

ILLINOIS

Summary

The Illinois Supreme Court has not yet decided whether the Illinois Constitution protects a right to abortion separate from, and independent of, the right to abortion recognized under the United States Constitution.¹ A careful examination of the state constitution, in light of its history and interpretation, as well as other relevant legal sources, however, suggests that the state supreme court probably would not recognize a state right to abortion. Thus, if *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*,² were overruled, Illinois could prohibit abortion. Moreover, nothing in the state constitution, properly understood, precludes the State from enacting and enforcing reasonable measures regulating abortion within current federal constitutional limits.

¹ In *Family Life League v. Dep't of Public Aid*, 493 N.E.2d 1054 (1986), the Illinois Supreme Court noted that in *Roe v. Wade*, 410 U.S. 113 (1973), “the Supreme Court first recognized a fundamental constitutional right of privacy which encompasses a woman’s decision of whether to terminate her pregnancy.” *Id.* at 1057. “That right of privacy guaranteed by the penumbra of the Bill of Rights of the United States Constitution,” the court added in *dicta*, “was also secured by the drafters of the 1970 Constitution of the State of Illinois.” *Id.*, citing art. I, §§ 6 and 12 of the Illinois Constitution. Whether either § 6 or § 12 secures rights relating to privacy of conduct is discussed later in this analysis. No such issue was presented in *Family Life League*, which rejected an informational privacy defense raised on behalf of abortion providers and their patients to the disclosure of the names of physicians who received public funds for abortion services.

² 505 U.S. 833 (1992).

Analysis

The pre-*Roe* abortion statute prohibited performance of an abortion unless the procedure was “necessary for the preservation of the woman’s life.”³ Pursuant to *Roe*, ¶ 23-1 was declared unconstitutional by the Illinois Supreme Court in *People v. Frey*,⁴ and was later repealed.⁵

Based upon arguments that have been raised in Illinois and elsewhere,⁶ possible sources for an asserted abortion right could include provisions of the

³ ILL. REV. STAT. ch. 38, ¶ 23-1 (1971).

⁴ 294 N.E.2d 257 (Ill. 1973). Prior to the Supreme Court’s decision in *Roe*, the Illinois Supreme Court rejected an attempt to engraft mental or psychiatric grounds onto the statute. *People ex rel. Hanrahan v. White*, 285 N.E.2d 129 (Ill. 1972). The pre-*Roe* statute was also struck down by a three-judge federal district court. *Doe v. Scott*, 321 F.Supp. 1385 (N.D. 1971), *vacated and remanded sub nom. Hanrahan v. Doe*, 410 U.S. 950 (1973).

⁵ Ill. Public Act 78-225, § 10 (1973). The preamble to the Illinois Abortion Act of 1975 states that if the decisions of the United States Supreme Court recognizing a right to abortion are “ever reversed or modified or the United States Constitution is ever amended to allow protection of the unborn[,] then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother’s life shall be reinstated.” 720 ILL. COMP. STAT. ANN. 510/1 (West 2003). In the absence of new legislation criminalizing abortion, the preamble would not, by its own terms, make abortion illegal. It contains no operative provisions and authorizes no punishment. Conduct is not criminal in Illinois unless a statute defined the particular conduct as criminal. *See* 720 ILL. COMP. STAT. ANN. 5/1-3 (West 2002). Moreover, one General Assembly cannot bind another to enact legislation. *See* ILLINOIS GENERAL ASSEMBLY LEGISLATIVE RESEARCH UNIT, EFFECTS ON ILLINOIS IF *ROE V. WADE* IS MODIFIED OR OVERRULED (Feb. 9, 1989).

⁶ *See Doe v. Wright*, No. 91 CH 1958, Order, Dec. 2, 1994 (Illinois Circuit Court, Cook County) (invalidating restrictions on public funding of abortion), *leave to file late appeal denied*, No. 78512 (Ill. Feb. 28, 1995).

Declaration of Rights guaranteeing due process and equal protection (art. I, § 2), religious freedom (§ 3), and a right to a remedy (§ 12); prohibiting unreasonable searches and seizures, invasions of privacy and interceptions of communications by eavesdropping devices (§ 6), and discrimination on account of sex (§ 18); recognizing inherent and inalienable rights (§ 1); and retaining rights (§ 24).⁷ The analysis that follows shall consider each of these provisions.

Inherent and Inalienable Rights

Article I, § 1, of the Illinois Constitution provides: “All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.”⁸ The official commentary notes that art. I, § 1, “is generally not considered alone as a limitation upon the exercise of governmental power. Rather, it is considered with the due process and equal protection guarantees of Section 2.”⁹ In reference to almost identical language in

⁷ One other more unlikely source of an abortion right under the Illinois Constitution—art. I, § 4 (guaranteeing freedom of speech)—is discussed generally in chapter two, *supra*.

⁸ ILL. CONST. art. I, § 1 (West 2006).

⁹ *Constitutional Commentary*, ILL. CONST. art. I, § 1 (West 2006).

the 1870 Illinois Constitution, the Illinois Supreme Court has said that “this section ‘is not generally considered, of itself, an operative constitutional limitation upon the exercise of governmental powers. Rather, it is considered supplemental to and implicitly within [the due process clause]. There is thus little purpose in treating this section as an independent source of constitutional law.’”¹⁰ Because the Illinois Supreme Court does not recognize art. I, § 1, as “an operative constitutional limitation on the exercise of governmental powers,” it could not serve as a source of a right to abortion under the state constitution.

Due Process & Equal Protection

Article I, § 2, of the Illinois Constitution provides: “No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the law.”¹¹ In any challenge to a statute prohibiting abortion, abortion advocates are likely to rely upon art. I, § 2. That reliance would be misplaced, however.

The Illinois Supreme Court has held that it “may construe the state due process clause independently of its federal counterpart, and in appropriate cases

¹⁰ *Kunkel v. Walton*, 689 N.E.2d 1047, 1056-57 (Ill. 1998), quoting G. Braden & R. Cohn, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 8 (1969).

¹¹ ILL. CONST. art. I, § 2 (West 2006).

will interpret the state due process clause to provide greater protections”¹²

Thus, the mere fact that the Supreme Court may overrule *Roe v. Wade* and hold that the liberty language of the Due Process Clause of the Fourteenth Amendment does not confer a right to abortion would not necessarily mean that the Illinois Supreme Court would follow suit in interpreting the due process clause of the Illinois Constitution. Nevertheless, there is little, if any, reason to believe that the state supreme court would recognize a right to abortion under the liberty language of the due process clause of the state constitution.

For purposes of state and federal substantive due process analysis, a statute is unconstitutional “if it impermissibly restricts a person’s life, liberty or property interest.”¹³ “If the life, liberty or property interest is a fundamental right, then any statute limiting that right may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate interests at stake.”¹⁴ “If,” on the other hand, “the interest is not a fundamental right, then the statute need only have a rational relation to the purpose the legislature sought to accomplish by

¹² *People v. Molnar*, 857 N.E.2d 209, 218 (Ill. 2006).

¹³ *People v. R.G.*, 546 N.E.2d 533, 540 (Ill. 1989).

¹⁴ *Id.* (citation and internal quotation marks omitted).

enacting the statute.”¹⁵ The Illinois Supreme Court has emphasized that “[n]ot every right secured by the State or Federal constitutions is fundamental, . . . but only those which ‘lie at the heart of the relationship between the individual and a republican form of government.’”¹⁶ “Fundamental rights include the expression of ideas, participation in the political process, travel among the states and privacy with respect to the most intimate and personal aspects of one’s life.”¹⁷

The Illinois Supreme Court has not held that a right to abortion is a “fundamental right” under the *state* constitution.¹⁸ Abortion is not mentioned in the text of § 2. Moreover, a review of the proceedings of the Constitutional Convention indicates that a right to abortion cannot be derived from the liberty language of the due process clause of § 2.¹⁹ Ironically, that indication is based

¹⁵ *Id.* (citation omitted).

¹⁶ *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 277 (Ill. 1984), quoting *People ex rel. Tucker v. Kotsos*, 368 N.E.2d 903, 907 (1977).

¹⁷ *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1194 (1996), citing *Kotsos*, 368 N.E.2d at 907.

¹⁸ *See* n. 1, *supra*.

¹⁹ “The meaning which the delegates to the convention attached to a provision in the Constitution before sending it to the voters for ratification is relevant in resolving ambiguities which may remain after consulting the language of the provision.” *Kalodimos*, 470 N.E.2d at 270 (citations omitted). “The reason is that it is only with the consent of the convention that such provisions are submitted to the voters in the first place.” *Id.* *See also* *People v. Tisler*, 469 N.E.2d 147, 161 (Ill. 1984) (Ward, J., concurring) (“it is generally accepted that courts must look to the intent of the adopters

upon the Convention's *rejection* of language that would have included the unborn within the meaning of the word "person," as used in the due process clause.

The original draft of art. I, § 2, proposed by the Bill of Rights Committee, added the phrase, "including the unborn," after the word "person."²⁰ The additional language was "meant to assure than an unborn person cannot be deprived of life, liberty or property by the State without due process of law."²¹ A minority of committee members opposed inclusion of this language.²² Their reasons for doing so are revealing on the question of whether the language, as ultimately adopted, embraces an abortion right.

The Minority Report stated that the chief, if not only, effect of including these words would be "to prohibit the General Assembly from enacting any laws to permit abortions, except presumably abortions which are now permitted under Illinois law where necessary to preserve the life of the mother."²³ The authors of the Minority Report argued that "the subject of abortion law should be left to the

and framers as controlling").

²⁰ VI RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (hereinafter RECORD OF PROCEEDINGS) at 18.

²¹ *Id.* at 19.

²² *Id.* at 127-36.

²³ *Id.* at 130.

legislature, which can study and evaluate the pertinent medical and social facts and policy consideration[s].”²⁴ In presenting their arguments on the convention floor, the delegates who signed the Minority Report left no doubt regarding the legislature’s authority to prohibit abortion. Delegate Wilson said:

It is the position of the minority that the legislature should be left free to deal with the question of abortion under the due process clause as it now stands, and that no further impediments on the power of the legislature to act freely should be inserted in the due process clause in the form of these words. It is not the position of the minority that the constitution should speak to the question of abortion by putting into the constitution some provision that presumably would authorize or make more constitutional . . . the enactment of what I will refer to as liberalized abortion laws. It is our position that the constitution should not address itself to the issue of abortion at all, but that this should be left to be acted upon by the legislature under the existing language of the due process clause.²⁵

He emphasized that

this whole matter should be left to the legislature to act upon The legislature, I think, has shown the capacity and the will to act in the field of abortion law; and we feel perfectly confident in leaving this to the legislature and not trying to constitutionalize it. There are too many imponderables. The whole subject is too dynamic and too volatile [T]he world is changing; and we feel that this should be

²⁴ *Id.* at 131. *See also id.* at 134-35: “The subject of abortion law should be left to the legislature. This Constitutional Convention is not equipped to study the pertinent medical or social facts or weigh the competing policy considerations which bear on the question of what kind of abortion law Illinois should have.”

²⁵ Vol. III RECORD OF PROCEEDINGS at 1504.

left to the legislature.²⁶

Delegate Weisberg echoed these sentiments:

The minority believes . . . that this subject is peculiarly appropriate and necessary to leave to the legislature. There are serious problems here. It has been pointed out more and more frequently in recent years that there are serious medical and social problems which the Constitutional Convention . . . is not equipped to study and evaluate.²⁷

Most of the delegates who spoke in favor of the Minority Report expressed the view that the Constitutional Convention should not attempt to deal with the question of abortion, but should leave it up to the legislature to act as it might deem appropriate.²⁸ After extended debate, the Convention adopted the Minority Report and deleted the phrase, “including the unborn,” from proposed art. I, § 2.²⁹ No delegate suggested that art. I, § 2, shorn of this language, would constitutionalize a right to abortion. Delegate Kinney, who voted in favor of the Minority Report, spoke to this question:

If there is any mischief in the proposed phrase [*i.e.*, “including the unborn”] and its deletion, if it is to be deleted, it may lie in opening a

²⁶ *Id.* at 1504-05.

²⁷ *Id.* at 1505.

²⁸ *Id.* at 1511-12 (remarks of Delegate Foster); 1513 (remarks of Delegate Pappas); 1514 (remarks of Delegate Raby); 1516-17 (remarks of Delegate Kelley), 1519 (remarks of Delegate Howard), and 1522 (remarks of Delegate MacDonald).

²⁹ *Id.* at 1523.

line of argument that by [its] deletion this Convention has expressed itself in favor of unlimited legalized abortion. To foreclose that possibility, I wish to set the record straight on my vote. I do not adopt this position.³⁰

And neither did the Convention. Three member proposals were submitted which would have limited the General Assembly's authority to prohibit abortion. Member Proposal No. 387 provided: "The State shall make no law decreeing who is to be born and who is to die."³¹ Member Proposal No. 407 provided: "No penalty may be imposed by law upon any person in connection with an abortion performed by a licensed physician with the consent of the woman upon whom it is performed and, if she is an unmarried minor, the consent of her parents or guardian."³² And Member Proposal No. 506 provided: "That any female by giving her consent and approval shall not be denied the right to comply with advice given by qualified medical authorities. The General Assembly shall define qualified medical authorities."³³ None of these proposals was adopted by either the Bill of Rights Committee or the Convention itself. Several delegates, including Elmer Gertz, the Chairman of the Bill of Rights Committee, acknowledged that neither

³⁰ *Id.* at 1521.

³¹ VII RECORD OF PROCEEDINGS at 3012.

³² *Id.* at 3021.

³³ *Id.* at 3069.

the Bill of Rights Committee nor the Convention would recognize abortion rights.³⁴ A review of the record of the proceedings of the 1970 Illinois Constitutional Convention leaves no doubt that the Convention did not intend to recognize abortion rights in the language of the due process clause of art. I, § 2. To suggest that a constitutional convention that expressly *rejected* specific abortion rights proposals and left the issue of abortion up to the legislature impliedly *accepted* a right to abortion under the general language of *other* provisions of the constitution is, at best, disingenuous.

Unlike the Illinois Supreme Court’s independent due process analysis, “in applying an equal protection analysis, we apply the same standard under both the United States Constitution and the Illinois Constitution.”³⁵ This equivalency of interpretation suggests that if the Supreme Court does not construe the Equal

³⁴ III RECORD OF PROCEEDINGS at 1514 (“[w]hile I would hope that this Convention would have faced this issue [abortion] squarely—would have included in the constitution a prevention from the legislature acting on this matter, . . . I recognize that that is not possible”) (remarks of Delegate Raby); 1516 (“[w]hereas this proposal [Member Proposal 407] reflects my philosophy in regard to abortion, I am not at this time suggesting that we adopt such. I am suggesting that we not preclude the General Assembly from enacting such legislation in the future”) (remarks of Delegate Kelley); 1500 (remarks of Delegate Gertz). It is apparent from the remarks of Delegates Gertz (*id.* at 1500) and Wilson (*id.* at 1504) that the Bill of Rights Committee defeated a proposal to restrict the legislature’s authority over abortion.

³⁵ *General Motors Corp. v. State of Illinois Motor Vehicle Review Board*, 862 N.E.2d 209, 229 (Ill. 2007).

Protection Clause of the Fourteenth Amendment to place limits on the State's authority to prohibit abortion (and it has not done so to date), then the Illinois Supreme Court will not so construe the equal protection clause of art. I, § 2, either.³⁶

Religious Freedom

Article I, § 3, of the Illinois Constitution provides:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.³⁷

In any challenge to a statute prohibiting abortion, abortion advocates may raise either or both of two arguments under art. I, § 3. First, relying on the first clause of the first sentence of § 3, they may argue that an abortion prohibition interferes with the “free exercise and enjoyment” of a woman’s “religious profession” by forbidding her from obtaining an abortion that would be allowed

³⁶ Whether an abortion prohibition would run afoul of the state prohibition of discrimination on account of sex (art. I, § 18) is discussed below.

³⁷ ILL. CONST. art. I, § 3 (West 2006).

by her religion. Second, relying upon the second clause of the second sentence of § 3, they may argue in the alternative (or in addition) that an abortion prohibition gives a “preference” to a “religious denomination” because it reflects sectarian beliefs regarding when human life begins and the sinfulness of abortion. Neither argument is likely to prevail.

The Illinois reviewing courts have that the rights secured by art. I, § 3, are no broader than those secured by the Free Exercise and Establishment Clauses of the First Amendment.³⁸ This equivalency of interpretation suggests that a challenge to an abortion statute that would not succeed under the Religion Clauses of the First Amendment would not succeed under art. I, § 3, either. For the reasons set forth in chapter [insert number], however, an abortion statute could not be successfully challenged on First Amendment grounds. Accordingly, a similar challenge under art. I, § 3, would not likely be successful.

*Searches, Seizures, Invasions of Privacy and
Interceptions of Communications*

Article I, § 6, of the Illinois Constitution provides, in pertinent part: “The people shall have the right to be secure in their persons, houses, papers and other

³⁸ *People v. Falbe*, 727 N.E.2d 200, 207 (Ill. 2000) (“any statute which is valid under the first amendment is also valid under the Illinois Constitution) (Establishment Clause); *Mefford v. White*, 770 N.E.2d 1251, 1260 (Ill. App. Ct. 2002) (Free Exercise Clause).

possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.”³⁹ In addition to restating the right to be secure against unreasonable searches and seizures in “more modern usage,” § 6 “was substantively changed by inclusion of two new clauses, each of which created a right not expressly stated in the 1870 constitution—the right to be secure against unreasonable invasions of privacy by the state and the right to be secure against unreasonable interceptions of communications by the state.”⁴⁰

The first clause of § 6, securing the right of the people against unreasonable searches and seizures, is concerned with the *means* by which evidence of criminal conduct is discovered,⁴¹ not whether the underlying conduct is constitutionally protected.⁴² Thus, although the first clause may protect aspects of privacy (“the

³⁹ ILL. CONST. art. I, § 6 (West 2006).

⁴⁰ *People v. Caballes*, 851 N.E.2d 26, 33 (Ill. 2006).

⁴¹ *People v. McGee*, 644 N.E.2d 439, 446 (Ill. App. Ct. 1994) (“judiciary cannot, and should not, tolerate evidence-gathering practices [that] violate the constitution”).

⁴² *See, e.g., People v. Ledesma*, 795 N.E.2d 253, 261 (Ill. 2003): The “fundamental purpose” of the Fourth Amendment and art. I, § 6, of the Illinois Constitution “is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. [Citation omitted]. We must carefully balance the legitimate aims of law enforcement against the right of our citizens to be free from unreasonable government intrusion.” *See also In re Brewer*, 320 N.E.2d 340, 342 (Ill. App. Ct. 1974) (“the very purpose of the constitutional guarantee was to place obstacles

right [of the people] to be secure in their persons, houses, papers and other possessions against unreasonable searches [and] seizures”), that privacy interest relates solely to the *method* by which incriminating evidence is obtained. The exclusionary rule, which has been adopted to enforce § 6 and bars admission of illegally obtained evidence, is primarily directed at and is intended to deter police misconduct.⁴³ The third clause of § 6, securing the right of the people against unreasonable interceptions of communications by eavesdropping or other means, obviously has no bearing on determining what conduct may be deemed criminal.

The second clause of § 6, however, secures the right of the people against unreasonable “invasions of privacy.” This language, the Illinois Supreme Court has held, “recognizes a zone of privacy not found in the Fourth Amendment and, therefore, affords protections that go beyond the guarantees of the Federal Constitution.”⁴⁴ Abortion advocates may be expected to argue that this language

in the way of a too permeating police surveillance thereby subjecting a free people to an even greater danger than the escape of some criminals”). Illinois generally follows the Supreme Court’s construction of the Fourth Amendment in interpreting the search and seizure language of art. I, § 6. *See People v. Caballes*, 851 N.E.2d at 31-45.

⁴³ *People v. Madison*, 520 N.E.2d 374, 380 (Ill. 1998) (referring to “the central purpose of deterring police misconduct which underlies the exclusionary rule”).

⁴⁴ *King v. Ryan*, 607 N.E.2d 154, 162 (Ill. 1992). Both the Fourth Amendment and art. I, § 6, of the Illinois Constitution prohibit “searches” and “seizures” that are “unreasonable.” *People v. Watson*, 825 N.E.2d 257, 261 (Ill. 2005). Section 6, however, “extends the ‘reasonableness’ requirement to ‘invasions of privacy’ and, as a result,

creates an independent right of privacy which, in turn, includes a right to choose abortion. There are several problems with this line of argument, however.

First, the overriding concern of the drafters of § 6 was informational privacy and privacy in communication.⁴⁵ Review of the debate fails to reflect any intent on behalf of the drafters to limit the legislature's power to prohibit abortion or any other conduct not given express constitutional protection.

Second, although the Illinois Supreme Court has not held that the privacy language of § 6 does not protect conduct, in each case in which it has upheld a privacy claim, the claim involved informational privacy (or privacy with respect to the gathering of physical evidence), not privacy of conduct.⁴⁶ The court has

provides citizens of this state with broader protection from unreasonable intrusions than the [F]ourth [A]mendment.” *Id.*, citing *In re May 1991 Will County Grand Jury*, 604 N.E.2d 929, 934 (Ill. 1992).

⁴⁵ III RECORD OF PROCEEDINGS at 1525, 1530 (remarks of Delegate Dvorak), 1529 (remarks of Delegate Foster), and 1535 (remarks of Delegate Gertz).

⁴⁶ *See, e.g., Kunkel v. Walton*, 689 N.E.2d 1047, 1055-56 (Ill. 1997) (protecting confidentiality of personal medical information); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1096-1100 (Ill. 1997) (same); *King v. Ryan*, 607 N.E.2d at 162 (statute authorizing chemical testing of driver without any indication that the driver had been drinking was unconstitutional); *In re May 1991 Will County Grand Jury*, 604 N.E.2d at 936-39 (in the absence of probable cause, hair samples could not be subpoenaed from an individual under investigation but not charged with any offense).

consistently rejected privacy of conduct claims under § 6.⁴⁷ In *Longeway*, the court said that, in the absence of “a clear expression of intent from the drafters of our 1970 State constitution, we . . . abstain from expanding the privacy provision of our State constitution to embrace this right [to refuse life-sustaining medical treatment].”⁴⁸ There was no “clear expression of intent from the drafters” that the privacy provision “embrace[s]” a right to abortion.

Third, and most important, the drafters unequivocally disavowed any intent that the privacy language of art. I, § 6, would affect the legislature’s authority with respect to abortion. This is evident from an exchange between Fr. Francis Lawlor, one of the delegates to the Convention, and Elmer Gertz, chairman of the Bill of Rights Committee, on the floor of the Convention. The exchange is brief, but illuminating:

FR. LAWLOR: “Mr. Gertz—I would very much appreciate it if you would assure the entire delegation here that the right of the people to be secure in their persons against unreasonable invasions of

⁴⁷ See, e.g., *In re C.E.*, 641 N.E.2d 345, 351 (Ill. 1994) (declining to decide whether there is a federal or state right to privacy that encompasses a right to refuse medical treatment); *In re Estate of Longeway*, 549 N.E.2d 292, 297 (Ill. 1989) (same); *People v. Geever*, 522 N.E.2d 1200, 1206-07 (Ill. 1988) (no privacy right to private possession of child pornography), *appeal dismissed*, *Geever v. Illinois*, 488 U.S. 920 (1988); *People v. Kohrig*, 498 N.E.2d 1158, 1162 (Ill. 1986) (no privacy right not to use seat belts). See also *Illinois NORML, Inc. v. Scott*, 383 N.E.2d 1330, 1332-34 (Ill. App. Ct. 1978) (no privacy right to private use and possession of cannabis).

⁴⁸ *Longeway*, 549 N.E.2d at 297.

their privacy . . . has absolutely nothing to do with the question of abortion.”

MR. GERTZ: “It certainly has nothing to do with the question of abortion.”⁴⁹

In light of the Convention’s repudiation of specific abortion rights language, Delegate Gertz’s reply should come as no surprise to anyone. Nothing in the language of art. I, § 6, may be construed to confer a right to abortion.

Right to a Remedy

Article I, § 12, of the Illinois Constitution provides: “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.”⁵⁰ In any challenge to a law prohibiting abortion, abortion advocates may be expected to rely upon the privacy language in the first sentence of § 12 in support of a claim that the Illinois Constitution protects a right to abortion. Such reliance would be misplaced for a variety of reasons.

First, as is apparent from its text and structure, § 12 is concerned with *remedies* for tortiously inflicted injuries and wrongs—it does not establish what *constitutes* an injury or wrong to anyone’s “person, privacy, property or

⁴⁹ III RECORD OF PROCEEDINGS at 1537.

⁵⁰ ILL. CONST. art. I, § 12 (West 2006).

reputation.” Those remedies, however, are derived from the common law, not § 12. Moreover, the remedies themselves redress injuries and wrongs recognized by the common law, not constitutional “injuries.” Section 12, in other words, does not *create* any new causes of action, but, at most, merely *preserves* pre-existing common law remedies.

Second, although there is one older case in which the predecessor of § 12 was used to strike down a statute eliminating certain common law remedies,⁵¹ there are no modern cases so holding. The Illinois Supreme Court has held that “this constitutional provision is merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form.”⁵²

Third, with respect to remedies for “injuries and wrongs” to a person’s privacy, the state supreme court has held that art. I, § 12, “was intended to protect an individual’s privacy from invasions or injuries caused by another *non-*

⁵¹ See *Heck v. Schupp*, 68 N.E.2d 464 (Ill. 1946) (striking down statute abolishing causes of action for alienation of affection, criminal conversation and breach of promise to marry).

⁵² *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024, 1036 (Ill. 2002). See also *Best v. Taylor Machine Works*, 689 N.E.2d at 1100 (“the certain remedy provision has been referred to in general as a statement of philosophy rather than a guarantee of a specific remedy”).

governmental individual or company.”⁵³ To the extent that a statute prohibiting abortion may be said to “invade” one’s privacy, that “invasion” is caused by the State, not by a private actor, and, therefore, does not implicate the concerns underlying § 12 as it has been interpreted by the supreme court.

Finally, even assuming, contrary to its purpose and interpretation, that § 12 confers substantive rights, as opposed to guaranteeing remedies, § 12 “does not create fundamental rights in the interests listed [therein].”⁵⁴ Accordingly, the proper test for statutes challenged under § 12 is rational basis, not strict scrutiny.⁵⁵ A statute prohibiting abortion would clearly satisfy that test.

Taken as a whole, § 12 is concerned with the availability of private civil causes of action (first sentence) and reasonable access to the courts (second sentence). It places no limitation on the State’s authority to define and punish crimes and has never been so interpreted.

Prohibition of Sex Based Discrimination

Article I, § 18, of the Illinois Constitution provides: “The equal protection

⁵³ *In re A Minor*, 595 N.E.2d 1052, 1056 (Ill. 1992) (emphasis in original), citing 3 RECORD OF PROCEEDINGS at 1531-32.

⁵⁴ *Schultz v. Lakewood Electric Corp.*, 841 N.E.2d 37, 46 (Ill. App. Ct. 2005), citing *Gavery v. Lake County*, 513 N.E.2d 1127, 1131 (Ill. App. Ct. 1987).

⁵⁵ *Id.* at 47.

of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.”⁵⁶ Section 18 was added to the Illinois Bill of Rights on the floor of the Constitutional Convention.⁵⁷ The chief sponsor of § 18, Delegate Nicholson, emphasized the problem of gender-based discrimination in employment, education and business.⁵⁸ She did not even allude to the issue of abortion. Moreover, Delegate Nicholson denied that adoption of the anti-discrimination provision would bring about “any significant change” in anyone’s way of life,⁵⁹ which she could not have said if the proposed language would have limited the Legislature’s authority over abortion.

Notwithstanding the absence of any mention of abortion in the debate over § 18, abortion advocates may challenge a law prohibiting abortion on the theory that such prohibitions, indeed, abortion regulations generally, affect only women and, therefore, are gender based and subject to the “strict scrutiny” standard of judicial review that applies to sex-based discrimination under § 18.⁶⁰ Such a

⁵⁶ ILL. CONST. art. I, § 18 (West 2006).

⁵⁷ V RECORD OF PROCEEDINGS at 3669, 3677.

⁵⁸ *Id.* at 3669-70.

⁵⁹ *Id.* at 3672.

⁶⁰ *See People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974) (adopting the strict scrutiny standard for review of sex-based classifications).

challenge is unlikely to succeed. Even assuming, contrary to federal equal protection analysis, that a law affecting abortion warrants greater than rational basis scrutiny,⁶¹ both the Illinois Supreme Court and the United States Supreme Court have held that biological differences between men and women may justify different treatment based on those differences.

In *People v. Boyer*,⁶² the Illinois Supreme Court rejected a challenge to a state criminal statute that classified and punished incest between a father and his daughter (aggravated incest) more harshly than incest between a mother and her son or between siblings (simple incest). The court held that, regardless of the applicable standard of review (strict scrutiny or rational basis), the distinction did not violate § 18.

That the State has an interest in protecting potential victims of incestuous relationships is obvious. It is also apparent that a female victim of a father-daughter incestuous relationship is exposed to potential harm to which male victims of incestuous relationships are not exposed. . . . [T]he psychological trauma that may result from incest is potentially severe whether the object of the incest is a male

⁶¹ The Supreme Court has held that “the disfavoring of abortion . . . is not *ipso facto* sex discrimination,” and, citing its decisions in *Harris v. McRae*, 448 U.S. 297, 321-26 (1980), and other cases addressing abortion funding, stated that “the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex discrimination, . . . but the ordinary rationality standard.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273 (1993).

⁶² 349 N.E.2d 50 (Ill. 1976).

or a female. The possibility that the female victim may become pregnant, however, adds considerably to the potential harm that may result from a father-daughter incestuous relationship. A female who is impregnated by her father is confronted with a traumatic experience beyond the experience of the incestuous act itself. The female must either endure the pregnancy and give birth to a baby or make the decision to have an abortion. If a child is born as a result of the incest, the female victim must either care for the child herself or give the child up for adoption. The physical change in a female who becomes pregnant could in itself be a source of trauma to the female. The potential psychological damage to the victim of a father-daughter incestuous relationship is admittedly difficult to estimate, but it is surely existent and considerable. Additionally, a pregnant woman is exposed to some physical dangers. While the statute prohibits deviate sexual conduct, as well as intercourse, and such acts could not cause pregnancies, the legislature could reasonably conclude that enhanced penalties were required to deter deviate sexual conduct, since such actions if undeterred would normally lead to acts of intercourse. We therefore agree with the State that the physical and psychological dangers of incest are greater with the offense is committed by a male and the victim is his daughter. . . . [T]he State's interest in protecting potential victims of incestuous relationships justifies the statutory classification at issue.⁶³

So, too, in upholding a statutory rape statute that applied only to males, the Supreme Court noted, "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."⁶⁴ As one federal district court held, "Abortion statutes are examples of cases in which the sexes are

⁶³ *Id.* at 51-52.

⁶⁴ *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981).

not biologically similarly situated” because only women are capable of becoming pregnant and having abortions.⁶⁵

In *Geduldig v. Aiello*,⁶⁶ the Supreme Court rejected an equal protection challenge to a California statute excluding pregnancy from the list of conditions that qualified for disability benefits. In its opinion, the Court stated:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is [an impermissible] sex-based classification. . . . Normal pregnancy is an objectively, identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, law makers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this [disability benefits] on any reasonable basis, just as with respect to any other physical condition.⁶⁷

A statute prohibiting abortion quite obviously can directly affect only women because only women are capable of becoming pregnant. Unlike laws that use women’s ability to become pregnant (or pregnancy itself) to discriminate against them in *other* areas (*e.g.*, employment opportunities), abortion prohibitions cannot fairly be said to involve a distinction between men and women that is a

⁶⁵ *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1549 (D. Utah 1992).

⁶⁶ 417 U.S. 484 (1974).

⁶⁷ *Id.* at 496 n. 20.

“mere pretext[] designed to erect an invidious discrimination against [women].”

Retained Rights

Article I, § 24, of the Illinois Constitution provides: “The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.”⁶⁸ Abortion advocates may be expected to cite § 24 in support of an asserted right to abortion under the state constitution. A proper interpretation of § 24, however, would not appear to support a right to abortion as a “retained right.”

The official commentary notes that the language of § 24 “is the same as that of the Ninth Amendment to the United States Constitution, except that ‘people’ has been replaced by ‘individual citizen[s] of this State.’”⁶⁹ Given that the language of § 24 is essentially the same as that of the Ninth Amendment, it should be given a parallel interpretation, absent evidence to the contrary in the proceedings of the Constitutional Convention.⁷⁰ That, in turn, suggests that if no right to abortion exists under the Ninth Amendment, then none would be

⁶⁸ ILL. CONST. art. I, § 24 (West 2006).

⁶⁹ *Constitutional Commentary*, ILL. CONST. art. I, § 24 (West 2006).

⁷⁰ To give § 24 a different interpretation, “there must be evidence in the language of the state constitution or in the debates and committee reports from its drafting that shows that the drafters intended the state constitution to be construed differently.” *People v. Moss*, 842 N.E.2d 699, 705 (Ill. 2005). With respect to § 24, there is no such evidence.

recognized under art. I, § 24. The Supreme Court, however, has rooted the “abortion liberty” in the liberty language of the Due Process Clause of the Fourteenth Amendment, not in the unenumerated rights language of the Ninth Amendment.⁷¹ Because abortion has not been recognized as a “retained right” under the Ninth Amendment, it should not be recognized as one under § 24, either. In the more than 35 years since the 1970 Illinois Constitution was adopted, § 24 has never been interpreted by a state reviewing court or cited in favor of any decision recognizing a “retained right.”⁷²

Apart from the conscious decision of the drafters to model § 24 on the Ninth Amendment,⁷³ which does not secure a right to abortion, the State’s history of prohibiting abortion would appear to undermine any argument that abortion could be regarded as a “retained” right, that is, a right that existed at the time the state constitution was adopted in 1970. From 1827, only nine years after Illinois was admitted to the Union, until 1973, when *Roe v. Wade* was decided, it was the

⁷¹ See *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

⁷² An entirely plausible reading of § 24 is that the enumeration of certain *constitutional* rights should not be construed to “deny or disparage” *common law* or *statutory* rights retained by the individual citizens of the State.

⁷³ See VI REPORT OF PROCEEDINGS at 66 (Bill of Rights Majority Report), III REPORT OF PROCEEDINGS at 1613-14 (debate on floor of Convention).

public policy of Illinois to protect unborn human life by prohibiting abortion.⁷⁴

More than 100 years ago, the Illinois Supreme Court recognized the purpose underlying this policy when it characterized abortion as “a grave crime, involving the destruction of an unborn child.”⁷⁵ Except for a brief, seven-year period between 1867 and 1874, when abortion was allowed “for *bona fide* medical or surgical purposes,”⁷⁶ Illinois prohibited abortion at any stage of pregnancy unless the mother’s life was endangered.⁷⁷ When, after *Roe*, the Illinois Supreme Court declared the state abortion law unconstitutional, it did so strictly on the basis of the Supremacy Clause, and not upon any independent state ground.⁷⁸ In light of the foregoing, there is no basis on which it fairly could be argued that the “retained rights” provision of the Illinois Bill of Rights secures a right to abortion.

In sum, there does not appear to be any principled basis on which one could conclude that the Illinois Constitution protects a right to abortion separate from, and independent of, the right to abortion recognized in *Roe v. Wade*. That, in turn,

⁷⁴ Act of Jan. 30, 1827, § 46, ILL. REV. CODE at 131 (1827), *repealed and replaced* by an Act of Feb. 26, 1833, § 46, ILL. REV. CODE at 179 (1833).

⁷⁵ *Earll v. People*, 99 Ill. 123, 132 (1881).

⁷⁶ Act of Feb. 18, 1867, Ill. Laws § 89 (1867).

⁷⁷ ILL. REV. STAT. ch. 38, § 3 (1874).

⁷⁸ *People v. Frey*, 54 Ill. 2d 28 (Ill. 1973).

suggests that, once *Roe*, as modified by *Casey*, has been overruled, the Illinois Legislature could prohibit abortion.

Conclusion

Nothing in the Illinois Constitution should preclude Illinois from prohibiting abortion once *Roe*, as modified by *Casey*, has been overruled, or from regulating abortion within federal constitutional limits in the meantime.