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The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine

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The Illinois Bill of Rights And Our Independent Legal Tradition: A Critique Of The Illinois Lockstep Doctrine

Thomas B. McAfee*

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I. INTRODUCTION

Writing in the bar journal in commemoration of the United States Constitution, Dean Robert Bennett recently reminded us that the central premise underlying the doctrine of judicial review is the idea that the Constitution is law.¹ As his brief comments suggested, this idea is filled with implications for the way we view both the Constitution and the role of courts in giving it effect.² One such implication is that the written constitution is a species of written law that is not altogether *sui generis*—basic canons of interpretation, for example, that apply to all forms of written law, will likely have application to the written constitution as well.³ These basic presuppositions of our legal order apply equally to the written charters of state governments, including the Illinois Constitution. The principle that constitutions are written to govern and to command courts as well as other branches of government is fundamental throughout our legal system; it applies equally to state and federal constitutions.

This fundamental assumption about the nature of constitutions is shared by the highest court of the state of Illinois. The Supreme Court of Illinois has consistently affirmed that the state constitution is binding law, on courts as well as other branches⁴, and that Illinois courts are to give it meaning and application in much the same way that other forms of written law, and in particular, statutes, are given effect.⁵ In contributing to a current dialogue on the court, Justice

1. Bennett, *Judicial Review as Law*, 75 ILL. B.J. 202 (1986).

2. *Id.* at 204.

3. See, e.g., McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 75 ILL. B.J. 263 (1987).

4. E.g., *People ex rel. Sammons v. Snow*, 340 Ill. 464, 476, 173 N.E. 8, 9 (1930).

5. See, e.g., *People v. Tisler*, 103 Ill. 2d 226, 253-54, 469 N.E.2d 147, 161 (1984) (Ward, J., concurring).

Ward recently defended these traditional assumptions about the interpretive function and criticized views that he saw as tantamount to the position that the judicial power to construe constitutions “[i]s limited only by the restraints courts might impose on themselves”.⁶

These fundamental points seem quite relevant to the current debate, both in the legal literature and within the Illinois Supreme Court, as to the role that decisions of the United States Supreme Court should play in state court decisions construing the provisions of a state constitution’s bill of rights. In the face of retrenchment by the Burger Court, most dramatically with respect to the rights of the accused, state courts have increasingly departed from Supreme Court decisions applying federal provisions that are substantially identical with state constitutional counterparts.⁷ These developments have been hailed by judges and commentators as better reflecting the nature of our federal system and the relationship between the state and federal constitutions.⁸ On the other hand, state courts that have charted their own course have been subjected to the criticisms that their decision-making is result-oriented and unprincipled in departing from Supreme Court precedent without adequate justification.⁹

For its part, Illinois’ highest court continues to follow the rule that the courts of this state are strictly bound by Supreme Court decisions construing provisions that are substantially identical to provisions found in the Illinois Constitution.¹⁰ Increasingly, however, this rule has been challenged by dissenting justices who contend that it is contrary to the state’s independent legal tradition and rests upon an inaccurate view of the relationship between federal and state courts and their respective constitutions.¹¹ These justices contend that the court may give independent attention to the provisions of the

6. *Id.*

7. For a review of many of the developments, and of the extensive commentary, see Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959-1318 (1985).

8. Perhaps the leading exponent is Judge Linde. *E.g.*, Linde, *First Things First: Rediscovering the States Bill of Rights*, 9 U. BALT. L. REV. 379, 394 (1980). The other oft-cited work favoring the development is Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

9. *E.g.*, Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1086 (1982). See generally *infra* text accompanying notes 154-77.

10. *E.g.*, *People v. Tisler*, 103 Ill. 2d. 226, 469 N.E.2d 147 (1984).

11. Though he is not alone, it appears that the term “lockstep” originated with Professor Howard. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 898 (1976). Howard describes three approaches to state constitutional decision-making—lockstep, deference to the Supreme Court, and independent decision-making. *Id.* at 898-99. This article defends the last approach as against the other two.

Illinois Constitution and need not slavishly adhere to decisions of the Supreme Court.¹² The debate is hardly over; indeed, it appears that it has scarcely begun. This article seeks to contribute to this important dialogue by giving sustained attention to the implications of the premise that the Illinois Constitution is the highest law of Illinois.

If the Constitution is law, the rule that Illinois courts must follow relevant Supreme Court decisions must be squared with the Illinois Constitution and the state judiciary's duty to apply it.¹³ If the rule cannot be meaningfully linked to the state constitution, the court must sensitively weigh the constitutional implications of such a judicially-imposed gloss on the constitution in light of the policies underlying the doctrine of *stare decisis*.¹⁴ In this connection, the court should, necessarily, be concerned with the longevity of the current rule, its workability, and its congruence with the entirety of our system of law, among other factors.

If the Illinois Constitution is a form of *state* law, a further implication is that these inquiries ought to be shaped by a close and careful analysis of the entire body of Illinois law to ensure that the rule fits within it. This is not to say that decisions of Illinois' sister states are irrelevant, or that arguments developed in the national debate of these issues will have no application here. It is to observe, however, that the duty of the highest court of the state to be concerned with the systematic and coherent development of state law applies with equal, if not special, force to analysis of this constitutional issue.

Finally, the reminder that the Constitution is law ought to give us special concern to avoid favoring one position simply because it will likely lead the Illinois Supreme Court to decide cases more in accordance with its own substantive preferences. The debate over the role of state courts in giving effect to the protections of state constitutions has all too often centered on the merits of aggressive state court activism in expanding the scope of individual rights.¹⁵

12. *E.g.*, *Tisler*, 103 Ill. 2d at 258, 469 N.E.2d at 163 (Clark, J., specially concurring); *id.* at 264, 469 N.E.2d at 166 (Goldenhersh, J., dissenting); *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 143, 461 N.E.2d 410, 413 (1984) (Simon, J., concurring).

13. As to the Illinois Constitution, see *infra* Part III-A of this article; as to the judicial duty to interpret it, see *infra* Part III-C.

14. The burden of considering these factors will be taken up in Parts III and IV of this article.

15. Even the titles are instructive. *Compare* Deukmejian & Thompson, *All Sail and No*

Many individual rights advocates favor independent decision-making to promote judicial activism; advocates of greater judicial restraint see mainly “the dark side” of the trend toward state court independence and activism.¹⁶ What is frequently missed (or ignored) is that the two issues—state court independence and judicial activism—can and should be treated separately.

A conceptual ground of confusion may be the equivocal use of a phrase like “independent decision-making”. The phrase can refer either to a court’s actual departure from Supreme Court precedent or only to a court’s adherence to the principle that it is to independently consider the meaning and effect of state constitutional protections of individual rights. The distinction is critical. The Supreme Court of California has been independent in both senses. It has not only announced the view that it is not bound by Supreme Court decisions on analogous issues, but has also taken an independent position on a range of important constitutional issues.¹⁷

But one sort of independence need not follow from the other. A conservative state court could easily adopt the position that it is not bound by decisions of the Supreme Court in giving effect to its state constitution, but discover that, in fact, the Court’s floor of federal protection offers as much or greater protection than its own reading of the state guarantees. Since federal Bill of Rights decisions bind the state courts to the extent that the protections in question have been applied to the states through the fourteenth amendment, disagreement with the breadth of Supreme Court holdings does not entail state court decisions that depart from federal precedent. Such a court might actually depart from Supreme Court precedent only rarely, or not at all.¹⁸

Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975 (1977), with *Project Report: Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

16. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

17. See, e.g., Galie, *The Other Supreme Courts: Judicial Activism Among the State Supreme Courts*, 33 SYRACUSE L. REV. 731, 741, 756, 761 (1982).

18. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1179 (1985). A conservative state court could, of course, choose to make clear its disagreement with the reach of governing federal precedent, so as to clarify that it does not govern the meaning of the state constitution. If the federal standard were a more demanding one, however, it is unlikely that the court would engage in extensive analysis of its own position inasmuch as the federal rule would still control the State court decision as federal law. See *State v. Roth*, 95 N.J. 334, 344-45, 471 A.2d 370, 375 (1984) (indicating view that state constitution provided less protection than federal prior to addressing reach of more rigorous federal standard).

Even so, it might be contended that arguments for judicial restraint lend support to a position that favors showing significant deference to Supreme Court decisions.¹⁹ While this position will be addressed later in this article,²⁰ it can be observed here that a rule of law requiring strict adherence to Supreme Court precedent can hardly be justified on the basis of a theory of judicial self-restraint. For one thing, a Supreme Court decision involving the competing values of potentially conflicting individual rights protections may be impossible to characterize as more or less activist than its opposite.²¹

Secondly, theories of judicial self-restraint are inevitably relativistic.²² Slavish adherence to Supreme Court precedent would only strike the appropriate balance of restraint to the degree that Supreme Court decisions adequately preserved it. To the degree that Supreme Court decisions failed to keep the balance true, by unduly restrictive interpretations of individual rights provisions, state court adherence would compound the error. On the other hand, state court judges who view the present court as more activist than the ideal could work to keep the balance true, within federal limits, by adopting and justifying the Supreme Court's retrenchment decisions.

It might be argued that the Illinois Supreme Court could best keep the balance between protection of individual rights and judicial self-restraint in the long run by adherence to Supreme Court precedent. But even if such an argument could be sustained,²³ there would remain the rock bottom question whether the Illinois Constitution permits the state's highest court to adopt a rule of decision that binds it to the holdings of another court in construing different, but

19. *E.g.*, Deukmejian & Thompson, *supra* note 15, at 987-96.

20. See Part V *infra*.

21. An example would be a decision resolving the competing claims of free press and fair trial.

22. Supreme Court justices known as advocates of a jurisprudence of judicial restraint have inevitably joined (or even written) opinions that many thoughtful commentators—and fellow advocates of restraint—would view as examples of activist decision-making. See, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Justice Holmes concurs despite prior dissents in substantive due process cases); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Justice Frankfurter joins unanimous Court decision on school segregation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Harlan, J., concurring) (Justice Harlan concurs in modern resurrection of substantive due process); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Justice Rehnquist writes opinion striking down congressional legislation on basis of implied limitation rooted in federalism and tenth amendment). The examples could be multiplied. There is no unanimity as to whether they kept the balance true.

23. The argument would be complex and would involve large elements of prophecy about the future of the federal and state judiciaries. See *infra* Part III-B-3 for discussion.

closely related, constitutional provisions.²⁴ The premise that the Constitution is law requires a consideration of traditional sources for addressing that particular legal issue and forbids justifying such a rule on a pragmatic assessment of whether it will best serve concerns about the anti-democratic character of judicial review.

Otherwise, we might as well take the position, criticized by Justice Ward, that courts are limited only by the constraints they place on themselves. That position is just as unacceptable as a rationale for rulings seeking to facilitate judicial self-restraint as for rulings favoring a more activist role. Unprincipled decision-making is unprincipled decision-making, whatever banner it travels under. As has been stated elsewhere, “[t]o reason that a result is desirable, and therefore it is constitutional, is wishful thinking.”²⁵ It is a thesis of this article that the proper role of Illinois’ state courts in construing the provisions of the state constitution can be resolved without reference to competing views on the perennial issues of judicial activism and restraint.

II. THE ILLINOIS LOCKSTEP DOCTRINE—BACKGROUND AND PRELIMINARY QUESTIONS

A. *Historical Development*

In 1961, the Illinois Supreme Court first announced its general intention to “follow the decisions of the United States Supreme Court on identical State and Federal constitutional problems.”²⁶ Two years later, the court followed the Supreme Court in overruling two of its own prior cases and contended that, even prior to the application of the exclusionary rule to the states, it had followed the Supreme Court’s fourth amendment decisions in applying the search and seizure provisions of the Illinois Constitution.²⁷ In both decisions, the court’s language and the nature and extent of analysis of the underlying issues suggested that the Illinois court viewed itself as (at least generally) committed to adopting as Illinois law whatever standards the United States Supreme Court had advanced in giving effect

24. This issue is taken up *infra* at Part III-C.

25. Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801, 801 (1980).

26. *People v. Jackson*, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961).

27. *People v. Williams*, 27 Ill. 2d 542, 190 N.E.2d 303 (1963).

to the fourth amendment.²⁸ Since that time, the Illinois court has never departed from decisions of the United States Supreme Court in search and seizure cases.

In referring to "identical State and Federal constitutional problems,"²⁹ the court in *Jackson* suggested that its lockstep approach would apply beyond the search and seizure issue presented in that case. Subsequently, the court has stated that the Supreme Court's interpretation of the privilege against self-incrimination³⁰ and the double jeopardy clause³¹ would be dispositive of analogous issues arising under Illinois' counterpart provisions. The court's practice has been consistent with its word. It has uniformly cited and purported to follow Supreme Court precedent in these areas over the last two decades.³²

Given the current controversy on the court, the paucity of argument or evidence to explain or justify the doctrine is striking. Until very recently, the court relied almost exclusively on its prior practice to justify the doctrine. In the 1961 *Jackson* case, for example, the court cited decisions from 1954³³ and 1924 as prior cases indicating that the court would follow the Supreme Court.³⁴ Since the national trend among state courts in this period was to follow the lead of the Supreme Court, the court's approach apparently met with little or no resistance either on or off the court.

The court has sometimes emphasized that the relevant state and federal provisions were intended to be substantially identical in meaning³⁵ or cited earlier cases stating that proposition.³⁶ Most often,

28. The inference to be drawn from the lack of lengthy or independent analysis is somewhat problematic. It seems to confirm the impression left by the text that the court considers the result reached by the Supreme Court to provide the answer. On the other hand, Illinois courts (like most state courts since the 1950's) have a tendency to adopt federal constitutional decisions even in contexts where it has not announced a commitment to following the high Court in lockstep, including some provisions for which the case for a lockstep approach does not have even surface plausibility. See *infra* note 186.

29. *Jackson*, 22 Ill. 2d at 387, 176 N.E.2d at 805.

30. *People ex rel. Hanrahan v. Powers*, 54 Ill. 2d 154, 295 N.E.2d 472 (1973).

31. *People v. Gray*, 96 Ill. 2d 44, 370 N.E.2d 797 (1977).

32. The court has never self-consciously departed from federal precedent in these areas. In the double-jeopardy area, however, the court has not succeeded in remaining true to federal precedent. Eisenberg, *Multiple Punishments for the "Same Offenses" in Illinois*, 11 S. ILL. L.J. 217 (1987). That case law reflects the problems involved in making the transition from a history of independent decision-making to one of tracking the Supreme Court, in an especially troubled area of the law. *Id.* at 259-61.

33. *People v. Tillman*, 1 Ill. 2d 525, 116 N.E.2d 344 (1954).

34. *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924).

35. *People v. Jackson*, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961).

36. *E.g., Tisler*, 103 Ill. 2d at 243, 469 N.E.2d at 156 (citing several cases).

the court has appeared to assume that the postulated identity of meaning of these provisions somehow gives rise to the supremacy of the federal construction. But this critical assumption has never been explicated or defended in any way until the 1980's. In a series of three decisions in 1984, the Illinois Supreme Court offered some additional support for its lockstep doctrine.

In *People v. Rolfingsmeyer*³⁷, in relying on Supreme Court precedent to reject a state constitutional self-incrimination claim, the court per Justice Ward relied for support on the legislative history of the 1970 Illinois Constitution.³⁸ Specifically, the court found nothing in the Illinois self-incrimination provision to indicate an intent to provide broader protection than the federal Constitution and discovered "a general recognition and acceptance of interpretations by the United States Supreme Court."³⁹ Less than a month later, Justice Ward offered essentially the same analysis of the 1970 constitution's search and seizure provisions in *People v. Hoskins*.⁴⁰

It might be argued that the reliance on the legislative history in these cases should be read less as a justification for the lockstep approach where the provisions are substantially identical than as an implicit treatment of the commonly proffered claim that the provisions of the 1970 constitution provided broader protection than corresponding federal provisions.⁴¹ Such an argument was addressed explicitly in *People v. Tisler*⁴² later that year, but there the court focused more on the near-identity of the relevant texts than on the legislative history.⁴³ The court in *Tisler* also relied on the pre-1970 precedent⁴⁴—sources of authority that suggest that the lockstep approach is not necessarily grounded in the 1970 constitution.

If the 1970 legislative history remains part of the justification for the practice, the court has yet to develop an argument to support the position that the use of illustrative Supreme Court case law at

37. 101 Ill. 2d 137, 461 N.E.2d 410 (1984).

38. *Id.* at 142, 461 N.E.2d at 412-13.

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

40. 101 Ill. 2d 209, 218, 461 N.E.2d 941, 945 (1984).

41. This reading receives some support from the premise that the lockstep approach applies only to identical problems. It may be that litigants were contending, at least in part, that lockstep simply did not apply because the Illinois provision was intended to provide broader protection. In other words, the court could have been addressing whether lockstep was applicable, rather than offering justification for the lockstep approach.

42. 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

43. *Id.* at 241-42, 469 N.E.2d at 155.

44. *Id.* at 243-44, 469 N.E.2d at 156.

the convention warrants the inference that the convention intended Illinois courts to invariably follow United States Supreme Court case law.⁴⁵ This sort of argument will be addressed in Part III below; in the meantime, this brief overview of the court's approach should serve as a foundation for raising some preliminary questions about the meaning and roots of the lockstep doctrine.

B. *The Doctrine's Meaning and Roots*

There are at least two rather basic questions one might ask about the Illinois Supreme Court's approach that it might have addressed more clearly: (1) whether the lockstep doctrine is in the nature of a binding rule of law or merely a practice from which the court has not yet seen fit to depart; and (2) whether, assuming that the doctrine is a legal rule rather than a discretionary practice, it is a prudential rule based on the court's judgment in exercising the power of judicial review or is considered to flow from a proper interpretation of the meaning of the Illinois Constitution. (The first question now seems fairly clearly resolved; the answer to the second remains obscure.) Each question has potential bearing on the nature of the justification that might be required and on arguments about the doctrine's proper scope and application.

1. Rule or Practice?

We have seen that since 1961 the Illinois Supreme Court has followed its indications that it would adopt the United States Supreme Court's standards on identical issues as its own. Consistent with this general stance, the Illinois court has generally paused very little to consider the merits of the underlying constitutional questions.⁴⁶ Even so, until the early 1980s there was some room for doubt whether adherence to Supreme Court decisions was a simple practice or a binding rule of law.

For one thing, the Illinois court's assertion in *Jackson* that it was continuing its prior practice of following the Supreme Court rendered the statement of its approach somewhat equivocal. In one of the very decisions cited to establish the prior practice, the court had made clear that it did not consider itself strictly bound by the

45. See *infra* Part III-A-4.

46. For comment on this tendency and its significance, see *supra* note 28.

United States Supreme Court decision it was following.⁴⁷ If past practice was merely being continued, there was no reason to assume that the court *might not* reject a decision of the Supreme Court. Moreover, the Illinois court's uniform adherence to Supreme Court decisions was not unlike many state supreme courts that have subsequently ruled that such adherence had never been strictly mandated and could be abandoned where it would sacrifice the court's sense of constitutional values.⁴⁸

The Illinois court's very lack of explication left open the question whether its practice represented something like a strong presumption or was considered a binding rule of law. While some formulations certainly made adherence to Supreme Court precedent seem automatic,⁴⁹ the decisions were equivocal to the extent that they never stated that departure from Supreme Court precedent would run contrary to state constitutional or statutory requirements, or that Supreme Court decisions could not be ignored in an extreme or obvious case.

In addition, some formulations suggested that the practice implied no binding rule, but involved looking primarily to the Supreme Court for guidance in construing state constitutional provisions. In 1973, the Illinois court referred to federal and state self-incrimination protections and stated that "[t]he two provisions differ in semantics rather than in substance and *have received the same general construction*".⁵⁰ A fair and plausible reading of this statement implies that Supreme Court decisions provide guidance as to general construction, but not necessarily binding direction.

As recently as 1983, Justice Simon, writing for the Illinois Supreme Court, suggested the possibility of an independent approach while addressing the question whether article I, section 6 of the Illinois Constitution might be interpreted contrary to the United States Supreme Court's holding on the scope of the fourth amend-

47. *People v. Jackson*, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961), *citing* *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924). For treatment of *Castree*, see *infra* notes 103-105 and accompanying text.

48. One court acknowledged that it had treated state and federal provisions "in a similar manner," but emphasized that "we have never intimated that the meaning of the Vermont Constitution is identical to the federal document." *State v. Badger*, 141 Vt. 430, 449, 450 A. 2d 336, 347 (1982); *see also* *State v. Ball*, 124 N.H. 226, 231, 471 A. 2d 347, 350 (1983).

49. *E.g.*, *People v. Hoskins*, 101 Ill. 2d 209, 218, 461 N.E.2d 941, 945 (1984).

50. *People ex rel. Hanrahan v. Power*, 54 Ill. 2d 154, 160, 295 N.E.2d 472, 475 (1973) (emphasis added).

ment's warrant requirement in *United States v. Ross*.⁵¹ In *People v. Smith*,⁵² Simon stated that the court must carefully balance the needs of law enforcement and the need to prevent unreasonable intrusions in applying Illinois' warrant requirement. Rather than finding *Ross* to be dispositive, Simon stated: "We believe that the Supreme Court's interpretation of the automobile exception, announced in *Ross*, achieves a fair balance between these competing objectives, and we see no reason at this time to adopt a different standard in applying Illinois' constitutional provisions."⁵³

The clear implication of the opinion in *Smith* was that the Illinois Supreme Court might well separate itself from a holding of the United States Supreme Court that was not thought to strike the appropriate balance between the competing values at stake in search and seizure cases. The statement was aberrational, but reflected the play that arguably remained despite prior formulations. The dictum in *Smith*, however, was short-lived. Later the same year, Justice Simon joined the dissenting opinion of Justice Goldenhersh in *People v. Exline*,⁵⁴ in which the Illinois court gave effect to the Supreme Court's holding in *Illinois v. Gates*⁵⁵ without pausing to consider the merits of the rule it announced.

In *Gates*, the United States Supreme Court overruled its prior standard for determining the conditions under which informant testimony may be used to satisfy the fourth amendment's probable cause requirement.⁵⁶ The Illinois court's willingness to follow *Gates* without pausing to consider its merits seems particularly striking because the Illinois court had stated in its original *Gates* opinion, prior to Supreme Court review, that its holding rested on article I, section 6, of the Illinois Constitution as well as on the federal Constitution.⁵⁷ An apparent implication of *Exline*, then, is that the Illinois Supreme Court will not take a hard look at United States Supreme Court decisions even if they reverse prior holdings that have already been adopted as a matter of Illinois state constitutional law. The implication did not escape Justice Goldenhersh, who objected

51. 456 U.S. 798 (1982).

52. 95 Ill. 2d 412, 422, 447 N.E.2d. 809, 813 (1983).

53. *Id.*

54. 98 Ill. 2d 150, 456 N.E.2d 112 (1983).

55. 462 U.S. 213 (1983).

56. For critical commentary on the Court's holding, see 1 W. LAFAVE, SEARCH AND SEIZURE § 3.3(a), at 618-27 (2d ed. 1987).

57. *People v. Gates*, 85 Ill. 2d 376, 381-82, 423 N.E.2d 887, 889 (1981).

that “we are not required to blindly follow the action taken by the Supreme Court in determining the standards applicable under our own constitution.”⁵⁸

A year later, the debate on the Illinois court went into full gear when the *Gates* issue was confronted more fully. In *People v. Tisler*,⁵⁹ the defendant contended that article I, section 6, of the Illinois Constitution gives more protection to the accused than the fourth amendment.⁶⁰ In rejecting the argument, the court became quite explicit as to the role played by United States Supreme Court decisions:

In [*Gates*] we held the search invalid because the informant’s tip did not comply with the [pre-*Gates*] test. In doing so, we were not establishing the [prior] test as defining the extent of the protection afforded by the Illinois Constitution. Those decisions, in effect, held that the protection against unreasonable searches under the Illinois Constitution is measured by the same standards as are used in defining the protection against unreasonable searches contained in the fourth amendment to the United States Constitution.⁶¹

In other words, Illinois decisions interpreting the search and seizure provision of the Illinois Constitution follow the standards set forth in United States Supreme Court decisions because the latter are considered to be the governing standards under the fourth amendment, and not, necessarily, because the Illinois Supreme Court has determined that the federal rulings embody the correct weighing of constitutional values. If the Supreme Court changes its mind, and creates a new governing standard, the role of the Illinois court would be to follow that new standard, even if a majority of the court’s members believed that the original standard did better service to the Illinois Constitution.

In short, the court in *Tisler* made clear that Illinois has adopted a rule requiring it to go in lockstep with the decisions of the United States Supreme Court when giving effect to comparable provisions within the state constitution. Yet despite the strong language of the court, and more that could be quoted, even in *Tisler* the court leaves the door slightly ajar. After relying on and defending the lockstep approach, the court cites Justice Simon’s *Smith* opinion in acknowl-

58. *Exline*, 98 Ill. 2d at 157; 456 N.E.2d at 116 (1983) (Goldenhersh, J., dissenting).

59. 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

60. *Id.* at 241, 469 N.E.2d at 154.

61. *Id.* at 243, 469 N.E.2d at 156.

edging the judicial duty to balance law enforcement needs and freedom from intrusion and goes on to state its agreement with the *Gates* test.⁶²

It might thus be argued that the court still has not precluded the possibility for an exception to this lockstep rule in some extreme case. Even so, in the face of repeated pleas to acknowledge the court's freedom and duty to independently examine constitutional issues under the state constitution, the supreme court in *Tisler* makes clear that the court views the practice of following the United States Supreme Court as a governing rule, rather than a discretionary practice of the court.

2. Prudential or Constitutional Roots?

A related issue is whether the Illinois Supreme Court considers the lockstep doctrine to be required by the Illinois Constitution itself, properly interpreted, or whether the court views it as a prudential doctrine that is designed to limit the court's role in appropriate ways. There is language in the court's decisions that could lend support to either view.

In *Tisler*, the court primarily advanced a *stare decisis* justification for the lockstep doctrine that arguably suggests that the doctrine has a prudential base. Acknowledging the *Gates* court's invitation to reconsider *Gates* for purposes of the state constitution,⁶³ the court stated 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."⁶⁴ But, the Illinois court stressed, "this court has, in the past, in construing provisions of our constitution, *elected to follow* the decisions of the Supreme Court rendered in construing similar provisions of the Federal Constitution."⁶⁵ The court then reviewed case law going back to 1953 in support of its practice and concluded that

[a]fter having accepted the pronouncements of the Supreme Court in deciding fourth amendment cases as the appropriate construction

62. *Id.* at 245, 469 N.E.2d at 157. This language suggests at least the possibility that the Illinois court holds on to the possibility of rejection of a Supreme Court holding in a sufficiently clear or extreme case.

63. *Id.* at 243, 469 N.E.2d at 156.

64. *Id.*

65. *Id.* (emphasis added).

of the search and seizure provisions of the Illinois Constitution for so many years, we should not suddenly change course and go our separate way simply to accommodate the desire of the defendant to circumvent what he perceives as a narrowing of his fourth amendment rights under the Supreme Court's decision in *Illinois v. Gates*.⁶⁶

In developing its *stare decisis* argument, the court sends mixed signals. The court's statement that it may construe the terms of the Illinois Constitution differently than the Supreme Court's interpretation of the same terms in the federal Constitution suggests that the lockstep doctrine is prudential (and ultimately discretionary). But the statement may only be referring to the freedom state courts possess to interpret their own constitutions without subjecting themselves to Supreme Court review,⁶⁷ without reaching any questions as to what the Illinois Constitution requires. Moreover, the statement is also qualified by "limitations noted later," and the court later stated that departure is justified only if the language of the state constitutional provision, or the debates and committee reports of the Illinois constitutional convention, indicate that the provision was intended to be construed differently than similar provisions in the federal Constitution.⁶⁸

Here is where the Illinois court's failure to clarify and develop its justification for the doctrine contributes to confusion as to its nature and supposed source. The court's requirement of evidence that the provision is really a "different" provision than the federal counterpart might be only a redescription of the rule; it might therefore reflect only the court's instinct that it should not expand the protection of rights beyond the Supreme Court's guidance except where that state constitutional provision is clearly broader in scope. It might also reflect, however, a rationale that sees the court's lockstep approach as mandated by a proper construction of the Illinois Constitution itself. We cannot know whether the doctrine is prudential or rooted in an interpretation of the constitution without seeing an explication by the court of the relevance of any apparent identity of meaning between state and federal provisions.

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

67. As a matter of federal constitutional law, a state court decision resting on the state constitution is not generally subject to Supreme Court review. Even when the court construes both the federal and state constitution, an independent analysis of the state constitution represents an "adequate and independent" state ground that insulates the decision from Supreme Court review. See Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985).

68. *Tisler*, 103 Ill. 2d at 245, 469 N.E.2d at 157.

Perhaps the court's admission that it had "elected to follow" the United States Supreme Court interpretations is a statement that more stubbornly suggests that another choice could have been made.⁶⁹ As we shall more fully discover, this is certainly a statement that comports with what is revealed by a thorough examination of the lengthier history of the court's exegesis of the Illinois Bill of Rights. But this statement may also be explained away. In stating that it had "elected" not to use its interpretive freedom, the court may have been saying only that it chose not to use the license granted by our *federal system*, without referring to whether its self-disciplining decision was the product of its own prudential judgment or an interpretation of the Illinois Constitution.

Finally, as noted above, in *Tisler* the court followed up its lockstep discussion with an alternative holding that the *Gates* standard best reconciled fourth amendment values. This finding appeared to acknowledge the Illinois court's duty to weigh those values.⁷⁰ A way of reconciling this treatment with the lockstep approach might be to see the doctrine as a prudential method of judicial self-restraint that should be utilized except in some especially clear case.

The critique of the lockstep doctrine which follows first assumes (in Parts III and IV) a "pure" lockstep doctrine considered as an absolute rule, whether rooted in the constitution or some prudential theory. Part V develops some separate arguments and approaches that might be used to justify something more like the strongly deferential, prudentially-based approach suggested here.

III. THE THEORY OF THE LOCKSTEP DOCTRINE

As noted, the Illinois Supreme Court's lockstep doctrine might be rooted in an interpretation of the Illinois Constitution, or in views of policy that have percolated through the court's developing case law. The doctrine's firmest foundation would be the one that finds its tap roots in the constitution itself. It is, therefore, to that view that we turn first.

69. *Id.* at 243, 469 N.E.2d at 156.

70. *Tisler*, 103 Ill. 2d at 245, 469 N.E.2d at 157. For an argument that the court cannot be true both to its lockstep approach and to this acknowledged duty to weigh the values at stake in search and seizure cases, see *infra* text accompanying notes 168-71. *Tisler* is a confusing opinion precisely because it states the court's lockstep approach in its most absolute form even while apparently acknowledging its discretionary character and the court's duty to be concerned with the competing values at stake in implementing constitutional protections.

A. *Interpreting the State Constitution*

To link the lockstep approach with the Illinois Constitution, there must be more than the substantial identity of federal and state constitutional provisions; it must also be shown that the decisions of another tribunal were meant to bind decision-makers under the state constitution. The Illinois Supreme Court starts in that direction when it observes "that the fourth amendment to the United States Constitution is the direct and lineal ancestor of the protection afforded by the Illinois Constitution."⁷¹

With the derivative quality of provisions in the Illinois Bill of Rights as a starting point,⁷² it is surprising that, since adoption of the lockstep approach, the court has failed to consult or confront the large body of general and Illinois case law addressing issues of interpretation in the analogous situation of derivative legislation. The basic principles developed in that case law are sound, have been applied in this and in other contexts during most of Illinois' history, and should inform the court's judgment today.

1. The Principles of Construction

For obvious reasons, the case law distinguishes the status of decisional law under a statute in existence *prior to* another jurisdiction's adoption of a foreign statute and post-enactment rulings under the same adopted statute. As to prior decisional law, courts have held that there is "a presumption that the adopting state receives the construction of the adopted state."⁷³ The presumption rests essentially on a factual inference that the adopting legislature intended to adopt the statute in its operational effect.⁷⁴

While some formulations of the rule state the presumption quite strongly, most courts hold that they are not bound absolutely.⁷⁵

71. *Tisler*, 103 Ill. 2d at 241, 469 N.E.2d at 155.

72. In fact, however, the search and seizure provision of the 1870 constitution is virtually the only provision that might be described this way. *See infra* note 231. Even the 1870 search and seizure provision in effect when lockstep analysis began should not be seen as a mere adoption of its federal counterpart. *See infra* notes 85-91 and accompanying text.

73. 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 52.02, at 522 (4th ed. rev. 1984).

74. *People v. Union Trust Co.*, 255 Ill. 168, 176, 99 N.E. 377, 381 (1912); *accord*, *Hansen v. Raleigh*, 391 Ill. 536, 63 N.E.2d 851 (1945). For the general case law, *see id.*

75. 2A N. SINGER, *supra* note 73, § 52.02, at 522 n. 3; R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 132-33 (1975). *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382-88 (1982) (general rule or presumption that may be rebutted by legislative history).

Indeed, courts of adopting states have rejected decisions of the foreign jurisdiction where they have contradicted the plain language of the statute,⁷⁶ contradicted the adopting state's established public policy,⁷⁷ or opposed the court's own prior constructions or decisions on the same general subject.⁷⁸

The exceptions tell us more about the presumption than statements of the presumption itself. It should be, at most, informative to courts in their interpretive efforts. Given the possibility of mistakes by the original state's courts, and the reality that many judicial decisions would be beyond the potential contemplation of the adopting legislature, judges are unlikely to bind themselves to an inflexible rule requiring slavish adherence to decisions of a foreign jurisdiction. As a leading authority has suggested, the value of the adoption presumption is to point a court to the meaning suggested by the relevant context of the statute.⁷⁹

Adopting state courts are even more independent in their approach to the foreign state courts' decisions subsequent to the adopted law's enactment. "When the courts of a foreign state construe the statute after it has been adopted, it is never considered more than persuasive and is usually given no more weight than cases construing similar statutes from other jurisdictions."⁸⁰

It is not uncommon to read statements, especially among the older cases, asserting that decisions outside the presumptive adoption rule have no precedential weight in the adopting state at all.⁸¹ Not

76. See *F & F Laboratories, Inc. v. Chocolate Spraying Co.*, 6 Ill. App. 2d 299, 301-02, 127 N.E.2d 682, 683 (1st Dist. 1955); 2A N. SINGER, *supra* note 73, § 52.02, at 524 & n. 29.

77. See *Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 250, 419 N.E.2d 23, 25-26 (1981); *American Steel Foundries v. Gordon*, 404 Ill. 174, 180-81, 88 N.E.2d 465, 468 (1949); *State v. Ebner*, 126 Az. 355, 616 P.2d 30 (1980); 2A N. SINGER, *supra* note 73, § 52.02, at 530 n. 3 (collecting cases).

78. *Wilcox v. Bierd*, 330 Ill. 571, 587-89, 162 N.E. 170, 177 (1928).

79. R. DICKERSON, *supra* note 75 at 132. Dickerson provides a devastating critique of the stronger formulations of the presumptive adoption doctrine. A strong version of the rule could not hold up because: (1) the decisions of the foreign jurisdiction would in any event have no greater status locally than it had in the foreign jurisdiction, and the better view is that courts may correct or withdraw prior interpretations of statutes; (2) the local context of the statute, including the meaning of words and such things as prior established public policy, may properly affect its construction; (3) there can be no guarantee that the foreign jurisdiction did not misinterpret the meaning of its own statute. *Id.* at 131-36. These points have additional relevance to the present controversy, as state law contexts may vary from federal law contexts. See *infra* Part IV-C.

80. 2A N. SINGER, *supra* note 73, § 52.02 at 524; see *F & F Laboratories*, 6 Ill. App. 2d at 302, 127 N.E.2d at 683.

81. Typical of the early cases showing reluctance as to other courts' interpretations of

infrequently, courts in adopting states have required a demonstration that another jurisdiction's statutory provision was substantially identical before judicial decisions from the foreign jurisdiction could receive any weight in the construction of the statute.⁸² State courts apply these same general principles when the foreign jurisdiction is the federal government and the state has adopted federal statutes as state law.⁸³

There are several reasons why post-enactment decisions are viewed as persuasive authority at best. First, since the enacting legislature could not have been aware of such decisions, they could not have intended to adopt their particular constructions of the statute. Second, it is extremely unlikely that the legislature would intend to vest final law-interpretation authority in the judiciary of another jurisdiction. Third, even if it were established that the legislature intended adoption of post-enactment decisions of another jurisdiction, there is considerable room for doubt about whether a legislature may constitutionally delegate law-making authority in this manner.⁸⁴

2. The Principles of Construction Applied

The above-described general principles can be applied to the relationship between the Illinois Bill of Rights and its federal counterpart. Commentators to date have focused primary attention on demonstrating that state Bills of Rights were not adoptions of the federal Bill of Rights at all. Indeed, as Judge Linde has observed, the federal Bill of Rights was largely derived from the provisions of

their own statutes and constitutions is *People v. Stevenson*, 281 Ill. 17, 25-26, 117 N.E. 747, 750 (1917) (finding cited state court decisions not on point, "even if we felt at liberty to follow decisions in other states in construing our own Constitution"; decisions of other states construing their constitutions "are of little value, as the courts of each state construe their own Constitutions").

82. *E.g.*, *Indiana Dep't of State Revenue v. Estate of Wallace*, 408 N.E.2d 150, 157 (Ind. App. 1980).

83. *Gray v. ITT Thorp Corp.*, 101 Ill. App.3d 167, 169-70, 427 N.E.2d 1284, 1286 (3d Dist. 1981) (federal decisions construing identical language from federal truth in lending act "highly persuasive" authority as to Illinois act).

84. *See* 2A N. SINGER, *supra* note 73, § 52.02, at 523 n. 20. This objection, however, would not apply to state constitutional delegation, given that state constitutions may structure state government outside traditional lines of separation of powers. Even so, the threat to traditional conceptions of separation of powers by a constitutional provision defining its own meaning by reference to another jurisdiction's subsequent interpretation of an identical provision should at least argue against such a construction in an ambiguous case. *See also infra* Part III-C.

state constitutions already in existence.⁸⁵ Even if a state constitution took the language of the federal Constitution whole-cloth, there would be no reason to assume that its adopters intended to be bound by Supreme Court decisions construing provisions that were already found in a number of state constitutions.

A brief glance at the Illinois Constitution of 1818 would confirm these points. The original Illinois Bill of Rights was inspired more by the Northwest Ordinance, which governed Illinois prior to adoption of the state constitution, and by the Virginia Bill of Rights, than by the first ten amendments to United States Constitution.⁸⁶ While each Illinois Constitution has contained provisions that might be identified with provisions in the federal Bill of Rights, the Illinois Bill of Rights has always contained a number of additional provisions not found in the federal Constitution.⁸⁷ Even among provisions that are to similar effect, such as the privilege against self-incrimination, the Illinois language has tracked the model of other states rather than the language of the federal wording.⁸⁸

A point hardly noted by the commentators is suggested by the first section of the 1818 Illinois Bill of Rights, which provides that "all men are born free and independent and have certain inherent and inalienable rights," including life, liberty, property, reputation, and the pursuit of happiness.⁸⁹ This classic invocation of the doctrine of natural rights as the ultimate foundation of the rights enumerated in the Bill of Rights remains in the Illinois Constitution and cuts sharply against a construction that would treat this set of protections like an adopted statute. Similarly, section 18 of the 1818 bill of

85. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

86. H. James, *The Origin and Development of the Bill of Rights in the Constitution of Illinois* 7 (unpublished master's thesis, U. of Illinois, Political Science Dep't, 1910). A brief comparison of the contents of the original Virginia and Illinois bill of rights confirms James' observation. See 7 THE FEDERAL AND STATE CONSTITUTIONS 3812 (F. Thorpe, ed. 1909) (1776 Virginia Constitution).

87. The 1818 Constitution's bill of rights contained twenty-three sections, a number of which contain several related protections. At least ten of those sections have no counterpart in the federal constitution, and a number of those with federal counterparts contain significantly different wording. See ILL. CONST. art. VIII (1818). The same sort of analysis applies to each of the succeeding Illinois constitutions.

88. See, e.g., *Hansen v. Owens*, 619 P.2d 315, 318-19 (Utah 1980) (Stewart, J., dissenting)(listing Illinois as among 24 states with language differing from the federal Constitution). As to the relevance of the difference in language in the self-incrimination provisions, see *infra* notes 232-248 and accompanying text.

89. ILL. CONST. art. VIII, § 1 (1818); ILL. CONST. art. I, § 1 (1970).

rights, also retained in the current constitution, provides that “[a] frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.”⁹⁰ This phrasing serves the purpose of reminding us that the point of construing these provisions is to return us to first principles—the sort of exercise that adoption of another court’s construction moves us away from.⁹¹

Even if the analogy to adopted statutes is valid, there was very little relevant decisional law under the federal Bill of Rights provisions prior to Illinois’ original 1818 constitution and none of these cases are cited today. Any presumption in favor of pre-1818 federal decisional law would, therefore, have no impact on issues litigated today. Applying these principles of construction, Supreme Court decisions construing the federal Bill of Rights are properly viewed as persuasive authority on the meaning and application of similar provisions of the Illinois Bill of Rights, but not as binding authority.

The factors generally cutting against giving decisive weight to post-enactment decisions of another jurisdiction clearly apply in this context as well. Just as with statutes, adopters of a state constitution cannot know, let alone intend to adopt, specific post-ratification holdings of courts construing a different constitution. As one would expect, nothing in the legislative or ratification histories of the 1818 constitution or its successors evidences an intent to limit the meaning of any of their provisions to the interpretations and application of analogous provisions of the federal Constitution.⁹² It is virtually

90. ILL. CONST. art. VIII, § 18 (1818); ILL. CONST. art. I, § 23 (1970).

91. While such provisions have been characterized as “Constitutional Sermons,” G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 97 (1969), *quoting*, R. DISHMAN, *STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT* 47-48 (1968), it has also been observed that this provision reinforces the concept of limited government in which the rights of the people are considered to be derived from the nature of the social compact rather than from the government. *Id.* at 96. It also suggests that in constitutional law, the priority is to preserve liberty more than it is to settle questions, a philosophy that comports with Supreme Court decision-making as to *stare decisis*. *E.g.*, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring).

92. In fact, the design of the Illinois Bill of Rights, in every constitution down to (and including) the present one, cuts sharply against a lockstep construction. There is no text that by its terms directs the interpretive function of courts. Each of the constitutions has contained a larger number of protections than the federal Bill of Rights. The provisions range from ones substantially identical to federal provisions and those that address the same general problems (like free speech) in conspicuously different language, to protections that clearly provide some additional protection of the same basic right and those that recognize rights not even found in the federal Bill of Rights. The sheer range of similarities and differences belies any attempt to reduce the Illinois provisions to a simple division between those that call for independent

inconceivable, given the "states' rights" mentality of nineteenth century frontier America, that any such intent was held. Finally, while there would be no federal constitutional problems if Illinois chose to delegate power to the federal system in this fashion, the break such a delegation would present from traditional views of separation of powers argues strongly against such a construction.

3. The Pre-1970 Case Law

These general principles of construction were applied in most states, including Illinois, until the process of incorporation of the Bill of Rights was in full swing by the latter part of the 1950's.⁹³ As Justice Abrahamson has observed, prior to incorporation "[s]tate appellate decisions relied on the text of state constitutions, the constitutional history of the state, English and American common law, sister states' interpretations of state constitutions, and the United States Supreme Court's analysis of the federal Constitution as applicable to federal criminal cases."⁹⁴ While state courts sometimes followed Supreme Court decisions, they sometimes did not.⁹⁵

The Illinois Supreme Court adopted this independent approach to search and seizure and self-incrimination law in both word and deed. The court's treatment of the substantial identity of comparable provisions in the pre-incorporation world was also clear and consistent with the general approach outlined here. In construing the state's self-incrimination provision, the Illinois Supreme Court historically looked to the decisions of other states to guide its decisional process, and not merely to federal precedent.⁹⁶ State and federal decisions were viewed as equally relevant to the construction of the Illinois text.

consideration and those that require total deference to the Supreme Court. Considering the extent to which modern constitutional decision-making inevitably requires judicial value-selection—a truth on virtually any current view of constitutional interpretation—too much turns on the independent role of the court for it to turn on the sort of distinction that the lockstep approach requires. For the development of the practical difficulties presented by the division contemplated by lockstep, see *infra* Part IV-A.

93. Abrahamson, *supra* note 18, at 1147.

94. *Id.* at 1146.

95. *Id.*

96. *E.g.*, *People v. Paisley*, 280 Ill. 310, 123 N.E. 573 (1919); *Lamson v. Boyden*, 160 Ill. 613, 43 N.E. 781 (1896). Of course, even a state court following lockstep might look for guidance to state courts as to issues not yet addressed by the Supreme Court, just as state courts cite each other in deciding novel issues of federal constitutional law. But there is no hint in these early cases that the use of precedent from other states was provisional or that anything other than independent decision-making was at work.

Thus, in 1923, the court noted that the privilege against self-incrimination was protected by the constitutions of the 48 states as well as by the fifth amendment and concluded that “[t]he provision in the federal Constitution is a limitation on the federal power only, and has no bearing on the case at bar except as the decisions of the federal courts may throw light upon the general subject.”⁹⁷ The substantial identity of the Illinois self-incrimination provision and that of other jurisdictions, then, was used to justify the Illinois court’s seeking guidance in the opinions of other courts. There is no suggestion in this early period that such identity of meaning carried any broader implication.

The evolution of Illinois’ search and seizure law provides particularly illuminating insight into the nature of the shift from application of these traditional principles to the current lockstep approach. In *People v. Brocamp*,⁹⁸ the case in which the Illinois Supreme Court first ruled that the exclusionary rule of evidence was required by the search and seizure provision of the Illinois Constitution,⁹⁹ the court cited state and federal cases and based its decision on the “well-considered decisions of the courts of this country”.¹⁰⁰ Having previously pointed up the substantial identity between state constitutional provisions and the fourth and fifth amendments,¹⁰¹ the court observed: “Said provisions of the federal constitution, and the federal decisions thereon, are quoted and cited as very applicable, because only of the similarity of the provisions aforesaid of both constitutions.”¹⁰²

A year later in *People v. Castree*,¹⁰³ the Illinois court confirmed and amplified its decisions on the exclusionary rule. Acknowledging that the larger number of jurisdictions had held to the contrary, the court stated: “We prefer to adhere to our own decisions and those of the Supreme Court of the United States and of the Supreme Courts of the states which agree with them, as founded upon the better reason.”¹⁰⁴ The court also sounded a theme that it would reiterate from time to time—the idea that the protection against

97. *People v. Spain*, 307 Ill. 283, 289, 138 N.E. 614, 617 (1923).

98. 307 Ill. 448, 138 N.E. 728 (1923).

99. *Id.* at 453-54, 138 N.E. at 730-31.

100. *Id.* at 454, 138 N.E. at 731.

101. *Id.* at 452-53, 138 N.E. at 730.

102. *Id.* at 456, 138 N.E. at 732.

103. 311 Ill. 392, 143 N.E. 112 (1924).

104. *Id.* at 405, 143 N.E. at 117.

unreasonable searches and seizures should be liberally construed to protect the rights of individuals.¹⁰⁵

On occasion, however, the court was somewhat less clear in stating the nature of its reliance on the federal decisions. In *People v. Reynolds*,¹⁰⁶ for example, the fourth amendment "was the prototype of the Illinois [search and seizure provision] and no reason is perceived why the latter should not receive the same interpretation as the former."¹⁰⁷ This statement, at the least, confirms the identity of the state and federal provisions and the obvious relevance of a prior federal construction to the interpretation of the Illinois provision; it might be read, however, as implying the stronger view that Illinois courts should always follow the lead of Supreme Court decisions under the fourth amendment.

But it is doubtful that in 1932 the court intended this broader reading. In explicating the rule adopted in the case, governing the use of subpoenas *duces tecum*, the court looked to the reasoning of a Missouri decision that, in turn, had been relied on by the United States Supreme Court.¹⁰⁸ During this period, it was common for courts at all levels to rely on decisions from other jurisdictions as persuasive authority. Moreover, the view that state courts were bound to follow analogous Supreme Court case law had not (to the best of my knowledge) been clearly expressed by any courts at this time.¹⁰⁹

In any event, over time the court confirmed its traditional approach. Nine years after *Reynolds*, the court in *People v. Exum*¹¹⁰ stated that federal decisions "are cited as very applicable," inasmuch as the state and federal provisions "are practically the same".¹¹¹ The language harks back to *Brocamp*, where the court was unequivocal that federal decisions were persuasive, not mandatory, precedent.¹¹² A year later, in ruling that the exclusionary rule applied to any item

105. *Id.*

106. 350 Ill. 11, 182 N.E. 754 (1932).

107. *Id.* at 16, 182 N.E. at 756.

108. *Ex Parte Brown*, 72 Mo. 83 (1880) cited in, *Hale v. Henkin*, 201 U.S. 43, 77 (1906).

109. *Reynolds* may, however, signal the beginning of the tendency to emphasize, or to look primarily at, Supreme Court case law for guidance in construing the state constitution. During this same general period, the California Supreme Court acknowledged the leadership of the United States Supreme Court and suggested that it would defer to the Court unless there appeared "cogent reasons" justifying departure. *Gabrielli v. Knickerbocker*, 12 Cal. 2d 85, 89, 92 P.2d 391, 392-93 (1938). For treatment of this less rigid form of deference, see *infra* Part V.

110. 382 Ill. 204, 47 N.E.2d 56 (1943).

111. *Id.* at 209-10, 47 N.E.2d at 59.

112. See *supra* note 102 and accompanying text.

seized from a defendant's dwelling, the Illinois court pointed to the *Castree* decision's exhaustive review of federal and state cases in support of the exclusionary rule.¹¹³

In the 1950s, the court continued its independent tradition, but offered up another statement that could be used to the opposite effect. Also, the court increasingly looked mainly to Illinois and federal cases in explicating search and seizure law.¹¹⁴ The ambiguous statement of the rule came in *People v. Tillman*,¹¹⁵ where the court responded in this fashion to the claimant's reliance on the fourth amendment:

The provisions of the Constitution of the United States, relied upon by plaintiff in error, while in somewhat different language, is in effect the same, and the provisions of the two constitutions are construed alike and should be construed in favor of the accused. *People v. Grod*, 385 Ill. 584, 53 N.E.2d 591.¹¹⁶

The above statement is quoted in full by the court in *People v. Tisler*¹¹⁷, as part of its 1984 summary of the court's lockstep doctrine.¹¹⁸ *Tillman* was also cited by the 1962 *Jackson* decision in support of the assertion that the court had previously indicated that it would follow Supreme Court decisions.¹¹⁹ As with *Reynolds*, however, while the court could have been more explicit it is unlikely that it intended to announce anything like a lockstep approach.

For one thing, the court went on to uphold the challenged search as incident to a valid arrest, relying on both state and federal precedent.¹²⁰ The federal case law added little to the analysis and was

113. *People v. Grod*, 385 Ill. 584, 587, 53 N.E.2d 591, 593 (1944), citing, *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924) (specifically referring to *Castree's* "exhaustive review of the federal authorities and those of other states").

114. The tendency was a natural one, for federal constitutional law came to dominate the legal imagination as the Supreme Court led the way in civil liberties and gradually nationalized individual rights. See also *infra* notes 127-128 and accompanying text.

115. 1 Ill. 2d 525, 116 N.E.2d 344 (1953).

116. *Id.* at 529, 116 N.E.2d at 347. See also, *City of Chicago v. Lord*, 3 Ill. App.2d 410, 419-20, 122 N.E.2d 439, 444 (1st Dist. 1954) (federal and state self-incrimination and search and seizures provisions "are, in effect, the same and are construed alike").

117. 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

118. 103 Ill. 2d at 244, 469 N.E.2d at 156.

119. *People v. Jackson*, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961).

120. *People v. Tillman*, 1 Ill. 2d 525, 529, 116 N.E.2d 344, 347 (1954). It is perhaps also relevant that the court adds that the two provisions are also "to be liberally construed in favor of the accused". *Id.* Nothing in the opinion as a whole suggests that the principle of liberal construction was less important than the concept that the federal and state provisions were construed alike. Furthermore, it was a principle that had been previously invoked, see

unnecessary. Moreover, we should not lightly infer an intent to change well-established law. Finally, as shown by the full quotation, the court in *Tillman* cited *People v. Grod* as direct support for the proposition it was asserting. Yet, as we have seen, *Grod* ruled on the scope of the exclusionary rule by relying on the *Castree* decision and its review of federal and state authorities.¹²¹ On the other hand, if not read too broadly, the *Tillman* language is unobjectionable.

The narrower reading of *Tillman* is borne out by subsequent decisions. In *People v. Albea*,¹²² decided the year after *Tillman*, the court extended the exclusionary rule to witness testimony obtained by illegal means and took the opportunity to reaffirm its commitment to the exclusionary rule itself. The court confirmed that the Illinois rule rested on its independent judgment and not merely on the strength of the Supreme Court rule:

This state has steadfastly adhered to the theory of inadmissibility of evidence obtained by illegal search, and we are supported in that view by the Supreme Courts of several States, the Federal courts and the United States Supreme Court. *State v. Dillon*, 34 N.M. 366, 281 P. 474, . . . and *People v. Castree*, 311 Ill. 392, 143 N.E. 112, and cases therein cited.¹²³

The following year, the supreme court rejected another attack on the exclusionary rule and stressed that Illinois followed "the minority rule of exclusion" for the reasons set forth in its earlier decisions.¹²⁴

People v. Martin, 382 Ill. 192, 202, 46 N.E.2d 997, 1002 (1942) (emphasizing that the principle of liberal construction ensures against keeping "the words of promise to our ear, and break[ing] it to our hope").

Justice Clark thus plausibly contended in *Tisler* that *Tillman* "stands for the proposition that the Federal and State constitutions should be construed alike if they are 'liberally construed in favor of the accused'." *Tisler*, 103 Ill. 2d at 61, 469 N.E.2d at 164-65 (Clark, J., specially concurring). Even more fundamentally, if the phrase "construed alike" is interpreted narrowly, there is no need to suggest any potential conflict between the two clauses of the sentence in question.

121. See *supra* note 113 and accompanying text. On the merits, the court in *Tillman* also cited *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943), the case that harked back to *Brocamp's* explicit recognition that federal decisions are only persuasive authority. See *supra* notes 110-112 and accompanying text.

122. 2 Ill. 2d 317, 118 N.E.2d 277 (1954).

123. *Id.* at 322, 118 N.E.2d at 280. That same year, in *People v. Shambley*, 4 Ill. 2d 38, 43, 122 N.E.2d 172, 174 (1954), the court relied on state and federal authority to support its holding on third party consent searches.

124. *City of Chicago v. Lord*, 7 Ill. 2d 379, 381, 130 N.E.2d 504, 505 (1955). Significantly, that same year the court rejected under the state's due process clause the Supreme Court decision in *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1951), sustaining against a

In 1961 the Illinois Supreme Court summed up this body of case law in this manner: "We have indicated before that we will follow the decisions of the United States Supreme Court on identical State and Federal constitutional problems. *People v. Castree*, . . .; *People v. Tillman*, . . .".¹²⁵ In *Jackson*, the court added to the accepted ideas that the relevant clauses were substantially identical and were "construed alike,"¹²⁶ the new suggestion that this meant that the Illinois courts should follow the United States Supreme Court. Even with this statement, there is perhaps room for discussion whether the court intends that it will *invariably* follow the Supreme Court. There is no question, however, that this formulation has now hardened into a rule that the court will generally not give any independent consideration to state constitutional provisions that mirror federal protections.

The court's new and less thoughtful treatment of the issue was a sign of the times. With federal constitutional law developing at a rapid pace, and particularly in view of the steady incorporation of provisions of the Bill of Rights, state courts generally began to take a back seat to the Supreme Court.¹²⁷ With their freedom to take a completely independent path gradually being restricted by the incorporation development, state courts found it easy to fall into the lockstep model.¹²⁸ For advocates of judicial self-restraint, the lockstep approach also provided a ready method for limiting judicial activism.

If unsurprising as a historical development, Illinois' lockstep doctrine cannot be justified in terms of a cogent theory of interpretation or by reference to relevant bodies of Illinois case law. The court's reliance on *Tillman*, though not wholly implausible, was

substantive due process challenge a regulation requiring employers to pay employees for time taken off to vote. *Heimgaertner v. Benjamin Electric Mfg. Co.*, 6 Ill. 2d 152, 158, 128 N.E.2d 691, 695 (1955) (affirming that "[i]t is the duty of each State to pass upon the validity of its own legislation"). Given the identity between the federal and state due process clauses, *Heimgaertner* cannot be squared with any coherent lockstep approach; this suggests that the court did not read *Tillman* as requiring lockstep in 1955. As to the significance of the Illinois Supreme Court's independent approach to due process and equal protection, see *infra* Part IV-B.

125. *People v. Jackson*, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961).

126. *People v. Tillman*, 1 Ill. 2d 525, 529, 116 N.E.2d 344, 347 (1954).

127. See, e.g., Abrahamson, *supra* note 18, at 1147-48; Collins, *Reliance on State Constitutions: Some Random Thoughts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, 1, 4 (B. McGraw ed. 1985) [hereinafter, Collins, *Random Thoughts*].

128. Other factors contributing to this trend in decision-making were the nationalization of American legal education and the tendency, growing out of all of these developments, to equate constitutional law with *federal* constitutional law.

misplaced and contradicted by case law during the intervening years. *Tillman* was at best ambiguous. The citation in *Jackson to People v. Castree* reflects the casualness of the court's approach and raises doubt as to how much the court was even trying to say. In *Castree*, the court did "follow" a Supreme Court decision, but only after stating its conclusion that the decisions of the Supreme Court and other state courts were "founded upon the better reason".¹²⁹

The lockstep approach developed gradually, then, apparently as a misconstruction of prior case law rooted in a misconception of the implications of acknowledging the identity of federal and state constitutional provisions. The Illinois court not only relied upon cases that offered no support to the newly-fashioned approach, but failed to confront, let alone to justify, its break with the past. It should, therefore, come as no surprise that the very basic questions raised as to the meaning and scope of the doctrine should not have received any meaningful treatment. The court has yet to offer anything like a systematic defense of the doctrine.

4. Arguments Based on the 1970 Constitution

As noted previously, more than twenty years after announcing that it would follow Supreme Court decisions on identical issues, the Illinois court first suggested that this approach was rooted in the 1970 Illinois Constitution.¹³⁰ In two 1984 cases, the court, per Justice Ward, contended that the proceedings of the constitutional convention indicated that the framers not only intended to track the meaning of analogous federal provisions, but also recognized and accepted the interpretations of those provisions by the United States Supreme Court.¹³¹ As we shall see, all the analysis developed above applies with equal force to the 1970 constitution and nothing in its legislative history calls for a different analysis.

The place to begin interpretation is with the text.¹³² If the prior constitutions gave no impression of attempting to adopt the federal

129. *People v. Castree*, 311 Ill. 392, 143 N.E. 112, 117 (1924).

130. *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 142, 461 N.E.2d 410, 412-13 (1984) (self-incrimination); *People v. Hoskins*, 101 Ill. 2d 209, 218, 461 N.E.2d 941, 945 (1984).

131. *Rolfingsmeyer*, 101 Ill. 2d at 142, 461 N.E.2d at 412; *Hoskins*, 101 Ill. 2d at 218, 461 N.E.2d at 945.

132. *People v. Stevenson*, 281 Ill. 17, 25, 117 N.E. 747, 749-50 (1917); J. ELY, *DEMOCRACY AND DISTRUST* 25 (1980). The treatment of legislative history in *Rolfingsmeyer* and *Hoskins* provides another example of why courts and commentators (like those above) continually warn us to pay close attention to the text and to be wary of uses of legislative history that import notions of intent at war with the text. See generally R. Dickerson, *supra* note 75, at 139-97.

Bill of Rights, the 1970 constitution clearly does not. While most of the provisions are continued from the 1870 constitution, amendments and additions give the new bill of rights a strikingly modern flavor. It includes an equal rights amendment,¹³³ guarantees against private and governmental discrimination in housing and employment,¹³⁴ and a newly-added provision for unenumerated rights.¹³⁵ In addition, the constitution significantly modifies the search and seizure provision to address modern privacy concerns.¹³⁶

As to pre-adoption United States Supreme Court case law, there is no evidence that the convention intended to incorporate into the meaning of the state constitutional provisions the extant body of federal interpretive precedents. Most of the individual rights provisions of the Illinois Constitution were taken from the 1870 constitution and have their roots in the 1818 constitution.¹³⁷ As to these carry-over provisions, if one began with any presumption at all, it would be that the framers intended to adopt prior Illinois case law on the scope of these individual rights sections rather than decisions of the United States Supreme Court.

While it is frequently said that “words carried forward verbatim from an earlier constitution to a revised constitution also carry forward the accumulated gloss of judicial interpretation,”¹³⁸ the principle is limited. It does not imply that the Illinois court is forever bound by prior holdings, or even by its own lockstep tendencies. The prior law included the possibility of reconsideration of the court’s decisions; that process does not end with the adoption of the 1970 constitution any more than it did with the adoption of the 1870 constitution.

The extrinsic evidence also confirms that the framers assumed that the course and development of the law would continue as before, except to the extent that the convention chose new language to

133. ILL. CONST., art. I, § 18.

134. *Id.*, art. I, § 17, 19.

135. *Id.*, art. I, § 24.

136. *Id.*, art. I, § 6.

137. E. GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 14 (1972). See generally G. Braden & R. Cohn, *supra* note 91 (providing section by section review of 1870 constitution; virtually all of the 1870 provisions appear in the 1970 constitution).

138. Kauper, *The State Constitution: Its Nature and Purpose*, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 3, 25 (1970) [hereinafter CON-CON]. The research papers published in the above-cited volume were important sources of information to the convention that framed the Illinois Constitution. See *People v. Tisler*, 103 Ill. 2d 226, 258, 469 N.E.2d 147, 163 (1984) (Ward, J., concurring) (indicating importance of these research papers “in any search to determine the mind of the convention”).

accomplish particular objectives. While the framers demonstrated awareness of the developed law, and clearly harbored expectations that much of it would remain intact, they did not expect that the law was settled once and for all, or that its development would be frozen as of 1970. In Braden and Cohn's classic work on the Illinois Constitution,¹³⁹ the study that informed the efforts of the Bill of Rights Committee that proposed the 1970 constitution's bill of rights,¹⁴⁰ the authors stated this view: "The genius of generalized constitutional principles is that they protect fundamental individual rights in respect to which a broad public consensus exists, while permitting flexibility and adaptation as the dynamics of a changing society may require."¹⁴¹

Convention members were well aware, moreover, that judicial interpretation of constitutions have been known to change from time to time and that *stare decisis* carries even less weight in the constitutional setting than in other areas of law.¹⁴² When Elmer Gertz, Chairman of the Bill of Rights Committee, was pressed as to a particular application of the search and seizure provision, he stated:

Who are we to say what the courts are going to say? It would be as our report says, on a case-by-case basis, and you would be a very foolish person and certainly a very unwise lawyer to anticipate what our courts are going to say. We hope that they would end up by saying that something is unreasonable if, in fact, it is unreasonable. We don't have the right to assume that our courts will act wildly and not in consonance with established law."¹⁴³

139. G. Braden & R. Cohn, *supra* note 91.

140. E. GERTZ, *supra* note 137, at 16.

141. G. Braden & R. Cohn, *supra* note 91, at 32. In defending the bill of rights committee's decision to limit the protection offered against eavesdropping by new language in the privacy provision by reference to a "reasonableness" standard, member Dvorak stated that the committee preferred a case-by-case approach so as to "provide for the flexibility of the ideological [sic] pendulum". III Record of Proceedings, Sixth Illinois Constitutional Convention 1524 (1972) [hereinafter III Record of Proceedings]. *Accord, id.* at 1379, *cited in*, *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 145, 461 N.E.2d 410, 414 (1984) (Simon, J., specially concurring) (member Gertz, chairman of bill of rights committee, stating that constitutional provisions are interpreted according to "community mores and a growing sense of what constitutes justice," and that "that's the process that's going on, and it isn't going to stop with our proceedings").

These convention members followed the lead of the research they had considered. In addition to the language from Braden and Cohn's study, Frank Graf had written that "[i]f cast in sufficiently broad and general language, they [bill of rights provisions] are likely to be reinterpreted from time to time to reflect contemporary needs." Graf, *The State Bill of Rights*, in CON-CON, *supra* note 138, at 30, 34.

142. *See supra* note 141. *See also supra* note 91 as to *stare decisis*.

143. III Record of Proceedings, *supra* note 141, at 1528.

The convention's "general recognition and acceptance of interpretations by the United States Supreme Court"¹⁴⁴ does not contradict this analysis nor suggest incorporation of that case law into the state constitution itself. The context of debate shows that the Supreme Court cases were cited to illustrate the general state of the law, particularly since in many instances the same rules would apply in Illinois, either by federal incorporation or because adopted by the Illinois Supreme Court as the proper construction of the state constitution.¹⁴⁵ There is nothing in the proceedings that states or implies that Supreme Court precedent will automatically control the meaning of the Illinois Constitution.¹⁴⁶

As to post-ratification Supreme Court case law, the convention could not have known, let alone adopted, the later constructions. The constitutional setting does not change this reality. If the Illinois court was correct that it is bound absolutely by Supreme Court cases establishing the law prior to the 1970 constitution, the court should have at least rejected subsequent Supreme Court decisions retrenching on rights recognized by the Court as of that date. But the Illinois Supreme Court did just the opposite when it flip-flopped with the

144. *Rolfingsmeyer*, 101 Ill. 2d 137 at 142, 461 N.E.2d at 412.

145. See, e.g. III. Record of Proceedings, *supra* note 141, 1376-80 (the section of debate cited in *Rolfingsmeyer*). A good example is Chairman Gertz's discussion of double jeopardy, in which he refers approvingly to Supreme Court precedent and a responsive Illinois statute, and then states that the committee had concluded that certain "knotty questions" of double jeopardy law "would be taken care of by the United States Supreme Court or the Illinois Supreme Court, in interpreting existing constitutional and statutory law." *Id.* at 1377-78 (emphasis added). See also *infra* note 146.

146. The last several paragraphs of text provide the key to refuting the inference Justice Ward draws from convention discussions of the privilege against self-incrimination. *Rolfingsmeyer*, 101 Ill. 2d at 143, 461 N.E.2d at 413. He observes that the bill of rights committee rejected certain proposed language changes to reflect current law based on the assumption that "the existing state of the law would remain unchanged" in any event. *Id.*, quoting delegate Weisbert, III Record of Proceedings, *supra* note 141, at 1376-77.

To begin, as observed above, "the existing state of the law" includes the possibility of development and reconsideration of precedent. Second, the cited discussion does not refer specifically to Supreme Court precedent, except to note the obvious limitations placed by the floor created by incorporation of the privilege into the fourteenth amendment.

Finally, the proposed language changes concerned well-settled matters that were unlikely to be relitigated, and the committee therefore applied its general approach of erring on the side of not changing language. See *Rolfingsmeyer*, 101 Ill. 2d at 145, 461 N.E.2d at 414 (Simon, J., specially concurring), citing, III Record of Proceedings, *supra* note 141, at 1379 (Chairman Gertz indicating that conservatism about language changes went hand in hand with assumption that flexibility already inhered in the constitutional language). By contrast, the convention adopted proposed language changes for the search and seizure provision as a means of ensuring against any retrenchment, confirming its awareness that interpretations can change. See *infra* note 262 and accompanying text.

Supreme Court's decision in *Illinois v. Gates*.¹⁴⁷ In *Gates*, the Court rejected the two-prong *Aguilar-Spinelli* probable cause test that was set forth in 1964¹⁴⁸ and further elaborated in 1969.¹⁴⁹

To justify the lockstep doctrine, it would be necessary to show not merely that pre-1970 Supreme Court decisions were considered to state the law, but also to show that the general supremacy of Supreme Court case law was contemplated by the drafters. But there is no such evidence. While the Illinois Supreme Court had been tracking the United States Supreme Court for several years, this practice was never focused on, let alone endorsed or embraced. And, as with the two-pronged probable cause test, the court might well reconsider and reverse its lockstep practice, as other states have done.¹⁵⁰ There is nothing in the 1970 constitution that would forbid it from doing so.

Rather than suggesting Supreme Court supremacy, the materials presented to the convention strongly suggested the independent status of the state judiciaries in construing their own constitutions. In one of an important series of essays on the proposed constitution, Professor Kauper clearly articulated the traditional view of state judicial independence.¹⁵¹ After observing that a number of provisions of the 1870 Illinois Bill of Rights were clearly not identical in scope with similar federal protections, Kauper turned to the separate question of interpretation of identically worded fundamental rights: "It must also be remembered that a state supreme court is free to give the freedoms recognized in the state constitution a reach that transcends interpretations given the fundamental rights by the United States Supreme Court. A state is free to develop its own higher standards."¹⁵²

147. See *supra* notes 55-57 and accompanying text.

148. *Aguilar v. Texas*, 378 U.S. 108 (1964).

149. *Spinelli v. United States*, 393 U.S. 410 (1969).

150. Montana, for example, has stated its adherence to lockstep, but appears to be in the process of retreat. See Collins, *supra* note 127, at 1137-39.

151. Kauper, *supra* note 138, at 3. As to the significance of the research essays prepared to aid the convention, see *supra* note 138.

152. *Id.* at 23-24. Frank Graf made a similar observation:

[I]t is clear that in interpreting provisions against search and seizure the states are bound to follow, at the very least, the requirements laid down by the Supreme Court whether or not, as is the case in Illinois, the state's own provision on searches and seizures follows the federal one. . . . Thus the question as to whether or not a so-called frisk law would meet constitutional requirements is an issue to be decided by the United States Supreme Court, even though the courts of Illinois could give the Illinois Bill of Rights more far-reaching scope by holding such "frisks" constitutionally improper, even if they were upheld by the Supreme Court.

Graf, *supra* note 141, at 45.

In the mass of commentary, pro and con, on the state constitutional law explosion of the last decade, there has not been a single commentator who has suggested that traditional state constitutions might properly be construed so as to require adherence to decisions of the United States Supreme Court. When the body of materials dealing with interpretation is considered, this comes as no surprise. It is also unremarkable that the Illinois Supreme Court has failed to offer a systematic treatment that attempts to link the doctrine to the Constitution itself. In *Tisler*, the court eventually backed up to the position that it should not suddenly change course after so many years of going lockstep with the Supreme Court.¹⁵³ While the treatment found above demonstrates that the lockstep practice represents a short-term aberration in the long view of things, sections III-B and -C will offer additional reasons why the Illinois Supreme Court should be willing to re-think its lockstep position.

B. Principled Decision-Making and the Role of the United States Supreme Court in the American System of Law

1. The Twin Fallacies

The appeal of the lockstep approach stems less from any thoughtful approach to the problem of interpretation of state constitutions than from certain common ways of thinking that explain, and, in many minds, justify state court deference to the United States Supreme Court. These distinguishable, yet closely related, notions are that constitutional law is to be thought of in terms of federal constitutional law, and that federal constitutional law is to be equated with decisions of the United States Supreme Court. Notions of federal preeminence and the identity of law and judicial decision-making appear to support the idea that state court departure from Supreme Court decisions is presumptively unprincipled and illegitimate. Consideration of these views is thus a necessary backdrop to analyzing the popular advanced argument that any state court departure from Supreme Court precedent is inherently unprincipled and, therefore, requires special justification.

There can be little question that the lockstep approach grows out of the historical development of constitutional law in this country, and, particularly, the predominant role that the Supreme Court has

153. See *supra* note 66 and accompanying text.

played in the creation of our modern system of individual rights. While state courts remained relatively silent, the Court revolutionized the law of individual rights both through its pathbreaking and activist approach to interpreting and applying the individual rights provisions of the federal Constitution, and its gradual application of the various provisions of the Bill of Rights to the states.¹⁵⁴ When the inactivity of the state courts was combined with the nationalization of American law schools in the 1960s,¹⁵⁵ the almost inevitable consequence was a generation of lawyers and judges who think of constitutional law almost exclusively in terms of federal constitutional law.¹⁵⁶

A related viewpoint sees the constitution almost exclusively in terms of judicial review and, therefore, equates the scope of constitutional provisions with the decisions of their authoritative interpreter—the United States Supreme Court. This viewpoint is summed up by the famous dictum that the Constitution is what the Supreme Court says it is.¹⁵⁷ If the fourth amendment means what the Supreme Court says it means, and if the text of the Illinois search and seizure provision was derived from the text of the fourth amendment, it seems illegitimate for the Illinois Supreme Court to presume to hold that the Illinois provision requires something more of state officials.

The tendencies to identify law with judicial decisions and constitutional law with federal decision-making may explain the lockstep approach, but they cannot justify it. No degree of state supreme court inactivity can alter the hard fact of the continuing existence of the state bills of rights and their historical and logical independence

154. Abrahamson, *supra* note 18, at 1147-48; Collins, *Random Thoughts*, *supra* note 127 at 4.

155. Collins, *Random Thoughts*, *supra* note 127, at 5-6. Despite the recent outpouring of judicial and scholarly interest in state constitutional law developments, very few schools teach courses in the subject. One scholar found it striking that *Illinois v. Gates* went all the way to the Supreme Court before it was discovered that a state statute might well have resolved the central issue in the controversy. *Id.* at 7 & n. 44. It is at least equally striking that in a state full of law schools, there has been no scholarly commentary on the Illinois lockstep doctrine or the recent controversy on the court over its validity.

156. As Judge Linde has observed, lawyers and academics speak about first amendment rights, "taking" the fifth, and fourth amendment violations, as though only the federal Bill of Rights protected such interests. Linde, *E Pluribus*, — *Constitutional Theory and State Courts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 273, 279 (B. McGraw ed. 1985) [hereinafter *E. Pluribus*]. These tendencies will remain so long as Supreme Court decisions are at the center stage of our national constitutional consciousness; the incorporation of the federal Bill of Rights virtually ensures that this will remain the case.

157. Hughes, *Speech before Elmira Chamber of Commerce*, in ADDRESSES AND PAPERS 133, 139 (1908), *quoted in* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 2.

from the federal Bill of Rights. This is particularly true in Illinois where, as we have seen, the state recently ratified a state bill of rights in full awareness that, despite federal incorporation, its bill of rights serves the purpose not merely of backing up federal protections, but of potentially providing supplementary protection if the state supreme court disagrees with the federal construction of an analogous federal safeguard.¹⁵⁸

The equation of Supreme Court case law with the Constitution itself probably reflects, in part, the influence of legal realism on American legal thought.¹⁵⁹ According to the realists, law is embodied in what authoritative decision-makers, especially courts, actually do, not what the arid text of a statute appears to say it will do.¹⁶⁰ An important critic of realism, H. L. A. Hart, observed that this perspective misses an important element of the "internal viewpoint" of law, namely, that courts are expected to decide according to applicable underlying rules rather than according to personal preference or some other standard.¹⁶¹ To equate their decisions with the underlying standard itself would eliminate, in theory, the possibility of informed criticism of a court's performance of its duty.¹⁶² Naturally, Hart's critique has prompted some responsive commentary.¹⁶³

Critics of independent state court decision-making inherit the worst of all worlds. They not only ignore Hart's insight, but also fail to follow through on realism's program. Realism's identification of law with judicial decision-making reflected skepticism as to the extent to which rules bind judges, and a corresponding emphasis on the power residing in the discretion given courts.¹⁶⁴ Judges were thus

158. See *supra* notes 151-52 and accompanying text.

159. On a less theoretical level, the equation of constitutional meaning with Supreme Court decisions may also aid the process of reinforcing the authoritative quality of the Court's decisions, as when the Court asserts that, as the Constitution's ultimate arbiter, its decisions are "the supreme law of the land". *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). While some have questioned whether *Cooper* overstates its case, e.g., G. GUNTHER, *CONSTITUTIONAL LAW* 27 (11th ed. 1985), the strong reaction to Attorney General Meese's recent statement, attempting to separate the questions of the Court's power to decide and the degree of closure afforded by its decisions reflects a force that tends us toward equating authority with correctness.

160. These views are often traced to the works of John Chipman Gray and Oliver Wendell Holmes, Jr. See, e.g., J. GRAY, *NATURE AND SOURCES OF LAW* (1909); Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

161. H.L.A. HART, *THE CONCEPT OF LAW* 138-44 (1961).

162. *Id.* at 139-40.

163. E.g., Shuman, *Jurisprudence and the Analysis of Fundamental Legal Terms*, in M. COHEN & F. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 115-18 (1979).

164. See, e.g., Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1236-37, 1251 (1931).

expected to use this discretion in the search for the "best" law.¹⁶⁵ On this view, if Supreme Court decisions *were* constitutional law, this said nothing about whether they were "good" law or ought to be followed in subsequent decisions or by state courts. In short, a confirmed realist was most unlikely to advocate a lockstep analysis.

Lockstep analysis, on the other hand, equates Supreme Court case law with the fourth amendment and then implies that, given the identity of constitutional language, it ought to control the Illinois Constitution as well.¹⁶⁶ The product of this is a peculiarly uncritical form of realism that takes no account of the possibility of error by the United States Supreme Court.¹⁶⁷ This is one reason that the Illinois Supreme Court's decision in *People v. Tisler* is so disquieting.¹⁶⁸ There the court paid lip service to its own duty to balance the values at stake in search and seizure cases;¹⁶⁹ so long as it seeks to perform that duty at all, however, there is no room for a true

165. *Id.* at 1237, 1251-52.

166. The Illinois Supreme Court conflates the fourth amendment and Supreme Court decisions interpreting the amendment each time it infers lockstep from the identity of relevant language in the state and federal provisions. Indeed, this conflation most rationally explains the court's ability to move, without blinking an eye, from the assertion that state and federal provisions "differ in semantics rather than in substance and have received the same general construction," *People ex rel. Hanrahan v. Powers*, 54 Ill. 2d 154, 160, 295 N.E.2d 472, 475 (1973), to the conclusion that the state provision "is measured by the same standards" applied in federal court, *People v. Tisler*, 103 Ill. 2d 226, 243, 469 N.E.2d 147, 156 (1984).

Commentators are equally capable of the same conceptual error. In criticizing the California Supreme Court's failure to explain the basis for its reliance on the state constitution (as well as the federal) on remand from the Supreme Court, it was observed that "[a] short explanation in the opinion on remand of the difference between the two provisions would have solved this problem." Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 303 (1977) (emphasis added). Having found that prior California decisions had described the relevant state and federal provisions to be "substantially similar," *id.* at 302, the commentator went on to conclude that if in the future the Supreme Court was to decide contrary to the California decision, "the California court would be compelled either to abandon [its state law interpretation] or to allow a substantial hole in the substantial similarity doctrine." *Id.* at 304. Underlying these comments is the unstated assumption that inasmuch as federal provisions *mean* whatever the Supreme Court holds, a court must choose between independent interpretation and "the substantial similarity doctrine." The assumption, of course, is false.

167. That is a mistake even Supreme Court justices avoid. Justice Jackson once reminded his colleagues that "we are not final because we are infallible; we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). *But see* *Florida v. Casal*, 103 S. Ct. 3100, 3101 (1983) (Burger, C.J. concurring) (questioning correctness of state court interpretation and suggesting that people of state should take action when state courts impair law enforcement by interpreting "state law to require *more* than the Federal Constitution requires") (emphasis added).

168. 103 Ill. 2d 226, 469 N.E.2d 147 (1984).

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

lockstep doctrine unless we assume that the Supreme Court never errs in seeking to fulfill its duty to balance those same values.

Yet when the Illinois Supreme Court simply follows a Supreme Court decision like *Illinois v. Gates*¹⁷⁰ that implicitly concedes that prior decisions had not adequately achieved that balance, it necessarily acknowledges that the assumption of an error-free Supreme Court is false. It is probably consciousness of this very difficulty that prompted the court in *Tisler* to simultaneously confirm its lockstep approach while defending *Gates* on the merits.¹⁷¹ It is hardly plausible to defend the proposition that the fourth amendment means *both* what the United States Supreme Court said in *Aguilar* and *Spinelli* and what it said in *Gates*; yet on its face, the Illinois lockstep application of the *Gates* standard seems to rest on such a premise.

To adopt the lockstep doctrine, one must somehow merge each of these unsupportable assumptions. Constitutional law must be equated with the holding of an authoritative decision-maker, the Supreme Court, and the spell of federal supremacy must enable us to forget that the relevant authoritative decision-maker in the case at hand is the Illinois Supreme Court. As we have seen, this kind of conceptual confusion was not present in Illinois until the 1960s.¹⁷²

While any argument for lockstep based on the tendency to equate Supreme Court decisions with the constitution retreats in the face of stern analysis, its influence remains and affects the whole tenor of the debate over independent state court decision-making. Its influence explains the tendency of many courts and commentators, even those who would advocate a measure of state court independence, to assume that such decision-making requires some kind of special justification or some species of "neutral" or "principled" grounds for departure from Supreme Court decisions.¹⁷³ Most interestingly,

170. 462 U.S. 213 (1983).

171. 103 Ill. 2d at 245-46, 469 N.E.2d at 157.

172. See *supra* notes 115-26 and accompanying text. Ironically, the Illinois court has never shown any such deference to the United States Supreme Court in other areas of law. When presented with the argument that Supreme Court precedent on the nature and scope of contempt power should control prior Illinois law, the court stated:

"The decisions of that court are always entitled to great consideration, and this court has never grudgingly yielded to them the deference which is due to so distinguished a tribunal; still, when its decisions conflict with those of this court upon questions over which this court has complete and final jurisdiction, it is our plain duty, under the law, to adhere to our own decisions."

Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 256 Ill. 196, 205, 99 N.E. 920, 923 (1912).

173. For example, see authorities cited *infra* note 176. An example is the Stanford Law

even an article devoted to defending the legitimacy of "state court rejection of Supreme Court reasoning and result" attempted to demonstrate that unique structural and institutional features of state courts argue against the presumptive validity of Supreme Court decisions, almost as though simple disagreement with the Court provides a weaker foundation for state court departure.¹⁷⁴

Even litigants and judges who advocate independent analysis and departure from Supreme Court case law pay tribute to this form of thought when they contend, as they so frequently do, that a state constitutional provision grants broader protection to a given right than does its federal counterpart, even though the particular provision might have been patterned after the federal one, and the difference in wording is clearly irrelevant.¹⁷⁵ Even if based on critical realism or merely a language convention, this form of argument for a variant reading invites a demand for textual or historical evidence suggesting that the state provision should be read differently from the federal and charges the court with result-orientation when such evidence is not forthcoming.¹⁷⁶ While such formulations may carry the advantage

Review note that purported to encourage "extension of independent interpretation of state constitutions," Note, *supra* note 166, at 297-98 n. 8. Yet the balance of the article promotes reliance primarily on differences in text, unique state conditions, and conflicting prior precedent, with the apparent implication that simple disagreement with the reasoning underlying a Supreme Court holding—especially where the Court "has spoken recently and definitively," *id.* at 319—provides a questionable basis for departure from Supreme Court case law.

Even more starkly, an article that would warrant several grounds for departure from Supreme Court precedent, characterized "unprincipled state court decisions" in this fashion:

Too often the adoption of a different rule under the state constitution is inspired by disagreement with the United States Supreme Court's interpretation of the federal Constitution. When a state court diverges from federal constitutional precedent solely because of a political or policy disagreement with the United States Supreme Court, it weakens the federal system. It signals a lack of respect by state court judges for precedent and the United States Supreme Court, and appears unseemly, result-oriented, and unprincipled.

Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DEN. U. L. REV. 85, 95 (1985) (citations omitted).

174. See e.g. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Results*, 35 S.C.L. REV. 353 (1984). While Professor Williams devotes a footnote to analyzing precisely why simple disagreement with the Supreme Court is a sufficient ground for departure from Supreme Court precedent, *id.* at 368 n.59, he devotes thirteen pages to his various institutional arguments in favor of a wholly independent role for the state courts. *Id.* at 389-402.

175. E.g., *People v. Brisendine*, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1110, 119 Cal. Rptr. 315, 326 (1975) (holding that California's search and seizure provision "requires a more exacting standard" than the fourth amendment). See Note, *supra* note 166, at 313 (criticizing opinion for failing to state sufficient "constitutional origin" of this "higher standard;" author suggests alternatives of "California common law" as such a source, or conclusion that court's

of avoiding emphasis on disagreement with the Court, and stressing instead the court's independent construction of the state provision, they frequently convey an awkward sense of backhanded deference to the Supreme Court.¹⁷⁷

2. Reactive State Decisions

A somewhat more interesting argument that activist state courts engage in unprincipled decision-making rests on the contention that such courts' decisions are purely reactive and reflect only ideological disagreement with decisions of the United States Supreme Court rather than application of neutral criteria of decision.¹⁷⁸ These criticisms would seem to offer little support to the lockstep doctrine unless it could be shown that the problems raised were inherent to independent state court decision-making. Analysis of these criticisms might aid, however, in separating legitimate concerns about independent state court decision-making from attacks that fall wide of their mark.

The most effective criticism of independent state courts is that their independence has frequently been much too half-hearted.¹⁷⁹ Courts have alternately relied on state and federal provisions, or on both simultaneously, with no apparent guiding principle to govern which approach they select.¹⁸⁰ Both courts and commentators all too

own prior decisions represented correct interpretation of both federal and state provisions). The most direct solution to the problem, of course, would have been a less confusing formulation that acknowledged simple disagreement with the Supreme Court.

176. *E.g.* *Brisendine*, 13 Cal. 3d at 556, 531 P.2d at 1117, 119 Cal. Rptr. at 333 (Burke, J., dissenting) (criticizing court for failure to point to anything unique to California that would call for higher standard). See Deukmejian & Thompson, *supra* note 15, at 991 (California search and seizure derived from federal constitution and "offer[s] no apparent basis for the divergent interpretation" of *Brisendine*).

The claimant in *People v. Tisler* effectively ran into this same buzzsaw. In the face of the claim that the Illinois provision required more than the fourth amendment, the straightforward response was that nothing in the Illinois text or legislative history uniquely called for greater protection than the fourth amendment. 103 Ill. 2d 226, 241-245, 469 N.E.2d 147, 155-57 (1984).

177. The statements in text are not intended to convey an impression that, absent textual differences or specific legislative history, only simple disagreement with the Supreme Court can explain more expansive interpretations of state law provisions. State law context may sometimes make the difference. See *infra* notes 290-313 and accompanying text. The point here is only that state courts frequently seem to go out of their way to mask their rejection of Supreme Court reasoning, as if there were something illegitimate about thus basing their decision.

178. *E.g.*, Deukmejian & Thompson, *supra* note 15.

179. *E.g.*, Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981).

frequently begin and end their state law argument by reference to the dissenting opinion from the Supreme Court decision they reject.¹⁸¹ When the state constitutional text is focused on, frequently it is only the counterpart of the federal provision at issue in a controversial federal case, to the exclusion of texts that might provide alternative theories of relief or which might suggest state law barriers to the relief sought.¹⁸² Serious commitment to state law decision-making must at least involve commitment to decision-making in a total context, by reference to the entire fabric of the state constitution and the whole of state law.¹⁸³

This sort of criticism, however, all too often shades into a distinguishable argument that state court decisions that are "reactive" to Supreme Court decisions are inherently result-oriented and unprincipled.¹⁸⁴ When the argument suggests that disagreement with the Supreme Court is never of itself a neutral ground of decision, it is rooted in the specious view that identifies constitutional law with Supreme Court decisions and should be recognized and rejected as such. Most Supreme Court decisions that have been rejected by state courts include thoughtfully written dissenting opinions, frequently joined by several members of the Court. If state court decisions rejecting those holdings are inherently unprincipled, then so is the practice of writing those dissenting opinions.

In other instances, the argument is that the state court's decision to depart from federal precedent is unjustified and not adequately grounded. But when the criticism is merely that the decision should not have departed from federal precedent because the federal rule represents the "better view", the argument has no bearing on the

180. The California Supreme Court, in particular, has been subjected to this criticism. Deukmejian & Thomson, *supra* note 15, at 996-99 (citing other critics).

181. Collins, *supra* note 179 at 3-4, 9.

182. *Id.* at 9 (relying on example of using state free speech language to avoid state action limitations to reach private forums for speech without considering state law provisions that protection property rights, sometimes with greater specificity than the federal Constitution).

183. *Id.* at 9-18.

184. Deukmejian & Thompson, *supra* note 15, at 988 (contending that result-oriented decision-making, illustrated by various criticisms, is that "state of affairs" that "follows the California Supreme Court's abandonment of its earlier policy of deferring to United States Supreme Court decisions"—implying that lack of deference is inherently unprincipled). *See also* People v. Norman, 14 Cal.3d 929, 942, 538 P.2d 237, 246, 123 Cal. Repr. 109, 118 (1975) (Clark, J., dissenting) (contending that Supreme Court interpretation should be "controlling" of California interpretation "unless conditions peculiar to California support a different meaning"). The premise underlying these views is the false notion that the meaning and application of constitutional language is fixed by decisions of the United States Supreme Court. *See supra* note 166.

lockstep doctrine or any special deference to the Supreme Court. Unwarranted state court activism is an evil to be avoided, but the debate as to when restraint is warranted is not furthered by a doctrine of special deference to the Supreme Court. Frequently, the argument for such deference is never completed, but is supported only by this sort of general case against perceived abuses of prior activism.¹⁸⁵

If the development of state constitutional law has a result-oriented sense about it, this may be at least partly the product of the prior failure by state courts to grapple with state constitutional doctrine. One suspects that many state court judges have been perplexed by arguments that they should reject Supreme Court precedent, precisely because they have so long equated the Court's decisions with the law to be applied, and have scarcely distinguished state and federal constitutional law.¹⁸⁶ If one is uncertain whether a given state constitutional doctrine reflects the developed views of the state court, or only its half-conscious assimilation of federal precedent, the question whether it ought to be extended (or retained) contrary to developing federal decisional law is bound to seem like an airy abstraction.

A proposed solution is for state courts to adopt an approach that gives primacy to state constitutional law.¹⁸⁷ Rather than merely reacting to federal precedent, the court would turn first to the state constitutional question.¹⁸⁸ Beyond the virtue of enabling state courts to avoid unnecessary federal constitutional questions, this primacy approach accentuates the court's duty to systematically develop state constitutional law. Any adoption of the framework or rules of federal decisional law would be self-conscious and reflective rather than merely reactive.¹⁸⁹

185. The oft-cited article by Deukmejian and Thompson, *supra* note 15, for example, offers thoughtful criticisms of examples of activist decision-making by the California Supreme Court, but nowhere buttresses this critique by argument showing how this undue activism demonstrates the need for deference to the Supreme Court as advocated there. For development of why such deference is unnecessary and likely to be self-defeating, see *infra* notes 363-369 and accompanying text.

186. See, e.g., Abrahamson, *supra* note 18, at 1147-48; Linde, *E Pluribus*, *supra* note 156, at 278-79. To discover the extent to which this is the case in Illinois, even in contexts where the court has never stated that lockstep applies, read the Smith-Hurd annotations to the state constitutional provisions dealing with freedom of speech and religion, as well as due process and equal protection. Many cases refer only to federal provisions, and state law provisions are viewed as coextensive with federal in discussions that combine them together.

187. The view is associated with Judge Linde. E.g., Linde, *E Pluribus*, *supra* note 156, at 282-83; Collins, *supra* note 179.

188. Linde, *E. Pluribus*, *supra* note 156; Collins, *supra* note 179.

189. Consider Judge Linde's argument for considering state constitutional issues first:

It would appear that the primacy approach has much to offer.¹⁹⁰ Short of adopting it as their model for decision-making, state courts would be well advised to at least seriously consider whether a rule's application to the states through selective incorporation of the federal Bill of Rights is really a sufficient ground to treat the rule as an authoritative construction of an analogous provision of the state constitution.¹⁹¹ It is difficult to see what is unprincipled about a "reactive" state court decision, provided the body of federal case law that is the foundation for analysis has been thoughtfully incorporated into state law, and the extension of that precedent considers the balance of state law. After all, state courts have long recognized that federal decisions are a source of persuasive authority, and no one doubts the experience of the federal courts, nor the extent to which federal forms of analysis have come to represent significant (if not inexorable) ways of approaching constitutional questions.

One thing is clear. It is difficult to imagine a less principled method of state constitutional decision-making than the lockstep

I think most courts would take it for granted when a state statute rather than a state constitution is involved. Of course they pay attention and respect to Supreme Court opinions on issues common to the two constitutions, and it is to be expected that on many such issues courts will reach common answers. The crucial step for counsel and for state courts is to recognize that the Supreme Court's answer is not presumptively the right answer unless the state court explains why not. The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.

Linde, *E PLURIBUS*, *supra* note 156, at 282. Advocates of lockstep, or at least strong deference, share with reactive state courts the focus of justifying departure from the Supreme Court: "But to ask when to diverge from federal doctrines is quite a different question from taking a principled view of the state's constitution." *Id.*

190. Linde's "primacy" approach is not without its critics. *See, e.g.,* Deukmejian & Thompson, *supra* note 15, at 990-91 (ironically introducing discretionary, prudential considerations into determination of which constitution to address first despite criticism of unprincipled determinations by California courts); Developments, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1362-1366 (1982) (contending that reactive and more independent approaches may each have their role in different settings). My own view is that state courts should probably begin with state law questions, but that federal case law might properly provide the framework for analysis so long as the state court independently concludes that it is actually the correct starting point and not merely a federal floor.

191. Conservative state courts would be well-advised to be especially careful about adopting federal precedent as encompassing state law protections merely because they are the federal floor in any event. Lockstep may be the fruits of labeling the federal minimum as state law without regard to whether the court agrees with the federal analysis; Supreme Court retrenchment then comes as welcome relief, at both the federal and state level. If this is true, lockstep springs as much from disagreement with the general trend of Supreme Court decision-making as from the identification of Supreme Court decisions with constitutional law. Paradoxical as it may seem, I believe that both tendencies contribute to the mentality that produces lockstep. No one said it had to be logical.

approach. It bears no relationship to the interpretation of the state constitution, the role of the Supreme Court in our federal system or our legal order generally, nor to any principled scheme for confronting the difficult institutional and political issues that confront any constitutional court. When the only justification offered both for adopting, and later rejecting, a given rule of law, is that in both instances it was the rule of decision in a Supreme Court case, it becomes difficult to imagine defending the practice because its alternative is unprincipled.

3. A Rule-Utilitarian Rationale for Lockstep

It might be contended that, although the lockstep approach does not involve principled decision-making in individual cases, adoption of it as a general principle might enable state courts to chart an appropriate course in seeking the balance between adequately protecting individual rights and showing appropriate deference to coordinate branches of government. If it is true that the Supreme Court may err in construing the constitution, the same is true of state supreme courts. If there are serious grounds for concern about whether state courts will strike the appropriate balances in developing an independent body of individual rights,¹⁹² it might be contended that they could better strike that balance by reliance on Supreme Court decisions.¹⁹³

Resort to this sort of rule-utilitarian justification for the lockstep approach is arguably lent some support by the nature of modern constitutional adjudication. Judges and scholars acknowledge that modern constitutional decisions frequently involve sensitive value judgments that go to the fairness and necessity of legislation, and that frequently such decisions are not dictated by the intentions of the framers of the Constitution.¹⁹⁴ To the extent that one is convinced that the legitimacy of these modern developments is established by a real need to subject the decisions of our powerful modern state to the sober second thought of impartial judges, it may be contended that rigorous state court application of standards flowing from

192. As suggested by Maltz, *supra* note 16.

193. Maltz contends for a view somewhat along these lines, though his argument is complicated considerably by its reliance on the problematic distinction between "interpretive" and "noninterpretive" decision-making. *Id.* See *infra* note 195.

194. The literature is now voluminous. For perhaps the most eloquent description of this view, see Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

similarly worded state constitutional provisions will unfairly skew our constitutional order by creating an unneeded second layer of review.¹⁹⁵

This sort of argument contains an intriguing thesis that would require a separate article to assess fully. As a justification for a strong version of the lockstep doctrine, however, it seems vulnerable at several levels. While there is obviously some risk that Illinois' courts will go too far in striking down democratic decision-making, the United States Supreme Court may also protect rights insufficiently. Unless the proposed approach is based on an unusually

195. A somewhat similar view to this one is articulated in Maltz, *supra* note 16. Maltz's thesis, however, is limited to the claim that state courts should not engage in "noninterpretivist" judicial review. For Maltz, interpretivist decision-making is the more easily defended judicial role, for the court is implementing the value choices embodied in the state constitution at its founding. The more open-ended model of noninterpretivist decision-making is troubling because it places the judiciary as the engine of social policy. Given that federal courts are already engaged in the much more problematic practice of noninterpretive decision-making, which is justified (if at all) in functional terms, supplemental state court activism can only have the effect of further tilting the balance away from democratic decision-making while offering dim prospects for better overall results.

The proposed distinction between interpretivist and noninterpretivist decision-making is problematic and raises doubts as to the reach of the proposed approach. See generally Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 453 (1985). For one thing, Maltz's description of interpretivism, as contrasted with the term's original elaboration by Thomas Grey, is simply a modern variation of what used to be called strict construction. Compare Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983) [hereinafter *New Thoughts*], with Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). In Maltz's interpretivism, generally worded provisions are interpreted to reach "only those evils explicitly discussed in debate" over the provision—a view that is unlikely to gather much assent by judges or theorists. Maltz, *New Thoughts, supra*, at 812.

Indeed, Maltz's analysis appears to reject rather standard assumptions of experts on legal interpretation, including statutory interpretation, that meaning (or "connotation") properly includes new or unimagined instances of application ("denotations"), and that meaning may sometimes outstrip intent. *Id.* at 812, 815 & n.14. For the competing views, see McAfee, *supra* note 3, at 271-72 (and collected sources). Any system of deference based on the distinction might thus flounder on the threshold question as to when the court is moving into the noninterpretivist sphere. It would also be subject to most of the objections developed in text.

Moreover, given that Maltz would generally limit courts to such narrow review for functional reasons, Maltz, *New Thoughts, supra*, at 838, the task for state courts under his agenda would be one of determining whether noninterpretive review is warranted in a given setting, with the prior existence of Supreme Court decision-making simply being a factor to be considered in making the determination. The question need not be whether the court should consider itself bound to defer to the Supreme Court decision and therefore to adopt it as a matter of state constitutional law; it would perhaps only be to conclude that functionally there is no need to engage in *any* noninterpretive decision-making (including adopting the Supreme Court rule). Indeed, it appears that for Maltz this becomes simply an additional reason to prefer the approach to decision-making he contends for on separate grounds. From this perspective, his is perhaps less an argument for lockstep, or even deference, and more an argument against state court activism.

narrow vision of the judicial role that most Americans, and most citizens of Illinois, would reject, the argument must rest either on the normative view that the greatest premium should be placed on preventing undue judicial activism by eliminating double-layered review, or on the empirical claim that Illinois courts are more likely to err toward undue activism than the Supreme Court is toward under-protection.

As to the first possibility, an initial objection is that the ratification of the 1970 constitution suggests that the priority runs in the opposite direction as a matter of constitutional law. Beyond that observation, it is not apparent why greater harm is likely to come from undue activism than from potential under-protection of rights. More likely than not, an advocate of this position simply assumes that the Supreme Court is unlikely to substantially undo what has already been done for individual freedoms in this country. Activist decision-making is perceived as more likely to run amok.

The argument rests less on a disputable value choice about which prospect should most concern us, than on an empirical assumption that the Supreme Court will not significantly reverse directions and under-protect individual rights in the future. But such things are difficult to predict with any certainty. Many people are convinced that the cause of individual freedom, an important dimension of our constitutional heritage, would be undermined if the Supreme Court eliminated the exclusionary rule of evidence. That is not an unthinkable development, even in the relatively near future. Given the constitutional heritage of Illinois in this area, such a result would be as disastrous a consequence of lockstep as one could plausibly anticipate from independent decision-making by Illinois courts.

To say the very least, one's attraction to the above thesis would depend on the resolution of fairly difficult empirical questions and (perhaps) the acceptance of some fairly definite viewpoint about the appropriate scope of judicial activism.¹⁹⁶ But however intriguing such an argument might be—and some intuitive version of the same may well underlie the thinking of many conservative state judges that have embraced the lockstep approach—it is an argument we ought

196. It is doubtful that a lockstep approach would contribute to the cause of judicial restraint, in any event, unless it was applied across the board. As we shall discover, the Illinois Constitution contains an unenumerated rights provision that was apparently intended to embody the constitutional philosophy embraced by the broadest modern readings of the ninth amendment, which is available for use by a court bent on playing an activist role. That provision is an unlikely candidate for lockstep analysis. See *infra* notes 306-311 and accompanying text.

not to consider, at least without advocating a constitutional amendment. In whatever version, the argument contradicts a fundamental postulate of our constitutional order—the judicial duty to declare the law.

C. *The Constitutional Duty of the Illinois Supreme Court*

A number of state supreme court justices have suggested that the lockstep approach represents an abdication of the judicial function and is therefore unconstitutional.¹⁹⁷ Since the lockstep doctrine is implausible as an interpretation of the state constitution, and not justified in terms of the role of the federal constitution or the Supreme Court in our legal order, this argument must at least be confronted. So far as research has shown, however, no court has offered an explanation as to how complete abdication to the Supreme Court can be squared with a state court's constitutional duty to declare the highest law of the state.

Whatever might be said historically about the doctrine of *Marbury v. Madison*¹⁹⁸ at the federal level,¹⁹⁹ there can be no issue of the legitimacy of judicial review in Illinois state constitutional law. The doctrine of judicial review is a fundamental postulate of modern constitutional law, and there can be no question that the 1970 constitution was adopted against the backdrop of judicial enforcement of basic legal and constitutional rights. The Illinois Supreme Court, like the United States Supreme Court, has emphasized that the state constitution is binding law as to all governmental actors, including the courts.²⁰⁰ Modern courts proceed under the assumption that *Marbury* correctly states that it is the duty of courts to say what the law is. At first glance at least, the lockstep doctrine represents an abdication of the judicial duty to declare the law and is difficult to square with the Illinois Supreme Court's general approach to separation of powers law.

197. E.g., *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969); *Brown v. State*, 657 S.W.2d 797, 807 (Tex. Crim. App. 1983) (Clinton, J., concurring).

198. 5 U.S. (1 Cranch) 137 (1803).

199. There remains to the present day a debate whether judicial review was embedded in the text or intended by the framers of the federal Constitution. The most complete recent work is R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969) (discussing views of Corwin, Crosskey, and others). While Berger concludes that judicial review is well-grounded in text and intent, he insists that its legitimacy would be overthrown if the evidence cut the other way, as some have supposed. *Id.* at 346. Many commentators would conclude, however, that the acceptance of the practice for 184 years is legitimacy enough.

200. *People ex rel. Sammons v. Snow*, 340 Ill. 464, 469, 173 N.E. 8, 9-10 (1930).

The only context in which courts arguably have adopted so complete a qualification of their general duty to declare the law is in the application of the political question doctrine.²⁰¹ One view suggests that the political question doctrine itself rests on a finding that a constitutional text, properly construed, grants power to a political branch to apply an underlying constitutional standard with finality.²⁰² The Court declares the law, but the law itself (in this case, our supreme law) grants a defined amount of law-application power to a non-judicial branch. There is no plausible argument that such a rationale would support the lockstep doctrine. An alternative view of the political question doctrine sees it as a court-created prudential doctrine that rests on the judiciary's sense of the reach of its own effective power and legitimate decision-making authority in a democratic system.²⁰³ In applying this view, the courts' focus has been on the unusual deference that ought to be shown to the political branches in important and sensitive areas where, apart from the constitutional standard at issue, they have plenary decision-making authority.²⁰⁴ Even in its prudential mode, the political question doctrine need not necessarily be unprincipled or be equated with sheer expedience.²⁰⁵

Under either rationale, however, the political question doctrine has been subject to the attack that it is contrary to the doctrine of

201. As a complete abdication of the duty to decide an issue, the political question doctrine distinguishes itself in theory from even such prudentially-based—at least in part—doctrines as standing, ripeness, and mootness. See Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 66-67 (1977). Though it may have something in common with them, the political question doctrine also appears as a more complete form of abdication than the tendency of courts to show deference to some administrative determinations of law, see Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983), or the alternative holding in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), suggesting that the Court should defer (within certain boundaries) to congressional determinations of the appropriate scope of the protections of the fourteenth amendment.

202. The classic formulation is Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

203. This view is associated particularly with the work of Alexander Bickel. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

204. Examples used include foreign affairs power (especially war-making), impeachment, and ratification of constitutional amendments. See Note, *A Dialogue on the Political Question Doctrine*, 1978 UTAH L. REV. 523, 536-39, 541-43 (war powers) Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1044-45; Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 587-97 (1966) (ratification of amendment).

205. See Note, *supra* note 204, at 541, 545-46 (contending that even prudentially-based political question rulings can be based on a principled consideration of “an enduring element” of the case that would call for avoidance, rather than for starkly “political” reasons).

Marbury v. Madison.²⁰⁶ Scholars have observed that no constitutional text purports by its terms to grant final constitutional decision-making power on any issue to a non-judicial branch.²⁰⁷ Whether the Court purports to read the notion into some text of the federal Constitution, or to justify it based on prudential reasoning, true political question holdings reflect a conscious decision about the appropriate limits of judicial power.²⁰⁸ Though the areas selected for application of the doctrine have been those perceived as most requiring such extraordinary abstention, similarly-styled arguments might well be applied to a much broader range of constitutional decisions²⁰⁹ or, indeed, to the whole of constitutional law. The only sure way to reject such a result in principle, the argument concludes, is to reject any view that produces inroads on the doctrine of judicial review.

Whatever the merits of the dispute over the meaning and legitimacy of the political question doctrine, it is clear that the lockstep doctrine rests on a much shakier foundation. No one has suggested that the text or history of the federal or state constitutions lend any support to extraordinary judicial abstention as concerning the individual rights provisions. Also, virtually all modern legal scholars agree that the doctrine of judicial review is most central and important in the enforcement of the limits imposed on government in behalf of individual rights. While there is debate over the appropriate scope of judicial review, generally cast in terms of judicial activism versus restraint, there is little doubt that the courts play a vital role in giving life to the great individual rights protections of our constitutional system.²¹⁰

Unlike the prudential theory of political questions, lockstep does not seek to cabin its application by reference to some fairly narrow range of uniquely sensitive decision-making areas in which the polit-

206. See Redish, *Judicial Review and the "Political Question"*, 79 Nw. U. L. Rev. 1031 (1985); Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCL L. REV. 1135 (1970).

207. E.g., Redish, *supra* note 206, at 1040-41.

208. See Note, *supra* note 204, at 535-36.

209. Redish, *supra* note 206, at 1057-1059. Indeed, one prominent scholar has provided a sustained analysis in support of the proposition that the Supreme Court should treat all issues of separation of powers and the scope of national power under the federal Constitution as political questions. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). Needless to say, the proposal has been highly controversial, however beguiling and provocative. For one of a number of critiques, see the above-cited pages in Professor Redish's article.

210. See, e.g., J. Choper, *supra* note 209, at 60-128.

ical branches arguably require special deference. Indeed, lockstep shows deference merely to another judicial decision-maker, presumably to avoid the perceived disadvantages of having a second layer of review, even though supplemental protection (and hence independent state court review) is built into the constitutional scheme itself.²¹¹

If a court may reconsider the utility of the second layer of judicial review which the Illinois Bill of Rights seems to provide, there is no reason why a court may not reconsider the utility of judicial review in general. While it might be contended that our commitment to judicial review is more deeply engrained than any commitment to independent constitutional decision-making, we have already discovered that lockstep thinking seems rooted in rather recent developments and a good deal of conceptual confusion. When lockstep is correctly seen as a serious compromise of the general presumption of independent judicial decision-making that undergirds the doctrine of judicial review, it is unlikely that the second layer of judicial scrutiny that Illinois' state constitution provides will be viewed as an expendable appendage of our constitutional system.

The above-outlined analysis of the constitutional status of the lockstep doctrine comports with the general approach of the Illinois Supreme Court to issues of separation of powers under the Illinois Constitution. As a general proposition, it is fair to describe the Illinois Supreme Court as somewhat old-fashioned in its approach to separation of powers issues. While articulating the modern view that separation of powers does not imply that the three branches represent air-tight compartments with no overlapping responsibilities,²¹² the court is more rigid than its federal counterpart in policing the boundaries between the branches. A good example is the anti-delegation doctrine that forbids the delegation of the "legislative" power. Even though modern federal courts have all but abandoned any meaningful requirement that the Congress provide administrative agencies with adequate standards to guide administrative action,²¹³

211. We have seen that the independence of the state bill of rights is built into our federal system. It is also significant, however, that even in the face of a nearly-complete incorporation process, the decision was made to include a bill of rights in the Illinois Constitution in the knowledge that it would provide supplemental protection to the baseline provided by the federal rights applied by the Supreme Court. See notes 151-52 and accompanying text.

212. *E.g.*, *City of Waukegan v. Pollution Control Board*, 57 Ill. 2d 170, 311 N.E.2d 146 (1974).

213. *E.g.*, B. SCHWARTZ, *ADMINISTRATIVE LAW* 36-52 (2d ed. 1983); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:2, at 150-52 (2d ed. 1978).

the Illinois court is well known for striking down laws deemed to provide insufficient guidance for the exercise of administrative discretion.²¹⁴

The court has been equally zealous in protecting judicial prerogatives against legislative encroachments under the 1970 constitution. In several instances, the Illinois Supreme Court has stricken state legislation that impacted too strongly on the judicial power of the court to administer the judicial system of the state.²¹⁵ In light of this record of rigorous enforcement of the separation of powers principle, it is anomolous for the court to abdicate the judicial power by means of the lockstep doctrine.

The lockstep doctrine transforms the Illinois Supreme Court into the equivalent of a lower federal court rather than the highest authority on Illinois state law.²¹⁶ In doing so, it literally delegates the judicial power to declare Illinois law to an entity outside of the Illinois judicial system. While the anti-delegation doctrine is generally applied as a limitation on legislative action that improperly grants either legislative or judicial power,²¹⁷ there is no reason that the doctrine should not apply to the same sort of action by a court. If Congress may not grant the article III judicial power to a non-article III court,²¹⁸ the relevant principle would seem, by analogy, to preclude the Illinois Supreme Court from delegating its own judicial power to a non-Illinois court, whether it be another state court or the United States Supreme Court.

While the exigencies of the modern administrative state have prompted judicial tolerance of the modern mixing of governmental powers in the agencies that help government move ahead, no such practical justifications present themselves on behalf of the lockstep doctrine.²¹⁹ Indeed, the lockstep doctrine will, in the long run, present

214. B. Schwartz, *supra* note 213, at 53; 1 K. Davis, *supra* note 213, at 206. A representative case is *People v Tibbits*, 56 Ill. 2d 56, 305 N.E.2d 152 (1973).

215. *E.g.*, *People v. Joseph*, 113 Ill. 2d 36, 495 N.E.2d 501 (1986); *see id.* at 43-44 (citing cases).

216. *See Collins, Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1115-16 (1985).

217. B. Schwartz, *supra* note 213, at 62-74 (judicial power).

218. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

219. It is probably significant that the Supreme Court has been deferential to decisions to delegate quasi-judicial power to administrative agencies, *e.g.*, *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), but not to the delegation of judicial power to a non-article III court, *Northern Pipeline Constr. Co. v. Marathon Pipe*, 458 U.S. 50 (1982).

practical difficulties on a par with the theoretical problems already reviewed.

IV. THE LOCKSTEP DOCTRINE—PROBLEMS OF APPLICATION

The Illinois Supreme Court has done very little to explicate the lockstep doctrine or to grapple with its inherent difficulties. We have seen that the doctrine lacks any roots in legal theory and is contradicted by a longer view of Illinois case law. If the court is nevertheless committed to proceeding with its lockstep approach, it ought to give sustained attention to the practical problems involved in giving the doctrine effect. When it does, the court will discover some of the best reasons for abandoning the lockstep practice. This section outlines the most salient of the difficulties associated with the doctrine.

A. *The Two-Clause Constitution*

The Illinois Supreme Court has expressed its intention to “follow decisions of the United States Supreme Court on identical State and Federal constitutional problems.”²²⁰ The basic problem with this formulation is that the notion of “identical State and Federal constitutional problems”²²¹ is hardly self-defining, and the court has done very little to explicate it over the last twenty-five years. Since the Illinois court has also not ventured to articulate the precise values that give rise to the lockstep approach, very little help is given as to the proper application of this crucial language. The question is of great importance because the court’s role as an independent voice for constitutional values turns on this determination. An examination of the court’s practice during the lockstep period, however, does not reflect any coherent view of this formulation or of the lockstep doctrine itself.

1. Mirror-Image Provisions

At a minimum, the court views at least the Illinois Constitution’s search and seizure, self-incrimination, and double jeopardy provisions as involving sufficiently “identical problems” to call for application of the lockstep doctrine.²²² Since the court has not spoken specifically

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

221. *Id.*

222. See *supra* notes 29-32 and cases cited therein.

beyond these provisions, its emphasis on the near-identity of language between analogous state and federal provisions²²³ makes it tempting to assume that the doctrine applies only to so-called "mirror image" provisions—those state constitutional provisions that are virtually identical in language and (presumably) indistinguishable in substance from a federal counterpart provision.

On the other hand, state and federal constitutions mirror each other in ways that go beyond specific texts in their bills of rights. For example, while it is clear, as a matter of federal constitutional law, that states are not bound by the federal model of separation of powers, most state constitutions, including Illinois', use the same tripartite scheme of government that is rooted in the separation of powers philosophy underlying the federal Constitution. If it is true that the search and seizure provisions of the state and federal constitutions have the same purpose, it is equally true that general principles of separation of powers, such as the doctrine against delegation of legislative power, also serve the same purpose in the respective constitutional schemes. In both settings, the value choices and conflicting policies are essentially the same.²²⁴

There is no apparent reason why the framers of the Illinois constitutions since 1818 would have been likely to intend that Illinois courts track federal decisions on individual rights, but not on separation of powers. Indeed, a number of individual rights theories embraced by Illinois and federal courts have roots in the roles of the three branches in our system of separation of powers.²²⁵ There is, moreover, nothing in "the language of our constitution, or in the debates and the committee reports of the constitutional convention"²²⁶—or, for that matter, any of the prior state constitutional conventions—that would suggest that the drafters intended that the anti-delegation doctrine, as one example, should be applied more strictly in Illinois than in the federal system.

223. See *Jackson*, 22 Ill. 2d at 387, 176 N.E.2d at 805. See also *People ex rel. Hanrahan v. Powers*, 54 Ill. 2d 154, 160, 295 N.E.2d 472, 475 (1973).

224. This is not, however, the same as saying that the differences in context may not lead to differences in interpretation and application of governing principles and language. See *infra* notes 290-313 and accompanying text. Indeed, that is one of the problems with the lockstep doctrine.

225. An example is the doctrine of substantive due process, with its underlying assumption that legislatures exist to implement general policies and not to invade private rights. *E.g.*, *People v. City of Chicago*, 413 Ill. 83, 91, 108 N.E.2d 16, 21 (1952); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1066 n.9 (1980).

226. *People v. Tisler*, 103 Ill. 2d 226, 245, 469 N.E.2d 147, 157 (1984).

Yet, as we have seen, the Illinois Supreme Court is well-known for its application of a more demanding requirement concerning adequate standards controlling administrative power.²²⁷ While state courts may appropriately apply more rigorous anti-delegation standards than the federal courts,²²⁸ the immediate point is that there is nothing from the perspective of abstract law (text and extrinsic evidence of intent) that calls into question the notion that general issues of separation of powers are “identical State and Federal constitutional problems.”²²⁹ The Illinois Supreme Court, however, has never suggested that it is bound by federal separation of powers precedent.

If it is determined that the lockstep doctrine is limited to relatively specific mirror image provisions, we must then confront the problems of determining when provisions are sufficiently identical to qualify as mirror image provisions and the extent to which a particular constitutional guarantee may be sub-divided to determine if the lockstep approach applies to at least some portion of it. These become important questions, partly because they bear on the plausibility of lockstep in interpretive terms, but also because the court’s power to directly confront the conflicting values involved in most issues of constitutional adjudication will depend upon these preliminary determinations. If there are no principled grounds for distinguishing when lockstep applies, then the meaningful exercise of judicial power will turn on arbitrary factors.

As to the first question, the Illinois Supreme Court has stated that the wording of a provision need not be identical, provided any differences in language are matters of semantics rather than of substance.²³⁰ On its face, this test appears to make a good deal of sense. The 1870 constitution, for example, included a search and seizure provision that tracks the fourth amendment virtually word for word, and the minor variation in language could not conceivably have any substantive significance.²³¹ Such a provision, at least, does seem to present “an identical question” to the fourth amendment,

227. B. Schwartz, *supra* note 213, § 2.12, at 52-53. *See supra* note 214 and accompanying text.

228. *See infra* notes 293-296 and accompanying text.

229. *People v. Jackson*, 22 Ill. 2d 382, 387, 176 N.E.2d 803, 805 (1961).

230. *People ex rel Hanrahan v. Powers*, 54 Ill. 2d 154, 160, 295 N.E.2d 472, 475 (1973).

231. The Illinois Constitution states that “no warrant shall issue *without* probable cause,” ILL. CONST. art. 2 § 6 (1870) (emphasis added), whereas the fourth amendment states that “no Warrants shall issue, *but upon* probable cause.” U.S. CONST. amend IV (emphasis added). There are also minor punctuation differences.

quite apart from whether it is reasonable to conclude from this that federal decisions bind Illinois courts.

In the case of Illinois' self-incrimination provision, however, the court has characterized its variant language as involving only semantics when the language does not obviously convey the same meaning. Article I, section 10 ensures one against being forced "*to give evidence* against himself;"²³² the fifth amendment provision, on the other hand, protects a person against being compelled "*to be a witness* against himself."²³³

There is no question that the Illinois and federal self-incrimination provisions, along with a third variation found in some state constitutions,²³⁴ all have roots in the common law heritage that inspired the protection.²³⁵ And for this reason, courts²³⁶ and commentators²³⁷ have tended to assume that the language variations were not intended to convey any implication of a differing scope of protection. On this basis, the mirror image characterization of the differently worded provisions does not seem unreasonable.

On the other hand, neither Illinois nor federal courts have adopted a reading of the protection against self-incrimination that is entirely coincident with the scope of the protection at common law.²³⁸ Instead, the courts have looked to the values and policies thought to be promoted by the privilege and sought to give them effect, at least to a significant extent,²³⁹ even if their application extended the privilege beyond its common law boundaries.²⁴⁰ In these circumstan-

232. ILL. CONST. art. 1 sect. 10.

233. U.S. CONST. amend. V. Since the Illinois language tracks the language found in twenty-four state constitutions, *Hansen v. Owens*, 619 P.2d 315, 318 (Utah 1980), an initial question is whether it is likely that the framers of the Illinois Constitution contemplated Illinois courts looking for guidance exclusively to the federal courts, rather than to sister state courts construing the identical language. In terms of interpretive theory, this language cuts against the lockstep approach to the provision.

234. *Hansen*, 619 P.2d at 318-19 (Stewart, J., dissenting).

235. See C. McCORMICK, *McCORMICK ON EVIDENCE* §§ 114-15 (E. Cleary, 3d ed. 1984).

236. *E.g.*, *Schmerber v. California*, 384 U.S. 757, 761 n.6 (1965).

237. *E.g.*, 8 J. WIGMORE, *EVIDENCE* § 2252 (McNaughton rev. ed. 1961). *But see* C. McCORMICK, *supra* note 235, § 115, at 283 ("give evidence" language may provide "broader protection than is available under other formulations").

238. See C. McCORMICK, *supra* note 235, § 118 (describing values and policies that undergird modern rule).

239. *Schmerber v. California*, 384 U.S. 757, 762-63 (1965).

240. See, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (extending privilege to custodial setting). To the extent that this failure to limit the scope of the privilege to its common law dimensions is viewed as suspect or illegitimate, it is no answer to adopt such federal cases, but to refuse to consider their implications in future state law cases.

ces, a question raised is whether the differing language of the Illinois provision might lend support to a treatment of the privilege against self-incrimination that varies from a Supreme Court construction.

The United States Supreme Court, for example, has held that the privilege against self-incrimination does not apply to the compelled extraction of various kinds of physical evidence, as opposed to the "communicative" or "testimonial" evidence that it is said to protect.²⁴¹ A competing view rests on the premise that the central purposes underlying the privilege against self-incrimination are to show respect for human dignity by protecting individuals against the cruel trilemma of self-accusation, perjury, or contempt, and to ensure against the danger of unreliable evidence this trilemma might generate.²⁴² Accordingly, the privilege should therefore be extended to prohibit all compulsion where the veracity of the evidence produced depends on whether the accused performs any conduct required of him in a truthful or accurate manner.²⁴³

Even if the more protective reading of the privilege is the stronger one, the fifth amendment's self-incrimination provision could also be read to extend the privilege by construing more expansively what it means to be a "witness" against oneself.²⁴⁴ Suppose, however, that the Supreme Court reasoned that the idea of being a "witness" against oneself does not include being compelled to engage in various behaviors which, despite placing similar pressures on the accused, are not ordinarily thought of as giving testimony or being a witness.²⁴⁵ Apart from whether this textual argument is legitimate given the existence of the Illinois variation of the clause, it seems clear that the language of the Illinois provision would justify the Illinois Supreme Court in rejecting a reading based on such analysis.²⁴⁶

241. *E.g.*, *Schmerber*, 384 U.S. at 763-64.

242. Dann, *The Fifth Amendment Privilege Against Self Incrimination: Extorting Physical Evidence From a Suspect*, 43 S. CAL. L. REV. 597, 604 (1970). See also C. McCORMICK, *supra* note 235, § 124, at 303-04.

243. Most courts have rejected the arguments in favor of this view, and there are persuasive points to be made against it. C. McCORMICK, *supra* note 235, § 124, at 304. The case for the more protective view, however, seems neither precluded by the text or history of the provision nor unworthy of serious consideration.

244. Such a case is made in Dann, *supra* note 242.

245. In fact, the Court disclaimed reliance on the textual focus on being a "witness." *Schmerber*, 384 U.S. at 761 n. 6.

246. Similarly, the Supreme Court might have adopted Dean Wigmore's interpretation, limiting the scope of the privilege to protecting words literally written or spoken by the accused, thereby precluding protection of such communicative activities as gestures. See C. McCORMICK, *supra* note 235, § 124, at 302. (In *Schmerber*, the Court expressly disclaimed

The state provisions that ensure that individuals may not be compelled to "give evidence" against themselves lend support to the more liberal construction that focuses on compelling meaningful cooperation. At least two state courts have interpreted the broader language of their state self-incrimination provision as warranting a departure from the narrower United States Supreme Court rule.²⁴⁷ It might seem fanciful to suppose that language should make an important contribution to self-incrimination law, when there is no reason to think that drafters intended different applications. If the commentators and philosophers of language²⁴⁸ are correct, however, in believing that drafters may say (and hence enact) more than they intended, it is understandable why a given judge might be more reluctant to extend the protection against self-incrimination beyond testimonial behavior when the language suggests such a limitation than when the language seems so clearly not to forbid such an extension. While in this narrow context one is inclined to think that the concept of "witness" might almost as easily encompass the act of providing a handwriting exemplar, the "giv[ing] evidence" language even more clearly seems to permit the broader application.

If the finding that a non-identical text is a mirror image provision based on common origins, and the lack of any apparent purpose to use different language to alter the meaning leads automatically to lockstep, the implication is that such language differences will be treated as irrelevant even if they clearly undercut the prevailing Supreme Court construction, or lend (at least some) support to an alternative reading. Lockstep would thus work against obtaining the correct answer.

While the Illinois Supreme Court has in the past indicated, however obliquely, a sense of this very tension, it currently articulates a strong lockstep approach. In *People ex rel. Hanrahan v. Power*,²⁴⁹ for example, the court came very close to providing an independent

adoption of this least protective reading of the privilege. 384 U.S. at 763 n. 7.) If such a Court focused on the "witness" language to buttress that reading of the privilege, once again the Illinois language prohibiting compulsion to "give evidence" would clearly supply a reason for adopting a more protective reading.

247. *Hansen v. Owens*, 619 P.2d 315 (Utah 1980); *State v. Armstead*, 152 Ga. App. 56, 262 S.E.2d 233 (1979). *But see* *American Fork City v. Crosgrrove*, 701 P.2d 1069 (Utah 1985) (overruling *Hansen*).

248. *See* R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 80 (1975); A. AYER, *LANGUAGE, TRUTH AND LOGIC* 86 (2d ed. 1947); J. Kohler, *Judicial Interpretations of Enacted Law*, in *SCIENCE OF LEGAL METHOD* 187-88 (1921).

249. 54 Ill. 2d 154, 295 N.E.2d 472 (1973).

analysis of the specific underlying issue to reinforce its mirror image conclusion. In that case, the Illinois court rejected the accused's claim that requiring him to provide handwriting exemplars to a grand jury violated his self-incrimination rights. After relying on Supreme Court precedent to reject the fifth amendment claim, the court turned to the Illinois provision with the observation that the two provisions differed only in semantics and receive "the same general construction."²⁵⁰ Rather than simply resting on the previously-cited Supreme Court cases, however, the court cited two prior Illinois decisions²⁵¹ to indicate that Illinois had long ago adopted the narrower "testimonial" conduct reading of the clause.

Even so, when a litigant in 1980 contended that older state case law²⁵² supported a different result as to the compelled production of documents, an Illinois appellate court asserted that Illinois cases had been decided "on the then-existing Federal standard" and cited cases considering both provisions simultaneously before concluding that state law would be controlled by federal holdings.²⁵³ This strong lockstep approach was confirmed by the Illinois Supreme Court in *People v. Rolfingsmeyer*.²⁵⁴

Considering the profound institutional implications of the mirror image issue, the more committed to the lockstep approach the court becomes, the more likely it is that Illinois provisions will be treated as mirror image provisions wherever language differences are of doubtful significance. The reason is plain: the closer a provision is to being a mirror image provision without being one, the clearer it becomes that the all important question of independent exercise of judicial power will turn on the fortuity of the extent to which Illinois draftsmen chose to vary relevant language in ways that arguably ensure a measure of additional (or different) protection of fundamental rights that are protected in both constitutions.

Indeed, this creation of a two-clause constitution is a central dilemma of the lockstep approach.²⁵⁵ Applied literally, the division between mirror image and other provisions is highly artificial and further undermines any idea that there are interpretive roots for the lockstep ap-

250. *Id.* at 160, 295 N.E.2d at 475.

251. *Id.*

252. *People v. Moore*, 43 Ill. 2d 102, 251 N.E.2d 181 (1969); *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925).

253. *People v. Lynch*, 83 Ill. App. 3d 479, 486, 404 N.E.2d 814, 819 (1st Dist. 1980) (citing *People v. Monroe*, 27 Ill. 2d 449, 189 N.E.2d 350 (1963)); *People ex rel. Scott v. Pintazzi*, 50 Ill. 2d 115, 277 N.E.2d 844 (1971).

254. 101 Ill. 2d 137, 461 N.E.2d 410 (1984).

255. Ronald Collins refers to this as "the problem of the divided constitution." R. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1117 (1985). For an insightful treatment of the problems raised, see *id.* at 1117-1123.

proach. Consider all that turns on this approach. If the Illinois self-incrimination language *was* clearly intended to extend the protection to include compelling witnesses to provide certain types of physical evidence, lockstep would presumably no longer apply and the Illinois Supreme Court would be free to consider whether the provision ought, also, to be applied so as to give greater protection to (for example) *Miranda* rights as well.²⁵⁶

Illinois has at least one provision of this nature. The Illinois "just compensation" clause provides that "[p]rivate property shall not be taken *or damaged* for public use without just compensation as provided by law," and it specifically provides that compensation shall be determined by a jury.²⁵⁷ This language is, without question, not a mirror image of the equivalent clause in the fifth amendment. For one thing, it assures that damage to private property is also compensable.²⁵⁸ Any attempt to argue that this phrasing supports the view that its framers intended that it be given identical effect as the federal construction should be rejected out of hand.²⁵⁹

If this lack of substantial identity frees the Illinois courts from the bondage of lockstep, they will be able to give independent analysis (and perhaps reach different results) to the essentially identical questions raised by the balance of the language of the two non-identical just compensation clauses. Yet it is highly unlikely, to use an example, that the framers of the Illinois Constitution intended that the Illinois judiciary give independent consideration to the police power/takings distinction, but not to the scope of protection of the privilege against self-incrimination of criminal suspects in the police station.

256. ILL. CONST. art. I, § 15.

257. *Id.*

258. While the concept of a "taking" for purposes of the fifth amendment might be construed broadly enough to include damaging, as well as the physical taking of possession, this difference in language is clearly a matter of substance and not merely of semantics. Indeed, the words "or damaged" were added to the 1870 Constitution to reverse decisions holding that the prior language applied only to physical takings, and not to mere damage to the property. Braden & Cohn, *supra* note 91, at 56; Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-72 (1987) (Illinois led national trend toward broader protection of property interests).

259. Even though it is clear that the inclusion of "or damaged" was intended to have a substantive effect, this example remains rather similar to the self-incrimination case. Some state courts have found the fifth amendment taking language to support the doctrine of inverse condemnation that accomplishes this same end, e.g., *Thornburg v. Port of Portland*, 233 Ore. 178, 376 p. 2d 100 (1962), so that arguably the prior construction of Illinois language was simply wrong and the language difference is not essential to protecting property against government damage. See also Van Alstyne, *supra* note 258, at 770 (observing that "narrow" construction of "taking" language is based on anachronistic conception of idea of "property" interests).

This dilemma appears less acute if substantially similar provisions, such as the self-incrimination clauses, are swept under the lockstep rug, whether or not the variant language might conceivably have influenced the interpretation of an independent-minded court. But the problem remains for provisions like the Illinois just compensation clause. If the idea, however, is that state courts should not be positioned to make redundant value choices, the lockstep two-clause dilemma might be further reduced by extending the doctrine beyond mirror image provisions. The place to begin such a project would be at protections that are “near mirror image” provisions.

2. “Similar” Provisions

The Illinois just compensation clause while clearly not identical, obviously contains elements that present essentially identical questions and value choices as its federal counterpart. Another example of this sort of provision is the Illinois search and seizure provision, article I, section 6, which since 1970 has not been identical or substantially identical in content to the fourth amendment.²⁶⁰

With the relevant differences between the two provisions underscored, the Illinois provision reads in part:

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*.²⁶¹

The language changes added to the 1970 constitution are matters of substance and not of semantics. At a minimum, the language of the Illinois provision grants explicit textual foundation for important modern fourth amendment doctrines with debatable roots in the text and history of the fourth amendment.²⁶²

260. Indeed, for Elmer Gertz, delegate and chairman of the Bill of Rights Committee of the Sixth Illinois Constitutional Convention, the changes adopted in this provision were the most important accomplishments of his committee:

I feel triumphant in an almost delirious fashion, about the far-reaching nature of the revision of the search and seizure provisions, profoundly enhanced by the addition of the prohibition against unreasonable invasions of privacy or interceptions of interceptions of communications. Suffice it to say that we in Illinois have rebuked Big Brother by this new language and have delayed 1984.

E. Gertz, *supra* note 137, at 168.

261. ILL. CONST. art. I, § 6 (emphasis added).

262. The Supreme Court once held that the fourth amendment had no application to wiretapping or electronic eavesdropping that involved no physical invasion of the premises. *E.g.*, *Goldstein v. United States*, 316 U.S. 114 (1942). Despite recent incantations of the

When confronted with these changes, however, the Illinois Supreme Court in *People v. Tisler* focused its attention, not on the implications of these changes for any claim that Illinois merely tracks the federal Constitution, but on the continuing identity of *the balance* of the state constitutional provision with the fourth amendment. The shift in emphasis began with the court addressing the extent to which federal decisions control state provisions that were "similar" (not identical) to federal Bill of Rights protections.²⁶³ In turn, the court found that "the language pertinent to the case at bar—the warrant clause with its probable-cause requirement and the guarantee against unreasonable search and seizure—remains nearly the same as that of the fourth amendment,"²⁶⁴ and concluded that its pre-1970 lockstep cases therefore applied.²⁶⁵ Later, the court stated that it would follow lockstep in construing the several "provisions" of article I, section 6, unless litigants provided textual or historical evidence to show that the state provisions "were intended to be construed differently than are similar provisions in the federal constitution after which they are patterned".²⁶⁶

In *Tisler*, the court divides a particular provision of the Illinois Bill of Rights and determines that at least a portion of article I, section 6, remains subject to lockstep analysis. This reformulation of the lockstep approach addresses the anomaly of independent interpretation turning solely on whether equivalent constitutional issues flow from identical or "different" provisions. To some extent at least, the court will apply lockstep to identical issues within different provisions by giving separate attention to whether the particular language giving rise to the issue provides grounds for lockstep.

But the *Tisler* approach poses questions of application equally as frustrating as the anomaly it avoids, and creates new problems

concept of privacy in the fourth amendment context, over the objections of Justice Black, the fourth amendment contains no reference to the word. See *Katz v. United States*, 389 U.S. 347 (1967). If nothing else, then, the Illinois provision explicitly secures these protections and ensures, in this one context at least, against the kind of retrenchment in giving effect to the fourth amendment which the lockstep doctrine would require us to embrace in all other cases.

Moreover, when the general guarantee against "invasions of privacy" is combined with the substitution of "other possessions" for "effects," one thing that emerges is a very different starting point for analysis of the argument for protection of a property owner's privacy interest in what the cases have called "open fields." Cf. *Oliver v. United States*, 466 U.S. 170 (1984).

263. *People v. Tisler*, 103 Ill. 2d 226, 241-45, 469 N.E.2d 149, 155-57 (1984).

264. *Id.* at 242, 469 N.E.2d at 155.

265. *Id.* at 242, 469 N.E.2d at 155-56.

266. *Id.* at 242, 469 N.E.2d at 157.

for any interpretive theory of the lockstep doctrine. In at least two important respects, the *Tisler* approach is unclear. An initial point of uncertainty concerns the breadth of the *Tisler* concept of a “similar” provision. The court states that the language or history of the state provision must support a variant reading from “similar provisions in the Federal Constitution, *after which they are patterned*.”²⁶⁷ Provisions deemed “patterned after” federal analogues might be limited to those, like the search and seizure and compensation clauses, that in general track the language of federal counterparts, but then vary from them substantively as to some particular point or points.²⁶⁸ In a broader sense, however, any provision addressing the same basic issue of freedom, such as freedom of speech or religion, might be described as “patterned after” its counterpart in the federal Constitution.²⁶⁹ Under the more restrictive reading, the court’s independence will depend on whether draftsmen chose to use language similar to a federal clause; under the broader reading, lockstep will apply to provisions with only similar value concerns in common with federal “counterparts,” and lockstep will be torn loose from any tenuous connection it had to the process of constitutional interpretation.²⁷⁰

267. *Id.* at 245, 469 N.E.2d at 157. An initial problem is that this descriptive language literally applies very rarely, if at all; as we have observed, it is not at all clear that the provisions of the Illinois Bill of Rights were patterned after their federal counterparts rather than after earlier state constitutions. In fact, the 1870 search and seizure provision may be the only provision as to which this statement plausibly applies; its language was changed from an earlier version to conform more nearly to the federal Constitution’s fourth amendment. G. Braden & R. Cohn, *supra* note 91, at 28.

268. It is this combination of apparent identity and obvious difference that would make it plausible to separate issues to which lockstep would apply and issues to be analyzed independently.

269. At this point, the concept of a pattern becomes a loose metaphor for common areas of concern. The problem of classification, on this view, grows more difficult. Illinois, for example, has a freedom of religion provision, but no equivalent to the establishment clause. It also has an equal rights amendment that partly tracks the language of the federal equal protection clause, in addition to a separate equal protection clause. It is not clear which of these would be considered “similar” provisions to the enumerated federal clauses, or what the criteria would be for making such a determination.

270. A good example of the problems raised is provided by the Illinois provision on freedom of religion. As Braden and Cohn observed, the length and detail of the Illinois freedom of religion provision is in marked contrast to the brevity of the free exercise and establishment clauses. G. Braden & R. Cohn, *supra* note 91, at 16. Even so, Braden and Cohn concluded that, after the particular clauses were parsed, it was not clear that the Illinois provision necessarily required any different results as to the free exercise of religion than was called for by the then-existing Supreme Court case law. *Id.* The upshot is that if lockstep is applied, it can hardly be because the drafters of such a differently worded provision intended Illinois

The other major area of uncertainty arises once we have found a "similar" provision under the *Tisler* analysis. The court is equally unhelpful in explaining how it will treat the non-identical language within the similar provision. If the court were truly to give independent effect to the prohibition on unreasonable "invasions of privacy,"²⁷¹ for example, it necessarily would have to make its own judgments both as to the sorts of activity that fall within the protected sphere, and as to the boundaries between reasonable and unreasonable invasions of such protected areas. Such judgment would require the court to determine not only the circumstances when "invasions of privacy" complied with the general reasonableness requirement, but also the circumstances under which the reasonableness requirement is met other than by the probable cause standard and the application of the probable cause standard where it governs.²⁷² Yet *Tisler* holds that Supreme Court rulings relating to the probable cause standard will govern decisions of the Illinois Supreme Court.²⁷³

This points up the complexity of attempting to divide a clause into dependent and independent parts. It may also suggest an even broader reading of the court's expansion of its lockstep approach in *Tisler*. In essence, the court may be saying that the Illinois language will control and produce a variant result only where the Illinois provision's wording uniquely precludes a particular Supreme Court decision.²⁷⁴ According to this reasoning, where the United States Supreme Court protects both reasonable expectations of privacy and freedom from electronic invasions under the fourth amendment, its application of governing principles would control Illinois decisions.

courts to be bound by interpretations of clearly different federal provisions; yet if it is not applied, Illinois courts will give independent consideration of the difficult values choices involved in reconciling religious liberty and legitimate state interests, but not to those involved in balancing privacy interests against the legitimate needs of law enforcement. The incoherence of this rigid separation of clauses remains.

271. ILL. CONST. art. I, § 6.

272. As, for example, in the line of Supreme Court cases in which fourth amendment seizures are permitted on less than probable cause. *E.g.*, *United States v. Sharpe*, 470 U.S. 675 (1985) (stop and frisk area); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (administrative searches). Presumably analogous issues will arise under what was intended to represent a new and expanded protection of privacy interests. See *infra* notes 275-80 and accompanying text.

273. *People v. Tisler*, 103 Ill. 2d 226, 243; 469 N.E.2d 147, 156 (1984).

274. This sort of standard would essentially convert *Tisler's* requirement of evidence showing "that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution," 103 Ill. 2d at 245, 469 N.E.2d at 157, into a strong presumption in favor of following the Supreme Court even where provisions are obviously not identical.

Were the Supreme Court to reverse its holdings concerning eavesdropping, or otherwise restrict its interpretation of the fourth amendment in a manner clearly irreconcilable with Illinois' separate language, the Illinois court would reject those holdings in favor of the clear requirements of the Illinois language.

If this analysis of *Tisler* were adopted, it would face two main objections. First, the contemplated deference to the Supreme Court would again be stripped of any connection to interpreting the Illinois Constitution. It would be court-imposed deference, pure and simple. Second, it is unclear how plainly it must appear that the Illinois provision requires a different result. For example, the Illinois Appellate Court for the First District has held that the Illinois privacy guarantee extends protection to expectations of privacy in one's bank records,²⁷⁵ rejecting the United States Supreme Court holding in *United States v. Miller*.²⁷⁶ At one level, the Illinois court's opinion clearly betrayed a rejection of the rationale used by the Court in *Miller* for refusing to extend the fourth amendment's protection to records held by third parties.²⁷⁷ On the other hand, the court also pointed to language in the Smith-Hurd Constitutional Commentary stating that the Illinois privacy clause "is stated broadly".²⁷⁸

If the lockstep approach is designed to prevent Illinois courts from departure from Supreme Court precedent based on simple disagreement with the Court, the First District holding appears suspect. On the other hand, there is evidence that the delegates to the constitutional convention contemplated that the provision would significantly enlarge the range of protection offered by the previous wording. One member of the bill of rights committee, in response to a question as to the meaning of "invasions of privacy," referred to the hypothetical creation of an exhaustive government information bank to be kept on American citizens.²⁷⁹ While the example is a bit problematical in terms of the language of the clause,²⁸⁰ the tone of

275. *People v. Jackson*, 116 Ill. App. 3d 430, 452 N.E.2d 85 (1st Dist. 1983).

276. 425 U.S. 435 (1976).

277. 116 Ill. App. 3d. at 434, 452 N.E.2d at 88 (citing other state court decisions rejecting the reasoning found in *Miller*).

278. 116 Ill. App.3d at 434, 452 N.E.2d at 88, quoting, ILL. ANN. STAT., art. I, § 6, at 317 (Smith-Hurd 1971) (Constitutional Commentary).

279. III Proceedings, *supra* note 141, at 1530 (Mr. Dvorak).

280. From the text alone, it appears that "invasions of privacy" stand on about the same plane as "searches" and "seizures," as all are found in a series that is qualified by the "unreasonable" limitation on the scope of protection. ILL. CONST., art. 1, sect. 6. The privacy right might thus be construed as little more than a codification of the Supreme Court's

the example and of the statement in which it is found suggests that the framers of the provision intended to offer protection beyond what the search and seizure language alone would offer.

In short, while neither the text nor the legislative history *requires* application of the language in any particular context, or rejection of the Supreme Court's own construct protecting reasonable expectations of privacy, it at least seems to authorize the First District's decision. If the Illinois Supreme Court rejects that holding in favor of the lockstep doctrine on the basis that it does not clearly call for a different construction, the promise of the provision would not be realized. But if the language and legislative history are relied upon to show that a different construction was *intended*, the decision would demonstrate the thin line between the occasions for lockstep and independent analysis. The moral, of course, is that the court should consider Supreme Court decisions as persuasive authority in all relevant contexts, but be bound by it in none.

B. The Problematic Distinction Between Rule-Making and Rule-Application

The lockstep doctrine appears to place the state courts in the same position as lower federal courts. Presumably, state courts might properly determine that holdings of the United States Supreme Court should be applied to new facts and issues as they present themselves, subject to Supreme Court correction. Even so, principled application of lockstep would seem to call not only for state court adoption of the Supreme Court's rules and standards, but also for acceptance of authoritative Supreme Court pronouncements as to the proper ap-

"expectations of privacy" test for determining when "fourth amendment" interests are intruded upon. *Katz v. United States*, 389 U.S. 347 (1967). The upshot would be to look for invasions of privacy primarily in the law enforcement context, with the accompanying requirements of the warrant clause and the general standard of probable cause.

The hypothetical in text suggests that the reasonableness requirement for "invasions of privacy" may have been thought to potentially give greater protection than suggested by its being placed parallel to the fourth amendment interests. In fact, Mr. Dovrak went on to express his understanding that the committee did not necessarily contemplate the issuance of warrants in support of any "reasonable" invasions of privacy—a statement reinforcing that the provision was not, despite its placement, expected to be a mere search and seizure analogue. III Proceedings, *supra* note 141, at 1530; *see also supra* note 260 (statement by chairman Gertz suggesting broad purpose for the provision). At the very least, the hypothetical suggests that the point of the provision was to give Illinois courts power to scrutinize the reasonableness of all government actions invading the privacy of citizens, a power which the lockstep approach undercuts.

plication of relevant standards, especially general standards. This would be especially true if the point of lockstep is to avoid redundant value choices by state courts.

Viewed from this perspective, the Illinois Supreme Court does not apply its lockstep doctrine to the equal protection and due process clauses of the Illinois Constitution. Historically, the development of the court's due process and equal protection standards has followed the same pattern as the self-incrimination and privacy clauses. In the early cases, the Illinois court paid no special deference to decisions of the Supreme Court; there is no evidence of lockstep at work.²⁸¹ More recently, the court has cited its own case law more frequently than Supreme Court decisions, and particular formulations are characteristic of the Illinois past.²⁸² On the other hand, the court frequently addresses both the fourteenth amendment and Illinois provisions simultaneously and appears to presume that there is no difference in their requirements.²⁸³

The striking difference in the treatment of due process and equal protection is that the Illinois Supreme Court has never articulated that its lockstep approach applies to these clauses. While they are logical candidates for lockstep, at least as much as any other provisions, there are sound reasons why the court would be tenuous in these contexts. Most importantly, the court would be hardpressed to defend the proposition that it has followed the leadership of the Supreme Court as to these provisions. The commentators have noted that Illinois is one of the states that have gone an independent route in the equal protection and due process areas.²⁸⁴ If the court were

281. *E.g.*, *Ramsey v. People*, 142 Ill. 380, 32 N.E. 364 (1892) (deprivation of property and liberty of contract by regulation of mining industry; prior Illinois case cited).

282. *E.g.*, *Northern Illinois Coal Corp. v. Medill*, 397 Ill. 98, 72 N.E.2d 844 (1947) (striking down statutory regulation of strip mining on due process and equal protection grounds despite plausible police power justifications; reliance on Illinois case law for proposition that "rights of property cannot be invaded under the guise of a regulation for the preservation of health when such is clearly not the object and purpose of the regulation," *id.* at 104, 72 N.E.2d at 846-47, and finding of denial of equal protection on ground essentially of underinclusiveness).

Another classic Illinois phrase is the assertion that "[t]he legislature may not, of course, under the guise of protecting the public interest, interfere with private rights." *People v. City of Chicago*, 413 Ill. 83, 91, 108 N.E.2d 16, 21 (1952). It is quoted in *People v. Fries*, 42 Ill. 2d 446, 448, 250 N.E.2d 149, 150 (1969), Illinois' infamous motorcycle helmet case that was recently overruled (at least in part) by *People v. Kohrig*, 113 Ill. 2d 384, 498 N.E.2d 1158 (1986). The sentiment underlying *Fries*, however, is not dead.

283. *E.g.*, *People ex rel. Barrett v. Thillens*, 400 Ill. 224, 233, 79 N.E.2d 609, 613 (1948), quoting, *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (striking down legislation limiting access to employment "[u]nder the federal and state Constitutions").

284. As to equal protection of the laws, see Karasik, *Equal Protection of the Law Under*

clear and forceful about a duty to follow the lockstep approach, the discrepancy would be apparent.²⁸⁵

At least since the arrival of lockstep, however, the Illinois court has been able to avoid clarifying that its decision-making in these areas cannot be squared with United States Supreme Court case law.²⁸⁶ The greatest source of aid is that the court has separated itself from Supreme Court reasoning and results without rejecting the Supreme Court's basic framework for analysis. For the most part, the court has simply harked back to the *Lochner* era by applying the rational basis test with significant bite in the taxing and regulatory areas where the Supreme Court has been most deferential.²⁸⁷

Oddly enough, the settled state of federal law in these areas over the last forty years or so has enabled the Illinois court to pursue its independent course without receiving much scrutiny by the United States Supreme Court. The Supreme Court has seldom reviewed purely social and economic legislation issues in the last three decades.

the Federal and Illinois Constitutions: A Contrast in Unequal Treatment, 30 DE PAUL L. REV. 263 (1981); Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 383 (1976). The court receives aid and comfort from the existence of a separate state constitutional prohibition against local and special legislation, ILL. CONST. art. IV, § 13, as well as an equal rights amendment. *Id.*, art. I, § 17. See Turkington, *supra*, at 393-403; 413-18. As a general proposition, however, the court has tended to treat the "special legislation" prohibition as the essential equivalent of the equal protection clause that was added to the 1970 constitution. Karasik, *supra* (critical of court's retrenchment from a more independent analysis).

As to the due process clause, see *e.g.*, Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 107, 112-13 (1950); Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 259, 266-67 (1981).

285. At one time, the Supreme Court virtually dropped out of scrutinizing economic and social legislation under these provisions—a practice that underscored the discrepancy between federal and Illinois state practice. The discrepancy is not as great as it once was. See Sager, *Foreward: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 971 n.39 (1985) (summary of recent examples of increased Supreme Court activism under due process and equal protection rational basis scrutiny).

Even so, it is difficult to imagine the Supreme Court reaching the same result that the Illinois Supreme Court reached in *Boynton v. Kusper*, 112 Ill. 2d 356, 494 N.E.2d 135 (1986) (striking down marriage license fee increase earmarked for domestic violence shelter fund as denial of equal protection under rational basis scrutiny and as infringement of fundamental right to marry).

286. Research has not revealed a post-1960 case in which the Illinois Supreme Court has specifically rejected a Supreme Court holding. In 1955, however, the court rejected the Supreme Court's holding in *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and overturned an Illinois statute that required employers to pay employees for time required to vote. *Heimgaertner v. Benjamin Electric Mfg. Co.*, 6 Ill. 2d 152, 128 N.E.2d 691 (1955). The court criticized the Supreme Court decision in *Day-Brite* and affirmed that "[i]t is the duty of each State to pass upon the validity of its own legislation." *Id.* at 158, 128 N.E.2d at 695.

287. See *supra* note 284 and sources cited therein.

The Illinois Supreme Court's selective activism has thus gone on quietly, even while the court has announced its slavish obeisance to Supreme Court decision-making in other contexts.

The question raised is whether the general lack of patent doctrinal departure and the practical insulation from review are appropriate bases for the court's independent decision-making in the due process and equal protection areas. While the answer must be in the negative, the question itself points up a deeper difficulty with the lockstep approach. If substantive review under the equal protection and due process clauses is a given in our constitutional order—as it probably is—there is no reason to think that the Supreme Court has any special insight into how it is to be done. The Court's own deep divisions on these issues attest to that. The same can be said, more generally, about the sorts of issues confronted in both the state and federal bill of rights provisions.

In many respects, the issues presented by the state and federal individual rights provisions are essentially the same. Among those common issues are ones concerning the proper role of courts in a democratic society, and the limits of legitimate decision-making under these written constitutions. Ironically, the Illinois Supreme Court takes itself much closer to the boundaries of legitimate judicial power by its activism on due process and equal protection questions than it would by giving independent attention to the meaning of search and seizure and self-incrimination provisions.

Illinois' independence on these former issues points up, however, that there may also be grounds for distinguishing the roles of state and federal courts in giving effect to similar or identical constitutional provisions. The most obvious is that Illinois had developed an independent tradition of decision-making long before the lockstep era. It is not surprising that this independent line of development did not stop in its tracks; general law continued to develop along parochial lines consistent with local experience.²⁸⁸ Indeed, one of

288. Admittedly, the court's track record in these areas probably also reflects the ideological makeup of the Illinois Supreme Court. Its primary theme through the years may have been less judicial restraint than the upholding of conservative (or traditional liberal) values, including economic ones. If so, the court's selective use of lockstep would appear even more result-oriented as not even based on any coherent theory of judicial restraint. Even if one concluded that the court has been guilty of "lochnerizing" in its most pejorative sense, however, the remedy would be correction of the error rather than adoption of a lockstep doctrine that commits the court to embracing as state law any emerging forms of lochnerizing by a Supreme Court that remains among the most activist in history.

lockstep's greatest weaknesses is that it cuts the court off from even considering this and other factors that might point away from following the Supreme Court's lead.

C. Constitutional Provisions in Their State Law Context

Proponents of the trend toward independent state court decision-making have offered a variety of reasons, beyond the absence of federal constraints and the judicial duty to declare the law, why state courts should feel confident about giving independent attention even to identically-worded state constitutional provisions.²⁸⁹ Of the various factors suggested, three interrelated factors seem to stand out and warrant attention: (1) the context in which state constitutional provisions have been enacted and implemented; (2) the impact of strategic and institutional concerns in constitutional decision-making; and (3) the place of state courts in the system of state law. These factors must be weighed in the balance by a conscientious and independent state court—or perhaps simply allowed to play their rather determinate role in the ordinary course of constitutional decision-making—and not merely be buried away in the fog of the lockstep doctrine.

In his effective critique of the so-called presumption of adoption of the case law underlying a borrowed statute, Professor Dickerson observed that both meaning and surrounding context may vary between the original and borrowing states.²⁹⁰ In particular, the tacit assumptions that might properly be found to warrant a limiting construction of a provision in one legislative setting might not govern the same language in another.²⁹¹ Moreover, to the extent that courts have legitimately played a creative role in giving clarifying effect to statutory language, there is no apparent reason why a borrowing state's judiciary should feel constrained by another court's sense of legislative purpose, equity, and congruity with the balance of the legal order.²⁹²

This analysis applies to state constitutions and, perhaps especially, the Illinois Constitution. Consider Illinois' restrictive view of the doctrine against the delegation of legislative power.²⁹³ Relying on

289. For representative treatments, see Sager, *supra* note 285; Williams, *supra* note 175; Note, Developments, *supra* note 190; Galie, *supra* note 17; Howard, *supra* note 11, at 935.

290. R. Dickerson, *supra* note 75, at 134-35.

291. *Id.* at 134.

292. *Id.* at 135.

293. See *supra* note 214 and accompanying text.

the arguments in Part III, Illinois courts might properly argue that federal decisions are wrong and that the liberalizing of federal law reflects a historic compromise of fundamental principles of separation of powers. But the context in which delegation law has developed within the respective systems may be the real key to understanding the differing approaches.

Professor Schwartz has contended that one reason a number of states apply more restrictive anti-delegation law is because, historically, the underlying state legislation has governed less complex matters and smaller geographical areas, and because state courts have not had good reason to defer to the expertise of less competent administrators.²⁹⁴ The resurgence of interest in the values supported by delegation doctrine²⁹⁵ is matched only by the recognition that significant retrenchment in the area cannot be squared with the federal administrative state. The state law context may better lend itself to giving effect to those values.²⁹⁶

Similar considerations come into play when historical provisions are adopted, for the first time, in a modern constitution, or when longstanding provisions are carried over but substantially amended or placed against a deliberately changed background.²⁹⁷ Consider the Illinois equal protection clause. Whatever doubts we may have as to whether the original equal protection clause was intended to provide for the review of the substance of legislative classifications,²⁹⁸ Illinois'

294. B. Schwartz, *supra* note 213, at 53. See also H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 537 (1976) (attributing state law to lack of legislative history, lack of familiarity with federal law cases, and state court lack of deference for both legislatures and agencies).

295. See R. PIERCE, S. SHAPIRO, & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 60 & n. 58 (1985) (collecting sources).

296. Perhaps more likely, as state administrative agencies grow in complexity and sophistication, state courts will probably shift in the direction of the federal model. *Id.* at 64.

297. Professor Dickerson has suggested that, despite the general presumption that retention of the original wording of a statute suggests that the language will be construed in its original context, "where the later statute includes enough substantive revision to suggest the probability that the legislature had made a fresh start even with respect to the provision being interpreted, the opposite result seems appropriate." R. Dickerson, *supra* note 75, at 131.

This language would seem to apply to the new Illinois search and seizure (privacy) provision. While time-honored concepts like probable cause are not plausibly subjected to altered status because of the changes, the language changes there are significant enough to suggest that Illinois courts are newly-commissioned to consider afresh the appropriate scope of interests protected by the concept of privacy in a modern society. See *supra* notes 275-80 and discussion in accompanying text.

298. One view is that the equal protection clause is most plausibly read as a guarantee of the right to equal enforcement of the law, primarily by imposing a duty on the executive

adoption of the same language for the first time in 1970 comes as an imprimatur at least of substantive review in general.²⁹⁹

Justice Rehnquist contends that the historical context of the equal protection clause raises doubts whether "suspect category" analysis is properly extended beyond the group the drafters most sought to protect—the Black race.³⁰⁰ But after a century of equal protection development, and without the radical transformation of federalism hanging in the balance, there is little reason for modern Illinois courts to subject their decisions on suspect categories to the same lingering doubts rooted in the historical context of the original federal provision.³⁰¹ Significant issues concerning institutional competence, doctrinal coherence, and the proper role of courts in a democratic society obviously remain even under the Illinois provision,³⁰² but the court has reason at least to go forward unplagued by the shadow of illegitimacy that some versions of originalism cast over the modern reach of the federal clause.

Illinois' due process and equal protection adjudication should also receive a sense of freedom and relief from Illinois' counterpart

branch to ensure that established rights are actually protected. *See, e.g.,* Currie, *The Constitution in the Supreme Court: Limitations on State Power 1865-67*, 51 U. CHI. L. REV. 329, 353-54 (1984). On this view, the legislature would retain the power to define the scope of rights to be protected, though it might also be obligated to make effective provision for the enforcement of rights granted by state or federal law.

299. The inference is clear. The Illinois Supreme Court had applied the fundamentals of federal equal protection analysis for years. The convention viewed the addition of an equal protection clause as a means of reinforcing and solidifying this judicial practice. E. GERTZ, *supra* note 137, at 82 ("the addition of an equal protection clause simply gave formal expression to a well recognized and applied principle").

300. *E.g.,* Sugarman v. Dougall, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting) (contending that "there is no language used in the Amendment, or any historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a 'suspect' classification, that it was designed in any way to protect 'discrete and insular minorities' other than racial minorities, or that it would in any way justify the result reached by the Court").

301. While a contrary argument could be made, it strikes me that, even for advocates of reliance in general on original intent, it should be doubtful that the adoption of this general language in Illinois in 1970 would be thought to carry all the baggage of the federal provision's original context. This is where the language of "adoption" makes some sense; it seems much more likely that Illinois sought to adopt the equal protection clause we have come to know through the adjudication process than the one that was ratified in the 1860's.

302. Illinois courts must, for example, still face the difficult issue as to whether there are sufficiently meaningful and objective standards by which to determine that a particular classification should be viewed as suspect and given searching scrutiny. *See Sugarman*, 413 U.S. at 649-57 (Rehnquist, J., dissenting) (raising difficulties posed by suspect category analysis). As to the factors referred to in text generally, *see* Howard, *supra* note 11, at 940-41.

to the ninth amendment.³⁰³ As part of the broader debate over individual rights adjudication, modern commentators have disagreed as to whether the ninth amendment is properly read as a federalism provision, a general description of historically determined (or at least limited) rights, or an invitation to courts to develop the concept of human rights over time and according to an unfolding interpretive tradition.³⁰⁴ But this entire debate is cut short under the Illinois Constitution, for the text and legislative history of article I, section 24, demonstrate that Illinois has rejected the narrowest reading of the federal ninth amendment.

Whereas the ninth amendment asserts that the enumeration of rights does not deny others "retained by the people,"³⁰⁵ the Illinois provision specifies that the enumeration does not deny rights "retained by the individual citizens of the State."³⁰⁶ The legislative history reveals that the language change was intended to clarify that the contemplated unenumerated rights were individual rights that belong to each citizen.³⁰⁷ This language reflects the understanding that our individual rights tradition involves a general assumption that there are limits on governmental power in favor of individual decision-making, and that the sphere of individual liberty cannot be captured in any verbal formula.³⁰⁸ Delegate Roy Pechous, a member

303. ILL. CONST. art. I, § 24.

304. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 390 (1977) (narrowest federalism reading); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 367 (observing that there has been no showing that ninth amendment was intended to have a dynamic character); Redlich, *Are There "Certain Rights. . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962) (ninth amendment as a source of implied rights).

305. U.S. CONST., amend. IX.

306. ILL. CONST. art. I, § 24.

307. Delegate Pechous presented the newly-proposed amendment to the convention and explained:

This particular language was extracted by myself from the State of Washington Constitution, and it's identical also to the Ninth Amendment to the United States Constitution except for the following: Instead of reference to the rights "retained by the people" in the Ninth Amendment, this particular section retains the rights to "the individual citizens of this state."

[T]his particular language gives explicit recognition to the principle that though a number of rights are enumerated and set out in the bill of rights that by no means is that to be construed as an exhaustive catalog or a maximum of the rights involved. Any rights that are not individually set out are still retained by the individual citizens of this state.

III Record of Proceedings, *supra* note 141, at 1614.

308. *Id.* According to the Smith-Hurd Commentary, written by Robert Helman and Wayne Whalen, this provision "gives explicit recognition to the principle that the Bill of Rights is not an all-encompassing enumeration of a citizen's rights and immunities with respect to government action." ILL. ANN. STAT. art. I, § 24 (Smith-Hurd 1971) (commentary).

of the bill of rights committee, specifically invoked *Griswold v. Connecticut*,³⁰⁹ the modern symbol of the unenumerated rights construction of the ninth amendment, in presenting this provision to the convention.³¹⁰

In the light of article I, section 24, it would be difficult to apply the arguments in Illinois, advanced by leading scholars of the federal Constitution, that modern explication of our individual rights tradition is inherently illegitimate as a misconstruction of the written Constitution and the adjudicatory tradition it inaugurated.³¹¹ There would remain, however, significant room for debate as to the manner by which the Illinois courts should proceed in developing this individual rights tradition.³¹² While it is therefore difficult to predict with certainty the full extent to which the Illinois Constitution should bolster judicial confidence in proceeding in the area of individual rights, there is almost no reason to think that Illinois should be saddled with the full range of debate that plagues the federal arena.³¹³

309. 381 U.S. 479 (1965).

310. Pechous observed that

it was asserted in the argument before the Supreme Court that even though there is no explicit recognition of the right of privacy in a marital state, that is a right so fundamental and so basic to a free society and free individuals that it is inherent and recognized in the Ninth Amendment which says that though the right is not set out that it is, in fact, retained.

III Record of Proceedings, *supra* note 141, at 1614.

311. *E.g.*, Monaghan, *supra* note 304.

312. As one example, a leading scholar who acknowledges the potentially broad implications of the ninth amendment—and therefore rejects any “clause-bound” approach to individual rights adjudication—has nevertheless propounded a theory of individual rights adjudication that would limit the judicial role to policing the democratic system. J. ELY, *DEMOCRACY AND DISTRUST* (1980). The debate over the proper role of courts in a democratic society will go on in any event, though it is arguable that Ely’s approach does not fully confront the substantive implications of his own analysis of constitutional text.

There is perhaps also room for argument whether this language is to be read as limited to some general framework of rights derived from the societal context at the time of enactment, or from what had been deemed fundamental in the American tradition. But in light of the citation to *Griswold*, it seems doubtful that the relevant context should be the era of the founding of the federal Constitution. While the more persuasive argument is that what is intended is a search for what is fundamental in the American tradition, there may be room for doubt whether that formulation operates as much of a constraint. Such issues, the subject of current debate in a growing literature, will certainly remain.

313. For the skeptical, it must also be acknowledged that there is room for some doubt as to how thoughtfully this ninth amendment counterpart was considered and voted on. It was passed unanimously by the bill of rights committee and presented to the convention as “the least controversial section of the bill of rights”. III Record of Proceedings, *supra* note 141, at 1613. In addition, the convention passed it unanimously based on Delegate Pechous’ presentation, which included, in addition to what is quoted above, a rather confusing suggestion that the amendment would somehow also have implications for federalism under the United

Once again, lockstep emerges as the least principled approach that the court might adopt to confront the underlying issues.

The state law context may also alter judicial perception of important institutional and strategic concerns. To the extent that these issues properly influence constitutional decision-making, it seems likely that the state court setting would provide potentially different considerations that might affect the explication of identically worded provisions. This seems especially clear if we take seriously the contentions of Supreme Court justices that sensitivity to the values of federalism ought to profoundly affect the Court's application of the general norms of the fourteenth amendment.³¹⁴ State courts confront no similar concerns about sensitivity to federalism values.

Beyond purely institutional concerns, it has been persuasively argued that courts are inevitably influenced by strategic considerations in the translation of constitutional norms into workable rules of law.³¹⁵ A classic example is Professor LaFave's analysis of "bright-line" rules as a preferred approach to search and seizure issues based on the central importance of providing clear guidelines for law enforcement officials.³¹⁶ Professor Sager has contended, by way of illustration, that the Supreme Court's role of providing decisions for an immense lower court system and for the nation as a whole properly points the Court in the direction of rules that are clear, simple, and fact-independent.³¹⁷

State courts, on the other hand, are likely to be somewhat more capable of sensing the likely applications of given rules and might have reason in many instances to develop approaches that are more nuanced and fact-sensitive.³¹⁸ A number of commentators have suggested that the combination of this strategic element in judicial decision-making and the varying social and legal contexts in the various states make state courts the logical candidates to provide

States Constitution. *Id.* at 1614. One might wonder if the delegates understood the potential implications of the text they voted on.

314. The oft-cited example is Justice Powell's emphasis on the consideration of federalism in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973). See, e.g., Williams, *supra* note 174, at 389-97.

315. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

316. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

317. Sager, *Forward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 974 (1985).

318. E.g., *id.* at 974-76.

needed substantive scrutiny of taxing, regulatory, and social legislation under due process and equal protection standards.³¹⁹

These contextual and institutional arguments are combined, finally, in the analysis of the somewhat differing position of state courts within the system of state government. State court judges are typically more accountable than federal judges where, as in Illinois, they (including members of the supreme court) are elected.³²⁰ Also, state constitutions are more easily amended than the federal Constitution, for a number of reasons.³²¹ Consequently, state court decision-making is not as insulated or quite so anti-democratic as in the federal system. This implies a reduced need for concern over "the anti-majoritarian difficulty" presented by judicial review.³²²

There may be room, of course, for skepticism concerning the extent to which institutional and strategic issues vary in the state law setting, and even as to the centrality of institutional and strategic concerns in constitutional decision-making. Several scholars have commented recently that substantive questions should receive our central attention, for we are ultimately most interested in whether judges are remaining true to the fundamental choices embodied in constitutional text.³²³ There are also compelling arguments that the most central institutional issues—particularly the appropriate role of courts in a democratic society, and the extent to which courts should use amorphous constitutional provisions to overturn popularly endorsed legislation—are not overwhelmingly altered by shifting the setting to a state court.³²⁴ But these arguments ultimately go to the

319. *E.g.*, Developments, State Constitutional Rights, *supra* note 190, at 1479-93 (advocating moderately activist state court review of economic issues; collecting authorities with similar views).

320. *See* Williams, *supra* note 174, at 400 & n.235 (collecting additional authorities); ILL. CONST., art. VI, § 12 (a).

321. Howard, *supra* note 11, at 938-40.

322. I agree with Professor Howard, however, that the significance of these differences can be overstated. He is correct, in my judgment, that the occasional elections to which state judges are subject "would seem a dubious ground on which to argue for greater state court activism." *Id.* at 940. Courts are only relatively more insulated than legislators, but they are more insulated nonetheless. Even so, in the absence of lockstep, the cumulative effect of the various differences in the institutional setting between state courts and the Supreme Court is likely to operate subtly to impact on the judicial decision-making process.

323. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 13-14 (1978); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, (1972). I am inclined in general to share this sentiment. One of Professor Sager's contentions, however, is that decision-making that attempts to give effect to the norms underlying constitutional protections will inevitably include a strategic element in which institutional factors will play a role. *See* Sager, *supra* note 315.

324. As Professor Howard put it:

weight of factors unique to the context of state court decision-making. They speak hardly at all to the more basic point that such contextual differences are matters to be reckoned with by state courts in applying the provisions of their own state constitution without the blinders that are the lockstep doctrine.

V. THE CASE FOR TRULY INDEPENDENT STATE COURT DECISION-MAKING

It should come as no surprise that none of the judges or commentators who have been critical of the trend toward greater reliance on state constitutions have advocated a lockstep doctrine of the sort criticized in Parts III and IV of this article. On the other hand, a number have advocated approaches to state constitutional decision-making that involve a substantial degree of deference to the Supreme Court.³²⁵ Given that these proposed approaches have greater currency than lockstep analysis, and considering that the Illinois decisions arguably admit of a less absolute construction than the one adopted heretofore,³²⁶ it should be useful to consider these somewhat less stringent proposals for reliance on the Supreme Court.

It is important to distinguish between proposals for special deference of the kind being referred to here, and the ordinary deference that courts show when they adopt the decisions of other jurisdictions as persuasive precedent. The main element that prompts adoption of non-binding decisions is undoubtedly the persuasiveness of the adopted opinion. Courts need help in resolving problems and they will look to virtually any source for genuine assistance. Obviously to the extent that Supreme Court decisions are compelling they ought to provide meaningful guidance to state supreme courts.³²⁷

Judicial review, even when exercised by elected judges, is never without an anti-democratic flavor. When judges invalidate a legislative act, however correct that judgment, they are thwarting an expression of popular will. What state courts do, then, has clear and significant implications for the political process and for democratic theory. This should weigh on their consciences just as it should upon their distinguished brethren on the federal bench.

Howard, *supra* note, 11 at 941.

325. On the bench, a deferential approach was adopted in *State v. Hunt*, 91 N.J. 338, 364-68, 450 A.2d 952, 965-67 (1982) (Handler, J., concurring), and advocated by the dissenters in *People v. Disbrow*, 16 Cal. 3d 101, 119, 545 P.2d 272, 284, 127 Cal. Rptr. 360, 371 (1976) (Richardson, J., dissenting). For commentators, see, e.g., Deukmejian & Thompson, *supra* note 15, at 987-96; Hudnut, *supra* note 173.

326. See *supra* § II-B-2 of this article.

327. The commentator most identified with independent state court decision-making, Judge Linde, has stated: "Of course we pay attention and respect to Supreme Court opinions on issues common to the two constitutions, and it is to be expected that on many such issues courts will reach common answers." Linde, *supra* note 156, at 282.

Judicial decisions carry the added attraction of reflecting the prior effort of similarly situated individuals grappling with an analogous problem. There may be a natural human tendency to draw on, and even to give some presumptive weight to, such prior efforts. These ordinary sorts of deference may be further enhanced if the opinion was drafted by a leading judge or reflected the work of a prestigious court.

Undoubtedly, these factors may all be at work, at times, in the respect state courts show the United States Supreme Court. The Court has tremendous experience dealing with constitutional issues facing the nation. Its prior leadership in the individual rights area, its prestige and resources as a court, and the considerable abilities of its membership, also help account for the serious attention that all courts pay to its judgments. If this were not enough, the incorporation doctrine means that Supreme Court decisions will inevitably receive very close attention because, at the least, they represent a floor of protection of rights beneath which state court protection may not fall. When these factors are combined, it becomes unrealistic to assume that state courts should proceed in a fashion that does not take serious account of Supreme Court decision-making.

The sort of deference described above should be contrasted, however, with what Professor Monaghan has referred to as "deference in a strong sense".³²⁸ When courts yield strong deference, the question shifts from whether another court's decision should be "considered" or "taken into account" to a determination of the extent to which the ruling "shall affect or control the court's interpretation".³²⁹ The ultimate question is whether the court reserves its power to exercise independent judgment after careful review of another's decision, or instead, sees itself as obligated to give controlling weight, or at least very strong presumptive weight, to the same decision.

Advocates of deference in a strong sense have proceeded along two (perhaps not mutually exclusive) paths. First, judges have advocated a return to judicial formulations that required the state court to give "great weight" to the constitutional decisions of the Supreme Court.³³⁰ If taken seriously, such formulations would require judges

328. Monaghan, *supra* note 201, at 5.

329. The phrases are adapted from Byse, *Scope of Judicial Review in Informal Rule-Making*, 33 ADMIN. L. REV. 183, 191 (1981), *cited in*, Monaghan, *supra* note 201, at 5.

330. The California Supreme Court once articulated the view that while state courts'

to give presumptive weight to Supreme Court decisions that could not be overcome except by a showing of "clear error" or the lack of a reasonable basis for the holding of the Supreme Court.³³¹ Second, some courts and commentators have advocated restriction of state supreme court departure to some discrete list of circumstances, generally limited to state-specific considerations, and typically excluding simple disagreement with the reasoning and result reached by the United States Supreme Court.³³²

A. *The Arguments for State Court Deference*

Not surprisingly, the common inclination of advocates of state court deference is to assume the presumptive illegitimacy of simple disagreement with the Supreme Court as a ground for departure from its decisions.³³³ More often than not, such advocates assert,

interpretations "are not necessarily concluded by an interpretation placed on similar provisions in the federal constitution," there must be "cogent reasons" before a state court would depart from Supreme Court holdings. *Gabrielli v. Knickerbocker*, 12 Cal.2d 85, 89, 82 P.2d 391, 392-93 (1938), *cert. denied*, 306 U.S. 621 (1939).

The attitude adopted by the court, however, is more important than the precise formulation. In a non-constitutional setting, the Illinois Supreme Court stated that Supreme Court decisions were "entitled to the highest and most respectful consideration as the pronouncements of a most eminent and learned tribunal," but nevertheless emphasized that they are "only to be considered by the State [sic] courts as persuasive authority". *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*, 256 Ill. 196, 206, 99 N.E. 902, 924 (1912). Despite the pomp and circumstance, the court made it clear that it would give the Supreme Court ordinary deference, not the sort of strong deference we speak of here.

331. The association of these standards is identified by Byse, *supra* note 329, at 192. This sort of strong deference is suggested by Justice Burke's contention that Supreme Court decisions "are strongly persuasive as to what interpretation should be placed upon similar language in a state constitution." *People v. Brisendine*, 13 Cal.3d 528, 555, 531 P.2d 1099, 1117, 119 Cal. Rptr. 315, 333 (1975) (Burke, J., dissenting). Similarly, Justice Clark argued that state courts should "accept the interpretation of the United States Supreme Court of language in the federal constitution as controlling of our interpretation of essentially identical language in the California Constitution unless conditions peculiar to California support a different meaning." *People v. Norman*, 14 Cal.3d 929, 942, 538 P.2d 237, 246, 123 Cal. Rptr. 109, 118 (1975) (Clark, J., dissenting). See also *People v. Sporleder*, 666 P.2d, 135, 149-50 (Colo. 1983) (Erickson, C.J., dissenting).

332. See *supra* notes 325 and sources cited therein. The best known list of state-specific criteria was set forth by Justice Handler. His seven points include: (1) differences in text; (2) "legislative history" indicating that a broader meaning was intended; (3) prior state law differing from federal construction; (4) differences in federal and state structure; (5) subject matter of positive state or local interest; (6) state history or traditions; and (7) public attitudes within the state. *State v. Hunt*, 91 N.J. 338, 364-68; 450 A. 2d 952, 965-67 (Handler J., concurring).

333. See *supra* notes 174-77 and statements found therein, as well as the formulations *supra* note 331. The same assumption underlies the insistence that "neutral" criteria for disagreement

without argument, that simple disagreement shows a lack of respect for the Supreme Court³³⁴ or a propensity for unprincipled and result-oriented decision-making.³³⁵ In virtually all of these cases, the root of such arguments appears to be fallacious assumptions about federal and Supreme Court supremacy that are analyzed and criticized in III-B-1 above. The analysis there obviously applies with equal force to arguments for strong deference as opposed to the purer lockstep doctrine that was specifically addressed.

Some commentators have offered an alternate, slightly more sophisticated argument that variance from the Supreme Court will be perceived by the public, if not the bar, as result-oriented and illegitimate.³³⁶ By some accounts, the problem is that Supreme Court decision-making is thought of as authoritative, so that the burden of proof is naturally on a decision-maker that would vary from its decisions.³³⁷ In other formulations, emphasis is placed on the increasingly national scope of our legal system in a shrinking world, and the sense of anomaly presented when the contents of one's fundamental rights varies upon crossing a state's boundaries.³³⁸ Under either view, the ultimate risk is that the legitimacy of the state's legal order will be called into question by maverick decisions of its state courts, with the consequence of popular backlash against the court and perhaps against the whole system of state constitutional rights.³³⁹

"would ensure that state courts did not merely substitute their notion of public policy for that of legislative bodies or of the United States Supreme Court." Deukmejian & Thompson, *supra* note 15, at 996.

334. As in the claim that disagreement "signals a lack respect by state court judges for precedent and the United States Supreme Court." Hudnut, *supra* note 173, at 95.

335. *E.g.*, Deukmejian & Thompson, *supra* note 15, at 996-1009 (using examples of supposed undue activism as support for conclusion that such problems inevitably follow from rejection of principles of decision that rest on presumption in favor of Supreme Court decisions).

336. *E.g.*, Hudnut, *supra* note 173, at 92; Deukmejian & Thompson, *supra* note 15, at 994-95.

337. One commentator states that

[w]hatever the Supreme Court says will influence the legal community and the general populace; the court that disagrees must recognize that fact if it is at all concerned about the way in which its decision will be received. Certainly the age of the ruling, as well as the breadth of its holding, may make a difference, but no state court can ignore the persuasive influence of a Supreme Court opinion.

Note, *supra* note 166, at 319. If the statement suggests that a divergent Supreme Court decision calls for reasoned explanation for its rejection, in light of the Court's influence, the point is unobjectionable. In the context of the entire article, however, it appears to be justifying a deferential approach along the lines being discussed.

338. See *supra* note 336 and sources therein.

339. As in the suggestion that "erosion or dilution of constitutional doctrine may be the eventual result" of independent decision-making. *State v. Hunt*, 91 N.J. 338, 349, 450 A.2d 952, 963 (1982) (Handler, J., concurring).

But these sorts of arguments fare little better than the underlying view that gives rise to them. First, under our federal system, variations of protection of rights cannot properly be viewed as truly anomalous.³⁴⁰ Advocates of deference might better serve the orderly progression of the legal system by teaching the correct understanding of the relationship between state and federal courts and constitutions than by crying wolf on behalf of a generally uninformed public. It is difficult to believe that resistance to independent state court decision-making would not yield to reasoned explanation of the grounds for such independence.

Second, it is extremely doubtful that the American public draws careful distinctions between federal and state decisions in evaluating their merits.³⁴¹ It is, for example, rather unlikely that the controversy that has enveloped some state courts has much to do with departure from Supreme Court precedent as such, or even judicial activism per se, so much as it reflects deeply felt public attitudes toward the substance of certain controversial topics.³⁴² If there is a prudential lesson for such courts, the message might be one of gauging rather carefully the extent to which a court should serve as a vanguard of public mores. The success of relatively activist state courts attests that public reaction to judicial independence has little to do with the fact of departure itself.

340. The model of federalism that sees the states as laboratories for experiment has never struck me as an important justification for independent state court decision-making. *See, e.g.*, Howard, *supra* note 11, at 940. Perhaps that is because I see judges less as social innovators and more as upholders of the rule of law and constitutional values; it is also because such an argument seems like a make-weight. Even so, the possibility of diversity that the "laboratories" metaphor suggests provides a complete response to the suggestion that diversity itself is presumptively illegitimate in our federal constitutional order.

341. The public, like the mass media, hardly seems to care. When I have insisted in interviews on focusing on the issue of statutory interpretation raised in anti-discrimination cases, media representatives yawn and then report on "discrimination" and "affirmative action." Public reaction appears to turn entirely on the result in the decision, rather than on the statutory or constitutional bases for judicial decisions.

342. If the preceding footnote seems cynical, examine the public reaction, and the extent of deference shown, to the Supreme Court's abortion decision. Then compare the public reaction to the Court's earlier decision as to contraception. Consider whether the reaction had much to do with the constitutional theory underlying either the case, or even was based to any great degree on any general theory of deference to legislative decision-making.

Similarly, the reaction of the California voters to the activism of the California Supreme Court rests more on the depth of public feelings about issues like capital punishment, and criminal law generally, than to views about deference to the Supreme Court, or even to state public policy makers. *See, e.g.*, Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 622-23 (1986).

The tendency to criticize the practice of activist state courts as unprincipled and result-oriented was noted earlier.³⁴³ To some extent, such arguments have reflected the specious assumptions critiqued above, and also simple disagreement with the reasoning and result of the court. In general, the critics view the state court as too activist on the restraint/activism scale.³⁴⁴ What is surprising, however, is the extent to which such arguments form the predicate for the case for deference to the Supreme Court. When the argument connecting the critique of prior activism to the case for strong deference is not developed, it strikes one as the equivalent of fleeing to the nunnery to avoid further compromise of virtue.

One question is whether the remedy is adequate to the wrong. If a court is inclined toward undue activism and result-orientation, it might well manipulate a standard of deference³⁴⁵ or easily find state-specific factors³⁴⁶ warranting departure from Supreme Court decisions. On the other hand, thoughtful state courts may choose independently to exercise considerable restraint without focusing unique attention on their relationship to the Supreme Court.

Indeed, there seems no particular advantage to special rules facilitating self-restraint unless maximizing such restraint is viewed as the overriding goal of state court decision-making. Yet that seems to be a view that ought to win on the merits of the court's independent consideration of its role in its state constitutional system, issue by issue and over time, rather than being preempted under the guise of fixing the court's proper relationship to the Supreme Court. In short, state court independence and state court activism ought to be treated as separate issues.

Of a similar nature are questions raised concerning the competence of state courts to confront complex constitutional issues.³⁴⁷

343. See *supra* § III-B-1 of this article.

344. See Deukmejian & Thompson, *supra* note 15.

345. In the early period of constitutional adjudication in this country, the Supreme Court frequently paid lip service to the idea of a strong presumption of constitutionality. But such a statement was likely to appear as a prelude to an obviously-independent judgment striking down legislation as unconstitutional—even when the legislative judgment was not clearly in error. *E.g.*, *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819).

346. State courts have sometimes gone out of their way to focus on language differences to justify results to the exclusion of frank acknowledgment of disagreement with the Supreme Court. *E.g.*, *Hansen v. Owens*, 619 P.2d 315 (Utah 1980). *But see* *American Fork City v. Cros Grove*, 701 P.2d 1069 (Utah 1985) (overruling *Hansen*). Insistence on state-specific factors for departure from Supreme Court decisions might simply multiply examples of such decision-making practices.

347. *E.g.*, *People v. Norman*, 14 Cal. 3d 929, 941, 538 P.2d 237, 246, 123 Cal. Rptr. 109, 118 (1975) (Clark, J., dissenting).

Even while distinguishing between strong and weak deference, it must be acknowledged that the differences are gradual and imprecise. Inexperienced state court judges might well proceed with caution, and there is nothing objectionable to looking for guidance to the decisions of the Supreme Court. In some instances, Supreme Court decisions may seem like more than just starting places. But if the Supreme Court has such natural advantages as the benefit of more elaborate briefing and larger staffs, such advantages will frequently be outweighed by advantages flowing from state court proximity to its state law environment.³⁴⁸

More centrally, the competency argument reflects historic desuetude of state court independence more than inherent incompetency. State court abdication of responsibility becomes the justification for further inactivity. The basic answer to state court incompetency is the acquisition of competency; and this is where the sophistication and competency of the bar should have a role to play in advancing the work of the state courts.³⁴⁹ A rule defining the role of a court should generally be based on something less transitory than its relative competency at a particular point in time.

Particularly in view of the unique constitutional provisions that appear in the Illinois Constitution, one would think that the best view is for the court to determine that it will give its independent consideration to each of them. To the extent that its burden is lightened somewhat by the careful consideration of similar issues decided under other constitutions, including the federal Constitution, it should avail itself of all that help. It is difficult to see, however, what is added by any system of special deference to another decision-maker.

The final justification offered for a deferential model of state court decision-making looks to the value of uniformity in legal decision-making. When the uniformity argument rests on the view that fundamental rights generally should not vary from state to state,³⁵⁰ the argument runs counter to our federal system and fails to recognize that such rights might vary as much by legislation and

348. See *supra* note 289 and sources cited therein.

349. Unfortunately, neither the academy nor the bar is doing an especially good job of helping the state courts perform their constitutional function as to state constitutions. The only good news is that this is gradually changing.

350. E.g., Hudnut, *supra* note 173, at 92. Hudnut contends that such diversity of fundamental rights will be perceived as unfair; but it is difficult to see how this argument can fare any better than the contention that such decision-making will be perceived as illegitimate.

variant state constitutional provisions as by independent state court decision-making. It is difficult to see why independent state court decision-making should be seen as distinguishable from these related judgments, inasmuch as each flows from our federal system.

Moreover, given the overwhelming trend toward independent state court decision-making, the breach of uniformity as a general value in constitutional law has already occurred. It is not clear why Illinois should follow the United States Supreme Court for the sake of uniformity in a case in which a number of other states have already rejected the Court's decision. Indeed, it would seem that its duty would be to choose the better of the conflicting holdings.

Most importantly, in other areas of decision-making, uniformity is conceived of as unusually important mainly because certainty as to the rule in transactions that cross state lines may be more vital than the particular rule that is chosen.³⁵¹ The parties may adapt their dealings to the rule and largely obtain satisfaction from the legal system so long as they can rely on the rule. The greater the uncertainty introduced by the multiplication of interpretations of the underlying legal principles, the more the interests of all the parties are harmed.

In general, these kinds of considerations do not apply to issues of individual rights in constitutional law. Supreme Court decisions provide a uniform federal floor of protection. Claimants, even first amendment claimants with an interest in clear rules as to the scope of their rights,³⁵² would not sacrifice the possibility of stronger protection at the altar of uniformity. And state officials do not, in general, have this sort of overriding interest in certainty as to the application of individual rights principles.³⁵³ Moreover, in most instances it seems likely that thoughtful and principled state court decisions based on independent analysis will be as likely to provide meaningful guidelines as Supreme Court decisions.

351. The classic example is the Uniform Commercial Code, where the goal of uniformity is used as a canon of construction. *See, e.g., Commonwealth v. Nat'l Bank & Trust Co.*, 469 Pa. 188, 194, 364 A. 2d 1331, 1335 (1976) (stating that decisions of other states are persuasive authority, but "are entitled to even greater deference where consistency and uniformity of application are essential elements of a comprehensive statutory scheme like that contemplated by the Uniform Commercial Code").

352. *See* Hudnut, *supra* note 173, at 92.

353. There is a respectable view that constitutional norms ought to be thought more in terms of guiding decision-making by the branches to which they are directed. Linde, *The Due Process of Law-Making*, 55 NEB. L. REV. 195 (1976). But its forceful spokesperson, Judge Linde, rightly does not see the need for such guidance as being overriding.

In this setting, it is difficult to see how the drive for uniformity could be seen as more important than correctly applying the constitutional principle at stake. While state courts have every reason to consider whether the Supreme Court has given the proper application of governing provisions, it seems difficult to justify allowing the general interest in uniformity to overcome the state court's conviction, based on its independent judgment, that the constitutional values at stake are not best served by the Supreme Court's ruling.

But the uniformity argument can be cast more narrowly. While some narrower formulations complaining generally of the "confusion" caused by divergent interpretations seem more like red-herrings than serious arguments,³⁵⁴ there are at least some contexts in which the concern for uniformity seems more cogent. The most compelling example is the potential for confusion in joint law enforcement operations when state courts adopt more restrictive rules governing search and seizure than the Supreme Court.³⁵⁵ The problem is enhanced because in such joint operations it may not always be clear whether the evidence will be used in state or federal court.³⁵⁶

Even if we assumed that uniformity presents an especially strong claim in this context, it might be questioned whether any unique concept of deference is required to reach the appropriate result. It appears that the value of uniformity might be weighed in particular cases against the extent of the court's conviction that a contrary result would sacrifice overriding values in protecting the rights of the individual. The Supreme Court decision might be conceived, on this view, as remaining a matter to be "considered" or "taken into account," along with the values of certainty and uniformity, after the court has independently considered the underlying constitutional values at stake—rather than as inevitably affecting or controlling the state court decision. The ultimate decision is an independent judgment of the Illinois court that includes an accounting of the traditional value of certainty in a particular context.

On the other hand, it could be contended that, if the recognition of the value of uniformity explains a given decision, it has the effect of causing the state court to give great weight to the Supreme Court decision and should therefore be viewed as an example of deferential

354. *E.g.*, Hudnut, *supra* note 173, at 93 (prosecutors need to know rules of game); Deukmejian & Thompson, *supra* note 15, at 995 (divergent federal and state rules "may confuse lawyers").

355. *E.g.*, Hudnut, *supra* note 173, at 93.

356. *State v. Lowry*, 295 Or. 337, 352, 667 P.2d 996, 1005 (1983) (Jones, J., concurring).

decision-making. Given that the line between “consideration” of uniformity values and giving special weight to Supreme Court decisions is somewhat vague, either formulation may have merit. But the question whether the value of uniformity should receive great weight even in the law enforcement context remains.

It is doubtful that it should. State statutes might equally impact on joint operations, to the extent that their fruits are to be admitted into evidence in state court; yet there has been no suggestion that state legislatures should presumptively place no greater restrictions on police than required by federal law. In general, there appears no reason why state police should not be familiar with state law and insist, to the extent of their interest, on compliance with that law. Clearly, they have no claim to the lowest common denominator so that they can work most easily with federal law enforcement—a sort of reverse “silver platter” doctrine. To the extent that state law rules are reasonably clear, there is no reason to assume that such operations could not simply choose to abide by more restrictive state law rules.³⁵⁷

By establishing a second layer of review, independent state law decision-making might be argued to generate additional uncertainty for state law enforcement officials. But even this is not clear. It is difficult to imagine more uncertainty about the direction and application of search and seizure law than already exists in our federal system. With the Supreme Court consistently divided, and with the Court’s changes in direction in the past two decades, it is not at all clear that a state court might not create additional certainty for state law enforcement officials simply by reaching some clear consensus with respect to some broader plane of protection in certain areas. This, at least, was the conclusion of the Oregon Supreme Court.³⁵⁸ In my judgment, the value of uniformity is entitled only to sufficient weight so that if the court could see little or no advantage in a contrary rule, it would provide a reason for adoption of the Supreme Court rule into state law.

357. All too often, the plea of uncertainty in the law of criminal procedure is a cover for an attitude of brinksmanship on the part of law enforcement officials. The only legitimate uncertainty added by independent state court decision-making is the added possibility that uncertain issues will be resolved against law enforcement. In large part, that possibility may only reinforce the appropriate attitude of erring on the side of protecting rights where the law is uncertain. At the same time, state courts should be as sensitive as federal courts to the need for bright-line rules wherever possible.

358. *State v. Caraher*, 293 Or. 741, 749, 653 P.2d 942, 946 (1982) (eight years of uniformity has not brought simplification to the law of search and seizure in Oregon).

B. *The Case Against State Court Deference*

State court deference to decisions of the Supreme Court are another species of what Professor Van Alstyne has called “special theories of judicial review”.³⁵⁹ Such theories focus unusual attention on the judicial role, to the disparagement of the court’s straightforward duty to attempt to determine and apply the law.³⁶⁰ A classic example is the view of several framers of the United States Constitution that courts should never strike down legislation except where there is “clear error”³⁶¹ or, alternatively, that federal legislation at least was subject to this sort of unusual deference by the courts.³⁶² But this view has not prevailed.

In the short run, invocations of the “clear error” formulation were frequently followed by decisions that did no more than pay lip service to the doctrine.³⁶³ In the long run, “[t]he Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text.”³⁶⁴ Various modern suggestions that the Supreme Court should defer to other branches concerning the substantive reach of constitutional provisions, even reserving a power to review the reasonableness of the decision, have been criticized and ultimately rejected.³⁶⁵

The lessons seem applicable to the issue of state court deference to the Supreme Court. As to “great weight” formulations, it does not seem likely that such a stated standard of deference will yield anything beyond reduction in the currency of language. If it could, given that there is no reason why state courts should defer to the Supreme Court, it would make more sense for state courts to apply

359. Van Alstyne, *Interpreting This Constitution: The Unhelpful Contribution of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 213 (1983).

360. See generally *id.*

361. See, e.g., Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For one modern discussion of the rule, see Monaghan, *supra* note 201, at 13-14.

362. See Van Alstyne, *supra* note 359, at 213.

363. E.g., *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

364. Monaghan, *supra* note 201, at 9.

365. The classic example is the Court’s suggestion in *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966), that it would follow reasonable congressional interpretations of the equal protection clause, provided Congress did not invade nor cut back on individual rights. For treatment of the criticisms and ultimate rejection of this approach, see Monaghan, *supra* note 201, at 9-10 (citing other commentators). Efforts to change the law of abortion through a human rights bill have encountered analogous criticism. *Id.* at 10.

the classic clear error doctrine to the work of the political branches within their own system of state government. If judicial restraint is the goal of the practice, this approach is a more direct way to advance that purpose. But it seems unlikely that Illinois will turn the clock back on well settled understandings of the judicial power in exercising judicial review.

The proposed requirement of state-specific grounds for departure from Supreme Court precedent seems equally misguided. The prospects for evasion through manipulation again seem virtually endless. In one formulation, prior state decisions might be followed instead of conflicting Supreme Court precedent.³⁶⁶ The imaginable result would be a state court that reaches to decide issues, on independent state law grounds, prior to their reaching the Supreme Court.³⁶⁷ To the extent that independent forms of analysis and reasoning are required to fit this framework, justices might even seek to strike new ground on relatively novel issues simply to create an independent state law tradition.

The possibilities for exploiting debatable differences in state law text, "legislative" histories, or state traditions, to fit within proposed categories for independent decision-making, are likely to be realized as well. But the problem runs even deeper. The reach of state law context, and of varying considerations presented by institutional and strategic factors in decision-making, will be subtler in quality than can be captured by any formula or listing of categories as to when independent decision-making is justified. The attempt to limit the occasions for state court independence by reference to state-specific factors ultimately must be seen as a purely artificial device for limiting the exercise of state court power.

Institutional concerns about the role of courts in a democratic society inevitably permeate constitutional decision-making by courts. Arguments about the nature of constitutional interpretation cannot escape confronting essentially institutional issues in determining the implications of the assumption that the constitution is to be consid-

366. Deukmejian & Thompson, *supra* note 15, at 996 (though qualified by ambiguous assertion that case for independence is strengthened where the decision was "grounded on state law"); *State v. Hunt*, 91 N.J. 338, 365, 450 A.2d 952, 965 (1982) (Handler, J. concurring).

367. It seems especially odd to consider that state courts might properly follow their own *prior* decisions, but should defer to established Supreme Court case law. Unless the suggestion is another way to contend for deference wherever the Supreme Court has been active and state courts have adopted the same basic framework of analysis—which virtually guts it as a separate criterion—everything depends simply on the timing with which issues reach the courts.

ered law to be applied by courts.³⁶⁸ Indeed, even the model of “independent” consideration of the constitutional text almost certainly is qualified, to some extent or another, in the formulation and application of constitutional standards by courts.³⁶⁹

For these reasons, proposals for strong deference by state courts probably run afoul of no constitutional strictures in the way that the lockstep doctrine does. Nevertheless, the proposals appear as not only unworkable and likely to be ineffectual, but also as running against the grain of the judicial function as we have come to know it. If there is any clear impression left by the consideration and ratification of the 1970 Illinois Constitution, it is that the constitution seeks to preserve and supplement the heritage of judicial protection of individual rights. While that overall impression may not yield many answers to specific constitutional questions, it does seem to cut sharply against any approach designed to limit the judicial role in giving effect to the promise held out by those constitutional guarantees.

368. For example, debate about the role that courts should play when the search for meaning has failed to yield determinant answers to constitutional questions—what has been called the “creative” function—necessarily involve decision-makers in a consideration of fundamental issues about the role of the judiciary in a constitutional republic. See McAfee, *supra* note 3, at 272-73 & n. 58 and sources cited therein.

369. Professor Monaghan observes that, despite the traditional commitment to the view that courts provide an independent interpretation of constitutional text, the Court’s substantive doctrine in such areas as reviewing congressional power and rationality review under due process and equal protection reflect an element of judicial deference to political decision-makers. Monaghan, *supra* note 201, at 33-34. A perhaps similar sort of point is offered by Professor Sager’s contention that constitutional doctrine frequently has a “strategic” quality to it. Sager, *supra* note 285.

