ARTICLES

A DECISION TREE TAKES ROOT IN THE LAND OF 10,000 LAKES: MINNESOTA'S APPROACH TO PROTECTING INDIVIDUAL RIGHTS UNDER BOTH THE UNITED STATES AND MINNESOTA CONSTITUTIONS*

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Elmer and Ethel are a retired farm couple living in west central Minnesota. They have recently turned the operation of their farm over to their children. It is Saturday afternoon, they are driving their pickup into town where they will get some groceries and perhaps stop at the local cafe for coffee and dessert. Elmer is behind

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the steering wheel; Ethel is seated next to the passenger door. They see a red convertible with the top down coming from the other direction. The man and the woman in the car are seated so close to one another that you could not fit a blade of straw between them. Ethel looks at the young couple and with a nostalgic tone she says, "You know Elmer, we used to sit like that." Elmer responds, "Well, Ethel, I haven't moved, I'm still sitting where I used to sit."

This is a story Minnesota Supreme Court Justice Paul H. Anderson will sometimes tell to illustrate when the Minnesota Supreme Court may be willing to look to the Minnesota Constitution when responding to the court's duty to protect the individual rights of Minnesota citizens. In essence, if the United States Supreme Court changes position and moves too close to the passenger door, the Minnesota court is willing to look to its state constitution to ascertain if there is a way to stay where the Minnesota court has been sitting comfortably for some time. Perhaps a more apt metaphor might be that the United States Supreme Court is driving, but the Minnesota court is sitting in the passenger seat in a car equipped with a side brake. At most times while the Supreme Court is driving, the Minnesota court will be comfortable with the ride. But if the Supreme Court makes a sharp or radical departure from the well-traveled road, i.e., federal precedent, the Minnesota court will utilize the brake. Under these circumstances, the Minnesota Supreme Court will fulfill its "duty" and "solemn obligation" by following a state constitutional route that provides greater protection for its citizens' individual rights.[1]

I. INTRODUCTION

In a 2005 voting rights case, *Kahn v. Griffin*,[2] the Minnesota

[1] Chief Justice John Marshall, writing for the United States Supreme Court, spoke of the "duty" and "solemn obligations" of the Court to interpret the Federal Constitution:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by *duty* to render such a judgment, would be unworthy of its station, could it be unmindful of the *solemn obligations* which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (emphasis added).

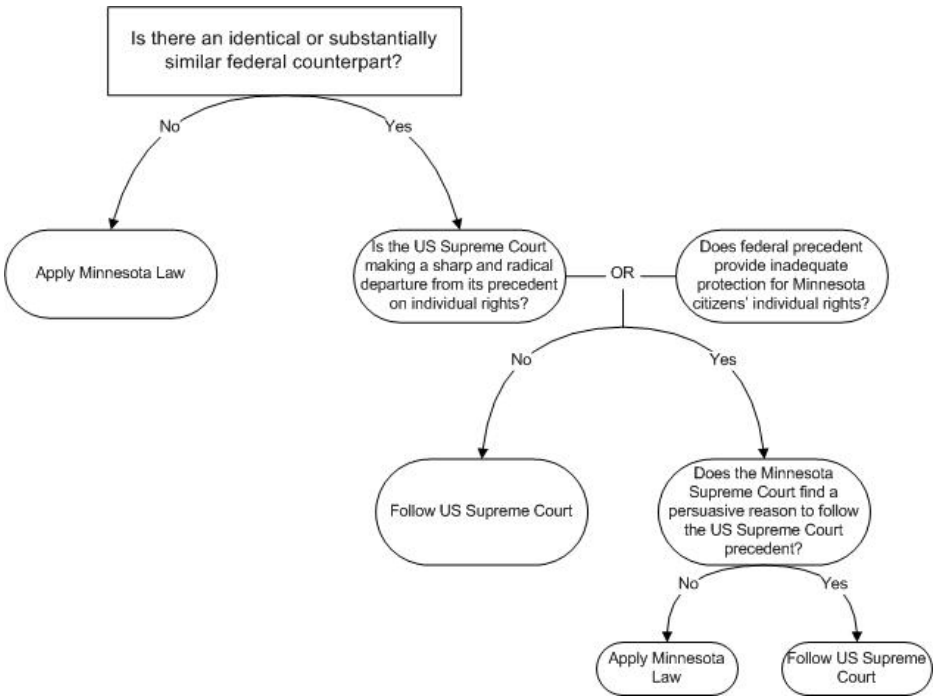
[2] 701 N.W.2d 815, 824–25 (Minn. 2005).

Supreme Court in essence developed a decision-tree[3] approach to decide issues of individual rights. This Article will examine Minnesota's approach to individual rights when those rights are protected under both the federal and state constitutions. It is timely that we examine this approach in 2007, the sesquicentennial of the adoption of the Minnesota Constitution.

Minnesotans have traditionally prided themselves on being progressive, but practical and predictable.[4] Minnesota's decision-tree approach directs litigants to ask several questions, and follow the path dictated by the answers. More particularly, Minnesota's approach requires litigants and the court to ask a number of questions, each of which leads to a particular path dictated by either a "yes" or "no" answer. The path taken will determine if the Minnesota Supreme Court will (1) interpret its state constitution to be in conformity with the Federal Constitution and federal precedent; or (2) interpret its state constitution in a manner independent of federal precedent. The diagram below illustrates Minnesota's approach:

[3] A "decision tree" is defined in the Oxford English Dictionary as "a tree diagram representing a sequence of decisions to be taken as a means of selecting one course of action out of many." OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The decision tree depicts a sequence of binary, yes or no, decisions which progress until a conclusion is reached.").

[4] *See, e.g.*, JENNIFER A. DELTON, MAKING MINNESOTA LIBERAL: CIVIL RIGHTS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY 23–25 (2002) (discussing mid-twentieth century Minnesota liberals' creation of "a new center in the American political spectrum" based on their "reconception of [both the] Left and Right as 'ideological'"); DANIEL J. ELAZAR, VIRGINIA GRAY & WYMAN SPANO, MINNESOTA POLITICS AND GOVERNMENT 49–53 (1999) (noting that while the percentage of Minnesotans who identified themselves as political liberals was often above the national average "by a considerable margin" from the early 1960s until the late 1980s, the state's personality is "essentially conservative" and the people are "frugal, disinclined to faddishness and outlandish behavior, taciturn, repelled by extravagance or waste, and leery of crazy new ideas"); Maeve Reston, *Once Liberal, Minnesota Now Is Up for Grabs*, PITTSBURGH POST-GAZETTE, Nov. 1, 2004, at A1 (quoting a Minnesota voter who remarked, "It's been a liberal state as far as voting goes sometimes, but it's a very conservative state as far as people think and act").



In essence, the Minnesota Supreme Court will independently interpret and apply the state constitution if either: (1) the state constitution protects a right that does not have an identical or substantially similar federal counterpart; or (2) there is an identical or substantially similar federal counterpart, but either the United States Supreme Court has made a sharp and radical departure from its precedent or federal precedent provides insufficient protection for Minnesota citizens' basic rights and liberties and the Minnesota court does not find a persuasive reason to follow that federal precedent.[5]

Part II of this Article provides a historical overview of judicial federalism, describes the four approaches states have traditionally taken to federal/state constitutional interpretation—lockstep, interstitial, dual sovereignty, and primacy—and reviews the critiques of these four approaches. Part III gives a brief history of judicial federalism in Minnesota, focusing on the state constitution and Minnesota Supreme Court decisions. Part IV considers *Kahn v. Griffin*, the 2005 voting rights case that provided the vehicle for the Minnesota Supreme Court to develop its decision-tree approach.

[5] The decision-tree approach is described in greater detail in Part V.

Part V describes the decision-tree approach and analyzes the guidelines the Minnesota court gives to aid litigants in answering questions required by it. Part VI discusses the advantages and potential critiques of the approach. Finally, this Article concludes that Minnesota's decision tree could serve as a model for other state courts seeking a practical and predictable, middle-ground approach that promotes uniformity and harmony between the federal and state courts.

II. HOW STATE COURTS DECIDE INDIVIDUAL RIGHTS ISSUES

State courts[6] deciding individual rights issues are faced with a solemn task. If properly pleaded, a claim will often assert violations of both federal and state constitutional rights.[7] State courts must then analyze the individual rights issue to determine if a right has been violated. This process can require the state court to interpret and apply the Federal Constitution, the state constitution, or both. Section A of this Part discusses how the American federal system provides dual constitutional protection for citizens and allows each state to offer greater protection to its own citizens based on its state constitution. Section B of this Part discusses the four traditional approaches state courts have taken when analyzing federal/state constitutional issues of individual rights and describes the major critiques of each of the four approaches.

A. The American Federal System Provides Dual Constitutional Protection for Citizens and Allows Each State to Offer Greater Protection to Its Own Citizens Based on Its State Constitution

One of America's enduring legacies is its long and rich history of constitutionalism. The federal government and each state have

[6] In this Article, the term "state courts" refers to the highest state appellate court. In most states, the final appellate court is the state supreme court, but that is not universally true. The court of last resort in each state is the final arbiter of that state's law, including its constitutional law.

[7] Some judges suggest that the failure to plead a violation of the state constitution is malpractice. State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring) ("Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice."); *see* Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are a Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1529 (1998) ("Lawyers are becoming increasingly effective in asserting state constitutional claims, having been prodded by judges and commentators to consider state constitutional arguments on behalf of their clients.").

written constitutions.[8] America's federal system offers dual protection to American citizens under the federal and state constitutions. The Federal Constitution protects all citizens, and its protections must be enforced by the states. However, a state can offer greater protection to its citizens based on that state's constitution. A state court's interpretation of its constitution is not reviewable by the United States Supreme Court.[9] The ability of states to offer greater protection based on their own constitutions, and certain states' recognition of this ability, provided the impetus for the renaissance of judicial federalism that began in the early 1970s and continues today.

1. America's Constitutional Tradition Includes Written Constitutions That Are Subject to Various Interpretations

Written constitutions have been essential in America for the federal government and each state.[10] Political Science Professor Martin Edelman notes:

> Modern constitutionalism was born in the United States. The founders of the American Republic believed that a written constitution would be their lasting contribution to the science of politics. Time has proven them right. . . .
>
> The appeal of written constitutions is not simply a trendy convention. It is grounded on historical experience. . . . If human beings are by nature both self-serving and social animals, there is a need for an umpire, the State, to guarantee the essentials of human existence—the respect for life, the respect for mutual obligations, etc. Every society needs stable, ordered behavioral patterns that only a State can uphold. We have also come to recognize the need to

[8] *See* Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837 app. C, at 847–48 (1999) (noting that ten of the original states had written constitutions prior to the writing of the Federal Constitution and that two states in particular, Massachusetts and New Hampshire, are still using their original pre-Union constitutions).

[9] Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); *see* Judith S. Kaye, Foreword, *The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights,* 23 RUTGERS L.J. 727, 728–29 (1992) ("[S]tate courts, by plain statements indicating adequate and independent state law grounds for their determinations, establish themselves as the final arbiters of fundamental questions affecting society, insulating those questions from review by the United States Supreme Court.").

[10] *See infra* note 16.

> protect against the State itself becoming the chief violator of the vital human concerns for which it was created. . . .
>
> Constitutions are, in Madison's language, a principal auxiliary precaution.[11]

Constitutions establish the rule of law that ensures the government is bound in its actions by rules that are announced beforehand.[12]

In the American tradition, constitutions are written documents that require interpretation. As a result of this tradition, the United States has developed a rich history of debate over the correct interpretation of both the federal and state constitutions. Such debate is inevitable because constitutional interpretation implicates human nature and our most deeply held beliefs. Moreover, society is in a constant state of flux, language usage changes over time, and constitutions often fail to specify the relative importance of the values they seek to protect.[13] The complexity inherent in the process of constitutional interpretation generates many approaches that are not easily categorized. As Professor Edelman notes:

> The history of American arguments about construing the Constitution indicates that all interpreters are both strict and loose constructionists who sometimes advocate judicial self-restraint and sometimes judicial activism. They—we—are all interpretivists, they—we—are all non-interpretivists. Interpretive methodologies are not selected randomly or arbitrarily. Rather, they are selected deliberately in terms of the larger purposes of written constitutions. If written constitutions perform an architectonic function for government and society, then it is natural that the interpreter's vision of the good society will determine the

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[11] Martin Edelman, *Written Constitutions, Democracy and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 586–87 (2005).

[12] *Id.* at 587. In *The Federalist No. 78*, Alexander Hamilton stated:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.
>
> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . sometimes disseminate among the people themselves.

THE FEDERALIST NO. 78, at 230–31 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

[13] *See* Edelman, *supra* note 11, at 590–92.

tools he or she utilizes in shaping that society.[14]

Even though interpretations vary, some interpretations have greater weight. The interpretation of the judges charged with enforcing the constitutions controls.[15]

2. The American Federal System Offers Citizens Dual Protection

Every American citizen is protected by two separate constitutions: the United States Constitution and the constitution of the citizen's state.[16] Federal and state governments coexist under our federal system.[17] Under this system, certain basic rights, such as those identified by English philosopher John Locke—life, liberty, and property[18]—reside with the people, not the sovereign. In order to live in a civil society and to protect their rights, the people needed a social contract with those who would govern them.[19] In the United States, government is centered on such a social contract—a constitution. Under the United States Constitution, the people delegated limited powers to the federal government; all other governmental powers were reserved to the states.[20] In part, this dual constitutional system is designed to encourage states to serve as individual "laborator[ies]" for protecting individual rights and for finding solutions to problems related to governing.[21]

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[14] *Id.* at 596.

[15] *See* Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts,* 61 ALB. L. REV. 1417, 1420 (1998) (citing City of Boerne v. Flores, 521 U.S. 507, 516 (1997)).

[16] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 1 (1998) ("Americans live under a system of dual constitutionalism, but one would hardly know it."); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation,* 61 ALB. L. REV. 1507, 1507 (1998) ("Our republic consists of a national government and fifty state governments. Each has its own constitution . . . . The powers and limitations of each government are established and defined by its constitution."). Not all American citizens realize they are protected by a state constitution. A poll conducted in 1988 showed that fifty-two percent of those polled did not know their state had its own constitution. Shepard, *supra* note 7, at 1533 (citing John Kincaid, *State Court Protections of Individual Rights Under State Constitutions: The New Judicial Federalism,* 61 J. ST. GOV'T 163, 169 (1988)) (referencing a June 1998 nationwide poll commissioned by the U.S. Advisory Commission on Intergovernmental Relations).

[17] DANIEL JOHN MEADOR, AMERICAN COURTS 1 (1991).

[18] JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 87 (Peter Laslett ed., Cambridge University Press 1970).

[19] MEADOR, *supra* note 17, at 2–3.

[20] *Id.* at 1. In *The Federalist No. 45*, James Madison stated that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45 (James Madison), *supra* note 12, at 137.

[21] *See* Donald C. Wintersheimer, *Supremacy Clause: Or Leash Law?*, 61 ALB. L. REV. 1575,

State constitutions differ from the United States Constitution in several respects. On average, state constitutions are about three times longer than the Federal Constitution; most state constitutions include a bill of rights that originally differed from the Federal Bill of Rights,[22] but often now resembles it more closely; many state constitutions have an express separation of powers requirement; most state constitutions deal with policy areas such as finance, revenue, corporations, and education; and, most state constitutions are easier to amend than the Federal Constitution.[23] Further, the nature of the Federal Constitution differs from state constitutions in several respects. For example, the Federal Constitution incorporates broad constitutional principles, but state constitutions often include both broad constitutional principles and more specific "statutory" material. And, while the Federal Constitution "embodies a political theory and a coherent constitutional design," state constitutions often have been frequently amended or otherwise changed,[24] which process can often dilute or obscure a founding philosophy. Further, there is considerable historical material to guide federal constitutional jurisprudence, but there is frequently a debate over whether there is enough historical material to provide

1578 (1998) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[22] The drafters of the Constitution were divided about whether specific "rights" retained by the people should be included in the Constitution. RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 194–96 (2006). Many delegates believed that because the Constitution only granted limited powers to the established government, all other rights were obviously reserved to the people. *Id.* at 199. Therefore, there was no need to include in the Constitution a specific list of which "rights" were reserved or protected. *Id.* But in 1791, ten amendments were added to the Constitution. *Id.* at 254–55. These amendments did list specific rights that were reserved or protected and are what we now call the Bill of Rights. *Id.*

[23] G. Alan Tarr, *Understanding State Constitutions,* 65 TEMP. L. REV. 1169, 1170–79 (1992) [hereinafter *Understanding State Constitutions*] (listing these five areas and describing the structural and substantive differences); *see* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 29 (2006) ("There is no denying the significant differences between the amendment and revision procedures in the federal constitution and in most state constitutions. Whereas Article V of the U.S. Constitution places substantial barriers in the way of amendment and revision, state procedures are generally more accessible and provide additional mechanisms for bringing about constitutional change."). Dinan further emphasizes the difference between the republican character of the federal government, which permits citizens to participate in lawmaking only through their elected representatives, and the democratic nature of the state government, which often requires that state constitutions must be submitted to the people for a vote. DINAN, *supra*, at 64.

[24] *Understanding State Constitutions*, *supra* note 23, at 1183. Minnesota has had only one constitution. *See infra* notes 90–92 and accompanying text. Several other states have had numerous constitutions—Louisiana has had eleven, Georgia has had nine, and South Carolina has had seven. JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 27 (2005).

an adequate basis for ascertaining a state's constitutional jurisprudence.[25] Finally, the federal government has limited power, but state governments have plenary power and "are not restricted in the purposes for which they can exercise power."[26] These differences have led some scholars to argue that state constitutions are not really "constitutions."[27] To this argument, Indiana Supreme Court Chief Justice Randall T. Shepard responds:

> While the scholar is free to ask whether state constitutions should even be considered as constitutions at all, the state court judge is stuck in the more intractable position of having to decide what to do when two interested parties assert that their state constitution means either this or that.[28]

When a state court compares the Federal Constitution with its state constitution, tension arises only if there is a right that both constitutions protect. If the right is guaranteed only by the state constitution, there is no issue as to the relative weight of a nonexistent federal right.[29] Rather the interpretive tension arises

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[25] *Understanding State Constitutions, supra* note 23, at 1185; *see* DINAN, *supra* note 23, at 1–3 ("[T]he predominant scholarly view is that state conventions have rarely debated the sorts of fundamental issues that preoccupied delegates to the federal convention, and moreover that these proceedings have not been characterized by the kind of deliberation that was seen in the federal convention."). Minnesota Supreme Court Justice John E. Simonett points out:

> "Original intent" is not a particularly helpful approach. Reports of our state's constitutional conventions are quite barren of discussions on the merits of the various provisions. Our state, for example, has nothing comparable to the *Federalist Papers.* The citizens of Minnesota in the mid-nineteenth century, among them the convention delegates, were recently-arrived immigrants, many from the East Coast. Consequently, the history of the drafting of our state constitution is not particularly enlightening, except as one might be able to trace specific provisions back to even earlier constitutions in other states.

John E. Simonett, *An Introduction to Essays on the Minnesota Constitution,* 20 WM. MITCHELL L. REV. 227, 239 (1994).

[26] *Understanding State Constitutions, supra* note 23, at 1180.

[27] James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1028–30 (1993). Gardner states:

> [S]tate constitutions by and large do not fit comfortably within our standard definition of "constitutions." Typically, state constitutions do not seem to have resulted from reasoned deliberation on issues of self-governance, or to express the fundamental values or unique character of distinct polities. Lacking these qualities, state constitutions, to put it bluntly, are not "constitutions" as we understand the term.

Id. at 1025–26.

[28] Shepard, *supra* note 7, at 1531 n.8.

[29] Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 655 (1987); *see* discussion *infra* Parts II.A.3.b, III.B.1.e (discussing the right to education, which is protected only in state constitutions).

when both constitutions protect an identical or substantially similar right. If the language is substantially similar, i.e., there is an analog between the federal and state constitutions, state courts must decide if the state constitutional provision should be assigned a meaning that offers greater protection of the individual right.[30] Even if the language of the two constitutional provisions is identical, state courts must still decide whether to follow federal precedent or separate state jurisprudence.[31]

3. States Can Offer Greater Protection for Individual Rights

All American citizens are guaranteed the protections of the United States Constitution. This guarantee is sometimes described as the federal floor.[32] State courts must protect individual rights at the minimum level prescribed by the Federal Constitution as interpreted by the United States Supreme Court, but states may also choose to further protect individual rights based on their own constitutions.[33]

a. States Cannot Offer Less Protection Than That Afforded Under the Federal Constitution

Originally, the Bill of Rights only constrained action by the federal government.[34] But the Bill of Rights was eventually extended, through the Fourteenth Amendment, to constrain state action so it "now establishes a basic level of protection that must be afforded to U.S. citizens across the country in nearly all important areas of individual rights."[35] Accordingly, states cannot offer less protection than that afforded under the Federal Constitution.[36]

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[30] Utter & Pitler, *supra* note 29, at 655.

[31] *Id.* at 656.

[32] Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 129 (1969).

[33] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); *see* Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." (emphasis added)).

[34] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–49 (1833).

[35] Heiple & Powell, *supra* note 16, at 1510.

[36] State courts are free to interpret the state constitutions as offering less protection than the Federal Constitution. *See* Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399, 1405 (1998). If, however, the state constitution is found to offer less protection, the state courts must enforce the Federal Constitution and its protections. *Id.* at 1406.

b. States Can Offer Greater Protection Based on Their Constitutions

Under our federal system, state constitutions may provide greater protection for individual rights.[37] In 1980, Justice William Rehnquist stated that United States Supreme Court opinions do not "limit the authority of [any] State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[38] Thus, a state is free to afford greater protection to individual rights and liberties under its own constitution.[39]

c. A State Court Decision Based on the State's Constitution Is Not Reviewable by the United States Supreme Court

If a state court's decision rests on state grounds that are independent and adequate to support the decision, then the Supreme Court cannot review that decision even if the case also involves federal issues.[40] In *Michigan v. Long*, the Supreme Court stated that if a state court decision was based on an independent state ground, the decision was to contain a plain statement identifying that ground.[41] If the *Long* plain statement rule is met, the Supreme Court will not overrule the state court.[42] Further, even if federal precedent is in a litigant's favor, "it is a mistake to ignore the state guarantee" because the Supreme Court may reverse its prior direction or reverse a state court's decision based on the United States Constitution.[43]

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[37] *See, e.g.*, Kahn v. Griffin, 701 N.W.2d 815, 823 (Minn. 2005).

[38] *Pruneyard Shopping Ctr.*, 447 U.S. at 81.

[39] Gregory Allen, *Ninth Amendment and State Constitutional Rights*, 59 ALB. L. REV. 1659, 1659 (1996). Heiple and Powell further note that "[c]onservative opponents of state constitutional interpretation claim that state courts use their constitutions only to expand civil liberties protections. Current Supreme Court doctrines will allow states to do nothing else." Heiple & Powell, *supra* note 16, at 1510.

[40] Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 592–93 (1874); *see* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379, 388–89 (1980). The advantage for attorneys in relying on state constitutional grounds is that the case cannot be reversed on state grounds. Plus, if the federal precedent is reversed, the state constitutional claim will not be subject to the change in federal precedent. *Id.*

[41] Michigan v. Long, 463 U.S. 1032, 1044 (1983).

[42] Others have studied whether state courts have satisfied *Long*'s "plain statement" requirement. Matthew G. Simon, Note, *Revisiting* Michigan v. Long *After Twenty Years*, 66 ALB. L. REV. 969, 987–88 (2003) (noting that state courts have often failed to satisfy the *Long* requirement).

[43] Linde, *supra* note 40, at 388–89.

d. The States' Ability to Offer Greater Protection for Individual Rights Provided the Impetus for the Renaissance of Judicial Federalism

Judicial federalism is commonly understood to mean a state court's reliance on its own constitution to decide individual rights issues.[44] A renaissance of judicial federalism began in the 1970s. Some commentators have indicated that this renaissance started as the result of a perceived retrenchment by the United States Supreme Court on individual rights during the Warren E. Burger era (1969–86), which followed the more progressive Earl Warren era (1953–69).[45] During this period of retrenchment, some state courts looked to their own constitutions to either maintain or provide greater protection for individual rights. Further, and perhaps as a result of his often being in the minority on the Court, Justice William J. Brennan, a Court member during both eras, championed the use of independent state constitutional grounds to protect individual rights.[46]

There is some dispute about whether this "new judicial federalism" is really all that new. Some scholars suggest that state constitutions always offered greater protection for individual

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[44] *See* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 (1997) [hereinafter *New Judicial Federalism*] (defining new judicial federalism as "the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution").

[45] *See* Stanley H. Friedelbaum, *Traditional State Interests and Constitutional Norms: Impressive Cases in Conventional Settings,* 64 ALB. L. REV. 1245, 1245 (2001) [hereinafter *Traditional State Interests*]; Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long-Term Prospects,* 19 FL. ST. U. L. REV. 1053, 1059 (1992) (reviewing the "renascent decades" and more recent developments in state courts). For information on the dates when all the Chief Justices of the United States Supreme Court served, please visit the United States Supreme Court's website at http://www.supremecourtus.gov/about/members.pdf.

[46] In 1975, Justice Brennan noted in a dissent that state courts were using independent constitutional grounds for their decisions involving individual rights. Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting). He then wrote an article in 1977 emphasizing the role of state constitutions in protecting individual rights. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, Jr., *State Constitutions*]; *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986) [hereinafter Brennan, Jr., *Bill of Rights*] (discussing the ways in which state courts can shield state constitutional law from federal interference).

Indiana Supreme Court Chief Justice Randall T. Shepard emphasized that judges are obliged to decide the "questions of law placed before them, rather than from exhortations by figures like Justice William Brennan, who emphasized individual rights as an end to be pursued for their own good, with state constitutions serving as a convenient means to that end." Shepard, *supra* note 7, at 1530.

rights.[47] But other scholars contend that our modern concept of individual rights originated in Supreme Court interpretations of the Federal Constitution and, thus, required federal individual rights interpretation before the states could develop their own individual rights jurisprudence.[48]

Whether judicial federalism is new or not,[49] it has become an important part of state court jurisprudence over the last three decades.[50] Moreover, it is not likely to go away;[51] indeed, judicial

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[47] Professor Tarr explains:

> The standard account of the new judicial federalism suggests that it is not really novel but rather involves a "rediscovery" of state constitutions and state declarations of rights. . . . During the first era, which lasted roughly 140 years, state constitutions were necessarily the primary vehicle for protecting individual rights. Until the 1930s state governments were far more involved than the federal government in domestic policy; as a result, civil liberties litigation usually involved challenges to the actions of state governments.

New Judicial Federalism, *supra* note 44, at 1099; *see also* Utter & Pitler, *supra* note 29, at 640 ("Most of the states had declarations of rights years before the United States Constitution.").

[48] Professor Tarr points out that the new judicial federalism did not develop until the 1970s in part because the state courts needed a model for developing civil liberties jurisprudence. He notes:

> What was missing was a model of how state judges could develop a civil liberties jurisprudence. Because Americans had not yet come to rely on courts to vindicate civil liberties, state courts throughout the nineteenth and early twentieth centuries gained little experience in interpreting civil liberties guarantees. Nor could they look to federal courts for guidance in interpreting their constitutional protections. The federal courts also decided few civil liberties cases, and their rulings typically revealed little sympathy for rights claimants. Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop constitutional guarantees, could a state civil liberties jurisprudence emerge. Put differently, when the Burger Court's anticipated—and to some extent actual—retreat from Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decades had laid the foundation for the development of state civil liberties law.

New Judicial Federalism, supra note 44, at 1111. Others contend that the origin of state constitutional jurisprudence did not derive from Justice Brennan's 1977 suggestions, but instead from "the work of multiple state supreme courts who continued to engage in state constitutional adjudication in spite of the nearly overpowering judicial activism of the Warren Court." Shepard, *supra* note 7, at 1530 n.6.

[49] Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication,* 72 NOTRE DAME L. REV. 1015, 1017 (1997) ("It has been correctly noted that the new judicial federalism is not new anymore.").

[50] *See* Ken Gormley, *The Silver Anniversary of* New Judicial Federalism*,* 66 ALB. L. REV. 797, 797 (2003) (marking the twenty-fifth anniversary of Justice Brennan's article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)). Additionally, Justice Paul Anderson noted in *Kahn*, "Approximately 40 years ago, we began to change how we view the use of United States Supreme Court precedent on issues implicating the Minnesota Constitution." Kahn v. Griffin*,* 701 N.W.2d 815, 826 (Minn. 2005).

[51] *See Traditional State Interests*, *supra* note 45, at 1247 ("[S]tate constitutionalism has displayed no signs of a reversion to the passivity of the first half of the twentieth century.").

federalism has reached a ripe stage where many states have developed different approaches to individual rights issues. The next Section discusses the four traditional approaches that the states have developed.

B. Four Traditional Approaches States Take to Protect Individual Rights

State constitutional law scholars have traditionally placed the states into four categories as to the approach they take to analyzing individual rights under state constitutions—lockstep, interstitial,[52] dual sovereignty, and primacy.[53] Further, several state courts have varied the type of approach they take depending on the type of individual right being protected.[54]

The four approaches can be likened to four familiar childhood phrases: "follow the leader" (lockstep), "first look left, and then right when crossing the street" (interstitial), "look both ways" (dual sovereignty), and "me first" (primacy). When taking the lockstep approach, a state court "follow(s) the leader" by looking exclusively at the Federal Constitution and the Supreme Court's interpretation of the Federal Constitution. When taking the interstitial approach, a state court "look(s) left, and then right when crossing the (constitutional interpretation) street" by looking primarily to the Federal Constitution and Supreme Court precedent, then secondarily to the state constitution and its own precedent. When taking the dual sovereignty approach, a state court "look(s) both ways" and considers the federal and state constitutions as equals. When taking the primacy approach, a state court only looks to its

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[52] The interstitial approach is also known as the supplemental approach. *See* Utter & Pitler, *supra* note 29, at 648.

[53] *See id.* at 645–52 (detailing the four traditional approaches). At least one state has adopted an approach different from the traditional four approaches. In 2006, the Illinois Supreme Court referred to its approach as a "limited lockstep approach." People v. Caballes, 851 N.E.2d 26, 43 (Ill. 2006). The court indicated that it had a "decades-long history of lockstep interpretation of cognate provisions of the state and federal constitutions, as well as the making of occasional exceptions to the lockstep doctrine." *Id.* at 39. The court further explained that it does not always follow in complete lockstep. The court noted that it has departed from lockstep when the "language of the state constitution, the history of the provisions dealing with the right . . . including the committee reports and debates, and the common law decisions" suggest that a different interpretation under the state constitution is warranted. *Id.* at 37. Additionally, the court noted that preexisting state law and the state's traditions and values are important in deciding whether to depart from the lockstep approach. *Id.* at 43.

[54] Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1181 (1985).

own constitution in a "me first" approach.

The following subsections describe each approach in greater detail and provide a critique of each approach. As a preliminary matter, we note that one major criticism common to three of the four approaches is that judicial federalism simply provides an excuse for state courts to manipulate state constitutional law to support a particular result.[55] The only approach not subject to this criticism is the lockstep approach because under this approach, state courts conform completely to Supreme Court precedent. State courts are aware of this criticism and often cite a principle similar to the one the Minnesota Supreme Court articulated in *Kahn v. Griffin*: "We will not reject a Supreme Court interpretation of a provision of the U.S. Constitution merely because we want to bring about a different result."[56]

1. Lockstep—Follow the Leader

a. A Description of the Lockstep Approach

The lockstep approach essentially follows the leader—the United States Supreme Court. When taking the lockstep approach, the state court does not look to its state constitution if the individual right is one that the Federal Constitution also protects.[57] In other words, a state court following the lockstep approach looks to the individual rights protected under the Federal Constitution and how the Supreme Court has interpreted those rights, and then the state court follows in the Supreme Court's footsteps. As others have noted, the lockstep approach is basically a "non-approach to state interpretation because it results in absolute deferential conformity with Supreme Court interpretations."[58] The Supreme Courts of Florida and Texas have taken this approach, at least for some criminal procedure issues.[59]

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[55] Professor Tarr explains:

> Thus, when state courts began to rely on their state constitutions, critics charged that they were merely attempting to evade Burger Court rulings and safeguard the civil libertarian gains of the Warren Court. This criticism lost force, however, as the new judicial federalism spread, and courts in every state announced rulings based on the rights guarantees of their state constitutions.

TARR, *supra* note 16, at 161–62.

[56] 701 N.W.2d 815, 824 (Minn. 2005).

[57] *See* Utter & Pitler, *supra* note 29, at 645.

[58] *Id.* (internal quotation marks omitted).

[59] *See* Thomas C. Marks, Jr., *Now You See It, Now You Don't, Privacy and Search and*

b. Critique of the Lockstep Approach

The advantage of the lockstep approach is that it is the only approach not subject to the manipulation criticism because of its conformity with federal precedent. In other words, courts following the lockstep approach never vary from federal precedent, so they cannot be criticized for reaching a different result. Further, this approach promotes national uniformity that makes it easier for all parties involved, including judges, lawyers, and law enforcement officers, to apply one consistent rule.[60] But there are at least three major criticisms of the lockstep approach: it ignores a state court's duty to independently interpret its state constitution, it "contradicts the historical relationship between the state and federal constitutions," and it is inconsistent with the roles of state and federal courts in the traditional model of federalism.[61]

2. Interstitial—First Look Left and Then Right

a. A Description of the Interstitial Approach

The interstitial approach reflects a common instruction given to children learning to cross the street, "first look left, then look right."[62] A state court following this approach first "looks left" or primarily to the Federal Constitution and Supreme Court precedent on individual rights subject to protection.[63] Secondarily, if the state court determines that federal precedent does not adequately protect an individual right,[64] the court then "look(s) to the right" to see if the state constitution offers an independent source of protection. Under this approach, if the court looks to the left and sees that the

Seizure in the Florida Constitution: Trying to Make Sense Out of a Tangled Mess, 67 ALB. L. REV. 691, 691–92 (2004); Utter & Pitler, *supra* note 29, at 646.

[60] TARR, *supra* note 16, at 180.

[61] Utter & Pitler, *supra* note 29, at 646.

[62] In actuality, children are often taught to look left, then right, *then left again*, before crossing the street. *See, e.g.*, Nat'l Highway Traffic Safety Admin., Campaign Safe & Sober, Prevent Pedestrian Crashes: Preschool / Elementary School Children, http://www.nhtsa.dot.gov/PEOPLE/outreach/safesobr/15qp/web/sbprevent.html (last visited Feb. 12, 2007). Similarly, a state court that takes the interstitial approach may look first to the Federal Constitution and federal precedent, then look to its state constitution, and sometimes will look again at federal constitutional law before reaching its decision in an individual rights case.

[63] Utter & Pitler, *supra* note 29, at 648.

[64] In other words, the state court determines that the United States Supreme Court or the Federal Constitution no longer protect a fundamental right.

individual right is protected by federal precedent, the court's inquiry stops. If the court looks to the left and sees either no protection or inadequate protection, it will then look to the right—toward its state constitution—to see if that constitution offers adequate protection.

A court taking the interstitial approach "view[s] federal interpretation of analogous provisions as presumptively correct[,] . . . [but does] not automatically follow the federal interpretation in construing state provisions."[65] State courts often take this approach to "foster uniformity and avoid conflict[s]" with federal court decisions in cases involving the same or similar individual rights.[66] Examples of states that have taken the interstitial approach include Indiana, New Jersey, and Massachusetts.[67]

Several states taking the interstitial approach have developed neutral criteria to guide any departure from federal analysis.[68] The criteria generally include "textual differences, legislative history, preexisting state law, structural differences between state and federal constitutions, matters of particular local or state interest, state traditions or history, and particular attitudes of the state's citizens."[69] Minnesota adopted a similar set of neutral criteria in the *Kahn* case.[70]

b. Critique of the Interstitial Approach

The advantage of the interstitial approach is that it "seeks to minimize legitimacy questions by limiting the frequency of rulings based on state declarations of rights."[71] Further, with a presumption of correctness given to Supreme Court precedent, the

[65] *Id.* at 648–49 (citing Abrahamson, *supra* note 54, at 1176).

[66] *Id.* at 648; *see* discussion *infra* Part IV.A.3 (noting that the *Kahn* opinion gives deference to the United States Supreme Court in part to foster uniformity).

[67] Utter & Pitler, *supra* note 29, at 648–51.

[68] *See, e.g.*, *id.* at 649 (noting that Justice Handler criticized the New Jersey Supreme Court's supplemental/interstitial approach because of the "lack of consistent standards," and instead suggested a set of neutral criteria); *see also* Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights,* 79 N.Y.U. L. REV. 1833, 1848 n.95 (2004) (listing New Jersey, Washington, Vermont, Pennsylvania, Illinois, and Connecticut as states adopting the neutral criteria). Not all states that have adopted a set of criteria use them consistently. Fitzpatrick, *supra*, at 1849 (mentioning New York's failure to consistently apply the criteria).

[69] Utter & Pitler, *supra* note 29, at 649–50 n.120.

[70] Kahn v. Griffin, 701 N.W.2d 815, 829 (Minn. 2005); *see also* discussion *infra* Part V.

[71] TARR, *supra* note 16, at 182. However, Tarr believes the supplemental/interstitial approach "actually aggravates, rather than alleviates, legitimacy concerns." *Id.* at 183.

interstitial approach reduces the frequency of divergence. The neutral criteria developed as part of this approach ensure that "such departures are principled rather than opportunistic."[72]

There are at least two major criticisms of the interstitial approach. First, critics point out that it is not prudent to rely solely on federal precedent for state court decisions.[73] If a state court relies only on federal precedent and the Supreme Court disagrees with the state court interpretation of the Federal Constitution, the state court decision is subject to reversal. Further, if a state court decides to turn to its own constitution and precedent after a Supreme Court reversal, that state court is subject to complaints that its decision is results-oriented and created unnecessary work for the Supreme Court.[74]

A second common criticism of the interstitial approach, and in particular its use of neutral criteria, is that it gives unwarranted deference to federal interpretation of individual rights.[75] The crux of this argument is that a state court has a duty to interpret its state constitution on its own merits, and primary reliance on federal interpretation permits a state court to "eschew[] its responsibility to independently interpret the state constitution in favor of conforming to the Supreme Court's result."[76]

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[72] *Id.* at 182.

[73] Utter & Pitler, *supra* note 29, at 650.

[74] *Id.* at 650–51 (reviewing the situation in *Commonwealth v. Upton*, where the Massachusetts court reversed a conviction based on its interpretation of the Fourth Amendment, the United States Supreme Court disagreed and reversed, and the Massachusetts court then turned to its state constitution to affirm its earlier decision).

[75] *See* Williams, *supra* note 49, at 1023. Williams criticizes the criteria approach for several reasons, including that the criteria approach can "limit independent state constitutional interpretation" by giving deference to United States Supreme Court interpretations of the Federal Constitution. *Id.* at 1027; *see* Utter & Pitler, *supra* note 29, at 650.

[76] Utter & Pitler, *supra* note 29, at 650 (indicating that New Jersey Supreme Court Justice Morris Pashman articulated this criticism of the use of the neutral criteria). Tracey Levy notes further:

> Courts like the Minnesota Supreme Court, which advance beyond this piggyback approach and independently analyze their state constitutions, still undermine the legitimacy of state constitutional interpretation when they fail to consider state constitutional provisions until after they determine that the federal constitution does not protect the right asserted. "The effect [of this approach] is to make independent state grounds appear not as original state law, but as a kind of supplemental rights that require an explanation."

Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1040 (1994) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts,* 18 GA. L. REV. 165, 177 (1984)) (alteration in original).

3. Dual Sovereignty—Look Both Ways

a. A Description of the Dual Sovereignty Approach

The dual sovereignty approach is like the actions taken by a child who is taught to look both ways without a particular emphasis on either direction. A state court following this approach looks to both the Federal Constitution as well as its state constitution and its own precedent and then decides which direction offers greater protection for its citizens' individual rights. In essence, the court does not give deference to one direction over the other, it only relies on the constitution that provides the greatest protection.[77] Vermont and Washington are examples of states that take the dual sovereignty approach.[78]

b. Critique of the Dual Sovereignty Approach

The dual sovereignty approach, which reaches independent decisions under both constitutions, has several advantages. Most notably, this approach "reflects the policies underlying our federal system by making available the maximum protection[s] both levels of government offer to citizens."[79] It is also said to reflect the original method of constitutional analysis.[80]

There are at least two criticisms of the dual sovereignty approach. First, if the state court relies on its state constitution, any discussion and/or analysis of federal constitutional law is merely dicta. If instead the state court relies on the Federal Constitution and federal precedent, any discussion and/or analysis of state law is dicta.[81] Further, when taking the dual sovereignty approach, state

[77] *See* Utter & Pitler, *supra* note 29, at 651–52.

[78] *Id.*

[79] *Id.* at 652 (quoting Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1029 (1985)).

[80] Utter, *supra* note 79, at 1029.

[81] Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts,* 63 TEX. L. REV. 977, 981 (1985); Jessica L. Schneider, *Breaking Stride: The Texas Court of Criminal Appeals' Rejection of the Lockstep Approach 1988–1998*, 62 ALB. L. REV. 1593, 1597–98 (1999) (stating that if a case is decided under federal law, then state law is dicta, and vice versa); *see* Utter & Pitler, *supra* note 29, at 652 ("The major criticism lodged against the dual sovereignty approach is that once a court affords protection under the provision analyzed first, subsequent discussion under the other constitution constitutes dicta, unnecessary to the final disposition of the case.").

courts appear in practice to rely more on federal precedent and may thus simply mimic federal law.[82]

4. Primacy—Me First

a. A Description of the Primacy Approach

The primacy approach reflects a "me first" attitude. A state court taking the primacy approach looks first to its own constitution. It looks to see what individual rights are protected under that constitution, and then interprets that document to the fullest extent possible to protect its citizens' individual rights. Under this approach, the court only considers federal precedent if its state constitution does not protect the particular individual right at issue.[83] Justice Hans A. Linde of the Oregon Supreme Court first articulated this approach in the early 1980s.[84] Oregon, Maine, and New Hampshire are examples of states that take the primacy approach.[85]

b. Critique of the Primacy Approach

Professor Tarr explains the advantages of the primacy approach:

> [O]nly the primacy approach encourages that independent interpretation of state constitutions which is appropriate to a system of dual constitutionalism. In addition, the primacy approach deals quite effectively with legitimacy concerns. The fundamental concern was that state judges would use state constitutions instrumentally, in order to pursue their policy goals. . . . In fact, the approach altogether eliminates state courts' discretion over whether to rely on state guarantees as an alternative to federal law. Recurrence to state law is an obligation, not a choice.[86]

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[82] *See* So Chun, Comment, *A Decade After* Smith*: An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California*, 63 ALB. L. REV. 1305, 1315 (2000) (finding it difficult to review holdings using the dual reliance approach because of the commingling of federal and state law).

[83] Linde, *supra* note 40, at 388. Justice Hans A. Linde, a retired Oregon Supreme Court Justice, was a chief proponent of the primacy approach. The *Albany Law Review* recently included a tribute to Justice Linde. Wayne V. McIntosh & Cynthia L. Cates, *The Power of Judicial Ideas: A Tribute to Justice Hans Linde*, 64 ALB. L. REV. 1147 (2001).

[84] Linde, *supra* note 40, at 379, 383.

[85] *See* Utter & Pitler, *supra* note 29, at 647.

[86] TARR, *supra* note 16, at 184.

But Justice Robert F. Utter of the Indiana Supreme Court and his coauthor Sanford E. Pitler have criticized the primacy approach as follows:

> Many commentators argue that the classical federalism model of distinct bodies of law, providing double protection, has become unnecessary due to the extensive incorporation of the federal Bill of Rights. Others contend that the need for nationwide uniformity, at least in the area of criminal law, makes the primacy method ill-advised. I also see the primacy method as creating some problems. In particular, primacy courts often address only the state constitution, resulting in state decisions that do not comment on federal law. Consequently, state courts would no longer play their crucial and historic role in the development of federal jurisprudence.[87]

Another criticism of the primacy approach is that it is not practical for a state court to rely exclusively on state law grounds as reflected in its constitution. As previously stated, state courts must enforce the protections offered in the Federal Constitution. So, state courts must keep an eye on federal interpretations of individual rights to insure that they are providing at least the minimum threshold level of protection for their citizens.[88] Tarr also notes that the primacy approach "seems to demand heroic efforts on the part of state constitutional interpreters."[89]

III. HISTORY OF MINNESOTA JUDICIAL FEDERALISM

Minnesota's judicial federalism begins with the adoption of the state constitution and continues with the Minnesota Supreme Court's interpretations of that constitution.

A. The Sesquicentennial Celebration of the "Two" Minnesota Constitutions

In 2007, Minnesota celebrates the sesquicentennial of the 1857 adoption of the Minnesota Constitution.[90] In reality, it is a celebration of the "two" Minnesota constitutions because the

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[87] Utter & Pitler, *supra* note 29, at 648.

[88] *See* discussion *supra* Part II.A.3.

[89] TARR, *supra* note 16, at 185.

[90] WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 134 (1921).

Republican and Democratic delegates to the state constitutional convention drafted two copies of the constitution, with delegates from each group refusing to sign the other's draft.[91] To this day, Minnesota statutes contain two separate longhand versions of the Minnesota Constitution,[92] but there is only one typeset version.[93] Minnesota has never had another constitutional convention, but it did restructure its constitution in 1974. The Minnesota Constitution is therefore "one of the oldest state constitutions . . . in effect."[94]

1. The Minnesota Constitutional Convention of 1857

Minnesota's 1857 constitutional convention plays a starring role in the story of judicial federalism in Minnesota. Allegations of political divisiveness, illegitimacy, falsified elections, and general party discord were pervasive. While these allegations might aptly describe the current political climate, they also accurately describe the atmosphere in which Minnesota's founders convened the 1857 constitutional convention, at which they would draft a workable document that would enable Minnesota to become a state. The story of the first and only Minnesota constitutional convention is a captivating study of pioneer politics, bipartisan friction, racial and cultural attitudes, and the rocky process by which a territory became a state.

In March of 1849, Congress passed the Organic Act, which established the territorial government of Minnesota.[95] In February of 1857, Congress considered and passed the Enabling Act for a State of Minnesota, paving the way for statehood and admission into the Union.[96] The Enabling Act authorized a state government and permitted the people of the Minnesota territory to hold their

[91] *Id.* at 109–10.

[92] MINN. STAT. ANN. art. I (West 1976).

[93] *Id.*

[94] MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE 12 (2002).

[95] Act of Mar. 3, 1849, ch. 121, 9 Stat. 403 (establishing the territorial government of Minnesota). The Organic Act served as a basic charter to provide a government to those of the territory and maintain law and order in the frontier. ANDERSON & LOBB, *supra* note 90, at 31–32. To provide leadership, President Zachary Taylor appointed a governor, secretary, attorney, and marshal of the territory. *Id.* at 32. The Organic Act sustained the territorial government need for nine years but soon the political leaders of the territory sought statehood. *Id.* at 31.

[96] Act of Feb. 26, 1857, ch. 60, 11 Stat. 166.

own constitutional convention in the summer of 1857.[97]

Shortly after the passage of the Enabling Act,[98] the territorial government authorized elections for delegates to the constitutional convention.[99] Elections were held and allegations of fraud, illegal ballots, counterfeit certificates, and stolen ballot boxes were common and foreshadowed the troubles to follow.[100] Significant differences in demeanor and campaign tactics divided the Republicans and Democrats and "[f]air play was in the discard; mutual confidence was gone."[101]

At noon on July 13, 1857, the constitutional convention was called to order by two men, one a Democrat and the other a Republican, who rushed to beat each other to the speaker's platform.[102] By all accounts, this was the only time all delegates met together in the same room.[103] This first and last meeting of all delegates lasted only about one minute.[104] The Democrats moved to adjourn until the next afternoon and "marched out in a body as they had come in."[105] The Republicans, apparently bewildered at the move, "remained in the hall and proceeded to organize what they called 'the' constitutional convention of Minnesota."[106] The following day, the Democratic delegation arrived to find the Republicans already

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[97] William Anderson, *The Constitution of Minnesota*, 5 MINN. L. REV. 407, 411 (1921).

[98] Act of Feb. 26, 1857, ch. 60, 11 Stat. 166 (authorizing the people of the territory of Minnesota to form a constitution and state government, preparatory to their admission in the "Union on an equal footing with the original States").

[99] ANDERSON & LOBB, *supra* note 90, at 66–67.

[100] *Id.* at 72–75.

[101] Anderson, *supra* note 97, at 415. Of the delegates finally elected to attend the convention, a clear majority were Republican. *Id.* The Republicans were the more inexperienced party and feared, fueled by rumor, that the Democrats "intended to dominate the convention by fair means or foul." *Id.* at 415–16. The resulting fear led the Republicans to arrive early for the convention and keep watch and prevent the Democrats from beginning the convention without them. *Id.* at 416. On the night before the convention was to start, the Democrats were holding a caucus in a Saint Paul Hotel when a group of the Republican delegates came across them. *Id.* Curious about the next day's activities, and in their naiveté, the Republicans asked about the time the convention would commence; the Democrats answered flippantly that the convention would meet at "the usual hour for the assembling of parliamentary bodies in the United States." *Id.* Their fears solidified and not knowing what a usual hour would be, a majority of the Republicans retired to the capitol to spend the night in the territorial hall of representatives ensuring that the Democrats would not begin without the full delegacy. *Id.* at 417.

[102] ANDERSON & LOBB, *supra* note 90, at 80.

[103] *Id.* at 82.

[104] *Id.*

[105] Anderson, *supra* note 97, at 418.

[106] *Id.* The Republican delegates "presented their credentials, were sworn in, elected their officers, and proceeded almost at once to debate the question of whether Minnesota wished at that time to be admitted to the Union." *Id.*

engaged in the business of drawing up the rules for the balance of the convention. Concluding that the meeting was illegitimate, the Democrats refused to join, moved to adjourn to the council chamber in the west wing of the capitol, came to order, chose their own leaders, and began the constitutional work proposed by the Enabling Act.[107]

With each party claiming legitimacy and blaming the other party's delegates for the split, the separate meetings continued for the balance of the convention.[108] For the next three weeks, each party drafted a constitution for the people of the State of Minnesota. In early August, delegates from each party realized a compromise was necessary to avoid having the Union see the convention as a mockery of the democratic process. On August 18, five delegates from each party were assigned to a committee charged with consolidating each group's work into a single document.[109] As the partisan work in each body continued, the compromise committee continued to consolidate their work into one draft. However, bitter disagreement within the compromise committee began to emerge on three key issues: the location of the state capital; congressional, legislative, and judicial apportionment; and most importantly, whether the issue of African American suffrage should be left to a vote of the people along with the constitution.[110] In a last ditch effort to save the process, the Republicans bowed to the Democrats on all three issues in exchange for a provision permitting easy amendment of the constitution, which the Republicans believed would bring about African American enfranchisement at a later date.[111] The compromise constitution was ready for presentation on

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[107] ANDERSON & LOBB, *supra* note 90, at 85. William Anderson notes that "[t]he schism between the Republican and Democratic groups of delegates was now complete and, as it proved, final. Neither side ever receded from the position it had taken that it was the constitutional convention." Anderson, *supra* note 97, at 419.

[108] ANDERSON & LOBB, *supra* note 90, at 86.

[109] *Id.* at 96–97.

[110] Anderson, *supra* note 97, at 424. Judge Julius E. Haycraft, a Minnesota District Court Judge and a past president of the Minnesota Historical Society, wrote in 1946, "The feeling . . . within political parties was bitter. Republicans were not just Republicans but 'Black Republicans' and 'Nigger Lovers.' The Democrats were divided into 'Regular' and 'Moccasin' Democrats, but were united for convention purposes." Julius E. Haycraft, *Territorial Existence and Constitutional Statehood of Minnesota*, *in* 1 MINN. STAT. ANN. 145, 151 (West 1976).

[111] ANDERSON & LOBB, *supra* note 90, at 99–100. For better, or perhaps worse, the agreed upon amendment process was to this point the simplest of those states admitted to the union. *Id.* at 100. Article IX, section 1 of the Minnesota Constitution provides:

> A majority of the members elected to each house of the legislature may propose amendments to this constitution. Proposed amendments shall be published with the

August 27.[112]

Between August 27 and 28, each political party, perhaps out of sheer exhaustion and frustration, adopted the unamended compromise constitution with minimal debate.[113] Following this vote, each party adopted a resolution for the copying of the newly passed compromise constitution. Divided to the end, each party produced its own copy of the constitution, one for each convention because "each faction refused to sign a single document that contained the signatures of the other faction's members."[114] A plethora of men copied the compromise constitution in longhand in one evening. One constitution was written on white paper and signed by fifty-three Republicans. One copy was written on blue paper and signed by fifty-one Democrats.[115] In all, there were 299 differences between the two drafts, most of which have been categorized as non-substantive.[116]

On October 13, 1857, the people of Minnesota adopted the new constitution and elected representatives to the United States Congress.[117] On May 11, 1858, the State of Minnesota entered the

laws passed at the same session and submitted to the people for their approval or rejection at a general election. If a majority of all the electors voting at the election vote to ratify an amendment, it becomes a part of this constitution. If two or more amendments are submitted at the same time, voters shall vote for or against each separately.

MINN. CONST. art. IX, § 1.

[112] ANDERSON & LOBB, *supra* note 90, at 101.

[113] *Id.* at 104–05.

[114] Minnesota Historical Society, Minnesota's Constitution(s), http://www.mnhs.org/library/constitution/index.html (last visited Feb. 12, 2007) [hereinafter Minnesota's Constitution(s)].

[115] Minnesota Secretary of State, Secretary of State's Note, http://www.sos.state.mn.us/student/mncnote.html (last visited Feb. 12, 2007) [hereinafter Secretary of State's Note].

[116] ANDERSON & LOBB, *supra* note 90, at 110.

[117] ANDERSON & LOBB, *supra* note 90, at 134; Anderson, *supra* note 97, at 426–27. Even the election and subsequent approval from Congress was fraught with controversy. The Minnesota Secretary of State's website explains:

> The schedule to the constitution provided for an election to be held on October 13, 1857. At this election the voters were to accept or reject the constitution. The ballots used for this purpose were printed to provide only for affirmative votes. A voter who wished to reject the constitution had to alter his ballot and write in a negative vote. The result: 30,055 for acceptance and 571 for rejection.
>
> The procedure for acquiring statehood not only requires a constitution to be approved by the voters of the proposed state, the constitution must also be approved by Congress. In December of 1857 the Minnesota constitution was submitted to the United States Senate for ratification.
>
> A certified copy of the Democratic constitution was transmitted to the senate by the territorial secretary: a Democrat. This copy was attached to the bill for the admission of Minnesota into the union. However, when the bill was reported back from the senate, historians report that the Republican constitution was attached. In any event, there is substantial authority that both constitutions were before Congress when Minnesota was

Union.[118] It is generally agreed that the Republican copy of the constitution became the state's official version.[119]

2. The Restructured Minnesota Constitution of 1974

The original amendment process facilitated steady constitutional growth. The resulting document, while operational, became bulky and unorganized and featured archaic language. As early as 1896, some political leaders advocated for a new constitutional convention to correct the constitution's deficiencies.[120] But it took another seventy-five years before any real progress in revising the constitution occurred.

Many states began the process of modernizing their constitutions in the 1950s, partly in response to President Dwight D. Eisenhower's Commission on Intergovernmental Relations.[121] In Minnesota, this process began in 1971 with the creation of the Minnesota Constitutional Study Commission.[122] The Commission's study process concluded after two years. The Commission recommended against a new constitutional convention and recommended few substantive changes to the existing constitution.[123] But the Commission did suggest an amendment to restructure and update the language of the constitution. The motivation for this suggestion was to clarify and modernize language, remove provisions that were deemed obsolete, consolidate other provisions, and reorganize the constitution to make it more

admitted to the union on May 11, 1858.

> In reality, the constitution ratified by Congress was not the original constitution. . . .
>
> . . . [Several] amendments were ratified by the voters at a special election held April 15, 1858. It would appear that the constitution that Congress approved on May 11, 1858, was an amended constitution, not the original adopted by the constitutional convention and approved by the voters in 1857.

Secretary of State's Note, *supra* note 115.

[118] Act of May 11, 1858, ch. 31, 11 Stat. 285 (admitting the State of Minnesota into the Union).

[119] *See* Minnesota's Constitution(s), *supra* note 114.

[120] William Anderson, *The Need For Constitutional Revision in Minnesota,* 11 MINN. L. REV. 189, 189 (1927). A proposal for a new constitutional convention was submitted to the people in 1896, but failed. *Id.*

[121] Comments on the Restructured Constitution of 1974, *in* 1 MINN. STAT. ANN. 129, 129 (West 1976) [hereinafter Comments on the Restructured Constitution].

[122] The members of the commission were: Elmer L. Andersen (Chairman), Carl A. Auerbach, Robert J. Brown, Jack Davies, Aubrey W. Dirlam, Orville J. Evenson, Richard W. Fitzsimons, O.J. Heinitz, Joyce A. Hughes, Carl A. Jensen, Betty Kane, L.J. Lee, Ernest A. Lindstrom, Diana E. Murphy, James C. Otis, Joseph Prifrel, Karl F. Rolvaag, Duane C. Scribner, Robert J. Tennessen, Stanley N. Thorup, and Kenneth Wolfe. *Id.* at 129–30.

[123] *Id.* at 131–33.

readable and understandable.[124] The Commission sought to shorten the document by over one-third and to categorize provisions by subject matter, which would result in a more concise and manageable document,[125] but leave the substance of the original largely intact.[126] On November 5, 1974, the people of Minnesota voted to adopt an amendment to reform the constitution in accordance with the Commission's recommendation.[127] The tranquil writing and adoption of the 1974 Form and Structure Amendment could not contrast more with the conflict and confusion surrounding the initial writing of the Minnesota Constitution.[128]

Importantly, the restructured document is not a new constitution—it is a revised constitution. Restructuring the Minnesota Constitution by amendment allowed the original constitution to survive, and it is now one of the oldest state

[124] *Id.* at 133.

[125] *Id.*

[126] *Id.* at 131. In addition to the Commission's constitutional revision recommendation amendment, the Commission purposed a change to the amending process itself. The Gateway Amendment sought to amend the revising provision of the document. *Id.* at 130–31. The new Gateway Amendment sought to ease the rule whereby a majority voting in an election would carry the amendment (counting all unmarked ballots as no's). *Id.* at 135. While some Commission members wished to move back to the original easier 1857 amending process, the recommendation was more aligned with eighty percent of the states and would require "more than a simple majority at either the submission or the ratification stage of a constitutional amendment." *Id.* The final recommendation was similar in nature to the Illinois revising provision and provided that in the alternative to ratification, either a majority of all electors or fifty-five percent of those voting could carry the amendment. *Id.* at 135–36.

[127] This 1974 amendment was adopted as proposed. *Id.* at 131. In the end, the voters failed to pass the Gateway Amendment. *Id.*

[128]

> Senator Jack Davies proposed the restructuring effort and, as a member of a three-person subcommittee, took it upon himself to do the writing. His "kitchen-table" draft was examined and largely approved by the other two subcommittee members, Justice James Otis and Representative Lon Heinitz, and then by the full Commission. In the legislature, bi-partisan committees in each house pitched in with enthusiasm, making minor changes, and the proposal was submitted to the voters with hardly a whisper of dissent, and with not a breath of partisan concern. The electorate followed suit with a 72.3% vote for ratification, rather amazing when some percentage of voters are known to vote against any change. Davies describes the writing process as "cut and staple." First, he cut all the provisions apart and shuffled them into several piles (literally on his kitchen table and fireplace rug). He made a pile of obsolete provisions, a pile of finance provisions, Bill of Rights provisions, and various other piles. Each pile, other than the obsolete pile, was stapled and scotch-taped into strings of paragraphs. Each set established a logical order for one article of the restructured constitution. The articles, in turn, were put in an appropriate order and then typed up to provide a rough draft. The document was then edited for grammar and sense, keeping intact the most admirable provisions of the old constitution. Davies says his favorite language change was modifying the description of the state's northern border from "British Possessions" to "Canada."

Letter from Jack Davies to Justice Paul Anderson (Sept. 25, 2006) (copy on file with authors).

constitutions in effect.[129] Therefore, the 1857 Minnesota Constitution remains the source of intent and the final authority in matters of state constitutional law.[130]

B. The Minnesota Supreme Court's Historical Interpretation of the Minnesota Constitution

There is some dispute about whether Minnesota, in the early days of judicial federalism, was a leader in protecting individual rights.[131] There has been little scholarly treatment of Minnesota on this issue nationally and what is available is widely divergent. A 1982 study listed Minnesota as one of fourteen states "having a moderate or better reputation for protecting civil liberties under their state constitutions."[132] However, as of 1990, one scholar listed Minnesota among the ten states least active in developing state constitutional criminal procedure law.[133]

Commentators who have reviewed Minnesota decisions tend to believe that Minnesota has varied its approach.[134] But under careful review, it appears that the Minnesota Supreme Court likely falls into the interstitial or dual sovereignty category because Minnesota does not always follow the Supreme Court nor does it always exclusively look to the Minnesota Constitution.[135] The

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[129] MORRISON, *supra* note 94, at 12.

[130] Comments on the Restructured Constitution, *supra* note 121, at 133.

[131] As early as 1862, the Minnesota Supreme Court referenced the Bill of Rights in the Minnesota Constitution to declare a Minnesota statute unconstitutional. Davis v. Pierse, 7 Minn. 1, 11 (1862) ("[Y]et, in the end, all must regard as matter of pride and gratulation, that in this state, no one, not even the worst of felons, can be denied the right to simple justice.").

[132] Utter & Pitler, *supra* note 29, at 638 n.26. The other thirteen states were Alaska, California, Hawaii, Maine, Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin. *Id.* Utter and Pitler noted that Wisconsin Justice Shirley Abrahamson suggested adding Arizona, Mississippi, New Hampshire, and Vermont for a total of eighteen states. *Id.*

[133] *See* Latzer, *supra* note 36, at 1402–03 n.18. The other nine states listed were South Carolina, Arkansas, Nevada, Alabama, Indiana, New Mexico, Virginia, Georgia, and North Dakota. *Id.*

[134] *See* Simonett, *supra* note 25, at 235; John R. Tunheim, *Criminal Justice: Expanded Protections Under the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 465, 465–66 (1994) ("In some areas, the [Minnesota] courts are blazing new trails, demonstrating a resolute independence in using the Minnesota Constitution to protect individual rights beyond the safeguards of the Federal Bill of Rights. In other areas, the courts have been reluctant to abandon the familiar, well-understood standards articulated by the United States Supreme Court."). *But see* Levy, *supra* note 76, at 1039 (noting that the Minnesota Supreme Court analyzed one free exercise claim based only on the state constitution, but then returned to the interstitial approach by considering first the federal constitutional claim and then turning to the Minnesota Constitution).

[135] *See* discussion *supra* Parts II.B.2, II.B.3.

Minnesota court has offered greater protection under the state constitution for various rights, including search and seizure protections, religious freedom, privacy, twelve-person jury, education, and the right to counsel, while not offering greater protection for rights such as due process, free speech, and double jeopardy.[136]

A review of pre-*Kahn v. Griffin* Minnesota Supreme Court cases deciding individual rights issues indicates that those decisions set the stage for the *Kahn* decision-tree approach.[137] As discussed in Parts IV and V, the Minnesota court utilized the decision-tree approach in *Kahn*, but in doing so relied on the rules, language, and tests developed in earlier cases. Thus, a historical overview of judicial federalism in Minnesota should help future litigants better understand what is required by this decision-tree approach and should aid those litigants who plan to advocate for greater protection of individual rights under the state constitution than is available under the Federal Constitution.

1. Minnesota Offers Greater Protection Under Its Own Constitution for Search and Seizure, Religious Freedom, Privacy, Twelve-Person Jury, Education, and the Right to Counsel

a. Search and Seizure

Minnesota has chosen on several occasions to offer greater protection for its citizens under article I, section 10 of the Minnesota Constitution than is provided under the Fourth Amendment of the United States Constitution.[138] In *State v. Carter*, the Minnesota Supreme Court concluded there was an unreasonable search under

[136] *See* discussion *infra* Part III.B.

[137] *See* David A. Schultz, *Mining Unexplored Riches: Litigating State Constitutional Claims*, BENCH & B. MINN., Apr. 2006, at 27, 29–30 (reviewing precedent Minnesota cases and *Kahn v. Griffin*).

[138] Although the text of the two provisions are nearly identical, the Minnesota Supreme Court has interpreted its state constitution to provide broader protections for its citizens. *Compare* MINN. CONST. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

article I, section 10 when officers lacked a reasonable, articulable suspicion of criminal activity as a basis for a drug-detection dog sniff outside the defendant's self-storage unit.[139] Thus, the court concluded that article I, section 10 afforded protection to Minnesota citizens even though there was no similar protection afforded under other state and lower federal courts' interpretations of the Fourth Amendment.[140]

The court also concluded in *State v. Askerooth* that article I, section 10 offers greater protection from searches and seizures than does the Fourth Amendment.[141] In *Askerooth*, the court "explicitly adopt[ed] the principles and framework of *Terry* for evaluating the reasonableness of seizures during traffic stops."[142] In doing so, the court diverged from the Supreme Court's decision in *Atwater v. City of Lago Vista*,[143] which held that an officer does not violate the Fourth Amendment by arresting a person who has committed "even a very minor criminal offense in [the officer's] presence," as long as the arrest is supported by probable cause.[144] Because the Fourth Amendment and article I, section 10 are textually identical, the Minnesota court, in both *Carter* and *Askerooth*,[145] first examined Supreme Court precedent, but did not find it to be persuasive because it did not adequately protect the rights of Minnesota citizens.[146]

In *State v. Fort*, the Minnesota Supreme Court concluded that under article I, section 10 of the state constitution, investigative questioning, a request for consent to search, and a subsequent search of a passenger in a vehicle stopped for routine traffic violations exceeded the scope of a traffic stop.[147] In *Ascher v.*

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[139] 697 N.W.2d 199, 202–03 (Minn. 2005).

[140] *Id.* at 208, 210.

[141] 681 N.W.2d 353, 362 (Minn. 2004).

[142] *Id.* at 363.

[143] 532 U.S. 318 (2001).

[144] *Askerooth*, 681 N.W.2d at 360 (quoting *Atwater*, 532 U.S. at 354).

[145] *Carter*, 697 N.W.2d at 206–09; *Askerooth*, 681 N.W.2d at 359–63.

[146] In particular, the *Carter* court looked at policy reasons to guard against using dogs to sniff in the area immediately outside a storage unit, and it likened the storage unit to a garage, where personal items are stored. *Carter*, 697 N.W.2d at 210–11. The court also mentioned that other states, namely Pennsylvania and Alaska, have examined this question and have offered greater protection to their citizens. *Id.* at 210 (citing McGahan v. State, 807 P.2d 506, 510–11 (Alaska Ct. App. 1991); Commonwealth v. Johnston, 530 A.2d 74, 78–79 (Pa. 1987)).

[147] 660 N.W.2d 415, 419 (Minn. 2003). The court determined that the stop was unsupported by any reasonable, articulable suspicion when the officer testified that the location of the stop was in a high drug area, and he conducted a pat search for purposes of officer safety. *Id.* However, the officer never suspected any crime other than a traffic

Commissioner of Public Safety, the court held that random sobriety checkpoints, without a reasonable, articulable suspicion that criminal activity is occurring, are unconstitutional under article I, section 10.[148] The court chose in *Ascher* not to follow the Supreme Court's holding in *Michigan Department of State Police v. Sitz*.[149] In *Sitz*, the Supreme Court held that a police roadblock that forced drivers to stop in order to be investigated for drunk driving did not violate the Fourth Amendment.[150] The Minnesota Supreme Court concluded that *Sitz* was a radical departure from how the Supreme Court had previously applied a *Terry*-style balancing test and therefore concluded that it was necessary to look to the Minnesota Constitution to protect the individual rights of its citizens.[151]

In *In re Welfare of E.D.J.*, the Minnesota Supreme Court explicitly departed from recent Supreme Court precedent.[152] There, three men turned and began walking in the opposite direction after noticing a police car.[153] The officers then pulled up and ordered the men to stop. One of the men, E.D.J., continued walking for five steps, dropped something that was later determined to be crack cocaine, took two more steps, and then stopped and turned around.[154] The Minnesota court held that a person facing contact with a police officer is "seized" when he reasonably concludes that he is not free to leave.[155] The court noted that two years earlier, in *California v. Hodari D.*,[156] the Supreme Court rejected the longstanding "totality of the circumstances" test for determining when a person is "seized." Instead the Supreme Court adopted a test requiring that a person either be restrained by police using physical force or that a person physically submit to a show of authority by the police.[157] The Minnesota court indicated that it would not follow the Supreme Court because the Court had taken a

violation. *Id.* Thus, the court found a violation of article I, section 10 even though there may not have been a violation of the Fourth Amendment. *Id.*

148 519 N.W.2d 183, 187 (Minn. 1994).

149 *Id.* at 186.

150 496 U.S. 444, 447 (1990).

151 *Ascher*, 519 N.W.2d. at 186–87. The Minnesota court also noted that article I, section 10 required the police to have an "objective individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop." *Id.* at 187.

152 502 N.W.2d 779, 780, 783 (Minn. 1993).

153 *Id.* at 780. In *E.D.J.*, the court refers to the parties as "three men—two were adults, one was a juvenile." *Id.*

154 *Id.*

155 *Id.* at 783.

156 499 U.S. 621, 625–26 (1991).

157 *E.D.J.*, 502 N.W.2d at 780.

sharp departure from tradition and practice.[158] Further, the Minnesota court emphasized that it was "*not* persuaded" by the Supreme Court's departure from the previous approach.[159] For these reasons, the Minnesota court applied its state constitution in order to continue to adhere to the "totality of the circumstances" test it had used in its prior case law.[160]

b. Religious Freedom

The Minnesota Supreme Court has also interpreted its state constitution to offer greater protection for religious freedom. In *State v. Hershberger*, the court held that, as applied to Amish defendants, a statute requiring the display of a fluorescent, orange-red, triangular, slow-moving vehicle emblem violated freedom of conscience rights under article I, section 16 of the state constitution.[161] The court noted that the language of article I, section 16 "is of a distinctively stronger character than [its] federal counterpart," in that the state provision "precludes even an *infringement* on or an *interference* with religious freedom" and limits the permissible countervailing interests of the government.[162] Therefore, Minnesotans are afforded greater protection for religious liberties under the state constitution than under the Federal Constitution.

c. Privacy

In *Jarvis v. Levine*, the Minnesota Supreme Court held that in the absence of court approval, forcible administration of neuroleptic drugs to non-consenting patients in confinement violates the right to privacy under the state constitution.[163] The court found support for its holding in its own precedent and also recognized that

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158 *Id.* at 783.

159 *Id.*

160 *Id.* at 780. The Minnesota court also noted that it had considerable experience with the previous approach. *Id.* at 781.

161 462 N.W.2d 393, 397, 399 (Minn. 1990) (holding that the state has not demonstrated evidence of reasonable alternative means); State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989) (explaining the factual background of the case), *vacated sub nom.* Minnesota v. Hershberger, 495 U.S. 901 (1990).

162 *Hershberger*, 462 N.W.2d at 397. The court also mentioned the preamble to the Minnesota Constitution, which explicitly acknowledges religious liberty as support for broad protection for religious freedom in Minnesota. *Id.* at 398.

163 418 N.W.2d 139, 144, 150 (Minn. 1988).

protection of bodily integrity is firmly rooted in Minnesota law.[164]

In *Women of the State of Minnesota v. Gomez*,[165] one of the Minnesota Supreme Court's most controversial cases, the court concluded that the state constitution afforded Minnesota citizens greater protection than the Federal Constitution and thus rejected Supreme Court precedent as articulated in *Harris v. McRae*.[166] The Minnesota court agreed with the plaintiffs that a "ban on medical assistance funding for abortion services 'interferes' with a woman's choice to have an abortion by adding state created financial considerations to the woman's decision making process."[167] The court noted that although there were "several possible rationales for interpreting [the state] constitution differently from the federal constitution," it was persuaded by Minnesota's "long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere."[168]

d. Twelve-person Jury

The Minnesota Supreme Court has also declined to follow Supreme Court precedent regarding the right to a twelve-person jury. In *State v. Hamm*, the Minnesota Supreme Court held that article I, section 6 of the Minnesota Constitution contained an implicit requirement of a twelve-person jury for misdemeanor and gross misdemeanor cases.[169] The court looked beyond Supreme Court precedent as reflected in *Williams v. Florida*, which held that "the United States Constitution does not require the individual states to provide 12-person juries in certain non-capital criminal offenses."[170] Here, the Minnesota court, treating the Minnesota Constitution as the source of intent and the final authority in matters of state constitutional law, looked to state precedent as far back as 1869 and determined that Minnesota courts have

[164] *Id.* at 144, 148–49; *see* Doe v. Ventura, No. MC 01-489, 2001 WL 543734, at *1 (Minn. Dist. Ct. May 15, 2001) (acknowledging that Minnesota recognizes a right to privacy and holding that right applicable to "private, consensual, non-commercial acts of sodomy by consenting adults").

[165] 542 N.W.2d 17 (Minn. 1995).

[166] *Id.* at 19.

[167] *Id.* at 28.

[168] *Id.* at 30.

[169] 423 N.W.2d 379, 380, 381 (Minn. 1988), *superseded by constitutional amend.*, MINN. CONST. art I, § 6 (amended 1988).

[170] *Id.* at 381, 382 n.2.

interpreted the word "jury" to mean "a body of *twelve* persons."[171]

e. Education

In Minnesota, the right to education enjoys greater protection than it does under the Federal Constitution because this greater protection is explicitly mandated in article XIII, section 1 of the state constitution.[172] In *Skeen v. State*, the Minnesota Supreme Court stated that it is most inclined to look to the Minnesota Constitution when it determines that Minnesota's constitutional language is different from the language used in the United States Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the United States Constitution.[173] The court concluded that because education is of overall importance to the state, it is a fundamental right in Minnesota even though the Supreme Court has held that education is not a fundamental right under the United States Constitution.[174]

f. Right to Counsel

The Minnesota Supreme Court has also interpreted the Minnesota Constitution more broadly than the United States Constitution regarding the right to counsel.[175] For example, in *Friedman v. Commissioner of Public Safety*, the court held that article I, section 6 gives a motorist a limited right to consult an attorney before the motorist decides whether to submit to chemical testing for blood alcohol.[176] The court reached this result because it concluded that under its state constitution, "the point at which an individual is asked by law enforcement officials to undergo a blood alcohol test constitutes a 'critical stage' in the criminal process."[177]

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[171] *Id.* at 380–81. This decision was changed only by a constitutional amendment. *See* MINN. CONST. art. I, § 6; *see also* Simonett, *supra* note 25, at 231.

[172] *See* MINN. CONST. art. XIII, § 1; Skeen v. State, 505 N.W.2d 299, 309, 313 (Minn. 1993).

[173] 505 N.W.2d at 313.

[174] *Id.*

[175] State v. Nordstrom, 331 N.W.2d 901, 904–05 (Minn. 1983) (recognizing that "regardless of federal constitutional underpinnings, Minnesota law has established a broad-based right to counsel").

[176] 473 N.W.2d 828, 837 (Minn. 1991).

[177] *Id.* The Minnesota court also held that the state statute governing chemical tests for intoxication violates rights protected by article I, section 6 of the Minnesota Constitution because the statute denies a person the right to counsel at a critical stage of a criminal proceeding. *Id.* at 833–34. The court offered this protection because "[t]he availability of an attorney early in the process can aid in the removal of drunk drivers from the highway and assist in their rehabilitation." *Id.* at 836.

The court also noted in *Friedman* that Minnesota has recognized the right to counsel as a fundamental right since early statehood.[178]

2. Minnesota Does Not Offer Greater Protection for Freedom of Speech, Double Jeopardy, or Due Process

Although the Minnesota Supreme Court has on several occasions interpreted the state constitution to offer greater protection than does the Federal Constitution, the court has not done so with regard to freedom of speech, double jeopardy, or due process.[179]

In *State v. Davidson*, the Minnesota Supreme Court decided that obscenity was not protected under article I, section 3 of the Minnesota Constitution.[180] The court looked to Supreme Court precedent on this issue and concluded that there was "no reason to apply [its] constitution differently."[181] The court also concluded that while article I, section 3 "may offer broader protection than the . . . first amendment, such protection does not extend to obscenity."[182] The court also stated that most other state supreme courts facing the same issue have determined that their state constitutions do not protect obscenity.[183]

The Minnesota Supreme Court has also declined to offer greater

[178] *Id.* at 831–32.

[179] The Minnesota Court of Appeals has also ruled on some state constitutional issues. In *State v. Morrow*, the Minnesota Court of Appeals held that revocation of probation did not violate the defendant's state or federal due process or equal protection rights. 492 N.W.2d 539, 546–47, 549 (Minn. Ct. App. 1992). The court said that "the due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the federal constitution." *Id.* at 547. Thus, since the revocation did not violate the due process clause of the United States Constitution, it did not violate the due process clause of the Minnesota Constitution. *Id.* The court also said that it "discern[ed] no violation of the equal protection guarantee of the Minnesota Constitution where the court's revocation of appellant's probation was not arbitrary or fundamentally unfair." *Id.* at 548.

[180] 481 N.W.2d 51, 57 (Minn. 1992).

[181] *Id.*

[182] *Id.*

[183] *Id.* at 57 n.1. In *State v. Wicklund*, the Minnesota court held that the defendant's protest of a department store's sale of furs in a shopping mall was not constitutionally protected free speech under the First Amendment nor was there any compelling reason to apply state constitutional free speech protections more broadly than federal protections. 589 N.W.2d 793, 798, 801 (Minn. 1999). The court said that even though there are differences in terminology between the federal constitutional free speech protection under the First Amendment and the free speech protection under article I, section 3 of the Minnesota Constitution, they do not support a conclusion that the state constitutional protection should be more broadly applied than the federal. *Id.* at 798–99. The court looked to the history of the development of the Minnesota Constitution and found nothing from the 1857 constitutional debates to suggest that Minnesota's free speech protection was intended to be applied more broadly than its federal counterpart. *Id.* at 799.

protection with respect to double jeopardy. In *State v. Fuller*, the defendant was charged with assault in the fifth degree, criminal damage to property, and driving after suspension of his license.[184] In a frequently-quoted passage of the *Fuller* opinion,[185] the court acknowledged that state courts are "the first line of defense for individual liberties within the federalist system,"[186] but also stated that being the first line of defense "does not mean that we will or should cavalierly construe [the Minnesota C]onstitution more expansively than the United States Supreme Court has construed the federal constitution."[187] The Minnesota court noted that a decision of the Supreme Court "interpreting a comparable provision of the federal constitution that . . . is textually identical to a provision of [the Minnesota C]onstitution, is of inherently persuasive, although not necessarily compelling, force."[188] Further, the Minnesota Supreme Court has held that "[t]he due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States."[189]

The foregoing cases indicate that the Minnesota Supreme Court is willing to interpret its state constitution to provide greater protection than the Federal Constitution does under some circumstances. But the cases also indicate that when the court does so, it acts in a deliberate and cautious manner, and will do so only when it concludes that there is clear and convincing evidence that it must look to its own constitution to protect its citizens' individual rights. This case history inevitably sets the stage for the Minnesota Supreme Court when it articulated its decision-tree approach in 2005.[190]

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[184] 374 N.W.2d 722, 724 (Minn. 1985). The Minnesota court had to decide whether article I, section 7 (the double jeopardy clause) of the Minnesota Constitution barred defendant's retrial when he requested and obtained a mistrial following unintentional or negligent elicitation of inadmissible evidence by the prosecutor. *Id.* at 726. However, the court noted: "We do not believe that this is an appropriate case in which to decide whether the double jeopardy clause of the Minnesota Constitution gives . . . greater protection than the federal constitution against retrial following a mistrial provoked by prosecutorial misconduct." *Id.* at 727.

[185] *See* Simonett, *supra* note 25, at 238.

[186] *Fuller*, 374 N.W.2d at 726.

[187] *Id.* at 726–27.

[188] *Id.* at 727. Although the court laid out the above mentioned rules, it decided that the retrial of the defendant would not violate the double jeopardy clause of the Minnesota Constitution. *Id.*

[189] Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988).

[190] *See* Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005). Several of the key phrases used in

IV. THE *KAHN V. GRIFFIN* CASE

Minnesota adopted a constitutional decision-tree approach for deciding individual rights issues in *Kahn v. Griffin*.[191] This Part provides the background of the *Kahn* case and then details the specific features about *Kahn* that made it an ideal vehicle for the Minnesota Supreme Court to refine and articulate its approach to deciding individual rights issues.[192]

A. Kahn v. Griffin*: An Allegation of Malapportionment*

The *Kahn* plaintiffs were Minneapolis residents who sued the City of Minneapolis, all thirteen Minneapolis City Council members, and the Minneapolis Director of Elections.[193] The plaintiffs claimed that allowing Minneapolis City Council members to continue to serve in malapportioned districts following the 2000 decennial census violated both the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 2 and article VII, section 1 of the Minnesota Constitution.[194] The following subsections discuss how the issue in *Kahn* developed, how the Minnesota Federal District Court resolved the federal constitutional issues, and how the Minnesota Supreme Court resolved the Minnesota constitutional issues.

1. How the Issue in *Kahn* Developed

In November 2001, the City of Minneapolis held elections for city council members using ward boundaries based on the 1990 decennial census data. Minneapolis is divided into thirteen equally populated wards with one council member elected from each

Kahn, most notably "textually identical," "radical departure," and "inherently persuasive, although not necessarily compelling," are gleaned from these and other precedent cases.

[191] *Id.*

[192] There are four different *Kahn* cases. The first is *Kahn v. Griffin*, No. Civ. 03-5037, 2004 WL 1635846 (D. Minn. July 20, 2004), decided by Judge John Tunheim. The second is *Kahn v. Griffin*, No. Civ. 03-5037, 2004 WL 2066842 (D. Minn. Aug. 31, 2004), certifying a question to the Minnesota Supreme Court. The third is *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005), answering the certified question. The fourth is *Kahn v. Griffin*, No. Civ. 03-5037, 2005 WL 2216246 (D. Minn. Sept. 8, 2005), which is the order based on the Minnesota Supreme Court's answer to the certified question.

[193] *Kahn*, 701 N.W.2d at 819.

[194] *Id.* at 819 & n.3. The plaintiffs also alleged violations of Minnesota statutes and the Minneapolis City Charter. *Id.*

ward.[195] Minneapolis City Council members serve four-year terms and "may complete the term for which they are elected or appointed notwithstanding changes in ward boundaries."[196] Thus, the council members elected in 2001 would serve their four-year terms until the newly-elected council members were sworn in following the November 2005 election.

The 2000 decennial census showed that the population of Minneapolis had both increased and shifted across areas of the city during the previous ten years.[197] On April 18, 2002, the Minneapolis Redistricting Commission drew new ward boundaries based on the 2000 census.[198] As a result of the new boundaries, voters in Wards two, four, and six were underrepresented, voters in Wards one, eleven, twelve, and thirteen were overrepresented, and some voters did not have a council member residing in their ward.[199] This malapportionment would continue from April 18, 2002, when the Commission filed its final redistricting plan, until after the election of new Minneapolis City Council members in November 2005. The plaintiffs alleged that because the Minneapolis City Charter and Code of Ordinances allowed council members to continue to serve in malapportioned districts, the Charter and Code were unconstitutional and violated both the United States and Minnesota constitutions.[200] The plaintiffs asked the Federal District Court to "order the City of Minneapolis to hold new elections for City Council based on the new boundaries within a

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[195] *Id.* at 819.

[196] *Id.* (quoting MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 1, § 3(F) (2004), http://www.municode.com/resources/gateway.asp?pid=11490&sid=23)) (internal quotation marks omitted).

[197] *Id.*

[198] *Id.*

[199] *Kahn*, 701 N.W.2d at 819 & n.2. The Minnesota court explained the malapportionment as follows:

> According to the decennial census, the official population of the City of Minneapolis in 2000 was 382,618 people. The parties agreed that because the City of Minneapolis has 13 wards and the population should be distributed evenly among the wards, the ideal population of each ward following the 2000 census should be 29,432. But as time has passed since the 1992 redistricting, the population has become increasingly unevenly distributed among the 13 wards. Wards 2, 4, and 6 as drawn in 1992 contained more people than the ideal ward population, and Wards 1, 11, 12, and 13 contained fewer people than the ideal ward population. There are no current council members residing within the boundaries of Wards 3 and 8 as drawn in the 2002 plan.

Id. at 819.

[200] *Id.* at 819 & n.3. The malapportionment issue will arise in Minneapolis City Council elections every twenty years. *Id.* at 823. The same problem will occur in other elections, as well. *Id.*

short time."[201]

2. The Precise Issue Before the Federal District Court Judge

Federal District Court Judge John Tunheim initially faced several claims.[202] The claims were based on the Federal Constitution, 42 U.S.C. § 1983, the state constitution, Minnesota statutes, and the Minneapolis City Charter.[203] Ultimately, Judge Tunheim decided the claims based on the Federal Constitution, 42 U.S.C. § 1983, and the Minneapolis City Charter,[204] but certified the claims based on the state constitution and Minnesota statutes to the Minnesota Supreme Court.[205]

Judge Tunheim held that the malapportionment in *Kahn* did not violate the one-person-one-vote principle enunciated by the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964).[206] Judge Tunheim acknowledged that the delay in implementing the new ward districts placed a burden on the right to vote, but held that the burden was outweighed by other considerations.[207] He emphasized that "[a]bsent a finding that the 2001 elections were based on districts that were so unrepresentative as to be unconstitutional, it would be inappropriate for this Court to interfere in a process and arena that is left to the state and, more particularly, to the legislative branch of the state."[208] After extending deference to the state legislative body, he then extended deference to the state judicial branch by asking the Minnesota Supreme Court to decide the questions of whether the malapportionment violated either the state constitution or Minnesota statutes.[209]

3. The Precise Issue Before the Minnesota Supreme Court

In the federal district court order for certification, the Minnesota Supreme Court was asked to address two questions: "Does the

[201] Kahn v. Griffin, No. Civ. 03-5307, 2004 WL 1635846, at *2 (D. Minn. July 20, 2004).

[202] The *Kahn* case, which started in Hennepin County District Court, was removed to the United States District Court for the District of Minnesota and was assigned to Judge Tunheim as a companion to a case that was pending before him. 701 N.W.2d at 819.

[203] *Kahn*, 2004 WL 1635846, at *2.

[204] *Id.* at *8, *10.

[205] *Id.* at *10.

[206] *Id.* at *8.

[207] *Id.*

[208] *Id.* at *3.

[209] *Id.* at *10–*13.

Minnesota Constitution provide greater protection to the right to vote than does the United States Constitution such that failure to hold prompt elections following decennial redistricting violates (a) the Minnesota Constitution and/or (b) Minnesota Statutes §§ 204B.135, subd. 1 and 204B.14, subd. 1a?"[210]

Based on the facts and circumstances presented in the certified question, the Minnesota court answered both questions in the negative.[211]

The Minnesota Supreme Court stated:

> We conclude that plaintiffs have failed to provide any principled basis for us to reach a clear and strong conviction that, under the facts and circumstances of this case, we should depart from the concept of uniformity by holding that the Minnesota Constitution provides greater protection to the right to vote than does the U.S. Constitution. Therefore, we hold that the Minnesota Constitution does not provide greater protection to the right to vote than does the U.S. Constitution such that the failure of the City of Minneapolis to hold elections immediately following decennial redistricting violates the Minnesota Constitution.[212]

But the Minnesota court left open the possibility that "under other facts and circumstances, a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution."[213]

Significantly, the *Kahn* opinion was unanimous, with the exception of one justice who took no part in considering or deciding the case.[214] In *Kahn,* the Minnesota court articulated the approach it would take in deciding individual rights issues. Essentially, what the court did was to create a decision-tree approach.[215]

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[210] Kahn v. Griffin, No. Civ. 03-5037, 2004 WL 2066842, at *2 (D. Minn. Aug. 31, 2004). The Minnesota Supreme Court reiterated the certified question. *See* Kahn v. Griffin, 701 N.W.2d 815, 818 (Minn. 2005).

[211] *Kahn*, 701 N.W.2d at 836.

[212] *Id.* at 833–34.

[213] *Id.* at 834. In particular, the Minnesota court was influenced by the facts here where all Minneapolis residents' right to vote was affected "regardless of whether the voters affected . . . are members of a suspect class." *Id.* at 832. This suggests that an infringement on the right to vote that targeted members of a suspect class likely would not be viewed as a legitimate burden on the right to vote.

[214] *Id.* at 836.

[215] The details of the Minnesota decision-tree approach are discussed *infra* Part V.

B. Several Features Made Kahn *an Ideal Vehicle for the Minnesota Supreme Court to Refine and Articulate Its Approach to Deciding Individual Rights Issues*

Five features of the *Kahn* case made it an ideal vehicle for the Minnesota Supreme Court to articulate the approach it would take in deciding individual rights issues. First, *Kahn* came before the court as a certified question. Second, *Kahn* was a civil case. Third, *Kahn* offered the advantage of time to consider a new approach. Fourth, the *Kahn* case involved an individual right—the right to vote—that is usually well protected by the federal courts. Fifth, the Minnesota court was motivated to clarify its state constitutional jurisprudence because of the court's heightened awareness that some attorneys believed there was "[no] principled basis" for when the court would look to and apply the Minnesota Constitution.[216]

1. Certified Question

Kahn came before the Minnesota court as a certified question.[217] As a result of the way the question was worded, there was no guessing about whether the court should interpret the individual rights issues under the Federal Constitution or the state constitution. Instead, the court was plainly asked for a ruling on its interpretation of the right to vote under the Minnesota Constitution. Thus, the procedural posture of the case made it an excellent case for the court to articulate the approach it would take in deciding individual rights issues.

The federal district court's order for certification was very specific in both its statement of facts and its wording of the certified

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[216] Interview with Robert A. Stanich, in St. Paul, Minn. (Aug. 8, 2006) [hereinafter Stanich Interview] (noting that some attorneys believed there was "no principled basis" for the Minnesota Supreme Court's reliance on the Minnesota Constitution). Mr. Stanich reviewed an earlier draft of this Article and in a letter to Justice Anderson, responded, "I'm complimented, but the idea that a principled basis is needed actually comes from a law review article I frequently cited in my briefs on this subject . . . : Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist,"* 7 HAMLINE L. REV. 51, 63 (1984) ("Much criticism has been directed at result-oriented use of state constitutions which establish[es] *no principled basis* for repudiating federal precedent and, accordingly, furnish[es] no basis for predicting the future course of decisional law." (alteration in original) (emphasis added)). Letter from Robert A. Stanich to Paul H. Anderson, Assoc. Justice, Minn. Supreme Court (Sept. 29, 2006). Mr. Stanich concludes, "A much better source than me, with a wonderful title." *Id.*

[217] Kahn v. Griffin, No. Civ. 03-5037, 2004 WL 2066842, at *1, *2 (D. Minn. Aug. 31, 2004) (evidencing the question certified from Judge Tunheim, a federal district court judge for the District of Minnesota).

question.[218] Judge Tunheim asked the Minnesota Supreme Court to determine whether the Minnesota Constitution provided "greater protection to the right to vote than does the United States Constitution."[219] Judge Tunheim acknowledged the Minnesota court's state constitutional jurisprudence by quoting the court's own statement that the court "has long recognized that we may interpret the Minnesota Constitution to offer greater protection of individual rights than the U.S. Supreme Court has afforded under the federal constitution."[220]

Judge Tunheim made it clear that he intended to defer to the expertise of the Minnesota Supreme Court on this question of deciding the extent to which the Minnesota Constitution protects the right to vote. He noted:

> The question of whether the Minnesota constitution provides different or greater protections than does the United States Constitution is a weighty one that requires close consideration of Minnesota law and policy. These sensitive considerations are obviously within the particular expertise of the Minnesota Supreme Court. This Court hesitates to insert itself into such a uniquely state matter . . . .[221]

The foregoing statement reflects the fact that the Minnesota federal courts and state courts have a strong, cohesive, and collegial relationship. Judge Tunheim explained that both the federal and state courts in Minnesota have "good, solid, strong appointees."[222] He continued:

> Neither bench will go too far out on a limb. . . . I trust the Minnesota Supreme Court. We have an exceptional state supreme court, and I trust that they will carefully consider the issues. I think it goes back to the overall quality of the appointees. The members of the Minnesota Supreme Court are my good friends. We trust each other.[223]

Judge Tunheim's colleague on Minnesota's federal bench, former Chief Judge Paul A. Magnuson, agrees with Judge Tunheim's

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[218] *Id.* at *2.

[219] *Id.*

[220] Kahn v. Griffin, No. Civ. 03-5037, 2004 WL 1635846, at *11 (D. Minn. July 20, 2004) (quoting Women of Minn. v. Gomez, 542 N.W.2d 17, 30 (Minn. 1995)) (internal quotation marks omitted).

[221] *Id.* at *12.

[222] Interview with John Tunheim, Judge, Federal District Court for the District of Minnesota, in Minneapolis, Minn. (Aug. 22, 2006) [hereinafter Tunheim Interview].

[223] *Id.*

observation and additionally notes that the collegiality between the courts may result from the fact that Minnesota does not have the death penalty, and thus there are no death penalty habeas corpus cases that transfer between the state and federal courts.[224] This collegiality may also stem from a recognition by each court that the federal court is the expert in areas of federal constitutional interpretation and the state court is the expert in the area of state constitutional interpretation.[225] In any case, in this question of first impression in Minnesota, Judge Tunheim wanted the Minnesota Supreme Court to decide the state constitutional issue.[226]

The positive relationship between the federal and state courts in Minnesota may serve as a good example of an active, but respectful, federal system. Political Science Professor G. Alan Tarr notes:

> [T]he protection of civil liberties in the United States should not be viewed as a zero-sum game, in which increased activity by one judiciary necessitates decreased activity by the other. Rather, the relationship between federal and state judiciaries involves a sharing of responsibility and a process of mutual learning, such that a change in orientation by one set of courts is likely, over time, to be reflected in other courts.[227]

In *Kahn*, the federal district court asked the Minnesota Supreme Court to perform a very specific task—to determine if the Minnesota Constitution provided greater protection than the Federal Constitution for the right to vote. This task gave the Minnesota court a chance to articulate its approach to deciding individual rights issues and in so doing, guide future litigants asserting individual rights claims.

2. Civil Case

The second feature of *Kahn* that made it a good case for the Minnesota Supreme Court to use in refining and articulating its approach to deciding individual rights issues is that *Kahn* was a

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[224] Telephone Interview with Judge Paul A. Magnuson, Judge, Federal District Court for the District of Minnesota, in St. Paul, Minn. (Aug. 29, 2006). From 1971 to 1981, when Chief Judge Magnuson was appointed to the federal bench, Judge Magnuson and co-author Justice Paul Anderson worked together as attorneys with the South St. Paul, Minnesota law firm of LeVander, Gillen, Miller, and Magnuson.

[225] *See* Tunheim Interview, *supra* note 222.

[226] *Id.*

[227] *New Judicial Federalism*, *supra* note 44, at 1111.

civil case. Variances between federal and state constitutional interpretations most often occur in criminal cases, which can be highly controversial.

Generally, the first courts to implement the new judicial federalism by applying state constitutional guarantees did so in criminal cases. But judicial federalism has also been used to address a variety of individual rights in civil cases. In this vein, and as previously noted, the Minnesota Supreme Court has extended its implementation of judicial federalism to address rights such as search and seizure, religious freedom, privacy, twelve-person jury, education, and the right to counsel.[228] Civil cases dealing with such issues generally do not garner the same emotionally-charged reaction as criminal cases.[229] Thus, in *Kahn*, the court arguably had more freedom to articulate a new approach for deciding individual rights issues in a relatively neutral civil context.

3. Length of Time

Third, the *Kahn* case offered the advantage of time. The Minnesota Supreme Court had time to consider the new approach, mull it over, and finally present it to Minnesota litigants as a guideline for future cases involving individual rights.

The *Kahn* plaintiffs filed their lawsuit in July 2003.[230] The case was removed from state court to federal court the next month.[231] Both sides moved for summary judgment and Judge Tunheim heard oral arguments on the summary judgment motions on March 20, 2004.[232] Four months later, Judge Tunheim issued his opinion denying the plaintiffs' motion for summary judgment on the federal constitutional claims, granting the defendants' motion for summary judgment on the federal constitutional claims, and certifying the state constitutional question to the Minnesota Supreme Court.[233] The Minnesota court ordered briefing from both sides and scheduled oral argument for January 5, 2005. Thus, by the time the court was able to hear the case, the already-scheduled November 2005 election

[228] *See* discussion *supra* Part III.B.

[229] *See* Abrahamson, *supra* note 54, at 1155.

[230] 701 N.W.2d 815, 819 (Minn. 2005).

[231] *Id.*

[232] Transcript of Record, Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005) (No. 03-5037).

[233] Kahn v. Griffin, No. Civ. 03-5037, 2004 WL 1635846, at *10 (D. Minn. July 20, 2004) (certifying the question of whether "failure to hold prompt elections following decennial redistricting violates . . . (b) Minnesota Statutes §§ 204B.135, subd. 1 and 204B.14, subd. 1a").

process, which was based on the 2000 census, was underway.[234]

4. Right to Vote

Fourth, *Kahn* presented an issue of voting rights. Federal courts have traditionally protected voting rights under the United States Constitution to the fullest extent possible.[235] Voting rights is not an area where the Supreme Court has retrenched in its protection of individual rights.[236] The voting rights issue in *Kahn* made it a fruitful case for the development of the decision-tree approach in a context where the Minnesota court was likely to follow federal precedent.

More particularly, "the right to vote is considered fundamental under *both* the U.S. Constitution and the Minnesota Constitution."[237] Under both constitutions, courts analyze potential government infringement of voting rights using the most rigorous standard of constitutional review—strict scrutiny.[238] Further, the Minnesota court noted that when deciding whether a state election law violates either the United States Constitution or the Minnesota Constitution, it will proceed as follows:

> [W]e will weigh the character and magnitude of the burden imposed on voters' rights against the interests the state contends justify that burden, and we will consider the extent

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[234] *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 2, § 4, amend. note (2004), http://www.municode.com/resources/gateway.asp?pid=11490&sid=23 ("By referendum held November 7, 1972, the city voted to adopt the state uniform municipal election day as the first Tuesday after the first Monday in November in odd-numbered years.").

[235] The 1960s saw a resurgence in state constitutional convention activity because the United States Supreme Court determined that legislative malapportionment claims were justiciable. Professor John J. Dinan notes:

> The key event, which eliminated the reason why many state legislatures had for so long declined to call conventions, was the U.S. Supreme Court's 1962 ruling in *Baker v. Carr* declaring that legislative malapportionment claims were no longer nonjusticiable and thereby ushering in the Reapportionment Revolution. For several decades before the Court's decision, rural legislators had sought to continue to reap the benefits of inequitable legislative apportionment plans and therefore had prevented the calling of conventions that they feared would produce more equitable apportionment plans. Once the Court made it clear that legislative malapportionment would no longer be tolerated, rural legislators were no longer able to prevent the calling of conventions, and many long-standing constitutional reform proposals were finally taken up.

DINAN, *supra* note 23, at 10.

[236] The Supreme Court recently found that part of a redistricting map drawn in Texas violated the Voting Rights Act because the plan prevented Hispanics from electing a candidate of their choosing. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2621, 2623 (2006).

[237] Kahn v. Griffin, 701 N.W.2d 815, 830 (Minn. 2005).

[238] *Id.* at 831.

> to which the state's concerns make the burden necessary.
>
> . . . .
>
> . . . Specifically, we conclude that, under the facts and circumstances presented here, the failure to hold prompt elections does not unconstitutionally burden the right to vote.[239]

Moreover, the Supreme Court has not retrenched on voting rights.[240] The Minnesota court stated:

> [P]laintiffs have not shown that following federal precedent will lead to a sharp or radical departure from our previous decisions or approach to the law. Nor have they shown that the basic civil liberties of the citizens of our state are not adequately protected if we favor uniformity by following federal precedent. Accordingly, at this time, we see no compelling reason to chart a new course for the right to vote under the Minnesota Constitution.[241]

5. Minnesota Attorneys Seek Guidelines

E.D.J., and more importantly, the reaction of many Minnesota attorneys to that case planted a seed in the minds of at least some of the Minnesota Supreme Court Justices that it would be helpful for the court to provide more guidance on when it would interpret and apply the state constitution to protect individual rights.[242] Even in 1994, when *E.D.J.* was decided, then Minnesota Supreme Court

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[239] *Id.* at 833.

[240] Other scholars have suggested that state courts may not engage in high levels of state constitutional policymaking if the area is one that is perceived as well-protected by the United States Supreme Court. Professor Cauthen suggests:

> It may be that the issue area was not one in which the U.S. Supreme Court pulled back federal rights to the extent that it generated a reaction from the state courts. Without such a retrenchment, state courts continued to defer to the Supreme Court's federal analysis, possibly driven by the recognition of the historical role of the Supreme Court as the leader in rights protection.

James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1200 (2000); *see* Chun, *supra* note 82, at 1322 (analyzing Justice Paul H. Anderson's concurrence in *State v. Tenerelli*, 598 N.W.2d 668, 673 (Minn. 1999), and suggesting that "because this was more of an establishment case than a free exercise case, the state's reliance on federal precedent is more forgivable as there has been no severe alteration in that area of law [establishment]").

[241] *Kahn*, 701 N.W.2d at 833.

[242] Justice Paul H. Anderson recalls a conversation he had with Robert A. Stanich in 2003 about the *E.D.J.* case when Stanich indicated that it was difficult to predict when the Minnesota Supreme Court would rely on the Minnesota Constitution. *See* Stanich Interview, *supra* note 216.

Justice John E. Simonett noted that "[t]here appear[s] to be no clear criteria for which constitution to apply and, if both, in what order."[243] The *Kahn* decision-tree approach attempted to address this perceived need for greater clarity.

In conclusion, when faced with the combination of a certified question, a civil case, a lengthy lawsuit, a voting rights issue, and the desire to provide more guidance for Minnesota's bench and bar, the Minnesota Supreme Court seized the opportunity presented by *Kahn* to refine and articulate its approach to deciding constitutional issues involving individual rights.

V. MINNESOTA'S CONSTITUTIONAL DECISION-TREE APPROACH

In *Kahn*, the Minnesota Supreme Court developed a decision-tree approach for determining when the court will look to its state constitution to protect individual rights. The court essentially wrote a "'teaching opinion' alerting the bar and bench to the possibilities of independent state constitutional analysis, and educating them in the techniques of making state constitutional arguments."[244] The decision-tree approach directs litigants to ask several questions and follow the path dictated by the answers.

Here is how it works:

QUESTION 1: Is there an identical or substantially similar federal counterpart to the individual right at issue in this case?[245]

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[243] Simonett, *supra* note 25, at 235; *see* Tunheim, *supra* note 134, at 514 (reviewing six rights protecting the criminally accused and concluding that "no clear pattern emerges on the extent to which Minnesota courts are willing to interpret the state constitution more broadly").

[244] Williams, *supra* note 49, at 1019. The advantages of writing a teaching opinion were further explained by Vermont Justice Thomas Hayes:

> There was some discussion on the court about publishing a law review article advising lawyers to look to the state constitution, but I had the feeling that if we took that course the article would be read by nine students, nine law professors, and the janitor who was cleaning up at night at the law school. I believed an article would not get our message across. Ultimately the court agreed that if we were to tell our lawyers: "Look to your Vermont constitution and, when you do, brief it adequately," we could do so only in a judicial opinion.

Id. at 1020.

[245] This question is divided into two parts later in the *Kahn* opinion:

Is our state constitution's language different from the language used in the U.S. Constitution?
OR
Does the state constitutional language guarantee a fundamental right that is not enumerated in the U.S. Constitution?

Kahn, 701 N.W.2d at 828. In *Kahn*, the Minnesota Supreme Court noted that if the answer to either of these questions is "yes," it is "most inclined to look to the Minnesota Constitution." *Id.*

"NO" ANSWER TO QUESTION 1: If the answer is "no" to both questions, the court will apply the state constitution and its own precedent.

"YES" ANSWER TO QUESTION 1: If the answer is "yes" to either question, then a litigant is to go to Question 2.

QUESTION 2:

(a) Is the United States Supreme Court making a sharp and radical departure from precedent on individual rights?; OR

(b) Does federal precedent provide inadequate protection for Minnesota citizens' individual rights?

"NO" ANSWER TO QUESTION 2(a) *and* 2(b): If the answer to 2(a) *and* 2(b) is "no," then the Minnesota court will follow Supreme Court precedent.

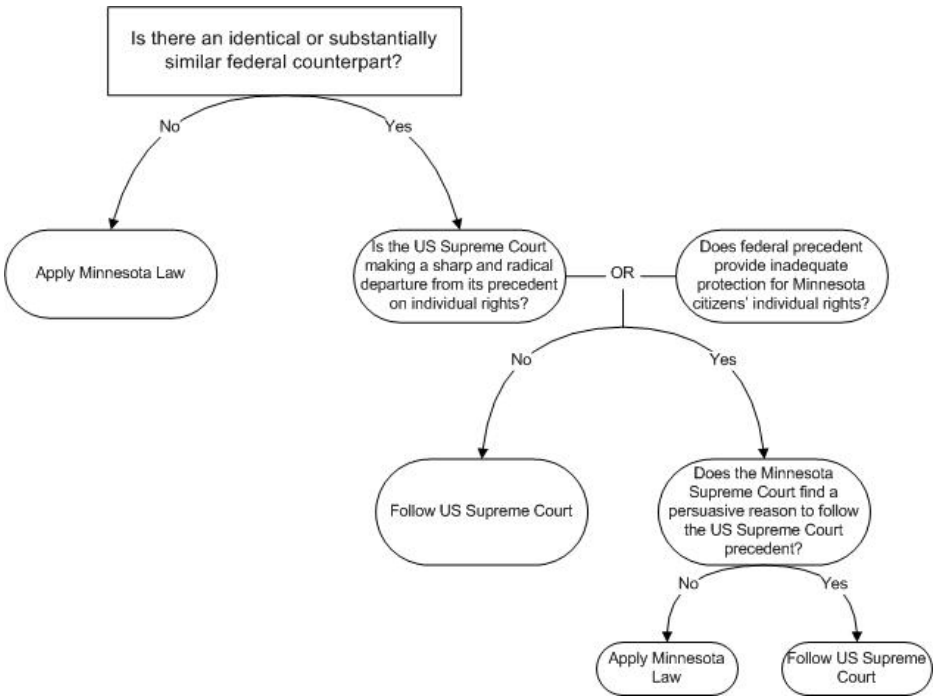
"YES" ANSWER TO QUESTION 2(a) *or* 2(b): If the answer to either 2(a) *or* 2(b) is "yes," then a litigant is to go to Question 3.

QUESTION 3: Does the Minnesota Supreme Court find a persuasive reason to follow United States Supreme Court precedent?

"YES" ANSWER TO QUESTION 3: If the answer is "yes," the Minnesota court will follow Supreme Court precedent.

"NO" ANSWER TO QUESTION 3: If the answer is "no," the Minnesota court will apply the state constitution and its own precedent.

The decision-tree approach is diagrammed below:



The *Kahn* opinion made it clear that in answering Question 1, the Minnesota Supreme Court is not primarily concerned with whether the language of the two constitutions is identical, but rather whether the fundamental right protected is the same or substantially similar.[246] Judge Tunheim acknowledged that the Minnesota court held that the right to education deserved greater protection under the state constitution.[247] He noted that "the right to vote is explicitly enshrined in the Minnesota Constitution," so it was "possible that the right to vote guaranteed by the Minnesota Constitution requires more of the City than does the United States Constitution."[248] Yet, because the right to vote is considered fundamental in both the Federal Constitution and the state constitution, the Minnesota Supreme Court held it would not automatically conclude that the latter offered greater protection

[246] *See, e.g.*, *id.* at 830–31.

[247] Kahn v. Griffin, No. Civ. 03-5037, 2004 WL 1635846, at *11 (D. Minn. July 20, 2004). The Minnesota Supreme Court acknowledged the plaintiff's argument that the Minnesota Constitution explicitly enumerates a right to vote, but the right to vote must be inferred from language in the United States Constitution. *Kahn*, 701 N.W.2d at 829.

[248] *Kahn*, 2004 WL 1635846, at *11.

based on different language alone.[249] The court explained:

> [T]he Supreme Court has held that, unlike the right to education, the right to vote is a fundamental right under the U.S. Constitution. This holding narrows considerably the leeway we have to independently conclude that the right to vote is deserving of greater protection under the Minnesota Constitution, based solely on the ground that the right to vote is a fundamental right because it is explicitly enumerated in the Minnesota Constitution. Because the right to vote is a fundamental right under both constitutions, we conclude that the fact that the right to vote is explicitly enumerated in the Minnesota Constitution does not, standing alone, support a holding that the right to vote deserves greater protection under our state constitution.[250]

For the Minnesota court, the first question of the decision tree centers on whether the right is considered fundamental under both constitutions. If the answer to Question 1 is "no," the inquiry ends and the court will apply Minnesota law.

In answering Questions 2 and 3, litigants are advised to look to the Minnesota Supreme Court's past decisions.[251] The *Kahn* decision did not use any new language in developing Questions 2 and 3, but instead relied on well-established rules developed in earlier Minnesota cases. The two prongs of Question 2 ask if (a) the U.S. Supreme Court has made a sharp and radical departure from its precedent on individual rights; or (b) federal precedent provides inadequate protection for Minnesota citizens' individual rights. In several instances, the Minnesota court has answered both prongs in the negative. In *Kahn*, for example, the court concluded that the Supreme Court has not made a radical departure in the voting rights area, and that Minnesota citizens' right to vote was adequately protected by federal precedent.[252] Other instances include obscenity protection and double jeopardy.[253]

If, however, the answer to either prong in Question 2 is "yes," then the Minnesota court considers Question 3 and decides if it is persuaded by federal precedent. In *Ascher*, for example, the court noted that the Supreme Court had made a sharp and radical

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[249] *Kahn*, 701 N.W.2d at 830–31.

[250] *Id.*

[251] The pertinent past decisions are discussed *supra* Part III.B.

[252] *See* discussion *supra* Part IV.A.3.

[253] *See* discussion *supra* Part III.B.2.

departure from its previous *Terry*-style balancing tests in random sobriety checkpoints.[254] In *E.D.J.* and *Askerooth*, the Minnesota court also concluded that the Supreme Court had made a sharp and radical departure from its long-standing practice of using a "totality of the circumstances" test to determine when a person is seized.[255] The Minnesota court also concluded in *Carter* that federal precedent did not provide adequate protection for the rights of Minnesota citizens in a case involving evidence obtained from dog sniffs immediately outside storage units.[256] Further, when answering Question 3, the Minnesota court often considers the state's traditions in deciding whether Minnesota citizens' rights are adequately protected. For example, the court has relied on the state's traditions of protecting bodily integrity,[257] affording persons on the periphery of society government protection,[258] interpreting the word "jury" to mean a body of twelve people,[259] and recognizing the right to counsel as a fundamental right.[260] In all these cases, the Minnesota court determined that the Supreme Court had made a sharp and radical departure from its precedent or that federal precedent provided inadequate protection for Minnesota citizens, and the Minnesota court did not find a persuasive reason to follow Supreme Court precedent.

VI. ADVANTAGES AND LIKELY CRITICISMS OF THE MINNESOTA DECISION-TREE APPROACH

This Part discusses the advantages of the Minnesota decision-tree approach and addresses likely criticisms.

A. Advantages

There appear to be four major advantages of the Minnesota decision-tree approach: it is forthright; it provides an easy way to satisfy the *Long* plain statement rule; it encourages all members of the bar to participate in developing state constitutional law; and it further advances the dual constitutional guarantees for individual

254 *See supra* notes 147–51 and accompanying text.
255 *See supra* notes 141–45, 152–60 and accompanying text.
256 *See supra* notes 139–40, 144–45 and accompanying text
257 *See* discussion *supra* Part III.B.1.c.
258 *See* discussion *supra* Part III.B.1.c.
259 *See* discussion *supra* Part III.B.1.d.
260 *See* discussion *supra* Part III.B.1.f.

rights as contemplated by our American federal system.

1. A Forthright Approach

The Minnesota decision tree presents a forthright approach to issues involving state constitutional law. By following the paths dictated by the decision tree, it becomes easier for litigants to know when the Minnesota court will interpret and apply the state constitution. The decision tree should help prevent, or at least diminish, a litigant's confusion and possible frustration over not knowing when the court will consider the Minnesota Constitution. Further, the decision-tree approach, coupled with a consideration of the neutral factors in subsection 3 below, provides litigants a forthright, analytical framework for addressing state constitutional issues. Moreover, the decision-tree approach diminishes potential criticism that the court has looked only to the state constitution in order to achieve a specific result.[261]

2. Long Plain Statement Rule Satisfied

If a court utilizes the Minnesota decision tree, it will be easy to satisfy the *Long* plain statement rule. The answer to each specific question will signal to the Supreme Court which law the state court is using to decide the particular individual right at issue. For example, if the state court answers "no" to the first question—"Is there an identical or substantially similar federal counterpart to the individual right at issue in this case?"—the Supreme Court will know that the state court is relying on state constitutional law. "Yes" or "no" answers to each question of the decision tree will similarly indicate whether the state court is relying on federal or state law. When utilizing the decision tree, the state court is in a position to issue a clear statement about when its decision rests on state constitutional law. This consequence may not initially appear to provide a significant advantage, but a review of state court cases reveals that many state courts fail to satisfy the *Long* plain statement rule.[262] Minnesota's approach should minimize the clash between federal and state courts that results when the federal court incorrectly assumes the state court ruling was based on federal

[261] *See generally* discussion *supra* Part V (providing the framework for Minnesota's decision-tree approach).

[262] *See* Simon, *supra* note 42, at 988.

law.[263]

3. Members of the Bar Are Encouraged to Participate in the Development of State Constitutional Law

The Minnesota Supreme Court indicated that it wants litigants and their attorneys to help develop Minnesota constitutional law.[264] First, litigants are directed to raise state constitutional issues if they are part of the case.[265] Hennepin County District Court Judge Jack Nordby, formerly a trial attorney, notes that "[t]he initial responsibility, and opportunity, for the elaboration of state constitutional law generally lies not with judges, but with lawyers, and principally with trial lawyers."[266] The decision-tree approach provides a structured framework in which attorneys can raise constitutional individual rights issues before the courts.

Here, the Minnesota court's desire to provide guidance to attorneys is again apparent. The court suggested that litigants should consider a list of seven nonexclusive factors when addressing issues that may implicate the Minnesota Constitution:[267]

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[263] Gormley, *supra* note 50, at 801–02 (finding that federal courts should not be required to search for the "single, glittering state constitutional needle in the haystack of precedent," but neither should the United States Supreme Court require "*magic language*" when the state court opinion rests on independent state constitutional grounds).

[264] Kahn v. Griffin, 701 N.W.2d 815, 829 (Minn. 2005).

[265] *See* discussion *supra* Part II. In Minnesota, litigants are required to raise the state constitutional claim. *See* Scruggs v. State, 484 N.W.2d 21, 24 n.1 (Minn. 1992) (remarking that an issue not addressed in the briefs could not be raised on appeal); State v. Bauman, 586 N.W.2d 416, 419 (Minn. Ct. App. 1998) (noting that since the appeal analyzed the search and seizure issue only under the Federal Constitution, the court would only address that issue).

[266] Jack Nordby, *Thirty-Two Reflections on the Birth, Slumber and Reawakening of the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 245, 272 (1994).

[267] *Kahn*, 701 N.W.2d at 829. Minnesota's factors are a bit different from other states, but would likely be subject to some of the same criticisms made by Williams. One difference might be that the decision tree appears to take precedence over the factors. So, the factors are not necessarily "a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution." Williams, *supra* note 49, at 1021. The decision-tree approach does give some deference to the United States Supreme Court, so it will not satisfy all the critics. Further, it remains to be seen how the Minnesota Supreme Court will use the factors. New York Chief Judge Judith Kaye noted:

> *First*, however much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether . . . constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court. . . .
>
> *Second*, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an *ironclad checklist* to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. . . . But where we conclude that the Supreme Court has changed course and diluted constitutional

(1) the text of the state Constitution,

(2) the history of the state constitutional provision,

(3) relevant state case law,

(4) the text of any counterpart in the U.S. Constitution,

(5) related federal precedent and relevant case law from other states that have addressed identical or substantially similar constitutional language,

(6) policy considerations, including unique, distinct, or peculiar issues of state and local concern, and

(7) the applicability of the foregoing factors within the context of the modern scheme of state jurisprudence.[268]

Oregon Supreme Court Justice Hans A. Linde has noted that "to make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis."[269] Other state courts have recognized the advantage of encouraging all members of the bar, including attorneys, judges, and scholars, to develop a rich state constitutional history.[270]

4. Dual Constitutional Guarantees for Individual Rights Advanced

The Minnesota Supreme Court respects and embraces the concept of federalism and its "double source of protection for the rights of our citizens."[271] The court has noted, "[o]ur federal system requires an interplay between federal and state courts, and is not well served when one level of government take[s] a back seat to the other when the question . . . is one of individual civil and political rights."[272] The court is well aware of its obligation to protect individual rights

principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law—wherever that may fall on the checklist.

People v. Scott, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring) (emphasis added); *see also* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1194–96 (1994).

[268] *Kahn*, 701 N.W.2d at 829.

[269] Linde, *supra* note 40, at 392.

[270] Christine M. Durham, *Employing the Utah Constitution in the Utah Courts,* UTAH B.J., Nov. 1989, at 27 (concluding that "Utah lawyers have . . . [an] opportunity to assist in the evolution of a rich and eventful state constitutional history. . . . [and] we judges and lawyers [must] take mutual advantage of it"); Shepard, *supra* note 7, at 1529–30 (suggesting that state constitutional law develops from "the combined work of lawyers, students, scholars, and judges").

[271] *Kahn*, 701 N.W.2d at 824 (quoting Brennan, Jr., *Bill of Rights*, *supra* note 46, at 552).

[272] *Id.* (alteration in original) (internal quotation marks omitted).

as mandated by the Federal Constitution.[273] State courts cannot ignore the development of federal law because of this obligation. As a result, state courts must pay attention to federal jurisprudence.[274]

The Minnesota Supreme Court acknowledged its obligation to consider federal jurisprudence when it said it will not construe the Minnesota Constitution to provide greater protection for individual rights "unless there is a principled basis to do so."[275] In *Kahn*, the court stated:

> [W]e traditionally approach this task with restraint and some delicacy. Moreover, we will not, on some slight implication and vague conjecture, depart from federal precedent or the general principle that favors uniformity with the federal constitution. But, when we reach a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of our citizens under the Minnesota Constitution, we will not hesitate to interpret the constitution to independently safeguard those rights.[276]

In line with this approach, the Minnesota Supreme Court also stated that it values uniformity, consistency, and the primacy of the Federal Constitution in individual rights cases:

> Favoring uniformity with Supreme Court interpretation of constitutional law reflects our belief in the primacy of the federal constitution in matters affecting individual liberties, even if the Supreme Court's interpretation is not always determinative. Moreover, uniformity places a value on consistency of practice in state and federal courts and the availability of ample federal case law that assists in illuminating the issues when addressing similar state constitutional provisions.[277]

This mutual respect between the federal and state courts fosters harmony and furthers the goal of dual constitutional protection for the individual rights of every American.[278] While some might think

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[273] *See id.* at 824 (citing Brennan, Jr., *State Constitutions*, *supra* note 46, at 491).

[274] *See* discussion *supra* Part II.A.2.

[275] *Kahn*, 701 N.W.2d at 824.

[276] *Id.* at 828.

[277] *Id.* at 824–25.

[278] *See* Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 612 (2005) (focusing on a middle ground between the legislative and judicial branches while suggesting an increasing cohesion and consensus within the ranks of the judiciary itself).

the public will lose confidence if two identical constitutional provisions are interpreted differently, this system actually furthers the goals of our federal system.[279]

B. Likely Criticisms

The Minnesota decision tree may garner criticism from several directions. State courts and commentators who favor the lockstep approach will find the decision tree irrelevant, unnecessary, and improper because they see no need to look at state constitutions. Those favoring the interstitial and dual sovereignty approaches may say that the decision tree either does or does not give state courts enough independence. State courts and commentators who favor the primacy approach may criticize the decision tree because they see no need to look to federal jurisprudence. Nevertheless, the Minnesota approach does mimic how states have actually analyzed individual rights cases, plus it is an attractive alternative for state courts wanting to find a practical, predictable, middle-ground approach that promotes uniformity and harmony between the federal and state courts.

Some may criticize the Minnesota decision tree as too reactive.[280] One part of Question 2 asks, "Is the United States Supreme Court making a sharp and radical departure from its precedent on individual rights?" This question suggests that the Minnesota Supreme Court is not willing to develop completely new state law in the individual rights area, but instead will look only to see if the Supreme Court has retrenched on previously recognized rights. But the second part of Question 2 asks, "Does federal precedent provide inadequate protection for Minnesota citizens' individual rights?"[281]

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[279] Professor Ken Gormley notes:

> [A]n enduring body of state constitutional law will only be constructed if it is a product of those neutral principles that inspired its rebirth in the first place. Not all judicial pronouncements concerning the scope of individual rights and liberties in the United States were meant to flow from the U.S. Supreme Court [or the U.S. Constitution]. . . . Rather, our democratic experiment . . . always contemplated a respect for the independent state constitutions . . . . These documents were designed to make the United States not a single monolithic entity that extinguished the identities of the several states but a democratic union that celebrated the rich identity of all fifty states and their unique charters of government.

Gormley, *supra* note 50, at 807.

[280] *See Traditional State Interests*, *supra* note 45, at 1283–84 ("The much-noted 'new' judicial federalism of the 1970s and succeeding years offered glamorous results, often comparable to the findings of the Warren Court. But significant state cases generally were limited to the affirmation of rights and liberties, largely reactive in their breadth and reach.").

[281] *See* discussion *supra* Part V.

Thus, Minnesota's approach allows for robust, original development of state constitutional law when there is no federal analog to the state right at issue or when there are textual differences between the federal and state constitutions as to that right. Moreover, when the Minnesota Supreme Court decides that federal precedent does not adequately protect Minnesota citizens' individual rights and the state constitution does afford greater protection, the court will decide the case based on its own precedent. Further, it may be a dubious argument to assert that state courts are being "too reactive" when they demonstrate a "willing[ness] to extend rights in 'reactive' settings, where [they] are only restoring a right previously guaranteed by federal courts."[282] While the decision-tree approach allows for the development of a rich state constitutional tradition, it still gives deference to Supreme Court precedent in cases where the Federal Constitution protects the right at issue or a right substantially similar thereto. In essence, the decision tree fosters state constitutional jurisprudence and still preserves uniformity and harmony.

Twelve years ago, then Minnesota Supreme Court Justice John E. Simonett cautioned:

> [I]t is evident that state courts have been pleased to flex their rediscovered constitutional muscle. Nevertheless, it is important for the bench and bar not to rush off precipitately. If our state's constitutional jurisprudence is to provide wisely for the citizens of this state in the next century, careful thought must be given now to building a sound foundation.[283]

It appears that the current Minnesota Supreme Court was not only aware of Justice Simonett's prescription, but that it followed his advice in *Kahn*, where the court "gave careful thought" to "building a sound foundation."

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[282] Cauthen, *supra* note 240, at 1198 (noting a higher level of state constitutional policymaking in the free exercise and search and seizure cases). Professor Cauthen further notes:

> The investigation indicates that over the first twenty-five years of the new judicial federalism, state supreme courts tended to follow the U.S. Supreme Court's analysis of the federal protection when interpreting the state constitution, expanding rights in only about one-third of the state constitutional cases. However, the rate at which state courts expanded rights varied significantly across issue areas. While some issues were in areas in which the Supreme Court had taken a conservative turn, others were not, suggesting that state courts provide broader rights under the state constitution for reasons other than to replace a formerly guaranteed federal right.

Id. at 1185.

[283] Simonett, *supra* note 25, at 228–29.

VII. CONCLUSION

As previously noted in this Article and as retired Justice Simonett has indicated, Minnesotans are practical,[284] and this practicality is evident in the approach the Minnesota Supreme Court has taken in interpreting its state constitution. The court has made it clear that it gives deference to the United States Supreme Court, and that it values uniformity and harmony with federal law if an individual right is protected under both the state and federal constitutions.[285] But it is also clear that the Minnesota Supreme Court sees itself as a partner with federal courts in guaranteeing individual rights. As Professor Cauthen stated:

> State supreme courts clearly have become partners (although maybe not equal partners) with the U.S. Supreme Court in the protection of rights. The continuation of this partnership will provide a balance to civil liberties policymaking in the country, giving individuals the ability to turn to state guarantees when federal protections are unavailable.[286]

When he or she takes office, a Minnesota Supreme Court Justice swears that he or she will support the Constitution of the United States and the Constitution of the State of Minnesota and that he or she will faithfully discharge the duties of the office to the best of his or her judgment and ability.[287] When a justice affirms such an oath, he or she assumes a solemn duty to uphold both constitutions. Based on its case law, the Minnesota Supreme Court has historically taken this duty and its role in our federal system very seriously.

Justice David Souter is the only current United States Supreme Court Justice who served on a state's highest court.[288] While sitting on the New Hampshire Supreme Court, Justice Souter acknowledged the difficulty in finding a reasoned middle-ground in

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[284] *See id.* at 235–36 n.42 (explaining Professor Carol Chomsky's findings that the Minnesota Supreme Court deferred to the legislature in economic regulation more than the United States Supreme Court, partly because of "the wide public and political consensus for moderate progressive reform in Minnesota").

[285] *See supra* text accompanying note 272.

[286] Cauthen, *supra* note 240, at 1202.

[287] *See* MINN. STAT. ANN. § 358.05 (West 2006); MINN. CONST. art. V, § 6; Gormley, *supra* note 50, at 807 (remarking that state judges try to "carry out their oaths to protect and defend their own constitutions, just as U.S. Supreme Court Justices must protect and defend the sacred federal document").

[288] THE JUSTICES OF THE SUPREME COURT 2 (2006), http://www.supremecourtus.gov/about/biographiescurrent.pdf.

approaching individual rights issues:

> If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.[289]

State courts face the dilemma of steering between the extremes identified by Justice Souter. It remains to be seen how Minnesota courts—by using the decision tree—may come to offer greater protection for individual rights under the state constitution. Again, Justice John Simonett spoke prophetic words in 1994 when he said:

> If there are any lessons to be learned, it would seem to be that in applying the provisions of our state constitution, and especially those of the bill of rights, the court should proceed prudently, fashioning its own analytical formula when feasible, and not allowing rhetoric to outdistance facts. Care should be taken in creating precedent because any precedent in constitutional law is perceived by the public to partake of the enduring and fundamental character of the constitution itself.[290]

One thing is certain, the Minnesota Supreme Court will protect its citizens' individual rights to the fullest extent required by both the United States Constitution and the Minnesota Constitution. Sometimes this jurisprudence will mean protecting an individual right the same way the Supreme Court has protected the same or a substantially similar right under the Federal Constitution. Sometimes, when the Supreme Court has made a sharp and radical departure from its own precedent, the Minnesota Supreme Court will restore a formerly protected individual right. At other times, the Minnesota Supreme Court will enforce an individual right unique to the Minnesota Constitution. In each of these circumstances, the Minnesota Supreme Court has indicated that it will follow what it believes to be a well-reasoned, practical, and predictable, middle-ground approach embodied in the decision tree it has developed. As it does so, the members of the court will continue to honor their oath to support both the United States Constitution and Minnesota Constitution as they pursue the goals

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[289] State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

[290] Simonett, *supra* note 25, at 242–43.

of our American federal system.