. *Gates*, 462 U.S. at 237 (“If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips would be of greatly diminished value in police work.”).

57. *Exline*, 456 N.E.2d at 114.

58. *Id.* at 116 (Goldenhersh, J., dissenting). Justice Simon joined this dissent.

59. In fact, the appellate court resolved the matter under the Fourth and Fourteenth Amendments with no reference to article I, section 6, either. *People v. Exline*, 439 N.E.2d 1097, 1099 (Ill. App. Ct. 1982), *rev'd*, 456 N.E.2d (Ill. 1983).

60. In *Illinois v. Gates*, Justice White concurred in the judgment and noted that the Illinois Supreme Court had invalidated the warrant under both the federal and state constitutions. 462 U.S. at 252 (White, J., concurring in judgment). He suggested that prudence dictated permitting the state courts to consider in the first instance whether a “‘totality of the circumstances’ test should replace the more precise rules of *Aguilar* and *Spinelli*.” *Id.* He continued: “The Illinois Supreme Court may decide to retain the established test for purposes of its state constitution.” *Id.* The majority in

The next year, the Illinois Supreme Court addressed a challenge that the State's implied consent law violated the Illinois constitutional protection against self-incrimination.⁶¹ Under Illinois law, any person driving on the public roads is deemed to have consented to a test to determine the alcohol or drug content of that person's blood in the event of an arrest.⁶² The statute further provided that if a person who is arrested refuses to submit to a test, evidence of the refusal is admissible in civil or criminal proceedings against that person.⁶³ The defendant in *People v. Rolfingsmeyer* was arrested for driving under the influence of alcohol and refused the test. He then challenged the implied consent law under the self-incrimination provisions of the federal and state constitutions.⁶⁴

In relevant part, the language of both constitutional provisions regarding self-incrimination is very similar. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."⁶⁵ Article I, section 10 of the Illinois Constitution provides: "No person shall be compelled in a criminal case to give evidence against himself."⁶⁶ The majority first determined that the implied consent law did not violate the Fifth Amendment under current United States Supreme Court precedent.⁶⁷ It then turned to the challenge under the state constitution, and found no reason to depart from the interpretation of the Fifth Amendment in interpreting article I, section 10 of the Illinois Constitution. The court explained that "[t]here is nothing in the proceedings of the constitutional convention to indicate an intention to provide, in article I, section 10, protections against self-incrimination broader than those of the Constitution of the United States."⁶⁸

People v. Tisler pointed out Justice White's language in *Gates*, but ultimately concluded that it should follow the interpretation of the Fourth Amendment in construing article I, section 6 of the Illinois Constitution. *People v. Tisler*, 469 N.E.2d 147, 153–55 (Ill. 1984).

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

62. 625 ILL. COMP. STAT. 5/11-501.1(a) (2016).

63. *Id.* at 5/11-501.1(c).

64. The defendant also raised a challenge, which the court rejected, under the separation-of-powers provision of the Illinois Constitution. *Rolfingsmeyer*, 461 N.E.2d at 411–12. The Federal Constitution does not include the words "separation of powers," and the separation-of-powers doctrine is a principle that has been read into the Constitution by the federal court. On the other hand, the Illinois Constitution contains an explicit separation-of-powers provision: "The legislative, executive and judicial branches are separate. No branch shall exercise the powers properly belonging to another." ILL. CONST. of 1970 art. II, § 1.

65. U.S. CONST. amend. V.

66. ILL. CONST. of 1970 art. I, § 10.

67. *Rolfingsmeyer*, 461 N.E.2d at 412–13 (applying *South Dakota v. Neville*, 459 U.S. 553 (1983)).

68. *Id.* at 412 (citing 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPTS 1376–80 (1970) [hereinafter 3 RECORD OF

Justice Simon in his special concurrence joined the debate on how to interpret the Illinois Constitution. He viewed the majority as holding that “we are bound to automatically follow the decisions of the United States Supreme Court interpreting the comparable provision” of the Federal Constitution.⁶⁹ According to Justice Simon, the majority assumed that a provision of the Illinois bill of rights has the same meaning as the corresponding provision of the Federal Bill of Rights unless constitutional convention proceedings indicate the contrary. That presumption, he argued, “is the reverse of the correct one and inverts the proper relationship between the [s]tate and [f]ederal constitutions.”⁷⁰ Thus, Justice Simon found it significant that nothing in Illinois’ constitutional convention debate proceedings reflected an intention to limit the scope of the Illinois provision to United States Supreme Court precedents.⁷¹ Arguing that Illinois judges were not “frozen” by Supreme Court interpretation of the Federal Bill of Rights, Justice Simon wrote that “we, as the justices of the Illinois Supreme Court, are sovereign in our own sphere; in construing the State Constitution we must answer to our own consciences and rely upon our own wisdom and insights.”⁷²

Soon thereafter, the Illinois Supreme Court was presented squarely with the question of whether to apply *Gates* to a motion to quash a warrant under article I, section 6, or whether to continue to apply *Aguilar-Spinelli*.⁷³ The court, thus, was faced with the question of whether to interpret the warrant clause of the Illinois Constitution in lockstep with the Supreme Court’s understanding of the Fourth Amendment. In *People v. Tisler*, the court first addressed the defendant’s argument that, as a matter of state constitutional law, *Aguilar-Spinelli* should control because the framers intended the Illinois Constitution to expand the protections against unreasonable police conduct and the “more flexible” *Gates* test undermined that protection.⁷⁴ In rejecting this argument, the court relied on a committee report to the constitutional convention which explained that article I, section 6 was intended to provide new protections against the use of eavesdropping devices and against invasions of privacy.⁷⁵ But other proposals to change section 6 were rejected, so the language of “the

PROCEEDINGS]).

69. *Id.* at 413 (Simon, J., specially concurring).

70. *Id.*

71. *Id.* at 413–14.

72. *Id.* at 414–15. Justice Simon also referred to Justice Brandeis’s dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), for the proposition that states may serve as laboratories trying “novel social and economic experiments.” *Rolfingsmeyer*, 461 N.E.2d at 413.

73. *People v. Tisler*, 469 N.E.2d 147 (Ill. 1984).

74. *Id.* at 155.

75. *Id.*

warrant clause with its probable-cause requirement, and the guarantee against unreasonable search and seizure . . . remains nearly the same as that of the [F]ourth [A]mendment.”⁷⁶ The court also relied on the explanatory material provided to the citizens voting on whether to adopt the proposed constitution, which stated that the “restriction on warrants is unchanged.”⁷⁷ Therefore, the court found that the Fourth Amendment was “the direct and lineal ancestor of the protection afforded by the Illinois Constitution”⁷⁸ and that both the state and federal constitutions were “designed to protect against the same abuses.”⁷⁹

The court explained that in the past it construed the state and federal provisions to provide the same protection, such as when it applied *Aguilar-Spinelli* to warrants based on informants’ information. But while the court adopted the *Aguilar-Spinelli* test in those cases, it did not establish the test “as defining the extent of the protection afforded by the Illinois Constitution.”⁸⁰ Instead, those cases applying *Aguilar-Spinelli* simply stood for the proposition that the Illinois Constitution’s protections are measured by the same standards as the Fourth Amendment.⁸¹ The court had “accepted the pronouncements of the Supreme Court in deciding [F]ourth [A]mendment cases as the appropriate construction of the search and seizure provisions of the Illinois Constitution for so many years,” and would not depart from that lockstep interpretation to forestall what the defendant argued was a narrowing of his civil rights.⁸²

As such, the court set out its test for interpreting state constitutional provisions that have an analogue in the United States Constitution. Under this test, the presumption was that a court will afford a state constitutional provision the same scope and interpretation as the federal version.⁸³ To depart from that lockstep interpretation, the court must find a meaningful difference in the language of the state constitutional provision or something in the constitutional convention debates and committee reports

76. *Id.* (citing 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, COMMITTEE PROPOSALS MEMBER PROPOSALS 29, 33 (1970) [hereinafter 6 RECORD OF PROCEEDINGS]).

77. *Tisler*, 469 N.E.2d at 155 (quoting 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, COMMITTEE PROPOSALS MEMBER PROPOSALS 2683 (1969–70).

78. *Id.* (citing BRADEN & COHN, *supra* note 18, at 28).

79. *Id.*

80. *Id.* at 156.

81. *Id.*

82. *Id.* at 157.

83. *Id.* Earlier in the opinion, the *Tisler* majority acknowledged that “[s]ubject to the limitations noted later, this court may construe these terms as contained in our constitution differently from the construction the Supreme Court has placed on the same terms in the Federal Constitution.” *Id.* at 156.

indicating that the state provision should be given a different interpretation.⁸⁴

The debate between the justices over the proper method of interpreting the Illinois Constitution played out over the various concurring and dissenting opinions in *Tisler*. For example, Justice Ward wrote a concurring opinion in which he noted “the developing interest in [s]tate constitutionalism” and that “there appear statements showing less than a full understanding of the character of constitutions and the principles that guide their judicial interpretation.”⁸⁵ He explained that “it is generally accepted that courts must look to the intent of the adopters and framers as controlling” when interpreting the constitution.⁸⁶ To understand the original intent of the constitution, Justice Ward relied not only on the convention debates, but also the research papers given to the convention delegates, concluding that the research papers “should not be overlooked in any search to determine the mind of the convention.”⁸⁷

Justice Clark specially concurred in the judgment, disagreeing with the notion that the court had tied its interpretation of the Illinois Constitution to the Supreme Court’s interpretation of the Federal Constitution.⁸⁸ He believed the fact that the court had in the past relied on Supreme Court precedent for guidance was not dispositive; instead, “[t]here [was] nothing which prevent[ed] this court from interpreting our constitution as affording greater protection than similar provisions of the Federal Constitution.”⁸⁹ Justice Clark found the majority’s position “dangerous” because it would prevent the court from protecting civil liberties of Illinois citizens in the event that the Supreme Court scaled back those rights as a matter of federal law.⁹⁰ He also highlighted a “tradition of

84. *Id.* at 157. The court went on to agree with the Supreme Court that the totality-of-the-circumstances test “will achieve a fairer balance between the relevant public and private interests” that must be balanced in search and seizure cases and adopted the *Gates* test as a matter of Illinois constitutional law. *Id.* Because the underlying events in *Tisler* occurred prior to the Supreme Court’s decision in *Gates*, the defendant argued that *Aguilar-Spinelli* (which was the law at the time of the arrest) should apply. *Id.* The court applied Supreme Court precedent to determine whether *Gates* should be given retroactive effect as a matter of Illinois constitutional law, ultimately concluding that *Gates* governed. *Id.* at 157–58.

85. *Id.* at 161 (Ward, J., concurring).

86. *Tisler*, 469 N.E.2d at 161 (discussing *GEORGE BLUM ET AL.*, 16 AM. JUR. 2D CONSTITUTIONAL LAW § 92, Westlaw (database updated Feb. 2017)).

87. *Id.* at 161–63.

88. *Id.* at 163 (Clark, J., specially concurring).

89. *Id.*

90. *Id.* at 163–64. Justice Clark echoed the concerns raised by Justice Brennan in his article—indeed, he cited the article—that the Warren Court’s expansion of civil rights, precipitated largely because state courts were unwilling to provide those protections, had given way to the Burger Court’s retrenchment of those rights. *Id.* at 164. Thus, in the Burger-Court era, “we have seen the role of the State and Federal judiciary reversed.” *Id.*

judicial independence” with a “long history in Illinois,”⁹¹ citing as examples that the Illinois Supreme Court struck down public school prayer fifty years before the Supreme Court⁹² and adopted the exclusionary rule well before the Supreme Court held that it applied to the states.⁹³ This led Justice Clark to conclude that “the idea that the Illinois Constitution is coextensive with the United States Constitution is a recent theory without support in the prior decisions of this court.”⁹⁴ To Justice Clark, the constitution “is a living document” framed in general terms to preserve “the flexibility to deal with unforeseen questions,” so “the absence of certain comments at the Illinois constitutional convention should not tie our hands.”⁹⁵ The majority’s approach, he felt, amounted to a “crushing degree of uniformity” that stifled the ability of the State to control its affairs.⁹⁶ Finally, Justice Goldenhersh, joined by Justice Simon, dissented from the court’s holding that the evidence obtained on the basis of the informant’s information should not be suppressed. The dissenters nonetheless noted their agreement with Justice Clark’s view about the manner in which the Illinois Constitution should be interpreted, explaining that the court should not “blindly follow the action taken by the Supreme Court in determining the standards applicable under our own Constitution.”⁹⁷

Shortly after the *Tisler* decision, the United States Supreme Court in *Moran v. Burbine* confronted the issue of whether an individual’s constitutional rights were violated when, while in custody, police did not inform that individual of his counsel’s attempts to reach him.⁹⁸ In

91. *Id.*

92. *Id.* (citing *Engel v. Vitale*, 370 U.S. 421 (1962); *People ex rel. Ring v. Bd. of Educ.*, 92 N.E. 251 (Ill. 1910)).

93. *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *People v. Brocamp*, 138 N.E. 728 (Ill. 1923)).

94. *Id.* Among other things, Justice Clark disagreed with the majority’s understanding of *People v. Tillman*. *Id.* at 164–65; *People v. Tillman*, 116 N.E.2d 344 (Ill. 1953). The majority cited *Tillman* for the proposition that the language of the Fourth Amendment and the Illinois Constitution were “in effect the same” and so should be construed the same. *Id.* at 156 (quoting *Tillman*, 116 N.E.2d at 346–47). Justice Clark, however, relied a different part of the quoted passage from *Tillman* which stated that the two constitutions, with the essentially similar language, “should be construed in favor of the accused.” *Id.* at 164–65 (quoting *Tillman*, 116 N.E.2d at 346–47).

95. *Id.* Justice Clark also explained that for years, the Federal Bill of Rights only protected citizens against abuses by the federal government, and the state constitutions protected the people from state authorities. While most of the protections of the Federal Constitution have been incorporated as applicable against the local governments, “[t]he [s]tates in our federal system . . . remain the primary guardian of liberty of the people.” *Id.* at 165.

96. *Id.* at 166 (citing *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

97. *Id.* (Goldenhersh, J., dissenting) (quoting his dissent in *People v. Exline*, 456 N.E.2d 112, 116 (Ill. 1983)).

98. *Moran v. Burbine*, 475 U.S. 412, 415–16 (1986).

Burbine, the Court held that an individual's waiver of his right to remain silent and to the presence of counsel was valid even though police did not inform him that counsel was trying to contact him.⁹⁹ The Court noted that the individual's waiver was not coerced and reasoned that events about which he had no knowledge could not affect his capacity to validly waive his rights.¹⁰⁰ As a result, statements made by the individual without the presence of counsel were admissible against him in a criminal proceeding.¹⁰¹ In reaching this decision, the Court noted that "a number of state courts have reached a contrary conclusion" while applying federal law, but stated that its holding does not prevent a state "from adopting different requirements for the conduct of its employees and officials as a matter of state law."¹⁰²

The *Burbine* Court's express acknowledgement that states may choose to adopt a different rule as a matter of state law prophesied subsequent decisions in Illinois. Understandably, defense counsel would recognize that though *Burbine* may foreclose a suppression motion as a matter of federal law, that same federal decision also explicitly mentioned the possibility of different rules under state law. Eight years later, in *People v. McCauley*, the Illinois Supreme Court considered an appeal from a trial court's decision to suppress statements made by a defendant after an attorney was present at the police station, but was not allowed to consult with the defendant.¹⁰³ The Illinois Supreme Court found that *Burbine* was dispositive of the Fifth Amendment claim, which therefore had to be rejected as legally groundless.¹⁰⁴

The court, however, found that the statements must be suppressed as a matter of Illinois constitutional jurisprudence: "The day is long past in Illinois, however, where attorneys must shout legal advice to their clients, held in custody, through the jailhouse door. In this case, we determine that our [s]tate constitutional guarantees afforded defendant a greater protection."¹⁰⁵ In reaching this determination, the court relied not only on the Illinois protection against self-incrimination,¹⁰⁶ but also on the

99. *Id.* at 421.

100. *Id.* at 421–23.

101. *Id.* at 421.

102. *Id.* at 427–28.

103. 645 N.E.2d 923 (Ill. 1994).

104. *Id.* at 929. ("[*Moran v. Burbine*] is controlling here in terms of any [f]ederal constitutional basis for suppressing defendant's statements. Defendant's waiver of the right to counsel was therefore valid and suppression of defendant's statements was insupportable on [F]ifth [A]mendment grounds.")

105. *Id.*

106. ILL. CONST. of 1970 art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself . . .").

state constitutional guarantee of due process.¹⁰⁷

In departing from the federal self-incrimination standard, the court relied on three of its prior decisions¹⁰⁸ and the constitutional convention proceedings.¹⁰⁹ This authority, the court found, demonstrated that the protections of article I, section 10 of the Illinois Constitution “differ substantially” from the Federal Constitution and that the contrary, pre-*Burbine* rule the Illinois court set forth in *People v. Smith* remains the law in Illinois “[r]egardless of the United States Supreme Court’s *current* views on waiver of the right to counsel under the Federal Constitution.”¹¹⁰ With regard to the constitutional convention proceedings, the court found that the delegates intended to incorporate then-existing federal law into the Illinois Constitution.¹¹¹ The court based this conclusion in part on Delegate Weisberg’s statement that the bill of rights committee intended “that the existing state of the law would remain unchanged” under article I, section 10.¹¹² Additionally, the essays and materials provided to the delegates described recent federal precedent and argued for the importance of retaining the language from the former constitution.¹¹³

Justice Bilandic disagreed, writing that none of the past Illinois decisions held that article I, section 10 is to be interpreted more broadly

107. *Id.* art. I, § 2 (“No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.”).

108. One of the three decisions, *People v. Smith*, predated *Burbine*. 442 N.E.2d 1325 (Ill. 1982). The other two, *People v. Holland* and *People v. Griggs*, were concerned with the application of *Burbine*, or more specifically whether to distinguish *Burbine* or *Smith*. *People v. Griggs*, 604 N.E.2d 257 (Ill. 1992); *People v. Holland*, 520 N.E.2d 270 (Ill. 1987).

109. *McCauley*, 645 N.E.2d at 929–30.

110. *Id.* at 930. The court quoted *Smith*’s rule as

when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him.

Id. (quoting *Smith*, 422 N.E.2d at 1329). *Smith* was decided as a matter of federal constitutional law under the Fifth Amendment, not as a matter of Illinois constitutional law under article I, section 10. See *Smith*, 422 N.E.2d at 1327 (“We consider, however, that the statements should have been suppressed. We rest that conclusion upon the defendant’s right to counsel during custodial interrogation. That right stems from the fifth amendment protection against self-incrimination.”).

111. *McCauley*, 645 N.E.2d at 936–37.

112. *Id.* That delegate, Bernard Weisberg, had recently represented the American Civil Liberties Union as amicus curiae in *Escobedo v. State of Illinois*, which held that the police’s refusal to honor a request to consult with a lawyer during an interrogation violated the Sixth Amendment. 378 U.S. 478, 495–98 (1964). The court in *People v. McCauley* found that the delegates were aware of the constitutional interpretations in *Escobedo* and *Miranda v. Arizona*, 384 U.S. 436 (1966). *McCauley*, 645 N.E.2d at 936–37.

113. *Id.*

than the Fifth Amendment.¹¹⁴ Moreover, he wrote that nothing in the text of the Illinois Constitution supports a broader reading, as the language of the two provisions is almost identical.¹¹⁵ Instead, the Illinois Supreme Court had previously held that the “two provisions differ in semantics rather than in substance and have received the same general construction.”¹¹⁶ Additionally, no evidence in the committee reports or debates stated that a court should give article I, section 10 a broader interpretation than the Fifth Amendment, and Delegate Weisberg’s statements also did not manifest an intent to constitutionalize then-existing federal precedent.¹¹⁷ Justice Miller agreed with Justice Bilandic, asserting that the Illinois cases that the majority relied on to support a broader state constitutional right “did not purport to rely on or apply the Illinois Constitution.”¹¹⁸

Turning to a separate due process analysis, the *McCauley* majority noted that it “has not consistently applied the so-called lockstep doctrine as an assist in interpreting” the due process clause, and instead “has expressly asserted its independence in interpreting this particular provision of our constitution.”¹¹⁹ The court examined Illinois case law and past statutes and determined that an accused person has the right to consult with an attorney and public officers have a duty to permit counsel to consult with persons in custody.¹²⁰ Justice Miller took issue with this analysis, referring to it as “a *Miranda* analysis viewed through a due process lens” and arguing that the old statutes the majority relied on are “not provisions of a constitution, and are of little, if any, assistance to the

114. *Id.* at 941 (Bilandic, J., concurring in part and dissenting in part).

115. *Id.* at 942.

116. *Id.* (quoting *People ex rel. Hanrahan v. Power*, 295 N.E.2d 472, 475 (Ill. 1973)). The court in *People ex rel. Hanrahan v. Power* essentially applied a lockstep interpretation of the state constitution. Justice Goldenhersh dissented, arguing that the conduct violated both the federal constitution and the state constitution, “which in my opinion impose[s] higher standards.” *Power*, 295 N.E.2d at 476 (Goldenhersh, J., dissenting).

117. *McCauley*, 645 N.E.2d at 942–43.

118. *Id.* at 944–45 (Miller, J., concurring in part, dissenting in part).

119. *Id.* at 937 (citing *Rollins v. Elwood*, 565 N.E.2d 1302, 1316 (Ill. 1990)). *Rollins v. Elwood* involved, in part, an action to quash service for lack of personal jurisdiction. The question raised was whether application of Illinois’ long-arm statute violated the party’s right to due process. The court explained that the Illinois Constitution’s due process guarantee “stands separate and independent from the [f]ederal guarantee of due process.” *Elwood*, 565 N.E.2d at 1316.

120. *McCauley*, 645 N.E.2d at 937–38 (“Considering these facts and principles, it is clear that the constitutional and statutory policies of our State favor a person *having* the assistance of counsel during custodial interrogation and contemplate prohibiting interference with that assistance by governmental authorities.”). As far back as 1874, Illinois had a statute that required public officers holding custody of a person to “admit any practicing attorney” whom the person desired to consult to see and consult with the person. *Id.* at 938 (quoting ILL. REV. STAT. ch. 38, par. 229 (1874)).

resolution of the constitutional question posed here.”¹²¹

The hybrid nature of the *McCauley* decision, resting equally on the Illinois constitutional protection against self-incrimination and its guarantee of due process, thus used two state constitutional provisions to provide greater constitutional protections than available under the Fifth Amendment. As seen, however, the justices vigorously debated whether the majority’s approach was consistent with the analytical method set forth by *Tisler*. Nonetheless, several years later, a unanimous Illinois Supreme Court explained that *McCauley* “represents this court’s refusal to allow this state’s counterpart to the [F]ifth [A]mendment right to counsel to diminish the way the federal right had in *Burbine*.”¹²²

In 1996, the Illinois Supreme Court departed from lockstep in two criminal cases, though each case invoked different constitutional rights. First, in *People v. Washington*, the court examined whether a “free-standing claim of innocence” presented a constitutional question.¹²³ In that case, a criminal defendant sought to raise new evidence that established his innocence many years after he was convicted.¹²⁴ Because this claim did not assert a constitutional violation with respect to his trial, it was a free-standing claim of innocence.¹²⁵ But because so much time had elapsed since his trial, the only vehicle for the defendant to raise the claim was under Illinois’ Post-Conviction Hearing Act.¹²⁶ That statute was limited to constitutional claims, so to raise his new innocence claim, the defendant needed a constitutional basis for the argument.¹²⁷ The court first found that the defendant did not have a federal constitutional due process right to raise a free-standing claim of innocence.¹²⁸ Turning to the Illinois Constitution, however, the court found both a procedural and a substantive due process right to raise the innocence claim.¹²⁹ Citing *McCauley* for the principle that the court “labor[s] under no self-imposed constraint to follow federal precedent in ‘lockstep’” when interpreting the state due process clause, the court found that to ignore the defendant’s

121. *Id.* at 945.

122. *Relsolelo v. Fisk*, 760 N.E.2d 963, 968–69 (Ill. 2001). The court also characterized *McCauley* as “stay[ing] true to the path begun in *Miranda* and *Escobedo*.” *Id.*; see *People v. Hunt*, 2012 IL 111089, ¶ 56, 969 N.E.2d 819, 829 (Freeman, J., concurring) (explaining that the court’s decision does not undermine the holding in *McCauley*, stating that the “force and effect of *McCauley* remains unchanged”).

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

124. *Id.* at 1331.

125. *Id.* at 1332.

126. 725 ILL. COMP. STAT. 5/122-1 (1998) (providing the Post-Conviction Hearing Act).

127. *Washington*, 665 N.E.2d at 1332–33; see also 725 ILL. COMP. STAT. 5/122-1 (1998) (providing the Post-Conviction Hearing Act).

128. *Washington*, 665 N.E.2d at 1332–35 (relying on *Herrera v. Collins*, 506 U.S. 390 (1993)).

129. *Id.* at 1335–37.

claim would be “fundamentally unfair”¹³⁰ and would shock the conscience so as to “trigger operation of substantive due process.”¹³¹

Once again, the justices debated the proper method for interpreting the state constitution in the concurring and dissenting opinions. Justice McMorro wrote a separate concurrence to explain that, in her view, the majority did not need to address the question of whether the defendant had a federal due process right.¹³² Instead, the court should have considered only the state constitutional right.¹³³ Justice Miller, joined by Chief Justice Bilandic, dissented and reasoned that the majority failed to explain why the Illinois Constitution should be interpreted differently than its federal counterpart.¹³⁴ The dissenters wrote that the court should continue to adhere to the *Tisler* test, and that no rationale to support deviation from lockstep existed because the language of the state and federal constitutional provisions is the same and nothing in the constitutional convention debates suggests that the drafters intended the Illinois due process right to mean something different than the federal right.¹³⁵

Second, the Illinois Supreme Court seemingly departed from lockstep in a search-and-seizure case under article I, section 6 of the Illinois Constitution.¹³⁶ In *People v. Krueger*, a defendant sought to suppress evidence seized pursuant to a warrant issued under an Illinois statute that authorized a no-knock search.¹³⁷ The court began its analysis by examining the constitutionality of the no-knock statute under both state and federal law. The court explained that the language of the search-and-seizure clause of the Fourth Amendment was “nearly identical” to article I, section 6 and it would “measure [defendant’s] constitutional

130. *Id.* at 1335–36.

131. *Id.* at 1336. The court subsequently reaffirmed its commitment to the more protective interpretation of the Illinois right to substantive due process when it comes to actual innocence claims in *People v. Coleman*, describing the court’s commitment to *People v. Washington* as “unwavering.” 2013 IL 113307, ¶ 93, 996 N.E.2d 617, 627.

132. *Washington*, 665 N.E.2d at 1337 (McMorro, J., specially concurring).

133. *Id.* at 1338.

134. *Id.* at 1341–42 (Miller, J., dissenting).

135. *Id.*

136. *People v. Krueger*, 675 N.E.2d 604 (Ill. 1996). The Illinois Supreme Court in *People v. Caballes* (“*Caballes II*”) stated that it did not consider *People v. Krueger* to be a departure from lockstep interpretation of the constitutional provisions, but rather a decision to apply a different remedy for a constitutional violation. *People v. Caballes (Caballes II)*, 851 N.E.2d 26, 38–39 (Ill. 2006). See *People v. Bolden*, 756 N.E.2d 812, 825–26 (Ill. 2001) (“We do not construe *Krueger* as suggesting that the search and seizure clause of article I, section 6, of the Illinois Constitution must be interpreted more expansively than the corresponding right found in the fourth amendment. The exclusionary rule is a judicially created remedy, and its history in Illinois may be traced to this court’s decision in *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923).”).

137. *Krueger*, 675 N.E.2d at 607.

protections under both using the same standard.”¹³⁸ The court subsequently found that the statute violated both constitutions.

The question then became whether a good-faith exception to the exclusionary rule, previously recognized by the United States Supreme Court, applied to allow admission of the evidence against the defendant. In *Illinois v. Krull*, the United States Supreme Court found that the Fourth Amendment did not bar the use of evidence obtained by a police officer who reasonably relied in good faith on a statute that authorized a warrantless search but which statute was later found to be unconstitutional.¹³⁹ The Illinois Supreme Court in *Krueger*, however, declined to apply the *Krull* rule as a matter of state law because it did not “comport with” article I, section 6.¹⁴⁰ The court based its departure from lockstep on the long history in Illinois of suppressing evidence gathered in violation of the state constitution’s prohibition against unreasonable searches and seizures. The court concluded that “to adopt *Krull*’s extended good-faith exception would drastically change this state’s constitutional law.”¹⁴¹ The court also explained that it was “obliged to evaluate the rationale underlying *Krull*” in determining whether to apply it to the state constitution.¹⁴² The court held that the rule provided a grace period for unconstitutional search-and-seizure legislation that imposed too high a price on the State’s citizens.¹⁴³ As in *Washington*, Justice Miller dissented on the ground that the court’s rationale for departing from lockstep did not satisfy the *Tisler* test.¹⁴⁴

The Illinois Supreme Court restated its methodology for interpreting the state constitution in *People v. Caballes* (“*Caballes II*”).¹⁴⁵ *Caballes II* came to the court on remand from the United States Supreme Court.¹⁴⁶ The Illinois Supreme Court’s original decision in *People v. Caballes*

138. *Id.* (citing *People v. Tisler*, 469 N.E.2d 147 (Ill. 1984)).

139. 480 U.S. 340, 343 (1987).

140. *Krueger*, 675 N.E.2d at 614.

141. *Id.* at 619.

142. *Id.*

143. *Id.* at 619–20.

144. *Id.* at 621–22 (Miller, J., dissenting). Justice Miller wrote that “the majority does not point to anything in either the text or history of our state constitution that would warrant this court reaching a result different from the one reached by the United States Supreme Court in [*Illinois v. Krull*].” *Krueger*, 675 N.E.2d at 621. He continued: “Just as the majority follows federal law in evaluating the validity of the statute under both the federal and state constitutions, so too should we follow federal law in applying the good-faith exception to the exclusionary rule.” *Id.* at 622. According to Justice Miller, following lockstep for the interpretation of article I, section 6 to determine the constitutionality of the statute but not the exclusionary rule was “incongruous[].” *Id.*

145. 851 N.E.2d 26 (Ill. 2006).

146. *Caballes II*, 851 N.E.2d at 29.

(“*Caballes I*”) found that a canine sniff during a routine traffic stop violated the defendant’s Fourth Amendment rights because it unjustifiably expanded the scope of that stop.¹⁴⁷ The United States Supreme Court reversed that decision as a matter of the Federal Constitution.¹⁴⁸ On remand, the Illinois Supreme Court noted that the defendant had also challenged his conviction under article I, section 6 of the Illinois Constitution, and addressed the question of whether to apply the United States Supreme Court’s holding reversing *Caballes I* to the interpretation of the state constitution.¹⁴⁹

The Illinois Supreme Court explained that the lockstep doctrine “has deep roots in Illinois and was firmly in place before the adoption of the 1970 constitution.”¹⁵⁰ Furthermore, the drafters of article I of the 1970 Constitution, the convention delegates, and the voters who approved the constitution were aware that Illinois courts traditionally interpreted the state constitution in the same manner as its federal counterpart, at least with regard to Fourth Amendment questions.¹⁵¹ After considering the different approaches to interpreting cognate provisions of state and federal constitutions and the court’s history of constitutional interpretation since *Tisler*, the court found “that it is an overstatement to

147. *People v. Caballes (Caballes I)*, 802 N.E.2d 202 (Ill. 2003). The majority in *Caballes II* explained that it did not expressly state that it was conducting its analysis in *People v. Caballes (Caballes I)* under only the Fourth Amendment, but it implicitly relied on Fourth Amendment cases and did not expressly consider the argument raised under the Illinois Constitution. *Caballes II*, 851 N.E.2d at 34. The issue of whether a state court decision rests on federal law alone, state law alone, or both federal and state law frequently is difficult to resolve. The matter is of jurisdictional significance to the Supreme Court, for it has the power only to review decisions of federal law. In recognition of the often murky basis for a state court decision, especially where both federal and state constitutional claims are raised but addressed in a single analysis, the Court adopted a rule whereby it will presume its jurisdiction to consider a decision in which the state court relied on both federal and state precedent unless the state court “make[s] clear by a plain statement” that it relied on federal precedence as guidance only and the court “indicates clearly and expressly that [the decision] is alternatively based on bona fide separate, adequate, and independent grounds” of state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). An example of such a statement that a decision rests on independent state law grounds is *People v. Duncan*. 530 N.E.2d 423, 428 (1988); see *People v. Brownlee*, 713 N.E.2d 556, 577–78 (Ill. App. Ct. 1999) (Heiple, J., specially concurring) (expressing that the majority should have made the *Michigan v. Long* statement and its failure to do so “places the rights of Illinois citizens in the hands of the federal judiciary.”) According to Justice Heiple, “[t]he responsible approach in this and other similar cases is to preclude federal review of the issue in question by clearly basing our holding on the Illinois Constitution.” *Brownlee*, 713 N.E.2d at 579.

148. *Illinois v. Caballes*, 543 U.S. 405, 425–25 (2005).

149. *Caballes II*, 851 N.E.2d at 32.

150. *Id.* at 39. In support, the court cited a series of search-and-seizure cases in which it applied Fourth Amendment law to questions raised under the Illinois Constitution, including *Tillman*, which was a focus of the debate between the justices in *Tisler* more than two decades before. *Id.* at 38–39.

151. *Id.* at 39.

describe our approach as being in strict lockstep with the Supreme Court.”¹⁵² Instead, the court explained that it applies a “limited lockstep approach.”¹⁵³ Relying in part on the doctrine of stare decisis, the court then reaffirmed its “commitment to limited lockstep analysis.”¹⁵⁴ The limited lockstep approach, the court wrote, “continues to reflect our understanding of the intent of the framers of the Illinois Constitution of 1970.”¹⁵⁵ Moreover, the court’s “jurisprudence of state constitutional law cannot be predicated upon trends in legal scholarship, the actions of our sister states, a desire to bring about a change in the law, or a sense of deference to the nation’s highest court.”¹⁵⁶ Instead, “our choice of a rule of decision on matters governed by both the state and federal constitutions has always been and must continue to be predicated on our best assessment of the intent of the drafters, the delegates, and the voters—this is our solemn obligation.”¹⁵⁷

The court then explained that *Tisler* represented a limited lockstep approach that was “modified” in *Krueger* and *Washington* “to allow consideration of state tradition and values as reflected by long-standing state case precedent.”¹⁵⁸ The court thus will interpret a provision of the Illinois Constitution in the same manner that the United States Supreme Court interprets a similar provision of the Federal Constitution unless there is: (1) a relevant difference in the language of the Illinois provision; (2) support in the Illinois constitutional convention debates that a different interpretation was intended; (3) evidence in the reports considered by the convention delegates or materials submitted to the voters favoring a different interpretation; or (4) a long-standing policy or precedent in Illinois establishing a different interpretation.

Justice Freeman, joined by Justices McMorro and Kilbride, dissented in *Caballes II*. With regard to the question of interpreting similar provisions of the state and federal constitutions, Justice Freeman wrote that Illinois’ method is best characterized as the interstitial approach because the reasons why the court has in the past departed from a lockstep interpretation are the reasons “commonly associated with this approach”: “[A] flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.”¹⁵⁹ He

152. *Id.* at 56.

153. *Id.* at 57.

154. *Id.* at 60.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 61.

159. *Id.* at 84 (Freeman, J., dissenting) (quoting *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997)).

considered *Krueger* to be an example where the Illinois Supreme Court departed from lockstep because the United States Supreme Court's reasoning was wrong and described *Washington* as an example where "the differences between the state and federal systems" justified the Illinois Supreme Court's departure from lockstep.¹⁶⁰

As seen, the evolution of the court's test for interpreting the state constitution reflects the concerns and benefits that underlie each of the different theoretical interpretative approaches. At some point in this evolution, the justices wrote a defense of each approach. Tracing the development of the court's methodology to arrive at the limited lockstep doctrine in *Caballes II* thus not only shows the different theories in a practical context of deciding important constitutional issues, but also showcases the development of important substantive constitutional doctrines in the last few decades.

The Illinois Supreme Court has had the opportunity to apply its interpretative approach in several different areas of constitutional jurisprudence, and Part III examines some of those areas.

III. ILLINOIS' APPLICATION OF THE LIMITED LOCKSTEP APPROACH IN DIFFERENT AREAS OF CONSTITUTIONAL JURISPRUDENCE

A. *Confrontation Clause Jurisprudence: A Lesson in the Implications of the Limited Lockstep Approach*

The confrontation clause of the Illinois Constitution provides a fascinating study. When the 1970 Illinois Constitution was adopted, the bill of rights provided: "In criminal prosecutions, the accused shall have the right . . . to meet witnesses face to face."¹⁶¹ The Illinois Supreme Court had occasion to interpret that provision in comparison to the interpretation given by the United States Supreme Court to the Sixth Amendment's Confrontation Clause in *People v. Fitzpatrick*.¹⁶² At issue was the constitutionality of the Child Shield Act, which applied to prosecutions for certain sex crimes and allowed the prosecution to present the testimony of a minor victim from outside the courtroom and show it in the courtroom via a closed-circuit television.¹⁶³ The defendant claimed that the Child Shield Act violated his confrontation rights under

160. *Id.* The dissent went on to conclude that the Supreme Court's decision in *Caballes I* was flawed, so the court should depart from lockstep. *Id.* at 84–85.

161. ILL. CONST. of 1970 art. I, § 8. This language was identical to the language of the 1870 Illinois Constitution. ILL. CONST. of 1870 art. II, § 9.

162. 633 N.E.2d 685 (Ill. 1994).

163. *Id.* at 688; 725 ILL. COMP. STAT. 5/106B-1, *repealed by* Pub. Act 88-674, § 5 (1994) (codifying the Child Shield Law).

the Illinois Constitution,¹⁶⁴ while the State argued that the court should afford the Illinois Constitution's confrontation clause the same interpretation as its federal counterpart.¹⁶⁵ The State argued that, though the language of the constitutions was different, the "essence" of the two clauses was the same and guaranteed a defendant's right to confront witnesses through vigorous cross examination.¹⁶⁶ Further, the United States Supreme Court in *Maryland v. Craig* upheld a similar child shield law as a matter of Sixth Amendment jurisprudence.¹⁶⁷ In *Craig*, the United States Supreme Court held that while the right to confront witnesses under the Sixth Amendment preferred face-to-face confrontations, that preference was subject to exceptions.¹⁶⁸

The Illinois Supreme Court, however, did not recognize any exceptions to the state constitutional provision. The court explained that it was bound to apply the plain meaning of the unambiguous language of article I, section 8.¹⁶⁹ The explicit constitutional language granting a right "to meet the witnesses face to face" "confers an express and unqualified right to a face-to-face confrontation with witnesses."¹⁷⁰ Because testimony by closed-circuit television was not face-to-face, the Illinois Supreme Court found the statute unconstitutional.¹⁷¹ In reaching this decision, the court noted that because the language of article I, section 8 was "clear and unambiguous," the court "need not refer to the constitutional debates, but must enforce the constitutional provision as enacted."¹⁷² The court distinguished *Craig*—and thus departed from lockstep interpretation of the two provisions—based on the different language used in the Sixth Amendment, which granted an accused the right "to be confronted with the witnesses against him," and did not explicitly require a "face-to-face" confrontation, as did article I, section 8.¹⁷³

Justice Freeman, joined by Justice Miller, dissented and argued that the two constitutional provisions conveyed the same meaning.¹⁷⁴ The dissent asserted that courts read the Sixth Amendment to require a face-

164. *Fitzpatrick*, 633 N.E.2d at 689.

165. *Id.* at 690.

166. *Id.*

167. *Id.* at 690–91 (citing *Maryland v. Craig*, 497 U.S. 836 (1990)).

168. *Craig*, 497 U.S. at 849.

169. *Fitzpatrick*, 633 N.E.2d at 689–90.

170. *Id.* at 690.

171. *Id.*

172. *Id.*

173. *Id.* at 692.

174. *Id.* at 693–94 (Freeman, J., dissenting).

to-face confrontation, but have not held that right to be absolute.¹⁷⁵ Therefore, the dissent concluded that the same rule should apply in Illinois, especially where the court had previously held that “despite the language difference, the two clauses are meant to protect the same interest.”¹⁷⁶

The reaction to *Fitzpatrick* was quick: the Illinois General Assembly proposed a constitutional amendment intended to reverse the decision and the voters approved that amendment in November of the same year.¹⁷⁷ After the amendment, the confrontation clause now reads that the accused shall have the right “to be confronted with witnesses against him or her.”¹⁷⁸ The Illinois Supreme Court explained that the amendment “conform[s] this state’s confrontation clause to that of the [S]ixth [A]mendment of the United States Constitution.”¹⁷⁹ In construing this “conforming” language, the court reads the two provisions in lockstep, acknowledging that “although the confrontation clause generally requires face-to-face confrontation, the requirement is not absolute.”¹⁸⁰

The recent history of the Illinois confrontation clause demonstrates some of the themes underlying state constitutional jurisprudence. First, the Illinois Supreme Court was tasked with interpreting the state constitutional language in light of the federal court’s interpretation of a cognate provision. Indeed, given the Supreme Court’s decision in *Craig*, it appears the defendant in *Fitzpatrick* made a wise tactical decision to press a challenge only under the Illinois Constitution in hopes that the court would depart from lockstep (which it did). Second, the reaction to *Fitzpatrick* shows the relative ease and speed by which a state constitution can be amended as compared to its federal counterpart: the language of the confrontation clause was amended less than nine months after the Illinois Supreme Court’s decision. This is an example of how state constitutions are more readily adapted to the values and interests of the State’s residents, which tend to be more homogenous than the values across the fifty states that are under the rubric of the Federal Constitution.

175. *Id.* at 697.

176. *Id.* at 695 (quoting *People v. Tennant*, 358 N.E.2d 1116, 1123 (Ill. 1976)).

177. *See People v. Dean*, 677 N.E.2d 947, 957 (Ill. 1997) (holding that the constitutional amendment deleting the “face-to-face” language from confrontation clause did not apply retroactively).

178. ILL. CONST. of 1970 art. I, § 8 (as amended Nov. 8, 1994).

179. *People v. Lofton*, 740 N.E.2d 782, 790 (Ill. 2000).

180. *Id.* at 793–94.

B. The Varied Protections of Article I, Section 6 and Their Equally Varied Interpretations

As discussed, the search-and-seizure clause of the Illinois Constitution has given rise to the benchmark cases, *Tisler* and *Caballes II*, where the Illinois Supreme Court has taken the opportunity to elucidate the standard for interpreting state constitutional provisions that have a federal analogue. As with other provisions, article I, section 6 provides several different rights. It is not only a protection against unreasonable searches and seizures; its title suggests its broader scope: “Searches, Seizures, Privacy and Interception.”¹⁸¹ Courts may interpret some of the rights within this provision in lockstep,¹⁸² but afford other rights a more expansive reading.¹⁸³ Still other rights may have no analogue in the Federal Constitution, so they are given their own independent meaning out of necessity.¹⁸⁴ By contrast, the Fourth Amendment expressly protects against unreasonable searches and seizures, but does not use the word “privacy,” though that term has been read into the amendment by the federal courts, or “interceptions.”¹⁸⁵ As in *Tisler* and *Caballes II*, where the reasonableness of a search and seizure is concerned, the court will generally interpret the Illinois Constitution in line with the federal counterpart.¹⁸⁶

But there is support in Illinois law for the proposition that when the privacy clause of article I, section 6 is invoked, Illinois courts will read that provision more expansively than the privacy right that is read into the Fourth Amendment.¹⁸⁷ The constitutional commentary on this

181. ILL. CONST. of 1970 art. I, § 6.

182. “This court interprets the search and seizure clause of the Illinois Constitution in limited lockstep with its federal counterpart.” *People v. LeFlore*, 2015 IL 116799, ¶ 16, 372 N.E.3d 1043, 1047 (internal quotation marks omitted).

183. As discussed below, this is true of the explicit privacy right in article I, section 6. *See generally* *Kunkel v. Walton*, 689 N.E.2d 1047 (Ill. 1997) (finding that an expansive reading was appropriate).

184. For instance, there is no federal constitutional right analogous to the article I, section 6 prohibition on “interceptions of communications by eavesdropping devices or other means.” ILL. CONST. of 1970 art. I, § 6; *see* *People v. Porcelli*, 323 N.E.2d 1, 3–4 (Ill App. Ct. 1975) (explaining that the use of an eavesdropping device is a criminal offense).

185. U.S. CONST. amend. IV; *see* *Katz v. U.S.*, 389 U.S. 347, 349 (1967) (explaining that Fourth Amendment protects “individual privacy against certain kinds of governmental intrusions”).

186. *People v. Fitzpatrick*, 2013 IL 113449, ¶ 28, 986 N.E.2d 1163, 1170 (discussing *Tisler* and *Caballes II*); *see* *People v. Mitchell*, 650 N.E.2d 1014, 1018 (Ill. 1995) (finding “the express intent of the drafters to leave unaltered the search and seizure clause of section 6, the additional language of section 6 provides no basis for an interpretation different from the Federal search and seizure clause”); *People v. Walker*, 2013 IL App (4th) 120118, ¶ 32, 995 N.E.2d 35, 359 (“The search and seizure provisions of the Illinois Constitution are interpreted in limited lockstep with the [F]ourth [A]mendment to the United States Constitution.”).

187. *People v. Nesbitt*, 938 N.E.2d 600, 604 (Ill. App. Ct. 2010); *see* *Katz*, 389 U.S. at 350

section provided that the “protection against ‘invasion of privacy’ is new and is stated broadly.”¹⁸⁸ Accordingly, the Illinois Supreme Court has held that “the Illinois Constitution goes beyond [f]ederal constitutional guarantees by expressly recognizing a zone of personal privacy”¹⁸⁹ that is “stated broadly and without restrictions.”¹⁹⁰ The privacy protection may extend to “noninvasive physical evidence, such as fingerprints, voice exemplars, and handwriting samples” or certain medical or financial records.¹⁹¹ For example, a grand jury request for noninvasive physical evidence such as a palm print did not raise a Fourth Amendment issue, but did implicate the broader privacy protection of the state constitution.¹⁹² Additionally, the privacy right extends to personal medical information.¹⁹³

Giving some clarity to the scope of the zone-of-personal-privacy protection, the Illinois Supreme Court in *Caballes II* rejected the argument that a dog sniff during a traffic stop implicated this right.¹⁹⁴ The court explained that the dog sniff “will not reveal the contents of diaries or love letters; it will not reveal the individual’s choice of reading materials, whether religious, political, or pornographic; it will not reveal sexual orientation or marital infidelity.”¹⁹⁵ Because the dog sniff in *Caballes II* did not implicate this privacy protection, it was to be analyzed under the search-and-seizure analysis under which the lockstep approach would be used.¹⁹⁶

In another instance regarding the scope of one’s privacy right, the court found that a requirement that a minor notify an adult before she obtains an abortion did “interfere with the minor’s right to keep medical information confidential,” but concluded that the statute’s interference with the minor’s privacy right was not unreasonable.¹⁹⁷ This decision

(explaining that the Fourth Amendment “protects individual privacy against certain kinds of governmental intrusion” but “cannot be translated into a general constitutional ‘right to privacy’”).

188. ILL. CONST. art. I, § 6 (constitutional commentary).

189. *In re May 1991 Will Cty. Grand Jury*, 604 N.E.2d 929, 934–35 (Ill. 1992). The court also stated that the privacy protection “is stated broadly and without restrictions.” *Id.*

190. *Kunkel v. Walton*, 689 N.E.2d 1047, 1055 (Ill. 1997).

191. *Caballes II*, 851 N.E.2d at 53–54.

192. *In re May 1991*, 604 N.E.2d at 934–35; *see People v. Boston*, 2016 IL 118661, ¶¶ 23–25, 43 N.E.3d 859, 863–64 (discussing *In re May 1991 Will County Grand Jury*).

193. *Kunkel*, 689 N.E.2d at 1055–56. Where the right to privacy is implicated, the challenged action will be invalidated only if the invasion is unreasonable. *See Burger v. Lutheran Gen. Hosp.*, 759 N.E.2d 533, 553–54 (Ill. 2001) (finding that only unreasonable invasions of privacy are constitutionally forbidden). The court applies the same test that it would to determine the reasonableness of a search and seizure under article I, section 4. *Kunkel*, 689 N.E.2d at 1055–56.

194. *Caballes II*, 851 N.E.2d at 54.

195. *Id.*

196. *Id.* at 32–46.

197. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶¶ 63–68, 991 N.E.2d 745, 761–

reinforces the constitutional rule that only unreasonable invasions of privacy are prohibited, not all invasions of privacy.

The development of the jurisprudence on the Illinois Constitution's express privacy right has established a new right unknown in the Federal Constitution that offers significant protection. But that right is not unbounded either in scope or degree. Therefore, while an Illinois citizen has a constitutional right to privacy in certain physical, medical, financial, or personal information, that right is still subject to reasonable deprivations by government authorities.

C. *McCauley Rights and Self-Incrimination*

After *McCauley*, the Illinois Supreme Court has generally interpreted the other guarantees of article I, section 10 the same as their federal counterparts. The court, for instance, has reasoned that the protection against self-incrimination under the Illinois Constitution is worded nearly the same as in the Fifth Amendment, and because nothing in the constitutional convention debates showed an intent that it be construed differently than its federal counterpart, the Illinois protection, like the Fifth Amendment protection, extends only to fears of prosecution by the government of this country, and not foreign governments.¹⁹⁸ Applying similar reasoning, the court has followed the federal interpretation of the privilege against self-incrimination in a case involving whether the invocation of the Sixth Amendment right to counsel in one proceeding constitutes the invocation of the Fifth Amendment right to counsel as to

63.

198. *Relsolelo v. Fisk*, 760 N.E.2d 963, 967–68 (Ill. 2001). In *Relsolelo v. Fisk*, the defendant sought to exercise his protection against self-incrimination in a civil proceeding because he feared prosecution in Venezuela where criminal charges were pending against him. *Id.* at 964–65. The Illinois Supreme Court applied the Fifth Amendment standard set forth by the United States Supreme Court in *United States v. Balsys*, which, in the *Relsolelo* court's words, held that the "fear of foreign prosecution was beyond the scope of the [F]ifth [A]mendment's self-incrimination clause." *Id.* at 966 (discussing *United States v. Balsys*, 524 U.S. 66, 670 (1998)). In declining to depart from lockstep on this point, the court explained that "there is absolutely no indication in either the Record of Proceedings or the Committee on the Bill of Rights of the Constitutional Convention that the drafters intended the Illinois privilege to differ from the federal counterpart as regarding fear of foreign prosecution." *Id.* at 967–68 (citing 3 RECORD OF PROCEEDINGS, *supra* note 68, at 1376–80; 6 RECORD OF PROCEEDINGS, *supra* note 76, at 43–44). The court noted that the language of the self-incrimination privilege was "virtually identical" and that there was "no evidence in the language" of article I, section 10 that indicated an intention that the protection should be interpreted differently than the Fifth Amendment privilege. *Id.* Accordingly, "substantial grounds" for departure from lockstep were not present. *Id.* at 967–69 ("The case at hand provides no such substantial grounds for departing from the federal interpretation of the self-incrimination privilege."). The court went on to distinguish *McCauley*'s departure from lockstep on the article I, section 10 right to counsel, explaining that there was evidence in the convention debates that the delegates intended to incorporate "then-existing federal constitutional principles regarding incommunicado interrogation." *Id.* at 968–69.

uncharged offenses.¹⁹⁹

Additionally, despite differences in wording, the court interprets the double jeopardy clause of the article I, section 10²⁰⁰ the same as the Fifth Amendment's double jeopardy protection.²⁰¹ Of note, the court has taken the step of departing from *stare decisis* and overruling prior Illinois precedent to bring Illinois law in line with federal double jeopardy jurisprudence.²⁰²

Thus, while the Illinois Supreme Court in *McCauley* found a broader right to the presence of counsel within this provision (as well as the state due process clause) than the federal courts have found under the Fifth Amendment, the rest of the protections provided by article I, section 10 generally track their federal counterpart.

199. *People v. Perry*, 590 N.E.2d 454 (Ill. 1992). The court followed the Supreme Court's reasoning in *McNeil v. Wisconsin*, 501 U.S. 171 (1991). *Id.* at 456. In declining to depart from lockstep, the court found that "the Supreme Court's analysis and conclusion in *McNeil* adequately safeguard the competing objectives of effective law enforcement and an individual's privilege against self-incrimination confronting us." *Id.*

200. "No person shall . . . be twice put in jeopardy for the same offense." ILL. CONST. of 1970 art. I, 10. The Fifth Amendment is worded in a slightly different manner: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Illinois Supreme Court has rejected the argument that the Federal Constitution's reference to "life or limb" provides a more restricted scope than the Illinois constitutional provision. *People v. Levin*, 623 N.E.2d 317, 327–28 (Ill. 1993).

201. *People v. Colon*, 866 N.E.2d 207, 223 (Ill. 2007) (explaining that nothing in the convention debates, the language of the state constitution, or tradition of the State warrants departure from lockstep); see *In re P.S.*, 676 N.E.2d 656, 661 (Ill. 1997) ("[W]e have previously interpreted our own state constitution's double jeopardy clause in a manner that is consistent with the United States Supreme Court's interpretation of the double jeopardy clause of the [F]ifth [A]mendment.") (citing *Levin*, 623 N.E.2d at 327–28). The majority and dissent in *In re P.S.* engaged in a discussion over whether the court should continue to follow the lockstep doctrine. Chief Justice Heiple, in dissent, argued that the bill of rights of the Illinois Constitution was ratified at a time when most of the Federal Bill of Rights had been deemed applicable to state governments. *Id.* at 662 (Heiple, C.J., dissenting). This led the Chief Justice to conclude that Illinois' bill of rights "must therefore have been intended to serve as an additional protection against abuses of power by state government, supplemental to the safeguards provided by the United States Constitution." *Id.* The Chief Justice wrote: "I believe that our oaths of office require 'that the seven justices of this court . . . bring to bear on every important constitutional issue their independent reasons of wisdom, judgment, and experience.'" *Id.* at 663 (quoting *People ex rel. Daley v. Joyce*, 533 N.E.2d 873, 880–81 (Ill. 1998) (Clark, J., concurring)). The majority disagreed, stating that the dissent's approach "leads to the conclusion that similar provisions of the federal and state constitutions mean different things, even though they are expressed in the same terms." *Id.* at 858. This approach, according to the majority, found no support in the convention proceedings and would require the court to find that the drafters of the constitution "did not adopt well-established meanings when they used familiar words and phrases but instead always meant something different." *Id.*

202. *Colon*, 866 N.E. at 223–25 (overruling *People v. Grayson*, 319 N.E.2d 43 (Ill. 1974)). The court in *People v. Colon* explained that it was unclear whether *People v. Grayson* was based on federal or state constitutional law, but if it was a Fifth Amendment case, it misapplied federal law, and if it was an article I, section 10 case, it was not justified in departing from lockstep.

D. The Takings Clause: More Expansive Language for Certain Situations, but Otherwise Lockstep

The necessity of overruling state precedent or otherwise changing prior state law to track changes in federal law is an inherent part of the limited lockstep approach.²⁰³ In *Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, the court addressed the effect of a United States Supreme Court decision on Illinois law.²⁰⁴ Past Illinois precedent, most specifically *People ex rel. Pratt v. Rosenfield*, found that a temporary flood was not a taking of property within the meaning of the Illinois Constitution.²⁰⁵ But contrary to Illinois precedent, in 2012, the United States Supreme Court determined, in *Arkansas Game & Fish Commission v. United States*, that a temporary flood constituted a compensable taking under the Fifth Amendment's takings clause.²⁰⁶ Contemplating the divergent holdings from past Illinois case law and the United States Supreme Court, the *Hampton* court noted that the Illinois constitutional takings provision is broader than the Fifth Amendment because it provides a remedy from property that is "damaged, in addition to property that is taken."²⁰⁷ But the court held that the extra protection was not implicated because the case raised only the issue of whether property was "taken" as a constitutional matter, and not whether it was "damaged."²⁰⁸

The court found that the definition of a "taking" was the same under the state and federal constitutions because, applying the *Caballes II* test, there was no evidence that the convention delegates intended a different interpretation and there was no state practice that required a different analysis.²⁰⁹ Accordingly, federal law was "relevant to the determination of whether government-induced temporary flooding is a taking pursuant to the Illinois Constitution."²¹⁰ The court then reconciled prior Illinois law with *Arkansas Game & Fish Commission*, reasoning that state law did not hold that temporary flooding can never constitute a taking, and incorporated the United States Supreme Court's standards articulated in

203. The Illinois Supreme Court has made clear that the Supreme Court cannot overrule one of its decisions interpreting the state constitution, but that it will "follow the lead" of the United States Supreme Court when it is interpreting state law in lockstep with federal law. *Hampton v. Metro. Water Reclamation Dist. of Greater Chi.*, 2016 IL 119861, ¶¶ 9–10, 57 N.E.3d 1229, 1233–34.

204. *Id.* ¶¶ 31–32, 57 N.E.3d at 1240.

205. *People ex rel. Pratt v. Rosenfield*, 77 N.E.2d 697, 700 (Ill. 1948).

206. 131 S. Ct. 511 (2012).

207. *Hampton*, 2016 IL 119861, ¶ 31, 57 N.E.3d 1229, 1240.

208. *Id.*

209. *Id.* ¶¶ 13–15, 57 N.E.3d at 1235–36; *see id.* ¶ 31; 57 N.E.3d at 1240 ("However, what constitutes a taking is the same under both clauses.").

210. *Id.*

the federal case into Illinois law for the purpose of determining whether a taking occurred.²¹¹ The court ultimately found that under the *Arkansas Game & Fish Commission* test, the plaintiffs did not allege a taking under Illinois law.²¹²

Justice Burke, joined by Justices Freeman and Kilbride, specially concurred. She believed that prior Illinois law could not be reconciled with *Arkansas Game & Fish Commission*, so the court should explicitly overrule the prior state law.²¹³ Applying the limited lockstep approach, Justice Burke concluded that it was appropriate to adopt the test set out by the United States Supreme Court as a matter of Illinois constitutional law.²¹⁴ The debate between the justices in *Hampton* demonstrates the effect the limited lockstep doctrine can have on long-established Illinois law. *Pratt* was decided almost seventy years earlier and had been the law of Illinois since. But a consequence of the limited lockstep doctrine was either that the rule of that case was amended as a result of the United States Supreme Court's decision, as the majority held, or that *Pratt* was to be overruled altogether, as the three specially concurring justices felt.

E. *The Right to an Abortion—Lockstep Interpretation*

The Illinois Supreme Court has read the right to an abortion protected by the Illinois Constitution to be coextensive with the federal right. In *Hope Clinic for Women, Ltd. v. Flores*,²¹⁵ the court considered the constitutionality of the Parental Notice of Abortion Act of 1995.²¹⁶ That statute prohibits a physician from performing an abortion upon an unemancipated minor unless forty-eight hours' notice is given to an adult family member, with certain exceptions. After a federal appellate court upheld the law on federal constitutional grounds,²¹⁷ it was challenged in an Illinois court under the state constitution. The first question the court addressed was the origin and the scope of the right to an abortion under the Illinois Constitution. The plaintiffs argued that the privacy clause of article I, section 6 secured the right, while the defendants argued that it was a substantive due process right that would be construed the same as the right under the Federal Constitution—under lockstep.²¹⁸ The court acknowledged that the privacy clause of the Illinois Constitution has no

211. *Id.* ¶ 25, 57 N.E.3d at 1239.

212. *Id.* ¶ 32, 57 N.E.3d at 1240. The court did not reach the issue of whether the flooding “damaged” plaintiffs’ property. *Id.* ¶ 33, 57 N.E.3d at 1241.

213. *Id.* ¶ 44, 57 N.E.3d at 1243 (Burke, J., specially concurring).

214. *Id.* ¶ 45, 57 N.E.3d at 1243.

215. 2013 IL 112673, ¶ 1, 991 N.E.2d 745.

216. 750 ILL. COMP. STAT. 70/1 (1995).

217. *Zbaraz v. Madigan*, 572 F.3d 370 (7th Cir. 2009).

218. *Hope Clinic*, 2013 IL 112673, ¶¶ 35–37, 991 N.E.2d at 754.

federal analogue,²¹⁹ but found the drafters of the Illinois Constitution explicitly ruled out extending the clause to abortion issues.²²⁰ The court then turned to the Illinois due process clause of article I, section 2, and applied the limited lockstep test. The court noted the lengthy debates during the constitutional convention regarding abortion, including whether language should be added to the due process provision to provide rights to “the unborn.”²²¹ But the ultimate conclusion of the debates was that the Illinois Constitution’s “due process clause remained unchanged.”²²² Accordingly, the court found no reason to depart from the federal courts’ interpretation of the federal due process protection of the abortion right.²²³ The court ultimately upheld the Illinois statute, relying on federal decisions upholding similar or more intrusive statutes as a matter of federal constitutional law.²²⁴

F. Free Speech Rights Under the Illinois Constitution—Sometimes More Expansive, Sometimes Not

One area that receives significant discussion is the protection of free speech rights. The First Amendment states that “Congress shall make no

219. *Id.* ¶ 42, 991 N.E.2d at 756.

220. *Id.* ¶ 45, 991 N.E.2d at 757. The court quoted a passage from the constitutional convention debates in which one delegate asked Elmer Gertz, the Chairman of the Bill of Rights Committee, to clarify that the privacy provision “has absolutely nothing to do with abortion.” Delegate Gertz responded: “It certainly has nothing to do with abortion.” 3 RECORD OF PROCEEDINGS, *supra* note 68, at 1537. At the time of the convention, of course, the Supreme Court had not decided *Roe v. Wade* or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which located an abortion right in the substantive due process protections of the United States Constitution. As part of its analysis, the court rejected the argument that its prior decision in *Family Life League v. Department of Public Aid*, 493 N.E.2d 1054 (Ill. 1986), found that the right to privacy included an abortion right. *Hope Clinic*, 2013 IL 112673, ¶¶ 38–40, 991 N.E.2d at 755. In *Family Life League*, the court did state that the “right of privacy guaranteed by the penumbra of the Bill of Rights of the United States Constitution was also secured by the drafters of the 1970 Constitution of the State of Illinois.” *Family Life League*, 493 N.E.2d at 1056 (citing ILL. CONST. of 1970 art. I, §§ 6, 12). The *Hope Clinic* court found that it was “highly unlikely that the court intended, by this statement, not only to decide the rather weighty question of whether our state constitution guarantees the right to abortion, but also to conclude that such a right is guaranteed by our privacy clause, without providing any analysis to support such findings.” *Hope Clinic*, 2013 IL 112673, ¶ 40, 991 N.E.2d at 755. Additionally, the court noted, the *Family Life League* statement was dicta. *Id.*

221. *Id.* ¶¶ 51–54, 991 N.E.2d at 758–60.

222. *Id.* ¶ 55, 991 N.E.2d at 760.

223. *Id.* Justice Thomas, joined by Justices Kilbride and Karmeier, wrote separately that, in their view, the Illinois Constitution’s due process clause did not provide a right to abortion. *Id.* ¶¶ 115–40, 991 N.E.2d at 772–79. Instead, after a lengthy discussion of the convention debates, they concluded that the drafters intended to leave abortion out of the constitution altogether and leave the matter of regulating abortion to the General Assembly. *Id.* ¶¶ 116, 140, 991 N.E.2d at 172, 179.

224. *Id.* ¶ 94, 991 N.E.2d at 769 (“Finding no reason to depart from lockstep here, we adopt the reasoning of the United States Supreme Court in holding that the Illinois Parental Notice of Abortion Act of 1995 does not violate our state constitutional guarantees of due process and equal protection.”).

law . . . abridging the freedom of speech, or of the press.”²²⁵ The Illinois Constitution contains a similar protection, but the words of the guarantee are very different: “All persons may speak, write and publish freely, being responsible for the abuse of that liberty.”²²⁶ The 1970 Constitution’s free speech provision mirrors the language of its predecessor,²²⁷ and Illinois courts have long acknowledged under the 1870 Constitution that the language may provide a more expansive protection than the First Amendment. For instance, the Illinois Supreme Court confronted a request to enjoin the publication of allegedly defamatory material in *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees of America, C.I.O.*²²⁸ When examining whether free speech principles precluded the issuance of the injunction, the court found that the language of the 1870 Constitution was “broader than that of the [C]onstitution of the United States, which merely prohibited Congress from making any law abridging freedom of speech or of the press.”²²⁹ Similarly, the court also held that the Illinois Constitution “is even more far-reaching than that of the [C]onstitution of the United States in providing that every person may speak freely, write and publish on all subjects, being responsible for the use of that liberty.”²³⁰

Although courts recognized that Illinois’ free speech provision was more expansive than its federal counterpart—by virtue of the different wording of the two provisions—that difference was not dispositive in any case. Instead, courts typically found that the provisions were both satisfied or violated.²³¹ In *People v. DiGuida*, a case that emerged under

225. U.S. CONST. amend. I.

226. ILL. CONST. of 1970 art. I, § 4. This provision continues: “In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.” *Id.*

227. ILL. CONST. of 1870 art. II, § 4 (“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.”).

228. 79 N.E.2d 46, 50 (Ill. 1948).

229. *Id.* In denying the requested injunctive relief, the court, however, did not rely on the broader reach of the state constitutional protection. *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees of America, C.I.O.* involved a long-running labor dispute between the retailer and several unions in which the company attempted to obtain a court order preventing the unions from publishing material that, among other things, referred to the company’s officers and staff “in scurrilous and opprobrious terms.” *Id.* at 48.

230. *Vill. of S. Holland v. Stein*, 26 N.E.2d 868, 871 (Ill. 1940). The court in *Village of South Holland v. Stein* found that the conduct at ordinance at issue, which prohibited soliciting magazine subscriptions without a permit, violated both the state and federal constitutions. *Id.*

231. One appellate court recently described the State’s free speech protection as “generally coextensive” with the First Amendment right. *People v. Relerford*, 2016 IL App (1st) 132531, ¶

the 1970 Illinois Constitution after *Tisler*, the defendant challenged his criminal trespass conviction for collecting signatures on a political-nominating petition on a local grocery store's private property.²³² By the time of the appeal, the defendant maintained his challenge under only the Illinois Constitution because United States Supreme Court precedent foreclosed his challenge as a matter of federal law.²³³

In addressing the free speech aspect of the challenge, the state appellate court noted that courts described the free speech guarantee as broader under the state constitution, and found that the constitutional convention debates "clearly show that the delegates intended article I, section 4 to be independent of the Federal Constitution."²³⁴ According to the appellate court, even though the Federal Constitution states that *Congress* shall make no law abridging the freedom of speech, the Illinois provision is not limited to deprivation by governmental action and the Illinois Constitution is framed as a positive right permitting each person to speak freely.²³⁵ Therefore, pursuant to the appellate court's analysis, the Illinois Constitution could be applied in certain circumstances when private parties deprive one's free speech rights.²³⁶ In that case, the grocery store permitted political activity on its premises, and thus "created a public forum or accommodation for expressionist activity."²³⁷ Having done that, the appellate court held, the store owner could not exclude "particular expressionists upon purely discriminatory or arbitrary grounds."²³⁸

The Illinois Supreme Court reversed.²³⁹ The court found that, while the delegates of the constitutional convention did not discuss free expression while on private property, they recognized that the state constitution "may provide greater protection to free speech than does its

16, 56 N.E.3d 489, 493, *petition for leave to appeal allowed*, 65 N.E.3d 845 (Ill. 2016). A federal district court has found that "[c]ourts have analyzed claims under the federal and state constitutions together while keeping in mind that protection of these liberties under the Illinois Constitution is broader than that under the United States Constitution." *Irshad Learning Ctr. v. Cty. of DuPage*, 804 F. Supp. 3d 697, 719 (N.D. Ill. 2011). In *Irshad Learning Center v. County of DuPage*, the court found no authority for the proposition that the Illinois Constitution provided greater free speech and free assembly protection to a religious organization that was denied a conditional use permit to operate a private school on residential property. *Id.*

232. *People v. DiGuida*, 576 N.E.2d 126, 127–28 (Ill. App. Ct. 1991).

233. *Id.* at 131–32.

234. *Id.* at 134.

235. *Id.* at 135.

236. *Id.*

237. *Id.* at 136.

238. *Id.*

239. *People v. DiGuida*, 604 N.E.2d 336 (Ill. 1992).

[f]ederal counterpart.”²⁴⁰ The court noted that, as opposed to the First Amendment, article I, section 4 does not “expressly restrict its application to governmental interference.”²⁴¹ But that was not dispositive, because other provisions of the Illinois Constitution, such as the protection against invasions of privacy, have been found to protect only against government action even though they contain no express textual restriction to that effect.²⁴² The court found that there may be situations where the Illinois Constitution will provide a broader free speech right than the First Amendment, but it held that the state-action requirement of the First Amendment was also a part of article I, section 4.²⁴³ In reaching this holding, the court relied on a long line of Illinois precedent that described the protections of the constitution generally as being against improper governmental conduct, not private action.²⁴⁴

Additionally, the court did not find anything in the convention debates stating that the delegates intended the free speech protection to extend to private action or that the delegates intended to change the character of the protection provided by the 1870 Constitution.²⁴⁵ The court found this significant because when Illinois adopted that earlier charter, the Federal Constitution operated only against the federal government and “the State bills of rights operated as a limitation only upon the powers of State government.”²⁴⁶ Moreover, other states with similarly worded free speech protections applied those protections only to state action.²⁴⁷ Thus, based on: (1) the convention proceedings; (2) past Illinois precedent; (3) decisions of other jurisdictions; and (4) “generally accepted doctrine concerning the reach of constitutional provisions,” the court found that article I, section 4 did not apply to private action.²⁴⁸ Because the requisite state action did not exist, the conviction did not violate the defendant’s free speech rights under the Illinois Constitution.²⁴⁹

While the *DiGuida* court acknowledged that article I, section 4 may provide greater free speech protection than the First Amendment, in practice it has generally been found to provide the same protections as the federal right. In *City of Chicago v. Pooh Bah Enterprises, Inc.*, the court examined a challenge to a Chicago ordinance that regulated nude

240. *Id.* at 343.

241. *Id.*

242. *Id.*

243. *Id.* at 344.

244. *Id.*

245. *Id.*

246. *Id.* (citing BRADEN & COHN, *supra* note 18, at 5).

247. *Id.* at 344–45.

248. *Id.* at 345.

249. *Id.* at 347.

and seminude dancing.²⁵⁰ The circuit court invalidated the ordinance under both the state and federal constitutions.²⁵¹ On appeal, the Illinois Supreme Court rejected the First Amendment claim and then turned to whether the ordinance violated the free speech guarantee of the state constitution.²⁵² The court relied principally on a decision by the Washington Supreme Court construing a Washington constitutional provision similar to that of Illinois.²⁵³ Much like the interpretation of the Illinois free speech right, the Washington court explained that its state constitutional provision “justifies a more protective standard for evaluating governmental restrictions on political speech”²⁵⁴ and “has been found to warrant greater protection for speech, both spoken and written, in some contexts.”²⁵⁵ But because the text of the provision “mentions only the right to speak, write and publish,” and does not refer to “expressive conduct,” the Washington court found that the constitutional text did not justify “extending greater protection to the adult performances at issue here.”²⁵⁶ The court also found that the differences in the text between the First Amendment and the Washington free speech provision did not justify a more expansive protection, the State’s constitutional convention did not show that the framers intended to provide greater protection to expressive conduct, and Washington’s history did not warrant a more protective analysis than is applied under the First Amendment.²⁵⁷

In addition to relying on Washington’s analysis, the Illinois Supreme Court relied on decisions from seven other states with similar free speech provisions that did not afford greater protection to nude dancing.²⁵⁸

250. 865 N.E.2d 133 (Ill. 2006).

251. *Id.* at 146.

252. *Id.* at 153–54.

253. *Id.* at 168–69 (citing *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997)). Article I, section 5 of the Washington Constitution provides: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” WASH. CONST. art. I, § 5.

254. *Ino Ino*, 937 P.2d at 163.

255. *Id.* at 163.

256. *Id.*

257. *Id.* at 163–66. The Washington court’s analysis was based on its test set forth in *State v. Gunwall*, 720 P.2d 808 (1986), for determining when a Washington court should “resort to the Washington Constitution for separate and independent state grounds of decision. *Id.* at 162. The “nonexclusive criteria” the court should consider are: (1) textual language; (2) differences in the text of the state and federal constitutional provisions; (3) Washington’s constitutional history; (4) preexisting Washington state law; (5) structural differences between the state and federal constitutions; and (6) unique state or local concerns. *Id.*

258. *City of Chi. v. Pooh Bah Enters., Inc.*, 865 N.E.2d 133, 168–69 (Ill. 2006). Those seven states are: Alabama, Arizona, Florida, Georgia, Minnesota, Montana, and Ohio. The court noted that Massachusetts did provide greater free speech protection to nude dancing, but was persuaded by the majority view. *Id.* at 169.

Based on the absence of any express language in article I, section 4 referring to expressive conduct²⁵⁹ and the majority view as exemplified by Washington's decision, the court held that the Illinois Constitution does not provide greater protection to nude dancing than the First Amendment.²⁶⁰ Because the federal challenge failed, the state claim also failed.²⁶¹

With respect to the establishment clause,²⁶² the court examined the scope of the state constitution's protection under the 1870 Constitution in *People ex rel. Ring v. Board of Education of District 24*.²⁶³ In that case, the plaintiffs challenged the practice in local public schools of reading the Bible, singing hymns, and repeating the Lord's Prayer. At that point in history (1910), the First Amendment's Establishment Clause did not apply against the states, so the court was required to address the matter under only the Illinois Constitution.²⁶⁴ The court found that the complained-of conduct was "religious worship" and that reading the Bible constituted sectarian instruction that violated the state constitution.²⁶⁵ The United States Supreme Court would not invalidate school prayer under the First Amendment's Establishment Clause for another half century.²⁶⁶

Ultimately, however, the fact that the Illinois Constitution's protections might have presaged the federal protections in this regard does not mean that courts give the state establishment clause a broader meaning than its federal counterpart. On the contrary, the restrictions imposed by Illinois' establishment clause are "identical" to those of the First Amendment.²⁶⁷ Thus, in examining the reach of the ecclesiastical abstention doctrine—which prohibits civil courts from deciding issues involving religious dogma—the free exercise and establishment clauses of both constitutions have been found to provide similar protections,²⁶⁸

259. It has been suggested that, under *City of Chicago v. Pooh Bah Enterprises, Inc.*, article I, section 4 extends less protection to dancing than the First Amendment. *People v. Relerford*, 2016 IL App (1st) 132531, ¶ 16, 56 N.E.3d 489, 493; LOUSIN, *supra* note 15, at 46.

260. *Pooh Bah Enters.*, 865 N.E.2d at 169.

261. *Id.*

262. The establishment clause of the 1970 Constitution provides that "[n]o person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." ILL. CONST. of 1970 art. I, § 3.

263. 92 N.E. 251 (Ill. 1910).

264. *Id.* at 251–52.

265. *Id.* at 257.

266. *Engel v. Vitale*, 370 U.S. 421 (1962).

267. *People v. Falbe*, 727 N.E.2d 200, 206–07 (Ill. 2000).

268. See *Susan v. Romanian Orthodox-Episcopate of Am.*, 2012 IL App (1st) 120697-U, ¶ 4 (discussing the ecclesiastical abstention doctrine); *Bruss v. Przybylo*, 895 N.E.2d 1102, 1109–10

and the same analysis applies under both constitutions to laws that create criminal penalties for conduct occurring within proximity to a church.²⁶⁹

The Illinois Constitution also contains a separate restriction on the establishment of religion related to education that is housed outside of the bill of rights. That restriction is found in article X of the Illinois Constitution—the “education article.” The third section of that article²⁷⁰ prohibits the use of public funds for sectarian education.²⁷¹ Illinois courts have held that this provision’s restrictions on the establishment of religion related to education are identical to the restrictions in the First Amendment.²⁷²

The Illinois Constitution also contains a separate protection for the right of assembly.²⁷³ The scope of that right is the subject of an action that the City of Chicago brought against a group of protestors affiliated with Occupy Chicago for violating a municipal ordinance that prohibited persons from remaining in Chicago parks from 11:00 p.m. to 6:00 a.m. The circuit court dismissed the charges against the defendants and found that the ordinance was unconstitutional because it violated equal

(Ill. App. Ct. 2008) (considering the trial court’s application of the ecclesiastical abstention doctrine).

269. *Falbe*, 727 N.E.2d at 207.

270. Article X, section 3 provides:

Neither the General Assembly nor any county, city, town, townships, 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 purposes, or to help support or sustain any school, academy, seminary, college, university, 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 1970 art. X, § 3.

271. This provision is the same as the provision that appeared in the 1870 Illinois Constitution. *See* ILL. CONST. of 1870 art. VIII, § 3. This provision was a so-called “Blaine Amendment,” named after Maine congressman James G. Blaine, who introduced an unsuccessful effort to amend the Federal Constitution to prohibit the use of public funds to support religious institutions. *Fonte, Zelman v. Simmons-Harris: Authorizing School Vouchers, Education’s Winning Lottery Ticket*, 34 LOY. U. CHI. L.J. 479, 496–98 (describing anti-Catholic sentiment that prompted thirty states to adopt explicit prohibitions on the use of public funds for sectarian purposes in their constitutions).

272. *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129, 130 (Ill. 1973); *Bd. of Educ. Sch. Dist. No. 142, Cook Cty. v. Bakalis*, 299 N.E.2d 737, 744–46 (Ill. 1973). In *Cook County v. Bakalis*, which concerned public bussing for parochial school students, Justice Ryan wrote separately to assert that he believed article X, section 3 did not have the same meaning as the First Amendment’s Establishment Clause. *Bakalis*, 299 N.E.2d at 749–52 (Ryan, J., specially concurring). He noted that the convention delegates rejected substituting the language of the First Amendment for the 1870 provision during the 1970 convention and that the more specific text of the Illinois provision, applying to aid to public schools, should be given a more restrictive meaning than the general language of the First Amendment. *Id.*

273. Article I, section 5 of the Illinois Constitution states: “The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representative and to apply for redress of grievances.” ILL. CONST. of 1970 art. I, § 5.

protection and the right to free assembly under the Illinois Constitution.²⁷⁴ On appeal, the appellate court initially found that the ordinance was a valid time, place, and manner restriction that did not violate the First Amendment,²⁷⁵ and that the ordinance was not enforced selectively in violation of the defendants' right to equal protection.²⁷⁶ The Illinois Supreme Court exercised its supervisory authority to vacate that decision and direct the appellate court to review whether the Chicago ordinance violated the defendants' right to free assembly under both the First Amendment and article I, section 5 of the Illinois Constitution.²⁷⁷

On remand, the appellate court held the 1970 convention proceedings showed that the framers intended to provide a broader right to assembly than the First Amendment.²⁷⁸ The court considered the substantive effect of a small change from the 1870 Constitution's right to assembly in the 1970 version. Previously, the right to assemble stated: "The 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."²⁷⁹ The 1970 Constitution adds a comma after "manner," so that the provision now reads that the people "have the right to assemble in a peaceable manner, to consult for the common good" ²⁸⁰ The purpose of the addition was to clarify that the right to assemble was independent and "not subject to qualification by the succeeding phrases," even if the assembly is not to consult for the common good.²⁸¹ Whereas the First Amendment right to assembly was limited to assembly for expressive purposes, the court found this Illinois right was protected regardless of purpose. The appellate court, however, considered this a "slight" difference from the First Amendment right.²⁸² The court further found that individuals gathered for nonexpressive purposes did not have a greater right to assemble than individuals gathered for expressive

274. See *City of Chi. v. Alexander (Alexander II)*, 2015 IL App (1st) 122858-B, ¶ 57, 46 N.E.3d 1207, 1226 (discussing the trial court's view of the ordinance); *City of Chi. v. Alexander (Alexander I)*, 2014 IL App (1st) 122858, ¶ 1, 24 N.E.3d 262, 266 (reversing the judgment of the circuit court).

275. *Alexander I*, 2014 IL App (1st) 122858, ¶ 31, ¶ 44, 24 N.E.3d 262, 272, 275.

276. *Id.* ¶ 51, 24 N.E.3d at 1224. The defendants argued that the City of Chicago enforced the ordinance against them, but the City did not prosecute the spectators who attended the rally at Grant Park on November 4, 2008, to witness President-elect Obama's victory speech for remaining in the park after 11:00 p.m. *Id.* ¶ 48, 24 N.E.3d at 1224. The court found that the two groups were not similarly situated for equal protection purposes. *Id.* ¶ 51, 24 N.E.3d at 1224.

277. *City of Chi. v. Alexander*, 32 N.E.3d 670 (2015) (memorandum).

278. *Alexander II*, 2015 IL App (1st) 122858-B, ¶ 61, 46 N.E.3d 1207, 1227.

279. ILL. CONST. of 1870 art. II, § 17.

280. ILL. CONST. of 1970 art. I, § 5.

281. 3 RECORD OF PROCEEDINGS, *supra* note 68, at 1480 (statement by delegate, Fr. Lawlor).

282. *Alexander II*, 2015 IL App (1st) 122858-B, ¶ 63, 46 N.E.3d 1207, 1227.

purposes under either the state or federal constitutions.²⁸³ Moreover, such assembly was still subject to the First Amendment’s “same time, place, and manner” analysis.²⁸⁴ At the time of this writing, the case remains pending on appeal in the Illinois Supreme Court.²⁸⁵

In sum, the United States Constitution’s First Amendment protections of the right to speech, the right to assemble, the right to free exercise of religion, and the protection against establishment of religion are embodied in four separate provisions of the Illinois Constitution. Illinois courts recognize that the right to free speech in article I, section 4 is broader than the First Amendment right, in large part because it expressly provides for the right not just to speak but also write and publish. Outside of those three rights, the protections are less certain, such as the case with nude dancing. And while courts recognize the broader scope of article I, section 4, generally that has no substantive effect on a case. Courts typically read the separate right to free exercise and the establishment clause in article I, section 3 of the Illinois Constitution in a coextensive manner with those rights under the Federal Constitution. So, too, is the specific antiestablishment of religion clause related to education located in article X, section 3. Finally, the right to assemble in article I, section 5 is broader than the First Amendment right because it does not contain the same textual qualifications related to the purpose of the assembly, but so far, courts have held that the provision is subject to the same restrictions as the federal right.

G. The Right to a Jury Trial Under the Illinois Constitution—A More Expansive Right

One area where the Illinois Constitution unquestionably provides a broader right than the United States Constitution is in the right to a jury trial. The Illinois Supreme Court examined the interpretation of the criminal jury trial right post-*Tisler* in *People ex rel. Daley v. Joyce*.²⁸⁶ At issue in *Joyce* was the constitutionality of a state statute that provided that the State must consent to the waiver of a jury trial in certain cases.²⁸⁷ Pursuant to that statute, a criminal defendant could not unilaterally waive a jury trial where only felony charges brought under certain drug-related laws were at issue. The court noted that the United States Supreme Court, as a matter of Sixth Amendment jurisprudence, likely would uphold the law because criminal defendants did not have a right to force a bench

283. *Id.* ¶ 63, 46 N.E.3d at 1227.

284. *Id.* ¶¶ 63–64, 46 N.E.3d at 1227–28.

285. *City of Chi. v. Alexander*, 50 N.E.3d 1139 (Ill. 2016).

286. 533 N.E.2d 873 (Ill. 1988).

287. 725 ILL. COMP. STAT. 5/115-1 (1992).

trial.²⁸⁸ Moreover, under federal law, the government has an interest protected by the Constitution in trying cases before a jury.²⁸⁹

But the text and structure of the Illinois Constitution differs from the Federal Constitution in this regard. To start, article I, section 13 provides that the “right of trial by jury as heretofore enjoyed shall remain inviolate.”²⁹⁰ The inclusion of the “as heretofore” language signified an intention to constitutionalize certain common law aspects of the jury trial right.²⁹¹ In addition to that section, the Illinois Constitution contained a separate provision that tracked the Sixth Amendment’s protections and provided that in criminal proceedings, “the accused shall have the right . . . to a speedy public trial by an impartial jury.”²⁹² Thus, two places in the Illinois Constitution provided the jury trial right and both places were in the bill of rights, which guaranteed certain rights to the people, not the government.²⁹³ On the other hand, the Federal Constitution provided the accused a jury trial right in the Sixth Amendment, but also provided that the trial of all crimes shall be by a jury in Article III, which defines judicial powers.²⁹⁴ In that way, the jury trial right was not necessarily only a right of the accused. Because of these substantive differences, the court found that it should give the Illinois jury trial right “meaning independent of the construction the [f]ederal courts have placed on the jury trial provisions of the Federal Constitution.”²⁹⁵

Turning to the history of the jury trial right in Illinois, the court found that the floor debates of the constitutional convention revealed that the delegates did not intend to change the right to a jury trial as it then existed.²⁹⁶ According to the court, the law in Illinois at that time was that the accused could waive the right to a jury trial and the State did not have

288. *Joyce*, 533 N.E.2d at 875 (discussing *Singer v. U.S.*, 380 U.S. 24 (1965)). In *Singer v. United States*, the Court explained that although a defendant can waive a jury trial right, he does not have the “right to insist upon the opposite of that right.” *Singer*, 380 U.S. at 34–35.

289. *Id.* at 36 (“We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.”).

290. ILL. CONST. of 1970 art. I, § 13.

291. *Joyce*, 533 N.E.2d at 875–86.

292. ILL. CONST. of 1970 art. I, § 8. The court in *People ex rel. Daley v. Joyce* noted that article I, section 8 enumerated other “rights of the accused” that were listed in the Sixth Amendment as well. 533 N.E.2d at 875.

293. *Id.*

294. *Id.*

295. *Id.* at 875–86.

296. *Id.* at 877.

a right to a jury trial.²⁹⁷ In rejecting the argument that the State had a right to a jury trial under the 1970 Constitution, the court held “[t]his simply turns the concept of our bill of rights on its head.”²⁹⁸

The Illinois Supreme Court recently confronted the question of what right to jury trial was “heretofore enjoyed” in civil cases. Effective June 1, 2015, section 5/2-1105(b) of the Illinois Code of Civil Procedure was amended to read: “All jury cases shall be tried by a jury of 6.”²⁹⁹ Previously, that statute permitted a six-person jury for damages claims of less than \$50,000, though it required a twelve-person jury in those cases if either party demanded it.³⁰⁰ The new statute thus removed the option of a twelve-member jury in all civil cases.

In *Kakos v. Butler*, the Illinois Supreme Court considered the constitutionality of that statute.³⁰¹ The court first noted that the United States Supreme Court had interpreted the Seventh Amendment right to a jury trial to permit juries of less than twelve people as a matter of federal law; and as part of that analysis, the court concluded that the Federal Constitution did not protect certain common-law elements of a jury trial, including the size of the jury.³⁰² In contrast to the Federal Constitution, the court found that by using the language “as heretofore enjoyed” in article I, section 13, the drafters intended the Illinois Constitution to “maintain common-law characteristics of jury trials” and for that reason, construed “the right of trial by jury protected by the Illinois Constitution differently than the rights protected by the [F]ederal [C]onstitution.”³⁰³

297. *Id.* at 877–78 (discussing *People v. Spegal*, 125 N.E.2d 468 (Ill. 1955)).

298. *Id.* at 877. Perhaps foretelling subsequent litigation, the court also noted: “When we speak of jury rights as they existed in the common law, we are encompassing more than a concept of 12 people unanimously deciding issues of fact.” *Id.* At 878. Justice Clark concurred in the judgment, noting his displeasure with the *Tisler* test. *Id.* at 879–81 (Clark, J., concurring). He raised the point subsequently raised in *In re P.S.* that given that the Federal Bill of Rights mostly applied to the states, “there would be little point in writing parallel guarantees into any [s]tate constitution if those guarantees were never to be interpreted more broadly. I cannot understand why anyone would want to spill ink uselessly.” *Id.* at 880. Justice Clark continued that by including parallel guarantees in the Illinois Constitution, the drafters meant to provide the “double protection” of “knowing that seven justices of this court would bring to bear on every important constitutional issue their independent resources of wisdom, judgment, and experience” even if it in the end resulted in no more protection than was afforded under the Federal Constitution. *Id.* Justice Miller dissented, arguing that nothing in the convention proceedings or the court’s past precedent supported a constitutional right to demand a bench trial. *Id.* at 884 (Miller, J., dissenting).

299. 735 ILL. COMP. STAT. 5/2-1105(b) (2015).

300. *Id.* at 5/2-1105(b).

301. 2016 IL 120377, ¶ 1, 63 N.E.3d 901, 903.

302. *Id.* ¶ 12, 63 N.E.3d at 905.

303. *Id.* ¶¶ 13–14, 63 N.E.3d at 905–06 (citing *Joyce*, 533 N.E.2d at 875–76). In his dissent in *Joyce*, Justice Miller opined that “the term ‘as heretofore enjoyed’ is unquestionably ambiguous” and that there was no support for the conclusion that inclusion of that language in article I, section 13 “was intended to ‘constitutionalize’ all existing judicial and statutory law pertaining to the

In describing the right to a jury trial, Illinois courts long included twelve-person composition as an element.³⁰⁴ Moreover, there was “ample evidence” that the drafters thought that the jury trial right demanded a twelve-person jury.³⁰⁵ During the 1970 constitutional convention, the delegates initially adopted a provision—on the urging of Chief Justice Underwood of the Illinois Supreme Court—that expressly permitted the General Assembly to provide for civil jury trials of no less than six and no more than twelve jurors and to permit less-than-unanimous verdicts in civil jury cases.³⁰⁶ Thus, at one point, the 1970 Constitution would have read: “The right to trial by jury as heretofore enjoyed shall remain inviolate except that the General Assembly may provide in civil cases for juries of not less than six nor more than twelve and for verdicts by not less than three-fourths of the jurors.”³⁰⁷

The Convention delegates, however, had second thoughts. The delegates subsequently passed amendments deleting, first, the nonunanimity requirement and, second, the grant of permission to the General Assembly to provide for juries of less than twelve in civil cases.³⁰⁸ The delegates, thus, expressly considered and ultimately rejected an express constitutional grant of authority to the General Assembly to provide for six-member juries in civil cases. As Delegate Gertz stated, “[s]o far as the constitution is concerned, the jury must be one of twelve members in criminal or civil cases unless the parties otherwise agree.”³⁰⁹ The court concluded that “the delegates believed the size of the jury was an essential element of the right as enjoyed at the time they were drafting the constitution and they deliberately opted not to make any change to that element.”³¹⁰ Because the size of the jury was an essential element of the right, it was guaranteed by the constitution and the amendment to the Illinois Code of Civil Procedure was unconstitutional.³¹¹

right.” *Id.* at 884 (internal quotation marks omitted).

304. *Butler*, 2016 IL 120377, ¶¶ 15–18, 63 N.E.3d at 906–08.

305. *Id.* ¶ 22, 63 N.E.3d at 908.

306. 3 RECORD OF PROCEEDINGS, *supra* note 68, at 1432.

307. *Id.*

308. 4 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPTS 3641 (1970).

309. 5 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPTS 4241 (1970) [hereinafter 5 RECORD OF PROCEEDINGS].

310. *Butler*, 2016 IL 120377, ¶ 24, 63 N.E.3d at 909.

311. *Id.* ¶ 28, 63 N.E.3d at 911. The court invalidated the entire Public Act 98-1132, of which the jury-size provision was a part. *Id.* ¶ 34, 63 N.E.3d at 912. The other part of that Act was an increase in the daily pay for people on jury duty. *See id.* ¶ 6, 63 N.E.3d at 904 (discussing the amendment to 55 ILL. COMP. STAT. 5/4-11001). The court found that these two provisions together were “intended to make jury trials more efficient and to incentivize citizens to participate in jury

The jurisprudence regarding the jury trial right in Illinois, thus, provides a striking example of the constitutional significance of this state's traditions, as reflected in its constitutional language but also its case law.

H. The Equal Rights Provision—More Expansive Protection Against Sex-Based Classifications

Concerned that the equal protection clause in the Illinois Constitution did not afford sex-based classifications heightened scrutiny,³¹² the convention delegates adopted a floor amendment to provide explicit protection against discrimination on the basis of sex.³¹³ Article I, section 18 of the Illinois Constitution thus provides that “equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.”³¹⁴ Soon after the 1970 Constitution was adopted,³¹⁵ the Illinois Supreme Court had the opportunity to interpret this provision in examining a challenge to a provision of the Juvenile Court Act that provided that seventeen-year-old males would be prosecuted as adults, but not seventeen-year-old females.³¹⁶ The court noted that the United States Supreme Court had not found sex to be a suspect classification, but that it was “incumbent upon the court to give meaning to every section and clause of the [Illinois Constitution].”³¹⁷ Thus, contrary to the Federal Constitution “which, thus far, does not contain the Equal Rights Amendment,”³¹⁸ the explicit

duty.” *Id.* ¶ 33, 63 N.E.3d at 911–12. The court reasoned: “If the provision raising the amount to be paid to each juror remains valid while the provision reducing the size of the jury is invalidated, then the legislative purpose would be frustrated. The cost of jury trials across the state will dramatically increase without any offset.” *Id.* ¶ 34, 63 N.E.3d at 912.

312. As a matter of federal equal protection jurisprudence, sex-based classifications were given intermediate scrutiny a few years later. *Craig v. Boren*, 429 U.S. 190, 197–98 (1976); *Reed v. Reed*, 404 U.S. 71, 75–77 (1971).

313. 5 RECORD OF PROCEEDINGS, *supra* note 309, at 3676.

314. ILL. CONST. of 1970 art. I, § 18.

315. After this provision was adopted, the General Assembly revised most of the statutes that contained a sex-based classification. Almost all sex-based statutory classifications favored women over men. *See* A. LOUSIN, THE ILLINOIS STATE CONSTITUTION 66 (2011) (discussing Illinois’ constitutional evolution).

316. *People v. Ellis*, 311 N.E.2d 98 (Ill. 1974) (discussing ILL. REV. STAT. ch. 37, par. 702-7(1) (1971)).

317. *Id.* at 100–01 (quoting *Oak Park Fed. Sav. & Loan Ass’n v. Vill. of Oak Park*, 296 N.E.2d 344, 346–47 (Ill. 1973) (construing article VII, section 6(l) concerning home-rule units of local government)).

318. At the time of *People v. Ellis*, the proposed Federal Equal Rights Amendment, which had been submitted to the states for ratification approximately two years earlier, provided that “equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” 311 N.E.2d at 100–01 (quoting H.R.J. Res. No. 208, 92nd Cong. 2d Sess. (1972)). Illinois never ratified the proposed Federal Equal Rights Amendment. *See The ERA in the States*,

language of article I, section 18 and the convention debates led the court to the “inescapable” conclusion that sex-based classifications were constitutionally suspect and subject to strict scrutiny.³¹⁹ And the classification in the Juvenile Court Act failed this test.³²⁰

Subsequent to the adoption of the 1970 Illinois Constitution, the Illinois General Assembly enacted the Illinois Human Rights Act in part to “secure and guarantee the rights established by sections 17, 18 and 19 of article I of the Illinois Constitution of 1970.”³²¹ Accordingly, there is a statutory cause of action for sex discrimination in certain circumstances.³²² Nonetheless, the Illinois Supreme Court has since entertained claims brought directly under article I, section 18 that challenge a statute as creating an impermissible classification, as opposed to claims of sex discrimination in areas such as employment, education, or housing that are actionable under the Human Rights Act.³²³

Article I, section 18 of the Illinois Constitution thus provides a fitting example of the use of a state constitution to provide protections deemed important to that state’s citizens where federal law had not afforded such protections and efforts to amend the United States Constitution had not come to fruition.

CONCLUSION

The Illinois Constitution is a font of important rights. Most of the litigation regarding those rights reasonably focuses on the protections that the Illinois Constitution’s bill of rights provides because those provisions accord important individual guarantees. The Illinois Constitution’s bill

EQUAL RTS. AMEND., equalrightsamendment.org/states.htm#IL (last visited May 6, 2017).

319. *Ellis*, 311 N.E.2d at 100–01.

320. *Id.* at 101.

321. 775 ILL. COMP. STAT. 5/1-102(F) (2015). Article I, section 17 prohibits discrimination in hiring and promotion practices and in the sale or rental of property on the basis of “race, color, creed, national ancestry and sex.” ILL. CONST. of 1970 art. I, § 17. That provision states that the rights conferred “are enforceable without action by the General Assembly,” but the General Assembly may provide “reasonable exemptions” to the rights as well as additional remedies for violations of the rights. *Id.* Article I, section 18, does not contain similar “enforceability” language, but, as in *Ellis*, the provision has been read as a basis for direct constitutional actions. Article I, section 19 prohibits discrimination on the basis of a “physical or mental handicap” and also lacks the enforceability language of section 17. *Id.* art. I, § 19.

322. Illinois law is not entirely clear on whether certain civil rights claims for which a cause of action is provided by the Human Rights Act must be brought under that statute, or whether a free-standing claim may be brought. See the discussion in *Blount v. Stroud*, 904 N.E.2d 1, 12–17 (Ill. 2009).

323. See, e.g., *Hope Clinic*, 2013 IL 112673, ¶¶ 102–105, 991 N.E.2d 745, 770–71 (discussing the interpretation of article I, section 18 of the Illinois Constitution of 1970); *In re Estate of Hicks*, 675 N.E.2d 89, 92–98 (Ill. 1996) (same); *People v. Adams*, 597 N.E.2d 574, 584–85 (Ill. 1992) (same).

of rights overlap, at least in name, with their federal counterpart to a large degree. That overlap, however, does not necessarily indicate that the rights conferred by both constitutions are the same. But as a practical matter, that is a result of the limited lockstep doctrine, founded as it is upon a presumption that a court will interpret the state right in the same manner as its federal counterpart. Nonetheless, that doctrine has adequate flexibility to account for differences in Illinois' legal tradition, expressed either in the constitutional convention debates, the State's statutory history, or its court decisions, as seen with free-standing claims of innocence under Illinois' due process clause or the right to a jury trial.

Furthermore, the Illinois Constitution provides some important rights that are not found in the United States Constitution. Thus, Illinois citizens have a constitutional right to privacy in personal information that is independent of the Federal Constitution, and laws that impose sex-based classifications are subject to strict scrutiny, regardless of the United States Supreme Court's interpretation of the federal equal protection clause. Additionally, the Illinois Constitution expressly provides rights to a healthful environment and a free public education.

More than anything, the Illinois Constitution, and the Illinois Supreme Court's method of interpreting its provisions, ultimately reflect the values of the State's citizens. The document does not need to take into account the varied values or concerns of citizens across the diverse breadth of all fifty states, but rather can be responsive to more local beliefs and problems. Those values are expressed in relatively recent terms, given that the current state constitution is less than fifty years old. And because of the relative ease—compared to the Federal Constitution—with which the Illinois Constitution may be amended and the requirement that Illinois citizens be given the opportunity to call for a new constitutional convention every two decades, it can evolve to continually reflect the values of the citizenry. State constitutions are often overlooked and frequently under-studied as sources of rights and limitations, but they offer unique solutions to many of modern society's problems. The Illinois Constitution of 1970 is a prime example.