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TABLE OF CONTENTS

I. INTRODUCTION

During the *Survey* year,[1] the Illinois Supreme Court resolved numerous challenges to the constitutionality of various Illinois statutes. The challenged statutes ranged from criminal law and procedure to taxation. The court assessed the validity of these statutes in terms of equal protection, due process, and separation of powers. In addition, the court resolved several constitutional challenges based upon the Bill of Rights and offered a definitive interpretation of selected provisions of the Illinois Constitution of 1970. This article will highlight and discuss the most significant of these recent decisions.

II. CASE LAW

A. Equal Protection

During the *Survey* year, the supreme court resolved several challenges to the constitutionality of selected statutes based upon the equal protection clause. The equal protection clauses in the Illinois

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1. The *Survey* period extends from July 1, 1987, through July 1, 1988.

and federal constitutions insure individuals that the laws enacted by the state will apply equally to all citizens similarly situated.[2] To resolve the equal protection challenges presented, the supreme court typically applied the rational relation test.[3] The rational relation test requires that the statute bear a rational relation to a valid legislative purpose.[4] If the court identified a rational relation between the statute and a valid legislative purpose, the court upheld the statute as constitutional. If a valid legislative purpose could not be proven, the court invalidated the statute as violative of equal protection.[5]

In *People v. Esposito*,[6] the supreme court held that the summary suspension of a drunk driver's license, pursuant to section 11501.1 of the Illinois Motor Vehicle Code, does not violate the equal protection clauses of the Illinois and federal constitutions.[7] The defendant in *Esposito* was charged with driving under the influence of alcohol after a breath test indicated a blood alcohol concentration of .16.[8] Pursuant to section 11-501.1, the Secretary of State then summarily suspended the defendant's driver's license.[9]

In response to the suspension, the defendant petitioned the court for a rescission hearing[10] and also moved to dismiss the indictment on the grounds that section 11-501.1 violates the equal protection

2. U.S. CONST. amend. XIV, § 1; ILL. CONST. art. I, § 2.

3. The rational relation test is the second tier of the two-tiered scrutiny ordinarily applied in cases involving equal protection challenges. The two-tiered scrutiny differentiates between those statutes affecting a fundamental right or a constitutionally suspect class and those not affecting a fundamental right or a suspect class. The court traditionally has scrutinized more closely those statutes in the former category while only subjecting the latter statutes to a rational relation scrutiny. G. GUNTHER, CONSTITUTIONAL LAW 588-93 (11th ed. 1985).

None of the cases addressed by the supreme court during the *Survey* year affected a fundamental right or involved a suspect class, and therefore they were scrutinized under the rational relation test.

4. The supreme court has held, however, that the State need not prove the existence of a valid legislative purpose, and in the absence of proof to the contrary, a valid purpose will be presumed. People v. Porter, 122 Ill. 2d 64, 521 N.E.2d 1158 (1988).

5. The court did not invalidate any statutes on equal protection grounds during the *Survey* year.

6. 121 Ill. 2d 491, 521 N.E.2d 873 (1988).

7. *Id.* at 504, 521 N.E.2d at 879. Section 11-501.1 authorizes the summary suspension of drunk drivers who refuse to take a breath test or other similar chemical test, or who submit to a chemical test and have a blood alcohol concentration over .10. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1987).

8. *Esposito*, 121 Ill. 2d at 496, 521 N.E.2d at 875.

9. *Id.*

10. *Id.* Section 2-118.1(b) of the Illinois Motor Vehicle Code permits a person to petition the court for a rescission hearing following a summary suspension of one's driver's license. ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b) (1987).

clause.[11] The defendant argued that section 11-501.1 arbitrarily treats drunk drivers on public highways and drunk drivers on private roadways unequally.[12] The defendant also contended that the statute arbitrarily penalizes drunk drivers with a blood alcohol concentration over .10, but not drunk drivers with a blood alcohol concentration of less than .10.[13]

The circuit court granted the defendant's motion to dismiss, ruling that section 11-501.1 violated the equal protection clause.[14] On appeal, the supreme court rejected the defendant's equal protection challenge and upheld section 11-501.1 as constitutional.[15] Applying the two-step analysis used to assess whether a statute provides an individual with equal protection under the law,[16] the court first ruled that the right to drive a car is not a fundamental right and that the group of "drunk drivers on public highways" is not a constitutionally suspect class.[17] The court, therefore, concluded that the requirements of equal protection would be met if the statute bore a rational relation to a valid legislative purpose.[18] Based upon its review of the legislative intent of the summary suspension provision, the court determined that the legislature enacted the summary suspension provision as part of a concerted effort to remedy the threat posed to public safety and welfare by drunk drivers.[19] Because drunk drivers on public highways pose a greater threat to the public safety than drunk drivers on private roadways, the court

11. *Esposito*, 121 Ill. 2d at 496, 521 N.E.2d at 875. The defendant also challenged the constitutionality of section 11-501.1 and section 6-206.1 of the Illinois Motor Vehicle Code on due process and separation of powers grounds. *Id.* at 497, 521 N.E.2d at 875. *See infra* notes 177-86 and accompanying text for a discussion of these challenges.

12. *Esposito*, 121 Ill. 2d at 500, 521 N.E.2d at 877.

13. *Id.* at 502, 521 N.E.2d at 878.

14. *Id.* at 496, 521 N.E.2d at 875.

15. *Id.* at 504, 521 N.E.2d at 879. The supreme court permitted direct appeal pursuant to Illinois Supreme Court Rule 302(a), which allows for direct appeal when "a statute of the United States or of [Illinois] has been held invalid." ILL. REV. STAT. ch. 110A, para. 302(a) (1987). Most of the cases during the *Survey* year involved direct appeals to the supreme court because the lower court had invalidated the contested statute.

16. *Esposito*, 121 Ill. 2d at 499, 521 N.E.2d at 876-77.

17. *Id.* at 500, 521 N.E.2d at 877. In People v. Graziano, 151 Ill. App. 3d 475, 502 N.E.2d 822 (2d Dist. 1986), the appellate court refused to recognize, as an identifiable class, individuals arrested for driving under the influence of alcohol against whom the evidence of intoxication was slight. *Id.* at 480, 502 N.E.2d at 826. Both *Graziano* and *Esposito* reflect the judiciary's reluctance to recognize, as a protected class, persons charged with violating the Illinois drunk driving laws. By refusing to recognize an identifiable class of persons, the courts can continue to resolve the equal protection challenges strictly in terms of the rational relation test and not subject the statute to a stricter scrutiny. *See generally* GUNTHER, *supra* note 3, at 588.

18. *Esposito*, 121 Ill. 2d at 501, 521 N.E.2d at 877.

19. *Id.* at 501, 521 N.E.2d at 877-78.

determined that the statute's distinction between the two groups has a rational basis.[20] The court also held that the group of drivers with a blood alcohol concentration of .10 or greater sufficiently differs from drivers with a blood alcohol concentration of less than .10, thereby justifying the statute's distinction between the two groups.[21] Because the statute's distinction between the two groups of drunk drivers bears a rational relation to the legislature's objective of remedying the threat to public safety posed by drunk drivers, the court held that section 11-501.1 does not violate the equal protection clause.[22]

In *People v. Watson*,[23] the court addressed an equal protection challenge to the constitutionality of the aggravated battery statute of the Illinois Criminal Code of 1961.[24] The defendant's battery charge was enhanced to aggravated battery because the victim was a state public aid worker. The defendant contested the validity of the enhancement provision of the battery statute because it drew a distinction between state or county public aid workers and local public aid workers.[25] The circuit court agreed with the defendant's argument and invalidated section 12-4(b)(5) of the criminal code as violative of equal protection. The circuit court stated that the statute arbitrarily distinguishes between state and local public aid employees despite the fact that the two groups are similarly situated.[26]

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20. *Id.*

21. *Id.* at 502-03, 521 N.E.2d at 878. In People v. Ziltz, 98 Ill. 2d 38, 455 N.E.2d 70 (1983), the court upheld the legislature's distinction between persons with a blood alcohol concentration over .10 and persons with a blood alcohol concentration less than .10 for purposes of the summary suspension statute. The court found that contrary to the plaintiff's assertions, the .10 limit provided a good indication of a person's state of intoxication. *Id.* at 43, 455 N.E.2d at 72.

22. *Esposito*, 121 Ill. 2d at 504, 521 N.E.2d at 879.

23. 118 Ill. 2d 62, 514 N.E.2d 167 (1987).

24. ILL. REV. STAT. ch. 38, para. 12-4 (1983). The statute provides in relevant part: "(b) A person who, in committing a battery, commits aggravated battery if he either: . . . (5) Knows the individual harmed to be a caseworker, investigator or other person employed by the State Department of Public Aid or a County Department of Public Aid . . . ." *Id.* Thus, section 12-4(b)(5) enhances battery to aggravated battery if the victim of the crime was a state or county public aid officer.

25. *Watson*, 118 Ill. 2d at 64, 514 N.E.2d at 168. Prior to its resolution of the equal protection challenge, the court determined that the defendant had standing to challenge the constitutionality of the statute. *Id.* at 66, 514 N.E.2d at 169. Ordinarily, a party may only assert its own rights. The court, however, found standing based on the fact that the defendant was in imminent danger of sustaining an injury (*i.e.*, conviction) as a result of the enforcement of the statute. The court ignored the fact that the only persons denied equal protection under the statute were local public aid workers and that the defendant was in neither of the classes of individuals treated differently by the statute. *Id.* at 64-65, 514 N.E.2d at 169.

26. *Id.* at 65, 514 N.E.2d at 169. The circuit court found that county, state, and local

The supreme court reversed the circuit court's decision.[27]

In reversing the circuit court, the court noted that the legislature enacted the enhancement provisions of the battery statute in an effort to provide greater protection to state and county public aid employees.[28] The court recognized that other provisions within the battery statute permitted the enhancement of battery to aggravated battery where the victim was a peace officer[29] or a group worker in a county youth detention home.[30] Given these special provisions, the court reasoned that the legislature could enact statutes designed to offer greater protection to persons subjected to greater risks in performing their official duties.[31] The court found that the evidence admitted at trial sufficiently showed that the risks and dangers encountered by state and county public aid workers exceeds the risks and dangers facing local public aid workers.[32] In light of the legislature's intent to provide greater protection to the state and county public aid employees, and the differences between the two groups of public aid employees, the court concluded that section 12-4(b)(5) does not violate the equal protection clauses of the Illinois and federal constitutions.[33] Thus, the court concluded that the enhancement provision of section 12-4(b)(5) is constitutional.[34]

In *People v. Hare*,[35] the supreme court considered whether section 110-14 of the Illinois Code of Criminal Procedure of 1963 violates equal protection in awarding five dollars per day[36] to persons

public aid workers are all similarly situated individuals performing essentially the same tasks. *Id.* at 67, 514 N.E.2d at 170. Because no true difference exists between the two groups, the circuit court held that the statute's distinction between the two groups is arbitrary, and violates equal protection. *Id.*

27. *Id.* at 69, 514 N.E.2d at 171.

28. *Id.* at 68, 514 N.E.2d at 170.

29. *See* ILL. REV. STAT. ch. 38, para. 12-4(b)(6) (1983); People v. Hanson, 53 Ill. 2d 79, 289 N.E.2d 611 (1972) (affirming enhancement of battery to aggravated battery because victim was a peace officer).

30. *See In re* V.P., 139 Ill. App. 3d 786, 487 N.E.2d 638 (2d Dist. 1985).

31. *Watson*, 118 Ill. 2d at 67, 514 N.E.2d at 170. *See* People v. Tosch, 114 Ill. 2d 474, 501 N.E.2d 1253 (1986) (legislature can distinguish between two similarly situated groups when a rational basis exists for doing so).

32. *Watson*, 118 Ill. 2d at 68, 514 N.E.2d at 170.

33. *Id.* at 68-69, 514 N.E.2d at 170-71. The court summarily concluded that this case involved neither a fundamental right nor a constitutionally suspect class and, therefore, resolved the defendant's equal protection challenge in terms of the rational relation test. *Id.*

34. *Id.* at 69, 514 N.E.2d at 171.

35. 119 Ill. 2d 441, 519 N.E.2d 879 (1988).

36. *Id.* at 446, 519 N.E.2d at 880. Section 110-14 provides in pertinent part: "Any person incarcerated on a bailable offense who does not supply bail and against who a fine is levied on conviction of such offense shall be allowed a credit of [five dollars] for each

who do not post bail, while providing no similar credit for persons who do post bail.[37] The circuit court allowed the defendant to use the five dollars per day credit to relieve his fine imposed pursuant to the Violent Crime Victim Assistance Act.[38] The appellate court for the third district affirmed the trial court's grant of credit and the State appealed.[39]

On appeal, the State argued that the five dollar per day credit violates the guarantees of equal protection because it allows a five dollar per day credit for persons who fail to post bail but not for those who do post bail.[40] In rejecting this argument, the supreme court noted that the statute does not threaten any right to bail and that persons who post bail are not a constitutionally suspect class.[41] The court, therefore, determined that if a rational relation exists between the statute and a valid legislative purpose, the statute satisfies the requirements of equal protection.[42]

The State argued that no valid legislative purpose justifies the monetary credit provision and, therefore, the statute's distinction between the two groups of people is arbitrary and irrational.[43] The court rejected the State's argument, however, and noted that all

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day so incarcerated upon application of the defendant." ILL. REV. STAT. ch. 38, para. 110-14 (1987).

37. *Hare*, 119 Ill. 2d at 448, 519 N.E.2d at 881. The State also questioned the applicability of the five dollar per day credit to persons who had already used pre-bail custody credit to reduce their jail sentence. *Id.* at 444, 519 N.E.2d at 879. The State argued that the statute was ambiguous and therefore violated due process. For a discussion of the due process argument, see *infra* notes 79-84 and accompanying text.

38. *Hare*, 119 Ill. 2d at 444-45, 519 N.E.2d at 880. The Violent Crime Victim Assistance Act creates a relief fund to provide monetary assistance to the victims of violent crimes. The Act imposes monetary fines upon defendants convicted of violent crimes. ILL. REV. STAT. ch. 70, paras. 501-511 (1985). In *Hare*, the defendant was convicted of armed robbery, a violent crime, and fined $20 pursuant to the Violent Crime Victim Assistance Act. *Hare*, 119 Ill. 2d at 444, 519 N.E.2d at 880.

39. *Hare*, 119 Ill. 2d at 445, 519 N.E.2d at 880. The appellate court decision is reported at 144 Ill. App. 3d 279, 494 N.E.2d 913 (3d Dist. 1986). *Hare* was consolidated on appeal with People v. Holzhauer, 144 Ill. App. 3d 153, 494 N.E.2d 272 (4th Dist. 1986), *rev'd*, People v. Hare, 119 Ill. 2d 441, 519 N.E.2d 879 (1988). In *Holzhauer*, the appellate court for the fourth district denied the defendant the monetary credit under section 110-14. *Id.* at 156, 494 N.E.2d at 274. Noting the division among the second, third, fourth, and fifth districts in addressing this issue, the supreme court consolidated the cases on appeal. *Hare*, 119 Ill. 2d at 446, 519 N.E.2d at 880.

40. *Hare*, 119 Ill. 2d at 448, 519 N.E.2d at 881.

41. *Id.*

42. *Id.*

43. *Id.* The State argued that in order to satisfy equal protection, the monetary credit provision had to apply both to persons who fail to post bail and to persons who post bail (*i.e.*, pay every arrestee five dollars per day until the case goes to trial). Because the monetary credit does not apply equally to both groups, the State argued that the credit violates equal protection. *Id.*

legislation enjoys a presumption of validity and rationality.[44] The *Hare* court further stated that the presumed rationality of the statute can only be rebutted by proving that the statute is, in fact, irrational.[45] Because the State failed to prove the lack of a rational basis for the monetary credit provision, the court presumed that the statute is rational.[46] Consequently, the court ruled that the five dollar per day credit provision of section 110-14 does not violate the equal protection clause.[47]

The *Hare* court's presumption of a rational relation between the statute and the presumed objective, if used liberally, could form the basis for rejecting almost all equal protection challenges to which the rational relation test applies. If the court presumes both a rational legislative objective and a rational relation between the statute and this objective, the court places a considerable burden of proof upon litigants challenging the validity of the statute in terms of equal protection.

In *Pre-School Owners Association v. DCFS*,[48] the court rejected an equal protection challenge to the Child Care Act of 1969 (the "Child Care Act").[49] The plaintiffs, a group of over 200 day-care centers, challenged the constitutionality of the Child Care Act.[50] The plaintiffs contended that the exemptions to the definition of "day-care centers," provided by section 2.09 of the Child Care Act, unlawfully exempt certain categories of "day-care centers" from regulation.[51] This preferential treatment for certain types of day-

44. *Id.* at 448, 519 N.E.2d at 881-82. The presumption of validity accorded to the statute by the *Hare* court is part of the traditional equal protection analysis, although the courts have long been inconsistent in articulating the precise standard to be applied. This inconsistency in the standard of review has resulted in varying degrees of deference to the legislature's judgment. At times, courts will presume a valid legislative purpose, but will analyze the statute to determine whether there is a rational relation between that purpose and the law. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). At other times, courts will extend the presumption not only to the legislative purpose, but to the rational relationship between that purpose and the statute. *See* Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911). It is this latter, more deferential standard that the court seemed to apply in *Hare*.

45. *Hare*, 119 Ill. 2d at 448, 519 N.E.2d at 881-82.

46. *Id.* at 448-49, 519 N.E.2d at 882.

47. *Id.* at 449, 519 N.E.2d at 882.

48. 119 Ill. 2d 268, 518 N.E.2d 1018 (1988).

49. *Id.* at 278, 518 N.E.2d at 1023 (citing ILL. REV. STAT. ch. 23, paras. 2211-2230 (1985)).

50. *Id.* at 273, 518 N.E.2d at 1021.

51. *Id.* Section 2.09 exempts three types of day-care programs from regulation under the Act: (1) programs affiliated with a school or other institution already within the purview of authority of the State Board of Education, (2) programs operated on a temporary basis, and (3) programs operated on federal property. *Id.* at 275, 518 N.E.2d at 1022.

care programs, the plaintiffs alleged, violates equal protection. The trial court granted the plaintiffs' motion for summary judgment, holding section 2.09 unconstitutional.[52]

In reversing the lower court, the supreme court examined the exemptions provided under section 2.09 of the Child Care Act to determine whether the exemptions bear a rational relation to a valid legislative purpose.[53] The court stated that section 2.09 exempts day-care programs which are already subject to regulation either by the State Board of Education or, in the case of day-care programs on federal property, by the federal government.[54] Additional regulation under the Child Care Act, the court reasoned, is unnecessary.[55] Thus, the court concluded that the exemptions under the Child Care Act bear a rational relation to the legislature's objective of avoiding multiple regulation of certain day-care programs.[56] Accordingly, the court upheld the Act as constitutional.[57]

B. Due Process

During the *Survey* year, the court addressed two particular categories of due process challenges. The first category of due process challenges included those challenges based upon an alleged ambiguity or conflict within a particular statute.[58] The second category of due process claims involved the procedural requirements of due process.[59] To resolve the due process challenges based upon an ambiguity or conflict within a statute, the court offered definitive interpretations of the allegedly ambiguous statutes.[60] Where a valid interpretation of the statute was not possible, the court invali-

52. *Id.* at 272, 518 N.E.2d at 1020.

53. *Id.* at 275, 518 N.E.2d at 1022. The court summarily concluded that a fundamental right was not involved and the group affected by the legislation was not a constitutionally suspect class. Thus, the court applied a rational relation analysis to the statute. *Id.* at 275-76, 518 N.E.2d at 1022.

54. *Id.* at 276, 518 N.E.2d at 1022.

55. *Id.* at 277, 518 N.E.2d at 1023.

56. *Id.* at 278, 518 N.E.2d at 1023.

57. *Id.*

58. An ambiguity or conflict within a statute deprives an individual of due process by allowing discriminatory enforcement of the law or by leaving uncertain what conduct the statute proscribed. Canteen Corp. v. Department of Revenue, 123 Ill. 2d 95, 525 N.E.2d 73 (1988); People v. Hare, 119 Ill. 2d 441, 519 N.E.2d 879 (1988); People v. Haywood, 118 Ill. 2d 263, 515 N.E.2d 45 (1987); People v. Monroe, 118 Ill. 2d 298, 515 N.E.2d 42 (1987); Spinelli v. Immanuel Lutheran Evangelical Congregation, 118 Ill. 2d 389, 515 N.E.2d 1222 (1987).

59. For a discussion of the procedural due process cases, see *infra* notes 135-202 and accompanying text.

60. *See, e.g.*, People v. Hare, 119 Ill. 2d 441, 519 N.E.2d 879 (1988) (interpreting

dated the statute as violative of due process.[61]

In *People v. Haywood*,[62] the court addressed a procedural due process challenge to the criminal sexual assault statutes.[63] The defendants were charged with aggravated criminal sexual assault[64] and criminal sexual assault.[65] Each count of the indictment alleged that the defendants acted "by use of force" and caused "bodily harm" to the victims.[66] The defendants moved to dismiss the indictment, contending that the statutes are impermissibly vague because they fail to define the terms "use of force" and "bodily harm."[67] The circuit court agreed with the defendants and held the criminal sexual assault and aggravated criminal sexual assault provisions impermissibly vague and overbroad.[68] The State appealed the circuit court's ruling directly to the supreme court and the supreme court reversed.[69]

In reversing the lower court, the supreme court noted that a challenge to a statute on the grounds of vagueness will only succeed if a valid construction of the statute is impossible.[70] The *Haywood* court determined that the words "force" and "harm" are not so broad as to make valid application of the statute impossible.[71] The common sense meaning of the words "force" and "harm" provide an initial limitation to these terms.[72] Furthermore, the court found that the repealed provisions of the Criminal Sexual Assault Act explicitly defined "use of force" as conduct done without the

section 110-14 of the Illinois Code of Criminal Procedure of 1963, ILL. REV. STAT. ch. 38, para. 110-14 (1985)).

61. *See, e.g.*, People v. Monroe, 118 Ill. 2d 298, 515 N.E.2d 42 (1987) (invalidating conflicting provisions of the Drug Paraphernalia Control Act, ILL. REV. STAT. ch. 56 1/2, paras. 2101-2107 (1985)).

62. 118 Ill. 2d 263, 515 N.E.2d 45 (1987).

63. *Id.* at 266, 515 N.E.2d at 46.

64. *Id.* Section 12-14(a)(2) provides in pertinent part: "(a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and . . . (2) . . . [causes] bodily harm to the victim." ILL. REV. STAT. ch. 38, para. 12-14(a)(2) (1985).

65. *Haywood*, 118 Ill. 2d at 266, 515 N.E.2d at 46. Section 12-13(a)(1) provides in pertinent part: "(a) The accused commits criminal sexual assault if he or she: (1) commits an act of sexual penetration by the use of force or threat of force . . . ." ILL. REV. STAT. ch. 38, para. 12-13(a)(1) (1985).

66. *Haywood*, 118 Ill. 2d at 266-67, 515 N.E.2d at 47.

67. *Id.* at 266, 515 N.E.2d at 46.

68. *Id.*

69. *Id.* at 277, 515 N.E.2d at 52.

70. *Id.* at 270, 515 N.E.2d at 48. *See* People v. Wawczak, 109 Ill. 2d 244, 249, 486 N.E.2d 911, 913 (1985) (a statute will be invalidated when it is incapable of any valid application).

71. *Haywood*, 118 Ill. 2d at 270, 515 N.E.2d at 48.

72. *Id.*

consent of the victim.[73] The court held that the definitions in the repealed provisions of the Act still applied to the recodified provisions because the legislature did not intend the recodification of the Criminal Sexual Assault Act to override and change the elements of a criminal sexual offense.[74] By applying the former definition of "force" to the recodified provisions of the Act, the court formulated a definitive interpretation of the statute.[75] The court reasoned that the crime of criminal sexual assault occurs when a person commits an act of sexual penetration through the use of force, without the victim's consent or against the will of the victim.[76] Based upon this valid construction of the criminal sexual assault statutes, the court concluded that these statutes are not impermissibly vague.[77] Accordingly, the court held the contested statutes constitutional.[78]

In *People v. Hare*,[79] the court provided a definitive interpretation of both section 110-14 of the Illinois Code of Criminal Procedure of 1963[80] and the Violent Crime Victim Assistance Act ("VCVA Act").[81] The issue in *Hare* was whether persons who had already received pre-bail custody credit to reduce their jail sentence could also receive the five dollar per day credit for pre-bail custody pro-

73. *Id.* at 271-72, 515 N.E.2d at 49. The defendants contended that the definition of "use of force" as an act committed without the consent of the victim is impermissibly vague. *Id.* at 273, 515 N.E.2d at 50. The court rejected this contention and held that the definition is sufficiently specific because evidence showing the lack of consent usually also shows the use of force. *Id.* at 274, 515 N.E.2d at 50.

74. *Id.* at 272-73, 515 N.E.2d at 49-50. The recodified sexual assault provisions replaced eight of the eleven code sections previously defining various sexual offenses. ILL. REV. STAT. ch. 38, paras. 11-1 to 11-11.1 (1981). The revised criminal sexual assault statutes criminalize all sexual assaults without regard to the sex of the victim or offender and without designating the type of particular sexual act proscribed. HOUSE PROCEEDINGS, 83d Ill. Gen. Assem., at 162-63 (May 10, 1983). The recodification provides greater uniformity in the laws proscribing criminal sexual conduct. *Haywood*, 118 Ill. 2d at 271, 515 N.E.2d at 49.

75. *Haywood*, 118 Ill. 2d at 274, 515 N.E.2d at 50. In People v. Mays, 91 Ill. 2d 251, 437 N.E.2d 633 (1982), the court defined the term "bodily harm" as used in the battery statute as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent . . . ." *Id.* at 256, 437 N.E.2d at 635-36. The *Haywood* court considered this definition consistent with the common sense definition of bodily harm, and, therefore, retained this definition for purposes of the Criminal Sexual Assault Act. *Haywood*, 118 Ill. 2d at 274, 515 N.E.2d at 51-52.

76. *Id.* at 274, 515 N.E.2d at 50.

77. *Id.*

78. *Id.* at 277, 515 N.E.2d at 52.

79. 119 Ill. 2d 441, 444, 519 N.E.2d 879, 879 (1988).

80. ILL. REV. STAT. ch. 38, para. 110-14 (1987).

81. ILL. REV. STAT. ch. 70, paras. 501-511 (1985). *See supra* notes 35-47 and accompanying text for a discussion of *Hare* in regards to the equal protection clause.

vided by section 110-14.[82]

To resolve this issue, the court examined the plain language of section 110-14 and found that the statute does not expressly exclude persons who already have received credit for pre-bail custody from receipt of the monetary credit provided by the statute.[83] Because the statute does not expressly prohibit a double credit for pre-bail custody, the court concluded that persons who have received credit for pre-bail custody against later jail sentences also are able to receive the five dollar per day credit for pre-bail custody.[84]

The *Hare* court also considered whether a person could use the monetary credit provided under section 110-14 to reduce or relieve the amount of a subsequently imposed VCVA Act fine.[85] At the time of Hare's arrest, the monetary credit provision did not exclude the VCVA Act fines from the monetary credit issued under section 110-14.[86] The State argued, however, that to allow the credit to offset the fine would defeat the purpose of the VCVA Act.[87] In support of its argument, the State contended that under the 1986 amendment to the statute, the VCVA Act fines were expressly excluded from the monetary credit of section 110-14.[88] The

82. *Hare*, 119 Ill. 2d at 444, 519 N.E.2d at 879. The appellate courts split on this issue. The fourth and second districts disallowed the double credit for pre-bail custody. People v. Holzhauer, 144 Ill. App. 3d 153, 494 N.E.2d 272 (4th Dist. 1987), *rev'd*, People v. Hare, 119 Ill. 2d 441, 519 N.E.2d 879 (1988); People v. Love, 140 Ill. App. 3d 651, 489 N.E.2d 393 (2d Dist. 1986). The third and fifth districts allowed the double credit. People v. Hare, 144 Ill. App. 3d 279, 494 N.E.2d 913 (3d Dist. 1986); People v. James, 133 Ill. App. 3d 623, 479 N.E.2d 344 (5th Dist. 1985).

83. *Hare*, 119 Ill. 2d at 447-48, 519 N.E.2d at 881.

84. *Id.* In reaching its conclusion, the court relied upon the rule of statutory construction that a court cannot read into a statute any exceptions or limitations other than those expressly provided by the plain language of the statute. *In re* Estate of Swiecicki, 106 Ill. 2d 111, 120, 477 N.E.2d 488, 491 (1985).

85. *Hare*, 119 Ill. 2d at 449, 519 N.E.2d at 882. The VCVA Act imposes relatively small fines upon persons convicted of violent crimes. The purpose of the fines is to generate revenue to assist the victims of violent crimes. ILL. REV. STAT. ch. 70, paras. 501-511 (1985).

86. Section 510(b) of the VCVA Act stated in pertinent part: "When any person is convicted in Illinois after January 1, 1984 of an offense listed below, the court which enters the conviction shall impose, in addition to any other penalty . . . a fine in accordance with the following schedule, (1) $25.00 for conviction of a crime of violence . . . ." ILL. REV. STAT. ch. 70, para. 510(b) (Supp. 1984).

87. *Hare*, 119 Ill. 2d at 449, 519 N.E.2d at 882.

88. *Id.* at 450, 519 N.E.2d at 882. The 1986 amendment to section 10(b) of the VCVA Act provides in pertinent part:

> When any person is convicted in Illinois after January 1, 1984, of an offense listed below, the court which enters the conviction shall impose . . . a fine, not subject to the provision of section 110-14 of the Code of Criminal Procedure of 1963, as amended, in accordance with the following schedule . . . .

State argued that the amendment reflects the original intent of the legislature to exempt VCVA Act fines from the monetary credit provision and, therefore, prevented the defendant from using this monetary credit to relieve his twenty dollar VCVA Act fine.[89] On the other hand, the defendant contended that the 1986 amendment represents a change in the law and, therefore, did not apply retroactively to the facts of this case.[90]

The *Hare* court found that the VCVA Act as originally enacted contained clear, specific language and was not ambiguous.[91] It concluded that the legislature intended the amendment to the VCVA Act to effect a change in the law.[92] Accordingly, the court held that the exclusion of VCVA Act fines from the monetary credit provision of section 110-14 did not apply to Hare and that he was entitled to use the monetary credit to relieve his VCVA Act fine.[93]

Unlike the court's finding in *Haywood* and *Hare*, in *People v. Monroe*[94] the court could not provide a valid interpretation of the challenged statute and, therefore, held that the conflicting provisions of the statute violated due process.[95] In *Monroe*, the defendants were arrested and charged with violating the Drug Paraphernalia Control Act (the "DPC Act"), which prohibited the sale of any equipment used in connection with the use of illegal drugs.[96] The defendants moved to dismiss the indictment on the grounds that the DPC Act was unconstitutionally vague with respect to the mental state requirements defined by sections 2(d) and 3(a) of the DPC Act.[97] The circuit court granted the defendants' motion and held the statute unconstitutionally vague.[98]

In affirming the lower court's decision, the supreme court ex-

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ILL. REV. STAT. ch. 70, para. 510(b)(1985).

89. *Hare*, 119 Ill. 2d at 449, 519 N.E.2d at 882.

90. *Id.* at 450-51, 519 N.E.2d at 883. Generally, if a statute as originally enacted contains an ambiguity, a subsequent amendment to the statute will be viewed as a clarification of the original intent of the statute. *Id.* at 451, 519 N.E.2d at 883. If the language of the statute is clear, however, a subsequent amendment will be viewed as a change in the law. *Id.*

91. *Id.* at 451-52, 519 N.E.2d at 883.

92. *Id.* at 452, 519 N.E.2d at 883.

93. *Id.* at 452-53, 519 N.E.2d at 883-84.

94. 118 Ill. 2d 298, 515 N.E.2d 42 (1987).

95. *Id.* at 305, 515 N.E.2d at 45.

96. *Id.* at 299, 515 N.E.2d at 42. The DPC Act prohibited the possession, delivery, and sale of drug paraphernalia. ILL. REV. STAT. ch. 56 1/2, paras. 2101-2107 (1985).

97. *Monroe*, 118 Ill. 2d at 301, 515 N.E.2d at 43.

98. *Id.* at 299, 515 N.E.2d at 42.

amined the allegedly conflicting sections of the DPC Act.[99] The court found that section 2(d) of the DPC Act required the offender to have actual knowledge that the goods sold constituted drug paraphernalia.[100] In contrast, section 3(a) of the DPC Act stated that a violation of the Act occurred when a person knew or under the circumstances should have known that the goods sold constituted drug paraphernalia.[101] Section 3(a), therefore, required only constructive knowledge on the part of the offender. Given the apparent disparity in mental state requirements between sections 2(d) and 3(a) of the DPC Act, the court determined that the statute failed to define the prohibited conduct.[102] Consequently, the court held the statute impermissibly vague and, therefore, unconstitutional.[103]

In *Spinelli v. Immanuel Lutheran Evangelical Congregation*,[104] the court held unconstitutional the Act Permitting Employees To Review Their Personnel Records (the "Records Review Act")[105] because of an inconsistency between sections 2 and 10 of the Act.[106] In *Spinelli*, the plaintiff, a school teacher who had been fired by her employer, requested to review her personnel files.[107] The employer complied with the teacher's request but excluded certain letters of reference from the disclosed materials. The employer claimed that the letters were part of the employer's "management planning," and, therefore, were exempted from the

99. *Id.* at 301-02, 515 N.E.2d at 43-44.

100. *Id.* at 303, 515 N.E.2d at 44. Section 2(d) of the DPC Act defined drug paraphernalia as any item "peculiar to and marketed for use with [illegal drugs]." ILL. REV. STAT. ch. 56 1/2, para. 2102(d) (1985). The court held that in defining drug paraphernalia in terms of marketing, section 2(d) implied that actual knowledge was required under the DPC Act. The court reasoned that one cannot unknowingly sell an item for a particular use. *Monroe*, 118 Ill. 2d at 304, 515 N.E.2d at 44. Consequently, the court held that according to section 2(d), a violation of the DPC Act occurred only when the defendant had actual knowledge that the goods sold constituted drug paraphernalia. *Id.* at 303, 515 N.E.2d at 44.

101. ILL. REV. STAT. ch. 56 1/2, para. 2103(a) (1985).

102. *Monroe*, 118 Ill. 2d at 305, 515 N.E.2d at 45.

103. *Id.*

104. 118 Ill. 2d 389, 515 N.E.2d 1222 (1987).

105. ILL. REV. STAT. ch. 48, paras. 2001-2012 (Supp. 1984).

106. *Spinelli*, 118 Ill. 2d at 403, 515 N.E.2d at 1228. Section 2 of the Records Review Act provided employees with the right to review personnel records containing information related to the employee's qualifications for promotion, transfer, additional compensation, or discharge. ILL. REV. STAT. ch. 48, para. 2002 (Supp. 1984). Section 10 contained a list of materials excluded from an employee's right of review, including materials related to "management planning." ILL. REV. STAT. ch. 48, para. 2010 (Supp. 1984).

107. *Spinelli*, 118 Ill. 2d at 396, 515 N.E.2d at 1225.

plaintiff's review.[108] The plaintiff sought a court order compelling production of the documents. The circuit court granted the plaintiff's request and ordered the employer to produce the withheld materials.[109] The employer appealed and the appellate court rescinded the trial court's order to compel production.[110] The appellate court ruled that the Records Review Act was unconstitutionally vague in regards to the exemption under section 10(c) for materials related to "management planning."[111] Subsequently, the Attorney General intervened and appealed the appellate court's decision.[112] The issue on appeal to the supreme court was whether the term "management planning" in section 10(c), when read in conjunction with section 2 of the Records Review Act, permitted a person of ordinary intelligence to determine which personnel documents were subject to disclosure and which documents were excluded from an employee's review.[113]

Section 2 of the Records Review Act provided employees with the right to review documents used in relation to the employer's hiring, promotion, and termination decisions.[114] The court held that, ordinarily, decisions regarding hiring, promotion, and termination comprised part of the employer's "management planning."[115] Because section 10(c) excluded documents related to "management planning" from an employee's review, the court held that section 10(c) necessarily conflicted with section 2 and made a valid interpretation of the Records Review Act impossible.[116] The court, therefore, concluded that an employee of ordinary intelligence would not be able to determine accurately which documents were subject to disclosure and which were not subject to disclosure.[117] Accordingly, the court held the Records Review Act unconstitutional.[118]

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 394, 515 N.E.2d at 1224. The appellate court decision is reported at 144 Ill. App. 3d 325, 494 N.E.2d 196 (2d Dist. 1986). *Spinelli* was consolidated on appeal with *Kamrath v. Board of Education*. *See infra* notes 138-47 and accompanying text for a discussion of *Kamrath*.

113. *Spinelli*, 118 Ill. 2d at 401, 515 N.E.2d at 1227.

114. ILL. REV. STAT. ch. 48, para. 2002 (Supp. 1984).

115. *Spinelli*, 118 Ill. 2d at 401-02, 515 N.E.2d at 1227-28.

116. *Id.* at 403, 515 N.E.2d at 1228.

117. *Id.*

118. *Id.* It is not clear from the court's opinion whether the court invalidated the entire Records Review Act or just the conflicting provisions. Furthermore, the effect of *Spinelli* on the Records Review Act is uncertain in light of the fact that the act has not

In *Canteen Corp. v. Department of Revenue*,[119] the supreme court invalidated a Department of Revenue regulation on the ground that the regulation violated due process by improperly extending the scope of the Retailers Occupation Tax Act ("ROT Act").[120] Section 2 of the ROT Act taxes, at a reduced rate, food that is not consumed on the premises of the sale. In contrast, foods produced for immediate consumption receive no reduction in the tax rate.[121] Canteen Corporation ("Canteen") contended that the majority of its vending machine sales involved food items consumed off the premises and food items not specifically produced for immediate consumption.[122] Consequently, Canteen claimed that the reduced rate of tax should be applied to its vending machine sales.[123] The Department of Revenue, however, defined all vending machine food sales as sales of food for immediate consumption.[124] The Department therefore denied Canteen's claim for tax credit based on its alleged overpayment of the retailers occupation tax.[125]

On administrative review, the circuit court held that the Department's regulation, which defined all sales of vending machines as sales for immediate consumption, was unconstitutional because it was inconsistent with the provisions of the ROT Act.[126] The Department of Revenue appealed directly to the supreme court.[127]

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yet been repealed by the Illinois General Assembly. *See* ILL. REV. STAT. ch. 48, para. 2010 (1985), *amended by* P.A. 85-1393, 1988 Ill. Legis. Serv. 6 (West).

119. 123 Ill. 2d 95, 525 N.E.2d 73 (1988).

120. *Id.* at 108, 525 N.E.2d at 78-79. The ROT Act imposes a tax upon all persons selling personal property at retail in Illinois. ILL. REV. STAT. ch. 120, paras. 440-452 1/2 (1987).

121. Section 2 of the ROT Act provides in pertinent part: "[W]ith respect to food for human consumption which is to be consumed off the premises from where it is sold . . . such tax shall be imposed [under this section] at the rate of 0%." ILL. REV. STAT. ch. 120, para. 441 (1987).

122. *Canteen Corp.*, 123 Ill. 2d at 107, 111, 525 N.E.2d at 78, 80.

123. *Id.* Canteen filed a claim for credit with the Department of Revenue for overpayment of the Retailers Occupation Tax for the years 1980-83. *Id.*

124. *Id.* at 102-03, 525 N.E.2d at 76. Illinois Department of Revenue Regulation 130-310(b)(2)(C) provided in pertinent part:

> . . . .
>
> 2) Gross receipts from sales of food for which facilities are provided so that it can be consumed on the premises where it is sold and gross receipts from sales of food which has been prepared for immediate consumption do not qualify for the reduced rate [of tax]. For example: . . .
>
> C) sales of food items in vending machines are sales of food for immediate consumption.

ILL. ADMIN. CODE tit. 86, § 130.310 (1985).

125. *Canteen Corp.*, 123 Ill. 2d at 99, 525 N.E.2d at 74.

126. *Id.*

127. *Id.* Rule 302(b) permits direct appeal when the "public interest requires prompt adjudication by the Supreme Court." ILL. REV. STAT. ch. 110A, para. 302(b) (1987).

On appeal, the supreme court considered whether the Department's regulation improperly extended the provisions of the ROT Act, thereby violating Canteen's due process rights.[128]

The court held that, in defining all vending machine sales as sales of food for immediate consumption, the Department's regulation improperly extended the scope of the ROT Act.[129] The evidence presented at trial conclusively established that the majority of Canteen's vending machine sales did not involve food produced for immediate consumption.[130] The evidence also established that the majority of the food sold through the vending machines was consumed off the premises.[131] The court concluded that the Department's categorization of all vending machine food sales as sales of food for immediate consumption failed to recognize the production and "off-the-premises" requirements of the ROT Act.[132] The court, therefore, held that the regulation was overbroad and an improper extension of the ROT Act.[133] Consequently, the court ruled that the regulation violated due process.[134]

In addition to the due process challenges based upon an alleged ambiguity or conflict in a statute, the court also addressed procedural due process challenges to certain statutes during the *Survey* year. Procedural due process demands that an individual be ac-

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The court apparently considered the purported ambiguity or internal conflict within the ROT Act of sufficient "public interest" to permit direct appeal.

128. *Canteen Corp.*, 123 Ill. 2d at 99, 525 N.E.2d at 74-75.

129. *Id.* at 108, 525 N.E.2d at 78-79.

130. *Id.* at 107, 525 N.E.2d at 78. In determining whether the food items sold through vending machines constituted sales of food for immediate consumption, the court focused upon the *production* of these food items, not on the marketing strategy of vending machine sales. *Id.* at 108-09, 525 N.E.2d at 79. The evidence showed that the food items sold through the vending machines were produced in the same manner as the identical food items sold in grocery stores and other shops. *Id.* at 107, 525 N.E.2d at 78. Because the plaintiff showed that the majority of food sold through its vending machines was not *produced* for immediate consumption, the sales qualified for the reduced tax rate under section 2 of the ROT Act. *Id.*

131. *Id.* at 111, 525 N.E.2d at 80. The Department argued that, for purposes of vending machine sales, "premises" included the entire building in which the vending machines were located. *Id.* at 110, 525 N.E.2d at 79. The court rejected this proposed definition and instead adopted the definition of "premises" contained in the regulation. Subsection (b)(2) and (b)(3) limited "premises" to those areas of the building that provided facilities for eating the sold items. ILL. ADMIN. CODE tit. 86, § 130.310(b)(2), (b)(3) (1985).

132. *Canteen Corp.*, 123 Ill. 2d at 108, 111, 525 N.E.2d at 78-80.

133. *Id.* at 108, 525 N.E.2d at 78-79. The court did not address the plaintiff's challenge to the regulation as violative of the uniformity clause of the Illinois Constitution, ILL. CONST. art. IX, § 2, because it had already invalidated the regulation as inconsistent with section 2 of the ROT Act. *Canteen Corp.*, 123 Ill. 2d at 112, 525 N.E.2d at 80.

134. *Canteen Corp.*, 123 Ill. 2d at 112, 525 N.E. 2d at 80.

corded notice and a fair hearing prior to a deprivation of a particular right or property interest.[135] The court has noted, however, that a compelling state interest may warrant deprivation of a property interest prior to an evidentiary hearing.[136] When a compelling state interest is not involved, notice and a pre-deprivation hearing are required in order to satisfy procedural due process.[137]

In *Kamrath v. Board of Education*,[138] the plaintiff challenged the local school board's suspension hearing as violative of his procedural due process rights.[139] The local school board suspended the plaintiff for using obscene language and for being abusive towards his students.[140] The plaintiff contested the school board's suspension, arguing that the school board failed to follow the procedures outlined in section 24-12 of the school code.[141] The court rejected the plaintiff's procedural due process arguments and held that section 24-12 does not apply to suspension hearings.[142] The court

135. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (due process of law requires that a person be provided notice and the opportunity for a hearing prior to the deprivation of property).

136. *See* People v. Esposito, 121 Ill. 2d 491, 521 N.E.2d 873 (1988).

137. *See* Spinelli v. Immanuel Lutheran Evangelical Congregation, 118 Ill. 2d 389, 406, 525 N.E.2d 1222, 1230 (1987) (due process requires notice and the opportunity for a fair hearing prior to deprivation of property). *See also* Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980).

138. 118 Ill. 2d 389, 525 N.E.2d 1222 (1988). *Kamrath* was consolidated on appeal with Spinelli v. Immanuel Lutheran Evangelical Congregation because Kamrath's complaint included a challenge to the constitutionality of the Records Review Act, ILL. REV. STAT. ch. 48, paras. 2001-2012 (Supp. 1984). After the appellate court in *Spinelli* declared the Records Review Act unconstitutional, the appellate court in *Kamrath* dismissed that portion of Kamrath's complaint. For further discussion of *Spinelli*, see *supra* notes 104-18 and accompanying text.

139. *Kamrath*, 118 Ill. 2d at 398, 515 N.E.2d at 1226. The plaintiff also contested the school board's power to suspend a tenured teacher. The court rejected the plaintiff's contention and held that the school board had the power to suspend a tenured teacher pursuant to section 10-20.5 of the Illinois School Code, which authorizes the school board to enforce all rules necessary for the proper government and maintenance of a school. *Id.* at 404-05, 515 N.E.2d at 1229 (citing ILL. REV. STAT. ch. 122, para. 10-20.5 (1985)). *Cf.* Craddock v. Board of Educ., 76 Ill. App. 3d 43, 391 N.E.2d 1059 (3d Dist. 1979) (local school board's authority to suspend a tenured teacher stemmed from the dismissal procedures outlined in section 24-12 of the school code).

140. *Spinelli*, 118 Ill. 2d at 397, 515 N.E.2d at 1225.

141. *Id.* at 394-95, 515 N.E.2d at 1224. In reliance upon *Craddock*, the plaintiff argued that because the school board's power to suspend a tenured teacher stemmed from section 24-12, the school board had to comply with the suspension procedures outlined in that section. *Id.*

142. *Id.* The court held section 24-12 inapplicable to suspension hearings because it located the board's authority to suspend a tenured teacher under section 10-20.5 of the school code, ILL. REV. STAT. ch. 122, para. 10-20.5 (1987). Section 10-20.5 authorizes the board to enforce all rules necessary to govern a school properly. *Id.* The court reasoned that because section 24-12 specifically addressed dismissal procedures and not suspension procedures, it did not apply when the school board suspends a tenured teacher.

then evaluated the suspension hearing procedure followed in the plaintiff's case to determine whether these procedures satisfied procedural due process.[143]

According to the school board's suspension procedure, a teacher must receive written notice of the suspension and a summary of the charges upon which the school board based its decision.[144] The suspension procedure also allows the teacher to request a hearing.[145] At the hearing, the teacher has the right to be represented by counsel, to present evidence on his own behalf, and to cross-examine the witnesses testifying against him.[146] The court stated that these suspension hearing requirements fully satisfy procedural due process requirements and, therefore, do not violate the plaintiff's due process rights.[147]

In *People v. Porter*,[148] the court rejected the defendants' procedural due process challenge to section 122-2.1 of the Illinois Code of Criminal Procedure.[149] Section 122-2.1 authorizes the court to dismiss the defendants' post-conviction petition for retrial prior to the appointment of counsel.[150] The defendants contended that section 122-2.1 deprives them, as indigent petitioners, of their due process right to equal access to the courts.[151]

Spinelli, 118 Ill. 2d at 405, 515 N.E.2d at 1229-30 (citing *Craddock*, 76 Ill. App. 3d at 49, 391 N.E.2d at 1063 (Alloy, J., dissenting)).

143. *Id.* at 406, 515 N.E.2d at 1230. The court noted that procedural due process requires that a person be accorded fair notice and an opportunity for a hearing prior to any deprivation of property by the state or local agency. *See* Wilson v. Bishop, 82 Ill. 2d 364, 369, 412 N.E.2d 522, 524-25 (1980).

144. *Spinelli*, 118 Ill. 2d at 406, 515 N.E.2d at 1230.

145. *Id.* at 406-07, 515 N.E.2d at 1230.

146. *Id.* at 407, 515 N.E.2d at 1230.

147. *Id.*

148. 122 Ill. 2d 64, 521 N.E.2d 1158 (1988).

149. *Id.* at 73, 521 N.E.2d at 1161. Section 122-2.1 states in pertinent part: "If the court determines the [petition for retrial] is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." ILL. REV. STAT. ch. 38, para. 122-2.1 (1987).

150. *Porter*, 122 Ill. 2d at 74, 521 N.E.2d at 1161. The defendants also contended that section 122-2.1 violates the separation of powers doctrine. *See infra* notes 236-56 and accompanying text. In addition, the defendants argued that section 122-2.1 violates equal protection because indigent post-conviction petitioners have no automatic right to counsel while indigent direct appellants had such a right pursuant to Supreme Court Rule 607(a), ILL. REV. STAT. ch. 110A, para. 607(a) (1987). *Porter*, 122 Ill. 2d at 78, 521 N.E.2d at 1163. Nevertheless, the court summarily disposed of the defendant's equal protection claim and reaffirmed the analysis and holding of People v. Baugh, 132 Ill. App. 3d 713, 477 N.E.2d 724 (4th Dist. 1985) (a rational basis existed for treating post-conviction petitioners and post-conviction appellants differently).

151. *Porter*, 122 Ill. 2d at 73, 521 N.E.2d at 1161. Procedural due process demands that indigents have a meaningful opportunity to present their grievances in court. People v. Taylor, 76 Ill. 2d 289, 391 N.E.2d 366 (1979).

In three separate cases, the circuit courts disagreed with the defendants' argument, and dismissed the post-conviction petitions for retrial.[152] On appeal, the second and fifth divisions of the Illinois Appellate Court for the First District affirmed the circuit court's dismissal and upheld the statute as constitutional.[153] The fourth division of the First Appellate District, however, reversed the circuit court's dismissal and held the statute unconstitutional as violative of separation of powers and due process.[154] The cases were subsequently consolidated on appeal to the supreme court.[155]

On appeal, the supreme court reversed the lower courts.[156] The court based its decision upon the United States Supreme Court's holding that the failure to appoint counsel prior to a post-conviction petition for retrial does not violate the petitioner's rights to due process of law under the federal constitution.[157] The court reasoned that because federal due process does not require the appointment of counsel prior to a post-conviction petition, due process under the Illinois Constitution also does not require the appointment of counsel prior to a post-conviction petition.[158] Therefore, the court concluded that in allowing for the dismissal of a post-conviction petition prior to the appointment of counsel, section 122-2.1 does not violate the petitioners' right to due process of law.[159]

Justice Simon dissented from the majority opinion with respect to its due process findings.[160] Simon stated that the court erred in failing to recognize the established differences between Illinois due process requirements and federal due process requirements.[161] According to Simon, the court's interpretations of the 1961 Post-Con-

152. *Porter*, 122 Ill. 2d at 69-70, 521 N.E.2d at 1159.

153. *See* People v. Singleton, 143 Ill. App. 3d 1159, 507 N.E.2d 555 (1st Dist. 1986); People v. Porter, 141 Ill. App. 3d 208, 490 N.E.2d 47 (1st Dist. 1986).

154. *See* People v. Mason, 145 Ill. App. 3d 218, 494 N.E.2d 1176 (1st Dist. 1986).

155. *Porter*, 122 Ill. 2d at 70, 521 N.E.2d at 1159.

156. *Id.* at 76, 521 N.E.2d at 1162.

157. *Id.* at 74-75, 521 N.E.2d at 1161-62 (citing Rodriguez v. United States, 395 U.S. 327 (1969)). In *Rodriguez*, the Court approved the federal *habeas corpus* statute which requires an indigent petitioner to prepare his petition for retrial without the benefit of counsel. *Rodriquez*, 395 U.S. at 330.

158. *Porter*, 122 Ill. 2d at 75, 521 N.E.2d at 1161-62. The *Porter* court presumed that the Illinois requirements for due process parallel the federal requirements because the language of the due process clauses in the state and federal constitutions is nearly identical. *Id.* at 76, 521 N.E.2d at 1162.

159. *Id.*

160. *Id.* at 86, 521 N.E.2d at 1167 (Simon, J., dissenting). Justice Simon also dissented from the majority regarding the defendants' separation of powers challenge. *Id.* at 93, 521 N.E.2d at 1170 (Simon, J., dissenting).

161. *Id.* at 87-88, 521 N.E.2d at 1167-68 (Simon, J., dissenting).

viction Act immediately prior to the adoption of the Illinois Constitution of 1970 evidenced the court's position that the due process requirements in Illinois exceed the requirements of the federal constitution.[162] Simon argued that the delegates to the Illinois constitutional convention in 1970 intended to incorporate the judicially established due process requirements into the due process requirements under the new constitution.[163] Simon thus felt that the majority erred by evaluating the defendant's due process challenge strictly in terms of the federal due process requirements.[164]

The resignation of Justice Simon from the bench may signal the end of the debate over the difference between the due process requirements of the Illinois Constitution of 1970 and the federal constitution. Justice Simon consistently argued for the expansion of the Illinois due process clause and rejected efforts to adopt uniformly federal interpretations of due process requirements. With Simon's resignation, any expansion of the Illinois due process requirements beyond the federal requirements seems unlikely in the near future.

Three cases raised procedural due process challenges with respect to the summary suspension of driver's licenses under the Illinois Motor Vehicle Code.[165] In *People v. Hamilton*,[166] for example, the defendant contended that section 2-118.1(b) of the Illinois Motor Vehicle Code[167] violates procedural due process by preventing a party from contesting the validity of the blood alcohol concentra-

162. *Id.* at 88-89, 521 N.E.2d at 1168 (Simon, J., dissenting). *See* People v. Butler, 40 Ill. 2d 386, 240 N.E.2d 592 (1968) (case remanded for appointment of counsel prior to disposition of the defendant's petition for retrial).

163. *Porter*, 122 Ill. 2d at 88-89, 521 N.E.2d at 1167-68 (Simon, J., dissenting). Justice Simon argued that this intent to expand the due process requirements under the Illinois Constitution applied despite the fact that the Illinois Constitution of 1970 adopted a due process clause nearly identical to that of the federal constitution. *Id.* at 88, 521 N.E.2d at 1167-68 (Simon, J., dissenting).

164. *Id.* at 90, 521 N.E.2d at 1169 (Simon, J., dissenting). Justice Simon also based his dissent from the majority's due process decision upon Supreme Court Justice Brennan's statement that state court judges should expand the protection of due process within their respective states beyond the protection enumerated by the federal courts. *Id.* at 87, 521 N.E.2d at 1167 (Simon, J., dissenting). *See* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977).

165. People v. Esposito, 121 Ill. 2d 491, 521 N.E.2d 873 (1988); People v. Gerke, 123 Ill. 2d 85, 525 N.E.2d 68 (1988); People v. Hamilton, 118 Ill. 2d 153, 514 N.E.2d 965 (1987).

166. 118 Ill. 2d 153, 514 N.E.2d 965 (1987).

167. ILL. REV. STAT. ch. 95 1/2, para. 2-118.1 (1987). Section 2-118.1 provides in pertinent part: "Upon notice of statutory summary suspension served under section 11-501.1, the person may make a written request for a judicial hearing in the circuit court of

tion test at a rescission hearing.[168] The circuit court agreed with the defendant's argument and held section 2-118.1(b) invalid as violative of procedural due process.[169] The State appealed directly to the supreme court, and the supreme court reversed the circuit court's decision.[170]

The court held that the testing standards defined in section 11-501.2 of the Illinois Motor Vehicle Code[171] apply to the summary suspension proceedings outlined under section 11-501.1 of the Code.[172] The court recognized that failure to comply with the test standards promulgated under section 11-501.2 of the Code render the test results inadmissible in a criminal drunk driving prosecution.[173] The court concluded that because compliance with the testing standards is mandatory, and tests that do not comply with these standards are held inadmissible, the licensee must be allowed to challenge the validity of the test results at a rescission hearing.[174] Section 2-118.1(b) does not preempt this right of the licensee to contest the validity of the test results[175] and, therefore, does not violate due process.[176]

In *People v. Esposito*,[177] the court rejected a procedural due process challenge to the provision of the Illinois Motor Vehicle Code

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venue. The request to the circuit court shall state the grounds upon which the person seeks to have the statutory summary suspension rescinded . . . ." *Id.*

168. *Hamilton*, 118 Ill. 2d at 155, 514 N.E.2d at 967. In *Hamilton*, the defendant was arrested while driving under the influence of alcohol. *Id.* at 154, 514 N.E.2d at 966. His breath test revealed a blood alcohol concentration slightly over the legal blood alcohol concentration limit of .10. *Id.* The defendant's license was summarily suspended for three months pursuant to ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1987), and he subsequently petitioned the court for a rescission hearing. *Hamilton*, 118 Ill. 2d at 155, 514 N.E.2d at 967. He also filed a motion to dismiss the criminal charges as violative of due process. *Id.* Section 2-118.1(b) purportedly violates due process by unlawfully limiting the possible defenses that a defendant could raise at a recission hearing. *Id.* at 157, 514 N.E.2d at 968.

169. *Hamilton*, 118 Ill. 2d at 155, 514 N.E.2d at 967.

170. *Id.* at 162, 514 N.E.2d at 970.

171. ILL. REV. STAT. ch. 95 1/2, para. 11-501.2 (1987). Section 11-501.2 promulgates the procedure to be followed in administering the "analysis of the person's blood, urine, breath or other bodily substance." *Id.*

172. *Hamilton*, 118 Ill. 2d at 160, 514 N.E.2d at 969.

173. *Id. See* People v. Emrich, 113 Ill. 2d 343, 498 N.E.2d 1140 (1986) (failure of the blood alcohol test to comply with the standards promulgated under section 11-501.2 warranted exclusion of the test results from evidence in a criminal drunk driving prosecution).

174. *Hamilton*, 118 Ill. 2d at 160, 514 N.E.2d at 969.

175. *Id.* at 161, 514 N.E.2d at 970.

176. *Id.* The court resolved the defendants' due process challenge on statutory grounds and declined to comment upon whether the legislature could constitutionally limit the possible defenses raised at a rescission hearing. *Id.* at 158, 514 N.E.2d at 968.

177. 121 Ill. 2d 491, 521 N.E.2d 873 (1988).

which authorizes the summary suspension of a driver's license where the driver's blood alcohol concentration exceeds the legal limit.[178] Following the summary suspension of her driver's license, the defendant filed a petition to rescind the summary suspension. The defendant claimed that the summary suspension provision deprives Illinois drivers of due process of law because the drivers are not allowed to have an evidentiary hearing prior to the summary suspension.[179] The circuit court granted the defendant's petition to rescind the summary suspension, and invalidated section 11-501.1 as violative of due process.[180] The State appealed directly to the supreme court. On appeal, the court considered whether the failure to afford licensees an evidentiary hearing prior to the suspension of their licenses violates the licensee's right to due process of law.[181]

Applying the test developed in *Mathews v. Eldridge*,[182] the court concluded that: (1) neither the nature nor the weight of the individual's interest in having a driver's license requires an evidentiary hearing prior to suspension of a driver's license in order to satisfy the requirements of due process;[183] (2) the summary suspension

178. *Id.* at 504, 521 N.E.2d at 879. Section 11-501.1 of the motor vehicle code provides in pertinent part: "If the person . . . submits to a test which discloses an alcohol concentration of 0.10 or more[,] . . . the Secretary of State shall enter the statutory suspension for the periods specified in section 6-208.1 [of the motor vehicle code] . . . ." ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1987).

179. *Esposito*, 121 Ill. 2d at 496, 521 N.E.2d at 875. The defendant also challenged the validity of section 6-206.1 of the Illinois Motor Vehicle Code, ILL. REV. STAT. ch. 95 1/2, para. 6206.1 (1987). *Esposito*, 121 Ill. 2d at 512, 521 N.E.2d at 882. Section 6-206.1 authorizes the court to issue judicial driving permits to parties demonstrating the need to drive in order to continue employment or to obtain necessary medical supplies or treatment. The court determined that the defendant lacked standing to challenge the constitutionality of this statute because she had not been adversely affected by its provisions. *Id.* at 512-13, 521 N.E.2d at 882-83.

180. *Id.* at 497, 521 N.E.2d at 875.

181. *Id.* at 504, 521 N.E.2d at 879.

182. 424 U.S. 319 (1976). The *Eldridge* Court developed a test to determine when an evidentiary hearing prior to the deprivation of a property interest is necessary to satisfy procedural due process. The test provides three measures: (1) the nature and weight of the private interest which may be impaired by the challenged process; (2) the likelihood that the impairment will be erroneous and the value of substitute procedures; and (3) the government's interest, including the fiscal and administrative difficulties of additional or alternative procedures. *Id.* at 335.

183. *Esposito*, 121 Ill. 2d at 507, 521 N.E.2d 880. The court determined the actual weight of the individual's interest in the possession of a driver's license through consideration of the following factors: (1) the duration of the suspension; (2) the availability of post-suspension review; and (3) the availability of relief in certain circumstances. *Id.* at 506, 521 N.E.2d at 880. After fully examining these three factors, the court concluded that the summary suspension is of reasonably limited duration, that post-suspension review is available, and that judicial driving permits are available in cases of need. *Id.* at

procedure is not likely to result in an erroneous deprivation of the individual's interest in having a license;[184] and (3) the statute provides a reasonable and efficient means to protect persons travelling on highways from drunk drivers.[185] Given the satisfaction of the requirements outlined in the *Eldridge* test, the court concluded that the suspension of a driver's license prior to an evidentiary hearing does not deprive Illinois drivers of due process of law, and the court upheld the summary suspension provision.[186]

In *People v. Gerke*,[187] the court expanded the *Esposito* decision and held that a one-year summary suspension of a repeat offender's driver's license did not violate due process.[188] In *Gerke*, following the defendant's arrest for driving under the influence of alcohol, the state summarily suspended her driver's license for one year.[189] The trial court later rescinded the summary suspension following the prosecution's *nolle prosequi* motion to dismiss.[190] The appellate court reversed the trial court's rescission of the suspension, holding that the trial court did not have the discretion to rescind the summary suspension based upon disposition of the criminal charges.[191] The appellate court also reinstated the one-year suspension of the

507, 521 N.E.2d at 880. Thus, the existing provisions of the summary suspension provision adequately protect the individual's interest in the continued possession of a driver's license, and a pre-suspension hearing is unnecessary. *Id.*

184. *Id.* at 509, 521 N.E.2d at 880-81. In reaching this decision, the court vested much confidence in the powers of observation of the arresting officer as a "trained observer and investigator." *Id.* at 508, 521 N.E.2d at 881 (quoting Mackey v. Montrym, 443 U.S. 1, 14 (1979) (upholding a Massachusetts law which authorized summary suspension of a driver's license prior to a hearing when the driver refused to take a breath test)). The input of an observer, the *Esposito* court stated, assures the individual that the summary suspension will not occur erroneously and arbitrarily. *Id.* at 509-10, 521 N.E.2d at 881.

185. *Id.* at 510, 521 N.E.2d at 881-82. The court reasoned that the prompt suspension of a driver's license prevents administrative inefficiency and provides a more immediate means of securing the public safety and welfare from the threat of drunk drivers. *Id. See also Mackey*, 443 U.S. at 18 ("A presuspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive . . . to demand a presuspension hearing as a dilatory tactic.").

186. *Esposito*, 121 Ill. 2d at 511, 521 N.E.2d at 882.

187. 123 Ill. 2d 85, 525 N.E.2d 68 (1988).

188. *Id.* at 90, 525 N.E.2d at 71.

189. *Id.* at 88, 525 N.E.2d at 70. Section 6-208.1(a)(3) of the Illinois Motor Vehicle Code authorizes the Secretary of State to suspend a driver's license for one year when the driver has been arrested previously for driving under the influence of alcohol. ILL. REV. STAT. ch. 95 1/2, para. 6-208.1(a)(3) (1987).

190. *Gerke*, 123 Ill. 2d at 88-89, 525 N.E.2d at 70. The prosecution filed a *nolle prosequi* motion to dismiss the criminal charges against the defendants when the arresting officer failed to appear to testify on the scheduled court date. *Id.* at 88, 525 N.E.2d at 70.

191. *Id.* at 89, 525 N.E.2d at 70.

defendant's license.[192] On appeal, the defendant contended that a one-year summary suspension violates due process because it was an excessive deprivation of property and did not provide for a timely review of the suspension.[193]

The supreme court, however, rejected the defendant's procedural due process challenge and affirmed the one-year summary suspension of the defendant's license.[194] The court relied upon the reasoning in *Esposito*,[195] and stated that the *Esposito* holding extends to the one-year summary suspension provision.[196] The court also held that the statute does not violate due process with respect to post-suspension review because the statute provides for a summary suspension hearing, in most cases, within three days of the effective date of the suspension.[197] The court stated that the three-day delay does not seriously impair an individual's due process rights.[198] Accordingly, the court affirmed the appellate court's decision and upheld the contested statute.[199]

Additionally, the *Gerke* court affirmed the appellate court's holding that the trial court lacked the discretion to dismiss the defendant's summary suspension based upon the disposition of the underlying criminal charges.[200] The court noted that by enacting the Illinois summary suspension procedures, the legislature intended to create a civil cause of action against drunk drivers independent of the criminal cause of action.[201] In light of the

192. *Id.*

193. *Id.*

194. *Id.* at 91, 525 N.E.2d at 71.

195. *See supra* notes 177-86 and accompanying text for a discussion of the *Esposito* case.

196. *Gerke*, 123 Ill. 2d at 90, 525 N.E.2d at 71. The court determined that a re-examination of the one-year summary suspension provision in light of the *Eldridge* test was not necessary because the *Esposito* court's analysis of the six-month summary suspension provision applies equally to the one-year summary suspension. *Id.*

197. *Id.* at 91-92, 525 N.E.2d at 71.

198. *Id.* The court did not express an opinion as to how long the post-suspension hearing could be delayed without violating the licensee's due process rights. *Id.* at 92, 525 N.E.2d at 71.

199. *Id.*

200. *Id.* at 92, 525 N.E.2d at 71-72.

201. *Id.* at 94, 525 N.E.2d at 72. The court distinguished the Illinois summary suspension law from a Wisconsin summary suspension provision which requires a person to submit to an alcohol test in order to secure evidence to be used in determining whether the person is intoxicated. *See* State v. Brooks, 113 Wis. 2d 347, 348, 335 N.W.2d 354, 354-55 (1983). In contrast to the Wisconsin statute, the Illinois legislature intended the Illinois summary suspension provisions to provide greater protection to the public by removing drunk drivers from the road. The summary suspension provision in Illinois, unlike the Wisconsin statute, is not punitive in nature. *Gerke*, 123 Ill. 2d at 94-95, 525 N.E.2d at 72-73.

legislative intent behind the Illinois summary suspension provisions, the court held that the trial court erred in dismissing the civil prosecution against the defendant based solely upon the disposition of the criminal charges.[202]

C. *Separation of Powers*

Unlike the federal constitution, the Illinois Constitution of 1970 expressly provides for the separation of powers among the three branches of the state government.[203] During the *Survey* year, the court consistently interpreted the separation of powers doctrine as not requiring a complete separation of the branches of government or a rigid compartmentalization of governmental functions. Under the court's analysis, a violation of the separation of powers clause occurs when one branch exercises "undue" power properly belonging to another branch or "unduly" burdens another branch in the exercise of "inherent" powers.[204]

In *People v. Inghram*,[205] the court addressed a separation of powers challenge to the provision of the Illinois Motor Vehicle Code[206] which authorizes the court to issue a judicial driving permit ("JDP") to persons demonstrating a need for such relief. The defendant in *Inghram* petitioned the court to obtain a JDP following the summary suspension of her driver's license.[207] The circuit court dismissed her petition and held that the JDP provision vio-

202. *Gerke*, 123 Ill. 2d at 95, 525 N.E.2d at 73.

203. ILL. CONST. art. II, § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

204. *But see* People v. O'Donnell, 116 Ill. 2d 517, 508 N.E.2d 1066 (1987) (the separation of powers doctrine does not bar one branch of government from exercising powers conventionally belonging to another branch); City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146 (1974) (the separation of powers clause was not intended to separate completely the three branches of government).

205. 118 Ill. 2d 140, 514 N.E.2d 977 (1987).

206. ILL. REV. STAT. ch. 95 1/2, para. 6-206.1 (1987). Section 6-206.1 states in pertinent part:

> [T]he driver who is impaired by alcohol or other drugs is a threat to the public safety and welfare. Therefore . . . to remove problem drivers from the highway, a statutory summary driver's license suspension is appropriate. It is also recognized that driving is a privilege and that in some cases the granting of limited driving privileges . . . is warranted . . . in the form of a judicial driving permit to allow the person to continue employment and drive in connection with other necessary activities where no alterative means of transportation is available.

Id.

207. *Inghram*, 118 Ill. 2d at 142, 514 N.E.2d at 978. Defendant's license was summarily suspended pursuant to ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1987) following her arrest for driving under the influence of alcohol. *Inghram*, 118 Ill. 2d at 142, 514 N.E.2d at 978.

lates the doctrine of separation of powers.[208] The Secretary of State appealed to the supreme court, and the court reversed.[209]

The court initially noted that, although the separation of powers doctrine prohibits two branches of government from exercising the same power,[210] the doctrine does not entirely prohibit one branch from performing a function ordinarily exercised by another branch.[211] The court reasoned that the judiciary can perform non-judicial functions as long as these functions neither usurp another branch's authority nor unduly burden the judiciary in performing its conventional activities.[212] The court held that the JDP provision does not usurp the Secretary's power to issue, suspend, or restrict a person's driving privileges.[213] The court also held that the judicial issuance of a JDP does not unduly burden the courts with a non-judicial function.[214] The court, therefore, upheld section 6-206.1 as a constitutional delegation of an executive power to the judicial branch of government.[215]

In *People v. Hamilton*,[216] the court addressed a challenge to the summary suspension provision of the Illinois Motor Vehicle Code based upon the separation of powers doctrine.[217] In *Hamilton*, the

208. *Inghram*, 118 Ill. 2d at 143, 514 N.E.2d at 978. The circuit court determined that, in authorizing the courts to issue JDPs, the statute confers upon the courts a power conventionally exercised by the Secretary of State, thereby violating separation of powers. *Id.* at 145, 514 N.E.2d at 980.

209. *Id.* at 152, 514 N.E.2d at 983.

210. *Id.* at 146, 514 N.E.2d at 980.

211. *Id.* at 148, 514 N.E.2d at 981.

212. *Id.* at 149, 514 N.E.2d at 981.

213. *Id.* at 150, 514 N.E.2d at 981-82. The court rejected the circuit court's finding that the JDP provision conflicts with the Secretary of State's power to restrict a person's driver's license at the time of issuance or to issue a hardship license following revocation of a driver's license. *Id.* at 150, 514 N.E.2d at 982. *See* ILL. REV. STAT. ch. 95 1/2, para. 6-113 (1987) (authorizing the Secretary of State to restrict a person's license); ILL. REV. STAT. ch. 95 1/2, para. 6-205 (1987) (authorizing the Secretary of State to issue hardship licenses following revocation of a driver's license). The supreme court held that the JDP provision applies at a different point in time from these other provisions of the Illinois Motor Vehicle Code and, therefore, does not conflict with these other sections. *Inghram*, 118 Ill. 2d at 152, 514 N.E.2d at 983.

214. *Inghram*, 118 Ill. 2d at 149, 514 N.E.2d at 981. The court reasoned that according to the plain language of the statute, section 6-206.1 was intended to be an additional remedy to the problem posed by drunk drivers on the state's roadways. *Id.* at 149, 514 N.E.2d at 981-82. The court stated that the General Assembly could determine that a judicial determination of a first-time drunk driver's need for a hardship license was appropriate. *Id.* at 150, 514 N.E.2d at 982.

215. *Id.*

216. 118 Ill. 2d 153, 514 N.E.2d 965 (1987).

217. *Id.* at 157, 514 N.E.2d at 968. The other issue raised in *Hamilton* was whether section 2-118.1(b) violated procedural due process, insofar as it purported to limit the issues which may be raised at a driver's license summary suspension rescission hearing.

circuit court held that section 2-118.1(b) of the Illinois Motor Vehicle Code violates separation of powers because it allows a court to rescind the Secretary of State's summary suspension of a driver's license.[218]

On appeal, the supreme court concluded that section 2-118.1(b) neither usurps the Secretary of State's power to suspend a driver's license nor imposes a function upon the judiciary that hinders its performance of other essential judicial activities.[219] The court added that the legislature has the authority to expand or limit the Secretary's power to issue a summary suspension because the Secretary's power stems from a legislative grant.[220] As long as the summary suspension provision neither usurps the Secretary's power to issue or suspend a driver's license nor impairs the conventional activities of the court, the statute does not violate the doctrine of separation of powers.[221] Accordingly, the court held the summary suspension provision constitutional.[222]

In *People v. Walker*,[223] the supreme court addressed a separation of powers challenge to a provision for the automatic substitution of judges in the Illinois Code of Criminal Procedure.[224] The defendant in *Walker* petitioned the court for a substitute judge because she believed that the assigned judge was prejudiced against her. The State filed a countermotion and contended that section 114-5(a) violates separation of powers by unlawfully infringing upon the administrative authority of the judiciary.[225] In particular, the

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For a discussion of the due process challenge, see *supra* notes 166-76 and accompanying text.

218. *Id.* at 161-62, 514 N.E.2d at 969-70 (citing ILL. REV. STAT. ch. 95 1/2, para. 2-118.1 (1987)).

219. *Id.* at 162, 514 N.E.2d at 970. *See* People v. O'Donnell, 116 Ill. 2d 517, 508 N.E.2d 1066 (1987), wherein the court sustained section 6-208.1(c) of the Illinois Motor Vehicle Code which authorizes the judiciary to collect fees for the issuance or re-instatement of a person's driving privileges. The *O'Donnell* court reasoned that because the collection of reinstatement fees is a ministerial, non-discretionary task, the court's performance of this task does not violate separation of powers. *Id.* at 528, 508 N.E.2d at 1071.

220. *Hamilton*, 118 Ill. 2d at 162, 514 N.E.2d at 970.

221. *Id. Cf.* People v. Inghram, 118 Ill. 2d 140, 514 N.E.2d 9776 (1987) (the court's power to issue judicial driving permits does not violate separation of powers because it neither usurps the Secretary of State's power to suspend driver's licenses nor unduly burdens the judiciary with a non-judicial function).

222. *Hamilton*, 118 Ill. 2d at 162, 514 N.E.2d at 970.

223. 119 Ill. 2d 465, 519 N.E.2d 890 (1988).

224. *Id.* at 473-74, 519 N.E.2d at 892. The automatic substitution of judges provision permits a person to petition the court for a substitution of the assigned judge on the grounds of personal bias or prejudice of the judge. Upon filing the petition, the case automatically transfers to another judge. ILL. REV. STAT. ch. 38, para. 114-5(a) (1987).

225. *Walker*, 119 Ill. 2d at 472, 519 N.E.2d at 891-92.

State argued that the provision for the automatic substitution of a judge conflicts with Supreme Court Rules 21(b)[226] and 63(c).[227]

In reversing the circuit court, the supreme court examined those Illinois Supreme Court Rules which allegedly conflicted with the provision for the automatic substitution of a judge.[228] The court found that the automatic substitution of judges provision does not conflict with the judicial authority over assignment of judges because the substitution of judges provision does not come into effect until after the initial assignment of a judge has been made.[229] The court also found that the provision for the automatic substitution of a judge does not conflict with Rule 63(c) because nothing in section 114-5 stops a judge from self-disqualification when the defendant challenges that judge's impartiality.[230] Thus, based upon the plain terms of the statute, section 114-5(a) does not violate separation of powers.[231]

Justices Ward, Miller, and Simon concurred with the majority's decision;[232] yet, they stated that the court erred in establishing a good faith requirement for a litigant's petition for substitution of

226. *Id.* at 475, 519 N.E.2d at 893. Rule 21(b) provides in pertinent part: "The chief judge of each circuit may enter general orders in the exercise of his general administrative authority, including orders providing for assignment of judges . . . ." ILL. REV. STAT. ch. 110A, para. 21(b) (1987). The State argued that the automatic substitution of judges provision interfered with the chief judge's power of assignment as authorized by Rule 21(b). *Walker*, 119 Ill. 2d at 475, 519 N.E.2d at 893.

227. *Walker*, 119 Ill. 2d at 477, 519 N.E.2d at 894. Rule 63(C)(1)(a) provides for the self-disqualification of a judge who has reason to question his impartiality as a result of either an affiliation with a particular attorney or party, or a potential bias concerning a particular attorney or party. ILL. REV. STAT. ch. 110A, para. 63(C)(1)(a)(1987).

228. *Walker*, 119 Ill. 2d at 475-76, 519 N.E.2d at 893-94. The court initially noted that the legislature has constitutional authority to enact procedural rules for the court in order to facilitate the exercise of judicial power and to complement the procedural rules promulgated by the court itself. *Id.* at 475, 519 N.E.2d at 893. The legislature, however, may not enact statutes concerned solely with the administration of the daily activities of the courts. *Id.* The court also stated that if a conflict exists between a legislative and judicial rule of court, and the legislative rule is based upon an important policy consideration, then the court reconciles the conflict between the two rules. If a conflict exists, and no policy consideration justifies the legislative rule, then the court rule prevails. *Id.*

229. *Id.* at 477, 519 N.E.2d at 894.

230. *Id.* at 478-79, 519 N.E.2d at 894.

231. *Id.* at 482, 519 N.E.2d at 896-97. In addition to its resolution of the separation of powers challenge in terms of statutory analysis, the *Walker* court also recognized that the automatic substitution of judges statute protects a litigant's constitutional right to a fair trial before an unbiased judge. *Id.* at 478, 519 N.E.2d at 894-95. The history of prior statutes and the case law supporting similar statutes, also support the court's conclusion that the automatic substitution of judges provision secures litigants with a fair and impartial trial. *Id.* at 480-81, 519 N.E.2d at 895-96. Lastly, the court noted that the automatic substitution of judges provision is subject to a good faith requirement and cannot be used as a delay tactic. *Id.* at 482, 519 N.E.2d at 896.

232. *Id.* at 482-85, 519 N.E.2d at 897-98 (Miller, J., concurring).

the assigned judge.[233] The justices found no "good faith" requirement within the language of the statute and noted that the statute requires only a showing of good cause for the substitution of a judge on the grounds of prejudice.[234] The justices stated that in establishing a "good faith" requirement, the majority overstepped its discretion and read into the statute something which the plain language of the statute does not indicate.[235]

In *People v. Porter*,[236] the court rejected a separation of powers challenge[237] to section 122-2.1 of the Illinois Code of Criminal Procedure.[238] The defendants contended that section 122-2.1 conflicts with Supreme Court Rule 651(c), which prescribes the procedure for appointment of counsel for indigent petitioners on appeal.[239] The supreme court rejected the defendants arguments and held that section 122-2.1 does not conflict with Supreme Court Rule 651(c) and, therefore, does not violate the separation of powers doctrine.[240]

In reaching its decision, the court noted that the appointment of counsel procedure under section 122-2.1 occurs at a different stage of the post-conviction process from the appointment of counsel procedure authorized under Supreme Court Rule 651(c).[241] Section 122-2.1 affects the post-conviction petitioner's right to counsel at the trial level; on the other hand, Rule 651(c) affects a post-

233. *Id.* at 483, 519 N.E.2d at 897 (Miller, J., concurring).

234. *Id.* at 484, 519 N.E.2d at 897 (Miller, J., concurring).

235. *Id.* (Miller, J., concurring). Justices Miller and Simon also opined that, contrary to the majority's opinion, the automatic substitution of judges provision has no constitutional basis. *Id.* at 484-85, 519 N.E.2d at 898 (Miller, J., concurring). The relevant consideration in analyzing section 114-5, Justice Miller wrote, is "the longevity of the practice under attack." *Id.* at 485, 519 N.E.2d at 898 (Miller, J., concurring). Like the majority, Miller recognized the historical precedent of the automatic substitution of judges statute and believed that this history provided adequate justification for the statute. *Id.* (Miller, J., concurring).

236. 122 Ill. 2d 64, 521 N.E.2d 1158 (1988).

237. *Id.* at 73, 521 N.E.2d at 1160-61. The defendants in *Porter* also contested the validity of section 122-2.1 in terms of procedural due process. *See supra* notes 148-64 and accompanying text. *See* note 150 for the supreme court's disposition of the defendants' additional equal protection challenge.

238. *Porter*, 122 Ill. 2d at 73, 521 N.E.2d at 1161. Section 122-2.1 allows the trial court to dismiss a post-conviction petition for retrial prior to the appointment of counsel on behalf of the petitioner. ILL. REV. STAT. ch. 38, para. 122-2.1(a) (1987).

239. *Porter*, 122 Ill. 2d at 72, 521 N.E.2d at 1160. Rule 651(c) states in pertinent part: "Upon timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it . . . shall appoint counsel on appeal, . . . without cost to the petitioner." ILL. REV. STAT. ch. 110A, para. 651(c) (1987).

240. *Porter*, 122 Ill. 2d at 73, 521 N.E.2d at 1161.

241. *Id.* at 72, 521 N.E.2d at 1160.

conviction petitioner's right to counsel at the appellate level.[242] In light of this distinction, the court concluded that section 122-2.1 and Rule 651(c) do not conflict with each other.[243]

Furthermore, the court ruled that appointment of counsel at the hearing stage of the post-conviction proceeding is a legislative matter.[244] The *Porter* court held that as long as the legislative enactment concerning the appointment of counsel in post-conviction proceedings does not conflict with the inherent powers of the judiciary, the law does not violate separation of powers.[245] The court concluded that section 122-2.1 does not conflict with any inherent judicial power and, therefore, does not violate the separation of powers doctrine.[246]

Justice Simon dissented from the majority's decision and found the majority's interpretation of the relation between section 122-2.1 and Rule 651(c) anomalous.[247] Simon noted that the majority distinguished section 122-2.1 from Rule 651(c) on the basis of the time at which the petition for retrial was made.[248] If the petition was filed before an appeal was taken, then the petitioner has no

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242. *Id.*

243. *Id.* at 73, 521 N.E.2d at 1161.

244. *Id.* at 72-73, 521 N.E.2d at 1160-61. In People v. Ward, 124 Ill. App. 3d 974, 978, 464 N.E.2d 1144, 1147 (4th Dist. 1984), the court stated that "the right to counsel at post-conviction proceedings is a matter of legislative grace and favor which may be altered by the legislature at will."

245. *Porter*, 122 Ill. 2d at 73, 521 N.E.2d at 1161.

246. *Id.* The court also affirmed the validity of section 122-2.1 despite the fact that the court had previously held unconstitutional section 122-8 of the Illinois Code of Criminal Procedure. *See* People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986). Section 122-8 required a different judge to hear a post-conviction petition than the original trial judge. The court reasoned that section 122-2.1 is severable from section 122-8 and can be enforced independently. *Porter*, 122 Ill. 2d at 80, 521 N.E.2d at 1163. Also, the court found that nothing in the legislative history of section 122-2.1 indicates that section 122-2.1 would not have been passed but for the inclusion of section 122-8. *Id.* at 80-81, 521 N.E.2d at 1164. The court therefore concluded that the invalidity of section 122-8 does not likewise invalidate section 122-2.1. *Id.* at 81, 521 N.E.2d at 1165. Lastly, the court held that the circuit court did not err in failing to file a written order dismissing the petitioners' post-conviction petition, but did err in failing to enter its dismissal order within 30 days of the filing of its petition. *Id.* at 83-85, 521 N.E.2d at 1165-67. In reaching this conclusion, the court determined that the word "shall" as it appears in the statute is directory in regards to the writing requirement and mandatory with respect to the 30-day requirement. *Id.* The court reasoned that the word "shall" meant that the court did not necessarily have to issue a written order but it did have to issue an order within 30 days. Given this distinction, the circuit court's failure to file a written order did not impair the validity of the dismissal order; but, the court's failure to file this order within 30 days did invalidate the order. *Id.* at 85, 521 N.E.2d at 1167.

247. *Id.* at 92, 521 N.E.2d at 1170 (Simon, J., dissenting).

248. *Id.* at 93, 521 N.E.2d at 1170 (Simon, J., dissenting).

constitutional right to counsel.[249] If, however, the petitioner filed for retrial after filing an appeal, then the petitioner has the right to have counsel appointed.[250] In making this distinction, Simon felt that the court inexplicably and unnecessarily shifted the focus of meaningful post-conviction representation from the trial court to the appellate court.[251] He also criticized the court's discussion of the difference between legislative acts that preempted a judicial prerogative and those that addressed merely a peripheral aspect of judicial administration.[252] Simon stated that the court inappropriately relied upon an appellate court decision for the proposition that the appointment of counsel is a legislative matter.[253] Simon argued that the majority again failed to establish a definitive line between the essential and peripheral function of the judiciary.[254]

The court's reluctance to invalidate legislation as violative of the separation of powers doctrine was evident throughout the *Survey* year. The court consistently rejected every separation of powers challenge presented. In rejecting these challenges, the court often focused upon the point at which the contested statutes became effective.[255] The court, however, failed to articulate any analysis that would inform litigants as to how the court determines which powers are inherent or essential and which are merely peripheral. It was the *ad hoc* process of categorization that led to Justice Simon's well-founded charge that the court forced litigants to play a "shell game" when bringing a separation of powers challenge.[256]

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249. *Id.* (Simon, J., dissenting).

250. *Id.* (Simon, J., dissenting).

251. *Id.* (Simon, J., dissenting).

252. *Id.* (Simon, J., dissenting). In his dissent in People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986), Justice Simon fully discussed the perceived difference between legislation which preempted a "fundamentally judicial prerogative" and legislation which has only a "peripheral effect on judicial administration." *Id.* at 50, 495 N.E.2d at 508 (Simon, J., dissenting).

253. *Porter*, 122 Ill. 2d at 93-94, 521 N.E.2d at 1170 (Simon, J., dissenting).

254. *Id.* at 94, 521 N.E.2d at 1171 (Simon, J., dissenting). Justice Simon also stated that the majority's use of the word "shall" in its interpretation of the statute was "chameleonic" in that the majority used the word to mean "mandatory" in one situation and simply "directory" in another. *Id.* (Simon, J., dissenting). The statute states:

> Within thirty days after filing . . . of each petition, the court shall examine such petition and enter an order . . . . If the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching it decision.

ILL. REV. STAT. ch. 38, para. 122-2.1 (1987). Given the language of the statute, Justice Simon's criticism of the majority's reading of the word "shall" is well-founded.

255. *See, e.g.*, People v. Walker, 119 Ill. 2d 465, 519 N.E.2d 890 (1988) (the contested provision applied at a point in time distinct from the allegedly conflicting provisions).

256. *Joseph*, 113 Ill. 2d at 58, 495 N.E.2d at 512 (Simon, J., dissenting). Justice Si-

D. Bill of Rights

Several cases during the *Survey* year challenged a particular Illinois statute as violative of the protection accorded to individuals under the Bill of Rights of the United States Constitution. In *People v. Baker*,[257] for example, the defendant argued that the presentence professional evaluation violated his fifth amendment right against self-incrimination.[258] The trial court ordered the defendant to submit to a presentence professional evaluation following his conviction for driving under the influence of alcohol.[259] The defendant, however, refused to submit to the professional evaluation, claiming that the fifth amendment guaranteed his right against self-incrimination.[260] The trial court issued a contempt order against the defendant, and he appealed.[261] The appellate court held that the fifth amendment applied to the pre-sentence evaluation and that the defendant was not required to answer the question presented in the evaluation.[262] The State appealed to the supreme court. On appeal, the court considered whether the fifth amendment applies to the pre-sentence evaluation, and whether a defendant can use its protection to avoid answering the questions raised during the course of the evaluation.[263]

To resolve this issue, the court considered the nature of both the sentencing phase of trial and the fifth amendment.[264] The court first determined that the professional evaluation was not mandatory in this case because the sentencing court could have appropriately determined the defendant's fine and sentence without the pre-sentence evaluation.[265] The abstract of the defendant's

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mon stated that the majority's "decision leaves future decisionmakers to chart an unsurveyed course and [they will] likely wander in the wilderness of our separation of powers jurisprudence." *Id.* at 58-59, 495 N.E.2d at 512 (Simon, J., dissenting).

257. 123 Ill. 2d 233, 526 N.E.2d 157 (1988).

258. *Id.* at 235, 526 N.E.2d at 159. Illinois law requires a defendant to undergo a professional evaluation prior to sentencing so as to determine whether the defendant has an alcohol or drug problem or any other mental or physical problems which require special treatment. ILL. REV. STAT. ch. 95 1/2, para. 11-501(e) (1985), *recodified at* ILL. REV. STAT. ch. 95 1/2, para. 11-501(f) (1987). The Uniform Code of Corrections also requires a pre-sentence evaluation. ILL. REV. STAT. ch. 38, para. 1005-4-1(a) (1987).

259. *Baker*, 123 Ill. 2d at 235, 526 N.E.2d at 159.

260. *Id.* at 238, 526 N.E.2d at 160. The defendant argued that the questions asked during the course of the professional evaluation would force him to reveal information which could potentially result in the imposition of a more severe sentence upon him. *Id.* at 238-39, 526 N.E.2d at 160-61.

261. *Id.* at 235, 526 N.E.2d at 159.

262. *Id.*

263. *Id.*

264. *Id.* at 236, 526 N.E.2d at 159.

265. *Id.* at 237-38, 526 N.E.2d at 160.

driving and criminal record sufficiently indicated whether the defendant had a recurrent problem of driving under the influence of alcohol or whether mitigating factors existed.[266] Although the professional evaluation would have provided additional information regarding the defendant's potential for rehabilitation, the court concluded that the evaluation was not necessary for a determination of the appropriate sentence for the defendant.[267]

The court next considered whether the fifth amendment applies to professional evaluations.[268] The court reasoned that because the professional evaluation generally occurs in an uncoerced, voluntary setting, and is directed only towards determining the defendant's mental and physical state, the fifth amendment is not self-activating with respect to such evaluations.[269] Thus, in order to claim the protection of the fifth amendment, the defendant must invoke its protection during the course of the professional evaluation and at the time the questions are asked.[270] The court also held that the defendant must timely raise any objections to the questions and must base his objections upon a reasonable fear that the questions, if answered, will reveal incriminating information.[271] The court thus reversed the appellate court and remanded the cause for sentencing, providing directions for processing any subsequent fifth amendment claim raised by the defendant.[272]

Prior to the court's decision in *Baker*, the Illinois courts had not established a definitive procedure for resolving a person's attempt to invoke the fifth amendment during the course of a pre-sentencing evaluation. The *Baker* court's thorough analysis of both the sentencing phase of trial and the nature of the fifth amendment

266. *Id.* at 241-42, 526 N.E.2d at 162. This information was already before the court as part of the record. *Id.*

267. *Id.* at 242, 526 N.E.2d at 162. The court stated that a pre-sentence evaluation is ordinarily used to reduce a sentence. The court usually imposes the maximum penalty and then reduces the sentence based upon the evaluation's results. Thus, the court concluded, the defendant's fear that the evaluation would lead to a more severe sentence was without merit. *Id.* at 241-42, 526 N.E.2d at 162.

268. *Id.* at 242, 526 N.E.2d at 162.

269. *Id.* at 243, 526 N.E.2d at 162-63. In Minnesota v. Murphy, 465 U.S. 420 (1984), the United States Supreme Court held that the protection of the fifth amendment is self-activating only in those situations where the individual is forced to disclose incriminating information involuntarily or within a custodial setting. In all other situations, the individual must invoke the protection of the fifth amendment upon timely objection. *Id.* at 425.

270. *Baker*, 123 Ill. 2d at 243, 526 N.E.2d at 163.

271. *Id.* at 243-44, 526 N.E.2d at 163. The supreme court held that the trial court will then determine the reasonableness of the defendant's fear and compel disclosure where appropriate. *Id.* at 244, 526 N.E.2d at 163.

272. *Id.* at 245, 526 N.E.2d at 163-64.

provides future decisionmakers with the appropriate method with which to address any subsequent fifth amendment challenges.

It is never made clear in the court's opinion, however, what outcome the defendant is seeking to avoid by invoking the fifth amendment. The defendant could be seeking to avoid further prosecutions for drunk driving based on an admission made during the evaluation or a harsher sentence for the instant conviction based on aggravating circumstances revealed at the evaluation. Particular language in the court's opinion indicates that the court considered the assertion of the fifth amendment privilege under the latter circumstances. The court stated that the defendant's argument lacked merit because the court had sufficient information without the evaluation to justify imposing the maximum sentence.[273] Therefore, any information revealed during the evaluation could only serve to mitigate the sentence.[274]

A decision that the fifth amendment could properly be asserted to protect against a harsher sentence would greatly expand upon the guarantees of the fifth amendment. There appear to be no decisions dealing with the analogous situation of invoking the fifth amendment privilege when answers might lead to the revocation of parole or probation. Nor do there appear to be any decisions dealing with the assertion of the fifth amendment strictly to protect a defendant in the sentencing phase of a trial.

In *People v. Geever*,[275] the court rejected the defendants' first amendment challenge to section 11-20.1 of the Illinois Criminal Code of 1969 which prohibits the possession of child pornography.[276] The defendants in *Geever* were charged with violating section 11-20.1 after home searches revealed evidence of child pornography.[277] The trial court dismissed the State's complaint on the grounds that section 11-20.1 violates the defendants' first amendment rights.[278] The State appealed directly to the supreme

273. *Id.* at 242, 526 N.E.2d at 162.

274. *Id.*

275. 122 Ill. 2d 313, 522 N.E.2d 1200 (1987).

276. *Id.* at 330, 522 N.E.2d at 1208. Paragraph 11-20.1 of the Criminal Code states in pertinent part:

> [The offense of child pornography occurs when] with knowledge of the nature or content thereof, [a person] reproduces, disseminates . . . or possesses any film, videotape, photograph or other similar visual reproduction of any child . . . under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection . . . .

ILL. REV. STAT. ch. 38, para. 11-20.1 (1987).

277. *Geever*, 122 Ill. 2d at 315, 522 N.E.2d at 1201.

278. *Id.*

court, and the court reversed the circuit court's decision.[279]

In assessing the constitutionality of the child pornography law, the court reviewed a decision of the United States Supreme Court wherein the Court held unconstitutional a Georgia state law that prohibited the possession of pornographic materials in an individual's home.[280] The court also noted, however, the more recent Supreme Court decision in *New York v. Ferber*[281] wherein the Court upheld a New York state law prohibiting the dissemination of child pornography.[282] In sustaining the New York law, the *Ferber* Court reasoned that the overwhelming public interest in the health and welfare of children justifies any alleged compromise of an individual's first amendment right to possess child pornography.[283]

The court in *Geever* adopted the *Ferber* Court's reasoning and ruled that society's need to preserve the welfare of children justifies the extension of the proscription against the possession of child pornography in an individual's home.[284] The court recognized that although the Constitution protects the privacy of an individual's home, the protection is not without limitation.[285] Compelling reasons may override an individual's right to possess certain objectionable materials.[286] Society's compelling interest in protecting

279. *Id.* at 330, 522 N.E.2d at 1208.

280. *Id.* at 317, 522 N.E.2d at 1202. Under Stanley v. Georgia, 394 U.S. 557, 564-65 (1969), any statute prohibiting the possession of pornographic materials in an individual's home violated the first and fourteenth amendments to the Constitution. The Court stated that although the state had the power to regulate obscenity, the state did not have the power to extend that regulation into the privacy of an individual's home. *Id.* at 568.

281. 458 U.S. 747 (1982).

282. *Id.* at 765-66. In *Ferber*, the Supreme Court discussed at length the evils of child pornography and the need for legislation to protect children from these evils. *Id.* at 758 n.9.

283. *Id.* at 764. The Court stated that the prevention of child pornography safeguards the physiological and psychological well-being of the child. *Id.* at 756-57. Given the severe and permanent damage which child pornography may cause, the Court concluded that the state is justified in regulating the dissemination of child pornography. *Id.* at 764.

284. *Geever*, 122 Ill. 2d at 327, 522 N.E.2d at 1206-07. The court also noted that the express purpose of the Illinois child pornography law was to prevent the sexual abuse and exploitation of children. *Id.* at 324, 522 N.E.2d at 1205. To achieve this goal, the legislature prohibited the production, dissemination, and possession of child pornography. *Id.* The proscription of possession, in particular, was aimed at "drying up" the child pornography market, thereby eliminating the demand for child pornography. *Id.* at 326, 522 N.E.2d at 1206. The legislature conceived the prohibition of possession as a vital link in the complete eradication of child pornography. *Id.*

285. *Id.* at 325, 522 N.E.2d at 1205.

286. *Id.* (quoting *Stanley*, 394 U.S. at 568 n.11).

children from the evils of child pornography,[287] the court reasoned, justifies the state's limitation on the first amendment rights of an individual.[288] The court, therefore, upheld section 11-20.1's prohibition of the possession of child pornography.[289]

Justice Clark dissented from the majority's opinion and stated that in extending the proscription against the possession of child pornography into private homes, the legislature compromised the first amendment rights of an individual.[290] Clark recognized the serious threat that child pornography poses to the safety of children, but believed that even this public interest does not justify the overthrow of the fundamental right of free expression.[291] Clark also stated that the majority failed to consider adequately the defendants' challenge to the validity of the statute in light of the right to privacy clause of the Illinois Constitution.[292] Clark argued that the protection of an individual's right to privacy under the Illinois Constitution exceeds the protection provided under the United States Constitution.[293] Although Clark conceded that section 11-20.1 may be constitutional in light of the first amendment, he maintained that section 11-20.1 violates the individual's right to

287. *See* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981) (discussing the evils of child pornography).

288. *Geever*, 122 Ill. 2d at 327, 522 N.E.2d at 1206-07.

289. *Id.* at 327, 522 N.E.2d at 1207. The court found additional support from decisions in other jurisdictions that affirmed the validity of statutes similar to section 11-20.1. *See, e.g.*, State v. Meadows, 28 Ohio St. 3d 43, 503 N.E.2d 697 (1986), *cert. denied*, 107 S. Ct. 1581 (1987); *see also* United States v. Anderson, 803 F.2d 903 (7th Cir. 1986). The court also cited several penal codes which contain proscriptions against the possession of child pornography. *See Geever*, 122 Ill. 2d at 329, 522 N.E.2d at 1207.

290. *Id.* at 331, 522 N.E.2d at 1208 (Clark, J., dissenting).

291. *Id.* (Clark, J., dissenting).

292. *Id.* at 337, 522 N.E.2d at 1211 (Clark, J., dissenting). In People v. Tisler, 103 Ill. 2d 226, 241-42, 469 N.E.2d 147, 155 (1984), the court held that the search and seizure provision of the Illinois Constitution should be construed similarly to the federal interpretation of the fourth amendment. The *Tisler* court recognized, however, that the Illinois Constitution protects an individual's right of privacy. *Id.* at 242, 469 N.E.2d at 155. In a special concurrence, Justice Clark suggested that because of this express protection of a right of privacy, the Illinois courts should not "march in lockstep" with federal interpretations of federal constitutional principles, even when the Illinois Constitution is worded similarly. *Id.* at 258, 469 N.E.2d at 163 (Clark, J., specially concurring).

In his dissent in *Geever*, Justice Clark relied upon the arguments raised in his *Tisler* concurrence and applied those arguments to the right of privacy. Clark urged that the court not "march in lockstep" with the federal court's interpretation of the first amendment and thereby discard the Illinois Constitution's express guarantee of the right of privacy. *Geever*, 122 Ill. 2d at 341, 522 N.E.2d at 1213 (Clark, J., dissenting).

293. *Id.* at 341-42, 522 N.E.2d at 1213-14 (Clark, J., dissenting). Justice Clark's dissent here echoes the argument raised by Justice Simon in his dissent to People v. Porter, 122 Ill. 2d 64, 521 N.E.2d 1158 (1988), *supra* notes 160-64 and accompanying text.

privacy guaranteed by the Illinois Constitution.[294]

By failing to undertake a serious analysis of the defendant's claim under the privacy clause of the Illinois Constitution, a majority of the court continued to demonstrate a reluctance to explore the use of the state constitution to expand personal freedoms beyond the standards required by the Bill of Rights.[295] Although it is not surprising that the court declined to find protection for child pornography within the privacy clause, the court's apparent unwillingness to consider the applicability of the Illinois privacy clause as a protection of the defendants' claimed fundamental rights is significant. The *Geever* case indicates that litigants relying solely on the Illinois Constitution to protect fundamental rights must drag a reluctant court into previously uncharted waters.

The overwhelming public interest that justified the limitation of an individual's first amendment right in *Geever*, also applies in a variety of other contexts. For example, in *People v. Kohrig*,[296] the court held that the overwhelming public interest in protecting Illinois motorists from the dangers of automobile accidents justifies the intrusion upon an individual's right to privacy posed by the Illinois Seat Belt Law.[297] The supreme court stated that the legislature may limit an individual's right to privacy when a compelling state interest necessitates such limitation.[298] The state's interest in protecting its citizens from serious injuries resulting from automobile accidents necessitates the requirements of the Seat Belt Law.[299] The court also noted that the state has the power to enact legislation that promotes the general economic welfare of the state.[300]

294. *Geever*, 122 Ill. 2d at 342, 522 N.E.2d at 1213-14 (Clark, J., dissenting).

295. *See* People v. Porter, 122 Ill. 2d 64, 521 N.E.2d 1158 (1988) (Simon, J., dissenting). In *Porter*, Justice Simon dissented from the majority opinion and argued for the expansion of due process protection under the Illinois Constitution beyond the limits of federal interpretations of due process. *Id.* at 88, 521 N.E.2d at 1167-68 (Simon, J., dissenting).

296. 113 Ill. 2d 384, 498 N.E.2d 1158 (1986).

297. *Id.* at 396, 498 N.E.2d at 1162 (citing ILL. REV. STAT. ch. 95 1/2, para. 12-603 (1985)).

298. *Id.* at 393, 498 N.E.2d at 1160.

299. *Id.* at 405, 498 N.E.2d at 1166. The *Kohrig* court overturned the decision in People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969), wherein the court previously held unconstitutional the Illinois Motorcyclists Helmet Law, ILL. REV. STAT. ch. 95 1/2, para. 189c(a) (1967). The court, in *Fries*, held that the helmet law violated an individual's right to privacy and unlawfully extended the police power of the state. *Fries*, 42 Ill. 2d at 450, 250 N.E.2d at 151. The *Kohrig* court declared that to the extent that *Fries* was inconsistent with the decision in *Kohrig*, *Fries* was overruled. *Kohrig*, 113 Ill. 2d at 406, 498 N.E.2d at 1166.

300. *Kohrig*, 113 Ill. 2d at 404, 498 N.E.2d at 1166. The *Kohrig* court also stated that the fact that a statute reflects an unprovable assumption about what is good for the peo-

The court reasoned that the Seat Belt Law reduces the private and public costs arising from injuries and deaths caused by automobile accidents, thereby promoting the general welfare of the state.[301] The court concluded that the law is a constitutional exercise of the police power of the state and does not violate the first amendment because the Seat Belt Law would reduce both the number and the cost of injuries arising from automobile accidents.[302]

The court's decision potentially may impact upon future challenges to the constitutionality of the recently enacted mandatory insurance law in Illinois.[303] If the state has the power to enact legislation aimed at reducing private and public costs arising from injuries and deaths caused by motor vehicles, then the state presumably would have the authority to require each individual to obtain automobile liability insurance as an incident of ownership of a motor vehicle. Whether the state's police power does, in fact, extend this far has yet to be determined.

In *County of Cook v. Renaissance Arcade and Bookstore*,[304] the court addressed a first amendment challenge to the Cook County Zoning Ordinance ("the 1981 Ordinance") which restricts the location of sexually explicit businesses to industrially-zoned areas and certain commercially-zoned areas.[305] Cook County ("the County") initially filed a complaint against the defendants as owners of sexually explicit businesses within the county, seeking to enjoin them from operating their businesses outside the areas designated by the 1981 Ordinance.[306] The circuit court ruled in favor of the County and issued an injunction against the defend-

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ple does not warrant invalidation of the statute on constitutional grounds. *Id.* at 402, 498 N.E.2d at 1165.

301. *Id.* at 404, 498 N.E.2d at 1166.

302. *Id.* at 393, 498 N.E.2d at 1160.

303. *See* 1988 Ill. Legis. Serv. 85-1201 (West) (to be codified at ILL. REV. STAT. ch. 95 1/2, para. 7-601 (1989)).

304. 122 Ill. 2d 123, 522 N.E.2d 73 (1988) [hereinafter *Renaissance Arcade*].

305. *Id.* at 131, 522 N.E.2d at 76. *See* COOK COUNTY ZONING ORDINANCE § 13.16-1 (1981).

306. *Renaissance Arcade*, 122 Ill. 2d at 128-29, 522 N.E.2d at 75. The 1981 Ordinance amended the 1977 Ordinance, portions of which were held unconstitutional in County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1st Dist. 1981). The 1981 Ordinance limited the location of sexually explicit businesses, *e.g.*, adult book stores, to industrially-zoned areas or certain commercially-zoned areas scattered throughout the county. The 1981 Ordinance also prohibited any two adult use stores from locating within 1000 feet of each other. The 1981 Ordinance applied to existing businesses and provided a six-month amortization period in which these established businesses could relocate. The business could obtain upon application a six-month extension to the period. Lastly, the 1981 Ordinance required the owners of the adult use businesses to obtain a special use permit from the Cook County Board of Commissioners

ants. On appeal, the appellate court reversed the trial court's order and held that the 1981 Ordinance unlawfully restricted the public's access to adult use stores.[307] The appellate court further stated that the 1981 Ordinance failed to provide the defendants with a reasonable opportunity to operate their businesses because it unfairly limited the location in which the businesses could operate and impaired public access to communications protected by the first amendment.[308]

The supreme court reversed the appellate court's decision and upheld the 1981 Ordinance.[309] The supreme court closely examined the evidence presented to the trial court concerning possible locations within Cook County for the defendants' businesses. Both parties provided detailed maps and surveys indicating the areas in which the defendants could locate and the amount of available property within these areas.[310] Based upon this evidence, the court found that the 1981 Ordinance identifies seventy-eight industrially-zoned areas in which the defendants could locate their businesses.[311] In addition, the ordinance allows adult use businesses in another 245 commercially-zoned areas, provided that the businesses held a special use permit. The court concluded that these industrial areas provide sufficient opportunity for the defendants to operate their businesses.[312] The court reasoned that because the

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prior to opening an adult use store. *Renaissance Arcade*, 122 Ill. 2d at 129-30, 522 N.E.2d at 75.

307. *Renaissance Arcade*, 122 Ill. 2d at 130-31, 522 N.E.2d at 75-76.

308. *Id.* The appellate court held that the 1981 Ordinance failed to meet the requirements established in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). County of Cook v. Renaissance Arcade and Bookstore, 150 Ill. App. 3d 6, 15, 501 N.E.2d 133, 139 (1st Dist. 1986). In *Renton*, the Court stated that a municipal ordinance could regulate adult use stores provided the ordinance "[did] not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. The appellate court in *Renaissance Arcade* reasoned that the limitations imposed by the 1981 Ordinance unreasonably limited the public's access to the first amendment protected communications offered by the defendants. Accordingly, the appellate court held the 1981 Ordinance unconstitutional. *Renaissance Arcade*, 150 Ill. App. 3d at 20-21, 501 N.E.2d at 142-43.

309. *Renaissance Arcade*, 122 Ill. 2d at 153, 522 N.E.2d at 86.

310. *Id.* at 134-35, 522 N.E.2d at 77-78. The expert witness for the adult use business owners showed that the areas in Cook County left available for the defendants' use comprised only 5.7% of the available land within the county. In contrast, the County's expert witness demonstrated that the ordinance left 8.9% of the total land area of Cook County available for the defendants' use. *Id.* at 134, 522 N.E.2d at 77.

311. *Id.* at 137-38, 522 N.E.2d at 79.

312. *Id.* at 139-40, 522 N.E.2d at 79-80. According to the Supreme Court's decision in *Renton*, a zoning ordinance restricting the operation of adult businesses must provide the owners a reasonable opportunity to operate their businesses in the city. *Renton*, 475 U.S. at 54. The ordinance upheld by the *Renton* Court left 5% of the entire land areas of the city available for use by the adult business owners. In comparison, the *Renaissance*

1981 Ordinance provides the defendants with a reasonable number of sites in which to operate their businesses, the ordinance neither unreasonably restricted the defendants' right to operate their businesses nor limited public access to materials protected by the first amendment.[313]

The *Renaissance Arcade* court also addressed several other first amendment challenges presented by the defendants.[314] The court rejected most of these challenges through statutory analysis and did not rely upon the first amendment for its decision. For example, the defendants contended that because the 1981 Ordinance applies to existing businesses, the ordinance has to contain a grandfather clause to allow existing adult use businesses that do not conform to the 1981 Ordinance to continue operation.[315] Because the 1981 Ordinance does not provide a grandfather clause, the defendants argued that the ordinance is unconstitutional. The County argued that the lack of a grandfather clause does not make the ordinance *per se* unconstitutional; it asserted that the ordinance's amortization period allows ample opportunity for nonconforming adult uses to relocate their businesses in conformity with the 1981 Ordinance.[316] Upon careful analysis of the ordinance, the court concluded that the ordinance is not unconstitutional despite the lack of a grandfather clause.[317] The court found that the six-month amortization period provided under the ordinance could be extended by an additional six months upon application.[318] Thus, a nonconforming business has a one-year period in which to relocate

Arcade court found that the Cook County zoning ordinance left between 5.7% and 8.9% of the total land areas of Cook County available for the defendants' use. The Illinois Supreme Court, therefore, concluded that the 1981 Ordinance provides the defendants with a reasonable opportunity to operate their adult businesses within Cook County. *Renaissance Arcade*, 122 Ill. 2d at 139-40, 522 N.E.2d at 79-80.

313. *Renaissance Arcade*, 122 Ill. 2d at 139-40, 522 N.E.2d at 79-80. The court rejected the defendants' objection that no commercially viable areas were readily available for adult use businesses. *Id.* at 139, 522 N.E.2d at 79. The court stated, "*Renton* does not require the county to provide the defendants with land tailor-made to conform to [their] requirements." *Id.* According to *Renton*, "[the defendants] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Renton*, 475 U.S. at 54.

314. *Renaissance Arcade*, 122 Ill. 2d at 140-56, 522 N.E.2d at 80-86.

315. *Id.* at 140, 522 N.E.2d at 80.

316. *Id.* The defendants argued that the ordinance's six-month amortization period is unreasonably short. *Id.* at 140-41, 522 N.E.2d at 80.

317. *Id.* at 141, 522 N.E.2d at 80.

318. *Id.* at 142, 522 N.E.2d at 81. The 1981 COOK COUNTY ZONING ORDINANCE, §§ 13.16-4-1 to 13.16-4-3 (1981), allows existing businesses to obtain a six-month extension to the amortization period upon application to the Department of Building and Zoning. *Renaissance Arcade*, 122 Ill. 2d at 141, 522 N.E.2d at 80.

in conformity with the 1981 Ordinance. The court reasoned that the one-year period compensates for the ordinance's lack of a grandfather clause and, therefore, concluded that the ordinance was not unconstitutional.[319]

The defendants also argued that the spacing requirements of the 1977 Ordinance still apply under the 1981 Ordinance because the court never invalidated these spacing requirements, despite the fact that it invalidated most of the other provisions of the 1977 Ordinance.[320] The defendants contended that these spacing requirements further restricted the number of areas available for their businesses and that the court failed to consider these requirements when determining the number of areas left available by the 1981 Ordinance.[321] The defendants, therefore, argued that the combined effect of the two ordinances unreasonably limits the number of areas available for their businesses. The court rejected the defendants' contention, however, and held that the remaining portions of the 1977 Ordinance no longer applied under the 1981 Ordinance.[322] Therefore, it does not further limit the areas available to the defendants.[323]

The court reasoned that even though the spacing requirements of the 1977 Ordinance had not been expressly invalidated, the requirements are not applicable under the 1981 Ordinance.[324] The court stated that, generally, the remainder of an invalidated statute cannot stand if: (1) the remainder cannot be enforced independently from the invalidated provisions; and (2) the legislative history of the statute shows that the General Assembly would not have enacted the remainder but for the enactment of the invalidated portion of the statute.[325] In this case, the court found that the spacing requirements could not be enforced independently of

319. *Renaissance Arcade*, 122 Ill. 2d at 142-43, 522 N.E.2d at 81.

320. *Id.* at 145-46, 522 N.E.2d at 85. In County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1st Dist. 1981), the court invalidated the zoning scheme created by the 1977 Ordinance as an unconstitutional restraint upon the first amendment right of free speech. Although the court invalidated most of the 1977 Ordinance, the spacing requirements were never invalidated. These spacing requirements prohibited more than two adult use businesses from locating within 1000 feet of each other and prohibited any adult use store from locating within 1000 feet of either a residentially-zoned area or a church. COOK COUNTY ZONING ORDINANCE § 13.16-1 (1977).

321. *Renaissance Arcade*, 122 Ill. 2d at 146, 522 N.E.2d at 83.

322. *Id.* at 149, 522 N.E.2d at 84.

323. *Id.*

324. *Id.* at 147, 522 N.E.2d at 83.

325. *Id. See also* George D. Hardin, Inc. v. Village of Mount Prospect, 99 Ill. 2d 96, 457 N.E.2d 429 (1983) (applying the general rule regarding the enforcement of the remainder of an invalidated statute).

the invalidated portions of the ordinance.[326] Additionally, the legislative intent of the 1977 Ordinance indicated that the spacing requirements would not have been passed but for the enactment of the entire ordinance.[327] In light of these facts, the court concluded that upon invalidation of the majority of the 1977 Ordinance, the spacing requirements of that ordinance were likewise invalidated.[328] Consequently, the court held that the 1977 Ordinance's spacing requirements did not further restrict the 1981 Ordinance's spacing requirements.[329]

The defendants' final contention attacked the 1981 Ordinance's requirement that the owners of adult use stores obtain a special use permit prior to locating within a commercially-zoned area.[330] The defendants objected to this requirement because the ordinance failed to establish objective criteria by which the county board of commissioners could determine whether the owner of an adult use business should receive a special use permit. The court agreed with the defendant's contention, holding that the ordinance was unconstitutionally vague with respect to the special use permit requirement.[331] The court stated that the ordinance's failure to specify objective standards for the permits allowed county officials to discriminate against the adult use businesses through selective and arbitrary enforcement of the permit provision. The court, therefore, invalidated this portion of the 1981 Ordinance.[332]

In sum, the court upheld the 1981 Ordinance as constitutional with respect to its limitation upon the areas available for use by the defendants, the amortization period provided for relocation, and the spacing requirements limiting further the possible location of

326. *Renaissance Arcade*, 122 Ill. 2d at 147-48, 522 N.E.2d at 83-84.

327. *Id.*

328. *Id.*

329. *Id.* at 149-150, 522 N.E.2d at 84-85. The court also noted that the county enacted the 1981 Ordinance as a comprehensive restructuring of the regulatory zoning scheme within Cook County. The court reasoned that the 1981 Ordinance replaced entirely the prior ordinance and therefore, any remaining portions of the prior ordinance were preempted upon enactment of the 1981 Ordinance. *Id.* at 147-48, 522 N.E.2d at 83-84.

330. *Id.* at 150, 522 N.E.2d at 85.

331. *Id.* at 151, 522 N.E.2d at 85.

332. *Id.* at 152, 522 N.E.2d at 85-86. The court held that this portion of the ordinance was severable from the other portions of the 1981 Ordinance because the permit requirement was capable of independent enforcement, and nothing in the legislative history of the ordinance indicated that the General Assembly would not have passed the ordinance but for the inclusion of the permit requirements. *Id.* at 151-52, 522 N.E.2d at 85-86. Thus, the court concluded that the invalidity of the permit requirement did not warrant invalidating the entire ordinance. *Id.*

the defendants' businesses.[333] In upholding the ordinance, the court adopted the standards for regulation of adult use stores as promulgated by the Supreme Court in *Renton*.[334] The court declined to adopt the more stringent application of the *Renton* requirements advocated by the appellate court and, instead, adopted a somewhat relaxed *Renton* standard.[335] Thus, the court concluded that the 1981 Ordinance does not unreasonably impair the defendants' right to disseminate materials protected by the first amendment or unduly restrict public access to such materials.[336]

In *Pre-School Owners Association v. DCFS*,[337] the court rejected a Bill of Rights challenge to the Child Care Act.[338] The plaintiffs contended that section 2.09(i) of the Child Care Act expresses a religious preference in exempting day-care programs operated by a religious institution from regulation.[339] This preferential treatment, the plaintiffs contended, violates the establishment clause of the United States Constitution[340] and the comparable provision of the Illinois Constitution.[341] Applying the *Lemon* test,[342] the court concluded that the statute does not express a religious preference

333. *Id.* at 123, 522 N.E.2d at 73.

334. *Id.* at 135, 522 N.E.2d at 78.

335. *Id.*

336. *Id.* at 153, 522 N.E.2d at 83.

337. 119 Ill. 2d 268, 518 N.E.2d 1018 (1988).

338. *Id.* at 278, 518 N.E.2d at 1023 (citing ILL. REV. STAT. ch. 23, paras. 2211-2230 (1985)). The main issue in *Pre-School Owners* was whether the Child Care Act violates the equal protection clause in exempting certain categories of day-care centers from regulation under the Child Care Act. *See supra* notes 48-57 and accompanying text.

The defendants also contended that the Child Care Act is unconstitutionally vague with respect to the licensing standards required under the Act. *Pre-School Owners*, 119 Ill. 2d at 281-82, 518 N.E.2d at 1025. The court rejected the defendant's contentions and held that the Child Care Act is sufficiently specific to enable members of the Department of Children and Family Services to review day-care facilities. *Id.* at 286, 518 N.E.2d at 1027.

339. ILL. REV. STAT. ch. 23, para. 2212.09 (1987). Section 2.09(i) provides an exemption from the definition of day-care centers for:

> (i) programs . . . which (1) [serve] children who shall have attained the age of three years, (2) [are] operated by churches or religious institutions . . . (4) [are] operated as a component of a religious nonprofit elementary school, and (5) operate primarily to provide religious education . . . .

Id.

340. U.S. CONST. amend. I.

341. ILL. CONST. art. I, § 3.

342. The *Lemon* test, developed in Lemon v. Kurtzman, 403 U.S. 602 (1971), defines three requirements to test the validity of a statute allegedly expressing a religious preference. First, the statute must have a secular purpose. *Id.* at 612-13. Second, the primary effect of the legislation must not affect religion. Third, the statute must not foster governmental entanglement in religion. *Id.*

because subsection (i) has a valid legislative purpose,[343] it neither advances nor inhibits religious freedom, and it holds governmental entanglement in religion to a minimum.[344] The court, therefore, held the statute constitutional.[345]

E. Contract Clause

Under article I, section 10, of the United States Constitution, a state cannot enact any law that may impair a pre-existing contractual obligation.[346] Historically, however, the contract clause infrequently formed the basis for a court to invalidate a particular legislative act.[347] Notwithstanding the general trend among the courts to avoid the use of the contract clause,[348] the Illinois Supreme Court adopted the rationale of the contract clause to resolve challenges to the constitutionality of two Illinois statutes during the *Survey* year.

In *Stelzer v. Mathews Roofing Co.*,[349] the court considered whether section 13-214 of the Illinois Code of Civil Procedure[350] governs the time for bringing an action for a breach of a written guarantee or whether the length of the written guarantee determined the appropriate statute of limitations.[351] The circuit court

343. *Pre-School Owners*, 119 Ill. 2d at 280, 518 N.E.2d at 1024. The court found that subsection (i) exempts day-care programs affiliated with a religious organization because these programs are already subject to regulation by the State Board of Education. Additional regulation under the Child Care Act was, therefore, unnecessary. *Id.*

344. *Id.* at 280-81, 518 N.E.2d at 1024-25. The court concluded that the narrow limits and specificity of subsection (i) minimize the provision's effect upon the practice of religion and limit governmental intrusion into religious matters. *Id.* at 280, 518 N.E.2d at 1024.

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

346. U.S. CONST. art I, § 10, cl. 1. The contract clause states in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." *Id.*

347. Gunther, *supra* note 3, at 487-500.

348. Gunther, *supra* note 3, at 487.

349. 117 Ill. 2d 186, 511 N.E.2d 421 (1987).

350. ILL. REV. STAT. ch. 110, para. 13-214(a) (1987). The statute states that any action for breach of contract arising in connection with, *inter alia*, the construction of an improvement to real property "shall be commenced within two years from the time the person bringing an action . . . knew or should reasonably have known of [the breach]." *Id.*

351. *Stelzer*, 117 Ill. 2d at 188, 511 N.E.2d at 421-22. The plaintiffs in *Stelzer* sued to recover the costs of repair to the roof of their house after the defendant, who installed the roof, refused to honor his written guarantee. *Id.* at 185, 511 N.E.2d at 422. The defendant filed a motion for summary judgment, arguing that the two-year statute of limitations had expired and that the plaintiffs' suit was untimely. The plaintiffs contended that the duration of the written guarantee should determine the proper statute of limitation. The plaintiffs, therefore, asserted that their action was timely because the defendant's ten-year written guarantee still had several years to run. *Id.* at 187, 511 N.E.2d at 421.

enforced the two-year statute of limitation under section 13-214 and dismissed the plaintiffs' complaint as untimely.[352] The appellate court reversed, holding that the plaintiff was entitled to bring the action within the time period of the written guarantee.[353] The defendant appealed to the supreme court, and the court affirmed the appellate court's decision.[354]

The supreme court found that according to section 13-214, actions for breach of a written guarantee of over twelve years in duration can be brought at any time within the period specified by the guarantee.[355] The court noted, however, that section 13-214 does not define the appropriate statute of limitations for actions based upon written guarantees for a duration of less than twelve years.[356] In light of this ambiguity, the court reasoned that section 13-214 must be construed so as to allow a cause of action for breach of a written guarantee of less than twelve years to be brought within the time period of the written guarantee.[357] Any other interpretation of section 13-214, the court stated, impairs the plaintiff's pre-existing rights under the express terms of the written guarantee.[358] The court, therefore, concluded that the statute of limitations for actions for breach of a written guarantee equals the time limit specified on the written guarantee.[359]

Justice Simon concurred in the judgment of the majority, but disagreed with respect to the majority's interpretation of section 13-214.[360] Simon interpreted section 13-214(d) to exempt actions

352. *Id.*

353. *Id.* at 191, 511 N.E.2d at 424.

354. *Id.*

355. *Id.* at 190, 511 N.E.2d at 422-23. The court based this conclusion upon subsections (b) and (d) of section 13-214. *Id.* at 190, 511 N.E.2d at 422. Subsection (b) prohibits any action for breach of warranty from being brought after 12 years from the time of the event underlying the action. Subsection (d) modifies subsection (b), however, and states that subsection (b) "shall not prohibit any action against a defendant who has expressly warranted or promised the improvement to real property for a longer period from being brought within that period." ILL. REV. STAT. ch. 110, para. 13-214 (1983). Given the language of section (d), the court concluded that an action for breach of a written guarantee of over 12 years duration could be brought at any time during the period covered by the guarantee. *Stelzer*, 117 Ill. 2d at 190, 511 N.E.2d at 422-23.

356. *Stelzer*, 117 Ill. 2d at 190, 511 N.E.2d at 423.

357. *Id.*

358. *Id.* According to the United States Supreme Court's decision in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242-44 (1978), a contractual right cannot be substantially impaired by legislation unless an important public interest justifies the impairment. The defendant in *Stelzer* presented no evidence to indicate that a compelling state interest justified the abrogation of the plaintiffs' contractual rights under the written guarantee. *Stelzer*, 117 Ill. 2d at 191, 511 N.E.2d at 423.

359. *Stelzer*, 117 Ill. 2d at 191, 511 N.E.2d at 423.

360. *Id.* at 191-92, 511 N.E.2d at 423-24 (Simon, J., specially concurring).

for breach of written guarantees of over twelve years in duration from only the period of repose proscribed in section 13-214(b).[361] In Simon's view, section 13-214(b) does not exempt actions on written guarantees of twelve years or more from the two-year statute of limitations.[362] Although Simon agreed with the majority's denial of the defendant's motion for summary judgment based upon the expiration of the statute of limitations, he would have remanded the case for purposes of determining the date on which the two-year statute of limitations began to run.[363]

A contract clause rationale also influenced the court's decision in *Buddell v. Board of Trustees, State University Retirement System*.[364] The plaintiff in *Buddell* worked for Southern Illinois University ("SIU") in 1969 and participated in the State University Retirement System.[365] Prior to his employment for SIU, the plaintiff served in the armed forces for approximately one and three-fourths years.[366] The Pension Code of 1969 permitted the plaintiff to purchase service credit for time spent in the military.[367] A 1974 amendment to the Pension Code, however, limited purchases of military service credit to persons who had participated in the pension plan prior to September 1, 1974, and who had applied for service credit by that date.[368] The plaintiff sought to purchase his service credit in 1983. Given the 1974 amendment to the Pension Code, however, the Board of Trustees ("the Board") denied Buddell's claim for service credit.[369] Upon administrative review, the circuit court reversed the Board's decision and held section 15-113(i) unconstitutional as violative of article XIII, section 5, of the Illinois Constitution.[370]

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361. *Id.* at 192, 511 N.E.2d at 423-24 (Simon, J., specially concurring).

362. *Id.* (Simon, J., specially concurring). Justice Simon also stated that contrary to the majority's assertion, nothing in the history of the statute or the language of the statute indicated a legislative intent not to impair pre-existing contractual rights of persons holding extended warranties. *Id.* at 192, 511 N.E.2d at 424 (Simon, J., specially concurring).

363. *Id.* at 194, 511 N.E.2d at 424 (Simon, J., specially concurring).

364. 118 Ill. 2d 99, 514 N.E.2d 184 (1987).

365. *Id.* at 100, 514 N.E.2d at 185.

366. *Id.*

367. ILL. REV. STAT. ch. 108 1/2, para. 15-113(i) (1969).

368. *Buddell*, 118 Ill. 2d at 101-02, 514 N.E.2d at 185. Section 15-113(i) as amended states: "This paragraph shall not apply to individuals who become participants in the system after September 1, 1974. Credit for military service under this paragraph shall be allowed only to those who are eligible for credit under this paragraph and have applied for such credit before September 1, 1974." ILL. REV. STAT. ch. 108 1/2, para. 15-113(i) (1975).

369. *Buddell*, 118 Ill.2d at 101, 514 N.E.2d at 185.

370. *Id.* Article XIII, section 5 states: "Pension and Retirement Rights — Membership in any pension or retirement system of the State, any unit of local government or

On appeal, the Board contended that the plaintiff was not entitled to receive the additional benefits based upon his prior military service because he had not claimed those rights as required under the statute and had given no consideration for the additional benefits.[371] The Board, therefore, argued that no contractual relationship existed between the parties.[372] The court rejected the Board's contention, however, and found that under the Illinois Constitution, all pension plans previously defined as non-contractual plans became contractual pension plans.[373] Accordingly, the court held that upon adoption of the Illinois Constitution of 1970, all of the plaintiff's rights under the Pension Code of 1969 became contractual in nature[374] and could not be altered or released except in exchange for valid consideration.[375] Consequently, the court concluded that because the legislature had not offered the plaintiff any consideration in exchange for the relinquishment of his right to purchase military service credit, the plaintiff still retains this right.[376] The court, therefore, held that insofar as section 15-113(i) attempted to divest the plaintiff of his contractual rights under the Pension Code of 1969 without valid consideration, section 15-113(i) violated article XIII, section 5, of the Illinois Constitution.[377]

Although the court in both *Buddell* and *Stelzer* recognized and protected the plaintiffs' contractual rights, the court did not base its decision upon the contract clause *per se*. Instead, the court examined the language of the challenged statute and adopted a construction of these statutes that protected the plaintiffs' contractual rights. The court's reluctance to invoke the contract clause remained consistent with the general tendency of the judiciary to

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school district or any agency or instrumentality thereof shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." ILL. CONST. art. XIII, § 5.

371. *Buddell*, 118 Ill. 2d at 105, 514 N.E.2d at 187.

372. *Id.*

373. *Id.* at 104-05, 514 N.E.2d at 187. The pre-1970 Illinois Constitution distinguished between contractual and noncontractual pension plans. In drafting the 1970 constitution, the delegates intended to preserve "the vested rights of pension plan participants." *Id.* at 102, 514 N.E.2d at 186. In furtherance of this objective, the court held that the Illinois Constitution of 1970 eliminated the distinction between contractual and noncontractual plans, thereby vesting contractual rights in all pension plan participants. *Id.*

374. *Id.* at 104-05, 514 N.E.2d at 187.

375. *Id.*

376. *Id.*

377. *Id.*

avoid use of the contract clause.[378]

F. Commerce Clause

In *Goldberg v. Johnson*,[379] the court addressed the issue of whether section 4 of the Telecommunications Excise Tax Act ("TETA"),[380] which imposes a tax on telecommunications originating or received in Illinois, violates the commerce clause of the United States Constitution.[381] The plaintiffs in *Goldberg* initially filed a class action complaint against the Illinois Department of Revenue ("the Department") and various long-distance telephone carriers operating in Illinois, seeking an injunction to prohibit the collection of the TETA tax.[382] In response to the plaintiffs' complaint, the Director of the Department of Revenue ("the Director") filed a motion for summary judgment on the grounds that section 4 of TETA was constitutional.[383] The court denied the Director's motion and held that section 4 of TETA violated the commerce clause and the equal protection clause because it "[discriminated] against interstate commerce and it [was] not fairly related to services provided in Illinois."[384] The court granted plaintiff's motion for summary judgment and entered an order allowing the Director to appeal immediately.[385]

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378. Gunther, *supra* note 3, at 498. *See* Energy Reserves Group v. Kansas Power and Light Co., 459 U.S. 400 (1983) (according greater deference to legislative judgment and declining to conduct a stricter scrutiny of a state law impairing pre-existing contracts). *But see* Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414 (1984).

379. 117 Ill. 2d 493, 512 N.E.2d 1262 (1987). The United States Supreme Court recently affirmed the Illinois Supreme Court's decision in Goldberg v. Sweet, 109 S. Ct. 582 (1989).

380. Telecommunication Excise Tax Act, ILL. REV. STAT. ch. 120, para. 2004 (1987), states in pertinent part:

> A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at a rate of five percent of the gross charge for such telecommunications . . . . To prevent actual multistate taxation of the [telecommunications], any taxpayer . . . shall be allowed a credit against the tax imposed [by this section] . . . .

Id.

381. *Goldberg*, 117 Ill. 2d at 497, 512 N.E.2d at 1264 (citing U.S. CONST. art. I, § 8).

382. *Id.* at 495, 512 N.E.2d at 1263.

383. *Id.* at 496, 512 N.E.2d at 1264.

384. *Id.* at 497, 512 N.E.2d at 1264.

385. *Id.* at 504, 512 N.E.2d at 1264. Prior to its resolution of the commerce clause challenge, the court addressed the Director's contention that section 4 of TETA did not involve interstate commerce and, therefore, could not be in violation of the commerce clause. *Id.* at 498, 512 N.E.2d at 1265. The court rejected the Director's contention, holding that the taxable event under the statute was "[t]he act or privilege of originating or receiving interstate telecommunications . . . in this State" and that this taxable event was inextricably bound to the interstate activity of interstate communication. *Id.* at 499-

The court examined section 4 of TETA in light of the *Complete Auto* test.[386] The court first determined that a substantial nexus exists between the State of Illinois and telecommunications originated or received in Illinois[387] because the taxable event occurs in Illinois and the tax is both billed and paid in Illinois. Given these facts, the court concluded that a substantial nexus exists between the taxable event and the State of Illinois.[388]

The court next determined that the tax imposed under section 4 of TETA is not fairly apportioned.[389] Although the court recognized that an unapportioned tax poses the threat of multiple taxing, it concluded that an unapportioned tax is not *per se* unconstitutional.[390] Thus, despite the fact that the tax is unapportioned, the court did not invalidate the tax.[391]

The court continued its commerce clause analysis and determined that in taxing the origination and reception of telecommunications in Illinois, TETA does not discriminate against interstate commerce.[392] The court reasoned that TETA poses no threat of multiple taxing with respect to the origination of telecommunications because only Illinois can levy a tax upon telecommunications originating in Illinois.[393] While multiple taxation does threaten the reception of telecommunications in Illinois,[394] the statute provides credit for taxpayers subjected to two or more taxes on the same

500, 512 N.E.2d at 1265. Thus, "[t]he act or privilege of originating or receiving interstate telecommunications" fell within the purview of the commerce clause. *Id.* at 499-500, 512 N.E.2d at 1265-66.

386. *Id.* at 500, 512 N.E.2d at 1266 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287 (1977)). The Court applied a four-part test in *Complete Auto* to determine whether a particular statute violated the commerce clause of the federal constitution. *Complete Auto*, 430 U.S. at 287. First, the court must determine whether a substantial nexus exists between the activity taxed and the taxing state. *Id.* Second, the tax must be fairly apportioned so as to be limited to the portion of the activity which occurs within the state. Third, the tax must not discriminate against interstate commerce. *Id.* Finally, the tax must be fairly related to services provided by the state. *Id.*

387. *Goldberg*, 117 Ill.2d at 500-01, 512 N.E.2d at 1266.

388. *Id.* at 501, 512 N.E.2d at 1266.

389. *Id.*

390. *Id.*

391. *Id.* at 501-02, 512 N.E.2d at 1266.

392. *Id.* at 502-03, 512 N.E.2d at 1267. Discrimination against interstate commerce would occur if the tax imposed multiple taxing upon the taxpayer. *Id.* at 502, 512 N.E.2d at 1266.

393. *Id.* at 502, 512 N.E.2d at 1266-67.

394. *Id.* at 502, 512 N.E.2d at 1267. The telecommunications received in Illinois may be subjected to a tax in the state wherein the telecommunication originated in addition to the Illinois tax. Thus, the taxpayer would be taxed twice on the same communication. *Id.* at 503, 512 N.E.2d at 1267.

telecommunication.[395] Thus, no real danger of multiple taxing exists. The court, therefore, held that TETA does not discriminate against interstate commerce.[396]

Finally, the court determined that the tax on telecommunications is sufficiently related to benefits extended to the taxpayer by Illinois.[397] The court noted that the State facilitates the origination of telecommunication in Illinois and provides other services to the telecommunication carriers.[398] These services are sufficiently connected with the origination or reception of telecommunications in Illinois to justify the imposition of a tax upon those telecommunications.[399]

Thus, the court found that section 4 of TETA meets the necessary elements of the *Complete Auto* test, and therefore does not violate the commerce clause.[400] Accordingly, the court upheld section 4 of TETA as constitutional.[401]

G. Interpretation of the ILLINOIS CONSTITUTION

In *League of Women Voters v. County of Peoria*,[402] the supreme court offered a definitive interpretation of article VII of the Illinois Constitution which provides for the creation and establishment of local county boards.[403] The Peoria League of Women Voters ("the League") sponsored a referendum in 1986 to change the representative districts in Peoria County from multiple-member districts to single-member districts.[404] The referendum was successful and the

395. *Id.*
396. *Id.*
397. *Id.* at 504, 512 N.E.2d at 1267.
398. *Id.*
399. *Id.*
400. *Id.* at 503, 512 N.E.2d at 1267. The court also dismissed the plaintiffs' equal protection challenge, holding that telecommunications originating or received in Illinois have a greater connection to the state than other forms of telecommunications and that this greater connection provides a rational basis for differentiation between these and other forms of telecommunications. *Id.* at 506, 512 N.E.2d at 1268. Because a rational basis exists for the legislature's differentiation between intrastate and interstate communications, the court held that section 4 of TETA does not violate the equal protection clause. *Id.*
401. *Id.* at 506, 512 N.E.2d at 1269.
402. 121 Ill. 2d 236, 520 N.E.2d 626 (1987).
403. *Id.* at 244-55, 520 N.E.2d at 630-35 (citing ILL. CONST. of 1970, art. VII).
404. *Id.* at 241, 520 N.E.2d at 628. Peoria County was divided into nine districts. Under the Code of Peoria County, each district was to elect three representatives to serve as members of the Peoria County Board. *Id.* at 240, 520 N.E.2d at 628. The plaintiffs' referendum sought to decrease the number of each district's representatives from three to one, thereby converting Peoria County from multiple-member districts to single-member districts. *Id.* at 241, 520 N.E.2d at 628.

League then attempted to implement the changes authorized by the referendum.[405] The County of Peoria, however, refused to enforce the referendum.[406] The League filed suit in circuit court seeking a writ of *mandamus* ordering the defendants to implement the changes under the referendum.[407] The circuit court dismissed the plaintiffs complaint with prejudice.[408] The supreme court permitted direct appeal to resolve the question of whether the electorate could change the number of members on the Peoria County Board by referendum.[409]

To resolve this question, the court examined sections 3(a), 3(b), 4(c), and 7(2) of the Illinois Constitution.[410] The court first noted that according to section 3(a), the number of county board members is determined by ordinance "with limitations provided by law."[411] The court held that the meaning of the term "law" as used in section 3(a) excludes a referendum like the one here involved because the Illinois Constitution does not expressly authorize such a referendum for use in changing the number of county board members.[412] The court stated that unless section 3(a) expressly authorized the use of a referendum as a means of changing the number of county board members, the referendum could not be enforced.[413] Because the court found no express authorization for the use of a referendum within section 3(a), the court held that the referendum could not be enforced.[414]

The court further noted that sections 3(b), 4(c), and 7(2) expressly authorize the use of referenda to change the method of selection of board members, the manner of selection of county officers, and the form of government.[415] Given the express provision for the use of referenda in sections 3(b), 4(c), and 7(2) to effect

405. *Id.*
406. *Id.*
407. *Id.* at 242, 520 N.E.2d at 629.
408. *Id.* at 239, 520 N.E.2d at 628.
409. *Id.* at 239-40, 520 N.E.2d at 628. The majority recognized that a referendum could be used to change the districts from multiple-member to single-member districts; but the majority denied that this meant that a referendum could also be used to change the number of county board members. *Id.* at 245, 520 N.E.2d at 630.
410. *Id.* at 244, 520 N.E.2d at 630. ILL. CONST. art. VII, §§ 3(a), 3(b), 4(c), and 7(2).
411. *League of Women Voters*, 121 Ill. 2d at 244, 520 N.E.2d at 630. Section 3(a) states: "(a) A county board shall be elected in each county. The number of members of the county board shall be fixed by ordinance in each county within limitations provided by law." ILL. CONST. art. VII, § 3(a).
412. *League of Women Voters*, 121 Ill. 2d at 245, 520 N.E.2d at 630.
413. *Id.*
414. *Id.*
415. *Id.* at 254, 520 N.E.2d at 634. Section 3(b) provides in pertinent part: "No county, other than Cook County, may change its method of electing board members

certain governmental changes, the court reasoned that had the legislature intended to allow the number of county board members to be changed by referenda, it would have done so expressly in section 3(a).[416] Because neither section 3(a) nor any other provision of the Illinois Constitution of 1970 expressly authorized the use of a referendum to change the number of county board members, the court held the Peoria County referendum void and unenforceable.[417]

Justice Simon argued in dissent that the majority erred in finding that a referendum does not constitute a "law" for purposes of section 3(a).[418] Simon also argued that the power to change by referendum from multiple-member districts to single-member districts necessarily implied the power to change the number of members on the county board.[419] Thus, the power to do the latter should be implied in the grant of the power to effect the former and the referendum as duly passed by the Peoria electorate should have been enforced.[420]

In reaching its decision, the majority in *League of Women Voters* adopted a narrow construction of article VII of the Illinois Constitution. The majority refused to recognize the use of a referendum to change the number of county board members because the constitution did not expressly authorize the use of a referendum for such a purpose. The majority's conclusion in this case appears to impose a tighter rein upon the powers of the electorate, and limits such powers to those specifically enumerated in the constitution.

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except as approved by county-wide referendum." ILL. CONST. art. VII, § 3(b) (emphasis added).

Section 4(c) provides in pertinent part: "Any office may be created or eliminated and the terms of office and manner of selection *changed by county-wide referendum.*" ILL. CONST. art. VII, § 4(c) (emphasis added).

Section 7(2) states in pertinent part: "Counties and municipalities which are not home rule units shall have only powers granted to them by law and the powers . . . (2) *by referendum*, to adopt, alter or repeal their form of government provided by law." ILL. CONST. art. VII, § 7(2) (emphasis added).

416. *League of Women Voters*, 121 Ill. 2d at 254, 520 N.E.2d at 634.

417. *Id.* at 255, 520 N.E.2d at 635.

418. *Id.* (Simon, J., dissenting). Justice Simon cited abundant authority for the proposition that a successfully passed referendum has the effect of law. *Id.* at 255-56, 520 N.E.2d at 635. *See., e.g.*, Ohio *ex rel* Davis v. Hildebrant, 241 U.S. 565, 568 (1916) (a properly approved referendum is law). Nevertheless, Justice Simon noted that no Illinois court had approved a referendum as law. *League of Women Voters*, 121 Ill. 2d at 255, 520 N.E.2d at 635 (Simon, J., dissenting).

419. *League of Women Voters*, 121 Ill. 2d at 257, 520 N.E.2d at 636 (Simon, J., dissenting).

420. *Id.* at 258-59, 520 N.E.2d at 637 (Simon, J., dissenting). Justice Clark joined in this dissent. *Id.* at 259, 520 N.E.2d at 637 (Simon, J., dissenting).

This interpretation contrasts with the court's ready presumption of a particular legislative or judicial power unless a specific provision indicates to the contrary.

III. CONCLUSION

During the *Survey* year, the Illinois Supreme Court resolved numerous challenges to the constitutionality of various Illinois statutes. The court assessed the challenged statutes in terms of equal protection, due process, and separation of powers. In addition, the court addressed several challenges based upon the Bill of Rights, the contract clause, and the commerce clause. The court also offered a definitive interpretation of the Illinois Constitution with respect to the establishment of county governments. In most of the cases during the *Survey* year, the court rejected the presented challenge and upheld the contested statute as constitutional.