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THIRTY-TWO REFLECTIONS ON THE BIRTH, SLUMBER AND REAWAKENING OF THE MINNESOTA CONSTITUTION

JACK NORDBY

1.

The phenomena of rebirth, regeneration and metamorphosis hold a powerful and perennial appeal for us, stimuli of hope, antidotes to despair. They are embedded in our culture: Rip Van Winkle, Snow White, the Ugly Duckling, even Lazarus, to move from the silly to the sublime. Institutions as well as individuals are known to revive—in the Renaissance an entire civilization. Consider the prevalence of the prefix re- in our language: pages and pages of any dictionary are filled with verbs and nouns so modified.

State constitutions, as Justice Simonett aptly suggests in his essay introducing the volume, are no longer wallflowers at the dance of justice.1 Once the timorous companions of their more vivacious federal sister, they are emerging as co-equals and, in some important respects, the more potent and fertile members of the republic’s sometimes contentious family. The Minnesota Constitution has eastern cousins who are, in fact, senior to the United States Constitution; she has her own personality and abilities, and she is coming—belatedly but rambunctiously—into a robust maturity.

1. John E. Simonett, An Introduction to Essays on the Minnesota Constitution, 20 WM. MITCHELL L. REV. 227 (1994). Curiously, Justice Simonett and I came independently upon the same metaphor. Slightly uncomfortable with gender terminology, I nevertheless decided it should be retained since it seems appropriate and certainly in no way derogatory to view the Constitution as feminine. On the contrary, to see the most fundamental and supreme law thus is perhaps a suitable antidote to the male-dominant presumptions that remain anachronistically prevalent in some quarters of our culture. It is of some little historical interest that a candidate for governor of this state could say in all seriousness that men are “genetically predisposed” to lead women, at a time when the majority of our Supreme Court consists of women. Interview of Alan Quist by David Brauer, Twin Cities Reader, April 6, 1994, p. 11.
Judges and lawyers in the state courts of the late twentieth century are privileged to live during and participate in a constitutional renaissance, one of a handful of the most notable periods of constitutional growth, a time of what might be called constitutional opportunity. The first of these, of course, was the founding, just two centuries ago, that gave birth to the United States Constitution and those indispensable amendments properly known as the Bill of Rights. Next, and hardly less significant, came the early and often decisive struggles in the Marshall era over the document's central silences and ambiguities regarding the allocation of power between the federal and state governments and the "people," and between the branches of the federal government. The civil war, and particularly the amendments that came in its wake, purged the Constitution of its toxic tolerance of slavery and, in the great first section of the Fourteenth Amendment, demanded that the states extend due process and equal protection of the law to all. These magnificently vague terms, however, as well as the power of the federal courts to dictate their import to recalcitrant and sometimes reactionary state governments, wanted both definition and elaboration. The Warren Court met this challenge with considerable courage and success. But even as the federal judiciary undertook to extract substantive and procedural detail from the Constitution's generalities, the state courts became quiescent, simply deferring to and adopting the Supreme Court's pronouncements affecting individual liberties. However, a conservative, anti-activist reaction settled in under the Burger and Rehnquist majorities, slowing, halting, or even in some cases reversing the more generous


3. Id. at chs. 8-11. See also Albert J. Beveridge, The Life of John Marshall (1919) (providing a detailed analysis of the remarkable constitutional statesmanship of John Marshall).

4. Among the literature on this period, special mention should be given to an extraordinary study by Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978). This book provides an exhaustive exploration of both the roots and aftermath of the slavery controversy which, in its extreme divisions among the states and regions of the country, is replete with lessons for the student of Federalism and state constitutions.

5. See Shirley S. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1147-48 (1985). This deference occurred despite repeated reminders from the Supreme Court that state courts were free to provide rights beyond those mandated in the Federal Constitution. Id.
protectiveness of the Warren era. And it is this withdrawal of the federal judiciary from the active advancement of personal rights that has created a climate in which the slumbering demi-gods that are the state constitutions could reawaken.

3.

In 1819, that *annus mirabilis* of constitutional construction, John Marshall observed in *M'Culloch v. Maryland* that in its nature a constitution can only mark great outlines and designate important objects, while the "minor ingredients which compose those objects [must] be deduced from the nature of the objects themselves." And, Marshall emphasized, "we must never forget, that it is a constitution we are expounding."

So too, state judges, and the lawyers who bring issues before them, must remember that it is a state constitution we are expounding. It is a document of certain large outlines, of a certain absoluteness of object, but with ample room for delineation of the "ingredients" of the great commands. Insofar as individual rights are concerned (nothing is ultimately more essential), we are free to add to, but we may not subtract from, the "ingredients" of the federal recipe. For example, Justice Powell has written:

> In an age in which empirical study is increasingly relied upon as a foundation for decisionmaking, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives.

4.

We Americans—from the extreme left to the far right—tend to worship the Federal Constitution rather instinctively. It is, af-

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9. *Id*.

ter all, a nice piece of work as well as the supreme law of the land. 11 Nevertheless, lest we kneel too quickly and adore too uncritically, we should remember that, among other things, it embodied slavery. 12 It is not unpatriotic to suggest—or if it is, so be it—that so egregious a defect entitles us to view other parts of the document with some caution. Nor should we overlook the discomforting fact that it was just two hundred years ago, a blink in historical time, that history's greatest assembly of democrats and constitutionalists boasted many slaveholders among its most able and prominent members. 13 This should remind us that we are not so far removed from a world-view we can now scarcely imagine sharing, and that our own descendants may look back upon us as equally benighted. History is largely the narrative of the struggle for freedom and decency, and state constitutions are the best weapons, sword and shield, of the oppressed and the potentially oppressed, but only if they are activated.

5.

The Federal Constitution, at least as respects individual liberties, is a blueprint of the superstructure, so to speak, an outline of minimum safety specifications for the ship of state. The states, in fashioning their own vessels, must conform to these general guidelines, but they are at liberty to add their own details. They may not reduce or eliminate federal protections, but they may supplement them, and indeed they are encouraged to do so. 14 How important is this? We might recall that H.M.S. Titanic, largest and greatest ship produced to its own time by a nation rich in seafaring tradition and expertise, conformed to current safety requirements. She foundered nevertheless as a result of a combination of defects in safety design and reckless navigation. She would surely not have gone to the bottom if she had had easily

11. U.S. CONST. art. VI, cl. 2.
12. See U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. IV, § 2, cl. 3.
13. See FEHRENBACKER, supra note 4 (providing an exhaustive history of the long dominance of pro-slavery sentiment among much of the country's political leadership).
14. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (holding that states are free to read their own constitutions more liberally than the Federal Constitution); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that states possess the sovereign right to adopt more expansive individual liberties); Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (stating that states are not precluded from applying higher standards); Oregon v. Hass, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting) (arguing that states are free to strike a balance between individual rights and police powers within constitutional limits).
constructed continuous bulkheads below decks, and even without those bulkheads there would have been little or no loss of life if she had had more lifeboats. It really was as simple as that.\textsuperscript{15}

The \textit{Titanic}, for all the ignominy that has since attached to her, was overall a good ship, built to and even beyond the accepted state of the art of naval architecture. Her owners, of course, were free to build her better, but they were not required to do so, and the additional expense—though it appears trivial in retrospect—persuaded them against more bulkhead steel and lifeboat wood.\textsuperscript{16}

So too with our constitutional scheme. The analogy is imperfect, as all analogies are, but the Federal Constitution’s incorporation of slavery may be compared to the \textit{Titanic’s} fatal bulkheads, just as its lack of precision on the respective roles of state and federal governments and in the definition of crucial phrases, such as due process, is comparable to the shortage of lifeboats. The republic very nearly foundered on the slavery question; she survived only because enough states that had eliminated slavery held her together at enormous cost.

6.

Let us modify the metaphor a little. Suppose the United States Constitution contained a clause requiring that all citizens be provided with safe housing. Further suppose that the United States Supreme Court had held that this meant, at least, that public accommodations must have fire escapes, and that this applies to states. Nothing in that, of course, prevents a state from enacting, or construing, a state constitution to require more. Florida, for example, may find certain construction practices necessary or desirable because of the likelihood of hurricanes, and California because of earthquakes, and Oklahoma because of tornadoes, and Alaska because of cold and snow. What is “safe” in one state may not be so in another.

But no geographic or climatic extremes or divergences are necessary. An inland state of moderate climate, for example, may decide that it wants a more universally rewarding quality of life, and therefore require that housing have more fire escapes


\textsuperscript{16} Marcus, supra note 15, at 30.
than federally-mandated, as well as smoke detectors and sprinkler systems—neither of which incidentally was available or even envisioned when the state or Federal Constitution was adopted, but is surely within the concept of safety. It is enough if the state wants it that way; it need not be even manifestly necessary.

No one would deny the power of states to adopt these measures. Only the desirability and practicability are debatable. We may reflect that a police state, against which constitutional liberties are the ultimate safety measures, is a far more ominous and pervasive threat than hurricanes, earthquakes, tornadoes, or cold.

7.

The Federal Constitution would have been a sounder structure if slavery had been eliminated, and perhaps even if it had been universally protected. The Dred Scott case, which as much as any single factor precipitated the civil war, may thereby have been avoided. But that was not feasible. The Constitution, like the Bill of Rights, was a compromise, as are all democratic documents—and as every generalization, such as due process, must be. The founders knew this, of course, and it was central to their genius that they left the filling-in of details largely to two institutions: the judiciary and the states.

But while the drafters of constitutions must be great compromisers, the judges who construe constitutions generally must not be. Marshall's great phrase in McCulloch v. Maryland that it is "a

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We believe, and I think properly, that when the men who met in 1787 to make a Constitution made the best political document ever made, they did it very largely because they were great compromisers. Do not forget that. They did put in the Bill of Rights afterwards; but the thing that made it stick was that they were great compromisers as to the immediate issues which were before them.

Id.

19. The great decisions of the Marshall Court, see supra notes 3 & 7, together with such other landmarks as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), established the power of judicial review of legislation, state and federal, which we sometimes forget was not at all explicit in the Constitution itself, and upon which the founders were by no means of one mind. See 3 Beveridge, supra note 3, 1-156.

20. 7 U.S. (4 Wheat.) 316 (1819).
constitution we are expounding”21 (and the emphasis falls naturally and usually on that word), can also be read: It is a constitution we are expounding. The tasks of writing and interpreting constitutions are quite different things, not least because drafters must build in flexibility to accommodate unseen future events, while courts interpreting those provisions must apply the generalities to actual and quite specific events as they arise and come before them.

The federal judiciary’s task is to decide the scope of minimal protections of national application; federal courts may say what quality of steel should form the bulkheads and what wood the boats. They may not extend the bulkheads beyond the constitution’s blueprint, or multiply the lifeboats. But the people may—by amending the Federal Constitution or through the design of their individual state constitutions as their chosen judges may construe them. And so they have, though for a long while they largely abdicated this crucial function. This is the process only recently getting underway and with which we are here concerned.

8.

Just about a decade ago, another lawyer and I undertook to examine what we took to be the relative neglect of the Minnesota Constitution and found that in no instance in recent memory had the Minnesota Supreme Court interpreted the state constitution as more protective of individual rights than the federal counterpart22—a conclusion which, I am happy to report, has been rendered a historical curiosity by a line of decisions in which our court has placed Minnesota among those giving vigorous new life to their moribund constitutions.23 It is in fact a remarkable development in so short a period of time, a record of which the judges and lawyers who were involved may justifiably be proud, and which should be an incentive to continuing development.

21. Id. at 407. See also Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (“It is, after all, a National Constitution we are expounding.”).


23. See infra notes accompanying part 18.
9.

The Minnesota Supreme Court had long recognized, but declined to exercise, its power to expand upon federal constitutional protections. When invited to do so, it routinely found the federal doctrine congenial, or at least acceptable, though some interesting dicta and dissents foreshadowed a more individualistic future. 24

10.

Each state's constitution, like its history, its geography, and its people, is unique. Some state constitutions predate the United States Constitution, of course, and these should not be overlooked as a source of light in both state and federal constitutional litigation, 25 just as some guidance may be found in documents as remote as Magna Carta and other English sources.

More immediate history, however, is of greater relevance to construing the constitution that emerged from it. In Minnesota's case, the antecedents are in the Northwest Ordinance of 1787, 26 an instructive document too seldom examined these days, and in the extraordinary conditions that unfolded in the years

24. See, e.g., AFSCME Councils 6, 14, 65 and 96 v. Sundquist, 338 N.W.2d 560, 580 (Minn. 1983) (Yettka, J., dissenting) (equal protection); State v. Willis, 332 N.W.2d 180, 183 n.1 (Minn. 1983) (self-incrimination); State v. Kraft, 326 N.W.2d 840, 841-42 (Minn. 1982) (cruel and unusual punishment); State v. Willis, 320 N.W.2d 726, 727 (Minn. 1982) (standing); State ex rel. Spannaus v. Century Camera, Inc., 309 N.W.2d 735, 738 n.6 (Minn. 1981) (free speech co-extensive); Wegan v. Village of Lexington, 309 N.W.2d 273, 281 n.14 (Minn. 1981) (equal protection); State v. Goar, 295 N.W.2d 635, 634 n.1 (Minn. 1980) (impeachment through the use of pre-arrest silence); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (unreasonable searches and seizures); Kelsey v. State, 283 N.W.2d 892, 896 n.1 (Minn. 1979) (Scott, J., concurring) (due process); Shreve v. Department of Economic Sec., 283 N.W.2d 506, 509 (Minn. 1979) (due process); State v. Olsen, 258 N.W.2d 898, 907 n.14 (Minn. 1977) (right to counsel); Americans United Inc. v. Independent Sch. Dist. No. 622, 288 Minn. 726, 281 N.W.2d 183, 185 (Minn. 1970) (holding the Minnesota Constitution is more restrictive than the establishment of religion clause of the Federal First Amendment); State v. Oman, 261 Minn. 10, 21, 110 N.W.2d 522-23 (1960) (quoting State v. Lakesboro Produce & Hatchery Co., 221 Minn. 246, 265, 21 N.W.2d 792, 800 (1946)) (holding Minnesota Supreme Court not bound to follow "interpretive relaxation[s] of the inhibitions of the Fourteenth Amendment made by the Supreme Court of the United States" when applying state due process clause); Anderson v. City of St. Paul, 226 Minn. 186, 190, 32 N.W.2d 538, 541 (1948) (due process coextensive); Reed v. Bjornson, 191 Minn. 254, 269-70, 253 N.W. 102, 109 (1934) (equal protection coextensive).


before our statehood in 1857. In those days, an obscure slave named Dred Scott resided for a time at Fort Snelling, and an obscure lawyer-politician named Lincoln studied the state of the union with alarm in Springfield, Illinois. Race, slavery and state's rights dominated political intercourse. The Missouri Compromise, the Wilmot Proviso, and the Kansas-Nebraska Act were hopeful, yet cynical, efforts to accommodate irreconcilable differences and to avert inevitable confrontation between states. For her part, Minnesota, then a territory, never embraced slavery, and her statehood was virulently opposed for this reason. She came into the Union, paired with Kansas, in 1858.

It was not a gentle birth. Republicans and Democrats were so hostilely divided at the constitutional convention in 1857 that they refused to meet together. Delegates fought physically as well as verbally. Despite all this, a conference committee eventually drafted a constitution acceptable to both parties.

Or, more accurately, two constitutions were drafted. Although reason had prevailed far enough to bring the parties together philosophically, charity and forgiveness remained in too short supply to bring them together physically. Republicans and Democrats signed separate constitutions. Not least remarkable among the peculiarities of Minnesota's constitution therefore, is that there are two of them—or were, until they were consolidated in the restructuring of 1974.

The two constitutions were virtually identical, but the duality itself is richly symbolic. At its worst, the duality reflects the ugliness of closed-minded partisanship, an almost childish spitefulness more suitable to the playground than to parliamentary chambers. At its best, however, it represents an ability to compromise on substance while retaining the sense and trappings of individuality.

29. Id. at 151-52.
30. Id.
31. Id. at 152.
33. Id. at 297.
11.

It is largely symbolic, but a symbol not to be scorned, that the bill of rights is the very first article of the Minnesota Constitution, whereas the Federal Bill of Rights was not even part of the original Constitution, but was added as a group of amendments in 1791.

12.

Not long after adoption, the Minnesota Supreme Court had occasion to interpret the constitution independently of, and, to a degree, antagonistically to federal law, in *Davis v. Pierse*. Dr. F.A.W. Davis had been involved in a number of complex real estate transactions in St. Paul, before he moved to Mississippi. He began an action in Ramsey County, but the legislature, in 1862, had adopted a statute "suspending the privilege of all persons aiding the rebellion against the United States, of prosecuting and defending actions and judicial proceedings in this state." The defendants claimed that Davis, as a resident of Mississippi, was aiding the rebellion and could not proceed against them in a Minnesota court. This, of course, was about the time Lincoln—in the least palatable of all his actions—suspended the writ of habeas corpus, in response to a national temperament that condoned and even demanded the suspension of liberty as a means for vindicating it.

34. MINN. CONST. art. I.
35. KELLY & HARBISON, supra note 2, at 174-77.
36. 7 Minn. 13, 7 Gil. 1 (1862).
37. *Davis v. Pierse* contains few facts on the underlying case, and discusses only the constitutional issues. *Id.* at 13, 7 Gil. 1. The documents in the remaining file, curiously enough, discuss the real estate transactions at length, but have almost nothing to say of the constitutional question. Therefore, unless documents have been lost, or filed elsewhere, it appears the question was raised and argued orally, not having been joined in pleadings or briefs.
38. *Id.*
39. *Id.* at 15, 7 Gil. at 3 (referencing 1862 MINN. LAWS 61).
40. *Id.*
41. James Russell Lowell wrote:
   Hain't we saved Habus Coppers,
   improved it in fact,
   By suspendin' the Unionists
   "stid of" the Act?
The Minnesota Supreme Court heard arguments three times, "each time by different and learned counsel," who offered "three distinct and elaborate discussions of this question," before the court held the statute unconstitutional. The court acknowledged that it was natural during such a war for any patriotic citizen to believe that anyone engaged in "this traitorous attempt to dismember the republic" should not enjoy the privileges "secured to him only by that government which he has renounced and is striving to subvert."

Davis lays an apt foundation for all later constitutional adjudication. Because it was a decision forged by the most threatening circumstances imaginable to the advocate of state constitutional independence, and because in the everyday practice of law—to our loss—we rarely delve so far back into our fertile history, it is instructive to look closely at the court's reasoning. Such scrutiny is productive because we are largely accustomed to working with the state constitution at all or to giving it the respect it deserves.

The language of the Davis opinion, in the context not only of its times but of our times, is an appropriate inspiration to the enthusiasm of any lawyer who undertakes to apply this body of law. It is, after all, an instance of the state constitution being used as a repository of individual rights against the legislature, against the federal government, against overwhelming public sentiment, and in favor of the least favored of citizens in a time of most acute crisis.

Chief Justice Emmett, writing for the Davis majority, noted:

[T]he very fact that the act was passed under such a state of excitement admonishes us of the necessity of carefully examining its several provisions, lest in our anxiety to punish the guilty authors and abettors of our national troubles, we do far greater injury to ourselves, by forgetting justice and disregarding the wholesome restraints of our fundamental law.

If the state of governmental affairs were always peaceful and quiet, and legislation never attended with undue excitement, many of the restrictions imposed by constitutional governments upon legislative power might be dispensed with as unnecessary; but it is precisely because emergencies will arise,
which, for the time, seem to demand or justify a resort to radical and extreme measures, that these various inhibitions are declared in the fundamental law; and, as extraordinary acts of legislation are seldom resorted to, except when the public exigencies seem to demand them, it may truly be said that these provisions are inserted in constitutions for the very purpose of meeting this plea of necessity. Hence the greater the seeming necessity, or popular demand for such legislation, the greater the danger to be apprehended from yielding to it, and the more imperative the obligation on the part of the courts to square it rigorously by the constitution; as no act in conflict with that instrument can ever become a law, however just, abstractly considered, its provisions may be; or however great and immediate the apparent necessity for such an enactment.46

Thus, the first great principle may be stated as follows: No law in conflict with the constitution is valid, no matter how “abstractly” just or how apparently necessary. Chief Justice Emmett noted that the State Bill of Rights affords “every person [a] certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character,” without exception.47 This broadest of guarantees is not found in the Federal Constitution. The Chief Justice continued:

And why, it may well be asked, should there be an exception? Why should simple justice, as against another, be denied to any citizen, however fallen, degraded or guilty, he may be? The chief end of government is the protection of the rights of all—the bad no less than the good—and, even without a constitutional provision, every member of society may rightfully claim protection of his person and property. To deny it to any one member of society is an injury to the community at large, and none the less so though the sufferer may have committed crimes worthy of imprisonment or death. We would never for one moment suppose that the legislature has the power, under the constitution, to deprive a person, or class of persons, of the right of trial by jury, or to subject them to imprisonment for debt, or their persons, houses, papers, and effects, to unreasonable searches; or their property to be taken for public use without just compensation; and yet neither of these is more sacred to the citizen, or more carefully guarded by the constitution, than the right to have a certain and prompt remedy in the

46. Id. at 16, 7 Gil. at 4 (emphasis added).
47. Id. at 17, 7 Gil. at 5; MINN. CONST., art. I, § 8.
laws for all injuries or wrongs to person, property, or character.

We think that the framers of the constitution intended that there should be no exception to the rule declared in the 8th section of the Bill of Rights, and are of opinion that to admit of one would not only be violative of every principle of justice, but wholly beneath the dignity of a free government. This is a mere question of legislative power under the constitution, and if we once admit that even the rebel or traitor can, in the face of the constitutional provision so often referred to, be deprived of the privilege of suing and defending in our courts, the same consequences may, in the discretion of the legislature, be visited upon criminals of every grade; for there is no line at which the law-making power can be stopped, if once permitted to pass that prescribed by the fundamental law.48

The phrase a "mere question of legislative power" has a nice ironic touch to it, putting the legislature into its proper place in the constitutional scheme of things. This proposition is even more worthy of attention today given the pervasive effect that legislation and regulation have on our lives.

13.

Our constitution also places significant emphasis on the inviolable rights of even the worst person. Our "democratic" belief in "majority rule" often conflicts with the purpose of our constitution. In the end, it is the role of the constitution, and particularly the bill of rights, to protect the rights of the minority, even a minority of one, from the tyranny of the majority. Chief Justice Emmett reflected that "in the end, all must regard as a 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."49

The passage of time has done nothing to dilute this language which leaves little doubt about the potency of the state constitution. We should remember that even in peacetime, it is generally only questions of great public importance that lead to disputes which must be resolved under a constitution.

48. Id. at 18-19, 7 Gil. 1, 6-7 (emphasis added).
49. Id. 23, 7 Gil. at 11.
In some cases the federal and state constitutions are, in fact, coextensive. In these instances, it is entirely proper for the court to follow federal law. It is notable, however, that decisions that do so have often inspired thoughtful and spirited dissents or concurrences.

For example, in State v. Fuller, the court declined to decide whether the state prohibition on double jeopardy is broader than the federal counterpart. In a vigorous dissent, Justice Wahl noted, "[t]hat state constitutional guarantees were 'meant to be and remain genuine guarantees against misuses of the state's governmental powers, truly independent of the rising and falling tides of federal case law.'"

In State v. Murphy, the court held that a confession to a probation officer violated the Federal Constitution. The United States Supreme Court granted certiorari and reversed in Minnesota v. Murphy. On remand, the defendant unsuccessfully argued that the confession violated the Minnesota Constitution. The Minnesota Supreme Court deferred to the United States Supreme Court's ruling and affirmed a murder conviction resulting from the confession.

In State v. Lanam, the court held that use of a child witness's statement did not violate the right to confrontation, relying principally on United States Supreme Court cases. Justice Kelley dissented, joined by Chief Justice Popovich and Justice Yetka. His opinion provides a good example of the type of analysis designed to demonstrate that, even though the federal and state constitutional clauses are facially the same, the right "under the

50. 374 N.W.2d 722 (Minn. 1985).
51. Id. at 727.
52. Id.
54. 324 N.W.2d at 344-45.
55. 465 U.S. at 420.
56. State v. Murphy, 380 N.W.2d 766 (Minn. 1986).
57. Id. Justice Wahl dissented, however, stating that prior state case law failed to support the holding rendered by the Supreme Court. Id. at 773. Note that if the state supreme court's previous ruling had been exclusively under the state and not the Federal Constitution, it would not have been reviewable. Thus, the choice of constitutions had practical consequences for Mr. Murphy who received a life sentence.
58. 459 N.W.2d 656 (Minn. 1990) (Kelley, J., dissenting).
59. Id. at 659.
Minnesota Constitution does have a history independent of the [Federal] Sixth Amendment in cases purporting to construe it. Justice Wahl's dissent in State v. Murphy, performed a similar explanation of self-incrimination law.

In State v. Sorenson, a search and seizure case, the court declined to consider the state constitution on an independent basis because the issue had not been raised in the trial court and was "neither adequately briefed nor litigated." Justice Kelley concurred, adding that he would have reached the same decision under the state constitutional provision, which is "virtually identical" to the Federal Fourth Amendment. This is notable because, in earlier years, the question of a different state result would not have been likely to arise. Now the court is properly conscious of the need for, or at least the desirability of, explaining why the state document does not depart from the federal.

In State ex rel. Humphrey v. Casino Marketing Group, Inc., the court held that restrictions on direct-dial marketing did not violate the state or federal rights to free speech, reaffirming that the state clause provides no greater protection of commercial speech than does its federal counterpart. The decision can be viewed as a commentary on the right to privacy, which was in effect vindicated in its collision with free speech.

60. Id. at 663.
62. 441 N.W.2d 455 (Minn. 1989).
63. Id. at 457. The court recognized, however, that it had the discretion to decide such issues. Id.
64. In relevant part, Justice Kelley stated that:

"In such case, this court will not lightly reject a Supreme Court interpretation of identical, or substantially similar language, nor "cavalierly construe our constitution more expansively than the United States Supreme Court has considered the [F]ederal [C]onstitution." The court historically has not, nor should it, absent unique or distinctive Minnesota conditions, depart from the general principle favoring unanimity merely because of its philosophical rejection of a particular constitutional interpretation emanating from the [F]ederal [S]upreme [C]ourt."

Id. at 460 (Kelley, J., concurring specially) (citation omitted) (quoting State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987)).
65. 491 N.W.2d 882 (Minn. 1992).
66. Id. at 885 n.2; see also State v. Century Camera, Inc., 309 N.W.2d 735, 738 n.6 (Minn. 1981) (stating that protection of commercial speech is no more extensive under state constitution than under Federal First Amendment).
The right to privacy is poised for growth under the Minnesota Constitution. The court has described it as an "emerging" doctrine. A general right to privacy has been recognized, but its contours remain to be delineated for both civil and criminal purposes and this may affect such diverse concerns as tort law, admissibility of evidence in criminal cases, abortion and other health-related procedures, and public access to data held in government files and computers.

In State v. Gray, the Minnesota Supreme Court reversed the district court to hold that the state sodomy law did not violate the right to privacy under the Minnesota Constitution, following a then recent United States Supreme Court decision under federal law. The state supreme court held for the first time that a right of privacy is embodied in the state constitution, but declined to find that "the right of consenting adults to engage in private sexual conduct within the privacy of the home [is a] fundamental right." Noting that the contact leading to the acts in question began in public and that it was a case of "sex for compensation," the court expressed its fear that to affirm could lead to invalidating laws against prostitution.

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68. Price v. Sheppard, 307 Minn. 250, 256-57, 239 N.W.2d 905, 910 (1976) (stating that more than just a bare conclusion concerning the presence or absence of the right to privacy is required due to its importance).
69. See State v. Gray, 413 N.W.2d 107 (Minn. 1987).
71. State v. Bates, 507 N.W.2d 847 (Minn. Ct. App. 1993) (holding that evidence of sexual preference is admissible only when it is relevant to the charged crime).
72. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986) (holding that Minnesota's wrongful death statute does not violate the constitution with regard to the right to abortion).
74. 413 N.W.2d 107 (Minn. 1987).
75. Id.
77. Gray, 413 N.W.2d at 111.
78. Id. at 113.
79. State v. Gray, 413 N.W.2d 107, 114 (Minn. 1987). The court elaborated by stating that:
Since we hardly suspect the court of homophobia, and its emphasis here is emphatically on commercial sex, its expressed reluctance to the phrase “debase both the Constitution and the concept of fundamental rights”\textsuperscript{80} must be supposed to mean simply that sex-for-hire is not a fundamental right in Minnesota, not necessarily that other private conduct, sexual or otherwise, may not be. Indeed, in an unusual coda the court seemed to recognize that further assertions of the right to privacy are to be expected, even encouraged.\textsuperscript{81}

16.

The right to privacy is also a vivid example of an area where constitutional law—as well as statutory and common law—must adapt to rapid technological development. Justice Jackson wrote: “The greatest expounders of the Constitution, from John Marshall to Oliver Wendell Holmes, have always insisted that the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events.”\textsuperscript{82} Indeed, in what appears only superficially to be a paradox, Marshall captured what might be called the indispensable lasting-changing

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, 174 (1941).
nature of constitutional material when he wrote: "This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." The Federal Constitution is an organic superstructure whose boundaries are molded by the United States Supreme Court within these broad and rather glacially changing limits; the state organism grows according to the wisdom of state judges.

17.

This is not to say, of course, that a state constitution is infinitely malleable. It is, after all, a constitution, written to endure by reasonable adaptability to changing conditions. It can be facially altered only by amendment, a cumbersome and uncertain process not to be over-encouraged. The pressure for change, which ultimately leads to widespread sentiment for amendment, can only be deflated by judicial construction of existing provisions. To an extent, then, appellate judges should see the constitution as a prospective device, anticipatory of and adaptable to future developments. Judges should ask not only what the drafters intended by a particular word or phrase, but also what would they, or like minded persons, intend—what language would they use—faced with today's conditions?

18.

Some cases, of course, involve construction of the state constitution without reference to its federal counterpart, especially where there is no identical or comparable provision in the United States Constitution. The cases that follow illustrate how Minnesota state courts have construed the state constitution without the help, or hindrance, of federal constitutional guidance.

State v. Krejci, for example, involved construction of the Minnesota Constitution's criminal trial venue clause, which requires a jury trial in the district where the crime occurred. The majority found no violation of the clause in a statute allowing a child abuse trial in the county where the child is found. Justice

84. 458 N.W.2d 407 (Minn. 1990).
85. MINN. CONST., art. I, § 6.
86. Krejci, 458 N.W.2d at 412.
Kelley dissented, stating that the constitutional language required a contrary result "[a]bout as clearly as it could be stated."\(^{87}\) The majority's holding apparently did not result from deference to a federal provision or construction.

In *Rice v. Connolly*,\(^{88}\) the Minnesota Supreme Court had occasion to construe a 1982 amendment to the Minnesota Constitution which authorized pari-mutuel wagering.\(^{89}\) The *Rice* court held that the amendment did not allow "off track" forms of betting and thus the legislation doing so was invalid.\(^{90}\)

In *Wegner v. Milwaukee Mutual Insurance Co.*,\(^{91}\) reversing the court of appeals, the Minnesota Supreme Court construed article I, section 13 of the state constitution to allow compensation to a homeowner whose property was damaged by police intrusion while attempting to apprehend an armed suspect.\(^{92}\)

In *Castor v. City of Minneapolis*,\(^{93}\) the Minnesota Supreme Court also construed the property-taking doctrine under article I, section 13 of the Minnesota Constitution.\(^{94}\) The court held that, in certain circumstances, the building of a skyway is a compensable taking by the city,\(^{95}\) relying exclusively on Minnesota case law construing the Minnesota Constitution.\(^{96}\)

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87. *Id.* at 414 (Kelley, J., dissenting); *see also* State v. Hanson, 285 N.W.2d 483, 485-86 (Minn. 1979) (finding venue under federal and state constitutions proper in any county where any element of the crime was committed).

88. 488 N.W.2d 241 (Minn. 1992).

89. *Id.* at 242.

90. *Id.* at 247-48. The court restated these basic principles of constitutional construction:

The rules governing the courts in construing articles of the State Constitution are well settled. The primary purpose of the courts is to ascertain and give effect to the intention of the Legislature and people in adopting the article in question. If the language used is unambiguous, it must be taken as it reads, and in that case there is no room for construction. The entire article is to be construed as a whole, and receive a practical, common sense construction. It should be construed in the light of the social, economic, and political situation of the people at the time of its adoption, as well as subsequent changes in such conditions.

*Id.* at 247 (citations omitted).

91. 479 N.W.2d 38 (Minn. 1991); *see also* Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433 (1994).

92. *Id.* at 39. The police fired at least 25 rounds of tear gas into the defendant's house during the confrontation. *Id.* In addition, the police cast three concussion or "flash-bang" grenades into the house to confuse the suspect. *Id.* Appellant estimated damages of $71,000 to her home as a result of the police department's activities. *Id.*

93. 429 N.W.2d 244 (Minn. 1988).

94. *Id.* at 245-46.

95. *Id.* at 246.

96. *Id.* at 245-46.
19.

Of greater interest and perhaps more gratifying are the cases where courts have recognized protections in the Minnesota Constitution which are greater than those found in the Federal Constitution. *Jarvis v. Levine*\(^97\) addressed a significant state issue involving a Minnesota resident committed to an institution pursuant to state law,\(^98\) and held that compelled administration of drugs without prior judicial approval violates the right to privacy under the Minnesota Constitution.\(^99\) The court held that it was not bound by a United States Supreme Court case concerning patients’ rights,\(^100\) and decided the case exclusively under the state constitution.\(^101\)

*In re Schmidt*,\(^102\) also involved the subject of involuntary administration of drugs to the mentally ill,\(^103\) and held that a statutory amendment satisfied the due process and privacy criteria of *Jarvis* under the state constitution.\(^104\) The court also stated that an equal protection argument had not been raised at trial and, therefore, was not reviewable.\(^105\)

In *State v. Hamm*,\(^106\) the court held a statute allowing six-member juries in non-felony cases to be a violation of article I, section 6 of the Minnesota Constitution.\(^107\) This was required by a previous case where the court construed the phrase “impartial jury”

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\(^97\) 418 N.W.2d 139 (Minn. 1988).

\(^98\) Id. at 140-50.

\(^99\) Id. at 150. This advancement starkly contrasts with the court’s holding in *Price v. Sheppard* in which only the Federal Constitution was considered. See *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976) (holding involuntary drug treatment not intrusive per se and thus, not requiring premedication judicial review). In *Price*, no indication was given as to why the case was decided solely under the Federal Constitution. One may surmise, however, that the parties failed to raise the state constitutional issues.

\(^100\) See *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that professional judgments are entitled to a presumption of validity).

\(^101\) 418 N.W.2d at 147.

\(^102\) 443 N.W.2d 824 (Minn. 1989).

\(^103\) Id.

\(^104\) Id. at 830. The court’s review of MINN. STAT. § 253B.03(6) (a), entitled “Administration of neuroleptic medication,” resulted in a finding that Mr. Schmidt’s right of privacy was not violated. *Schmidt*, 443 N.W.2d at 830.

\(^105\) *Schmidt*, 443 N.W.2d at 828 n.7.

\(^106\) 423 N.W.2d 379 (Minn. 1988).

\(^107\) Id. at 836. The court struck down MINN. STAT. § 593.01(1) as unconstitutional. The statute read as follows:

> Notwithstanding any law or rule of court to the contrary, a petit jury is a body of six men or women, or both, impaneled and sworn in any court to try and determine; by a true and unanimous verdict, any question or issue of fact
to mean a jury of twelve. The change was short-lived, however, because article I, sections 4 and 6 were amended later that same year, authorizing juries of less than twelve, but not less than six, in civil and non-felony cases.

In *State v. Hershberger*, on remand from the United States Supreme Court, the Minnesota Supreme Court held a statute requiring display of a slow-moving vehicle emblem violated Amish persons' freedom of conscience rights under article I, section 16 of the Minnesota Constitution. The court explicitly and commendably chose this course rather than to apply a United States Supreme Court decision of uncertain meaning.

Another case of unusual interest in several respects is *State v. French*. The central holding is relatively narrow: the Minnesota Human Rights Act does not forbid a private person, on religious principles, from refusing to rent to an unmarried, cohabiting couple. Justice Yetka for the majority, however, undertook to explicate the Minnesota Constitution's religious liberty clause, article I, section 16, and the preamble, even though the appellant had relied principally on the Federal Constitution. Citing historical as well as textual reasons for finding this clause of special importance in the state, as compared with the Federal First Amendment, the majority detected a "more stringent burden on the state" and "more protection of religious freedom."

in a civil or criminal action or proceeding, according to the law and the evidence as given them in court.

*Hamm*, 423 N.W.2d at 386.


110. Id.

111. 462 N.W.2d 393 (Minn. 1990).

112. Id. at 397.

113. Id. at 396. Notably, this approach stands in contrast to that of State v. Sports and Health Club, 370 N.W.2d 844 (Minn. 1985), which relied on both the state and federal constitutions.

114. 460 N.W.2d 2 (Minn. 1990).


117. Id. at 8 (stating that Minnesota Constitution grants greater protection of religious freedom than does the Federal Constitution).

118. Id. at 10. In impassioned language, Justice Yetka wrote:

It appears that we have now reached the stage in Minnesota constitutional law where the religious views of a probable majority of the Minnesota citizens are being alleged by a state agency to violate state law. Today we have a department of state government proposing that, while *French* has sincere religious beliefs and those beliefs are being infringed upon by the Human Rights Act,
The court found insufficient "compelling" interests to justify the state's intrusion upon the landlord's religious liberty, bolstering this argument by an animated defense of the institution of marriage. Interestingly, the privacy interest of the renters and the doctrine of equal protection were not discussed, apparently not having been urged by counsel, or perhaps not urged with sufficient persuasion.

Justice Simonett concurred in the result but did not believe the constitutional question need be raised since construction of the statute disposed of the case. Chief Justice Popovich, joined by Justices Wahl and Keith, dissented and would have found the landlord in violation of the statute.

In Friedman v. Commissioner of Public Safety, the court held that a motorist has a limited right under the Minnesota Constitution to consult counsel before being subjected to a blood test. The opinion traces the history of the right to counsel in Minnesota, vis à vis federal law that the court had earlier applied to reach a contrary result in Nyflot v. Commissioner of Public Safety. The court overruled Nyflot, stating that what had changed since then was not the membership of the court, but rather, "the development of state constitutional law." The court further stated that state courts are returning to the practice of protecting individual liberties, as intended by the colonists before the United States

the state, nevertheless, has an interest in promoting access to housing for cohabiting couples which overrides French's right to exercise his religion.

Respondent characterizes the state's interest as "eliminating pernicious discrimination, including marital status discrimination." We are not told what is so pernicious about refusing to treat unmarried, cohabiting couples as if they were legally married. The state does not even attempt to reconcile this notion with this court's express recognition of the "preferred status" of the institution of marriage . . . .

Id.119. State v. French, 460 N.W.2d 2, 10-II (Minn. 1990).
120. Id. at 11 (Simonett, J., concurring).
121. Id. at 11-21 (Popovich, C.J., Wahl & Keith, J.J., dissenting) (arguing that federal and state protection for religious freedom are overridden by state's interest in preventing marital discrimination that is prima facie violation of the Minnesota Human Rights Act). The French decision demonstrates the need for vigorous advocacy of state constitutional issues, in a context where two or more provisions appear to collide. We may wonder, had equal protection and privacy been strongly asserted, would the result of this very close decision have changed?
122. 473 N.W.2d 828 (Minn. 1991).
123. Id. at 837.
124. 369 N.W.2d 512 (Minn. 1985).
125. Friedman, 473 N.W.2d at 835-36 (emphasis added).
Supreme Court existed. The court articulated its rationale by noting that "[i]n recent years, as the United States Supreme Court has retrenched on Bill of Rights issues, state courts have begun to interpret expansively the rights guaranteed under their own state constitutions."

Equal protection, which is not explicit in the state constitution, unlike the federal counterpart, was construed independently in State v. Russell, to strike down a statute punishing crack cocaine offenses more severely than ordinary cocaine crimes because of its disproportionate enforcement against black defendants. The decision and dissent also refer to a question of substantive due process. The decision in State v. Russell resulted in an amendment to Minnesota's controlled substance statute.

In re E.D.J. represents the extremely interesting phenomenon of a state court departing from a federal constitutional position by construing an identical provision in reliance on its own precedents. In E.D.J., reversing the court of appeals, the Minnesota Supreme Court explicitly declined to follow the United States Supreme Court's restrictive holding in California v. Hodari regarding when a seizure occurs. Instead, the court adhered to its earlier cases construing the identical language of article I, section 10 of the Minnesota Constitution. The court reiterated its concise description of the principles governing state departures from federal law.

The various rationales for state constitutional decisions are sometimes denominated as: (a) the "primacy" or "self-reliant"
approach, in which priority is given to the state constitution regardless of language in or construction of the federal;\textsuperscript{137} (b) the "interstitial" or "reactive" approach, which looks first to federal law as a "settled floor of rights" and then asks "whether and how to criticize, amplify, or supplement" it for state purposes;\textsuperscript{138} or (c) the "lock-step" approach, which essentially adopts a settled federal position with little or no debate or elaboration.\textsuperscript{139} We might call this last the "grudging" position, found usually in dissents or concurrences in which a judge marshals all available arguments against expanding a federal right, while ostensibly recognizing the state's power to do so.\textsuperscript{140}

21.

The primacy model is the most appealing to the devotee of the state constitution, but it is surely unwise to be willfully blind to the reasoning of the United States Supreme Court, particularly where the language under consideration is the same. At the very least, that Court provides an instructive starting point. Having done that, the question becomes: What considerations will encourage or support a departure? The test need not, and should not, be a stringent one, but unless we have only contempt


\textsuperscript{138} See Developments, supra note 134, at 1362.

\textsuperscript{139} See Rita Coyle DeMeules, Minnesota's Variable Approach to State Constitutional Claims, 17 WM. MITCHELL L. REV. 163, 179 (1991). With disapproval, the author suggests that the Minnesota Supreme Court's approach to many constitutional issues is lock-step and that the court undervalues the cases in which it has demonstrated independence. \textit{Id.} California, a state that has frequently amended its constitution by the proposition method, lock-stepped itself to federal law on the exclusionary rule by this route in 1972, via Proposition 18. \textit{See Cal. Const.} art. I, \S 13.

\textsuperscript{140} For vivid examples, see Justice Coyne's dissents in State v. Russell, 477 N.W.2d 886, 895 (Minn. 1991) (Coyne, J., dissenting) (arguing that the judicial branch has no inherent authority to set the terms or conditions of punishment for a criminal act) and Friedman v. Commissioner, 475 N.W.2d 828, 838 (Minn. 1991) (Coyne, J., dissenting) (arguing that the court's role is to determine whether a statute has met minimum constitutional requirements, not to question the wisdom of the statute itself). Compare these cases with her majority opinion in State \textit{ex rel.} Humphrey v. Casino Mktg. Group, Inc., 491 N.W.2d 882 (Minn. 1992), \textit{cert. denied}, 113 S. Ct. 1648 (1993) which contains a balancing of the rights to free commercial speech and privacy. 491 N.W.2d at 883-92. In \textit{Casino Mktg. Group}, Justice Coyne favors the latter, partly on the basis of the state's objective of protecting residential privacy, but with little apparent attention to, or analysis of, a state \textit{constitutional} right of privacy as such. \textit{Id.} at 886-87. The opinion primarily rejects protection for a form of speech but may be a sleeper, perhaps unintentionally so, on the issue of privacy.
for the federal courts it makes no sense to disregard the reasoning that brought them to a given result.

It also makes little sense to attach constricting labels to one's position on the approach generally. State judges who understand the powers they possess, and the corresponding limits on them, need only pursue what is most probably the best, fairest interpretation. As Chief Justice Marshall recognized: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 141

22.

While it is true that the resources available to the United States Supreme Court, and to the parties and advocates who appear there, are generally more ample than in most cases in lower courts, there is nothing to prove that justices of that Court are any wiser, or lawyers any abler, or parties any more deserving, or issues necessarily any more important. By the same token, although the genius of the founding fathers remains an accepted notion in American history, even in our cynical times and assuming its truth, this does not mean that the authors of state constitutions were any less equal to their tasks. The latter had the mission and advantage, as do state judges, of being able to focus upon local conditions, history, and prospects, rather than having to be concerned always to write for nationwide application. Thus the states may learn from the lessons of federal history and federal law, but they should be neither intimidated by them nor blinded to their own needs, privileges and opportunities.

23.

The laboratory of state constitutional development, like any forum for invention, invites innovation, and although prudence is naturally indicated, state courts should not be inhibited in their experimentation. As Justice Holmes observed, "constitutional law like other mortal contrivances has to take some

chances, and in the great majority of instances, no doubt, justice will be done." 142

24.

The inbred tendency to worship the federal founders and their Constitution uncritically should be corrected by the realization that they embraced slavery, 143 and denigrated the equal status of women 144 and Native Americans. 145 It matters little whether institutionalized injustices are attributed to moral shortcomings, or to the radically different tenor of the times. Either way, these are enormous and indelible defects which undermine an argument for the absolute force of the United States Constitution, and especially for the "original intent" of the founders. Even at that time some states were more enlightened, and if states could and can do better in those important areas, they could and can do better in others as well.

25. The sources to which judges may look, and the factors they may consider, in reaching state constitutional conclusions are manifold 146 and include: (a) the specific language of the state constitution; 147 (b) the comparable language of the Federal Constitution, if any; 148 (c) the apparent reasons for any difference; (d) comparable language in other state, or even foreign, constitutions; 149 (e) history of the state constitution, 150 which in Minnesota is relatively sparse as compared to the federal or other states' literature; 151 (f) earlier state statutes and deci-

143. See U.S. CONST. art. I, § 2, amended by U.S. CONST. amend. XIII; U.S. CONST. art. IV, § 2, cl. 3, amended by U.S. CONST. amend. XIV.
144. The nineteenth amendment, assuring women the right to vote, was not adopted until 1920. U.S. CONST. amend. XIX.
147. Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993).
149. State v. Findling, 123 Minn. 413, 416, 144 N.W. 142, 143 (1913).
150. State v. Sorenson, 441 N.W.2d 455, 460 (Minn. 1989).
151. See Anderson, supra note 25, at 113. The author states:
sions;\textsuperscript{152} (g) differences in the structures of federal or other state constitutions;\textsuperscript{153} (h) conditions or concerns, unusual in or peculiar to the state—including, as we have suggested, geography, climate, ethnicity, public attitudes, tradition and mores;\textsuperscript{154} (i) what appears to be most in accord with the general principles of the state constitution, expressed in its preamble—to perpetuate the blessings of “our civil and religious liberty to ourselves . . . and our posterity,”\textsuperscript{155} and (j) what best gives meaning to the extraordinary and potentially fertile language, not found in the Federal Constitution, of article I, section 8: “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.”\textsuperscript{156} It was this mandate the Minnesota Supreme Court applied so long ago in \textit{Davis v. Pierse}.\textsuperscript{157}

26.

It is one of the nice ironies of history that, in the arena of state constitutional law, the label of “states’ rights” attaches more often to the posture of traditionally liberal civil libertarians than to the conservative or reactionary schools with whom that term is usually associated. Slavery, always the great anomaly in our history, all but eternally tainted the notion of states’ rights by its perverse insistence upon the right of state governments to resist the federal government to the utter detriment of certain innocent individuals, which is now the very reverse of the state constitutional mission.

\textsuperscript{[I]}t is impossible to escape the conclusion that the debates in the two wings of the Minnesota constitutional convention have for legal purposes far less value than is ordinarily the case with constitutional debates. It is clear from what the members of the compromise committee said in reporting their final conclusions to the several conventions, that they worked somewhat independently of both conventions.

\textit{Id.}

\textsuperscript{152} State v. Davidson, 481 N.W.2d 51, 57 (Minn. 1992).

\textsuperscript{153} O’Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979).

\textsuperscript{154} Sorenson, 441 N.W.2d at 460.

\textsuperscript{155} MINN. CONST. pmbl.

\textsuperscript{156} MINN. CONST. art. I, § 8 (emphasis added).

\textsuperscript{157} 7 Minn. 1 (1862); \textit{see supra} notes 34-44 and accompanying text. \textit{See also Magna Carta}, Section 40.
The initial responsibility, and opportunity, for the elaboration of state constitutional law generally lies not with judges, but with lawyers, and principally with trial lawyers. Excepting those infrequent occasions where a reviewing court interjects an issue sua sponte, or where appellate counsel successfully raises a question for the first time on appeal, law is made at the end of a process which begins in the lower courts. This process is favored because it allows the most complete debate on an issue, focused upon the most immediate facts of the particular case.

Reviewing courts may, and often do, refuse to consider questions which have not been decided below. If, however, trial lawyers are providing competent representation, they should be the first to identify and assert any rights, constitutional or otherwise, to which their clients are even arguably entitled. The relative paucity of state constitutional decisions must therefore be attributed to the failures of the trial bar, a failure for which several reasons may account, two in particular.

First, law schools have traditionally emphasized the federal as opposed to the state constitution. Until recently the United States Supreme Court’s decisions have virtually monopolized the field of Constitutional Law; this failure, therefore, is unremarkable. Second, trial lawyers are, for better or worse, often concerned only with the immediate facts and procedural intricacies of a given case and fail to undertake the innovative conjecture that is required for development of new constitutional territory. Thus, it is not surprising that the majority of cases make their way through the system within the confines of federally settled constitutional doctrine. Only very slowly has this pattern begun to change.

Trial lawyers must ask: Is a constitutional question implicated in a given situation? If so, they must further ask whether it has been decided under the Federal Constitution. Conversely, if no such question is implicated, trial lawyers must ask if constitutional doctrine can be extended to meet the present circumstances. Finally, the advocate must inquire whether the state constitution may provide a different result even though the question has been decided adversely under the Federal Constitution. In a very real sense, virtually any constitutional right or privilege, regardless of whether it has gone unrecognized or even been
rejected by the federal courts, may emerge from a state constitution.

Because of the traditional predominance of federal pronouncements, the relative ease in simply following them deferentially, and the bar's ignorance of or indifference to the independent potency of their state constitutions, state courts have too rarely been invited to fashion autonomous state doctrine. As a result, state decisions too often merely parrot federal learning. Nonetheless, even where this has occurred it need not be left to rest. State decisions are more easily overruled than those of the United States Supreme Court, particularly if new or more persuasive arguments, sometimes based upon changing conditions, can be presented.

Lawyers have the exciting opportunity and responsibility for raising the issues. This responsibility is highest among criminal defense lawyers who are, or should be, most alert to constitutional nuances and who should be most innovative in the field. Unfortunately, they have been conspicuously absent from the bench.

State trial judges have the power and the splendid privilege of deciding these questions in the first instance. They may do so *sua sponte* and should be encouraged to interject the state constitution where the parties and counsel have overlooked it and where it is appropriate to do so. It is not presumptuous to suggest that new state judges should be educated in the intricacies of state constitution law.

Ultimately, it is the state appellate judges to whom the rare privilege of making constitutional law falls. One would imagine this to be the most rewarding of judicial labors. Only a handful of men and women even attain the positions which carry this authority. Since these decisions are beyond the authority of federal courts to review, and beyond the power of the legislature to impair, they must, of course, be principled. But since the nature of the power itself can only be used to expand constitutional rights and privileges, they present ordinarily only opportunities


159. See State v. Clausen, 493 N.W.2d 113, 117 (Minn. 1992) (citing Herb v. Pitcairn, 324 U.S. 117 (1945)).
for doing good—except in the eyes of those who see expansion of personal liberties as evil. One can scarcely conceive of an area of judicial activity where so much benefit is likely to flow from innovations involving so little risk of doing harm.

29.

It is important for the issue to be framed and decided specifically and exclusively on state constitutional grounds. If a state court decision involves an interpretation of federal law, or rests upon both federal and state constitutional grounds, it is ordinarily reviewable in the federal courts. But if a state court explicitly decides a question under adequate and independent state constitutional principles the federal courts have no authority to interfere with it—provided, of course, that the decision does not diminish or conflict with federal constitutional desiderata. Therefore counsel should urge the court to “make clear by a plain statement” that any reference to federal law in an opinion is “only for the purpose of guidance,” that those authorities do not “compel the result that the court has reached,” and the decision should indicate “clearly and expressly” that it is based on “bona fide separate, adequate, and independent” state constitutional grounds. 160

30.

Justice Brennan, as long ago as 1977, wrote in what should be taken as an admonition to members of the bar, and certainly an invitation to state judges: “I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.” 161 Justice Robert Jones of Oregon has gone so far as to

160. Michigan v. Long, 463 U.S. 1032, 1041 (1983). For an example of a state court very carefully following this safeguard, see State v. Carter, 370 S.E.2d 553 (N.C. 1988), where the state declined to find itself bound under the state constitution by the United States Supreme Court’s holding in United States v. Leon, 468 U.S. 897, 905 (1984) (creating the so-called “good faith” exception to the fourth amendment’s exclusionary rule).

suggest that a lawyer who fails to invoke the state constitution “should be guilty of malpractice.”

The Minnesota lawyer who is also a student of the state constitution should always have in mind at least these facial particulars in which the state version differs from the Federal Constitution: (a) the emphasis on religious liberty and the prohibition of the use of state funds for religious purposes; (b) the several guarantees of trial by jury; (c) the expansive free speech provision; (d) the “rights of conscience” guarantee; (e) the broader bail provisions; (f) the plenary guarantee of a remedy for redress of injuries, including those to “character”; (g) the insistence upon the right to obtain justice “freely and without purchase, completely and without denial”; (h) the explicit prohibition upon imprisonment for debt; (i) the subordination of the military power together with the omission of the federal right to bear arms; (j) the exclusion of slavery; (k) the preferred place of the Bill of Rights at the outset of the state constitution, and (l) the emerging right of privacy, which is not explicit in either Constitution. These areas represent a cornucopia of potential liberties, but they remain latent until lawyers and judges give them life.

31.

In his poem “The Road Not Taken,” Robert Frost speaks of coming upon two diverging roads in a wood where, after some reflection:

I took the one less traveled by,
And that has made all the difference.

163. See Minn. Const. pmbl.; Minn. Const. art. I, § 16.
165. Id. § 3.
166. Id. § 16.
167. Id. §§ 5, 7.
168. Id. § 8.
170. Id. § 12.
171. Id. § 13.
172. Id. § 2 (pre-dating the Federal Thirteenth Amendment).
173. Id.
174. See Steenson, supra note 67, at 383.
175. Robert Frost, The Road Not Taken, in Modern Poetry 114 (Maynard Mack et al., eds. 1961).
These well-known words are often taken as an exhortation to individuality, and so they are, but in their context they are more circumscribed than the license for rebellion they are sometimes taken to be. The two roads in the poem are, in fact, very similar; the one the speaker takes is only marginally less traveled; and the speaker reckons he may come back and take the other some day.176

The enduring potency and wonderful suggestiveness of this little poem resides, in large part at least, in its quietness and even its ambiguity. The reader is more likely to take that path because he is invited rather than pushed down it, and reassured that the absence of an unequivocal reason for preference is no obstacle. Implicitly no great danger lurks at its end. But the choice makes "all the difference."177

So in questions of state constitutional law, when we encounter a fork in the road the better-worn federal path has its immediate appeal and may seem safer or shorter, (otherwise why would more travelers have taken it?), but the other tempts the adventurer in us, even the reformer, and so long as we see no insurmountable obstacles along it, we may take it with the anticipation that particular rewards await. The stakes are not so high that we need fear disaster, and the choice may make a salutary difference.

176. Frost says:
   Oh, I kept the first for another day!
   Yet knowing how way leads on to way,
   I doubted if I should ever come back.

   Id.

177. Id.
A state constitutional provision or issue may be related to the Federal Constitution in one of several ways: (a) both constitutions may have identical provisions, as in the search and seizure sections;\(^{178}\) (b) each may have similar language with more or less unimportant differences, as with freedom of speech;\(^{179}\) (c) one may have an identical provision, but additional language on the point as well, as in the jury trial and bail provisions;\(^{180}\) or (d) one may have language altogether absent from the other, as in Minnesota's redress of injuries or wrongs, and freedom of conscience and religion sections.\(^{181}\)

Although under the preferable "primary" approach one looks first to the state document, it is neither realistic nor desirable to ignore altogether the federal provisions and their construction, particularly when they are identical or closely similar. By the same token, however, deference to the Federal Constitution is obviously impossible where the state provision is entirely different, and the very fact that other areas coincide lends particular force to the state language when they do not. It therefore becomes important, and is certainly instructive, to place the documents side-by-side, to identify the differences, and thereby to suggest areas of especial potential in the Minnesota version.

The Federal Bill of Rights\(^ {182}\) comprises a series of amendments that follow, physically as well as chronologically, the body of the Federal Constitution. The Minnesota Bill of Rights is the first article of the state constitution, suggesting its particular importance. There are naturally many differences between state and federal provisions relating to the branches and form of government, taxation, and boundaries. Matters of local and public concern generally involve no conflict between state and federal provisions. We are here concerned with individual rights, and our attention is therefore principally to the bills of rights. Following is a comparison of the Minnesota Bill of Rights and the federal counterparts.

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178. Minn. Const. art. I, § 9; U.S. Const. amend. IV.
179. Minn. Const. art. I, § 3; U.S. Const. amend. I.
180. Minn. Const. art. I, §§ 4, 5, 7; U.S. Const. amends. VI, VIII.
182. U.S. Const. amend. I-X.
PREAMBLE

MINNESOTA
We the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution. 183

U.S.
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. 184

SEC. 1 - OBJECT OF GOVERNMENT

MINNESOTA
Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good. 185

U.S.
No similar provision, but compare with preamble, supra and also with:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. 186

SEC. 2 - RIGHTS AND PRIVILEGES

MINNESOTA
No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted. 187

183. MINN. CONST. pmbl.
185. MINN. CONST. art. I, § 1; see also MINN. CONST. pmbl.; MINN. CONST. art. IX (amending process).
186. U.S. CONST. amend. IX.
U.S.
[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 188

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. 189

**SEC. 3 - LIBERTY OF THE PRESS**

**MINNESOTA**
The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right. 190

U.S.
Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

**SEC. 4 - TRIAL BY JURY**

**MINNESOTA**
The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours’ deliberation, is a sufficient verdict. The legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members. 191

U.S.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . . 192

188. U.S. CONST. amend. XIV, § 1.
190. MINN. CONST. art. I, § 3.
192. U.S. CONST. amend. VI.
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.193

SEC. 5. - NO EXCESSIVE BAIL OR UNUSUAL PUNISHMENTS

MINNESOTA

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.194

U.S.

Identical with the exception that the "or" is replaced by "and."195

SEC. 6 - RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

MINNESOTA

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and causes of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.196

U.S.

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compel-

193. U.S. CONST. amend. VII.
194. MINN. CONST. art. I, § 5.
195. U.S. CONST. amend. VIII. But see MINN. CONST. art. I, § 7, to which no comparable federal counterpart exists. "All persons . . . shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Id.
196. MINN. CONST. art. I, § 6 (amended pursuant to 1988 MINN. LAWS, ch. 716, in response to State v. Hamm, 423 N.W.2d 379, 380 (Minn. 1988)).
sory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.\textsuperscript{197}

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.\textsuperscript{198}

\textbf{SEC. 7 - DUE PROCESS; PROSECUTIONS; DOUBLE JEOPARDY; SELF-INCRIMINATION; BAIL; HABEAS CORPUS}

\textbf{MINNESOTA}

No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended unless the public safety requires it in case of rebellion or invasion.\textsuperscript{199}

\textbf{U.S.}

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.\textsuperscript{200}

No State shall . . . deprive any person of life, liberty or property without due process of law . . . .\textsuperscript{201}

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.\textsuperscript{202}

\textsuperscript{197} U.S. Const. amend. VI.
\textsuperscript{198} U.S. Const. art. III, § 2, cl. 3.
\textsuperscript{199} Minn. Const. art. I, § 7.
\textsuperscript{200} U.S. Const. amend. V.
\textsuperscript{201} U.S. Const. amend. XIV, § 1.
\textsuperscript{202} U.S. Const. art. I, § 9, cl. 2.
SEC. 8 - REDRESS OF INJURIES OR WRONGS

MINNESOTA
Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws. 203

U.S.
No comparable provision, but compare with:

Congress shall make no law . . . abridging the . . . right of the people peaceably to assemble, and to petition the Government for a redress of grievances. 204

SEC. 9 - TREASON DEFINED

MINNESOTA
Treason against the state consists only in levying war against the state, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. 205

U.S.
Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. 206

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. 207

SEC. 10 - UNREASONABLE SEARCHES AND SEIZURES PROHIBITED

MINNESOTA
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

204. U.S. Const. amend. I.
207. U.S. Const. art. III, § 3, cl. 2.
particularly describing the place to be searched and the persons or things to be seized.  

U.S. Identical.  

SEC. 11 - ATTAINDERS, EX POST FACTO LAWS AND LAWS IMPAIRING CONTRACTS PROHIBITED

MINNESOTA

No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

U.S.

No Bill of Attainder or ex post facto Law shall be passed.

No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts ... .

SEC. 12 - IMPRISONMENT FOR DEBT; PROPERTY EXEMPTION

MINNESOTA

No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

U.S.

No comparable provision.

209. U.S. Const. amend. IV.
211. U.S. Const. art. I, § 9, cl. 3.
212. Id. § 10, cl. 1.
SEC. 13 - PRIVATE PROPERTY FOR PUBLIC USE

MINNESOTA

Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.\textsuperscript{214}

U.S.

[N]or shall private property be taken for public use without just compensation.\textsuperscript{215}

SEC. 14 - MILITARY POWER SUBORDINATE

MINNESOTA

The military shall be subordinate to the civil power and no standing army shall be maintained in this state in times of peace.\textsuperscript{216}

U.S.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.\textsuperscript{217}

SEC. 15 - LANDS ALLODIAL; VOID AGRICULTURAL LEASES

MINNESOTA

All lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited. Leases and grants of agricultural lands for a longer period than 21 years reserving rent or service of any kind shall be void.\textsuperscript{218}

U.S.

No comparable provision, but compare with:
No state shall . . . grant any Title of Nobility.\textsuperscript{219}

SEC. 16 - FREEDOM OF CONSCIENCE; NO PREFERENCE TO BE GIVEN TO ANY RELIGIOUS ESTABLISHMENT OR MODE OF WORSHIP

MINNESOTA

\begin{itemize}
\item \textsuperscript{214} Id. § 13.
\item \textsuperscript{215} U.S. Const. amend. V.
\item \textsuperscript{216} Minn. Const. art. I, § 14.
\item \textsuperscript{217} U.S. Const. amend. II.
\item \textsuperscript{218} Minn. Const. art. I, § 14.
\item \textsuperscript{219} U.S. Const. art. I, § 10, cl. 1.
\end{itemize}
The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.  

U.S. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.  

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.  

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

SEC. 17 - RELIGIOUS TESTS AND PROPERTY QUALIFICATIONS PROHIBITED

MINNESOTA

No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.

U.S.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.  

221. U.S. Const. amend. I.  
222. U.S. Const. amend. IX.  
223. U.S. Const. amend. X.  
States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\footnote{U.S. Const. amend. XIV, § 1.}