DePaul Law Review

Volume 62
Issue 1 *Fall 2012*

Article 3

A Roadmap to State Judicial Independence under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition

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A ROADMAP TO STATE JUDICIAL INDEPENDENCE UNDER THE ILLINOIS LIMITED LOCKSTEP DOCTRINE PREDICATED ON THE INTENT OF THE FRAMERS OF THE 1970 ILLINOIS CONSTITUTION AND ILLINOIS TRADITION

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INTRODUCTION

The Illinois Supreme Court possesses the paramount judicial power and ultimate responsibility for determining the meaning, scope, and proper application of Illinois law, and more particularly, the Illinois constitution. This power to construe the Illinois constitution stands independent of the U.S. Supreme Court. As the U.S. Supreme Court has repeatedly held, the U.S. Constitution permits state courts to construe their own respective state bill of rights without constraints from the U.S. Supreme Court's interpretation of the U.S. Constitution, provided that individual rights protection does not drop below the minimum guarantees required by the U.S. Constitution.[1] The U.S. Supreme Court's recognition of and support for a broad range of state judicial power free from federal control manifests the Court's commitment to a division of authority between federal and state courts.[2]

Though the U.S. Constitution authorizes the Illinois Supreme Court to decide for itself how to construe the Illinois constitution, the question remains as to whether state law imposes limits on the manner in which the Illinois high court may exercise its authority. The 1970 Illinois constitution grants the Illinois Supreme Court the final authority to develop cogent and principled standards to guide all Illinois courts

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1. *See, e.g.*, Nichols v. United States, 511 U.S. 738, 748–49 n.12 (1994); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

2. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 714 (1999) ("The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" (quoting THE FEDERALIST No. 39, at 245 (J. Madison) (Clinton Rossiter ed., 1961))).

in carrying out their interpretive function.[3] In many cases throughout its history, the Illinois Supreme Court has steadfastly resisted delegations of its authority to the U.S. Supreme Court and has rejected U.S. Supreme Court decisions as binding authority on state law issues.[4]

The 1970 Illinois constitution, in its bill of rights section, protects a wide array of individual freedoms from government infringement. This Article endeavors to ascertain the proper standards that the Illinois Supreme Court should apply to determine the meaning of Illinois bill of rights provisions that have identical or similarly worded counterparts in the U.S. Constitution. Indeed, many of the rights safeguarded in the Illinois constitution are similarly worded to the individual guarantees in the U.S. Constitution.[5]

The Illinois Supreme Court's seminal opinion in *People v. Caballes*[6] discussed three basic analytical frameworks that have guided state courts throughout the United States in determining the meaning of state constitutional provisions that parallel federal constitutional provisions. *Caballes* referred to these methods of state constitutional adjudication as the lockstep, primacy or primary, and interstitial approaches.[7] The lockstep doctrine is a legal construct in which the

3. *See* ILL. CONST. art. VI, § 1 ("The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts.").

4. *See, e.g.*, Rollins v. Ellwood, 565 N.E.2d 1302, 1316 (Ill. 1990) (explaining that the Illinois Supreme Court is precluded from abrogating its authority to the federal courts in construing the meaning of state constitutional due process because "the final conclusions on how the due process guarantee of the Illinois constitution should be construed are for this court to draw"); Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 99 N.E. 920, 924 (Ill. 1912) ("[T]he decisions of the United States Supreme Court, while entitled to the highest and most respectful consideration as the pronouncement of a most eminent and learned tribunal, are, as regards all such matters, only to be considered by the state courts as persuasive authority. In respect to questions of general law, the state courts are required to follow the decisions of the highest court of the state, and are not bound by the authority of the Supreme Court of the United States; and particularly is this true where it would be necessary to overrule previous state decisions in order to conform to the views of the federal court.").

5. Two primary examples of these co-extensive constitutional safeguards discussed in this Article are the individual's right to freedom from unreasonable searches and seizures embodied in article I, section 6 of the Illinois constitution and the Fourth Amendment to the U.S. Constitution, and the right to due process of law contained in article I, section 2 of the Illinois constitution as well as the Fifth and Fourteenth Amendments of the U.S. Constitution. *Compare* ILL. CONST. art. I, § 2, *and* art. I, § 6, *with* U.S. CONST. amends. IV, V, *and* XIV, § 1.

6. *See* People v. Caballes, 851 N.E.2d 26, 31–32 (Ill. 2006). As of this Article's publication, *Caballes* sets out the Illinois Supreme Court's most recent extensive analysis on the governing standard for interpreting the search and seizure clause of article I, section 6 of the 1970 Illinois constitution. This Article analyzes the *Caballes* majority and dissenting opinions *infra* Part III.B. Prior to Part III.B, this Article undertakes a historical analysis, which includes a discussion of several Illinois bill of rights cases leading up to *Caballes*, so that *Caballes* can be placed in an appropriate contextual framework.

7. *Id.* at 41–42 (citing Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000); James A. Gardner, *The Failed Dis-*

state court gives its state constitutional provision the same meaning that the U.S. Supreme Court attributes to its analogue in the U.S. Constitution.[8] Under a true or strict lockstep approach, the state court is prohibited from giving its state constitutional provision a meaning more protective of individual rights than its federal analogue.[9]

To clarify lockstep's meaning, a practical application is useful. Consider, for example, article I, section 6 of the 1970 Illinois constitution, the Illinois constitutional counterpart to the Fourth Amendment. Article I, section 6 includes a provision similarly phrased to the Fourth Amendment, both of which prohibit unreasonable searches and seizures.[10] If the state court utilizes a strict lockstep approach, then it must stringently apply the U.S. Supreme Court's Fourth Amendment precedent as the binding interpretation of article I, section 6. The state court may not analyze the state constitutional question independent of the controlling federal standard. A search or seizure held constitutional under the Fourth Amendment would automatically be constitutional under article I, section 6. As its name implies, the state court must, without exception, fall in lockstep with U.S. Supreme Court precedent on state constitutional issues.[11]

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course of State Constitutionalism, 90 MICH. L. REV. 761 (1992)) (comparing the three basic approaches of state constitutional interpretation and discussing their merits and demerits from the viewpoint of respected scholarly research and judicial opinions).

8. *Id.* at 41–42.

9. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102–03 (2000).

10. *Compare* ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches [and] seizures . . . ."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). In addition to the Illinois search and seizure clause, the framers of the 1970 Illinois constitution broadened article I, section 6 to include individual protections against invasions of privacy and interceptions of communications, both of which are beyond the scope of this Article. *See* ILL. CONST. art. I, § 6.

11. As can be discerned by the historical analysis to follow in this Article, it appears that no reported Illinois Supreme Court case has adopted a strict or true lockstep approach in which it is doctrinally impossible under any circumstances for the state court to reject Supreme Court precedent. In many cases, the court has exercised its judgment independently from federal jurisprudence such that its governing philosophy can only be characterized as a primacy model. *See infra* Parts II.B, III.A. In other cases, the court has adhered to an interstitial model or a restrained version of lockstep under which it has followed U.S. Supreme Court precedent as binding authority, but has acknowledged its power to go its separate way if state-specific factors allow for a different analysis. *See infra* Parts III.A, III.B. In still other cases, the court has accepted the validity of limited lockstep principles, but has affirmatively exercised its power to chart a different course from federal law because, in its view, justifiable circumstances warranted a deviation. *See infra* Parts III.A, III.B.

At the other end of the state constitutional spectrum is the second theory of state constitutional interpretation discussed in *Caballes*, known as the primacy or primary approach.[12] Under this framework, the state court construes state constitutional provisions independently of U.S. Supreme Court constitutional precedent.[13] U.S. Supreme Court majority opinions can operate as persuasive authority in analyzing the state constitutional issue, but the state court is not obligated to follow such decisions as binding precedent.[14] The primacy approach permits, but does not require, the state court to rely on approaches to constitutional problems that differ from U.S. Supreme Court majority opinions.[15] The state court is entitled to adopt the U.S. Supreme Court approach if it is persuaded by the wisdom of the Court's decision.[16]

As this Article demonstrates, the Illinois Supreme Court has often relied on the primacy approach without specifying that designation, which sometimes results in a more expansive reading of individual rights than that provided by the U.S. Supreme Court.[17] In other cases, however, the Illinois Supreme Court, in adopting an independent approach, has arrived at the same result as the U.S. Supreme Court for the particular constitutional issue under consideration and, therefore, an identical level of individual liberty safeguards for both the respective state and federal constitutional claims.[18] Thus, judicial indepen-

12. *Caballes*, 851 N.E.2d at 42.

13. *See id.*; *see also* Rollins v. Ellwood, 565 N.E.2d 1302, 1316 (Ill. 1990) (illustrating the Illinois Supreme Court's exercise of the primacy approach although, in that case, the court did not use the primacy label in describing its analysis); Friedman, *supra* note 9, at 95, 106–07. The *Rollins* court held that the Illinois due process guarantee stands separate and independent of the federal safeguard, and that U.S. Supreme Court precedent, though it may be helpful in reaching a reasoned result, is not mandatory authority. *Rollins*, 565 N.E.2d at 1316.

14. *See* Friedman, *supra* note 9, at 95, 106–08.

15. *Id.*

16. *Id.*

17. *See infra* Part II.B.

18. *See infra* Part III.A. A state court construing a state constitutional provision under the primacy approach, which arrives at the same result and an identical level of individual rights protection as the U.S. Supreme Court's interpretation of federal law, legitimizes the state court's adoption of the federal standard if it independently considers the validity and persuasive force of the Supreme Court precedent rather than reflexively adopting it without critical analysis. *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1061 (2003) (finding that state courts that follow federal law under a functional theory do so "not because they think such rulings presumptively correct, but because, in the exercise of their independent judgment, they deem such rulings to provide adequate protection for the liberties at issue"); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991) ("[I]f the state courts are not merely presuming that state and federal law are alike, but are coming to this conclusion after independent evaluation of the meaning of the state provisions, . . . [t]here is nothing improper in concluding that the Supreme Court's construction of

dence under the primacy or primary method should not necessarily be equated with a more expansive construction of constitutional rights than that espoused by the U.S. Supreme Court.[19]

Aside from the lockstep and primacy theories, there is a third basic construct noted in *Caballes*—the middle ground "interstitial" or "criteria" approach.[20] Under this mode of interpretation, the state court begins its analysis by applying U.S. Supreme Court precedent as a benchmark to determine whether U.S. constitutional rights protect the individual from the challenged government conduct. If not, the court proceeds to examine the state constitution for a potential remedy. The court will not depart from the federal approach unless unique state values or traditions, as defined by the state court, call for a deviation from the federal analysis.

In *Caballes*, the court adopted a blended version of the lockstep and interstitial approaches for the search and seizure clause of article I, section 6 of the 1970 Illinois constitution, which the court called its "limited lockstep approach."[21] Under this melding of interstitial and lockstep, the Illinois Supreme Court presumes that Illinois courts shall

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similar text is sound."); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1507–08 (2005) (concluding that "reflective adoptionism," whereby the state court considers but rejects the arguments for a more expansive construction of a state constitutional provision than its federal counterpart, is a legitimate and justifiable mode of state constitutional interpretation).

19. An expansive reading of Illinois constitutional rights may support not only a liberal view of political liberties, but may also favor individual rights generally identified with a conservative perspective. *See, e.g.*, Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E.2d 691, 694–95 (Ill. 1955) (holding that an Illinois statutory provision that barred employers from deducting an employee's wages for time off of work to vote violated Illinois due process); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1510 (1998) ("A state court can interpret its constitution to protect the economic and property rights traditionally favored by conservatives as easily as it can protect the civil rights and liberties customarily championed by liberals."); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 433 (1988) ("One can identify state constitutional decisions that advance values generally associated with the conservative movement.").

20. *See* People v. Caballes, 851 N.E.2d 26, 42 (Ill. 2006); *see also* Friedman, *supra* note 9, at 95, 104–05.

21. *Caballes*, 851 N.E.2d at 42. The Illinois Supreme Court acknowledged, however, that if the state constitutional provision at issue does not have a federal counterpart with similar or identical language, then a different interpretive framework applies. First, a constitutional provision unique to the Illinois constitution, which has no relationship to the U.S. Constitution, must be applied without reference to the U.S. Constitution. *Id.* at 31. Second, an Illinois constitutional provision whose language is similar to a provision in the U.S. Constitution, but differs in some significant respect is to be given a meaning independent from the U.S. Constitution. *Id.* at 31–32. The court found, therefore, that these two separate types of Illinois constitutional provisions are not governed by the limited lockstep doctrine. *See id.* This Article's focus is restricted to an exploration of the correct mode of interpretation to be applied to Illinois constitutional provisions having identical or nearly identical phraseology to their federal analogues.

interpret cognate provisions of the Illinois constitution in the same way as the U.S. Supreme Court has construed the U.S. Constitution. The *Caballes* court, however, carved out two exceptions to this general rule. First, the state court may depart from lockstep and interpret the state constitutional provision independently of U.S. Supreme Court precedent if the framers' intent supports an independent construction.[22] Second, the state court is free to analyze state constitutional law independently of U.S. Supreme Court precedent if Illinois's long-standing values and traditions, as reflected in case law, allow such a separation.[23]

II. THE FRAMERS' INTENT AND ILLINOIS TRADITION SUPPORT ILLINOIS JUDICIAL INDEPENDENCE

A. The Broad View of Lockstep's Exceptions

The central purpose of this Article is to gauge the meaning and scope of the two sources for lockstep rejection noted in *Caballes*—the framers' intent and Illinois's long-standing traditions and values. This Article advocates that Illinois courts take a broad view of these criteria. Although a presumption of correctness attaches to federal law as the determinant of state constitutional law under Illinois's limited lockstep approach, the framers of the 1970 Illinois constitution intended Illinois state courts to be unshackled from unprincipled federal analysis and to have the discretion to adopt a different approach to an analogous constitutional problem.[24] Furthermore, Illinois precedent embodying long-standing state traditions and values that support judicial independence from the U.S. Supreme Court permit Illinois courts to embark on a path that differs from U.S. Supreme Court precedent.[25] The constraining effect of the limited lockstep doctrine should itself be subject to carefully restricted parameters, if not jettisoned altogether.

This Article will show that the Illinois framers' use of language that is textually similar to the U.S. Constitution does not mean that the delegates intended Illinois courts to always parrot the views of a U.S. Supreme Court majority. In fact, case law prior to the adoption of the 1970 Illinois constitution reflects Illinois's long-standing practice of judicial independence.[26] The use of particular research articles to guide the delegates of the 1970 Illinois Constitutional Convention in crafting

22. *See id.* at 45.
23. *See id.*
24. *See infra* Parts II.C, II.D, II.E.
25. *See infra* Parts II.B, III.A, III.B.
26. *See infra* Part II.B.

a new constitution suggests that the framers considered and chose a model for constitutional interpretation that preserved the Illinois constitutional independence—the same independence that prevailed under the predecessor 1870 Illinois constitution.[27] Because the Illinois constitution originated from, and was patterned after, other state constitutions as well as the U.S. Constitution, a strict lockstep approach to Illinois constitutional law that reflexively copies Supreme Court jurisprudence is inconsistent with the framers' intent supporting Illinois judicial sovereignty.[28] The Illinois constitutional debates and an Illinois bill of rights committee report that commented on the 1970 Illinois constitution also support Illinois judicial independence from U.S. Supreme Court decisions on state constitutional questions.[29]

The limited lockstep doctrine first arose after the adoption of the 1970 Illinois constitution.[30] This doctrine is not constitutionally based, but is rather a judicially created rule without foundational roots in the framers' intent.[31] Notwithstanding the Illinois Supreme Court's resort to the limited lockstep doctrine after the passage of the 1970 Illinois constitution, the court has, on many recent occasions, reverted to its traditional approach of favoring judicial independence.[32] The Illinois Supreme Court's recent decision in *Caballes* allows deviations from lockstep based on the framers' intent and long-standing Illinois traditions as reflected in Illinois case law.[33] Yet, the appellate court's current gloss on the limited lockstep doctrine and its narrow interpretation of the *Caballes* court's exceptions to lockstep constitute a sharp rebuke to the framers' intent and Illinois traditions.[34] When viewed through the correct historical context, the limited lockstep approach, as analyzed in depth below, should be read as doctrinally permitting the Illinois Supreme Court to depart from flawed or inadequate federal solutions to the often vexing constitutional dilemmas faced by state law enforcement authorities, Illinois residents, and the state court system.

The defendant and his amici supporters in *Caballes* apparently assumed the existence of a firmly entrenched lockstep approach and ar-

27. *See infra* Part II.C.

28. *See infra* Part II.D.

29. *See infra* Part II.E.

30. *See infra* Part III.A.

31. *See infra* Part III.A; *see also* People v. Mitchell, 650 N.E.2d 1014, 1017 (Ill. 1995) (finding that the Illinois Supreme Court has the power to read Illinois constitution more expansively than the U.S. Constitution, but "judicially crafted limitations . . . define the exercise of that right").

32. *See infra* Part III.A.

33. *See infra* Part III.B.

34. *See infra* Part III.C.

gued for its abandonment and replacement with the primacy approach based on the "scholarly literature, the practices of other states, and public policy."[35] Accepting the premise that lockstep was an embedded fabric of Illinois law, the court rejected the defendant's argument that it should abruptly change course and adopt a primacy approach.[36] The court reasoned that the limited lockstep doctrine is part of Illinois judicial history and "continues to reflect [its] understanding of the intent of the framers of the Illinois [c]onstitution of 1970."[37]

The court clarified that it was not endorsing the limited lockstep doctrine as a matter of public policy or "a sense of deference to the nation's highest court."[38] Rather, the court explained that its endorsement of the limited lockstep methodology was "predicated on [its] best assessment of the intent of the drafters, the delegates, and the voters" pursuant to a "solemn obligation" to its judicial function to implement the framers' intent.[39] Under its original intent framework, the court appeared to equate the framers' intent to a manifestation of the will of the people who ratified the 1970 Illinois constitution. In doing so, the court suggested that its reliance on the framers' intent as the bedrock source for determining the meaning of the Illinois constitution lends legitimacy to the process of constitutional interpretation. The court explained that ignoring the framers' intent is tantamount to

35. People v. Caballes, 851 N.E.2d 26, 44 (Ill. 2006). Insofar as the scholarly work referenced in *Caballes*, the court noted Justice Brennan's seminal article, which encouraged state courts to independently analyze their state constitutional provisions as they had historically done before federal constitutional rights became applicable to the states. *See id.* at 40–41 (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)). Some commentators and state supreme courts, as *Caballes* noted, approved of the call for a more protective stance toward individual liberties under state constitutions, while others criticized the movement. *See id.* at 41.

36. *Id.* at 39, 44.

37. *Id.* at 44–45.

38. *Id.* For an informative report on a spirited pre-*Caballes* debate on the public policy merits of the lockstep doctrine, see Daniel C. Vock, *Rights Review*, ILLINOIS ISSUES ONLINE (Jan. 2006), http://illinoisissues.uis.edu/features/2006jan/rights.html. As shown in Vock's article, proponents of lockstep have argued generally that the role of the Illinois Supreme Court in interpreting the Illinois constitution should not be based on what the court believes is good policy but rather on what the framers intended. Indeed, lockstep proponents have argued that the court follows wise public policy by following the framers' intent, regardless of the policy views of the individual justices on particular constitutional issues. By contrast, lockstep detractors, as Vock reported, have asserted that the Illinois Supreme Court's role as an equal partner in our federal system should include protecting its state constitutional authority from being ceded to the U.S. Supreme Court as a matter of vital public policy. This Article applies a framers' intent approach, as advocated by some lockstep proponents, to reach a diametrically different outcome—the framers intended to endorse a primacy paradigm that exemplified judicial independence.

39. *Caballes*, 851 N.E.2d at 45.

disregarding established rules of constitutional construction and embracing "judicial arrogance."[40]

This Article takes a different approach from the defendant and amici in *Caballes* and assumes the court's premise that the framers' intent must be the guiding force in the court's interpretation of the Illinois constitution.[41] Contrary to the view of the *Caballes* court, however, historical analysis demonstrates that the framers intended the Illinois Supreme Court to be functionally distinct from the U.S. Supreme Court. In showing that the Illinois Supreme Court should return to its past practice of judicial independence, this Article rebuts the unwarranted assumption that the Illinois Supreme Court practiced the lockstep approach prior to the adoption of the 1970 Illinois constitution.

The defendant and amici in *Caballes* apparently did not take an original intent perspective in presenting their arguments to the court; at least, if they did, the court did not address their arguments in its published opinion. The emphasis in the defendant's argument for a primacy approach based solely on scholarly and judicially based public policy considerations, as opposed to an analysis of the framers' intent, may have led to the *Caballes* court's failure to address the framers' intent as a legitimate basis for adopting a primacy model of judicial interpretation.[42] If resort to the framers' intent is essential to lawful

40. *See id.* (citing People v. Tisler, 469 N.E.2d 147, 161 (Ill. 1984) (Ward, J., concurring)).

41. This Article does not definitively take an affirmative or negative position as to whether an original intent perspective is a correct and valid standard for interpreting the Illinois constitution. Such a topic could only be adequately covered as the principal subject of another article. For a general overview of arguments in favor of and against the use of original intent to determine constitutional meaning, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989). This Article simply applies the construct espoused in *Caballes* and assumes the correctness of its approach, which requires Illinois courts to use the framers' intent to interpret the Illinois constitution.

42. Defense practitioners have often erred by raising state constitutional claims based almost exclusively on public policy considerations and the perceived imperative to correct a narrow interpretation of federal constitutional law by the U.S. Supreme Court. *See, e.g.*, People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984) (noting that the defendant asked the Illinois Supreme Court to reject U.S. Supreme Court precedent based on "the desire of the defendant to circumvent what he perceive[d] as a narrowing of his [F]ourth [A]mendment rights"). This approach is misguided in light of the *Caballes* court's emphasis on the framers' intent as the guiding force underlying the court's interpretation of the Illinois constitution. An original intent perspective provides plenty of fuel for the full development of a body of state constitutional law untethered to federal principles. Defense practitioners should present state constitutional claims demonstrating that the Illinois framers intended the Illinois courts to be independent of the U.S. Supreme Court on questions of state law. Once this pillar of constitutional construction is firmly established, the practitioner could then proceed to argue that the court is entitled to weigh competing policy considerations in arriving at the correct constitutional solution consistent with the framers' intent. A number of law review articles demonstrate that the Illinois framers intended the Illinois Supreme Court to be the final arbiter of the meaning of the Illinois constitution

and legitimate constitutional adjudication, then the Illinois Supreme Court bears the responsibility to thoroughly investigate and ascertain a reliable understanding of the intent of the Illinois framers and apply that intent in future cases.

Principles of stare decisis do not preclude the Illinois Supreme Court from adopting a primacy approach. *Caballes* described stare decisis as "express[ing] the policy of the court to stand by precedents and not to disturb settled points."[43] Although the court in *Caballes* determined that stare decisis considerations weighed in favor of a limited lockstep approach,[44] the Illinois Supreme Court has not addressed the issue implicitly raised (for the first time) by *Caballes*—whether the exceptions set out by *Caballes* for deviating from lockstep are sufficiently broad so as to swallow the limited lockstep rule. Thus, the Illinois Supreme Court has not settled whether to secure full judicial independence from the U.S. Supreme Court under the two exceptions to the lockstep rule discussed in *Caballes*—the framers' intent and long-standing Illinois traditions. Stare decisis, therefore, does not preclude the Illinois Supreme Court from adopting a broad interpretation of the framers' intent and Illinois tradition exceptions to lockstep interpretation as a vehicle to support its judicial independence under a primacy approach.[45]

This Article is designed to provide practitioners and courts with a thorough historical and analytical map demonstrating that the framers intended the Illinois Supreme Court to have the freedom to reject U.S. Supreme Court precedent and adopt a different approach on

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without blind obedience to the U.S. Supreme Court. *See, e.g.*, Thomas B. McAffee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1, 16–30 (1987); Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 913–19 (2005) (criticizing the lockstep doctrine for undermining the independent significance of the Illinois constitution); Roger Kangas, Comment, *Interpreting the Illinois Constitution: Illinois Supreme Court Plays Follow the Leader*, 18 LOY. U. CHI. L.J. 1271, 1282–85 (1987).

43. *Caballes*, 851 N.E.2d at 44 (quoting Neff v. George, 4 N.E.2d 388, 390–91 (Ill. 1936)).

44. *Id.* at 44.

45. If a future court were to erroneously reject the claim that the framers' intent and Illinois traditions exceptions to the lockstep approach under *Caballes* allow for the reintegration of the primacy model into Illinois law, consistent with stare decisis, then a practitioner could alternatively ask the Illinois Supreme Court to overrule the part of *Caballes* that disapproved of the primacy model, while leaving intact the court's linking of state constitutional interpretation with the framers' intent. The court's recent history reveals that, despite the strictures of stare decisis, it has not hesitated to overrule decisions that constitute bad law or are poorly reasoned. *See, e.g.*, People v. Colon, 866 N.E.2d 207, 219 (Ill. 2007) ("If it is clear a court has made a mistake, it will not decline to correct it, even if the mistake has been reasserted and acquiesced in for many years."); People v. Sharpe, 839 N.E.2d 492, 516 (Ill. 2005); People v. Jones, 797 N.E.2d 640, 647 (Ill. 2003); People v. Tisdel, 775 N.E.2d 921, 928 (Ill. 2002).

state constitutional matters based on the Illinois high court's reasoned and principled judgment. The Illinois Supreme Court should implement the framers' intent and exercise its independence through either a primacy approach, as it did before and sometimes after the adoption of the 1970 Illinois constitution, or under a robust version of the interstitial approach, which would also allow the court to be unshackled from the U.S. Supreme Court.

B. The Illinois Supreme Court Has Construed the 1870 Illinois Constitution Independently from and More Expansively than the U.S. Constitution

As support for the broad interpretation of the two *Caballes* exceptions to lockstep, this Article first explores the foundations for judicial independence stemming from Illinois case law under the predecessor 1870 Illinois constitution.[46] The case law under the 1870 constitution did not endorse or even discuss the limited lockstep doctrine described in *Caballes*.[47] Rather, if federal law was analyzed, it served only as a guide in the search for state constitutional meaning, not the exclusive source of wisdom that it would have been if the Illinois Supreme Court applied a strict lockstep approach.[48]

1. Case Law Prior to the 1970 Illinois Constitution Not Cited in Caballes

This Part discusses several cases, not cited in *Caballes*, in which the Illinois Supreme Court construed the 1870 Illinois constitution as granting greater individual rights than required by the U.S. Constitution. The following pre-1970 cases are not meant to be an exhaustive catalogue of every case in which the Illinois Supreme Court has allowed more expansive protection. Though the court did not identify its approach as a primacy or primary paradigm (as present courts and commentators use this phraseology), the court's philosophy in these cases reflects its implicit commitment to judicial independence from the U.S. Supreme Court.

A quintessential example of the Illinois Supreme Court's independence from the U.S. Supreme Court is its nineteenth-century decision

46. *See infra* Part II.B. Illinois has had four different state constitutions: 1818, 1848, 1870, and 1970. *See* ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 3 (2011). Lousin provides an excellent overview of Illinois constitutional history and a discussion of each of the provisions of the 1970 Illinois constitution. *See id.*

47. *See infra* Part II.B.

48. *See infra* Part II.B.

in *Board of Education v. Blodgett*.[49] In *Blodgett*, the Illinois Supreme Court invoked the state constitutional due process provision to strike down Illinois legislation that revived certain causes of action that had been previously barred by the running of the statute of limitations.[50] The court found that when the statute of limitations had run, the right to plead the expiration of the limitations period as a defense became a vested right within the meaning of due process under the 1870 Illinois constitution—a right that could not be usurped by legislation.[51] The court relied on the ruling principles of other states and guidance from learned treatises, which similarly found that the right to a statute of limitations defense is a vested right that remains invulnerable to legislative attack.[52]

The opposing view was represented by the U.S. Supreme Court's decision in *Campbell v. Holt*, which held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution did not protect defendants from the loss of a statute of limitations defense because such a defense was not considered "property" within the meaning of federal due process.[53] Expressly rejecting the *Holt* majority's reasoning, the Illinois Supreme Court reasoned that the dissenting opinions of Justices Bradley and Harlan properly reflected the prior decisions of the Illinois high court and the great weight of authority.[54]

In *Heimgaertner v. Benjamin Electric Manufacturing Co.*,[55] another due process case, the Illinois Supreme Court again interpreted the Illinois constitution more expansively than the U.S. Constitution. The court in *Heimgaertner* addressed the constitutionality of an Illinois statutory provision that barred employers from deducting an employee's wages for their time off work to vote.[56] The U.S. Supreme Court in *Day-Brite Lighting, Inc. v. Missouri* upheld the constitutionality of a similar law as a valid exercise of the police power, comparing it to minimum-wage legislation.[57] The Illinois Supreme Court determined, however, that *Day-Brite* was not controlling on the state due process issue, finding instead that "[i]t is the duty of each State to pass

49. Bd. of Educ. v. Blodgett, 40 N.E. 1025 (Ill. 1895).
50. *Id.* at 1026–28.
51. *Id.* at 1026.
52. *Id.* at 1026–27.
53. Campbell v. Holt, 115 U.S. 620, 628–29 (1885).
54. *See Blodgett*, 40 N.E. at 1027.
55. Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E.2d 691 (Ill. 1955).
56. *Id.* at 693.
57. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424–25 (1952).

upon the validity of its own legislation."[58] The *Heimgaertner* court noted that one commentator called *Day-Brite* "a withering ray upon constitutional protection,"[59] and cited its own precedent as well as decisions from other states that had invalidated similar laws.[60] Finding that it had a duty independent from that of the U.S. Supreme Court to determine whether the legislation passed muster under the Illinois constitution, the court struck down the legislation as violative of Illinois due process and an unwarranted extension of the police power.[61]

In the area of separation between church and state, the Illinois Supreme Court demonstrated its judicial independence from the federal courts prior to the Illinois 1970 Constitutional Convention in *People ex rel. Ring v. Board of Education.*[62] In *People ex rel. Ring*, the court held that state-organized prayer in public schools violated the constitutionally protected right to freedom of religious worship encompassed in the 1870 Illinois constitution.[63] This decision was rendered more than fifty years before the U.S. Supreme Court relied on the First Amendment to arrive at the same result in *Engel v. Vitale.*[64]

On free speech matters, the Illinois Supreme Court observed in *Village of South Holland v. Stein* that "[t]he constitution of Illinois is even more far-reaching than that of the [C]onstitution of the United States in providing that every person may speak freely, write and publish on all subjects, being responsible for the use of that liberty."[65] Accordingly, the court found that separate constitutional questions may arise under the federal and state constitutions, suggesting that each may be construed differently.[66] Applying free speech principles, the court set aside a conviction of a Jehovah's Witness for violating an ordinance that punished individuals who solicited at a private residence without a permit.[67]

Regarding jury trial guarantees, although *Apprendi v. New Jersey*[68] is considered a watershed case in the federal constitutional domain, the Illinois Supreme Court has a long history of looking to its own constitution and common law to determine the reach of the Illinois

58. *Heimgaertner*, 128 N.E.2d at 695.

59. *Id.* (quoting Note, Day-Brite Lightning, Inc. v. Missouri: *A New Light on the Constitution*, 47 Nw. U. L. REV. 252, 254 (1952)).

60. *See id.* at 695–99.

61. *See id.*

62. *See* People *ex. rel.* Ring v. Bd. of Educ., 92 N.E. 251, 251 (Ill. 1910).

63. *Id.* at 252, 255–57.

64. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).

65. Vill. of S. Holland v. Stein, 26 N.E.2d 868, 871 (Ill. 1940).

66. *See id.* at 869.

67. *See id.* at 871.

68. Apprendi v. New Jersey, 530 U.S. 466 (2000).

jury trial guarantee. In *George v. People*, decided more than a century ago, the Illinois Supreme Court held that the right to a jury trial, as it existed under common law, was engrafted into the Illinois constitution, and that under the state constitution, the jury alone was entrusted to decide the facts in a criminal case.[69] Thus, the Illinois Supreme Court has recognized jury trial protections, firmly embedded in Illinois constitutional traditions, that are at least equivalent in scope to those that the U.S. Supreme Court belatedly embraced in *Apprendi*.

The Illinois Supreme Court's seminal decision in *People v. Brocamp* demonstrates judicial independence in the search and seizure context.[70] In *Brocamp*, the Illinois Supreme Court held that the police had violated the defendant's constitutional rights by entering his home and searching his premises without first obtaining a warrant.[71] Consequently, the court further found that "as the [c]onstitution guarantees the rights of the defendant in criminal cases, there must, of necessity, be a remedy."[72] As to the particular remedy, the court held that all evidence obtained as a result of the unconstitutional search and seizure was inadmissible at trial.[73] The court premised its holding on the Illinois constitution, not the Fourth Amendment, stating specifically, "Our holding is that the unlawful search and seizure aforesaid violate the provisions of our state [c]onstitution."[74]

In 1923, when *Brocamp* was decided, the Fourth Amendment guarantee against unreasonable searches and seizures did not provide protection against constitutional abuses by state officials.[75] The U.S. Supreme Court did not extend the privacy protection of the Fourth Amendment to Illinois and the other states until 1949 when it held in *Wolf v. Colorado* that such federal constitutional guarantees were enforceable against the states through the application of the Fourteenth Amendment.[76] The Court in *Wolf* held, however, that the Fourteenth Amendment did not bar the admission of unconstitutionally obtained evidence in state courts.[77] In 1961, the U.S. Supreme Court in *Mapp v. Ohio* overruled the part of *Wolf* that declined to extend the Fourth

69. *See* George v. People, 47 N.E. 741, 743–44 (Ill. 1897).

70. People v. Brocamp, 138 N.E. 728, 732 (Ill. 1923).

71. *Id.* at 730–31.

72. *Id.* at 731.

73. *Id.* at 732.

74. *Id.*

75. *Cf.* Barron v. City of Baltimore, 32 U.S. 243, 247 (1833) (holding that the U.S. Bill of Rights did not apply to the states).

76. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

77. *Id.* at 33.

and Fourteenth Amendment exclusionary rule to the states, and held instead that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[78] Thus, the historical progression clearly demonstrates that the Illinois Supreme Court in *Brocamp* construed the Illinois constitution as providing Illinois residents with protection from unreasonable searches and seizures, as well as guarantees in state court against the admissibility of unconstitutionally obtained evidence, long before the U.S. Supreme Court.

In *City of Chicago v. Lord*, as in *Brocamp*, the Illinois Supreme Court construed the Illinois constitution more expansively than the U.S. Constitution.[79] *Lord* was a 1955 decision in which the State argued that the Illinois Supreme Court should follow the U.S. Supreme Court's holding in *Wolf* that the admissibility of unconstitutionally obtained evidence in state court does not violate the Fourth and Fourteenth Amendments.[80] The Illinois Supreme Court rejected the State's arguments and determined that *Wolf* only decided that the Fourteenth Amendment did not bar the admission of evidence obtained by unreasonable search and seizure.[81] In doing so, the court retained the Illinois constitutional exclusionary rule laid out in *Brocamp*.[82] Thus, *Lord* is a case in which the Illinois constitution guaranteed exclusionary-rule protection against unreasonable searches and seizures when the U.S. Constitution provided no such protection.

As the above discussion illustrates, *Blodgett*, *Heimgaertner*, *Ring*, *Stein*, *George*, *Brocamp*, and *Lord* are all cases in which the Illinois Supreme Court construed the provisions of the 1870 Illinois constitution as providing more expansive individual rights protection than the parallel provisions of the U.S. Constitution. Given the historical backdrop created by these cases, there can be little doubt that in the century preceding the adoption of the 1970 Illinois constitution, the Illinois Supreme Court rightly considered itself to be the supreme authority in deciding the meaning and scope of the Illinois constitution, notwithstanding the similar wording of the Illinois and U.S. constitutional provisions. The Illinois Supreme Court did not reflexively parrot U.S. Supreme Court precedent as mandatory authority when construing the Illinois constitution, but instead independently considered the pertinent U.S. Supreme Court case law.

78. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
79. *See* City of Chicago v. Lord, 130 N.E.2d 504, 505 (Ill. 1955).
80. *Id.*
81. *Id.*
82. *Id.*

Nonetheless, the *Caballes* court found that prior to 1970 the Illinois Supreme Court had followed U.S. Supreme Court precedent as conclusive in determining the meaning of the Illinois constitutional search and seizure provision.[83] In doing so, the *Caballes* court did not examine the cases that have been analyzed in this Part of the Article.[84] Instead, the court cursorily discussed other cases and claimed that these cases supported its finding that the lockstep doctrine was firmly entrenched when the delegates met to adopt the 1970 Illinois constitution.[85]

Given its premise that the lockstep doctrine was established Illinois law under the 1870 Illinois constitution, the court surmised that the drafters of the 1970 Illinois constitution, the delegates debating the language of the new constitution, and the voters who ratified it knew of the lockstep doctrine's deep roots as pre-existing law.[86] The *Caballes* court's finding of a pre-existing lockstep doctrine suggested to it that the 1970 framers intended to leave the lockstep doctrine intact, as it related to the state search and seizure clause, because the framers left the wording of the search and seizure clause of the 1970 Illinois constitution substantively unchanged from the 1870 Illinois constitution.[87]

The *Caballes* court's historical analysis, however, is flawed and incomplete.[88] Conspicuously absent in *Caballes* is any discussion of pre-1970 cases that reflected the court's long-standing practice of greater Illinois constitutional rights protection when persuasive circumstances warranted a deviation from U.S. Supreme Court precedent. As will be analyzed in the next Part of this Article, even the cases *Caballes* did discuss do not support its pre-existing lockstep premise.[89] Nor did the court in *Caballes* acknowledge the authoritative research papers that were prepared for the delegates to the 1970 Illinois Constitutional Convention, which showed that the Illinois Supreme Court was not irretrievably bound by federal law on state constitutional matters in the years leading up to the 1970 Illinois Constitutional Convention.[90]

83. *See* People v. Caballes, 851 N.E.2d 26, 32–33 (Ill. 2006).

84. *See id.*

85. *See id.*

86. *Id.* at 33.

87. *See id.* (explaining that the original right protected by the 1870 constitution was left largely intact, though the 1970 constitution included two new clauses).

88. *Cf.* Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 482–86 (2004) (finding that state courts often apply faulty historical analysis based on selective use of source material and unwarranted fictions and assumptions in ascertaining the framers' intent regarding state constitutional provisions).

89. *See infra* Part II.B.2.

90. *See infra* Part II.C.

In light of the Illinois Supreme Court's prior exercise of judicial independence in interpreting Illinois constitutional provisions, the framers' decision to retain parallel provisions of the 1870 Illinois constitution in substantially their same form indicates their intent to maintain that judicial independence.

2. *Case Law Prior to 1970 Illinois Constitution Cited in* Caballes

Caballes referenced a handfull of cases to support its premise that the Illinois Supreme Court construed the search and seizure provision of the 1870 Illinois constitution in line with the U.S. Supreme Court's interpretation of the Fourth Amendment.[91] The common principle in these cases, from which *Caballes* sought to derive support, was that because the search and seizure provision of article II, section 6 of the 1870 Illinois constitution used similar language to the Fourth Amendment, the two provisions were to be construed alike.[92]

In separately scrutinizing each of the pre-1970 cases cited in *Caballes*, this Article first analyzes *People v. Castree*, which held that the search of the defendant's home under a warrant that described a store was a violation of article II, section 6 of the 1870 Illinois constitution.[93] The court further held that evidence obtained as a result of the constitutional violation was inadmissible at trial, relying heavily on *People v. Brocamp*.[94] The court reviewed a variety of sources before determining how it would apply the exclusionary rule, ultimately explaining its rationale: "We prefer to adhere to our own decisions and those of the Supreme Court of the United States and the Supreme Courts of the states which agree with them, as founded upon the better reason."[95]

The Illinois Supreme Court's analysis in *Castree* exemplifies the primacy approach because the court followed U.S. Supreme Court precedent "as founded upon the better reason," not as the result of a binding rule of court interpretation that required it to adopt U.S. Supreme Court doctrine. The court merely consulted U.S. Supreme Court decisions, as well as state supreme court decisions from other states, for guidance in determining the best approach for Illinois. Al-

91. *See Caballes*, 851 N.E.2d at 32–33.

92. *See id.* This Article acknowledges that the Fourth Amendment and the search and seizure provision of the 1870 Illinois constitution have nearly identical phraseology. Article I, section 6 of the 1870 Illinois constitution provided in pertinent part: "[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." ILL. CONST. art. II, § 6 (1870).

93. People v. Castree, 143 N.E. 112, 113 (Ill. 1924).

94. *Id.* at 114.

95. *Id.* at 115–17.

though the court noted that the Fourth Amendment "is in practically the same words"[96] as the search and seizure provision of the Illinois constitution, the court did not suggest that federal law was a mandatory component of state constitutional interpretation, or that state courts could not construe the state constitutional provision at issue more expansively than its federal counterpart.[97]

Following *Castree*, in *People v. Reynolds*, the Illinois Supreme Court found that the Fourth Amendment was the prototype for article II, section 6 of the 1870 Illinois constitution and that "no reason is perceived why" both should not receive the same interpretation.[98] Nonetheless, the court did not hold as a matter of state law that it was barred from reading article II, section 6 as more protective of individual privacy safeguards on any given constitutional question than that employed by a U.S. Supreme Court majority opinion. The court had not been confronted with this question; in fact, lockstep analysis had not yet entered into the lexicon of state constitutional interpretation.

Later, in *People v. Grod*, the court, relying in large part on *Brocamp* and *Castree*, as well as other Illinois and U.S. Supreme Court decisions, suppressed evidence obtained in a home that was searched without a warrant in violation of the Illinois constitution.[99] The *Grod* court noted that "because of the similarities of the provisions of the Federal constitution and the Illinois constitution, the resolution of particular constitutional problems by the U.S. Supreme Court were pertinent."[100] The *Grod* court's finding that U.S. Supreme Court decisions may be "pertinent" in determining the meaning of a constitutional issue arising under the Illinois constitution is not the same as saying that those federal decisions are binding, mandatory precedent as they would be under a lockstep approach. A "pertinent" federal decision is one that is useful as persuasive authority in marshaling support for the Illinois Supreme Court's interpretation of state constitutional principles. The *Grod* case, similar to prior Illinois Supreme Court decisions, did not restrict state courts from giving a broader reading of state constitutional safeguards than federal courts construing the U.S. Constitution.

Relying on *Grod*, the court in *People v. Tillman* found that the search and seizure provisions of both the federal and state constitutions should be "construed alike and should be liberally construed in

96. *Id.* at 113.
97. *See id.* at 114–17.
98. People v. Reynolds, 182 N.E. 754, 756 (Ill. 1932).
99. People v. Grod, 53 N.E.2d 591, 593–96 (Ill. 1944).
100. *Id.* at 594.

favor of the accused."[101] The "liberally construed in favor of the accused" language connotes a preference for reading individual rights provisions expansively, not narrowly, which could not be accomplished by following strict lockstep. In addition, because *Tillman* relied on *Grod* for the above finding, U.S. Supreme Court authority should be read as "pertinent" and useful in resolving the state constitutional problem at hand, but not preclusive so as to prohibit the Illinois court from reading the state constitution more broadly than the U.S. Constitution.

In *People v. Jackson*, the Illinois Supreme Court noted in a single statement without analysis that, although it had followed the decisions of the U.S. Supreme Court on identical state constitutional issues, it relied on *Castree* and *Tillman* for this proposition.[102] Placed into the correct contextual framework of *Castree* and *Tillman*, U.S. Supreme Court precedent may be highly useful and persuasive, but it is not a straightjacket for Illinois courts. The court in *People v. Jackson* was not presented with a claim that U.S. Supreme Court precedent should be rejected in favor of a state approach that more properly safeguarded individual rights. *Jackson*, therefore, cannot be read as a lockstep case because it did not hold that Illinois would be bound to U.S. Supreme Court precedent if it was presented with a persuasive rationale under the Illinois constitution to proceed under a different approach.

Of all the pre-1970 cases cited in *Caballes*, the only one to mention *Mapp v. Ohio*,[103] even cursorily, was *People v. Williams*.[104] In *Williams*, the court again relied on *Castree* and in a single sentence without analysis stated that it had followed the decisions of the U.S. Supreme Court prior to *Mapp* in interpreting the search and seizure provision of the 1870 Illinois constitution.[105] But the Illinois Supreme Court followed prior U.S. Supreme Court decisions because it found those decisions highly relevant and persuasive, not mandatory as it would have under a lockstep approach.[106] The *Williams* court did not hold that it was bound to U.S. Supreme Court majority opinions, nor that it could not, regardless of the merits of the issue presented, deviate from federal doctrine.

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101. People v. Tillman, 116 N.E.2d 344, 347 (Ill. 1953).

102. People v. Jackson, 176 N.E.2d 803, 805 (Ill. 1961).

103. Mapp v. Ohio, 367 U.S. 643 (1961).

104. People v. Williams, 190 N.E.2d 303 (Ill. 1963).

105. *Id.* at 304.

106. *See* People v. Castree, 143 N.E. 112, 117 (Ill. 1924) (noting that the Illinois Supreme Court followed decisions of the U.S. Supreme Court that were "founded upon the better reason").

Aside from the judicial independence shown by the Illinois Supreme Court in the cases mentioned above, the U.S. Supreme Court in this historical period did not extend complete Fourth Amendment protection to aggrieved individuals against unreasonable searches and seizures by state officials. Thus, the idea that Illinois courts were legally bound to follow the Supreme Court's Fourth Amendment precedent simply does not follow.

As discussed above, prior to *Mapp v. Ohio*, federal constitutional law did not safeguard Illinois residents from unreasonable search and seizure violations by state officials through application of the exclusionary rule.[107] Thus, the Illinois Supreme Court's opinions in *Castree*, *Reynolds*, *Grod*, *Tillman*, and *Jackson*, which were rendered prior to *Mapp*, should be read as filling the gap left by the lack of Fourth Amendment protection in Illinois courts in the pre-*Mapp* era.[108] In these cases, the Illinois Supreme Court broadly construed the 1870 Illinois state search and seizure provision to ensure that individuals enjoyed freedom from unreasonable invasions of privacy against state actors, and enforced this provision by a state constitutional exclusionary rule. The pre-1970 cases that *Caballes* cited can thus be read as a manifestation of judicial independence from the structural inadequacies that federal law created prior to *Mapp*. If the Illinois Supreme Court genuinely practiced a lockstep philosophy under the 1870 Illinois constitution, then it would have, for all intents and purposes, written the search and seizure provision out of the former 1870 Illinois constitution by judicial fiat in order to render Illinois constitutional law in lockstep with the lack of Fourth Amendment protection against unreasonable searches and seizures by state violators. However, the Illinois Supreme Court did not take this radical step.

The *Caballes* court's erroneous finding of a historical basis for the lockstep doctrine unjustifiably skewed the court's analysis as to whether the delegates to the 1970 Illinois Constitutional Convention intended the Illinois Supreme Court to follow a lockstep doctrine. The *Caballes* court framed the pivotal issue as whether or not the court should abandon the long-standing lockstep doctrine.[109] However, this issue wrongly presumed that lockstep analysis governed con-

107. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (declining to extend the Fourth Amendment exclusionary rule to the states).

108. Though *Williams*, a pre-1970 case cited in *Caballes*, was decided two years after *Mapp*, the court in *Williams* relied on *Castree*, which in turn considered federal law as persuasive authority on state constitutional issues, rather than binding precedent. *See Williams*, 190 N.E.2d at 304; *see also Castree*, 143 N.E. at 117.

109. *See* People v. Caballes, 851 N.E.2d 26, 39–40 (Ill. 2006).

stitutional decision making under the 1870 Illinois constitution, which was not the approach used by the Illinois Supreme Court in its pre-1970 case law.[110] Rather, the correct question in determining the framers' intent, as it relates to the lockstep doctrine, is whether the 1970 framers sought to preserve the judicial independence that the Illinois Supreme Court had always enjoyed on state constitutional matters since Illinois's founding as a state. The research papers prepared for the 1970 Illinois Constitutional Convention recognized the Illinois Supreme Court's traditional independence from the U.S. Supreme Court on state constitutional questions and sought to extend that independence to the soon-to-be-adopted 1970 Illinois constitution, an objective that the framers endorsed.

C. The Research Papers to the 1970 Illinois Constitution

Because the *Caballes* court determined that the framers' intent is the bedrock source for interpreting the Illinois constitution, future courts should closely examine the research papers used to guide the delegates of the 1970 Illinois Constitutional Convention in crafting the text of the new constitution.[111] The 1970 framers placed considerable reliance upon two indispensable resources—*The Illinois Constitution: An Annotated and Comparative Analysis*, written by George D. Braden and Rubin G. Cohn,[112] and *Con-Con: Issues for the Illinois Constitutional Convention*, a compendium of articles on various issues relating to the 1970 Illinois Constitutional Convention.[113] The Braden and Cohn report's prefatory comments explain that the authors designed their treatise to provide the members of the 1970 Constitutional Convention with valuable historical insight into past Illinois constitutions (in particular the former Illinois constitution of 1870), the meaning of judicial interpretations of particular constitutional provisions, comparison with other states, and recommendations from the authors as to the preferred language of the soon-to-be-drafted Illinois constitution of 1970.[114] The *Con-Con* treatise's introduction noted that then-Governor Richard B. Ogilvie had commissioned several scholars to prepare impartial research papers to provide valuable in-

110. *See supra* Part II.B.

111. *See* People v. Tisler, 469 N.E.2d 147, 162–63 (Ill. 1984) (Ward, J., concurring) ("The research papers should not be overlooked in any search to determine the mind of the convention.").

112. GEORGE D. BRADEN & RUBIN G. COHN, U. OF ILL., INST. OF GOV'T & PUB. AFFAIRS, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS (1969).

113. CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION (Victoria Ranney ed., 1970) [hereinafter CON-CON].

114. *See* BRADEN & COHN, *supra* note 112, at xii.

formation and insights to assist the delegates to the 1970 Illinois Constitutional Convention in drafting a new constitution.[115]

Before showing that the research papers rebut the central tenets of the lockstep doctrine, it is first necessary to examine the doctrine's underlying premises and assumptions. Lockstep proponents claim, for example, that the use of similar or nearly identical state constitutional language in article I, section 6 of the 1970 Illinois constitution, which protects against the same unreasonable searches and seizures as the Fourth Amendment, shows that the Illinois framers intended the state provision to be interpreted co-extensively with the U.S. Constitution.[116] They further claim that the Illinois Supreme Court gave the 1870 Illinois constitutional search and seizure provision, which was similarly worded to its counterpart in the 1970 Illinois constitution, the same meaning as the Fourth Amendment.[117]

Operating from the faulty premise that a strict lockstep approach prevailed in the pre-1970 era, lockstep proponents extrapolate what they view as a key question faced by the 1970 framers—whether to expand the rights guaranteed under the state search and seizure provision to provide more individual rights protection than the Fourth Amendment.[118] Because the drafters of the 1970 Illinois constitution decided to leave the language of the guarantee against unreasonable searches and seizures largely intact from the corresponding provision of the 1870 Illinois constitution, lockstep supporters claim that the framers of the 1970 Illinois constitution intended the provision to have the same meaning as its U.S. constitutional counterpart, just as it supposedly did under the 1870 Illinois constitution.[119]

As can be seen in the Braden and Cohn treatise, however, this analysis is fundamentally unsound. For most of Illinois's constitutional history prior to 1970, as previously explored in this Article[120] and explained by Braden and Cohn,[121] the U.S. Bill of Rights was limited in scope to a check on the governmental power of federal officials rather than a safeguard against state action.[122] In the two decades prior to

115. Samuel K. Gove, *Introduction* to CON-CON, *supra* note 113, at ix, x.

116. *See Tisler*, 469 N.E.2d at 155–56; *see also* People v. Caballes, 851 N.E.2d 26, 32–33 (Ill. 2006); Vock, *supra* note 38.

117. *See supra* note 116 and accompanying text.

118. *See Tisler*, 469 N.E.2d at 155; *see also id.* at 161 (Ward, J., concurring); *Caballes*, 851 N.E.2d at 45.

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

120. *See supra* Part II.B.

121. BRADEN & COHN, *supra* note 112, at 5–6.

122. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. 243, 247–49 (1833) (holding in a case prior to the enactment of the Due Process Clause of the Fourteenth Amendment that the U.S.

1970, however, the U.S. Supreme Court had "incorporated" most of the provisions of the U.S. Bill of Rights into the Due Process Clause of the Fourteenth Amendment, thereby extending U.S. constitutional protection to the states.[123] The incorporation doctrine, according to Braden and Cohn, therefore served as a vehicle for expanding individual rights protections from state infringement in areas in which the states may not have previously provided such safeguards.[124]

As poignantly emphasized by Braden and Cohn, however, the U.S. Supreme Court, through its incorporation doctrine, was not the only source of protection against state violations of constitutional guarantees. Braden and Cohn explained that the Illinois Supreme Court had previously relied on the Illinois constitution rather than the U.S. Constitution to safeguard individual rights, thereby allowing state constitutional decisions to take "precedence" over U.S. Supreme Court opinions that narrowly construed individual rights.[125] Citing a case that exemplified the Illinois Supreme Court's traditional independence from federal doctrine, Braden and Cohn referred the 1970 constitutional delegates to *Board of Education v. Blodgett*.[126] As already discussed in this Article and further noted by Braden and Cohn, the Illinois Supreme Court in *Blodgett* applied the 1870 state due process constitutional provision to reject the U.S. Supreme Court's narrow reading of federal due process.[127]

The Illinois Supreme Court's prior history of using state constitutional provisions with similar counterparts in the U.S. Constitution to provide greater individual rights protection than that afforded under the U.S. Constitution, together with the U.S. Supreme Court's incorporation doctrine, raised the question to Braden and Cohn and the framers as to whether it was necessary to retain state constitutional provisions that had been preempted by federal law.[128] In other words, if most of the U.S. Bill of Rights is incorporated into due process and operates as a bulwark against state encroachment for the fundamental liberties defined in those amendments,[129] then why are state bill of rights provisions that merely duplicate the U.S. Bill of Rights a necessary component of the Illinois constitution? Despite the develop-

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Constitution served as a check on federal government power, but did not limit the authority of state officials).

123. BRADEN & COHN, *supra* note 112, at 5.

124. *See id.* at 6.

125. *See id.* at 6–7.

126. *See id.*; *see also* Blodgett v. Bd. of Educ., 40 N.E. 1025, 1026–28 (Ill. 1895).

127. BRADEN & COHN, *supra* note 112, at 6–7; *see also Blodgett*, 40 N.E. at 1026–28.

128. BRADEN & COHN, *supra* note 112, at 7.

129. *Id.*

ments in federal law, particularly the incorporation doctrine, Braden and Cohn recommended to the delegates of the 1970 Illinois Constitutional Convention that Illinois retain those state bill of rights provisions that had similar or identical federal counterparts, despite the arguably needless duplication of individual rights.[130] Braden and Cohn explained:

> The question may properly be asked whether there is any purpose in retaining provisions in a state bill of rights which have been "preempted" by the incorporation doctrine so as to become federally prescribed limitations upon the exercise of state power. The most persuasive case, it is submitted, favors retention in the constitution of the state.[131]

Braden and Cohn noted that one of the reasons for state retention was the primacy of state constitutional law protecting individual rights in circumstances in which the U.S. Supreme Court had denied such protection.[132]

Another reason for retaining state constitutional provisions that are parallel to provisions in the U.S. Bill of Rights, according to Braden and Cohn, was the possibility that the U.S. Supreme Court could, in the future, dilute, weaken, or eliminate U.S. constitutional protection of individual rights in state court proceedings.[133] Braden and Cohn observed:

> Here the retention of the provision is desirable . . . because there is nothing immutable about judicial interpretations of the [U.S.] Constitution. The "incorporation" doctrine itself may conceivably be modified or abandoned in all or particular existing applications by judicial re-evaluation. If this occurs, the parallel state provisions take on new vitality. It would appear, therefore, to be the course of good judgment not to discard existing state constitutional guarantees simply because the incorporation doctrine bears heavily upon their meaning and application.[134]

This principle identified by Braden and Cohn has proved to be prophetic. Since the enactment of the 1970 Illinois constitution, the U.S. Supreme Court has sharply reversed course from expanding constitutional protections to significantly reducing the scope and application of the U.S. Bill of Rights.[135]

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130. *See id.*

131. *Id.*

132. *Id.* at 6–7.

133. *Id.* at 7.

134. BRADEN & COHN, *supra* note 112, at 7.

135. *See, e.g.*, People v. Tisler, 469 N.E.2d 147, 164 (Ill. 1984) (Clark, J., concurring) ("[T]he United States Supreme Court has been cutting back on the individual liberties provided by the Warren court . . . ."); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368–69 (1982).

The framers of the 1970 Illinois constitution apparently endorsed Braden and Cohn's recommendations and justifications for retaining similar language from the parallel guarantees of the 1870 Illinois constitution in the 1970 Illinois constitution.[136] By retaining state bill of rights provisions that were duplicated in the U.S. Constitution, the framers seemingly intended to authorize the Illinois Supreme Court to construe the state bill of rights independently of and more expansively than the U.S. Constitution, just as it had done under the former 1870 Illinois constitution.[137] If the framers intended the Illinois Supreme Court to march in lockstep with the U.S. Supreme Court on all issues and in all contexts, then, presumably, they would have rejected Braden and Cohn's suggestions and found it unnecessary to retain parallel state provisions in the Illinois constitution in light of the protections afforded by the U.S. Constitution under the incorporation doctrine.

Research papers prepared for the constitutional convention contained in the *Con-Con* treatise also demonstrate that the framers intended Illinois courts to be free from the constraints of U.S. Supreme Court precedent on state constitutional issues.[138] Similar to Braden and Cohn, commentator Paul G. Kauper's article in *Con-Con* asked the delegates to consider whether it was necessary to recognize and protect rights under the Illinois constitution when such rights were already protected against state infringement by the U.S. Constitution.[139] In advising the delegates to provide for such further protection, Kauper noted, among other reasons, that a right embodied in a state constitution can be construed more expansively than the parallel right in the U.S. Constitution. He explained as follows:

> [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 [U.S.] Supreme Court. A state is free to develop its own higher standards. The Supreme Court has held that, consistent with the Constitution of the United States, a state may authorize advance censorship of movies. But a state by its own

136. *Cf.* People v. Caballes, 851 N.E.2d 26, 32–33 (Ill. 2006); *Tisler*, 469 N.E.2d at 155–56 (noting similarity in the language of the Fourth Amendment and the search and seizure clause of both the 1870 and 1970 Illinois constitutions).

137. *See* BRADEN & COHN, *supra* note 112, at 6–7.

138. *Tisler*, 469 N.E.2d at 163 (Ward, J., concurring) (noting that research papers compiled in the *Con-Con* treatise were distributed to the constitutional delegates to guide them in formulating a new constitution and could be used as an indicator of the framers' intent).

139. Paul G. Kauper, *The State Constitution: Its Nature and Purpose*, *in* CON-CON, *supra* note 113, at 3, 23 ("The question may be raised whether, since many basic rights of the person are already protected against impairment by the states under the Constitution of the United States, further recognition and protection of rights under a state constitution is necessary.").

> constitution may see fit to prohibit all forms of advance censorship.[140]

Applying Kauper's illustration, if the U.S. Supreme Court authorizes a prior restraint on the release of certain movies based on their content, then under a strict lockstep approach, the Illinois Supreme Court would be divested of the authority to reject the federal interpretation regardless of state-specific free speech grounds that mandate a different construction. As Kauper's scholarly work demonstrates, however, the delegates strived to preserve the power of state court judges to determine the meaning of the Illinois constitution, unshackled from U.S. Supreme Court precedent, by retaining state constitutional counterparts to the U.S. Constitution.

If the lockstep approach represented the governing law in effect when the 1970 framers were deciding on the content of a new constitution, then Kauper would not have informed the delegates that the Illinois Supreme Court is not bound by the decisions of the U.S. Supreme Court in interpreting state constitutional law, or that it could construe the state constitution as providing more extensive protection. Under the lockstep approach, when provisions in the Illinois and U.S. constitutions are similarly worded, the Illinois Supreme Court has no discretion to reject U.S. Supreme Court precedent. Kauper was not advocating for a change in approach from the 1870 Illinois constitution, but rather was seeking to educate the delegates to the 1970 Illinois Constitutional Convention on the existing state of the law under the 1870 Illinois constitution so that the delegates could make informed choices on the content of a new constitution.

In his article for the above referenced *Con-Con* treatise, commentator Frank P. Grad similarly noted that many of the bill of rights provisions of the prior 1870 Illinois constitution duplicated the most important provisions of the U.S. Bill of Rights.[141] For most of Illinois's history, according to Grad, the U.S. Constitution only protected individuals against constitutional violations by the U.S. government, not state officials, thus making state constitutional rights an essential bulwark against denial of rights by the state government.[142] Grad explained that after the passage of the Due Process Clause of the Fourteenth Amendment, which forbids states from depriving individuals of life, liberty, or property without due process of law, the U.S. Supreme Court started incorporating the U.S. Bill of Rights to apply its protec-

140. *Id.* at 23–24.

141. Frank P. Grad, *The State Bill of Rights*, *in* CON-CON, *supra* note 113, at 30, 31.

142. *See id.* at 31.

tions against state infringement.[143] By October of 1969, when Grad's article was published, most U.S. Bill of Rights provisions had already been applied to the states through the Fourteenth Amendment.[144]

Grad determined, as did Braden, Cohn, and Kauper, that there still was an important need for state bill of right provisions that duplicated U.S. Bill of Rights provisions, even though the most important federal constitutional rights safeguarded individuals from state abuses of power.[145] Grad explained:

> Although most important bill of rights provisions have thus become "federalized," there is a clear, continuing justification for state bills of rights. First, the state may grant greater and more far-reaching protections to its citizens than federal decisions require. For instance, the Illinois [b]ill of [r]ights does provide greater protection in the case of damages for property taken or "damaged" for public use by eminent domain. The federal Bill of Rights as applied through the Fourteenth Amendment merely establishes the minimum amount of protection afforded, leaving the states free to impose more stringent requirements if they choose to do so. In the past the minimum required under the Fourteenth Amendment has all too often been the maximum provided by the states, but there is no reason why this should persist into the future.[146]

Grad advanced this "clear, continuing justification" for state constitutional provisions that are parallel to the U.S. Constitution so that Illinois courts would retain the authority to interpret these provisions to "grant greater and more far-reaching protection to its citizens than federal decisions require."[147]

Illustrating this concept in the search and seizure context is the following example from Grad's article:

> Thus the question as to whether or not a so-called stop and frisk law would meet constitutional requirements is an issue to be decided by the [U.S.] Supreme Court, even though the courts of Illinois could give the Illinois [b]ill of [r]ights more far-reaching scope by holding such "frisks" constitutionally improper, even if they were upheld by the [U.S.] Supreme Court.[148]

In making this statement, Grad was helping the delegates understand the nature and extent of the Illinois courts' authority to construe the 1870 search and seizure provision to give more extensive privacy protections than the U.S. Supreme Court was willing to acknowledge

143. *See id.* at 32.
144. *Id.*
145. *Id.* at 32–33.
146. *Id.*
147. *See* Grad, *supra* note 141, at 32–33.
148. *Id.* at 45.

under the Fourth Amendment. Grad's use of the "clear, continuing justification" language to describe his support for retaining duplicate state constitutional rights, including the state search and seizure provision, together with his recognition that Illinois courts could give "more far-reaching" scope to these duplicate state constitutional rights, shows that he recommended that the delegates retain Illinois judicial independence under the 1970 Illinois constitution.[149]

Because the research papers, including the articles from Braden and Cohn, Kauper, and Grad, provided the delegates with insights into the meaning of the 1870 Illinois constitution and suggestions for the drafting of the 1970 Illinois constitution, the research papers are a highly relevant source in determining the framers' intent.[150] In consulting these research papers, the framers of the 1970 Illinois constitution must have wrestled with the same question posed by Braden and Cohn, Kauper, and Grad—whether provisions in the 1870 Illinois constitution that duplicate the U.S. Bill of Rights are unnecessary in light of the incorporation doctrine. As discussed above, Braden and Cohn, Kauper, and Grad all recommended retention because they determined that retention was important to preserving the Illinois Supreme Court's power to construe the Illinois constitution more expansively than the U.S. Constitution. The framers apparently followed their views because the 1970 Illinois constitution indeed retained constitutional provisions from the 1870 Illinois constitution that duplicate federal constitutional guarantees. Had the framers chosen to require the Illinois Supreme Court to always follow in lockstep with the U.S. Supreme Court, they presumably could have dispensed with Illinois bill of rights provisions that had federal counterparts.

The Illinois Supreme Court has long held that courts should eschew a constitutional interpretation that renders the meaning of a particular provision superfluous and meaningless.[151] If the lockstep approach is the governing law, then the Illinois search and seizure provision, for example, is reduced to a meaningless redundancy because the Illinois court must always apply the meaning attached to the Fourth Amendment by the U.S. Supreme Court, irrespective of the Illinois constitution. Under lockstep, the meaning and scope of constitutional protection is the same under both the Illinois constitution and the U.S. Constitution, with or without a state bill of rights, because U.S. constitutional law controls the disposition of a constitutional issue under either scenario. The framers would not have retained state constitu-

149. *See id.* at 32–33, 45.

150. *See* People v. Tisler, 469 N.E.2d 147, 163 (Ill. 1984) (Ward, J., concurring).

151. *See* Hirschfield v. Barrett, 239 N.E.2d 831, 835 (Ill. 1968).

tional provisions with federal counterparts if the corresponding state provisions had no impact on governing constitutional principles.

The correct analytical question, therefore, is not whether the 1970 framers intended to expand the individual rights guarantees of the Illinois constitution of 1870 by changing the state constitutional language to give it a broader reading than the U.S. Constitution. Rather, the proper issue that the framers addressed was whether to excise state constitutional rights that were already protected by the U.S. Constitution.

Bernard Weisberg, a member of the 1970 Illinois Constitutional Convention's bill of rights and rules committee, understood that the retention of parallel state constitutional provisions authorized the Illinois Supreme Court to interpret Illinois constitutional provisions more expansively than their analogous U.S. constitutional counterparts.[152] Weisberg was also mindful that removing a parallel state constitutional provision would abrogate the Illinois Supreme Court's authority to provide greater state constitutional protection[153]

Similarly, Elmer Gertz, the chairman of the Illinois bill of rights committee to the 1970 Illinois Constitutional Convention, correctly characterized the pertinent issue.[154] He observed that the constitutional delegates questioned whether a state bill of rights was a necessary component of the Illinois constitution, given that the U.S. Supreme Court had applied most of the U.S. Bill of Rights to the states through incorporation:

> Those charged with responsibility for a bill of rights article at the Sixth Illinois Constitutional Convention would be asked, at the outset and repeatedly, about the relationship of such an article to the first ten amendments and the Fourteenth Amendment to the [U.S.] Constitution. The prime questions would be: What do those federal amendments provide? And why are they not sufficient for all purposes here in Illinois? Legitimate questions these, and they were faced firmly during the nine months following the opening session of the convention.[155]

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152. *See* Bernard Weisberg, *Article I—Bill of Rights*, 52 CHIC. B. REC. 63, 69 n.4 (1970).

153. *Id.*

154. ELMER GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 5 (1972).

155. *Id.*; *see also* James W. Hilliard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269, 283–84 (2010) (finding that state constitutional provisions that merely duplicate the federal constitution are necessary and proper in light of state authority to "protect a certain right or liberty to a far-greater extent than is afforded under the Federal Constitution"). Whether to remove duplicative state constitutional provisions also arose in the context of the 1920 Illinois Constitutional Convention. Although the voters in 1922 rejected a new constitution, thereby leaving the 1870 Illinois constitution unchanged, *see* FRANK KOPECKY & MARY SHERMAN HARRIS, UNDERSTANDING THE ILLINOIS CONSTITUTION 5 (2001 ed.), http://www.isba.

The framers chose to retain the similarly phrased Illinois constitutional guarantees. Their retention indicates that the framers intended the Illinois Supreme Court to be empowered to exercise its sound discretion to construe provisions of the Illinois constitution differently than their parallel U.S. constitutional counterparts.

D. The Textual Origins of the Illinois Bill of Rights

The *Caballes* court found that the language used in the Illinois bill of rights is a key source for determining the meaning of a state constitutional provision and for ascertaining the framers' intent on whether they endorsed a lockstep approach.[156] Noticeably absent from the 1970 Illinois constitution, however, is any provision that requires Illinois courts to follow U.S. Supreme Court majority opinions as controlling precedent on state constitutional questions that involve a state provision that is similarly worded to a parallel federal provision.[157] Considering the long roots of the Illinois Supreme Court's judicial independence, the framers' omission of such a provision from the Illinois constitution suggested they intended to support the then-existing status quo grounded in respect for the integrity of judicial federalism.

Lockstep proponents counter that because the language of many Illinois constitutional guarantees are patterned and modeled after the federal Bill of Rights, Illinois courts should give their state constitutional provisions the same meaning and reach as the parallel provi-

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org/sites/default/files/teachers/publications/constbook.pdf., certain research papers prepared for the 1920 convention are instructive because they discussed useful concepts for interpreting the Illinois constitution. These research papers noted that the purpose of having state constitutional provisions similarly or identically worded to the federal Constitution is to enable the state supreme court to construe the state provisions more broadly than the federal provisions. The authors found that removing the state provision would allow the U.S. Supreme Court to create a uniform interpretation. *See* STATE OF ILL., LEGISLATIVE REFERENCE BUREAU, CONSTITUTIONAL CONVENTION BULLETINS, 1200–01 (1920). Apparently rejecting the idea that the Illinois constitution should always receive the same construction as the U.S. Constitution, the framers of the 1970 Illinois constitution decided to leave the duplicative state provisions intact, thereby evincing the framers' intent to preserve the power of the Illinois Supreme Court to construe the comparable state provisions more broadly.

156. *See* People v. Caballes, 851 N.E.2d 26, 43 (Ill. 2006) (quoting People v. Tisler, 469 N.E.2d 147 (Ill. 1984)).

157. If the framers intended Illinois courts to always or presumptively follow the U.S. Supreme Court, the constitutional delegates would likely have inserted a provision in the Illinois constitution expressly requiring Illinois courts to adopt a lockstep approach. The framers of the Florida state constitution, for example, enacted a 1982 constitutional amendment that obligated their protection against unreasonable search and seizure to "be construed in conformity with the [Fourth] Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court." FLA. CONST. art. 1, § 12. The absence of a similar provision in the Illinois constitution thus manifests the framers' preference for judicial independence and a rejection of lockstep principles.

sions in the U.S. Constitution.[158] Yet, the premise supporting such a conclusion is unsubstantiated given the historical evidence that U.S. constitutional provisions originated from the constitutions of the revolutionary states. Braden and Cohn's research showed that:

> In many respects [the Federal Bill of Rights] parallels, sometimes almost in verbatim form, the bill of rights provisions of the several states, a not-surprising fact as some of the states, before the adoption of the [U.S.] Constitution, had adopted their own constitutions and formulated their own bills of rights.[159]

The U.S. Supreme Court has also recognized that the Fourth Amendment was patterned after state constitutional bill of rights provisions from the Thirteen Colonies, particularly the Virginia constitution.[160] Thus, the bill of rights provisions of the several states did not originate with the federal Bill of Rights. Instead, the reverse is true; the state constitutions formed the prototype for U.S. constitutional guarantees.[161]

Also instructive on the historical beginnings of the Illinois bill of rights is a passage from a scholarly book written by Janet Cornelius.[162] Cornelius explained that the bill of rights provisions in the original 1818 Illinois constitution were patterned not only on the U.S. Constitution, and therefore, the preceding state constitutions upon which the U.S. Constitution was patterned, but also certain state constitutions that post-dated the adoption of the U.S. Constitution. Cornelius stated:

> Like all other early midwestern constitutions, the Illinois [c]onstitution contained a bill of rights modeled on those of revolutionary state constitutions and the Constitution of the United States. The wording of the Illinois [b]ill of [r]ights was taken largely from the Ohio, Kentucky, Tennessee, and Indiana constitutions,

158. *See, e.g.*, *Caballes*, 851 N.E.2d at 32–33; People v. Tisler, 469 N.E.2d 147, 155–56 (Ill. 1984). *See also* Vock, *supra* note 38.

159. BRADEN & COHN, *supra* note 112, at 5; *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977) (noting that the U.S. Bill of Rights was patterned after and modeled on provisions of the original state constitutions).

160. *See* Henry v. United States, 361 U.S. 98, 100–01 (1959) (noting that the philosophy of the Fourth Amendment originated in state constitutions); *see also* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 69 (Rowman & Littlefield 2002) (1992) ("Article [ten of the Virginia Declaration of Rights] contains the direct antecedent of the Fourth Amendment.").

161. *See* Heiple & Powell, *supra* note 19, at 1512 ("[M]any provisions common to both constitutions originated not in the [U.S.] Constitution, but instead in the constitutions of the founding states written prior to adoption of the nation's charter.").

162. JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818–1970 (1972).

> with little thought given to changes in these basic statements of individual rights.[163]

Cornelius, however, went one step further and noted that the Illinois bill of rights incorporated language from the state constitutions that came into existence after the federal Bill of Rights.

Because the Illinois bill of rights was modeled not only on the federal Bill of Rights, but also on state constitutional provisions of other midwestern states and the original Thirteen Colonies, it logically follows that the Illinois framers did not intend the Illinois Supreme Court to always provide identical meaning to the Illinois bill of rights as that accorded to the U.S. Constitution. A lockstep approach, however, would require the Illinois Supreme Court to apply the decisions of midwestern states or the Thirteen Colonies as mandatory precedent. Simply because the Illinois constitution directly or indirectly borrowed ideas from other state constitutions, however, does not warrant the Illinois courts to march in lockstep with other states' decisional law for no other reason than the Illinois constitution's linear relationship to those other state constitutions upon which the Illinois constitution was patterned.

Moreover, suppose that the U.S. Supreme Court were to reverse the incorporation doctrine and declare that the Fourth Amendment's prohibition on unreasonable searches and seizures is no longer binding on the states.[164] Under the strict lockstep doctrine, the Illinois Supreme Court would be required to follow that decision and find that the constitutional ban on unreasonable searches and seizures no longer safeguards against abuses by Illinois officials. Contrary to this potential scenario, however, the framers did not approve of the notion that article I, section 6 could be written out of the Illinois constitution simply because of an unexpected decision of the U.S. Supreme Court.[165] It defies basic principles of logic to extrapolate that the Illi-

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163. *Id.* at 16–17; *see also* Heiple & Powell, *supra* note 19, at 1513 ("While the existence of a common provision may mean that a state intended to copy a federal provision, the state provision might just as easily have instead been modeled on provisions in other *state* constitutions."); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 381 (1980) ("[T]he states that adopted new constitutions during the [decades following the enactment of the Federal Bill of Rights] took their bill of rights from the preexisting state constitutions rather than from the federal amendments.").

164. *Cf.* BRADEN & COHN, *supra* note 112, at 7 (explaining that there is a justification for retaining a state bill of rights, notwithstanding analogous federal constitutional guarantees, because "[t]he 'incorporation' doctrine itself may conceivably be modified or abandoned in all or particular existing applications by judicial re-evaluation"). The incorporation doctrine's legitimacy is not universally accepted, and some commentators question its federal constitutional foundation. *See, e.g.*, Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM. & MARY BILL RTS. J. 121, 121 (1992).

165. *See supra* Part II.

nois framers intended the same scope of protection as the U.S. Constitution, without regard to how narrow federal liberties might become.

Rather than adopt a lockstep approach, the framers of the respective constitutions of the states, including Illinois, and the United States intended for their courts to be sovereign, free from the restraints imposed by state or federal courts in other jurisdictions.[166] Under article VI, section 1 of the Illinois constitution: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."[167] Consequently, the judicial power to construe the Illinois constitution is not vested in the U.S. Supreme Court as it would be under a strict lockstep doctrine. Illinois constitutional provisions, even if similarly worded to their federal analogues, merit an independent construction free from encroachment by courts outside the Illinois domain.

E. The 1970 Illinois Constitutional Debates and Committee Reports

Another factor used by the *Caballes* court to gauge the framers' intent was the constitutional debates and committee reports.[168] Proponents of the lockstep doctrine, however, cannot garner support from the debates because no delegates who spoke at the debates expressly espoused support for such a framework. Indeed, the *Caballes* court did not claim that even a single delegate advocated for Illinois courts to fall in lockstep with the U.S. Supreme Court in determining the meaning of cognate provisions of the Illinois constitution. This lack of discussion on the lockstep doctrine in the debates supports the concept that the lockstep doctrine, as a matter of state constitutional law, did not exist when the delegates met in 1970 to debate a new Illinois constitution. As will be seen in Part III of this Article, the limited lockstep philosophy as a governing rule is a new concept, judicially created and announced several years after the adoption of the 1970 Illinois constitution in the Illinois Supreme Court's seminal 1984 decision, *People v. Tisler*.[169]

The comments of Delegate John Dvorak at the 1970 Illinois Constitutional Convention suggest that the framers neither considered nor chose the lockstep approach for the state search and seizure provision embodied in the soon-to-be-adopted article I, section 6 of the 1970

166. *See* Alden v. Maine, 527 U.S. 706, 714 (1999).
167. ILL. CONST. art. VI, § 1.
168. *See* People v. Caballes, 851 N.E.2d 26, 43 (Ill. 2006).
169. *See generally* People v. Tisler, 469 N.E.2d 163 (Ill. 1984).

Illinois constitution.[170] The same can be said with respect to the Illinois right against self-incrimination and double jeopardy embodied in article I, section 10 of the 1970 Illinois constitution. Delegate Bernard Weisberg assured other delegates at the convention that "whichever phrasing were to be put into . . . section 10, that the existing state of the law would remain unchanged."[171]

The concept of lockstep interpretation was foreign to the delegates of the 1970 Illinois Constitutional Convention. They were clearly aware, through the research papers and prior decisional law, that the Illinois Supreme Court did not consider itself inexorably tied to the views of a U.S. Supreme Court majority on state constitutional issues.[172] Thus, the delegate comments informing the convention that there would be no substantive changes in the language of duplicate state constitutional provisions, such as the search and seizure clause and the self-incrimination and double jeopardy clause, evinced their intent to maintain the existing Illinois judicial independence from the U.S. Supreme Court.[173]

The framers also demonstrated their intent through affirmative delegate commentary indicating that Illinois courts should be unshackled from any restrictive rule that limited their discretion in interpreting article I, section 6, or any other Illinois constitutional sections. The committee responsible for studying and formulating the Illinois bill of rights and making recommendations to the delegates decided that "the courts would determine, in the final analysis, what is reasonable and what is unreasonable" in ruling on whether a search or seizure would pass muster under article I, section 6.[174] Elmer Gertz, chairman of the committee, echoed this sentiment by explaining that the Illinois courts were the most appropriate decision-making body to ascertain the meaning of the Illinois constitution through case-by-case analysis.[175] Another comment by Delegate Leonard Foster is most telling: "I think that the seven gentlemen down the street who ultimately will decide what this constitution means aren't going to spend

170. *See* Verbatim Transcript of June 4, 1970, *in* 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970, at 1523–24 (1970) [hereinafter RECORD OF PROCEEDINGS] ("There is nothing new or no new concepts that the Bill of Rights Committee intended to provide insofar only as the search and seizure section—or the search and seizure concept—is concerned if, in fact, we break [section 6] down into three concepts—the section down in three concepts—as I originally stated.").

171. *Id.* at 1377.

172. *See supra* Parts II.B, II.C.

173. *See supra* Parts II.B, II.C.

174. Verbatim Transcript of June 4, 1970, *supra* note 170, at 1531.

175. *See* Verbatim Transcript of Aug. 28, 1970, *in* 5 RECORD OF PROCEEDINGS, *supra* note 170, at 4277.

their time going through all these transcripts . . . . They have got sense enough to figure it out for themselves."[176] Besides the debates, in the committee's report to the convention, the delegates stated that the meaning of the prohibition on unreasonable searches and seizures would be determined "by a process of case-by-case adjudication."[177] These comments indicate that the delegates intended the Illinois Supreme Court, not the framers' themselves, to determine what is a reasonable or unreasonable search or seizure under article I, section 6.

Additionally, the question of whether and how the Illinois framers intended to control the disposition of any given constitutional issue wrongly assumes that the framers intended their intent to matter. Insofar as the U.S. Constitution is considered, scholars are divided as to whether the framers' intent was meant to have any relevance as to how courts should resolve particular constitutional disputes.[178] For the Illinois constitution, however, the framers' intent was clear—that they would not instruct Illinois courts how to decide state constitutional issues. The framers assigned the task of determining what the Illinois constitution means in a particular factual context to the Illinois courts, headed by the Illinois Supreme Court. Therefore, speculation on how the framers would resolve a particular dispute contravenes the intent of the framers to let the Illinois Supreme Court decide.

If the delegates intended to adopt the lockstep approach, they presumably would have instructed the Illinois courts that current and future U.S. Supreme Court decisions construing the U.S. Constitution are binding as to the meaning of what is reasonable under the cognate Illinois constitutional provisions. Instead, the delegates implicitly informed the Illinois courts that they were not bound by any set meanings imposed by the delegates, or any other outside source.

In 1987, a committee was formed to examine state constitutional developments in light of the 1970 Illinois constitution.[179] As noted below, the committee expressed disapproval of Illinois court decisions that had inexorably tied the meaning of state bill of rights provisions to majority U.S. Supreme Court opinions, an implicit rebuke of the limited lockstep rule that arose out of *Tisler*. The committee stated in pertinent part:

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176. Verbatim Transcript of June 4, 1970, *in* 3 RECORD OF PROCEEDINGS, *supra* note 170, at 1533. It should be noted that as of this Article's publication, the Illinois Supreme Court consists of four men and three women.

177. *See* Committee Proposals, *in* 1 RECORD OF PROCEEDINGS, *supra* note 170, at 29–31.

178. *See* Landau, *supra* note 88, at 456 ("It is hotly debated whether the framers of the U.S. Constitution, for example, shared the view that their intentions should control future determinations as to the meaning of that document.").

179. THE 1970 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES 5 (1987).

1. In general, the courts have allowed federal interpretations of the U.S. Bill of Rights to dominate interpretation of the Illinois [b]ill of [r]ights.
2. This practice has restricted Illinois court interpretation of the right to privacy, thus limiting the substance of the right which was intended by the framers.
3. The delegates were in agreement with a reported national movement among judges to see the U.S. Bill of Rights as a floor above which state bills of rights may extend.[180]

For the reasons explained in this Part, the constitutional debates and committee proposals support a model of Illinois judicial independence free from the restraints imposed by U.S. Supreme Court precedent.

III. THE LIMITED LOCKSTEP DOCTRINE'S GENESIS FOLLOWING ADOPTION OF THE 1970 ILLINOIS CONSTITUTION AND THE CONTINUATION OF ILLINOIS JUDICIAL INDEPENDENCE

This Article has already analyzed several pre-1970 Illinois constitutional cases in which the Illinois Supreme Court relied on a variety of sources, including its own precedent, dissenting opinions from the U.S. Supreme Court, and decisions of sister-state supreme courts to arrive at constitutional outcomes that were not dictated by a U.S. Supreme Court majority rule.[181] Case law post-dating the 1970 Illinois constitution that delved into the nature and extent of the Illinois judicial power to construe the Illinois constitution and its connection to U.S. constitutional law should be analyzed within the proper historical context and structure. Although the limited lockstep doctrine did not appear in the case law leading up to the 1970 Illinois constitution, much of the Illinois constitutional law following the adoption of the 1970 Illinois constitution relies extensively on this approach. This section of the Article will explore the advent of lockstep interpretation.

The Illinois Supreme Court, in a number of cases in its post-1970 search and seizure jurisprudence, engaged in its own policy determinations as to the proper allocation of power between law enforcement and individual liberties without applying, or even acknowledging the existence of the lockstep doctrine.[182] In other opinions, in a seemingly contradictory fashion, the court has applied both the lockstep and an

180. *Id.* at 19; *see also* Kyle Hutson, Comment, *The Supreme Court Lets the Dogs Out: Reestablishing a Reasonable Suspicion Standard for Drug Dogs in Illinois*, 30 S. ILL. U. L.J. 335, 353 (2006) ("[T]he intent of the framers of the 1970 Illinois constitution was, in fact, to have the courts determine what protections to afford article I, section 6.").

181. *See supra* Part II.B.

182. *See, e.g.*, People v. Smith, 447 N.E.2d 809, 810–13 (Ill. 1983).

independent primacy approach in the same case despite the underpinnings of the lockstep approach, which ostensibly precluded the court from doing so.[183] In yet another category belong cases in which the court has recognized a lockstep rule, but has knowingly departed from that rule based on various policy reasons, to achieve an outcome that is more protective of individual rights than U.S. Supreme Court precedent.[184] This Part will explore these categories of cases in depth.

A. The Inception of the Limited Lockstep Doctrine Juxtaposed Against Illinois Tradition Supporting Judicial Independence

The limited lockstep doctrine did not arise immediately following the adoption of the 1970 Illinois constitution. As late as 1983, for example, the Illinois Supreme Court exercised judicial independence in the search and seizure context.[185] In *People v. Smith*, the Illinois Supreme Court addressed whether a warrantless search of a closed container inside a defendant's vehicle violated the warrant requirement of both the U.S. and Illinois constitutions.[186] The court rejected the U.S. constitutional claim on the authority of *United States v. Ross*.[187] The defendant in *Smith* specifically contended, however, that article I, section 6 of the Illinois constitution provided greater protection against warrantless searches of closed containers found in automobiles than that provided under *Ross*.[188]

In analyzing the Illinois constitutional question, the Illinois Supreme Court, in a unanimous opinion authored by Justice Simon, crafted a balancing test that required the court to weigh the law enforcement interest in seeking to discover illegal contraband against the defendant's interest in preserving his privacy:

> In interpreting the warrant requirement of our State constitution and applying the exclusionary rule we must carefully balance the legitimate aims of law enforcement against the interest of all our citizens in preventing unreasonable intrusions on their privacy. We believe that the Supreme Court's interpretation of the automobile exception, announced in *Ross*, achieves a fair balance between these

183. *See, e.g.*, People v. Mitchell, 650 N.E.2d 1014, 1017–18 (Ill. 1995); People v. Tisler, 469 N.E.2d 147, 155, 157 (Ill. 1984).

184. *See, e.g.*, People v. Krueger, 675 N.E.2d 604 (Ill. 1996); People v. Washington, 665 N.E.2d 1330 (Ill. 1996); People v. McCauley, 645 N.E.2d 923 (Ill. 1994); People *ex rel.* Daley v. Joyce, 533 N.E.2d 873 (Ill. 1988).

185. *See Smith*, 447 N.E.2d at 813.

186. *Id.* at 810–13.

187. *Id.* at 810–12 (citing United States v. Ross, 456 U.S. 798 (1982)).

188. *Id.* at 813.

> competing objectives, and we see no reason at this time to adopt a different standard in applying Illinois constitutional provisions.[189]

Although the Illinois Supreme Court in *Smith* rejected the defendant's state constitutional claim and followed *Ross* as a matter of state constitutional law, the above language shows that it did not endorse a lockstep approach to achieve that result. The *Smith* court's belief that the U.S. Supreme Court's interpretation of the Fourth Amendment in *Ross* "achieve[d] a fair balance" between law enforcement and privacy interests suggests that *Smith* followed *Ross* because it independently agreed with *Ross*'s reasoning. By contrast, under a lockstep approach, the question whether the Illinois Supreme Court agreed with the reasoning of the U.S. Supreme Court would be irrelevant. Because the *Smith* court followed the U.S. Supreme Court's *Ross* decision as persuasive authority instead of mandatory precedent, *Smith* should be categorized as fitting within the primacy paradigm for state constitutional interpretation. Moreover, *Smith* is a case in which the Illinois Supreme Court exemplified its judicial independence from the U.S. Supreme Court without interpreting the Illinois constitution more expansively than the U.S. Constitution.[190]

The Illinois Supreme Court's inconsistent approaches to its own judicial authority began with *People v. Tisler*.[191] The *Caballes* court labeled *Tisler*, which was decided one year after *Smith*, as the seminal decision adopting the limited lockstep approach.[192] Though *Tisler* has been read to represent the classic embodiment of the lockstep philosophy, the majority opinion is, in actuality, a conflicted decision that espouses elements of a lockstep approach and, ironically, a roadmap for state judicial independence based on *Smith*.

Tisler was a fractured four-to-three opinion on the issue of lockstep interpretation with four justices appearing to accept a limited form of lockstep interpretation and three justices outright rejecting a lockstep approach.[193] Then-Chief Justice Ryan authored the majority opinion.[194] Justice Ward, one of the four justices in the majority, wrote a concurring opinion in which he argued that the framers' intent should be the touchstone for assessing the proper analytical framework utilized by Illinois courts to determine the meaning of state constitu-

189. *Id.*

190. *See supra* note 18 and accompanying text (commentators discussing the concept that state constitutional decisions that follow federal law based on the state court's agreement with the reasoning of the federal decision is tantamount to a rejection of a lockstep approach).

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

192. People v. Caballes, 851 N.E.2d 26, 34–35 (Ill. 2006).

193. *See Tisler*, 469 N.E.2d at 148.

194. *Id.* at 150–61.

tional provisions.[195] Justice Ward concluded, however, that the framers favored the lockstep approach.[196] Justice Clark was among the detractors of the lockstep doctrine, authoring a specially concurring opinion in which he attacked the notion that the justices of the Illinois Supreme Court must be bound by U.S. Supreme Court majorities on state constitutional issues, notwithstanding the merits of the underlying U.S. Supreme Court opinion.[197] In dissent, Justices Goldenhersh and Simon agreed with Justice Clark on this point.[198]

Echoing a lockstep philosophy, Chief Justice Ryan's majority opinion discussed some prior Illinois Supreme Court opinions in which the court had followed U.S. Supreme Court decisions interpreting the Fourth Amendment in resolving state constitutional claims.[199] Using

195. *Id.* at 161–63 (Ward, J., concurring).

196. *Id.* Justice Ward reasoned that the delegates to the 1970 Illinois Constitutional Convention did not intend to expand the reach of the Fourth Amendment via the search and seizure section of article I, section 6 of the soon-to-be-adopted 1970 Illinois constitution. *Id.* The delegates, according to Justice Ward, left intact the search and seizure language from the 1870 Illinois constitution, thereby reflecting the intent of the framers not to confer expanded safeguards under the search and seizure section of article I, section 6. *Id.* Justice Ward contrasted the framers' decision not to disturb the status quo on search and seizure language with the framers expansion of the reach of equal rights protection by specifically including a new provision in the 1970 Illinois constitution granting Illinois residents a right to equal protection of the laws. *Id.* at 163.

Though Justice Ward was correct that the framers intended to expand the reach of the 1970 Illinois constitution by including additional provisions that were not part of the 1870 constitution, this does not address the framers' intent as to how Illinois courts should construe provisions of the 1970 Illinois constitution, such as the search and seizure section of article I, section 6, that have parallel provisions in the U.S. Constitution. As pointed out in this Article, the question considered by the framers was whether to retain parallel state provisions, given that the U.S. Constitution, through the Due Process Clause of the Fourteenth Amendment, extended federal Bill of Rights protections to Illinois and the other states. In deciding to retain the search and seizure section of article I, section 6 in the 1970 Illinois constitution, the framers expressed their intent to maintain the then-existing discretionary power of the Illinois Supreme Court to construe the Illinois constitution differently from U.S. Supreme Court constructions of the U.S. Constitution. Justice Ward erroneously failed to comprehend that the framers were concerned about preserving judicial federalism and independence rather than whether the Illinois search and seizure provision should confer additional safeguards not provided by the Fourth Amendment.

197. *Id.* at 163–66 (Clark, J., concurring).

198. *Id.* at 166–67 (Goldenhersh, J., dissenting).

199. *See Tisler*, 469 N.E.2d at 155–57. The *Caballes* court cited two post-1970 Illinois Supreme Court decisions, *People v. Rolfingsmeyer* and *People v. Hoskins*, as support for the court's limited lockstep rule. People v. Caballes, 851 N.E.2d 26, 33–34 (Ill. 2006) (citing People v. Rolfingsmeyer, 461 N.E.2d 410, 412 (Ill. 1984); People v. Hoskins, 461 N.E.2d 941, 945 (Ill. 1984)). Those decisions were issued in the same year as *Tisler*, but prior to *Tisler*'s release. In both *Hoskins* and *Rolfingsmeyer*, the court examined the constitutional debates to determine whether the framers of the Illinois constitution intended to expand the protections granted under the U.S. Constitution with regard to the Fourth and Fifth Amendment issues considered in those cases. Having found no such intent in the debates, the court declined to construe the state constitution differently than the U.S. Constitution in these contexts. However, these cases did

this history as a basis to craft a rule to guide itself and the lower state courts, Chief Justice Ryan found that Illinois courts, in construing the search and seizure provision of the Illinois constitution, must follow Fourth Amendment jurisprudence of the U.S. Supreme Court unless the framers intended, as expressed through the state constitutional language, the debates, or the committee reports of the constitutional convention, to show that the Illinois constitutional provision is to be construed independent of the U.S. Constitution.[200] Chief Justice Ryan stated the limited lockstep rule as follows:

> After having accepted the pronouncements of the Supreme Court in deciding [F]ourth [A]mendment cases as the appropriate construction of the search and seizure provisions of the Illinois [c]onstitution 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 [F]ourth [A]mendment rights under the Supreme Court's decision in *Illinois v. Gates*. Any variance between the Supreme Court's construction of the provisions of the [F]ourth [A]mendment in the [U.S.] Constitution and similar provisions in the Illinois [c]onstitution must be based on more substantial grounds. We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the [U.S.] Constitution, after which they are patterned.[201]

The above quotation suggests that the court in *Tisler* found that the U.S. Supreme Court's mere use of a restrictive approach toward individual rights in construing the Fourth Amendment is not itself a sound basis to depart from the U.S. Supreme Court precedent, unless the departure is linked to a showing that the framers intended to allow the Illinois Supreme Court to construe a specific state provision differently than its federal analogue.[202] As discussed above, the framers'

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not find that the framers intended Illinois courts to follow U.S. Supreme Court decisions as mandatory precedent on the corresponding state constitutional issue, that is, *Hoskins* and *Rolfingsmeyer* did not adopt a lockstep-style philosophy as a constitutional rule that Illinois courts were required to follow. Accordingly, the court in these cases did not impose limits on the discretion of Illinois courts to construe the meaning of the Illinois constitution differently than the U.S. Constitution, which did not occur until *Tisler*. *Compare Tisler*, 469 N.E.2d 147, 157 (Ill. 1984), *with* People v. Hoskins, 461 N.E.2d 941, 941 (Ill. 1984), *and* People v. Rolfingsmeyer, 461 N.E.2d 410, 410 (Ill. 1984).

200. *See Tisler*, 469 N.E.2d at 157.

201. *Id.*; *accord Caballes*, 851 N.E.2d at 36. Though *Tisler* was correct that the Illinois Supreme Court had accepted many holdings of the U.S. Supreme Court in the past, the majority opinion failed to explain that it adopted those federal decisions because it agreed with their reasoning, not because it was required to do so under a judicially created rule. *See supra* Part II.B.2.

202. *See Tisler*, 469 N.E.2d at 157.

objective in retaining state constitutional provisions similarly worded to provisions in the U.S. Constitution was to permit the Illinois Supreme Court to more expansively construe the state provision based on its own reasoned judgment, thereby undermining the foundation for the Illinois lockstep doctrine created in *Tisler*.[203]

In the paragraph immediately following the *Tisler* majority opinion's description of its limited lockstep rule, the court, without explanation, undercut the lockstep rule it just announced by applying its own reasoned judgment independent of federal law to resolve the defendant's state constitutional claim. Before addressing this portion of the court's opinion, however, the particular constitutional question addressed by *Tisler* should be explored to provide a meaningful framework for analyzing this concept.

Under the U.S. Supreme Court's two-pronged *Aguilar-Spinelli* test, for a warrant supported by an informant's tip to pass Fourth Amendment muster, the magistrate issuing the warrant must be informed of the reasons for believing that the informant is reliable and credible, and must be informed of some of the underlying circumstances relied on by the person providing the information.[204] As a matter of Fourth Amendment law, the Illinois Supreme Court had applied the *Aguilar-Spinelli* standard until the U.S. Supreme Court replaced it with a totality-of-the-circumstances approach in *Illinois v. Gates*.[205] Though *Gates* was controlling in the Illinois courts on the Fourth Amendment question, the defendant in *Tisler* argued that the Illinois Supreme Court should reject *Gates* and continue to use the *Aguilar-Spinelli* test on state constitutional grounds.[206]

In resolving the defendant's state constitutional claim, the *Tisler* court, after announcing its lockstep rule, paradoxically relied on its one-year-old balancing test crafted in *Smith* as the governing standard for assessing claims arising under article I, section 6 of the Illinois constitution:

> Decisions involving the exclusionary rule and the Illinois [c]onstitution's article I, section 6, require that we carefully balance the legitimate aims of law enforcement against the right of our citizens to be free from unreasonable governmental intrusion. With this in mind, we note our agreement with the *Gates* conclusion regarding the *Aguilar* standard. The two-pronged test correctly stressed reliability, but its rigid rules were inconsistent with a non-

203. *See supra* Part II.C.

204. Aguilar v. Texas, 378 U.S. 108, 114 (1964); Spinelli v. United States, 393 U.S. 410, 415–16 (1969).

205. *See Tisler*, 469 N.E.2d at 154–56 (citing Illinois v. Gates, 462 U.S. 213, 230–31 (1983)).

206. *Id.* at 155.

> technical, common-sense approach to the probable-cause requirement. Like the Supreme Court, we think that the totality-of-circumstances approach will achieve a fairer balance between the relevant public and private interests. Accordingly, we adopt the *Gates* standard for resolving probable-cause questions under the Illinois [c]onstitution that involve an informant's tip.[207]

This language is an implicit disapproval of the lockstep doctrine. The Illinois Supreme Court did not adopt *Gates* and reject *Aguilar-Spinelli* because it was required to follow U.S. Supreme Court precedent in resolving state constitutional claims. Rather, the court criticized the *Aguilar-Spinelli* test and embraced *Gates* because *Gates*'s totality-of-circumstances approach "achieve[d] a fairer balance."[208] The court in *Tisler* applied its own judgment independent of the Supreme Court and relied on *Gates* as persuasive authority, a distinctive feature of a primacy approach to state constitutional adjudication.

Instead of abdicating its responsibilities to construe the Illinois constitution independently, the *Tisler* court appropriately exercised its discretion, with the balance tipping to the law enforcement side of the equation. Under the lockstep approach, the court would have had no discretion to agree or disagree with *Gates*; rather, it would have been required to apply that decision reflexively. The court's use of a balancing test demonstrates that the Illinois Supreme Court recognized its freedom to reject or accept U.S. Supreme Court precedent and utilized its own reasoned analysis on state search and seizure issues.

Following *Tisler* and prior to *Caballes*, the Illinois Supreme Court applied the lockstep approach in several cases in which it was called upon to construe article I, section 6. The court in *Caballes* cited three cases—*People v. Cox*,[209] *People v. Lampitok*,[210] and *People v. Mitchell*[211]—as illustrative of this development.[212] Among these cases, *Mitchell* is significant because in that case the Illinois Supreme Court recognized that it had a duty to determine whether police conduct violated the Illinois constitution by independently "balanc[ing] the legitimate aims of law enforcement against the interest of all our citizens in preventing unreasonable intrusions on their privacy," a standard that harkened back to *Smith* and *Tisler*.[213] At issue in *Mitchell* was whether the plain touch doctrine announced by the U.S. Su-

207. *Id.* at 157 (citations omitted).
208. *Id.*
209. People v. Cox, 782 N.E.2d 275 (Ill. 2002).
210. People v. Lampitok, 798 N.E.2d 91 (Ill. 2003).
211. People v. Mitchell, 650 N.E.2d 1014 (Ill. 1995).
212. People v. Caballes, 851 N.E.2d 26, 36–37 (Ill. 2006).
213. *Mitchell*, 650 N.E.2d at 1020 (quoting People v. Smith, 447 N.E.2d 809, 813 (Ill. 1983)).

preme Court in *Minnesota v. Dickerson*[214] was unconstitutional under article I, section 6.[215] As held in *Dickerson*, an officer conducting a *Terry* pat-down search who discovers contraband through the sense of touch may seize the contraband consistent with the Fourth Amendment.[216] In *Mitchell*, when analyzing whether the *Dickerson* rule violated the Illinois constitution, the Illinois Supreme Court applied the limited lockstep principles from *Tisler*, and held that the seizure at issue did not abridge the search and seizure provision of article I, section 6.[217]

Though upholding the state constitutionality of the plain touch seizure under the limited lockstep doctrine, the *Mitchell* court was cognizant that it was also required to undertake its correlative responsibility to independently weigh the competing interests of law enforcement against the individual right to be free from unreasonable intrusions under the Illinois constitution.[218] In conducting the required balancing, the Illinois Supreme Court accepted the U.S. Supreme Court's resolution of the competing law enforcement and privacy interests in *Dickerson* as proper.[219] The court noted, however, that "significant to [its] acceptance" of *Dickerson* was Illinois's longstanding history, prior to *Dickerson*, recognizing the constitutional validity of the plain view doctrine, from which the *Dickerson* plain touch principles naturally flow.[220] The important point of the language in *Mitchell* is that the court premised its endorsement of *Dickerson* not only on limited lockstep principles, but also the independent vitality of pre-existing Illinois law, which supported the principles espoused in *Dickerson*.[221]

Insofar as the court had previously endorsed the limited lockstep approach, the *Mitchell* court described its decision making in this regard as an "election to follow the U.S. Supreme Court's interpretation."[222] The use of the word "election" signifies that the court recognized, as a matter of judicial policy, that it had a choice, rather than a duty, to follow a particular U.S. Supreme Court decision. The *Mitchell* court also described its election to follow the U.S. Supreme

214. Minnesota v. Dickerson, 508 U.S. 366 (1993).

215. *Mitchell*, 650 N.E.2d at 1017.

216. *Dickerson*, 508 U.S. at 373.

217. *Mitchell*, 650 N.E.2d at 1017–18.

218. *See id.* at 1020.

219. *Id.*

220. *See id.*

221. *See id.*

222. *Id.*

Court as "both expedient and appropriate."[223] This language implies that the court may decline to follow a U.S. Supreme Court decision if that decision was neither expedient nor appropriate. As if to remind future parties and courts of its judicial independence from the U.S. Supreme Court, the court in *Mitchell* further emphasized that the Illinois Supreme Court is not "precluded from engaging in [its] own independent analysis, particularly when confronted with issues not addressed in the *Dickerson* opinion."[224] Significant weight should be given to the fact that the court did not limit its declaration of judicial independence to issues not addressed by the U.S. Supreme Court. In summary, *Mitchell* is a case in which the Illinois Supreme Court not only applied the limited lockstep doctrine, but also recognized its independent authority to balance the respective needs of law enforcement against individual freedoms.

Despite the Illinois Supreme Court's pronouncement of a limited lockstep doctrine in *Tisler*, the *Caballes* court referred to four other Illinois Supreme Court cases since *Tisler* that exemplified judicial independence, or at least reflected a robust interpretation of the interstitial approach.[225] In each of these cases, the court expanded individual rights protection under the Illinois constitution beyond that afforded by the U.S. Constitution.[226]

In *People v. Krueger*, for example, the Illinois Supreme Court invoked the balancing test utilized by *Smith*, *Tisler*, and *Mitchell* as an instrument to independently construe article I, section 6 and reject U.S. Supreme Court precedent.[227] Though application of the balancing test in *Smith*, *Tisler*, and *Mitchell* ultimately resulted in a favorable

223. *Mitchell*, 650 N.E.2d at 1020.

224. *Id.*

225. *See* People v. Caballes, 851 N.E.2d 26, 37–39 (Ill. 2006). Additional case law exists subsequent to *Tisler* that recognized Illinois judicial independence and eschewed lockstep construction, but was not cited by *Caballes*. *See, e.g.*, People v. Duncan, 530 N.E.2d 423, 429 (Ill. 1988) ("[I]t is clear that the Illinois courts have for about a century warily approached the admissibility of nontestifying codefendants' statements and have done so quite independently of the Federal constitutional doctrine underlying [U.S. Supreme Court cases]."); People v. Williams, 695 N.E.2d 380, 390 (Ill. 1998) (affirming and quoting *Duncan* for the proposition that the admission of a codefendant's "statements at a joint trial, absent a total deletion of all references to defendant, violated established Illinois case law that is independent of [U.S.] constitutional doctrine." (internal quotation marks omitted)). Also manifesting judicial independence under the 1970 Illinois constitution, but not cited by *Caballes*, are *Rollins* and *Smith*. *See* Rollins v. Ellwood, 565 N.E.2d 1302 (Ill. 1990); People v. Smith, 447 N.E.2d 809 (Ill. 1983).

226. The Illinois Supreme Court can insulate a state constitutional decision that guarantees broader individual safeguards than the U.S. Constitution from U.S. Supreme Court review by simply including a clear statement that adequate and independent state grounds exist to support its decision. *See Caballes*, 851 N.E.2d at 42 (citing Michigan v. Long, 463 U.S. 1032, 1041 (1983)).

227. *See* People v. Krueger, 675 N.E.2d 604, 612 (Ill. 1996) (quoting People v. Tisler, 469 N.E.2d 147, 157 (Ill. 1984)).

outcome for the government, the court in *Krueger* found that individual privacy interests outweighed law enforcement in the context of the particular issue addressed.[228] After determining that a state statute that provided for no-knock warrants was unconstitutional, the court disavowed the U.S. Supreme Court's five-to-four decision in *Illinois v. Krull*, which declined to apply the federal exclusionary rule in this setting.[229] Instead, the Illinois Supreme Court relied on its previously articulated balancing test and the Illinois exclusionary rule to bar the admission of evidence obtained as a result of police officers acting under the authority of a constitutionally invalidated statute.[230] In doing so, the court declared that it "knowingly depart[ed]" from the lockstep doctrine.[231] In rejecting the *Krull* majority opinion, the Illinois Supreme Court relied heavily on Justice O'Connor's dissenting opinion in *Krull*, its own prior precedent, the decisions of the courts of sister states, and the views of distinguished legal scholars.[232]

As in *Krueger*, the Illinois Supreme Court rejected U.S. Supreme Court precedent on state constitutional grounds in *People v. Washington*.[233] At issue in *Washington* was whether a free-standing claim of innocence was cognizable under the Illinois constitution's due process guarantee so as to enable a claim for post-conviction relief to be brought under the Illinois Post-Conviction Hearing Act.[234] Before examining the state constitutional issue, the court closely examined the U.S. Supreme Court's decision in *Herrera v. Collins*, which held that free-standing claims of innocence brought in a U.S. habeas proceeding had no constitutional basis under the Fourteenth Amendment Due Process, or the Eighth Amendment ban on cruel and unusual punishment.[235] Relying on *Herrera*, the *Washington* court rejected the defendant's free-standing innocence claim under the U.S. Constitution.[236]

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228. *Id.* at 612.

229. *Id.* at 606 (citing Illinois v. Krull, 480 U.S. 340 (1987)).

230. *Id.* at 612.

231. *Id.* at 611. The court in *Caballes* questioned whether *Krueger* should be read as a departure from the lockstep doctrine and reasoned that *Krueger* was a case about the appropriate remedy for a constitutional violation, not the lockstep doctrine. *Caballes*, 851 N.E.2d at 39. A subsequent Illinois Appellate Court decision criticized the soundness of the *Caballes* court's suggestion that *Krueger* was not a departure from lockstep in light of the *Krueger* court's clear statement that it "knowingly depart[ed]" from lockstep, as well as internally contradictory statements in *Caballes* that treated *Krueger* as a lockstep case. *See* People v. Glorioso, 924 N.E.2d 1153, 1160 (Ill. App. Ct. 2010).

232. *Krueger*, 675 N.E.2d at 610–12.

233. *See* People v. Washington, 665 N.E.2d 1330, 1335–37 (Ill. 1996).

234. *Id.* at 1335–37 (Ill. 1996); *see also* 725 ILL. COMP. STAT 5/122-1 to -8 (2010).

235. *See Washington*, 665 N.E.2d at 1333 (citing Herrera v. Collins, 506 U.S. 390 (1993)).

236. *Id.* at 1335.

The court next examined whether the due process clause under article I, section 2 of the 1970 Illinois constitution provided the defendant with an alternative source of relief.[237] The court began its state constitutional analysis by examining the language of federal and state constitutional due process provisions and the framers' views as expressed in the debates.[238] The court noted, however, that the due process language of the Illinois constitution was basically the same as the U.S. Constitution's Fourteenth Amendment Due Process Clause and, moreover, that the debates were silent as to whether the drafters intended Illinois due process to have a different meaning than its federal counterpart.[239] Nonetheless, the Illinois Supreme Court found that it was not constrained by lockstep principles discussed in *Tisler*.[240]

The court continued to examine other sources on which it could base a rejection of the U.S. Supreme Court's majority opinion in *Herrera*. In criticizing *Herrera* as a matter of state due process, the court relied on the dissenting and concurring opinions in *Herrera*, as well as decisions of sister-state courts that recognized free-standing claims of actual innocence under their respective state habeas laws.[241] Ultimately, the court recognized the right to raise a free-standing claim of actual innocence under state due process based on newly discovered evidence.[242]

The *Washington* court also cited its earlier decision in *People v. McCauley* as support for its proposition that it was free from the constraints of the lockstep doctrine.[243] In *McCauley*, the police denied the defendant access to the attorney retained by his family for a custodial interrogation and failed to inform the defendant about his attorney's efforts to consult with him.[244] As a result, the defendant made incriminating statements during his custodial interrogation.[245] At issue was whether the defendant waived his right to counsel and whether his incriminating statements should be suppressed under either the U.S. Constitution or the Illinois constitution.[246]

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237. *See id.*
238. *See id.*
239. *See id.*
240. *See id.*
241. *See Washington*, 665 N.E.2d at 1335.
242. *Id.* at 1337.
243. *Id.* at 1335.
244. *See* People v. McCauley, 645 N.E.2d 923, 927–29 (Ill. 1994).
245. *Id.* at 927.
246. *See id.* at 928.

The *McCauley* court examined the U.S. Supreme Court's decision in *Moran v. Burbine*[247] to determine whether such police misconduct invalidated the defendant's waiver of his Fifth Amendment rights.[248] The court determined that, under the Fifth Amendment as construed by *Burbine*, the suspect's waiver of his right to counsel was constitutionally permissible, notwithstanding any police deception.[249]

The U.S. constitutional answer, however, did not end the inquiry. The Illinois Supreme Court proceeded to consider whether such police misconduct violated the suspect's Illinois constitutional right to due process.[250] The court determined that *Burbine* did not pass constitutional muster under the stricter state constitutional standards, which prohibited police from deliberately preventing a suspect undergoing custodial interrogation from receiving assistance of counsel.[251] In rejecting *Burbine* as a matter of state constitutional due process, the Illinois Supreme Court relied on its (1) own precedent; (2) decisions of the U.S. Supreme Court prior to *Burbine*; (3) the Braden and Cohn treatise; (4) *Burbine*'s explicit allowance for state courts to disavow its reasoning under their respective state constitutions; (5) state court opinions accepting this invitation and disagreeing with *Burbine*; (6) and proceedings from the 1970 Illinois Constitutional Convention.[252]

Also manifesting judicial independence from the U.S. Supreme Court is the Illinois Supreme Court's decision in *People ex rel. Daley v. Joyce*.[253] At issue in *Joyce* was the state constitutionality of section 115-1 of the Illinois Code of Criminal Procedure, which granted the State a right to a jury in certain types of drug offense prosecutions.[254] Had the Illinois Supreme Court applied the lockstep doctrine, it would have affirmed the constitutionality of section 115-1 because the U.S. Supreme Court upheld the constitutionality of a similar federal rule of criminal procedure.[255] Declining to follow the U.S. Supreme Court, the Illinois Supreme Court held section 115-1 unconstitutional and recognized an Illinois constitutional right to a bench trial for criminal defendants.[256]

247. Moran v. Burbine, 475 U.S. 412 (1986).
248. *McCauley*, 645 N.E.2d at 928–29.
249. *Id.*
250. *See id.* at 929–39.
251. *Id.* at 929.
252. *See id.* at 929–39.
253. *See* People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 874–75 (Ill. 1988).
254. *See id.* at 874.
255. *See id.* at 875.
256. *See id.* at 879.

B. People v. Caballes *and the Illinois Supreme Court's Present Approach to Limited Lockstep*

In contrast to post-*Tisler* decisions such as *Krueger*, *Washington*, *McCauley*, and *Joyce*, which departed from the lockstep approach, many recent decisions have applied the lockstep doctrine to reject state constitutional claims.[257] A recent appellate court decision remarked that the Illinois Supreme Court "has not always been clear or consistent in its approach" to its lockstep doctrine.[258] It is against this backdrop of seemingly inconsistent application that this Article addresses the Illinois Supreme Court's seminal four-to-three decision in *People v. Caballes*.

The new wrinkle espoused in *Caballes*, which was not explicitly stated in the court's prior case law, is that the court must correlate constitutional interpretation with the intent of the framers of the 1970 Illinois constitution.[259] While rendering its assessment of the framers' intent, the court expressly rejected the claim that it had applied a strict lockstep doctrine in previous decisions.[260] Rather, the court explained that it had previously embraced either an "interstitial or perhaps a limited lockstep approach."[261] The court examined Illinois constitutional history as it pertained to the lockstep doctrine, which included a discussion of recent departures from the lockstep doctrine in *Krueger*, *Washington*, *McCauley*, and *Joyce*, and affirmed its interstitial or limited lockstep doctrine.[262]

Though the court considered the lockstep approach to be the general rule in the search and seizure context, the court explained that it could diverge from U.S. Supreme Court precedent if the proponent of the divergence could show either one of two exceptions: (1) that the framers' intent supported a different interpretation; or (2) that "state tradition and values as reflected in long-standing state case precedent" justified a different approach.[263] The court justified the first exception by citing *Tisler*'s limited lockstep statement that the court may examine the Illinois constitutional language, debates, and committee reports as grounds for construing the Illinois constitution differently from the U.S. Constitution.[264] The *Caballes* court then concluded that

257. *See, e.g.*, People v. Caballes, 851 N.E.2d 26, 36–37 (Ill. 2006).
258. People v. Glorioso, 924 N.E.2d 1153, 1156 (Ill. App. Ct. 2010).
259. *See Caballes*, 851 N.E.2d at 45.
260. *See id.* at 42.
261. *Id.*
262. *See id.* at 37–45.
263. *See id.* at 45.
264. *See id.* at 43 (citing People v. Tisler, 469 N.E.2d 147 (Ill. 1984)).

in its prior decisions in *Krueger* and *Washington*, the court allowed state traditions and values, as reflected through case law, to warrant a second exception to the lockstep approach.[265] Despite the exceptions to lockstep, however, the court adopted what it characterized as its basic premise; in general, the framers intended to attribute the same meaning for the search and seizure section of article I, section 6 as the U.S. Supreme Court employs for the Fourth Amendment.[266]

After finding that the limited lockstep doctrine represented the proper approach, the Illinois Supreme Court proceeded to apply its doctrine.[267] Accordingly, the Illinois Supreme Court considered whether to deviate from the lockstep approach and reject, on state constitutional grounds, the U.S. Supreme Court's holding in *Illinois v. Caballes* that a canine sniff of an automobile is not a search within the meaning of the Fourth Amendment.[268] Justice Garman, writing for the narrow four-justice majority, considered, among other sources, state supreme court decisions from Minnesota and Pennsylvania, as well as an appellate decision from Alaska, to determine whether article I, section 6 of the Illinois constitution required canine sniffs to be supported by a reasonable, articulable suspicion of criminal activity—a different standard than that used by the U.S. Supreme Court in *Illinois v. Caballes*.[269]

Although the Minnesota,[270] Pennsylvania,[271] and Alaska[272] state courts rejected the U.S. Supreme Court's *Caballes* decision under their respective state constitutions, Justice Garman found these decisions unpersuasive when viewed through the prism of the Illinois limited lockstep doctrine.[273] Justice Garman further found that nothing in the language of article I, section 6 or the constitutional debates suggested that the use of trained police dogs to look for illicit drugs in an automobile could be considered an unreasonable search under the Illinois constitution.[274] Justice Garman therefore concluded that the canine sniff of the defendant's automobile was not a search within the meaning of article I, section 6 and upheld the state constitutional validity of the canine sniff.[275]

265. *Caballes*, 851 N.E.2d at 45.
266. *Id.*
267. *See id.*
268. *See* Illinois v. Caballes, 543 U.S. 405, 409 (2005), *remanded to* 851 N.E.2d 26 (Ill. 2006).
269. *See Caballes*, 851 N.E.2d at 45–46.
270. *See* State v. Carter, 697 N.W.2d 199, 210 (Minn. 2005).
271. *See* Commonwealth v. Johnston, 530 A.2d 74, 79 (Pa. 1987).
272. *See* McGahan v. State, 807 P.2d 506, 509 (Alaska Ct. App. 1991).
273. *See Caballes*, 851 N.E.2d at 45–46.
274. *Id.* at 46.
275. *Id.*

Justice Freeman, writing for himself and Justices McMorrow and Kilbride in dissent, agreed with the majority that the court had previously applied a construct resembling "a form of the 'interstitial approach.'"[276] Justice Freeman noted that an Illinois court relying on the interstitial approach could divert from federal law for three reasons: (1) a flawed federal analysis; (2) structural differences in the state and federal courts; or (3) unique state characteristics.[277] In reviewing cases in which the Illinois Supreme Court had departed from Supreme Court precedent, Justice Freeman found that the Illinois Supreme Court had rejected lockstep for reasons that echoed these three rationales.[278]

After citing these examples of the Illinois Supreme Court's departure from lockstep, Justice Freeman declared that the Illinois Supreme Court erred in following the U.S. Supreme Court's majority opinion in *Illinois v. Caballes*.[279] Justice Freeman relied in large part on Justice Ginsburg's dissenting opinion in *Illinois v. Caballes* and provided reasons as to why her opinion was more persuasive than the majority's decision.[280] Accordingly, Justice Freeman concluded that a canine sniff of the defendant's automobile was an unreasonable search that violated article I, section 6 of the Illinois constitution because the police had no reasonable suspicion that the occupants of the car were engaged in criminal activity.[281]

Justice Garman's majority opinion and Justice Freeman's dissent, though reaching different results as to whether to deviate from lockstep on a narrow issue, can nevertheless be harmonized on the broader issue regarding the criteria that may be considered to support a rejection of U.S. Supreme Court precedent. Justice Garman's majority opinion recognized that Illinois's long-standing practices, traditions, and values present a principled basis for deviating from the limited lockstep doctrine.[282] Relying on *Krueger* and *Washington*, Justice Freeman further observed that the Illinois Supreme Court has de-

276. *Id.* at 57–58 (Freeman, J., dissenting).

277. *Id.* at 58 (citing State v. Gomez, 932 P.2d 1, 7 (N.M. 1997)).

278. *See id.* To illustrate, Justice Freeman recalled that the court in *Krueger* had renounced applicable federal law due to a poorly reasoned U.S. Supreme Court majority opinion. *Id.* Justice Freeman also noted that the *Washington* decision provided a state law basis for adjudicating post-conviction claims of actual innocence because federal law lacked a forum for such claims, thereby highlighting differences in the structure of the state and federal judicial systems. *Id.*

279. *See Caballes*, 851 N.E.2d at 58.

280. *Id.*

281. *Id.*

282. *Id.* at 45 (majority opinion) ("[T]his court adopted a limited lockstep approach in *Tisler* and modified it in *Krueger* and *Washington* to allow consideration of state tradition and values as reflected by [long-standing] state case precedent.").

parted from Supreme Court precedent based on its determination that the precedent was poorly reasoned, or because of differences in the structure of the state and federal systems, or unique Illinois values.[283]

Each of the three factors cited by Justice Freeman for permitting a deviation from lockstep fit neatly within the traditional practices and values exception to the lockstep rule set out by Justice Garman. Not only *Krueger* and *Washington*, as Justice Freeman pointed out, but also several other Illinois Supreme Court cases, reaching back as far as the nineteenth century, have diverged from the U.S. Supreme Court's constitutional precedent by implicitly applying the factors noted by Justice Freeman.[284] Several cases previously discussed in this Article illustrate the Illinois Supreme Court's practice of adopting a different approach from a flawed federal analysis, which corresponds with the second *Caballes* exception to the lockstep doctrine. A brief overview of this tradition must include the Illinois Supreme Court's 1895 decision in *Board of Education v. Blodgett*.[285] In *Blodgett*, the Illinois Supreme Court rejected the U.S. Supreme Court majority opinion's due process interpretation in *Campbell v. Holt*[286] and aligned itself instead with the approach of the *Holt* dissent, its own prior precedent, and state supreme courts from other jurisdictions.[287] The court summarized its reasons for endorsing the dissenting opinion in *Holt* as better reasoned than the majority opinion:

> The doctrine of the dissenting opinion is most in consonance with former decisions of this court, and is supported by the great weight of authority. That opinion seems to us to present the better view. It expresses so strongly and so well our understanding of the law that we will quote from it at length.[288]

Moreover, the Illinois Supreme Court expressed its disapproval of Supreme Court precedent in its 1955 decision in *Heimgaertner v. Benjamin Electric Manufacturing Co.*, noting a law review article that called the U.S. Supreme Court's decision in *Day-Bright Lighting, Inc. v. Missouri*[289] "a withering ray upon constitutional protection."[290] The *Heimgaertner* court declined to follow *Day-Bright*, which in turn had refused to invalidate certain legislation under federal due process;

283. *Caballes*, 851 N.E.2d at 58 (Freeman, J., dissenting).

284. *See supra* Parts II.B.1, III.A.

285. Bd. of Educ. v. Blodgett, 40 N.E. 1025 (Ill. 1895).

286. Campbell v. Holt, 115 U.S. 620 (1885).

287. *See Blodgett*, 40 N.E. at 1026–28.

288. *Id.* at 1027.

289. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424–25 (1952).

290. Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E.2d 691, 695 (Ill. 1955) (citing Note, Day-Brite Lightning, Inc. v. Missouri: *A New Light on the Constitution*, 47 NW. U. L. REV. 252, 254 (1952)).

instead, the court struck down similar legislation as violating the Illinois constitution, finding that "[i]t is the duty of each State to pass upon the validity of its own legislation."[291]

In construing the Illinois constitution more expansively than the U.S. Constitution, the Illinois Supreme Court in *People v. Washington* criticized the majority opinion in *Herrera v. Collins* as a "conflicted decision," in part because it "overlooked that a 'truly persuasive demonstration of innocence' would, in hindsight, undermine the legal construct precluding a substantive due process analysis."[292] Also criticizing the U.S. Supreme Court was the Illinois Supreme Court's decision in *People v. Krueger*, which found that the U.S. Supreme Court majority's decision in *Illinois v. Krull* was erroneous, and noted that "Justice O' Connor's dissent revealed several serious flaws in the majority's decision."[293] The Illinois Supreme Court's state constitutional decision in *People v. McCauley* likewise disagreed with the U.S. Supreme Court majority opinion in *Moran v. Burbine*, noting the "court's disagreement with *Burbine*'s basic premises" and stating that it would not "blindly follow the reasoning of a United States Supreme Court decision at all costs."[294] Instead, the Illinois Supreme Court relied on its own precedent "to reject *Burbine*'s Federal constitutional analysis."[295]

Aside from having criticized several flawed federal decisions, the Illinois Supreme Court in *People v. Brocamp* and *People v. Lord* exemplified the state tradition of the Illinois Supreme Court in departing from Supreme Court precedent when there are differences in the structure of the state and federal systems, namely, when the full scope of Fourth Amendment protection did not safeguard Illinois residents from unreasonable searches and seizures by state officials. In *Brocamp*, the court held that the Illinois constitution required the suppression of evidence obtained as a result of a search and seizure violation, even though the U.S. Constitution's Due Process Clause had not yet applied the Fourth Amendment to the states.[296] Moreover, in 1955, the Illinois Supreme Court held in *Lord* that the Illinois exclusionary rule barred the admission of evidence seized as the result of an unconstitutional search or seizure when the federal exclusionary

291. *Id.* at 695.

292. People v. Washington, 665 N.E.2d 1330, 1335–36 (Ill. 1996).

293. *Krueger*, 675 N.E.2d at 610.

294. People v. McCauley, 645 N.E.2d 923, 934, 936 (Ill. 1994).

295. *Id.* at 936.

296. *See* People v. Brocamp, 138 N.E. 728, 732 (Ill. 1923); *see also* Barron v. City of Baltimore, 32 U.S. 243 (1833).

rule had not yet been extended to Illinois and the other states.[297] Similarly, in *People v. Washington* the Illinois Supreme Court recognized an Illinois constitutional right—a free-standing claim of actual innocence—in part because the U.S. Constitution did not provide a forum for such a claim.[298]

Read together, *Blodgett*, *Brocamp*, *Lord*, *Heimgaertner*, *Washington*, *Krueger*, and *McCauley* manifest a long-standing Illinois tradition in which the Illinois Supreme Court has provided broader Illinois constitutional protection than the U.S. Constitution based on its finding that U.S. Supreme Court precedent is flawed or unpersuasive, or because of differences in the state and federal systems. These cases permitted the court to anchor a rejection of U.S. Supreme Court precedent or utilize a different approach from the U.S. Supreme Court on any source the Illinois Supreme Court found persuasive, as opposed to the limited criteria for lockstep rejection espoused in *Tisler*—the state constitutional language, debates, and committee reports.[299] Indeed, as this Article's discussion of these cases illustrates, the court relied on an expansive catalogue of materials to guide it in reaching the correct state constitutional outcome, including concurring and dissenting opinions of the U.S. Supreme Court, the Illinois Supreme Court's prior precedent, state supreme court opinions from other jurisdictions, and authoritative treatises.[300]

In cases dating as far back as its 1895 decision in *Blodgett*, the Illinois Supreme Court has frequently rejected U.S. Supreme Court precedent based on its own independent judgment. Because of this long-standing tradition, the Illinois Supreme Court may, in accordance with its decision in *Caballes*, reject U.S. Supreme Court precedent as unpersuasive or inadequate under the state tradition exception to the lockstep doctrine.[301] Going forward, the Illinois Supreme Court should recognize a flawed federal analysis and differences in the structure of the state and federal courts, in addition to unique Illinois characteristics, as traditional grounds to provide greater protection under the Illinois constitution.

In addition to the cases in which the Illinois Supreme Court has diverged from U.S. Supreme Court precedent, the Illinois Supreme Court has carved out its own sphere of independence in cases such as

297. *See* City of Chicago v. Lord, 130 N.E.2d 504, 505 (Ill. 1955); *see also* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (declining to apply the Fourth Amendment exclusionary rule to the states).

298. *Cf.* People v. Washington, 665 N.E.2d 1330, 1335–37 (Ill. 1996).

299. *See supra* Parts II.B.1, III.A.

300. *See supra* Parts II.B.1, III.A.

301. *See* People v. Caballes, 851 N.E.2d 26, 45 (Ill. 2006).

Castree in 1923, *Smith* in 1983, *Tisler* in 1984, and *Mitchell* in 1995, despite having followed U.S. Supreme Court precedent in those cases. The state constitutional outcomes in those cases rested, in part, on the Illinois Supreme Court's agreement with the policy reasons supporting Supreme Court precedent rather than a lockstep approach.[302] When the Illinois Supreme Court adopts U.S. Supreme Court precedent because it agrees with the Court's reasoning, the state high court by logical implication recognizes its discretion to disagree with the U.S. Supreme Court to achieve a correct outcome under the Illinois constitution. Thus, the fact that Illinois Supreme Court precedent follows U.S. Supreme Court precedent should not be read as an implicit adoption of lockstep, or a limitation on the Illinois Supreme Court's authority to construe state constitutional provisions. The *Caballes* court's reliance on traditional practices embodied in case law as an exception to the limited lockstep doctrine supports Illinois judicial independence under a primacy approach. Indeed, Illinois judicial independence is a traditional practice that fits neatly within the second *Caballes* exception to the lockstep doctrine.[303]

Moreover, the Illinois Supreme Court in *Caballes* did not analyze or cite to its previously articulated balancing test for independently determining the meaning and scope of the search and seizure section of article I, section 6 that it applied in *Smith*, *Tisler*, *Mitchell*, and *Krueger*. The Illinois Supreme Court has applied the test by weighing the competing interests of individual liberties against law enforcement to reach the correct state constitutional result. Because it has been separately applied in each of the four cases mentioned above, the balancing-of-interests test has seemingly become an established fabric of Illinois law. There is no legitimate reason for the balancing test's absence from *Caballes*. The Illinois Supreme Court should not retreat from applying this sensible and well-established standard of Illinois law.

Subsequent to *Caballes*, in *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court endorsed a broad reading of *Caballes*.[304] Citing *Caballes*, the *Lebron* majority noted that Illinois constitutional law cannot be controlled by the jurisprudence of other states.[305] If the issue to be decided requires an examination of unsettled law, how-

302. *See supra* Parts II.B.2, III.A.

303. Practitioners and courts should not overlook the framers' intent in supporting Illinois judicial independence under the first *Caballes* exception to lockstep, expressed through the retention of parallel state constitutional provisions, the research papers, the origins of the Illinois constitution, the constitutional commentary, and committee reports.

304. *See* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 914 (Ill. 2010).

305. *Id.*

ever, the majority found that "[d]ecisions from other jurisdictions can provide guidance."[306]

The *Lebron* partial concurrence and partial dissent of Justices Karmeier and Garman elaborated on the role that out-of-state decisions have on the development of Illinois constitutional law within the contextual framework of *Caballes*.[307] Recognizing the framers' intent paradigm discussed in *Caballes*, Justices Karmeier and Garman cited numerous Illinois Supreme Court decisions that devoted serious consideration to the approaches of other jurisdictions, which had construed provisions similar to Illinois law, to enlighten the justices on the correct approach for interpreting the Illinois constitution.[308] Given the Illinois Supreme Court's long-standing tradition of examining the decisions of other jurisdictions for guidance in adjudicating Illinois constitutional questions, Justices Karmeier and Garman concluded that the Illinois Supreme Court has "found it appropriate to consider the well-reasoned decisions of other jurisdictions not only when interpreting statutory provisions, but also when examining the protections afforded by the Illinois [c]onstitution."[309]

After *Lebron*, in *People v. Clemons*, the Illinois Supreme Court construed *Caballes* as determining that Illinois constitutional law "cannot be predicated on the actions of our sister states."[310] Similar to *Lebron*, however, the court found "that the analyses employed by other jurisdictions may inform [its] own analysis."[311] Read together, *Lebron* and *Clemons* interpreted *Caballes* as authorizing Illinois courts to consider the reasoning of courts of sister states as persuasive authority in determining the meaning of similar Illinois constitutional provisions, absent controlling authority in Illinois.

Moreover, the Illinois Supreme Court, in cases such as *Blodgett*, *Krueger*, *Washington*, and *McCauley*, has considered concurring and dissenting opinions from the U.S. Supreme Court, prior U.S. and Illinois Supreme Court opinions, decisions of sister-state supreme courts, and scholarly articles and research as authorities that may be consulted on any given Illinois constitutional question. The upshot is that future Illinois state courts are entitled to examine a wide variety of sources outside the domain of U.S. Supreme Court majority opinions to determine the meaning and proper application of Illinois constitu-

306. *Id.*

307. *See id.* at 931–32 (Karmeier, J., concurring in part and dissenting in part).

308. *Id.* at 932.

309. *Id.*

310. People v. Clemons, 360 Ill. Dec. 293, 302 (2012).

311. *Id.*

tional law. Such an approach does not contravene the framers' intent, especially in light of Illinois's rich history of judicial independence from the U.S. Supreme Court and its traditional reliance on well-reasoned authorities from other jurisdictions as an instructive influence.

Finally, Illinois courts should be wary of, and guard against, any erroneous framing of the state constitutional issue under consideration. One common error is to question whether the framers intended the applicable state constitutional provision to confer broader protection than the federal analogue in the context of the specific issue presented.[312] The framers, however, intended not to answer such questions pertaining to similarly worded state and U.S. constitutional guarantees, but instead understood that the Illinois courts would resolve specific constitutional disputes individually.

As discussed above, case law prior to the 1970 Illinois constitution, the research papers, the origins of the state bill of rights, and delegate commentary suggest that the framers intended to reserve to the Illinois courts the independent responsibility for determining the meaning, scope, and application of state constitutional rights in connection with the particular factual context of each individual case.[313] These sources also indicate that the framers did not compare the levels of protection between Illinois and U.S. constitutional provisions for any particular issue or application and never sought to prejudge *any* type of constitutional claim.[314] Illinois courts should assiduously avoid the nonsensical comparative test, which erroneously erects a legal fiction that undermines the framers' intent. The framers themselves decided not to usurp the role of the Illinois courts to resolve constitutional disputes.

Moreover, if the framers had decided that they were sufficiently prescient to instruct the courts on the proper methodology for deciding every potential issue that could conceivably arise, then the Illinois constitution would have been several thousand pages in length, resembling an administrative code. The framers chose not to straightjacket the Illinois courts with the answers to the myriad constitutional issues and applications that could arise. As correctly reiterated by the Illinois Supreme Court:

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312. *See, e.g.*, People v. Glorioso, 924 N.E.2d 1153, 1161 (Ill. App. Ct. 2010) ("[T]he court will not expand the state exclusionary remedy beyond the federal one, unless the proponent of the expansion can show either that (1) the framers of the 1970 constitution intended the expansion; or that (2) denying the expansion would be antithetical to 'state tradition and values as reflected by long-standing case precedent' . . . .").

313. *See supra* Part II.

314. *See supra* Part II.

> The Constitution does not partake of the prolixity of a legal code. It speaks instead with a majestic simplicity. One of 'its important objects,' is the designation of rights. And in 'its great outlines,' the judiciary is clearly discernible as the primary means through which these rights may be enforced.[315]

The comparative approach is a red herring that diverts attention from the central issue. The correct methodology eschews an approach that compares the scope of individual rights protection between the U.S. Constitution and the Illinois constitution:

> "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. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised."[316]

This simple and straightforward standard is consistent with the analytical framework suggested by case law, research papers, textual origins of the Illinois constitution, and delegate commentary that favors Illinois judicial independence from the U.S. Supreme Court.[317] Properly understood, the framers' intent shows that the Illinois Supreme Court must determine for itself, based on its own reasoned judgment, what an Illinois constitutional provision means and how it applies in a given case, just as it has for most of its history.

C. *The Illinois Appellate Court's Post-*Caballes *Interpretation of Limited Lockstep*

A recent Illinois appellate case involving the limited lockstep doctrine that the Illinois Supreme Court decided to hear, and is still on the court's docket as of this Article's publication, is *People v. Fitzpatrick*.[318] In *Fitzpatrick*, the police arrested a man for walking in the middle of a public roadway, a violation of the Illinois Vehicle Code.[319] The man was later searched at the police station where cocaine was found in one of his socks.[320] Though the defendant sought to challenge his arrest on the grounds that he could not be constitutionally

315. People v. Lawton, 818 N.E.2d 326, 336 (Ill. 2004) (citations omitted) (internal quotation marks omitted).

316. Massachusetts v. Upton, 466 U.S. 727, 738 (1984) (Stevens, J., concurring) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984)).

317. *See supra* Part II.

318. People v. Fitzpatrick, 960 N.E.2d 709, 714 (Ill. App. Ct. 2011).

319. *See id.* at 710.

320. *Id.* at 711.

arrested for a petty offense under the Illinois constitution, the court found that he was foreclosed from doing so as a matter of U.S. Supreme Court precedent under *Atwater v. City of Lago Vista*.[321] The *Fitzpatrick* court noted *Atwater*'s holding that an "arrest for a misdemeanor punishable by a fine only [did] not run afoul of the United State Constitution's prohibition against unreasonable searches and seizures."[322]

Notwithstanding *Atwater*, the defendant argued that his arrest for a mere petty offense violated the Illinois search and seizure clause of the Illinois constitution.[323] The Illinois appellate court, however, rejected this claim, relying on its interpretation of the limited lockstep doctrine as explicated in *Caballes*.[324]

The appellate court in *Fitzpatrick* found that it had no power to disagree with the rationale in *Atwater* because, in its view, the limited lockstep doctrine would be rendered meaningless if state courts were entitled to question the reasoning of a U.S. Supreme Court majority opinion.[325] The court in *Fitzpatrick* noted that the Illinois limited lockstep doctrine was the equivalent of an interstitial approach, but was narrower in scope than the interstitial approach applied by state supreme courts in other jurisdictions.[326] Some state jurisdictions outside of Illinois, using a broad interstitial approach, have rejected U.S. Supreme Court precedent under their respective state constitutions if the state court determined that the particular U.S. Supreme Court holding at issue was premised on a flawed analysis.[327] Relying on *Caballes*, however, *Fitzpatrick* ruled that a flawed U.S. Supreme Court analysis was not a legitimate basis to depart from lockstep under the Illinois limited lockstep doctrine.[328] Rather, the *Fitzpatrick* court determined that lockstep could be avoided only if Illinois's unique history or experience warranted an independent approach.[329] Finding no such Illinois tradition in the context of arrests for petty offenses, the appellate court declined to independently assess the merits of *Atwater* and thus refused to find that the defendant's arrest violated the Illinois constitution.[330]

321. *See id.* (citing Atwater v. City of Lago Vista, 532 U.S. 318 (2001)).
322. *Id.*
323. *See id.*
324. *See Fitzpatrick*, 960 N.E.2d at 713–14.
325. *Id.*
326. *See id.*
327. *See id.*
328. *See id.* at 714.
329. *Id.* at 713.
330. *See Fitzpatrick*, 960 N.E.2d at 713–14.

Seeking to challenge the second district's opinion in *Fitzpatrick*, the defendant appealed to the Illinois Supreme Court. Agreeing to hear the case, the Illinois Supreme Court granted the defendant's petition for leave to appeal.[331] As of this Article's publication, the Illinois Supreme Court has yet to decide *Fitzpatrick*.

The appellate court in *Fitzpatrick* erroneously limited the meaning of unique state history and experience as a force for independent state constitutional interpretation. The Illinois Supreme Court has embraced a long-standing practice under which it may question the wisdom of U.S. Supreme Court decisions, even when construing a state constitutional provision having identical or almost identical language to its U.S. constitutional counterpart. The pertinent question is whether the Illinois courts have enjoyed a unique state history or practice under which they have recognized their authority under the Illinois constitution to exercise their independence or consider whether a U.S. Supreme Court majority opinion is the product of a flawed constitutional analysis. As demonstrated in this Article, the answer is a resounding yes.

Accordingly, the *Fitzpatrick* appellate court wrongly held that a flawed U.S. Supreme Court analysis is not a permissible ground to exercise an independent approach to a state constitutional issue. The Illinois Supreme Court would be on solid doctrinal footing were it to question the reasonableness of *Atwater*'s five-to-four decision. The limited lockstep doctrine is not an impediment to the Illinois Supreme Court's independent determination of whether such arrests pass muster under the Illinois constitution. The Illinois Supreme Court is free to rely on the opinion of the four *Atwater* dissenters as well as state supreme court decisions from other jurisdictions and its own reasoning for guidance to achieve a correct and analytically sound outcome.[332]

IV. CONCLUSION

The limited lockstep doctrine requires Illinois courts to apply a presumption that U.S. Supreme Court precedent is mandatory when considering a state constitutional guarantee identically or similarly worded to its U.S. constitutional analogue. This presumption, however, may be rebutted under the two exceptions to the lockstep rule

331. People v. Fitzpatrick, 963 N.E.2d 248 (Ill. 2012).

332. If the Illinois Supreme Court in *Fitzpatrick* does not address whether the two *Caballes* exceptions to lockstep—the framers' intent and Illinois traditions—as analyzed in this Article, are sufficiently broad to replace its preference for lockstep interpretation with a primacy approach, then the Illinois Supreme Court should visit this unsettled issue in a subsequent case.

discussed in *Caballes*—the framers' intent and Illinois traditions. The framers have manifested their intent to support Illinois judicial independence in a variety of ways, which include the following: the endorsement of pre-existing state case law favoring Illinois judicial independence under the predecessor 1870 Illinois constitution; the retention of state constitutional guarantees parallel to the U.S. Constitution in the 1970 Illinois constitution, notwithstanding the U.S. Supreme Court's extension of U.S. Bill of Rights protection to the states; the endorsement of the research papers to the 1970 Illinois Constitutional Convention supporting Illinois judicial independence; and the Illinois constitutional debates, which show that the Illinois Supreme Court, and not the framers, should resolve particular constitutional questions. Illinois tradition, as reflected through case law, has also demonstrated the Illinois Supreme Court's commitment to its judicial independence. The Illinois Supreme Court has authorized the rejection of U.S. Supreme Court majority opinions on state constitutional grounds based on multiple sources, including the persuasive force of concurring and dissenting U.S. Supreme Court opinions, prior Illinois Supreme Court and U.S. Supreme Court precedent, sister-state supreme court opinions, and scholarly research.

The *Caballes* court's emphasis on the framers' intent as the cornerstone in construing the Illinois constitution has sown the seeds for the demise of the limited lockstep doctrine and should restore the Illinois's traditional judicial independence. In other words, the framers' intent and traditional practices exceptions to the lockstep doctrine should swallow the preference for the lockstep approach. The correct mode of state constitutional interpretation should be the primacy or primary model, or at least a robust version of the interstitial approach that respects Illinois's principles of state judicial independence.

The People of the State of Illinois would be well-served if the collective wisdom of the Illinois Supreme Court is brought to bear on the state constitutional issues of the day, instead of persisting blind obedience to the views of a U.S. Supreme Court majority. This does not mean that legitimate law enforcement interests must be sacrificed to a more expansive approach to individual liberties. Nor does it mean that individual freedom as enshrined in Illinois constitutional rights must become an endangered species. Balance must be the touchstone. If state constitutional interpretation must rely on framers' intent, then the Illinois Supreme Court rightly has the primary responsibility and authority to resolve the tension between law enforcement and individual Illinois liberties as a matter of state constitu-

tional law, with U.S. Supreme Court precedent representing a possibly guiding, but non-mandatory, resource.