William Mitchell Law Review

Volume 29 | Issue 2 Article 9

2002

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I. INTRODUCTION

In *Abraham v. County of Hennepin,*[1] the Minnesota Supreme Court held that there exists a state constitutional right to a jury trial under both the Whistleblower Act[2] and the Minnesota Occupational Safety and Health Act (MOSHA).[3] The provision of the Minnesota Constitution upon which the court relied was Article I, Section 4, which provides, in relevant part, that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at

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1. 639 N.W.2d 342 (Minn. 2002) [hereinafter *Abraham II*].
2. MINN. STAT. § 191.932, subd. 1(a) (2000).
3. MINN. STAT. § 182.654, subd. 9 (2000).

law without regard to the amount in controversy."[4] In this essay I shall seek to identify and evaluate the method of constitutional interpretation the court used in arriving at its conclusion.

There are many ways of distinguishing and classifying methods of constitutional interpretation. One of the standard approaches, the one I shall use here, distinguishes between *originalist* and *non-originalist* methods.[5] The basic recommendation of originalism is that in interpreting a written constitution, judges should restrict themselves to invoking principles and norms that are explicitly stated, or at least implicit in, the document itself.[6] In contrast, nonoriginalist approaches maintain that it is legitimate, and perhaps even necessary, for judges interpreting a written constitution to invoke principles and norms from sources which have nothing to do with the language of the original document, the historical intentions motivating that language, the implicit structure presupposed by the document, or the document's historical context.[7] I shall refer to such sources as *non-originalist* sources. They might include a great variety of items, e.g., current systematic political philosophies (e.g., John Rawls[8]), ideologies of current political parties, prevailing attitudes in society, personal ideologies of judges, and so forth.

Of course, this way of contrasting the two approaches is very crude and overlooks a great many technical issues and distinctions (e.g., the existence of many distinct forms of both originalist and non-originalist approaches).[9] But it will do for the purpose of this essay. The fundamental contrast I am interested in is that between approaches which restrict themselves, in one way or another, to the historical document itself, as opposed to approaches which, in one way or another, refuse to so restrict themselves.

My objective is modest. I shall make no effort to argue the merits of the controversy between proponents of originalist methods and proponents of non-originalist methods. Rather, I shall analyze the court's opinion in terms of the contrast between the two methods of constitutional interpretation. In particular, I shall argue (1) that in *Abraham* the court attempted to combine

4. MINN. CONST. art. I, § 4.

5. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 5-25 (2d ed. 2002), for a helpful overview of the distinction.

6. *Id.* at 17.

7. *Id.*

8. JOHN RAWLS, A THEORY OF JUSTICE (1999).

9. See CHEMERINSKY, *supra* note 5, for an account of many of these varieties.

these two methods; (2) that this effort was misguided because the methods are mutually incompatible; and (3) that, despite what the court said, its decision is best understood as the result of applying a non-originalist method.

II. FACTS & PROCEDURAL HISTORY

A. Facts

David Abraham and Scott Lennander worked as offset equipment operators in Hennepin County's print shop.[10] In February 1995 they complained to their supervisor, Theresa Schaffer,[11] about the air quality in the shop and stated that the fumes in the workplace were making them ill, causing them to have headaches, nausea, and difficulty breathing.[12] A property management worker informed Schaffer, Abraham, and Lennander that the shop ventilation system had been closed periodically for asbestos abatement work.[13]

On March 2, 1995, Abraham filed a written complaint with the Occupational Safety and Health Division of the Minnesota Department of Labor and Industry ("Safety & Health Division), reporting the closed ventilation system and stating that employees of the county's print shop believed that they were faced with an immediate health threat due to chemicals in the air.[14] The complaint resulted in an unannounced MOSHA inspection of the shop on March 22, 1995.[15]

Abraham and Lennander's co-worker, Michael Fishman, claimed that he saw Lennander sprinkle chemicals on the print shop carpeting during the inspector's visit.[16] Fishman also claimed that he later saw Abraham wave a spray can in the air and heard him say, "Let's get some fumes going in here."[17] Fishman reported these observations to other co-workers, and Schaffer eventually

10. *Abraham II*, *supra* note 1, at 346.
11. Abraham v. County of Hennepin, 622 N.W.2d 121, 124 (Minn. Ct. App. 2001) [hereinafter *Abraham I*].
12. *Id.*
13. *Id.*
14. *Id.; Abraham II*, *supra* note 1, at 346.
15. *Abraham I*, *supra* note 11, at 124.
16. *Id.*
17. *Id.*

asked him about what he had seen and heard.[18]

Five days after the inspection, Abraham and Lennander were suspended.[19] The county notified them four days later that their employment would be terminated on April 7, 1995, because they had tried to skew the results of the MOSHA inspection.[20] Lennander was discharged for intentionally pouring chemicals on carpeting in the work area during the inspection, and Abraham was discharged for intentionally spraying chemicals into the air during the same inspection.[21]

B. Procedural History

Abraham and Lennander subsequently filed claims for retaliatory discharge.[22] They sued the county, alleging that their discharges violated the anti-reprisal provisions in MOSHA,[23] the Whistleblower Act,[24] and the Minnesota Human Rights Act.[25] [26] The district court granted summary judgment for the county, dismissing all claims.[27] Abraham and Lennander appealed only the dismissal of the MOSHA and whistleblower claims.[28] The Minnesota Court of Appeals remanded the case and directed the district court to determine whether the county's discharges were more likely than not motivated by retaliation, even if the county had a legitimate reason for the discharges.[29]

On remand, the district court ruled that MOSHA provided the exclusive remedy for alleged reprisals and dismissed the whistleblower claim.[30] Abraham and Lennander moved for a jury trial on the MOSHA claim.[31] The district court denied this motion and conducted a bench trial.[32] At the end of a two-week trial, the court found that the county discharged Abraham and Lennander

18. *Id.*
19. *Id.*
20. *Id.*
21. *Abraham II*, *supra* note 1, at 346.
22. *Id.*
23. MINN. STAT. § 182.669 (1996).
24. MINN. STAT. § 181.932 (1996).
25. MINN. STAT. § 363.03, subd. 7 (1996).
26. *Abraham I*, *supra* note 11, at 124.
27. *Abraham II*, *supra* note 1, at 345.
28. *Id.*
29. *Id.*
30. *Abraham I*, *supra* note 11, at 124.
31. *Id.*
32. *Id.*

for intentionally introducing chemicals into their work area on the day of the inspection and that the county had not violated the MOSHA anti-reprisal law.[33]

After a second appeal, the Minnesota Court of Appeals held that Abraham and Lennander were not entitled to a jury trial for either their claim under the Whistleblower Act or their claim under MOSHA.[34] Distinguishing between "(1) actions at law from causes in equity, and (2) actions existing at the adoption of the constitution from actions created later,"[35] the court of appeals interpreted Article I, Section 4 of the Minnesota Constitution as providing for a right to a jury trial in civil cases only for causes of action which are actions at law (i.e., actions for damages) *and* which existed under the state of Minnesota law prevailing in 1857.[36] Both conditions are necessary:

> [T]he claim must be an action at law *and* must have existed when the state constitution was adopted. The mere fact that a claim is solely for the recovery of money will not suffice. If that were the case, workers' compensation claims and human rights act claims, being actions for the recovery of money, would carry a constitutional entitlement to jury trial. But because these actions did not exist when the constitution was adopted, they do not carry jury trial rights.[37]

Thus, the court of appeals concluded that, although claims for money damages bought under the Whistleblower Act and MOSHA qualify as actions at law, they are not entitled to jury trials under the Minnesota Constitution because they did not exist as part of the common law when the constitution was adopted.[38] Importantly, the Legislature *could have* conferred a right to a jury trial in civil actions brought under the new statutes,[39] but it chose not to do so.

33. *Abraham II*, *supra* note 1, at 345.
34. *Abraham I*, *supra* note 11, at 129.
35. *Id.* at 125.
36. *See id.* at 125-26.
37. *Id.* at 126.
38. *Id.*
39. *Id.* at 125.

III. ARGUMENTS ADVANCED BY THE PARTIES IN THE MINNESOTA SUPREME COURT

Conceding that neither the Whistleblower Act nor MOSHA provides for a *statutory* right to a jury trial, the appellants argued that they nevertheless had rights to jury trials under Article I, Section 4, of the *Minnesota State Constitution* because the actions they brought were "legal in nature" and sought only the "recovery of money."[40] The appellants rejected any interpretation of Article I, Section 4's phrase "cases at law" which would construe it as referring to the particular state of the common law existing in the Territory of Minnesota in 1857, the year in which the State Constitution was adopted. In short, they maintained that the jury trial provision of Article I, Section 4 should not be construed as providing for a constitutional right to a jury trial only for causes of action existing under Minnesota common law as of 1857.[41] On the affirmative side, they argued that it ought to be read as providing for a right to a jury trial in any case which is "legal in nature," whether or not a case of that kind could have been successfully brought in the Territory of Minnesota in 1857.[42] According to the appellants, the only legally relevant question is whether such a case could be correctly categorized as being legal in nature and seeking only money damages under present Minnesota law.[43]

The county argued (1) that neither the Whistleblower Act nor MOSHA explicitly provides for a right to a jury trial; and (2) that there is no state constitutional right to a jury trial under either statute because neither statutory cause of action existed in 1857 when the Minnesota Constitution was adopted.[44] More broadly, with respect to (2), the county argued that in 1857 there was no common law cause of action for wrongful discharge against employers and that, in any case, in 1857 the doctrine of sovereign immunity shielded municipalities from actions of any kind, including, but not limited to, actions for wrongful discharge.[45]

40. *Abraham II*, *supra* note 1, at 348.
41. *Id.* at 349.
42. *Id.*
43. *Abraham I*, *supra* note 11, at 125.
44. *Abraham II*, *supra* note 1, at 348.
45. *Id.*

IV. THE SUPREME COURT'S HOLDING

A. Framing of the Issue

As the court saw it, the issue was "whether Article I, Section 4 of the Minnesota Constitution guarantees the right to trial by jury in an action, such as this, in which an employee seeks only money damages for retaliatory discharge from employment in violation of the Whistleblower Act and MOSHA,"[46] where Article I, Section 4 provides that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."[47]

Why did the court regard this as the issue? Because the appellants had demanded a jury trial and since neither the Whistleblower Act nor MOSHA explicitly provides for a right to a jury trial, "that right, if it exists, must arise under the constitution."[48] In this regard, the court obviously presupposed the existence of only two possible legal sources for a right to a jury trial under Minnesota law: State statutes, on the one hand, and the State Constitution, on the other.[49] Thus, the court apparently did not think that it would be permissible for Minnesota courts to extract a right to a jury trial from common law principles which were not themselves grounded in the Constitution.

B. Interpretation of Minnesota Constitution Article I, Section 4

What did the court take to be the intended meaning of Article I, Section 4? In answering that question, I shall follow closely the court's own sequence of analysis.

The court began by noting that its prior decisions have "consistently acknowledged the distinction between actions at law, for which the constitution guarantees a right to jury trial, and actions in equity, for which there is no constitutional right to jury trial."[50] Thus, it seems clear that the court agreed with the court of appeals on at least the proposition that a *necessary* condition for having a constitutional right to a jury trial in a civil case is bringing

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 349.

a claim at law for money damages. That is, it appears that the court agreed with the first of the two necessary (and together sufficient) conditions for a constitutional right to a jury trial in a civil case specified by the court of appeals.

But what about the court of appeals' second condition, namely, that a constitutional right to a jury trial exists only for common-law actions which existed under Minnesota law as of 1857? On the one hand, it might well seem that the court agreed. For, it said that this provision "was intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when our constitution was adopted in 1857."[51] Standing alone, that sentence appears to adopt the court of appeals' second condition.

On the other hand, however, the rest of the court's discussion strongly suggests that, whatever the court itself may have intended by that sentence, it certainly did not mean what the court of Appeals would have meant had it used those words. As the court explained:

> [T]his court has not held that only those causes of action that were identified in 1857 as causes of action at law carry today an attendant right to jury trial. Rather, the constitutional right exists for the same type of action for which a jury trial existed when the constitution was adopted, any cause of action *at law*. The constitution is not frozen in time in 1857, incapable of application to the law as it evolves. The nature and character of the controversy, as determined from all the pleadings and by the relief sought, determines whether the cause of action is one at law *today*, and thus carries an attendant constitutional right to jury trial.[52]

But what precisely does this mean? Fully grasping the court's intended sense requires a close examination of the way in which the court applied these words to its own precedents and to the *Abraham* litigation.

One of its precedents the court examined was *Olson v. Synergistic Technologies Business Systems, Inc.*,[53] a case in which it had ruled that a party bringing a claim for promissory estoppel has no constitutional right to a jury trial. In *Abraham* the court said that it

51. *Id.* at 348.
52. *Id.* at 349 (citations omitted).
53. 628 N.W.2d 142 (Minn. 2001).

had ruled as it had in *Olson* because the action brought there was an equitable, rather than a legal, claim.[54] In particular, the court observed that it

> traced the historical progression of promissory estoppel not to determine whether promissory estoppel was a cause of action at law in 1857, but only to determine whether promissory estoppel evolved in Minnesota as an equitable or legal cause of action, and therefore whether promissory estoppel is a cause of action at law or a cause of action in equity in Minnesota *today*, for in different jurisdictions the cause of action for promissory estoppel evolved differently,[55]

and that it had concluded that "in Minnesota promissory estoppel evolved as an equitable action, for which there is no right to trial by jury."[56]

In resolving the question whether there is a constitutional right to a jury trial with respect to any particular claim, the court said that it must "examine the nature and character of the controversy . . . as determined from the pleadings and by the relief sought."[57]

1. Common Law Precedent

Turning to the statutory claims brought in *Abraham*, the court characterized them as "a species of the common law action of wrongful discharge."[58] It then turned to a historical analysis of the evolution of that common law action. By way of prefatory comment, the court said that such a historical examination is not required to look back to 1857 in order to decide "whether wrongful discharge existed then as a cause of action at law."[59] Rather, "we need only determine whether a claim for wrongful discharge seeking only money damages is an action at law or an equitable action."[60] In making that determination, the sole question is whether a cause of action for wrongful discharge seeking only money damages has *now evolved into* an action at law.[61]

54. *Abraham II*, *supra* note 1, at 350.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

The court then traced the evolution of the cause of action for wrongful discharge back to an 1861 case, *Mackubin v. Clarkson*,[62] in which the court had ruled that an employee could bring a breach-of-contract action for damages for wrongful termination.[63] Citing a series of later breach-of-contract cases, the court said, "[a]s contract actions brought in a court of law for money damages, claims for wrongful discharge were causes of action at law, and they were consequently tried to juries."[64] Of course, even conceding that this line of cases can be traced back to 1861 (and notice that 1861 comes *after* 1857, the latter of which might well be regarded as the legally relevant year) would not, by itself, help the cause of the *Abraham* appellants. They had not brought breach-of-contract claims, but rather statutory claims.

The court then discussed the origin and evolution of the doctrine that "absent an employment contract for a specified term, employment is 'at-will,' meaning either the employee or the employer may end the employment relationship at any time for any reason."[65] The at-will doctrine was applied in the 1936 case of *Skagerberg v. Blandin Paper Co.*[66] Now, at first glance, it might well seem that the at-will doctrine advances the appellants' cause no further than did the earlier line of breach-of-contract cases, which is to say, not at all. For, at least *prima facie*, absent statutory protection against retaliatory discharge, the appellants would have had no cause of action at all, much less a cause of action at law.

However, the court went on to observe that "the common law doctrine of employment has been narrowed in the 66 years since *Skagerberg*" and that "[i]n many jurisdictions, courts have recognized an exception to the doctrine of employment at will, allowing a cause of action when the employee is wrongfully discharged."[67] With respect to more recent developments in Minnesota, in *Phipps v. Clark Oil & Refining Corp.*,[68] the court of appeals ruled that there exists an exception to the at-will doctrine when an employee is terminated for refusing to engage in unlawful

62. 5 Minn. 247 (1861).
63. *Abraham II*, *supra* note 1, at 350.
64. *Id.* at 351.
65. *Id.*
66. 197 Minn. 291, 266 N.W. 872 (1936).
67. *Id.*
68. 408 N.W.2d 569 (Minn. 1986), *aff'g* 396 N.W.2d 588 (Minn. Ct. App. 1986).

conduct.[69] After the supreme court granted review, but before publication of its decision, the Minnesota Legislature enacted the Whistleblower Act.[70] The *Abraham* court said that at that point it no longer had to decide the general policy question whether the State of Minnesota should follow those states that had recognized a common law cause of action for wrongful discharge.[71] However, since the *Phipps* employee had been terminated prior to the effective date of the Whistleblower Act, the latter statute could not ground his claim.[72] Hence, according to the *Abraham* court's analysis, it was compelled to decide whether that particular plaintiff could proceed at common law.[73] The court said that it "allowed the employee to pursue his common law cause of action for wrongful discharge, and . . . agreed that the common law protects those fired for their refusal to violate the law."[74] Thus, the *Abraham* court apparently committed itself to the proposition that, immediately prior to the effective date of the Whistleblower Act, employees who were terminated for refusing to violate the law had a common law cause of action at law for retaliatory discharge under Minnesota law.[75]

2. *Statutory Claims*

Having completed its overview of the development of the common law cause of action for wrongful discharge in Minnesota, the court turned to an analysis of the statutory claims brought by the appellants,[76] remarking that "[w]hile the causes of action before us are statutory claims for wrongful discharge, our analysis of the right to jury trial remains the same: are these claims for retaliatory discharge seeking only money damages causes of action at law?"[77]

69. *Id.*
70. *Id.* at 351-52.
71. *Id.* at 352.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* However, note that the court also confusingly stated, "Because of the enactment of the Whistleblower Act, we acknowledged in *Phipps* that we did not have to resolve the policy question whether Minnesota should recognize a common law cause of action for wrongful discharge." *Id.* Perhaps it means to say that although it did not *have* to resolve the question, it did so *anyway.* Presumably, the court of appeals was puzzled as well. *See Abraham I, supra* note 11, at 127.
76. *Abraham II, supra* note 1, at 352.
77. *Id.*

In that regard, the court first characterized a claim for wrongful discharge as a "tort" claim.[78] After observing that a retaliatory discharge claim is one kind of wrongful discharge claim, the court concluded that "[a] whistleblower claim that arises from alleged retaliatory conduct by the employer intended to injure the employee for engaging in lawful conduct or for reporting unlawful conduct . . . is a tort."[79] The court also noted that not only is a retaliatory discharge claim a tort claim, but it is also a claim "for which the law recognizes a right to consequential money damages in an action in district court."[80] In sum, as "a tort action seeking only money damages in a district court," a retaliatory discharge claim is "a cause of action at law."[81]

Applying these general principles to the *Abraham* claims, the court characterized them as "tort claims, brought in the district court, seeking only consequential money damages," and concluded that "the nature and character of the controversy support the conclusion that a whistleblower claim seeking only money damages is an action at law."[82]

3. Theory of Relief

The court next turned to the question of the "theory of relief" upon which the appellants' claims were based.[83] It observed that, according to its own precedents, seeking monetary relief is not by itself a sufficient condition for a constitutional right to a jury trial.[84] For example, in *Indianhead Truck Line, Inc. v. Hvidsten Transportation, Inc.*,[85] the court had refused to recognize a constitutional right to a jury trial with respect to actions for specific performance seeking money damages as part of the equitable relief requested, as contrasted with actions seeking money damages for breach of contract.[86] Thus, whereas claims for money damages are usually classifiable as legal claims, the court said that it would not permit a litigant to "cloak or disguise an equitable action simply by

78. *Id.*
79. *Id.* at 352-53.
80. *Id.* at 353.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. 268 Minn. 176, 128 N.W.2d 334 (1964).
86. *Abraham II*, *supra* note 1, at 353.

its prayer for relief."[87]

However, despite the fact that seeking money damages is not by itself sufficient to guarantee a right to a jury trial, it is nonetheless an important factor in the inquiry whether a particular claim is legal or equitable in nature.[88] In that regard, the court said, "because we look to the nature and character of the controversy as determined from all the pleadings, including the relief sought, the nature of the relief sought is important in determining whether a claim is legal or equitable, and as noted, claims for consequential money damages are typically legal claims."[89] Thus, since the *Abraham* appellants did not seek equitable relief under either the Whistleblower Act or MOSHA, but only money damages, the court's examination of the relief sought ". . . supports the conclusion that a whistleblower claim seeking only money damages is an action at law."[90]

The court then addressed its rulings in *Breimhorst v. Beckman*[91] and *Ewert v. City of Winthrop*.[92] With respect to *Breimhorst*, the supreme court said that its analysis in the *Abraham* case was not altered by that earlier holding.

> In *Breimhorst*, we recognized that the legislature abolished a common law cause of action for an employee injured on the job, replacing it with a remedy under the Workers' Compensation Act, a statutory remedy that was *new, adequate,* and *fundamentally different* from the common law cause of action. The legislature took the cause of action out of the district court and placed it in a quasi-judicial forum. We concluded that when the legislature abolished a common law cause of action and substituted a remedy that was new, adequate, and fundamentally different from that which was provided at common law, there was no constitutional right to a jury. We did not hold in *Breimhorst* that the legislature could deny the constitutional right to jury trial when it codifies, creates, or modifies a cause of action at law.[93]

With respect to its holding in *Ewert*, the court said:

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. 227 Minn. 409, 35 N.W.2d 719 (1949).
92. 278 N.W.2d 545 (Minn. 1979).
93. *Abraham II, supra* note 1, at 353-54.

> In *Ewert*, we held that the Minnesota Constitution does not provide the right to trial by jury to one who appeals a special assessment. We stated that the right to appeal a special assessment arises exclusively from statute and does not exist at common law, and as such, there is no attendant right to jury trial in appeals from special assessments. We did not hold in *Ewert* that all statutory causes of action are equitable actions with no right to jury trial. When a statutory cause of action is legal in nature, it falls within the parameters of those 'cases at law' for which there is a constitutional right to jury trial.[94]

The court went on to reaffirm earlier decisions, holding that, although the legislature may expand the right to a jury trial beyond the scope of the constitutional guarantee, it may not eliminate the constitutional right to a jury trial "merely by codifying or modifying a common law cause of action."[95]

By way of clarification, the court noted that:

> To the extent that we suggested in *Breimhorst* that the legislature may limit the constitutional right to a jury by simply codifying or modifying a common law cause of action, and to the extent that we suggested in *Ewert* that a statutory cause of action may never carry a constitutional right to jury trial, we clarify today that the right to a jury trial applies to all causes of action at law, regardless of whether the legislature has codified the cause of action.[96]

The court concluded by holding that a retaliatory-discharge action brought under the Whistleblower Act and MOSHA and seeking only money damages is a cause of action at law for which there is a constitutional right to a jury trial.[97]

V. ANALYSIS OF THE COURT'S HOLDING

A. Structure

This section details the essential structure of the court's analysis. I am not certain that my analysis matches exactly what the court had in mind, but at the very least, it seems to be a plausible interpretation of the decision.

94. *Id.* at 354 (citations omitted).
95. *Id.*
96. *Id.*
97. *Id.*

Suppose that C is a statutory cause of action brought pursuant to a Minnesota statute S. Suppose further that S does not provide for a right to a jury trial. The question is whether a litigant who brings C nonetheless has a right to a jury trial under the Minnesota Constitution. I propose that the essence of the court's analysis can be adequately formulated in terms of the following series of questions and answers:

[1] What is the ultimate legal question?

[a] The ultimate legal question is whether C would be *currently* classified as a cause of action *at law* under *present* Minnesota law. If so, then C is protected by a constitutional right to a jury trial.

[2] Thus, are we to understand that it is not legally relevant that C may not have *itself* existed as a cause of action under Minnesota law in 1857?

[a] That is correct.

[3] Upon what aspects or elements of the lawsuit in which C is asserted should a court focus its attention in order to determine whether C would be currently classified as a cause of action at law under present Minnesota law?

[a] The court should examine (1) the "nature and character of the controversy" and (2) the "relief sought."

[4] With respect to the relief sought:

[a] Is seeking money damages a necessary condition for being constitutionally entitled to a jury trial?

{1} Yes.

[b] Is seeking money damages a sufficient condition for being constitutionally entitled to a jury trial?

{1} No. A request for money damages which is

incorporated in a more comprehensive claim for equitable relief would not be constitutionally entitled to a jury trial. The claim for relief must be solely a claim for money damages.

[5] With respect to the nature and character of the controversy:

[a] Does it matter that C is a statutory cause of action, as opposed to a common-law cause of action? In other words, is it only common-law causes of action which are constitutionally guaranteed jury trials?

{1} No. Being a statutory cause of action is not a fatal defect.

[b] Is it necessary that C, along with its authorizing statute S, existed under Minnesota law in 1857, the date the Minnesota Constitution was adopted?

{1} No.

[c] Does that mean that *any* statutory cause of action, *qua* statutory cause of action, carries with it a constitutional right to a jury trial?

{1} No.

[d] What then is the criterion for identifying those statutory causes of action for which there is a constitutional right to a jury trial?

{1} A statutory cause of action is protected by a constitutional right to a jury trial if and only if:

{a} that statutory cause of action merely *codified* or *modified* a pre-existing common-law cause of action, as opposed to creating a statutory cause of action which was *new* or *fundamentally different* from any common-law cause of action existing at the time of the statute's enactment;

{b} that pre-existing common-law cause of action possessed the following legal attributes:

<1> It was, immediately prior to its transformation into a statutory cause of action, classifiable as an action at law; and

<2> It had, by the time of its transformation into statutory form, *evolved*, by means judicial interpretive expansion, from a *common-law root*,[98] an action at law that existed under Minnesota law as of 1857.

[e] Is it necessary for the statutory cause of action to be a recognizable version of the common-law root, as the latter existed in 1857?

{1} No. All that is necessary is that the common-law root eventually evolved, through judicial interpretive expansion, into a *common-law derivative*[99] that can be recognized in the statutory cause of action.

[f] What is an example of a statutory cause of action that created a cause of action which was new or fundamentally different from any common-law cause of action existing at the time of the statute's enactment?

{1} The statutory creation of an employee's remedies under the Workers' Compensation Act.[100]

98. This is my term, not the court's. I use it because it illuminates the court's conception.

99. Again, this is my term, not the court's.

100. It should be noted that this analytic outline does not account for every aspect of the court's discussion. For example, I have omitted any reference to the possibility of a statute "creating" a common-law cause of action, as in "codifies, creates, or modifies a cause of action at law." *Abraham II*, *supra* note 1, at 354. It seems to me that the concept of a statutory cause of action being itself a common-law cause of action is self-contradictory. I assume that the court did not intend to say that, but what it did mean is not clear to me. In any case, it seems to me that the court's point can be adequately expressed with just the verbs "codifies" and "modifies" alone.

B. Underlying Theory of Constitutional Interpretation

What is the nature of the underlying method of constitutional interpretation the court applied in *Abraham*? In particular, is it an application of an originalist method or a non-originalist method?

On the one hand, at the beginning of its discussion the court offered a remark that, if considered by itself, strongly suggests an originalist approach. With respect to the jury-trial provision of the Minnesota Constitution, the court said, "[t]his provision is intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when our constitution was adopted in 1857."[101] There are at least two reasons for thinking that this assertion suggests the invocation of an originalist method.

First, the assertion focuses upon the state of Minnesota law in 1857, the year in which the Minnesota Constitution was adopted. It would be odd for any full-blooded use of a non-originalist method to pay attention to the historical context of a constitution. For, that would suggest that the primary question is, "What did the Constitution mean *then*?" Presumably, for a non-originalist the primary question is rather, "What does the *living* Constitution mean *now*?," where it is implicitly presupposed that this latter question must be answered by looking to what I have called *non-originalist* sources, that is, sources other than the original document, its intentions, structure, or historical context.

Second, the court used the verb "is intended" in referring to the constitutional provision in question. The use of that verb also suggests the implicit invocation of an originalist approach insofar as it draws the reader's attention to the historical intentions motivating the provision. Presumably, non-originalists would not be especially concerned with *what* the historical intentions motivating any particular constitutional provision may or may not have been.

In sharp contrast, the reader is presumably startled to encounter these words just a few lines later:

> This court has not held that only those causes of action that were identified in 1857 as causes of action at law carry today an attendant right to jury trial. Rather, the constitutional right exists for the same type of action for which a jury trial existed when the constitution was

101. *Abraham II*, *supra* note 1, at 348.

> adopted, any cause of action *at law*. The constitution is not frozen in time in 1857, incapable of application to the law as it evolves. The nature and character of the controversy, as determined from all the pleadings and by the relief sought, determines whether the cause of action is one at law *today*, and thus carries an attendant constitutional right to jury trial.[102]

Whatever this language suggests, it certainly does *not* suggest an originalist method of constitutional interpretation. Rather, it is a paradigm of non-originalist language. Here we see the familiar non-originalist concept of a "living" constitution, with all its attendant characteristics. The court might well have quoted Justice William Brennan's well-known remarks in this regard:

> We current Justices read the Constitution in the only way that we can: as Twentieth-Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.[103]

C. Originalism v. Non-Originalism

According to the originalist conception, a constitution is (1) a set of legal principles, which are (2) expressed in terms of particular sentences, that, in turn, are (3) contained in a particular historical document, and (4) whose semantical meanings are functions of the particular historical context in which that document was adopted, including at the very least the particular intentions of those responsible for choosing those particular sentences to express those intentions.[104]

On the other hand, according to the non-originalist approach, a constitution is not a historically rooted and historically expressed set of legal principles. It is rather conceived of primarily as

102. *Id.*

103. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, reprinted *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, 23, 27 (Jack N. Rakove, ed. 1990).

104. CHEMERINSKY, *supra* note 5 at 17-18.

whatever set of principles a particular group of persons (namely, the final court in the jurisdiction) happens to presently select as the constraints that, as a matter of contemporary political and philosophical considerations, ought to be imposed upon governmental power. Indeed, there is an important sense in which non-originalists do not think of a constitution as a set of *principles* at all. Rather, it is thought of primarily as a particular set of persons who have been presently assigned the legal power to tell society what "constitutional law" *now requires*.

Obviously, these two approaches result in dramatically different conceptions of what it means for a society to follow the *Rule of Law*. Originalist methods are essentially tied to the idea that a sophisticated legal system typically operates in distinct stages (at least on the constitutional and statutory levels): (1) rule formation and enactment by the people or their representatives; (2) rule interpretation and application by the courts; and (3) rule enforcement by the executive agency. In contrast, non-originalist methods tend to think of rules of law as continually in the process of creation, where that creative process is ultimately in the hands of judges. In other words, such methods tend to collapse the first two stages of the originalist analysis and commit both to the ultimate power of the courts. This is essentially the legal-realist conception of legal rules, famously articulated by Holmes.[105] There is no legal rule at all until some particular court declares: "This is what the rule is *here*."

One of the consequences of using a non-originalist method of constitutional interpretation is the availability of two methods of amending a constitution. On the one hand, there is the method of following the explicit provisions governing the process of formal amendment contained in the document itself. On the other hand, there is the method of amending the constitution by the judicial techniques of non-originalist interpretation. Indeed, one of the primary arguments offered in support of non-originalist interpretative methods is the relative difficulty of formally amending constitutions, as compared with the relative ease of amending them by non-originalist judicial methods.[106] In fact, once permitting oneself the use of non-originalist judicial amendment of the original document, there would presumably be little or no

105. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

106. *See* CHEMERINSKY, *supra* note 5, at 23.

point in *ever* invoking the formal procedural apparatus of formal amendment by the people.

Thus, there is at least a *prima facie* appearance that in *Abraham* the court tried to simultaneously use both originalist and non-originalist methods of constitutional interpretation, an attempt which seems self-inconsistent in light of the fact that originalist and non-originalist approaches are typically defined as being mutually exclusive. However, some might wonder whether this *prima facie* appearance is only an appearance, one which could be dispelled by a closer examination. There are at least two ways in which one might think the appearance of logical incoherence could be dispelled.

First, one might suppose that the court interpreted the jury-trial provision as having *originally* been intended to state something like this: "We, the framers of this constitutional provision, hereby declare the existence of a constitutional right to a jury trial with respect to any cause of action, whether existing now in 1857 or later, upon which any subsequent Minnesota Supreme Court shall decide to confer a constitutional right to a jury trial." If the court had so interpreted the jury-trial provision, then there would be no appearance of incoherence in its analysis. For, that analysis could then be interpreted as not invoking any non-originalist method at all, but rather as straightforwardly invoking only an originalist method. A court which simply follows original directions of the framers to "make things up as you go along" could not be justifiably accused of resorting to non-originalist methods. By definition, non-originalist methods look to interpretive sources *distinct from and independent of* the original document itself. Under the contemplated hypothesis, that could not be said of the Minnesota Supreme Court.

There are only two problems with that hypothesis. First, it seems unlikely that the framers of any constitution would have drafted a provision with anything even approximating such an open-ended unlimited intent. Indeed, it seems rather that if that were the mutual intention of the participants in a constitutional convention, they would not have even bothered to draft any provision concerning the issue at all. What would be the point of drafting a provision whose intended meaning is: "By the way, with respect to this issue, you can do anything you want"? The basic motivation for adopting a constitution at all is to *limit and constrain* all present and subsequent governmental agencies, including the

courts. If one has decided ahead of time to allow any and all subsequent judicial interpretations of the constitutional document to stand, one might as well save the time and trouble of even committing the constitution to paper. The second problem is that there seems to be nothing in the court's discussion which even remotely suggests that it intended to adopt such an interpretation of the jury-trial provision.

The second way in which one might consider trying to avoid interpreting the court's opinion as internally inconsistent is to suppose that the court interpreted the jury-trial provision as having been originally intended to state something like this: "We, the framers of this constitutional provision, hereby declare the existence of a constitutional right to a jury trial with respect to any cause of action, whether existing now in 1857 or later, which seeks money damages as the sole relief."

Unlike the first suggested interpretation of the jury-trial provision, this interpretation is perhaps at least *prima facie* historically plausible. But the difficulty is that there is nothing in the court's discussion in *Abraham* which suggests that it construed the provision in this way. On the contrary, there is much suggesting just the opposite. After all, if it had construed the provision in this second suggested way, its analysis could have been adequately expressed in just three sentences: "(1) The constitutional jury-trial provision provides that any cause of action seeking only money damages is protected by a constitutional right to a jury trial. (2) This statutory cause of action seeks only money damages. (3) Hence, this statutory cause of action is protected by a constitutional right to a jury trial." The fact that the court did not so express itself strongly suggests that it had no such intention.

D. Incompatibility of the Two Approaches

So, what do we have? It seems that we have a judicial opinion trying to have it both ways. Readers might ask, "But so what?" They might continue by objecting, "You earlier asserted that any simultaneous use of originalist and non-originalist methods of constitutional interpretation is logically incoherent. But I'm not convinced. Why can't courts coherently use both methods at the same time?"

I would respond in the following way: these two methods of interpretation are indeed incompatible. The *prima facie* appearance of compatibility is primarily caused by the *sociological*

fact that courts often *describe themselves* as resolving constitutional issues by simultaneously examining both the original intent motivating the constitutional document itself, on the one hand, and contemporary non-originalist considerations, on the other, and they often *expressly deny* that the simultaneous use of both methods involves any logical inconsistency. But despite this, I would maintain that the two methods really are incompatible on the basis of this argument: [1] In the event of a conflict between the historical intention motivating a particular constitutional provision, on the one hand, and contemporary non-originalist considerations, on the other, there are only two alternatives. [2] On the one hand, courts can permit the contemporary non-originalist considerations to override the historical considerations. [3] On the other hand, courts can permit the historical considerations to override the contemporary non-originalist considerations. [4] But the first alternative is essentially equivalent to a non-originalist approach, whereas the second alternative is essentially equivalent to an originalist approach. [5] Hence, the two approaches are mutually incompatible. In the event of a conflict, courts are logically compelled to choose between them.

E. Non-Originalism Applied

Assuming that I am right about the mutual incompatibility of originalist and non-originalist methods of constitutional interpretation, the only remaining question I shall take up is, "Which of these alternatives did the court choose to apply in *Abraham*?"

I have interpreted the court's opinion as trying to simultaneously have it both ways and have quoted two passages in support of my interpretation—one strongly suggesting the use of an originalist method, the other strongly suggesting the use of a non-originalist method. Additional support which could be offered for my interpretation is the court's use of an historical test in resolving the constitutional issue before it. By tracing in elaborate scholarly detail the "evolution" of the common-law *root* of breach-of-contract causes of action against employers legally available in 1857 down through the common-law *derivative* of retaliatory-dismissal causes of action legally available immediately prior to the enactment of the Whistleblower Act in 1987 and, from there, down to the ultimate statutory codification or modification of that derivative by the Whistleblower Act, the court presumably sought to

convey the idea that it was simultaneously relying upon both originalist and non-originalist methods.

But if the simultaneous use of both originalist and non-originalist methods is logically inconsistent, then it presumably follows that, if the court's analysis in *Abraham* is to be construed as logically coherent, it must be construed as selecting one or the other of these two methods, but not both. I shall argue that its opinion is most plausibly construed as applying a non-originalist method.

Here is an argument supporting that interpretation: [1] Any originalist method of constitutional interpretation imposes significant limitations upon the class of possible interpretations of the provision in question. [2] The court's historical test does not impose significant limitations upon the class of possible interpretations of the provision in question. [3] Hence, the court's historical test is not an originalist method of constitutional interpretation. I shall refer to this argument as *Argument A*.

The argument is deductively valid. Hence, the only relevant question is whether its premises are true. I will not offer any argument for premise [1]; its truth seems obvious, at least to me. This point about obviousness can be put in another way: If [1] is false then there simply are no originalist methods of constitutional interpretation at all. That leaves the question of premise [2]'s truth-value.

I propose that [2] can be supported by focusing once more upon the court's historical test for identifying those statutory causes of action for which there exists a constitutional right to a jury trial. Recall the essence of that test: Any presently existing Minnesota statutory cause of action "S" is protected by a constitutional right to a jury trial if and only if [1] in 1857 there existed a Minnesota common-law cause of action "C" (the common-law "root") with respect to which there was in 1857 a constitutional right to a jury trial, which [2] eventually evolved by means of judicial interpretation into a Minnesota common-law cause of action "C*" (the common-law "derivative"), which, in turn, [3] was eventually "codified" or "modified" by a statute S, as opposed to being "replaced" by S.

So, what is the problem? I suggest the problem is this test can apparently be used to prove that *any* statutory cause of action carries with it a constitutional right to a jury trial. In general, given *any* common-law cause of action existing in 1857, one can, with

sufficient ingenuity, link it with *any* statutory cause of action. There are at least two reasons for so thinking. The court's test possesses two features which give it indefinitely large degrees of flexibility.

One of those features concerns the purported relationship between two causes of action, the 1857 cause of action I have been referring to as the common-law root, C, on the one hand, and the later cause of action I have been referring to as the common-law derivative, C*, on the other. The underlying jurisprudential question is, "Under what circumstances is a later cause of action (here, C*) merely an evolutionary modification of an earlier cause of action (here, C), as opposed to simply being a *different* cause of action altogether?" The corresponding underlying jurisprudential problem is that, while the earlier cases exemplifying C will inevitably share some legal features with the later cases exemplifying C*, they will not share others. Hence, by selectively describing the characteristics the two lines of cases share, one can make it look as if C* really is just a later evolutionary stage of C. On the other hand, by emphasizing the characteristics the two sets of cases fail to share, one can also make it look as if C* is not a later evolutionary stage of C at all, but rather a different cause of action altogether.

The availability of this flexibility can be illustrated in terms of the court's own discussion in *Abraham*. The court's purported common-law root was first exemplified in *Mackubin v. Clarkson*[107] in 1861. Its purported common-law derivative was exemplified in *Phipps v. Clark Oil & Refining Corp.*[108] in 1986. On the one hand, it is possible to describe these two cases as cases in which an employee sues its employer for money damages for a wrongful termination. Using that level of semantic generality, it is easy to make it look as if the cause of action exemplified in *Phipps* is merely a later stage of the cause of action exemplified in *Mackubin*.

On the other hand, it is also possible to describe these two cases in a very different way. One can characterize *Mackubin* as a case in which an employee sues his private employer for money damages for a wrongful termination on a breach-of-contract theory, at a time when the rule of sovereign immunity precludes public employees from suing their employers,[109] and at a time when

107. 5 Minn. 247 (1861).

108. 408 N.W.2d 569 (Minn. 1986).

109. The doctrine of sovereign immunity with respect to tort liability was judicially abrogated in *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 188

private employees who are not parties to employment contracts are at the mercy of the employment-at-will doctrine. On the other hand, one can characterize *Phipps* as a case in which an employee sues a private employer for money damages for a wrongful termination, where the employee does not have to rely upon a breach-of-contract theory because of the earlier demise of the at-will doctrine, and where, although the employee happens to sue a private employer, he could have also sued a public employer, were he employed by one, because of the earlier demise of the sovereign-immunity doctrine. Thus, using this more specific level of semantic generality, it is possible to make it look as though the cause of action exemplified in *Phipps* is not a later stage of the cause of action exemplified in *Mackubin* at all, but rather a new and different cause of action.

I said earlier that the court's historical test possesses two features which give it indefinitely large degrees of flexibility. The second feature concerns the relationship between the purported common-law derivative C* and S, the purported statutory codification or modification of C* (as opposed to the "replacement" of C*).

The underlying jurisprudential problem in this context is the same as the just-discussed problem concerning the relationship between C and C*, namely, the availability of varying levels of semantic description. On the one hand, it is possible to characterize C* and S so as to make it look as if S is merely a "codification" or "modification" of C*, as opposed to being a "replacement" of C*. On the other hand, it is also possible to characterize C* and S so as to make it look as if S is a replacement of C*. At least one reason for thinking so is that any common law cause of action shares at least one legal characteristic with any statutory cause of action, on the one hand, and differs from that statutory cause of action with at least one other characteristic, on the other. Given this general fact, by focusing upon one or the other of these characteristics it is possible to characterize the relation between C* and S either as a mere "codification" or "modification", on the one hand, or as a "replacement," on the other.

The availability of these two alternatives can be illustrated in

N.W.2d 795 (1962). For the subsequent legislative abrogation, see MINN. STAT. § 3.736 (2000).

terms of the court's own discussion. Let *Phipps* be the purported common-law derivative C* and the Whistleblower Act be C*'s purported statutory codification, S. By suitably describing *Phipps* and the Whistleblower Act, one can make it look as if the latter is merely a codification or modification of *Phipps*.

For example, it is possible to describe the cause of action exemplified in *Phipps* as *suing one's employer for money damages for a wrongful termination*, on the one hand, and to describe the cause of action exemplified in the Whistleblower Act as *suing one's employer for money damages for wrongful termination*, on the other. Characterizing the two causes of action at this level of semantic generality makes it look as if S is merely a codification or modification of C*.

On the other hand, it is possible to characterize the cause of action exemplified in *Phipps* as *suing one's employer for money damages for a wrongful termination, where the plaintiff has a right to a jury trial*, on the one hand, and the cause of action exemplified in the Whistleblower Act as *suing one's employer for money damages for a wrongful termination, where the plaintiff has no right to a jury trial*, on the other. Describing the two causes of action at this level of semantic generality makes it look as if S is not a codification or modification of C*, but rather a replacement.

It might be argued in defense of the court's distinction between codification/modification, on the one hand, and replacement, on the other, that if some particular statute goes "too far" it would be obvious to the court and to everyone else that the statute was a replacement, rather than a codification/modification. It might be argued that in such a case the court would hold the line.

But perhaps not. In support of such a doubt, one could mention the court's own ruling in *Breimhorst v. Beckman*[110] that the Workers' Compensation Act[111] was a "replacement" of the common-law cause of action employees had against their employers for personal injuries, rather than a mere "codification/modification" of that cause of action. Now, as the court itself emphasized in *Abraham*, the Workers' Compensation Act substituted an *administrative* process for a *judicial* process. That seems to have been a very radical change. But consider the following possibility.

110. 227 Minn. 409, 35 N.W.2d 719 (1949).
111. *See* MINN. STAT. §§ 176.01-.81 (1949).

Suppose that the Minnesota Legislature were to substitute administrative proceedings without juries for *all* common-law tort and breach-of-contract actions. Such a legislative action would seem to come pretty close to a total elimination of jury trials in civil actions. It seems easy to imagine, the court being so distressed by that elimination that it would find *some* way to tie that hypothetical statute to *some* common-law root and common-law derivative. If so, so much the worse for the line the court drew in *Breimhorst*.

Thus, it seems that the court's historical test does not provide any significant degree of restriction upon the class of possible constitutional interpretations. Consequently, the conclusion of Argument A—that the court's historical test is not an originalist test—seems to have been established.

Indeed, given what the court said in *Abraham* about the *"present"* meaning of "action at law", it seems that it does not even need the historical test. As Wittgenstein famously observed, "a wheel that can be turned though nothing else moves with it, is not part of the mechanism."[112] Apparently, the court views itself as having the power to simply decree the present meaning of "action at law," based upon whatever its own philosophical intuitions dictate as to which statutory causes of action *ought to have* jury trials, despite what the Legislature might or might not think. Presumably, the court would even have the power to declare that the term "action at law" should, on contemporary philosophical grounds, be construed as semantically including even "equitable" actions, a ruling that would obliterate the traditional distinction between law and equity.

But if the semantical content of words in constitutional texts can vary as the court grasps them, with the philosophical and political exigencies of the moment, then why not? After all, words are nothing but syntactic types semantically tied to particular meanings. The words, understood as syntactic types, can persist over time, while their associated meanings can vary.

VI. CONCLUSION

I have argued that in *Abraham* the court tried to simultaneously use both originalist and non-originalist methods of constitutional interpretation and that it formulated and applied a complicated

112. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, ¶ 271 at 95e (G.E.M. Anscombe trans., The Macmillan Company, 2d ed. 1968).

historical test to bridge the apparent gap. I have also argued that because the gap is not only apparent, but real, it cannot be bridged by any device, no matter how legally sophisticated. Originalist and non-originalist methods are mutually exclusive as a matter of logic. As for the historical test, I would recommend that the court discard it. So far as I can see, it just gets in the way, frustrating any effort to decide cases on a transparent basis. Once free of the historical test, the court would be free to choose such publicly clear and transparent methods of deciding constitutional issues. On the one hand, it could choose to explicitly adopt an originalist approach and publicly abandon any recourse to non-originalist methods. On the other, it could publicly adopt a non-originalist approach and ignore the history.

In terms of the question presented in *Abraham*, the court would have the opportunity of explicitly choosing between two very different formulations of the constitutional issue: [1] Does the jury-trial provision of the Minnesota Constitution, as intended by its framers in 1857, require jury trials for claims brought under the Whistleblower Act? [2] Do contemporary philosophical, political, and ideological considerations, as evaluated by the court, prove that it would be desirable to provide for jury trials for claims brought under the Whistleblower Act? Either formulation would constitute an important step in the direction of deciding the case on the basis of publicly clear and transparent grounds.

The gain for both the public and the court would be increased clarity. In my view, everyone ought to be able to agree upon at least one proposition - a necessary condition for a healthy democracy is clear and transparent governmental operations. There could never be sufficiently strong reasons for disguising the ways in which governmental power is actually wielded. If the courts are not making it up as they go along, the public has a right to know that. If they are, the public has a right to know that too.