Interpreting the Illinois Constitution: Illinois Supreme Court Plays Follow the Leader

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I. INTRODUCTION

During the Warren Court era, the United States Supreme Court acted as a guardian of civil liberties and interpreted the Bill of Rights as granting extensive safeguards to individuals accused of crimes. The Burger and Rehnquist Courts, however, have significantly narrowed the protections delineated in the Bill of Rights. Some state courts have declined to follow the Supreme Court's conservative trend. Instead, they have interpreted their state constitutions as granting liberties that are broader than the Supreme Court's interpretations of the Bill of Rights. The Illinois Supreme Court, however, continues to follow United States Supreme Court precedent. Apparently, the Illinois Supreme Court has linked certain state constitutional provisions to United States Supreme Court interpretations of parallel provisions in the Bill of Rights.

This comment will focus upon the Illinois Supreme Court's decision to embrace the interpretations of the United States Supreme Court. First, the comment will discuss the principle of federalism as established by the United States Constitution. It then will consider the impact of the fourteenth amendment on federalism and criminal procedure. Next, the comment will examine Illinois Supreme Court decisions that have refused to recognize the Illinois Constitution as a source of independent protection. Finally, the comment will assert that Illinois courts should not be bound by the decisions of the United States Supreme Court but should exercise independent judgment when interpreting the state Constitution.


2. Id. See Note, Developments in the Law - The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1368-69 (1982); Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 TEX L. REV. 1141, 1153 (1985). See also McNally v. United State (Stevens, J., dissenting) (recognizing that the Court has not been particularly receptive to the rights of criminal defendants in recent years).

3. See infra note 27 and accompanying text.

4. See infra notes 58-97 and accompanying text.

5. See Tisler, 103 Ill. 2d at 243, 469 N.E.2d at 156 (search and seizure); People v. Rolffingmeyer, 101 Ill. 2d 137, 142, 461 N.E.2d 410, 412 (1984) (privilege against self-incrimination); see also infra notes 71, 92 and accompanying text.
II. BACKGROUND

A. Federalism Under The United State Constitution

The framers of the United States Constitution sought to institute a national government with the power to govern those matters outside the competence of state governments. At the same time, they sought to preserve the integrity of state governments. Thus, the framers established a national government with supreme, albeit limited, power. The power of the national government is thus confined to enumerated areas. All concerns outside the enumerated areas fall within the general police power of the state governments.

The framers of the United States Constitution assumed that the states would strive to exercise their full range of authority in their self-interest. This state authority included the preservation and
protection of civil liberties. Thus, the extensive bills of rights present in the state constitutions at the time that the United States Constitution was adopted illustrate the role the states were intended to play in safeguarding individual rights. State involvement in the protection of individual rights continues to be evidenced by state constitutions.

B. The Incorporation Doctrine

The fourteenth amendment, adopted in 1868, gave the national government the authority to review state action. In the area of criminal procedure, the Supreme Court has determined that the fourteenth amendment requires the states to recognize fundamental rights essential to principles of liberty and justice. The Bill of Rights contains many such rights. The Supreme Court, however, has not required the states to adhere to the United States Constitution's Bill of Rights. Rather, the Court has applied a doctrine of selective incorporation, holding certain Bill of Rights guarantees fundamental, and thus binding on state governments. Although

12. Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 501-02 (1977). ("[P]rior to the adoption of the fourteenth amendment . . . state bills of rights . . . were the primary restraints on state action . . . .").


16. Adamson v. California, 332 U.S. 46 (1947). In Adamson, the Court stated, "The due process clause of the fourteenth amendment . . . does not draw all the rights of the federal bill of rights under its protection." Id. at 53. Adamson triggered a great debate, centering upon the relationship between the fourteenth amendment and the Bill of Rights, between Justices Black and Frankfurter. Justice Frankfurter advocated the selective incorporation approach, stating that "[d]ue process of law meant one thing in the Fifth Amendment and another in the Fourteenth." Id. at 66 (Frankfurter, J., concurring). Justice Black, however, rejected the selective incorporation approach, and instead advanced the position that the privileges and immunities clause of the fourteenth amendment incorporated all of the provisions in the Bill of Rights. Id. at 89. (Black, J., dissenting) ("I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights.").

17. U.S. CONST. amends. I-X. See also APPENDIX (listing of provisions in the first ten amendments to the United States Constitution).


the majority of the Court has continued to follow this "fundamental rights" approach, most Bill of Rights guarantees have been incorporated in the fourteenth amendment’s due process clause on a case-by-case basis.20

This action at the federal level indicates that states were not adequately securing these rights under their own constitutions.21 Criminal procedure thus became "nationalized," based on the minimum requirements mandated by the fourteenth amendment’s due process clause.22 The states, however, have retained declarations of rights within their own constitutions and the concomitant authority to interpret what those state rights entail.23 Moreover, the United States Supreme Court’s rejection of an automatic incorporation reflects the Court’s desire to preserve federalism and the states’ intended role in determining policy in the area of criminal procedure.24

C. State Court Approaches

Recently, United States Supreme Court interpretations of the Bill of Rights have narrowed the protections afforded individuals accused of crimes.25 Because many state constitutional provisions parallel those in the Bill of Rights, state courts must determine whether to follow the minimum requirements of the fourteenth amendment, or whether to base their decisions on independent state constitutional grounds.26 Of course, it is not questioned that the states have the authority to interpret their respective constitu-


20. G. GUNTHER, Constitutional Law 420 (1985). The right to be indicted by a grand jury has been held to not be applicable to the states. Hurtado v. California, 110 U.S. 516 (1884). The Supreme Court has yet to rule on the issue of whether the fourteenth amendment incorporates the excessive bail clause of the eighth amendment.


22. See Brennan, supra note 12, at 495.


24. See Adamson, 332 U.S. at 62 (Frankfurter, J., concurring) (noting that judges who had rejected total incorporation were "duly regardful of the scope of authority that was left to the states . . ." and arguing that total incorporation would improperly alter then existing law in the states, and would deny states the opportunity for reforms).

25. See People v. Tisler, 103 Ill. 2d 226, 260, 469 N.E.2d 147, 164 (1984) (Clark, J., concurring) (“Today the United States Supreme Court has been cutting back on the individual liberties provided by the Warren court . . . .”); Abrahamson, supra note 2, at 1153; Brennan, supra note 12, at 495; Note, supra note 2, at 1368-69.

26. Brennan, supra note 12, at 495 (noting that state courts are construing bill of rights' provisions in their state constitutions as providing greater protections than federal constitutional counterparts, even when identically phrased).
tions more broadly than United States Supreme Court interpretations of similar United States constitutional provisions.27 Numerous jurisdictions, in fact, have reached broader interpretations with regard to particular issues.28

State courts have taken various approaches when interpreting provisions in their bill of rights that parallel provisions in the United States Constitution.29 Frequently, state courts have refused to grant greater protections than the minimum requirements of the fourteenth amendment.30 Some state courts simply have declared that particular provisions within their state constitutions have the same scope as parallel provisions in the United States Constitution.31 Other state courts have afforded United States Supreme Court decisions high regard, but have not hesitated to vary from the Court's reasoning.32 State courts also have followed the minimum requirements set by the United States Supreme Court in a particular case merely because they are convinced of the propriety of the fourteenth amendment standard.33

Increasingly, state courts have granted broader protections under their state constitutions than the United States Supreme Court demands under the fourteenth amendment.\textsuperscript{34} The point at which state courts will stray from United States Supreme Court precedent varies among the jurisdictions. Some state courts have conditioned variance on specific language in the state constitution or other state specific factors.\textsuperscript{35} Clearly, however, a state court can depart from United States Supreme Court precedent based solely on disagreement concerning the proper level of protection under a particular constitutional provision\textsuperscript{36} or on grounds of state public policy.\textsuperscript{37}

### III. DISCUSSION

#### A. The Illinois Constitution

In 1970, Illinois adopted a new constitution. Particular provisions within that constitution parallel those in the Bill of Rights of the United States Constitution.\textsuperscript{38} References from the 1970 Illinois Constitutional Convention indicate that delegates looked to the United States Constitution and United States Supreme Court decisions for guidance.\textsuperscript{39} The Illinois framers also relied on the Illinois Constitution of 1870 and Illinois Supreme Court decisions.\textsuperscript{40}

Comments made at the 1970 convention illustrate that the state bill of rights committee sought to retain the language of various

\textsuperscript{34} See supra note 27 and accompanying text. To preclude reversal by the United States Supreme Court, the state decision must clearly indicate that it is based upon independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).


\textsuperscript{36} See, e.g., People v. Disbrow, 16 Cal. 3d 101, 113, 545 P.2d at 280, 127 Cal. Repr. at 310 (1976) ("[W]e . . . declare that [Harris v. New York] is not persuasive authority in any state prosecution in California."); State v. Kaluna, 55 Hawaii 361, 369, 520 P.2d 51, 58 (1974) ("We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted.").


\textsuperscript{38} See APPENDIX.


\textsuperscript{40} See supra note 38.
provisions unless a specific reason for change existed. If judicial decisions had implemented prior existing provisions to the satisfaction of the delegates, the drafters typically left the provisions intact, even when the court interpretations lacked detailed textual support. For instance, with regard to the state constitution's self-incrimination clause, the bill of rights committee rejected proposals to update the language to comport with judicial decisions. The committee determined that changes were unnecessary because the court interpretations properly and effectively stated the law. The committee further noted that the judiciary was best situated to detail constitutional guidelines based on case-by-case interpretations.

The bill of rights committee, however, adopted a different approach regarding the search and seizure provision. Unlike the Fourth Amendment of the United States Constitution, amendments to the 1970 Illinois Constitution's search and seizure provision expressly protect against unreasonable invasions of privacy and interceptions of communications. The committee supported this additional protection by noting that the new language reflected case law and public opinion. Nevertheless, the committee adopted only limited changes, recognizing that the judiciary ultimately would be in the best position to implement the prohibition of unreasonable searches and seizures. Therefore, the committee drafted the language of the search and seizure provision to resemble the fourth amendment and the search and seizure provision in the Illinois Constitution of 1870.

B. Illinois Decisions

In Illinois, as in other states, commentators and litigators have argued that state constitutional provisions should be considered in-

41. See 3 RECORD OF PROCEEDINGS, supra note 39, at 1377 ("We felt that it was our task, not to show how much superior we were to the original phrase-makers, but whenever we had no sufficient reason to change language — even archaic language — we felt we ought to leave it alone.") (comments of Mr. Gertz).
42. Id. at 1376 (comments of Mr. Weisberg).
43. Id. The state constitutional privilege against self-incrimination differs from that in the United States Constitution. See infra notes 115-19 and accompanying text.
44. 3 RECORD OF PROCEEDINGS, supra note 39, at 1376-77 (comments of Mr. Weisberg).
45. 4 RECORD OF PROCEEDINGS 4277 (comments of Mr. Gertz).
46. Id. RECORD OF PROCEEDINGS, supra note 39, at 1368 (comments of Mr. Gertz).
47. Id. at 1525 (comments of Mr. Dvorak).
48. Id. (comments of Mr. Gertz).
49. Id. at 1523-24 (comments of Mr. Dvorak).
dependent of United States Supreme Court interpretations of similar provisions in the United States Constitution. In *People v. Jackson*, for example, an Illinois appellate court faced the issues of whether a person has a right to privacy in bank records and, if so, whether the seizure of the records was constitutionally reasonable. Although the *Jackson* court determined that the defendant had standing to challenge the state’s invasion, the court refused to quash a grand jury subpoena of the defendant’s banking records, concluding that the state invasion of privacy was reasonable, and therefore, constitutional. In reaching this result, the court rejected the United States Supreme Court’s decision in *United States v. Miller*. In *Miller*, the Court held that a defendant lacked standing to challenge a governmental seizure of bank records, reasoning that an individual has no privacy interest in his banking records under the fourth amendment. In rejecting *Miller*, the Illinois appellate court relied on the specific right to privacy language in Article 1, Section 6 of the Illinois Constitution. Thus, the court distinguished the Illinois search and seizure provision from the fourth amendment of the United States Constitution.

Subsequent to *Jackson*, the Illinois Supreme Court has rejected attempts to expand the protections of the search and seizure and self-incrimination provisions of the Illinois Constitution beyond the United States Supreme Court’s interpretations of the United States Constitution. This approach was evidenced by the Illinois Supreme Court’s response to the 1983 United States Supreme

52. *Id.* In *Jackson*, a grand jury, investigating the defendant for the unlawful receipt of state unemployment benefits, issued a subpoena *duces tecum* to the defendant’s bank, demanding her bank records for a period relevant to their investigation. *Id.* at 432, 452 N.E.2d at 87. The defendant was later indicted and she filed a motion to quash the subpoena. *Id.*
53. *Id.*
55. *Id.* at 439-40.
56. ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.").
57. See *Jackson*, 116 Ill. App. 3d at 434, 452 N.E.2d at 88.
Court decision in *Illinois v. Gates.*\(^5^9\) At the time *Gates* was decided, *People v. Exline,*\(^6^0\) which presented the issue of whether an affidavit supporting a search warrant stated probable cause, was pending before the Illinois Supreme Court. The majority in *Exline* recognized that *Gates* established a "less rigid standard" for finding probable cause than had existed under the previous *Aguilar-Spinelli* test.\(^6^1\) The court raised the issue of whether *Gates* was to be applied retroactively or prospectively. The Illinois Supreme Court, however, did not decide that issue, but instead held that probable cause existed under either the *Gates* or the *Aguilar-Spinelli* tests.\(^6^2\) Noticeably absent from the majority opinion was any discussion concerning whether the *Aguilar-Spinelli* test should be retained as the state constitutional standard, irrespective of the new minimum standard established in *Gates.*\(^6^3\) The court made no mention of the relative merits of the tests even though the *Aguilar-Spinelli* test had been the existing standard in Illinois.\(^6^4\) The Illinois Supreme Court’s failure to discuss any independent Illinois Constitutional standard portended the direction the majority of the court would take in interpreting the state constitution.

Under the previous *Aguilar-Spinelli* test, a probable cause finding required a particularized showing of the informant’s credibility and basis for his knowledge.\(^6^5\) With regard to cases involving information provided by informants, *Gates* redefined probable cause as a "common sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."\(^6^6\) In a 1984 decision, *People v. Tisler,*\(^6^7\) the Illinois Supreme Court embraced this latter interpretation of probable cause.

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60. 98 Ill. 2d 150, 456 N.E.2d 112 (1983).
61. Id at 155, 456 N.E.2d at 115.
62. Id. at 153, 456 N.E.2d at 114.
63. In a dissenting opinion, Justice Goldenhersh, joined by Justice Simon, argued that probable cause did not exist under the *Gates* test. *Exline*, 98 Ill. 2d 150, 157, 456 N.E.2d 112, 116. He further argued that the Illinois Supreme Court should not "blindly follow" the United States Supreme Court, and that the *Aguilar-Spinelli* test should be retained as the proper standard under the Illinois Constitution. Id. at 157-58, 456 N.E.2d at 116.
In *Tisler*, the Illinois Supreme Court confirmed the implication of *Exline* that the United States Supreme Court's interpretations of the fourth amendment determine the scope of the search and seizure provision in the Illinois Constitution. The *Tisler* court faced the issue of whether probable cause existed for the defendant's warrantless arrest. The defendant argued that the *Aguilar-Spinelli* standard of probable cause controlled.\(^{68}\) The court, however, rested its holding on the *Illinois v. Gates* "totality-of-circumstances" approach, thereby establishing *Gates* as the applicable standard in Illinois.\(^{69}\) The court recognized that past cases had applied the *Aguilar-Spinelli* test, which was more beneficial to defendants than was *Gates*.\(^{70}\) The majority, however, stated that the *Aguilar-Spinelli* test did not demarcate the extent of protection guaranteed by the Illinois Constitution.\(^{71}\) Rather, the court opined that past decisions applying the *Aguilar-Spinelli* test held that Illinois standards are equivalent to fourth amendment standards as they evolve.\(^{72}\) Recognizing a history of unity between Illinois and United States Supreme Court decisions in interpreting their respective search and seizure provisions, the Illinois Supreme Court held that the Illinois court should not go its "separate way simply to accommodate the desire of the defendant. . . ."\(^{73}\) The court conditioned its variance from United States Supreme Court precedent on the existence of language in the state constitutional text or convention proceedings that indicated an intent to place a different construction on the Illinois search and seizure provision.\(^{74}\)

*Tisler* divided the court and drew a host of separate opinions.\(^{75}\) Justice Clark, while concurring in the outcome of the case, rejected the approach taken by the majority.\(^{76}\) He argued that "the absence of certain comments at the Illinois [C]onstitutional [C]onvention [calling for variance from United States Supreme Court decisions] should not tie [the court's] hands."\(^{77}\) He also cautioned that the majority approach would unnecessarily limit the court's power to...

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68. Id. at 241, 469 N.E.2d at 155.
69. Id. at 246, 469 N.E.2d at 157.
70. Id. at 243, 469 N.E.2d at 156-157.
71. Id. at 243, 469 N.E.2d at 156.
72. Id.
73. Id. at 245, 469 N.E.2d at 157.
74. Id.
75. In addition to the opinions mentioned in the text, Justice Ward filed a concurring opinion in which he emphasized that the intent of the Illinois framer's should not be overlooked. *Tisler*, 103 Ill. 2d at 254, 469 N.E.2d at 161 (Ward, J., concurring).
76. *Tisler*, 103 Ill. 2d at 258, 469 N.E.2d at 163 (Clark, J., concurring).
77. Id. at 262, 469 N.E.2d at 165.
interpret the state constitution.\textsuperscript{78}

Justice Goldenhersh, joined by Justice Simon, dissented and disapproved of the adoption of Gates as the probable cause standard under the Illinois Constitution.\textsuperscript{79} The dissent also agreed with Justice Clark's rejection of binding Illinois courts to United States Supreme Court precedent.\textsuperscript{80}

In People v. Hoskins,\textsuperscript{81} the Illinois Supreme Court similarly had concluded that the United States Supreme Court's interpretations of the fourth amendment were fully applicable in Illinois. The Hoskins court held that a warrantless search of the defendant's purse was constitutionally proper because it was incident to a lawful arrest.\textsuperscript{82} The court based its holding on the United States Supreme Court decision in United States v. Robinson.\textsuperscript{83} Because Robinson was decided on fourth amendment grounds, the Illinois Supreme Court noted the relation of Article 1, Section 6 of the Illinois Constitution to the fourth amendment.\textsuperscript{84} The Hoskins court rejected any contention that the Illinois search and seizure provision was intended to be "interpreted differently from the Supreme Court's interpretations of the search provisions of the fourth amendment . . . ."\textsuperscript{85}

Justice Clark dissented on the grounds that the search violated the fourth amendment, Article 1, Section 6 of the Illinois Constitution, and Section 108-1 of the Illinois Code of Criminal Procedure of 1963.\textsuperscript{86} Specifically, he argued that Illinois courts were bound to grant protections as broadly as the Illinois Code of Criminal Procedure directed, notwithstanding the United States Supreme Court's more limited interpretation of the fourth amendment.\textsuperscript{87} Justice Simon joined in Justice Clark's dissent and also filed a separate dissent.\textsuperscript{88} In his separate dissent, Justice Simon called upon the court to recognize its obligation to interpret the state constitution based on an independent analysis of individual privacy rights and law enforcement considerations.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{78} Id. at 259, 469 N.E.2d at 163-64.
\item \textsuperscript{79} Id. at 265, 469 N.E. 2d at 166-67 (Goldenhersh, J., dissenting).
\item \textsuperscript{80} Id.
\item \textsuperscript{81} 101 Ill. 2d 209, 461 N.E.2d 941 (1984).
\item \textsuperscript{82} Id. at 217, 461 N.E.2d at 944.
\item \textsuperscript{83} 414 U.S. 218 (1973).
\item \textsuperscript{84} Hoskins, 101 Ill. 2d at 218, 461 N.E.2d at 945.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. at 223-34, 461 N.E.2d at 948-953.
\item \textsuperscript{87} Id. at 227, 461 N.E.2d at 950 (Clark, J., dissenting).
\item \textsuperscript{88} Id. at 234, 461 N.E.2d at 953 (Simon, J., dissenting).
\item \textsuperscript{89} Id. at 236, 461 N.E.2d at 954.
\end{itemize}
Nevertheless, the Illinois Supreme Court's adherence to United States Supreme Court interpretations of the United States Constitution has continued. Moreover, the Illinois Supreme Court has not limited its reliance on United States Supreme Court interpretations to decisions concerning the scope of the Illinois Constitution's search and seizure provision. In *People v. Rolfingsmeyer*, the Illinois Supreme Court upheld the validity of the implied consent statute of the Illinois vehicle code against a self-incrimination challenge. Section 11-501.2(c) of the Illinois Vehicle Code allows for the admission into evidence of the refusal to submit to a breath alcohol test in a criminal action. In upholding the statute, the Illinois Supreme Court found that the self-incrimination provision in the Illinois Constitution, Article 1, Section 10, was not intended to provide broader protections than the self-incrimination clause in the fifth amendment of the United States Constitution.

Justice Simon concurred in the result, but disagreed with the majority position that Illinois courts are bound to United States Supreme Court's self-incrimination decisions. He argued that the Illinois Supreme Court cannot delegate the duty of upholding the Illinois Constitution. He asserted that a presumption requiring Illinois courts to follow federal precedent unless rebutted by express indications to the contrary was the "reverse" of the proper presumption. Justice Simon again implored the court to respond to its own conscience and to rely on its own wisdom and insights when interpreting the Illinois Constitution.

IV. ANALYSIS

The Illinois Supreme Court's blind reliance upon the United States Supreme Court interpretations of the federal constitution as authoritative interpretations of the Illinois Constitution is suspect for a number of reasons. First, such automatic reliance is not supported by the intent of the state constitution's framers. Second, the reliance denies the Illinois Constitution independent significance. Finally, the Illinois Supreme Court's approach precludes independent judicial reasoning at all levels in the state court system.

91. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1982).
92. ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(c) (1981).
93. *Rolfingsmeyer*, 101 Ill. 2d at 142, 461 N.E.2d at 412.
94. Id. at 143, 461 N.E.2d at 413.
95. Id.
96. Id.
97. Id. at 147, 461 N.E.2d at 415.
Because these weighty considerations clearly support independent interpretation of our state constitution, the "follow the leader" approach of the Illinois Supreme Court should be discarded.

A. Blind Reliance Upon The United States Supreme Court's Interpretations of the Federal Constitution Is Not Supported by the Framer's Intent.

The starting point for state constitutional analysis should be the intent of the framers. The Illinois Supreme Court has purported to start there, justifying its linkage of the state constitution to the United States Supreme Court's interpretations of the federal constitution based on the Illinois Constitutional Convention's failure to express any intention to deviate from United States Supreme Court interpretations.\(^{98}\) The Illinois Supreme Court's rationale, however, is ill-conceived. The text of the Illinois Constitution establishes broad guidelines, encouraging flexibility in court interpretations rather than obtuse dependence on the United States Supreme Court.\(^{99}\) Moreover, it is plain that Illinois' constitutional delegates were relying on the state courts to delineate the specific levels of state constitutional protection.\(^{100}\) Having recognized the major role courts would play, it is unlikely that they contemplated a preemption of Illinois court reasoning in favor of United States Supreme Court dominance. In fact, the Illinois debates indicate a working assumption by the framers that the Illinois Supreme Court would be the interpreter of the state bill of rights.\(^{101}\)

Furthermore, it is fundamental that courts within a jurisdiction are the interpreters of that jurisdiction's constitution. Even a limited departure from that course would be unusual; any intention to fetter a judiciary with decisions from a different jurisdiction would have been clearly indicated by the framers of the state constitution. Thus, contrary to the reasoning of the Illinois Supreme Court, the Illinois framers' general approval of United States Supreme Court decisions in 1970 does not in any way indicate an intention to approve and adopt subsequent United States Supreme Court decisions as a matter of state constitutional law.

In addition, the failure to vary every provision in the state con-

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98. See supra note 39 and accompanying text.
99. See 3 RECORD OF PROCEEDINGS, supra note 39, at 1376, 1524.
100. See id. at 1378-79, 1531; 5 RECORD OF PROCEEDINGS, supra note 39, at 4277.
101. See 3 RECORD OF PROCEEDINGS, supra note 39, at 1533 ("I think that the seven gentlemen down the street who ultimately will decide what this constitution means aren't going to spend their time going through all these transcripts . . . . They have got sense enough to figure it out for themselves.") (comments of Mr. Foster).
stitution from the United States Supreme Court’s interpretations of the federal constitution does not illustrate that the Illinois framers considered their development of a state bill of rights a purposeless formality. If the framers wanted simply to defer, in perpetuity, to United States Supreme Court decisions regarding Bill of Right protections, they would have omitted entirely the comparable sections from the state bill of rights or explicitly expressed their deference. The Illinois framers evidently considered their role in drafting the state constitution to be an important one. Contrarily, the caretakers and ultimate interpreters of that constitution have concluded that several of its provisions mean precisely what another judicial body has decided.

Finally, the Illinois Supreme Court has given short shrift to the proposition that the pre-1970 United States Supreme Court interpretations of the fourth and fifth amendments, approved by the Illinois delegates, granted broader protections than more recent decisions. In accordance with those earlier decisions, the Illinois delegates indicated a high regard for individual rights. The failure to endorse broader protections in 1970 is hardly indicative of the framers’ approval of the subsequent narrowing of protections. Nor does that failure illustrate any intent by the framers to confine Illinois courts to United States Supreme Court decisions in perpetuity. In sum, the convention’s acceptance of pre-1970 decisions simply does not constitute a wholesale approval of subsequent United States Supreme Court decisions. Though the court’s inference that the framers intended to follow those decisions may

102. See id. at 1368 (“In all cases, the issues were squarely faced, vigorously debated, and firmly decided. [E]ven when we ended up where we started, it was a process of spending hours and even days in going over the matter.”) (comments of Mr. Gertz).

103. See Tisler, 103 Ill. 2d at 242, 469 N.E.2d at 156; Hoskins, 101 Ill. 2d at 218, 461 N.E.2d at 945; Rolfingsmeyer, 101 Ill. 2d at 142, 461 N.E.2d at 412.

104. See Tisler, 103 Ill. 2d at 260, 469 N.E.2d at 164 (1984) (Clark, J., concurring); Abrahamson, supra note 2, at 1153; Note, supra note 2, at 1368-69.

105. See 3 RECORD OF PROCEEDINGS, supra note 39, at 1525 (“[W]hile the federal constitution has been . . . interpreted . . . to include all these concepts, we felt that we would be very progressive and very thorough and very proper if we would include all three theories into section 6 of our bill of rights.”) (comments of Mr. Dvorak).

106. See, e.g., 5 RECORD OF PROCEEDINGS, supra note 39, at 4278 (“We have stated what we believe the Illinois law to be and what we hope the federal law is, but . . . we can never tell in the long run what the United States Supreme Court will say . . . .”) (comments of Mr. Gertz). See also 3 RECORD OF PROCEEDINGS, supra note 39, at 1528 (“You would be a very foolish person . . . to anticipate what our courts are going to say. We hope they would end up saying that something is unreasonable if, in fact, it is unreasonable . . . . I would say — subject to correction — that the same kind of thinking that has prevailed with respect to searches and seizures would prevail [in the eavesdropped area] for better or for worse.”) (comments of Mr. Gertz).
be reasonable, the court’s analysis of the 1970 constitution should focus only on the cases and principles approved by the convention.\textsuperscript{107} Hence, in accord with the intent of the state constitution’s framers, cases decided before 1970 should guide state constitutional analysis.

\textbf{B. The Illinois Constitution Warrants Independent Consideration}

By linking the search and seizure and self-incrimination provisions of the Illinois Constitution to United States Supreme Court interpretations of similar provisions in the Bill of Rights, the Illinois Supreme Court effectively has rejected the independent significance of the Illinois Constitution. This result is most unfortunate.

Wholesale or automatic divergence from the United States Supreme Court is not necessary for recognition of our state constitution’s independent significance. All that is required is independent reasoning predicated upon the state constitution. Such a jurisprudence would sometimes result in following United States Supreme Court opinions and at other times require a decision based wholly on our state constitution.\textsuperscript{108} Rather than utilizing a judicial thought process that recognizes the obvious fact that Illinois has a constitution of its own, the Illinois Supreme Court has spoken in sweeping terms, indicating that all United States Supreme Court interpretations of search and seizure and self-incrimination protections of the United States Constitution also provide interpretations of the Illinois Constitution.\textsuperscript{109} Thus, the Illinois Supreme Court need not sanction a new United States Supreme Court decision in order to change the state of the law in Illinois. As the \textit{Tisler} court held, Illinois cases do not establish a standard, they merely hold that the Illinois standard mirrors the federal standard.\textsuperscript{110} When the Illinois Supreme Court denies that Illinois cases establish an independent standard, it also denies that the Illinois Constitution establishes any standard.

\textsuperscript{107} \textit{See, e.g., State v. Ringer, 100 Wash. 2d 686, 692, 674 P.2d 1240, 1243 (1983)} ("In construing Const. art. 1, § 7 we look initially to its origins and to the law of search and seizure at the time our constitution was adopted."), \textit{overruled on other grounds, State v. Stroud, 106 Wash. 2d 144, 150, 720 P.2d 436, 439 (1986)} ("[O]ur Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.")


\textsuperscript{109} \textit{See Tisler, 103 Ill. 2d at 243, 469 N.E.2d at 156; Hoskins, 101 Ill. 2d at 218, 461 N.E.2d at 945; Rolfsnmsmeyer, 101 Ill. 2d at 142, 461 N.E.2d at 412.}

\textsuperscript{110} \textit{Tisler, 103 Ill. 2d at 243, 469 N.E.2d at 156.}
Moreover, the Illinois Supreme Court formulated a requirement that the language of the state constitution or the records of the constitutional convention must indicate an intent to diverge from federal standards before the court will attach any independent significance to our state constitution. This approach is perilous, promoting a continued lack of consideration of the independent significance of the Illinois Constitution.

The bill of rights in the Illinois Constitution differs from the federal bill of rights in several areas.\textsuperscript{111} Notwithstanding the Illinois Supreme Court's assertions to the contrary, close scrutiny of the Illinois search and seizure and privilege against self-incrimination provisions reveals numerous differences.\textsuperscript{112} For example, in addition to augmenting fourth amendment language by providing that the people have a right to be secure from "invasions of privacy or interceptions of communications by eavesdropping devices,"\textsuperscript{113} the Illinois Constitution's search and seizure provision requires written oaths in support of applications for probable cause, while the fourth amendment permits oral warrant applications.\textsuperscript{114} The text of the United States Constitution's self-incrimination clause and the self-incrimination clause in Article I, Section 1 of the Illinois Constitution also are different. The fifth amendment provides that "[n]o person shall be compelled . . . to be a witness against himself."\textsuperscript{115} The privilege against self-incrimination found in the Illinois Constitution goes further by specifically providing that "[n]o person shall be compelled . . . to give evidence against himself."\textsuperscript{116} This variance is not merely one of semantics. The Supreme Court has construed the self-incrimination clause of the fifth amendment as protecting only compelled statements that are testimonial in na-
Thus, the fifth amendment does not permit a person to refuse to give nontestimonial evidence against himself on constitutional grounds. The language of the Illinois Constitution clearly makes more than testimonial communications privileged. In providing that a person cannot be compelled to give evidence against himself, the constitution sets no restriction regarding the type of evidence. Consequently, any state decisions that hold the privilege against self-incrimination applies only to testimonial communications are suspect.

The preceding comparisons manifest variances between the Illinois and federal bill of rights. The different language in the Illinois bill of rights and the federal Bill of Rights evidences the Illinois framers' intent that our state constitution have independent significance. Recognition of such independence can be easily overlooked in light of the Illinois Supreme Court decisions that link certain state liberties to the United States Supreme Court's interpretation of the federal Bill of Rights. Thus, to preserve the Illinois framers' intent and to honor the actual language of the state constitution, courts first should examine the text of the state constitution. This examination will reveal the independent significance of the state constitution, rendering automatic reliance upon the United States Supreme Court improper.

C. Automatic Reliance Upon Decisions from Another Jurisdiction Improperly Precludes Independent Judicial Reasoning.

The Illinois Supreme Court's blind adoption of United States Supreme Court holdings also is suspect because it inhibits, and even precludes, independent reasoning. While adoption of the nonbinding precedents of other courts is commonplace, such adoption should be selective and conditioned on a rational acceptance of principles set down by those cases. Independent reasoning,
however, promotes innovative analysis\textsuperscript{123} and may lead to better reasoned solutions.\textsuperscript{124}

Although the Illinois Supreme Court may be reluctant to diverge from United States Supreme Court decisions,\textsuperscript{125} it should not shirk its fundamental role as the ultimate interpreter of the Illinois Constitution.\textsuperscript{126} An Illinois citizen clearly has the right to the protections of its state constitution and independent state court reasoning.\textsuperscript{127} An aimless game of "follow the leader" simply is not appropriate in matters of this magnitude.\textsuperscript{128}

Moreover, the current reasoning of the Illinois Supreme Court bridles our entire state court system. Lower Illinois courts have been forced to wear a straight jacket woven of the decisions of the United States Supreme Court,\textsuperscript{129} thus depriving Illinois citizens of an independently functioning court system. Because lower court

\textsuperscript{123} Note, supra note 2, at 1396 ("Across jurisdictions, alternative interpretations of an open-ended right cannot be considered illegitimate.").

\textsuperscript{124} See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986) (recognizing the successful implementation by states of the evidentiary standard adopted by the Court for determining equal protection violations in criminal jury selections); Mapp v. Ohio, 367 U.S. 643, (1961) (Supreme Court consideration of state practices regarding the exclusionary rule).

\textsuperscript{125} In Tisler, the Illinois Supreme Court noted an historical consonance of Illinois search and seizure decisions to United States Supreme Court decisions. \textit{Tisler}, 103 Ill. 2d at 243-45, 469 N.E.2d at 156-57. The court then rejected the argument that it "go [its] separate way" and reasoned that if it did so, it would simply be to "accommodate the desire of the defendant." \textit{Id.} at 245, 469 N.E.2d at 157.

\textsuperscript{126} Note, supra note 2, at 1498 ("It is vital that the Supreme Court's interpretation of the federal constitution control federal constitutional law; it is not only unnecessary but also irrational that it control state constitutional law as well.").

\textsuperscript{127} A number of state courts have recognized that they have an obligation to determine defendant's rights by an independent analysis of state constitutional protections. \textit{See} State v. Ball, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983); State v. Kennedy, 295 Or. 260, 271, 666 P.2d 1316, 1323 (1983); State v. Caraher, 293 Or. 741, 756, 653 P.2d 942, 950 (1982); State v. Badger, 141 Vt. 430, 448-49, 450 A.2d 336, 347 (1987); People v. Disbrow, 16. Cal. 3d 101, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360 (1976). \textit{See also Rolfingsmeyer}, 101 Ill. 2d at 143, 461 N.E.2d at 413 (Simon, J., concurring) ("As justices of the highest court of the State of Illinois we take an oath of office to faithfully uphold the provisions of the State Constitution. We cannot delegate that duty to anyone . . . .").

\textsuperscript{128} \textit{Tisler}, 103 Ill. 2d at 241, 469 N.E.2d at 155.

\textsuperscript{129} In making virtually all United States Supreme Court search and seizure and self-incrimination decisions binding on lower Illinois courts, the Illinois Supreme Court violates the principle that a court must decide the actual case before it in establishing binding precedent. In effect, the court is legislating. It is enacting United States Supreme Court case law, establishing the boundaries of Article 1, Sections 6 and 10, of the Illinois Constitution within the United States Constitution. \textit{See Tisler}, 103 Ill. 2d at 245, 469 N.E.2d at 157; \textit{Hoskins}, 101 Ill. 2d at 218, 461 N.E.2d at 945; \textit{Rolfingsmeyer}, 101 Ill. 2d at 142,461 N.E.2d at 412. Declaring the law governing an issue it has not itself decided is not a judicial function. \textit{See Ill. Const.} art. VI, § 4; \textit{Ill. Const.} art. II, § 1.
judges are forced to adhere to United States Supreme Court precedent absent independent analysis of their state constitution, internal development in fundamental areas of jurisprudence has been unjustifiably surrendered.\textsuperscript{130} 

In confining state constitutional law to minimum national standards, the Illinois Supreme Court has missed a critical distinction: the perspective of the United States Supreme Court is national while the perspective of a state court is local. Supreme Court decisions arguably aim to establish "bright-line" rules with little regard for fact variations.\textsuperscript{131} In addition, Supreme Court opinions sometimes establish minimum standards of protection under the fourteenth amendment, in deference to state courts that may wish to grant greater protection.\textsuperscript{132} In contrast, a state court should read its constitution with only its own jurisdiction in mind. Thus, a state court can better fashion its criminal procedure to address law enforcement practices and policies peculiar to that jurisdiction. Federalism seeks to preserve this type of state independence.\textsuperscript{133} In interpreting our state constitution, however, the Illinois Supreme Court thus far has ignored this salutary system. Consequently, principles of federalism have been diluted.

An independent state court system that responds to its constitution and policies should be fostered. Utilization of such independent reasoning, particularly reasoning that interprets a charter of state civil liberties, is the hallmark of a functioning judiciary.\textsuperscript{134} Thus, the Illinois Supreme Court must not perfunctorily accept standards established by the United States Supreme Court under the fourteenth amendment as the best standards for Illinois.\textsuperscript{135}

\textsuperscript{130} The lower courts in Illinois should be bound only by the terms of the Illinois Constitution and the reasoning of higher Illinois courts interpreting that document. Regardless of whether the Illinois Supreme Court ultimately rejects the reasoning of a lower court that varied from United States Supreme Court precedent, that decision would have the added legitimacy of independent analysis by Illinois jurists. Principles of federalism dictate that decisions in the area of fundamental rights be determined locally rather than by a national tribunal. \textit{See generally} notes 6-14 and accompanying text.

\textsuperscript{131} \textit{See} Note, supra note 2, at 1349.

\textsuperscript{132} For example, although the court has incorporated the right to a jury trial into the fourteenth amendment, Duncan \textit{v.} Louisiana, 391 U.S. 145 (1968), it has held that all of the facets of the jury trial right that apply under the sixth amendment, do not similarly apply to the states. Apodaca \textit{v.} Oregon, 406 U.S. 404 (1972); Johnson \textit{v.} Louisiana, 406 U.S. 356 (1972).

\textsuperscript{133} \textit{See} supra notes 7-14 and accompanying text.

\textsuperscript{134} Abrahamson, \textit{supra} note 2, at 1156 ("[I]t is axiomatic that state courts, subject to federal constitutional prohibitions or requirements, are the final arbiters of the meaning of the . . . state constitution.").

\textsuperscript{135} \textit{See}, e.g., Wolfson, \textit{supra} note 50. While the Illinois Supreme Court has looked to a history of Illinois decisions necessarily adopting fourteenth amendment standards,
V. CONCLUSION

In many jurisdictions, state courts have been interpreting their state constitutions as granting broader protections to criminal defendants than recent United States Supreme Court interpretations of the United States Constitution. The Illinois Supreme Court, however, has embraced the decisions of the United States Supreme Court. Thus, the Illinois Supreme Court has bound lower Illinois courts to United States Supreme Court decisions in perpetuity.

The direction taken by the Illinois Supreme Court contradicts principles of federalism. The effect of its decisions is to inhibit independent reasoning. Particular provisions of the Illinois Constitution are thus reduced to a mimicry of United States Supreme Court decisions, regardless of whether those decisions were rendered subsequent to the adoption of the state constitution. The Illinois Supreme Court largely bases its decisions on the failure of the Illinois constitutional delegates to specify divergence from United States Supreme Court precedent. It is unlikely, however, that the Illinois framers intended by their silence to fetter the right of the Illinois courts to interpret independently all provisions of the state constitution. Reliance on United States Supreme Court decisions should be limited to a recognition of fourteenth amendment requirements and to the application of a particular decision to a fact situation that arises within the state. The Illinois bill of rights demands no less.

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Tisler, 103 Ill. 2d at 245, 469 N.E.2d at 157, it has failed to note that the adoptions were not necessarily the product of selection, but rather were minimum requirement impositions. Although Illinois courts were compelled to expand protections to fourteenth amendment dictates in accordance with United States Supreme Court interpretations, regardless of their independent judgment, it does not follow that they should return to lesser protections without independent consideration. See, e.g., State v. Wood, 457 So. 2d 206, 210-11 (La. 1984) (recognizing that Mapp v. Ohio, 367 U.S. 643 (1961), had imposed the exclusionary rule on Louisiana, yet independently considering whether to adopt the exception to the exclusionary rule established in United States v. Leon, 468 U.S. 897 (1984)).
APPENDIX

Bill of Rights: Comparative Provisions of the Constitution of the United States of America and the constitution of the State of Illinois. Different language in the state constitution is italicized.

Constitution of the United States of America  
Constitution of the State of Illinois (Article I)

Amendment I:  
Section 3. RELIGIOUS FREEDOM

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

Section 4. FREEDOM OF SPEECH  
All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.
or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II:
A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III:
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV:
The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 5. RIGHT TO ASSEMBLE AND PETITION
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.

Section 22. RIGHT TO ARMS
Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Section 21. QUARTERING OF SOLDIERS
No soldier in time of peace shall be quartered in a house without the consent of the owner; nor in time of war except as provided by law.

Section 6. SEARCHES, SEIZURES, PRIVACY AND INTERCEPTIONS
The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.
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Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law;

Section 7. INDICTMENT AND PRELIMINARY HEARING

No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use.

No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.

Section 10. SELF-INCRIMINATION AND DOUBLE JEOPARDY

No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense.

Section 2. DUE PROCESS AND EQUAL PROTECTION

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.
nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 15. RIGHT OF EMINENT DOMAIN

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

Section 8. RIGHTS AFTER INDICTMENT

In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to meet the witnesses face to face and to have process to compel the attendance of witnesses in his behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.
Amendment VII:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Amendment VIII:
Excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 13. TRIAL BY JURY
The right of trial by jury as heretofore enjoyed shall remain inviolate.

Section 9. BAIL AND HABEAS CORPUS
All persons shall be bailable by sufficient sureties, except for capital offenses and offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction where the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it. (As amended by the Third Amendment to the Constitution. Approved November 2, 1982, effective November 23, 1982.)

Section 11. LIMITATION OF PENALTIES AFTER CONVICTION
All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.
Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Section 24. RIGHTS RETAINED

The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.

Note:

1. The bill of rights contained in the constitution of the State of Illinois has no provision comparable to Amendment X of the Constitution of the United States.

2. The Bill of Rights to the Constitution of the United States has no provisions comparable to the following provisions found in the bill of rights embodied in the constitution of the State of Illinois:

   (1) Section 1. Inherent and Inalienable Rights;
   (2) Section 12. Right to Remedy and Justice;
   (3) Section 14. Imprisonment for Debt;
   (4) Section 16. Ex Post Facto Laws and Impairing Contracts;
   (5) Section 17. No Discrimination in Employment and the Sale or Rental of Property;
   (6) Section 18. No Discrimination on the Basis of Sex;
   (7) Section 19. No Discrimination Against the Handicapped;
   (8) Section 20. Individual Dignity; and
   (9) Section 23. Fundamental Principles.