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MINNESOTA RATIONAL RELATION TEST: THE LOCHNER MONSTER* IN THE 10,000 LAKES

DEBORAH K. MCKNIGHT†

Since the demise of the Lochner Monster, the United States Supreme Court has almost totally abandoned its independent scrutiny of economic legislation under substantive due process or equal protection theory. As Ms. McKnight reveals, several recent Minnesota Supreme Court cases indicate a resurrection of substantive review and misapplication of the federal and state rational relation tests. Following a review of the troubling state court decisions, Ms. McKnight discusses the effects of the court's independent determinations.

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* The phrase was coined by Judge J. Skelly Wright, who so characterized the use of substantive due process to invalidate laws other than those inhibiting vital personal liberties. Lochner v. New York, 198 U.S. 45 (1905), provided the name for a much criticized era of jurisprudence when the Supreme Court invalidated economic regulatory laws under substantive due process review. See Wright, Judicial Review and the Equal Protection Clause, 15 HARV. C.R.-C.L. L. REV. 1, 16 (1980).

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I. INTRODUCTION

Since 1979, the Minnesota Supreme Court has issued a small but steady stream of decisions invalidating statutes for failing to satisfy the equal protection rational relation test under the United States Constitution, the Minnesota Constitution, or both. The new development is noteworthy because, for several decades, the rational relation test has seldom been used to invalidate legislation.

A United States Supreme Court statement of the rational relation test provides that a statute is constitutional if it has a permissible governmental purpose and employs a classification rationally related to achieving that purpose. The Minnesota Supreme Court has frequently relied on a formulation of the test requiring: (1) a genuine and substantial distinction between those inside and outside the challenged class; (2) a connection between the distinctive needs of the class and the statutory remedy; and (3) a legitimate purpose for the statute at issue.

Recent Minnesota cases that have reviewed statutes under the federal or state equal protection rational relation test are troublesome for three reasons. First, two cases deciding statutory challenges on federal equal protection grounds may have misapplied Supreme Court authority, in violation of the supremacy doctrine. Second, three of the cases invalidating statutes under the state equal protection rational relation standard recited the traditional state standard, long deemed equivalent to the federal standard,
but applied a new, stricter standard of review. Third, the test applied in these cases evidenced a substantive form of review reminiscent of the Lochner era.

This Article first illuminates the Minnesota Supreme Court's apparent misapplication of Supreme Court precedent in federal rational relation cases and recommends several changes. Second, the Article demonstrates Minnesota's departure from the doctrine of federal-state equivalence and implicit development of a new state rational relation standard. The argument is made that if the court must deviate from Supreme Court precedent, it should enunciate a new test expressing the state standard of review for state equal protection claims. The Article concludes that even though a new state equal protection rational standard could be articulated, the substantive review evidenced in recent Minnesota equal protection cases is fraught with the weaknesses demonstrated during the Lochner era and should be discouraged.

II. DECISIONS BASED ON FEDERAL EQUAL PROTECTION THEORY

A. United States Supreme Court Equal Protection Theory

The United States Supreme Court employs a three-tier analytical model applying strict scrutiny, intermediate scrutiny, or rational relation review, depending upon the legislative classification at issue. The Court applies strict scrutiny to any legislative classification affecting a suspect classification or a fundamental right.

7. See infra Section III.
8. The rational relation test subjects a statute to scrutiny under the fourteenth amendment equal protection or due process clauses or analogous state constitutional provisions. U.S. CONST. amend. XIV; MINN. CONST. art. I, § 2 (1857, amended 1974). When used to evaluate the rationality of statutory classifications not involving an interest enumerated in the Constitution, such as speech, religion, or the right to a jury trial, the test is known as "substantive review." Since substantive review is not grounded in specific constitutional provisions, it is used sparingly by courts and observed closely by commentators. For a general discussion of substantive review, see Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976).
10. See infra Section II.
11. See infra Section III.
12. See infra Section IV.
13. Legislation that contains a suspect classification almost always violates equal protection. The one exception is Korematsu v. United States, 323 U.S. 214 (1944), which found that national origin was a suspect classification but upheld the legislation because the country was at war. Id. at 216, 223. The Warren Court determined that race was a suspect class. Loving v. Virginia, 388
Intermediate scrutiny is applied to legislation which is "not facially invidious" but "give[s] rise to recurring constitutional difficulties."\textsuperscript{15} In such cases, the Court requires that the classification further "a substantial interest of the State" in order to satisfy equal protection.\textsuperscript{16}

The groups and interests to which strict and intermediate scrutiny have been applied are few. Most legislation challenged on equal protection grounds is reviewed under the remaining tier of analysis—the rational relation test. Under this test, the Supreme Court seeks "only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."\textsuperscript{17} The Court's decisions upholding nearly every statute scrutinized under the rational relation standard during the past three decades demonstrate that the standard is easily satisfied.\textsuperscript{18}


\textsuperscript{16} Id. at 217-18 n.16. Despite the open-endedness of this formulation, intermediate scrutiny has been applied only to three classifications. See id. at 202 (educational rights of illegal alien children); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (sex).

\textsuperscript{17} Plyler, 457 U.S. at 216.

\textsuperscript{18} One commentator calculated that in the 25 years ending with the 1978 term, 90 Supreme Court opinions involved a claim brought under the rational relation standard of review. In only seven of the 90 cases did the Court invalidate legislation as irrational. See Barrett, The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications, 68 Ky. L.J. 845, 860 (1980). For the Supreme Court terms from 1979-80 through 1982-83, in only one case was a statute invalidated under what arguably was a rational relation test. In Plyler v. Doe, the Court invalidated a Texas statute excluding illegal alien
B. Minnesota Decisions Interpreting Federal Equal Protection Theory

In 1979, the Minnesota Supreme Court decided the first of two cases departing from United States Supreme Court authority governing rational relation review. In a third case, the state court did not follow the Supreme Court’s indication of how it would have decided a federal equal protection challenge to a statute. These children from public schools. 457 U.S. at 202. The standard of review appeared to be a form of intermediate scrutiny, since the Court required a showing that the statute “furthers some substantial state interest.” Id. at 230. Earlier in its opinion, however, the Court noted that “the discrimination contained [in the statute] can hardly be considered rational unless it furthers some substantial goal of the State.” Id. at 224. Perhaps a heightened rational relation review was applied.

19. Kossak v. Stalling, 277 N.W.2d 30 (Minn. 1979), involved a federal equal protection challenge to a statute distinguishing between municipality tortfeasors and private tortfeasors by giving municipalities a shorter limitations period. Id. at 32. The court held that since the municipality received actual notice of plaintiff’s claim, requiring that suit be filed during the one year limitation period was unconstitutional. Id. at 34. In its analysis, the court found the shortened limitations period did not further any of the five conceivable government purposes offered in its defense. Id.

Before the Kossak decision, the United States Supreme Court dismissed an equal protection challenge to a similar statute of limitations distinguishing between architects and building owners in suits for injuries caused by building defects. Carter v. Hartenstein, 248 Ark. 1173, 455 S.W.2d 918 (1970), appeal dismissed for want of a substantial federal question, 401 U.S. 901 (1971). Dismissal for want of a substantial federal question is a decision on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1974). Although the United States Supreme Court does not hold itself as closely bound by such a precedent, it has said that state courts and lower federal courts are bound by the result until the Court informs them that they are not. Id. at 345.

Carter did not involve precisely the same kinds of tortfeasor classifications as Kossak, but the feature distinguishing the classifications of tortfeasors was the same in both cases—a shortened limitations period. If anything, the Kossak distinction between municipal and private tortfeasors was more defensible than that between architects and building owners in Carter. The doctrine of sovereign immunity, recognized in the federal Constitution, suggests that rational distinctions can be drawn between public and private tortfeasors. U.S. Const. amend. XI; see Hans v. Louisiana, 134 U.S. 1, 17 (1889). The Minnesota Supreme Court has indicated that the abrogation of sovereign immunity does not mean government entities will be liable in all situations precisely as private parties are. Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979); McCarty v. Village of Naswauk, 286 Minn. 240, 175 N.W.2d 144 (1970). The traditional role of the legislature in setting statutes of limitations, and the recognition that government entities are not subject to the same liabilities as private parties, should have allowed the statute in Kossak to survive federal equal protection review.

Kossak may have been undermined by Green-Glo Turf Farms, Inc. v. State, C7-82-520, slip op. (Minn. Apr. 27, 1984). In Green-Glo, the court rejected a federal equal protection rational relation challenge to a statute immunizing the state from tort liability for damage to property caused by the operation of outdoor recreational areas. The court stated that the issue in Green-Glo was “whether it is rational to relieve the state from potentially huge tort liability for damages to property caused by the operation of outdoor recreational areas.” Id. at 5. The court held that the immunity was “rationally related to the purpose of the ‘preservation of Minnesota’s outdoor recreational resources.’” Id. The equal protection issue did not involve a classification distinguishing public and private
apparent misapplications of Supreme Court authority, when read with other contemporary Minnesota decisions, reflect a developing state equal protection theory equivalent to substantive review.

I. Clover Leaf Creamery Co. v. State

In *Clover Leaf Creamery Co. v. State*, the Minnesota Supreme Court considered whether a statute violated federal equal protection by banning plastic nonrefillable milk cartons while permitting paper nonrefillable cartons. The plaintiffs had obtained an injunction against enforcement of the law on grounds that it violated federal equal protection, substantive due process, and the interstate commerce clause. On appeal, the Minnesota Supreme Court limited its review to the equal protection issue and struck down the statute on that basis.25

Tortfeasors, since private landowners who permitted recreational use of their land enjoyed the same degree of immunity as the state. *Id.* In this respect, *Green-Glo* may be distinguished from *Kossak* rather than viewed as a departure from it. Yet two points suggest the case does represent a changed interpretation of federal law. First, the opinion relied for its federal equal protection test on *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), rev’d, *Clover Leaf Creamery Co. v. State*, 289 N.W.2d 79 (Minn. 1979). See infra notes 22-49 and accompanying text. Second, the dissent perceived the decision as inconsistent with the federal equal protection ruling in *Kossak*. *Green-Glo*, slip op. at D-4 (Scott, J., dissenting).

20. See infra Section III.
21. See infra Section IV.
23. See 289 N.W.2d at 80-81. The plaintiffs in *Clover Leaf* were packagers and sellers of milk and makers of plastic milk cartons.

Use of substantive review to strike down economic regulations has historically been a rare phenomenon in Minnesota. See Note, *State Views on Economic Due Process 1937-1953*, 53 COLUM. L. REV. 827, 833 (1953) (as of 1983, Minnesota had invalidated no economic legislation on due process grounds since 1939). Other than *Clover Leaf*, the only recent examples are *Minnesota Bd. of Barber Examiners v. Laurance*, 300 Minn. 203, 218 N.W.2d 692 (1974), and *Grassman v. Minnesota Bd. of Barber Examiners*, 304 N.W.2d 909 (Minn. 1981). Both decisions are defensible in light of *Bolton v. Texas Bd. of Barber Examiners*, 350 F. Supp. 494 (N.D. Tex.), aff’d without opinion, 409 U.S. 807 (1972) (provisions of Texas statute limiting persons licensed as cosmetologists to perform cosmetology on females only and persons licensed as barbers to perform work only on males violated equal protection).


24. 289 N.W.2d at 80 n.2.
25. See id. at 80-81.
The court recognized that because the challenged statute involved economic regulation, the proper test was whether the classification was rationally related to a legitimate state interest.\(^{26}\) Evidence of the state’s interest appeared in a legislative policy statement expressing concern over solid waste disposal and the use of energy and natural resources to produce nonrefillable containers.\(^ {27}\) The majority found these to be legitimate state interests, but disagreed that a ban on plastic nonrefillable milk containers was rationally related to furthering the interests.\(^ {28}\)

According to evidence offered at trial, paper nonrefillables were not superior to plastic ones, either as solid waste material or in the energy and resources required for their manufacture.\(^ {29}\) The state argued that even were this true, it was consistent with federal equal protection to take one step toward economic regulation of cartons by banning plastic nonrefillables before they gained a foothold in the market, while allowing use of paper nonrefillables.\(^ {30}\) The state contended that the ban on plastic nonrefillables would encourage development of new returnable containers.\(^ {31}\) The supreme court rejected this argument because the evidence showed that a similar ban on plastic nonreturnable bottles in Ontario had led to the use of plastic nonrefillable pouches, not returnable containers.\(^ {32}\) Since the court found no rational relation between the milk carton and the state interests in conservation of energy and natural resources or its concern over solid wastes, the legislation was struck down.

The Minnesota Supreme Court based its equal protection analysis on the trial court’s resolution of conflicting evidence rather than on the legislature’s factual conclusions.\(^ {33}\) The *Clover Leaf* majority cited *New Orleans v. Dukes*\(^ {34}\) as the United States Supreme Court’s equal protection test governing economic regulation, but did not discuss the case.\(^ {35}\) *Dukes* involved an equal protection challenge to an ordinance banning pushcart vendors from New

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26. *Id.* at 81.
28. 289 N.W.2d at 82, 86-87.
29. *Id.* at 82-85.
30. *Id.* at 86.
31. *Id.* at 85.
32. *Id.* at 86.
33. *Id.* at 82.
34. 427 U.S. 297 (1976), *cited in* Clover Leaf Creamery Co. v. State, 289 N.W.2d at 81-82.
35. *Dukes* had been relied on by the majority, however, in a case decided not long.
Orleans' French Quarter unless they had been in business for eight years or more. Rather than labeling the grandfathering as arbitrary, the Supreme Court held that the gradual elimination of vendors was permissible.

The analysis in *Dukes* would seem to control the federal equal protection issue in *Clover Leaf*. The ban on nonrefillable plastic milk cartons in *Clover Leaf*, like the ban on pushcarts in *Dukes*, was an economic regulation. Since it did not implicate a suspect classification or fundamental right, the milk carton ban, like the pushcart ban, should not have been subjected to judicial evaluation of its wisdom. The ban on certain milk cartons, like that on certain pushcarts, should have been allowed to stand.

The United States Supreme Court granted certiorari in *Clover Leaf* and reviewed the equal protection issue using the rational relation test. The *Clover Leaf* parties agreed that the legislative purposes of minimizing solid waste disposal and conserving resources and energy were legitimate. Nevertheless, they disagreed that the legislative classification distinguishing paper and plastic containers was rationally related to achieving those purposes. In addressing this question, the Supreme Court reasoned consistently with *Dukes*.

The Court indicated that economic regulation statutes required a theoretical rather than an empirical connection between their purposes and their means. In other words, the state need not convince the Court that legislative facts are accurate. To discredit a statute, a challenger must show that the legislative facts could not reasonably be conceived as true; if they are debatable,
the challenger loses.\textsuperscript{45} According to the United States Supreme Court, the Minnesota Supreme Court's decision in \textit{Clover Leaf} violated this principle of equal protection rationality analysis.\textsuperscript{46} If any one of the four reasons advanced by the state to show a rational relation between the statutory purpose and the classification were conceivably true, the act should have been sustained.\textsuperscript{47}

The Court then reviewed the justifications for the act. On each point it found that, given the evidence before the legislature, the efficacy of the statute was at least debatable and the legislature reasonably could have reached its conclusion.\textsuperscript{48} Consequently, the Minnesota Supreme Court should have followed \textit{Dukes} and upheld the legislation.\textsuperscript{49}

\section*{2. Dependents of Ondler v. Peace Officers Benefit Fund}

\textit{Dependents of Ondler v. Peace Officers Benefit Fund}\textsuperscript{50} was the second Minnesota Supreme Court decision mistakenly invalidating a statute on federal equal protection grounds. \textit{Ondler}, a 1980 decision, involved a statute excepting peace officers who died of heart attacks from a benefit program for officers killed on duty.\textsuperscript{51} The court held that the exclusion of heart attack victims lacked a rational basis.\textsuperscript{52}

The testimony in \textit{Ondler} had indicated that the decedent's heart

\begin{itemize}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.} at 469-70.
\item \textsuperscript{47} \textit{Id.} at 465. The trial court had resolved conflicting evidence on legislative facts in favor of the challengers, and the Minnesota Supreme Court failed to reverse the trial court. \textit{Id.} at 464.
\item \textsuperscript{48} \textit{Id.} at 465-70.
\item \textsuperscript{49} Although \textit{Dukes} seemed to control the federal equal protection issue in \textit{Clover Leaf}, only Justice Wahl, dissenting from the majority, relied on it. 289 N.W.2d at 87 (Wahl, J., dissenting). Given the United States Supreme Court's analysis in \textit{Dukes}, Justice Wahl saw no distinction between the milk container legislation struck down in \textit{Clover Leaf} and the pushcart ordinance upheld in \textit{Dukes}. \textit{Id.} at 87. Both represented a "stepwise" approach to eliminating a perceived problem. \textit{Id.} Although the Supreme Court never required evidence of a legislative intent to take more than one step, Justice Wahl found evidence in floor debates of precisely that intent. \textit{Id.} at 88. She also questioned the majority's conclusion on the Ontario experience with a nonrefillable milk container ban. \textit{Id.} Though the majority correctly noted that the Ontario ban did not encourage returnable containers, it did promote the use of plastic pouches which, from an environmental viewpoint, were superior to paper or plastic nonrefillables. \textit{Id.} Justice Wahl then observed: "while the measure perhaps did not have precisely the effect intended, it nevertheless had salutary environmental impact." \textit{Id.} at 88.
\item \textsuperscript{50} 289 N.W.2d 486 (Minn. 1980).
\item \textsuperscript{51} See \textit{Id.} at 488.
\item \textsuperscript{52} \textit{Id.} at 480.
\end{itemize}
attack was stress-induced\textsuperscript{53} and that stress could have produced a stroke or respiratory failure—causes of death not excluded from the special benefit program.\textsuperscript{54} Since the court drew no distinction between victims of heart attacks and victims of other stress-related fatalities, it concluded that the statutory classification of victims violated federal equal protection.\textsuperscript{55} According to the Minnesota court, the exclusion of heart attack victims subverted the statutory purpose of awarding benefits to peace officers’ dependents to compensate for the unusual occupational hazards.\textsuperscript{56}

The \textit{Ondler} court limited discussion of federal equal protection to a correct statement of the test for “minimal judicial scrutiny” under the fourteenth amendment.\textsuperscript{57} It did not apply United States Supreme Court precedent governing classifications analogous to the one in the officers’ benefit program. The issue should have been controlled by \textit{Dandridge v. Williams}.\textsuperscript{58}

In \textit{Dandridge}, the United States Supreme Court addressed a federal equal protection challenge to state AFDC regulations setting grant ceilings.\textsuperscript{59} The ceilings awarded less assistance per capita to larger families than to smaller families.\textsuperscript{60} Although acknowledging that social welfare regulation involved a “dramatically real factual difference” from economic regulation, the Court still applied the rational basis test to the grant ceilings.\textsuperscript{61} The Court expressed concern over the implications of judicial interference with the legislative allocation of scarce public funds among deserving

\textsuperscript{53}. See \textit{id.} at 489.

\textsuperscript{54}. \textit{Id.}

\textsuperscript{55}. \textit{Id.} at 489-90.

\textsuperscript{56}. \textit{Id.} at 489.

\textsuperscript{57}. See \textit{id.}

\textsuperscript{58}. 397 U.S. 471 (1970). In a case similar to \textit{Ondler}, decided only a few years earlier, the Minnesota Supreme Court relied on \textit{Dandridge} to reject a federal equal protection attack on a state benefit program. See \textit{Thomale v. Schoen}, 309 Minn. 285, 244 N.W.2d 51 (1976). In \textit{Thomale}, the plaintiff challenged a statute providing that prison inmates who had less than a $100 credit for work performed in prison would, upon release, receive an additional sum to make the total $100. See \textit{id.} at 286-87, 244 N.W.2d at 52-53. Those inmates with $100 or more to their credit were not eligible to receive additional pay upon their release. \textit{Id.} The Minnesota Supreme Court noted that because the classification in \textit{Thomale} did not affect a fundamental interest or suspect classification, it was subject to review under the \textit{Dandridge} standard. See \textit{id.} at 288, 244 N.W.2d at 53. Applying the \textit{Dandridge} standard, the court upheld the statutory classification. \textit{Id.} The court did not attempt to distinguish \textit{Thomale} in \textit{Ondler}.

\textsuperscript{59}. See \textit{Dandridge}, 397 U.S. at 473.

\textsuperscript{60}. \textit{Id.} at 473-75.

\textsuperscript{61}. \textit{Id.} at 485.
parties. According to the Court, subjecting the legislation to greater scrutiny would have signaled a return to substantive due process. In applying the rational relation test, the *Dandridge* Court held that the allocation of public funds required only some reasonable basis and need not be mathematically precise. Since the state law promoted a legitimate interest in avoiding discrimination between welfare families and the working poor, it satisfied federal equal protection.

*Dandridge* should have controlled the federal equal protection issue in *Ondler*. Under federal equal protection analysis, the denial of benefits to survivors of officers who died of heart attacks rather than other causes was analogous to the denial of equal per capita welfare benefits to large and small families. Both laws allocated scarce public funds among social welfare programs. Because the statute in *Ondler*, like the regulation in *Dandridge*, allocated funds on a basis that did not implicate a suspect classification or fundamental interest, it should have survived a federal equal protection attack.

### 3. Potential Explanations for Clover Leaf and Ondler

To some degree, the Minnesota Supreme Court’s departure from United States Supreme Court precedent in *Clover Leaf* and *Ondler* may have been unintentional. The three tiers of federal equal protection theory evolved after years of repeated attempts to persuade the United States Supreme Court to apply stricter scrutiny to legislation affecting various interests or to add clout to rational relation review. The persistent attacks on statutes subject to the rational relation test, given the odds against success, may have been encouraged by the Supreme Court’s willingness to ex-

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62. *Id.* at 486.

63. *Id.* at 484 ("for this Court to approve the invalidation of state economic or social regulations as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be . . . out of harmony with a particular school of thought'").

64. *Id.* at 487.

65. *Id.* at 485.

66. Floor debate in the House revealed concern that the bill in *Ondler* should carefully limit extra death benefits to prevent overspending. Thus, legislators sought to cover causes of death directly job-related (for example, a firefighter killed by building collapse) rather than deaths resulting from previously existing health conditions. See *Tape Recordings of Minnesota House of Representatives Floor Debate on H.F. 178* (Apr. 2, 1973).

67. *See supra* note 18.
amine legislation and make what appeared to be its own determination of reasonableness.

Though the Court upheld the legislation, the exercise of discretionary review gave the impression that the Court would invalidate some statutes. This impression encouraged lower federal and state courts, including the Minnesota Supreme Court, to adopt expansive readings of the equal protection clause not endorsed by the United States Supreme Court. Although the Supreme Court’s frequent review of decisions under the rational relation standard may have been intended to demonstrate the variety of legislation that was rational, the confusion stemming from this review may explain in part the Minnesota Supreme Court’s equal protection interpretations.68

To the extent that Clover Leaf and Ondler reflect an intentional departure from Supreme Court precedent, their justification is more troublesome. Although the desire to differ with Supreme Court authority may be appropriate,69 the Minnesota court violates the federal supremacy clause by ruling on federal grounds after the Supreme Court has addressed the issue.70 This approach invites reversal.71

Notwithstanding the attraction of rendering decisions under the fourteenth amendment,72 if a departure from federal law is de-

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69. But see infra Section IV.
71. See Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471-74 (1981). One commentator has argued that it is inappropriate for the Supreme Court to require that state courts restrain themselves from fully enforcing “underenforced” constitutional rights: Accordingly, state court decisions which may apply more generous readings of the federal constitution to state conduct than would the Supreme Court ought to be highly disfavored candidates for certiorari review, and it is inappropriate for the Court to reverse such state court decisions if they are instances of state judicial enforcement of the unenforced margins of federal constitutional norms. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1264 (1978). Sager noted that a significant number of Supreme Court reversals involved liberal state court enforcements of equal protection and substantive due process claims. Id. at 1244-45, 1245 n.105.
72. Given the nationalization of politics, news coverage, and legal education, state courts and commentators often assume that the federal Constitution is the only source of legal theory for the Republic. This attitude has been taken for granted by some commentators. See, e.g., Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324 (1982) [hereinafter cited as Developments]. Others have argued in favor of this proposition, maintaining that no state constitution can protect the individual against the actions of a powerful federal government. See, e.g., Deukmejian & Thompson, All Sail and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST.
sired, the state court should rule only on federal issues that the Supreme Court has not addressed.\(^{73}\) Where there is applicable federal law, the state court should base its decision on the Minnesota Constitution when choosing to deviate from the federal result.\(^{74}\) This Article next examines three recent Minnesota

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\(^{73}\) L.Q. 975 (1979). Still others disagree, arguing that state courts have an inescapable responsibility to apply their own bills of rights first in protecting individual rights against public authority. See, e.g., Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980).

\(^{74}\) In *Nelson v. State Dep't of Natural Resources*, 305 N.W.2d 317 (Minn. 1981), the Minnesota Supreme Court reviewed a federal equal protection rational relation challenge to a statute that required giving the state, as an interested employer, notice of any settlement reached between its employee and a third-party tortfeasor. *Id.* at 319. Under the statute, failure to notify the state would invalidate the settlement. The court held that to protect an employer's interest in the litigation, it should receive notice of a petition to distribute proceeds of a wrongful death action. *Id.* Nonetheless, the court struck down the statute because it applied only when the state was an employer. Since the statute failed to treat all employers equally, the statute violated equal protection. *Id.*

Though it was deciding a federal constitutional claim, the court did not rely on United States Supreme Court cases. Instead, it used the equal protection standard enunciated in *Schwartz v. Talmo*, 295 Minn. 356, 205 N.W.2d 318 (1973). See also *Nelson*, 305 N.W.2d at 319. Under the *Schwartz* test, a legislative classification must (1) apply uniformly to those who are similarly situated; (2) be necessitated by genuine and substantial distinctions between the two groups; and (3) effectuate the purpose of the law. 205 N.W.2d at 319.

Applying the *Schwartz* test in *Nelson*, the Minnesota Supreme Court found the notice statute invalid because it did not apply uniformly to a similarly situated group, namely employees. *Nelson*, 305 N.W.2d at 319. The statute also failed the *Schwartz* test because it did not genuinely or substantially distinguish between the state as an employer and other employers. *Id.* Finally, the statute failed to advance the purposes of the Workers' Compensation Act because it afforded the state greater protection than other employers. *Id.* at 318-19.

No United States Supreme Court cases have held or suggested that a statutory distinction between private and public employers, in itself, violates equal protection. Yet, the Supreme Court has not held that such a distinction does not violate federal equal protection. Under the circumstances, the Minnesota Supreme Court did not offend the supremacy doctrine by concluding that a statutory classification distinguishing between public and private employers violates the federal Constitution.

\(^{74}\) The court must base its decision on one constitution or the other. A reference to the principle "equal protection of the laws" does not provide an adequate foundation for judicial review. See Linde, *supra* note 68. The legitimacy of judicial review is rooted in measuring a statute against a constitution to see if the fit is adequate. This practice is in turn rooted in the court's role as umpire, not lawmaker. See *Marbury v. Madison*, 1 Cranch 137 (1803); cf *Griswold v. Connecticut*, 381 U.S. 479, 514 n.6 (1965) (Black, J., dissenting) ("The Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress.").

A court's failure to mention the state or federal constitutions in its statement or resolution of an issue creates uncertainty over the precise grounds of its constitutional analysis. See, e.g., *Essling v. Markman*, 335 N.W.2d 237 (Minn. 1983); *Nordstrom v. State*, 331 N.W.2d 901 (Minn. 1983); *National Indem. Co. v. Mutual Serv. Cas. Co.*, 311 N.W.2d...
Supreme Court decisions construing the state equal protection guaranty and evidencing the development of a new standard of review.

III. DECISIONS BASED ON STATE EQUAL PROTECTION THEORY

A. Introduction

The Minnesota Constitution's equal protection clause provides: "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." This clause was adopted as part of the original constitution in 1857. It was mentioned only once in the constitutional convention debate, where it was characterized as putting "all citizens" of the United States "upon the same basis." The clause was not intended to address contemporary concerns with race and sex discrimination.

856 (Minn. 1981); Fritz v. State, 284 N.W.2d 377 (Minn. 1979); Minnesota Educ. Ass'n v. State, 282 N.W.2d 915 (Minn. 1979); Invention Mktg. v. Spannaus, 279 N.W.2d 74 (Minn. 1979); State v. Vail, 274 N.W.2d 127 (Minn. 1978). An even less specific decision is Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977) (invalidating a statute of repose for actions against architects and builders). In Thompson-Yaeger, the court did not specify which constitution or clause ("variously... a denial of equal protection... special legislation... [or] a denial of due process of law") it used to reach its decision. Id. at 555.

A secondary concern is the matter of judicial economy. A precise statement of the grounds for decision helps parties decide whether or on what basis an appeal to the United States Supreme Court may be warranted. Specificity of decision can also help the Court dispose of an appeal. If the basis of a decision is ambiguous, the Supreme Court may have to remand for clarification, increasing the delay and expense of litigation. On the other hand, if a decision is clearly based on independent and adequate state grounds, litigants will know it is final unless changed by state constitutional amendment.

75. MINN. CONST. art. I, § 2 (1857, amended 1974). The 1971 Constitutional Study Commission was misinformed but perceptive when it alleged that the Minnesota Constitution lacked an equal protection clause. Minnesota Constitutional Study Commission, Final Report 15 (1973). A student note more accurately recognized the existence of the clause, at least as construed by the Minnesota Supreme Court, and described it as being "worded in an archaic and unfamiliar manner." Note, An Effort to Revise the Minnesota Bill of Rights, 58 MINN. L. REV. 157, 171 (1973).


77. Separate debates were held on black suffrage and married women's property rights. Id. at 428-37, 539-40; DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 168-74, 340-81 (1858) (contains the debates of the 1857 republican convention).
Despite the drafters' intent and the state provision's lack of resemblance to its federal counterpart, by the early twentieth century, the Minnesota Supreme Court treated the state clause as analogous to the equal protection clause of the fourteenth amendment. 78

Until the late 1970's, the Minnesota Supreme Court maintained that state and federal equal protection law were equivalent. 79 Since Clover Leaf, decisions reviewing some legislation, such as liquor regulations 80 and tax statutes, 81 have continued to support that claim. Nevertheless, decisions reviewing statutes in other areas contained a different state constitutional standard. 82 The development of this standard is illustrated in Wegan v. Village of Lexington, 83 Nelson v. Peterson, 84 and Thompson v. Estate of Petroff. 85 Its emergence explains the court's misapplication of federal equal protection theory.

The Minnesota court also applied the stricter standard when in-


79. State v. Forge, 262 N.W.2d 341, 347 n.23 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978) (citing Minneapolis Fed'n of Teachers v. Obermeyer, 275 Minn. 347, 354, 147 N.W.2d 358, 363 (1966) (statute exempting teachers from application of Public Employees Labor Relation Act not unreasonable or arbitrary classification under uniform requirements of federal or state equal protection clauses)); C. Thomas Stores Sales Sys. v. Spaeth, 209 Minn. 504, 514, 297 N.W. 9, 16 (1941) (statute exempting certain retailers from tax on their products not an unreasonable classification under uniform requirements of the federal and state equal protection clauses).


81. See, e.g., Exxon Corp. v. Eagerton, 103 S. Ct. 2296 (1983); Regan v. Taxation with Representation, 103 S. Ct. 1997 (1983); In re United States Steel, 324 N.W.2d 638 (Minn. 1982); In re McCannel, 301 N.W.2d 910 (Minn. 1980); Guilliams v. Commissioner of Revenue, 299 N.W.2d 138 (Minn. 1980). But see AFSCME Councils 6, 14, 65 & 96 v. Sundquist, 338 N.W.2d 560 (Minn. 1983). In Sundquist, the four dissenting justices would have invalidated a requirement that state employees make special pension payments as a violation of the state uniformity clause. Id. at 577 (Yetka, Scott & Wahl, JJ., dissenting); id. at 584 (Kelley, J., dissenting).

82. See infra notes 86-140 and accompanying text. Such an abrupt departure from a rule of equivalence is not unique to Minnesota. See, e.g., Kroger Co. v. O'Hara Township, 481 Pa. 101, 392 A.2d 266 (1978); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975). In their rush to applaud the development of independent state constitutional law, not all commentators have questioned the phenomenon. See, e.g., Kelman, Foreword: Rediscovering The State Constitutional Bill Of Rights, 27 WAYNE L. REV. 413, 426-28 (1981).

83. 309 N.W.2d 273 (Minn. 1981).

84. 313 N.W.2d 580 (Minn. 1981).

85. 319 N.W.2d 400 (Minn. 1982).
interpreting federal equal protection in *Clover Leaf* and *Ondler*. To clarify the development of the new standard, the court should expressly acknowledge it and articulate a new state constitutional test rather than relying on the older, more relaxed test. In doing so, however, the court should consider that the new standard is a substantive review standard with several weaknesses.

**B. Wegan v. Village of Lexington**

The first case evidencing a new state equal protection standard was *Wegan v. Village of Lexington*, decided in 1981. In *Wegan*, four plaintiffs appealed from dismissals under the Dram Shop Act for failure to serve timely notice of their claims or to file suit within the limitations period. The court addressed whether federal or state equal protection had been denied because the plaintiffs, who were injured by intoxicating liquor retailers, were treated differently than persons injured by nonintoxicating liquor retailers. Under the Dram Shop Act, claimants suing an intoxicating liquor dealer were required to file a notice of claim with the dealer and to bring suit within one year of being injured. Plaintiffs suing a nonintoxicating liquor retailer were not required to file a notice of claim and had six years to bring suit. The discrepancy arose because the Dram Shop Act applied only to sellers of intoxicating liquor.

In 1973, the Minnesota Supreme Court created a negligence action analogous to dram shop recovery for injuries caused by nonintoxicating liquor vendors. As a common law tort, the action was governed by the six-year tort limitations period and did not require a notice of claim. The *Wegan* court found that the joint operation of the Dram Shop Act and the common law negligence

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86. 309 N.W.2d 273 (Minn. 1981).
87. *Id.* at 275.
88. *Id.* at 277.
89. "Intoxicating liquor" includes distilled spirits, wine, and beer containing more than 3.2% alcohol. *Id.* at 278.
90. *Id.* at 277-78.
91. "Nonintoxicating liquor" is beer containing less than 3.2% alcohol. *Id.* at 279.
92. *Id.* at 278.
93. *Id.* at 279. The distinction between intoxicating and nonintoxicating liquor arose during Prohibition to permit vendors to continue selling 3.2 beer without violating the law. *Id.* The Minnesota Supreme Court has recognized that a person can become intoxicated drinking 3.2 beer. *Trail v. Christian*, 298 Minn. 101, 107, 213 N.W.2d 618, 621 (1973).
95. *Minn. Stat.* § 541.05 (1982).
action created two classes of persons—those injured by an unlawful intoxicating liquor sale and those injured by an unlawful non-intoxicating liquor sale. The court held that the dissimilar treatment of these classes violated equal protection.96

*Wegan* did not contain separate analyses of the federal and state constitutional issues.97 The opinion's test for equal protection rational relation review was taken from *GuiYiams v. Commissioner of Revenue*,98 a state constitution uniformity clause decision. The three-factor *GuiYiams* rational relation test required: (1) distinctions, relevant to the purpose of the law, between those included in and excluded from a statutory classification; (2) a connection between the prescribed remedy and needs peculiar to the class; and (3) a legitimate legislative purpose.99 The application of the uniformity clause standard in *Wegan* illustrated an abrupt departure from prior state equal protection theory.100

96. *Wegan*, 309 N.W.2d at 281. An unlawful sale is the basis of liability under both the Dram Shop Act, MINN. STAT. § 340.95 (1982), and the *Trail* common law action. Under *Trail*, sale to a minor or intoxicated person in violation of statutory law is negligence per se. 298 Minn. at 115, 213 N.W.2d at 626.

97. Failure to separate these two issues is a mistake. If the Minnesota Constitution provides a different standard than the federal Constitution, mingling the two analyses is misleading. Unless the court indicates it has cited federal cases only to distinguish them or to illustrate a possible interpretation of a constitutional doctrine, citation to federal cases on a state constitutional issue implies that the court intended to follow federal law. When the state court does not follow United States Supreme Court precedent, it confuses litigants and legislators who then question the court's grasp of constitutional theory. Consequently, if the state court wants to reach a different result or use a different test than the Supreme Court, it should not merge the state and federal constitutional discussions. See *Delaware v. Prouse*, 440 U.S. 648, 651-53 (1979).

98. 299 N.W.2d 138 (Minn. 1980). The uniformity clause provides:

> The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, public schools, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation except as provided in this section. There may be exempted from taxation except as provided in this section. There may be exempted from taxation personal property not exceeding in value $200 for each household, individual or head of a family, and household goods and farm machinery as the legislature determines. The legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation. The legislature by law may define or limit the property exempt under this section other than churches, houses of worship, and property solely used for educational purposes by academies, colleges, universities and seminaries of learning.


99. 299 N.W.2d at 142.

100. For fifty years the Minnesota Supreme Court had interpreted the uniformity clause to be "not more restrictive than the equal protection clause of the fourteenth amendment." Reed v. Bjornson, 191 Minn. 254, 261, 253 N.W. 102, 105 (1934); see *In re
In applying the Guilliams test to the statutory classification in Wegan, the court found that the provisions on notice of claim and commencement of suit satisfied the third factor. These procedural requirements furthered the legitimate purpose of allowing defendants an early opportunity to investigate claims, thereby reducing the incidence of stale claims and encouraging settlement. The court then held that the statute failed the first two parts of the Guilliams test for two reasons. First, the distinction between intoxicating liquor vendors and 3.2 beer vendors was arbitrary. Customers of both groups could become intoxicated and cause injuries. Second, the distinction did not further the statutory purpose defined by the court: to compensate persons injured by intoxicated customers of liquor retailers. Since the classification did not satisfy the three-factor test, the court invalidated the challenged Dram Shop Act provisions.

The Guilliams test as employed in Wegan led to an analysis and result unlike that in prior federal and state rational relation review. Specifically, the court concluded that the distinction in Wegan was arbitrary because all liquor and beer could cause inebriation. This conclusion was based upon an inquiry into the actual effect of the statute. Traditional rational relation review would have only inquired whether there were facts on which the legislature could conceivably have based the classification. The Wegan court thus departed from the United States Supreme Court’s rational relation standard of review.

Cold Spring Granite Co., 271 Minn. 460, 466, 136 N.W.2d 782, 787 (1965). In Guilliams, the court again stated that the uniformity clause was equivalent to the federal equal protection clause and it upheld the tax statute. 299 N.W.2d at 142 n.5. Consequently, the use of the uniformity clause test, so easily satisfied in Guilliams, seemed an unlikely candidate for the basis of a new, stricter state equal protection standard in Wegan.

101. Wegan, 309 N.W.2d at 280.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
A footnote to Wegan implied that the court had used a stricter state constitutional standard: "[E]ven if the classifications passed constitutional muster under the federal constitution, they would still be defective under our state constitution." Since the new state standard of review involved inquiry into the actual instead of the conceivable rationality of a challenged statute, it constituted substantive equal protection review.

C. Nelson v. Peterson

The Minnesota Supreme Court further developed the new state equal protection standard in Nelson v. Peterson. Nelson, decided the same year as Wegan, involved federal and state equal protection challenges to a statute governing the qualifications for work-
ers’ compensation judges. The statute prohibited state-employed attorneys who represented petitioners in workers’ compensation matters from serving as compensation judges until two years after they last represented a petitioner. Under the statute, state-employed petitioners’ attorneys were distinguished from others who qualified for workers’ compensation judicial positions. The court invalidated this classification using the three-factor rational relation test from *Guilliams*.

The *Nelson* court accepted the state’s contention that reducing employee bias among compensation judges was a legitimate statutory purpose. Consequently, the state had satisfied the third factor of the *Guilliams* test. The court did not analyze the first factor, requiring substantial distinctions between those inside and outside the statutory class. Instead, it focused on the third factor—whether the classification was relevant to achieving the statutory purpose.

The state presented three arguments in support of the challenged statute. First, the state argued that the statute’s application to only state-employed petitioners’ attorneys was justified because the legislature “could have believed” petitioners’ attorneys perform only one function for one employer, while private attorneys might not practice in only one area or represent only one side. This difference could cause state-employed attorneys to identify more closely with compensation petitioners and be less impartial than private practitioners. The court, however, saw no distinction between private petitioners’ attorneys and state-employed petitioners’ attorneys, because private attorneys tended to represent

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114. 313 N.W.2d at 580.
115. As Chief Justice Sheran noted in dissent, the compensation judge position at issue in *Nelson* was in the classified employment service of the state, not a judgeship in the judicial branch. *Id.* at 583 (Sheran, C.J., dissenting); *see* Act of June 1, 1981, ch. 346, § 2, 1981 Minn. Laws 1611, 1613-14. The distinction is an important one, since cases decided under both the Minnesota and federal Constitutions indicate that statutory qualifications cannot be added if an applicable constitution sets forth qualifications for an elected office. *See* Davis v. Adams, 400 U.S. 1203 (1970); Stack v. Adams, 315 F. Supp. 1295 (N.D. Fla. 1970); Pavlak v. Grawe, 284 N.W.2d 174 (Minn. 1979).
117. *Id.* at 581-83.
118. *Id.* at 582.
119. The court simply found that the statute was incapable of satisfying the first two factors of *Guilliams* and was therefore irrational. *Id.*
120. *Id.* at 582-83.
121. *Id.*
one side exclusively in compensation proceedings.\(^{122}\)

Second, the state argued that the legislature "may have legitimately believed" that the statute would remove the apparent impropriety of having compensation judges decide cases presented by their recent colleagues.\(^{123}\) The Nelson court replied that, by this logic, state-employed defense attorneys should also be delayed from consideration for workers' compensation judgeships, since they too would be deciding cases presented by their former colleagues.\(^{124}\) Finally, the state argued that the legislature may "have rationally believed" the statute diversified compensation judges' backgrounds, further reducing the potential for bias.\(^{125}\) The court refuted this point with empirical data revealing that many compensation judges had diverse backgrounds because of other employment experience.\(^{126}\)

In Nelson, the state presented arguments that would satisfy traditional deferential equal protection rational relation review. The state attempted to establish only a conceivable basis for the statutory classification. The court, however, responded with a rigorous review of the actual effect of the legislative classification. Such a review evidenced a state equal protection standard stricter than the prior state standard. At a minimum, the Nelson standard required empirical proof that a legislative classification would in fact further the statutory purpose, regardless of the class or interest affected by the legislation. The Nelson inquiry into the actual effect of the statute echoed the substantive judicial review of the Lochner era.

D. Thompson v. Estate of Petroff

Thompson v. Estate of Petroff,\(^{127}\) decided in 1982, involved an equal protection attack on the validity of the Minnesota survival statute.\(^{128}\) The plaintiff, who had killed her former boyfriend, was acquitted of murder and manslaughter charges on grounds of self-defense. Subsequently, she brought an action for assault and battery, an intentional tort, against the decedent's estate.\(^{129}\) The trial

\(^{122}\) Id. at 582.
\(^{123}\) Id. at 583.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) 319 N.W.2d 400 (Minn. 1982).
\(^{129}\) 319 N.W.2d at 401.
court granted summary judgment for the estate under the survival statute. The statute provided that personal injury actions based only on negligence, strict liability, or breach of warranty survived a defendant's death. On appeal to the state supreme court, the plaintiff argued that the omission of intentional torts from the survival statute violated equal protection. She contended that there was no rational basis for distinguishing between persons injured by intentional torts and persons injured by unintentional torts.

The Thompson court analyzed the statutory classification under the Guillian rational relation test applied in Wegan and Nelson. The court held that the statute's purpose of mitigating the harsh common law nonsurvival rule was legitimate, satisfying the third factor of the Guillian test. Nonetheless, the statute was invalid because it failed to meet the other two requirements.

To show that the distinction between persons injured by the two types of torts was relevant to the statutory purpose, the defendants argued that intentional torts differed from others because proof of a decedent's intent was difficult. The Thompson court found this distinction specious, noting that Minnesota and other jurisdictions have permitted analogous actions, such as wrongful interference with property, against decedents' estates. Therefore, the court concluded that intentional tort claims could be litigated despite a defendant's death.

The Thompson court also held that the nonsurvival of intentional torts failed the second element of the Guillian test because nonsurvival did not serve the purpose of modern tort law. The court stated that modern tort law was intended to compensate victims.

130. Id. at 401-02.
131. Id. at 402.
132. Id. In addressing the plaintiff's argument, the court first traced the common law rule that most actions for personal injury did not survive the defendant's death. Id. The common law rule was eased in the nineteenth century as various legislatures enacted exceptions. Id. at 403. In 1941, the Minnesota Legislature allowed survival of negligence claims; in 1967, the statute was amended to extend to strict liability, products liability, and breach of warranty claims. Id. at 404. The issue in Thompson was whether the failure to add intentional torts to the list of exceptions denied equal protection. Id. at 405-06.
133. Id. at 404.
134. Id. at 406.
135. Id.
136. Id. at 404.
137. Id. at 405.
138. Id. at 405-06.
139. Id.
By failing to permit survival of intentional torts, the statute omitted a group of victims.140

Although the plaintiff had raised both federal and state equal protection challenges, the Thompson court relied exclusively on Minnesota authority to hold that the statute violated the equal protection rational relation test.141 Since other states had demonstrated that intentional tort actions could be pursued after a defendant’s death and since compensation is a goal of tort law, the court concluded that the exclusion of intentional tort actions from the survival statute was unconstitutional. In contrast, a federal equal protection analysis would have restricted a legislative classification only in an area meriting heightened judicial scrutiny.

The state equal protection analyses in Wegan, Thompson, and Nelson have indicated a judicial willingness, absent a suspect classification or fundamental interest, to examine the empirical effectiveness of statutory classifications and to reach conclusions contrary to legislative judgments. Despite citations to the Gulhams test, the court has in fact employed a new standard of review. The willingness to examine the empirical bases of legislative judgments in applying the new state rational relation test is a form of substantive review.

Since Thompson, the court has decided one significant state equal protection case. In AFSCME Councils 6, 14, 65 & 95 v. Sundquist,142 a statute increasing state employees’ required pension contributions during a fiscal crisis was upheld. In a five to four decision, the majority held that the legislative classification—all state employees except those at the University—was “rationally related to the achievement of a legitimate governmental purpose.”143 A footnote explained the standard of review:

Some confusion has . . . arisen regarding . . . the degree to which our use of [the rational relation test] in the interpretation of the Minnesota Constitution indicates a departure from the

140. Id.

141. No federal cases were cited in the text, making the analysis clearer than in Nelson, where state and federal claims and authorities were combined. The court, however, included a footnote stating that the statute would also be defective under the federal constitution. Id. at 406-07 n.10. For reasons suggested earlier, supra notes 19, 108-09 and accompanying text, the court’s conclusion on federal law seems inaccurate. Unless the court wants to stimulate debate on a significant and unclear point of federal constitutional law, it should avoid inaccurate conclusions about the fourteenth amendment and the accompanying dangers of reversal. See supra note 97.

142. 338 N.W.2d 560 (Minn. 1983).

143. Id. at 569.
standard of rationality analysis developed by the United States Supreme Court. We therefore reiterate that the [state] prohibition against arbitrary legislative action is coextensive with the federal equal protection clause.\textsuperscript{144}

Whether this footnote signaled a permanent retreat or only a temporary reprieve from the standard of review employed in \textit{Wegan}, \textit{Nelson}, and \textit{Thompson} is uncertain.\textsuperscript{145} This uncertainty indicates the continuing relevance of issues discussed in the final section of this Article: the dangers of substantive review.\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{144} \textit{Id.} at 570 n.12 (citations omitted).
\item \textsuperscript{145} The judicial restraint exercised in \textit{Sundquist} may not indicate a permanent change. Instead, it may have been only a pragmatic recognition that the statute at issue addressed a fiscal matter too important for the application of substantive review. The appearance of being result-oriented, inherent in substantive review, threatens the court's integrity. \textit{See infra} notes 160-71 and accompanying text; \textit{see also} Simonett, \textit{The Use of the Term "Result-Oriented" to Characterize Appellate Decisions}, 10 WM. MITCHELL L. REV. 187 (1984). The most recent Minnesota Supreme court equal protection holding was clearly limited to federal constitutional review. \textit{See} Green-Glo Turf Farms, Inc. v. State, C7-82-520, slip op. (Minn. Apr. 27, 1984); \textit{supra} note 19.
\item \textsuperscript{146} Substantive review could be eliminated in tort remedy cases like \textit{Wegan} and \textit{Thompson} by basing decisions on article one, section eight of the Minnesota Constitution rather than on equal protection. Article one, section eight, provides that "\textit{e}very 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." \textit{MINN. CONST.} art. I, § 8 (1857, amended 1974). \textit{See generally} Mickelsen, \textit{The Use and Interpretation of Article I, Section Eight of the Minnesota Constitution 1861-1984}, 10 WM. MITCHELL L. REV. 667 (1984).
\end{itemize}
IV. THE PROBLEM OF SUBSTANTIVE REVIEW

Viewing together the Minnesota cases using the federal equal protection rational relation test\textsuperscript{147} and those using the state test,\textsuperscript{148} the apparent misapplication of United States Supreme Court authority in the first group coincides with the emerging stricter state standard in the second group. This new standard is substantive review.

Substantive review under the federal Constitution has been defined as "judicial appraisal of the substance of laws directly under [the equal protection or due process clauses] . . . of the fourteenth amendment . . . unaided by substantive values attributed to other provisions of the Constitution."\textsuperscript{149} It first became prominent when used by the Supreme Court, usually on due process grounds, to strike down economic regulatory laws during what was known as the \textit{Lochner} era.\textsuperscript{150} Substantive due process review was criticized from its inception\textsuperscript{151} and has been generally unmourned since its demise in the middle 1930's.\textsuperscript{152}

Just after the United States Supreme Court abandoned substantive review of economic legislation, Justice Stone authored the famous \textit{Carolene Products} footnote.\textsuperscript{153} He suggested heightened judicial scrutiny under the equal protection clause of laws affecting matters within the Bill of Rights, restricting participation in the political process, and affecting "discrete and insular minori-

\textsuperscript{147} See supra Section II.
\textsuperscript{148} See supra Section III.
\textsuperscript{149} Linde, supra note 8, at 199.
\textsuperscript{150} During the \textit{Lochner} era, federal substantive review was conducted under the due process clause of the fifth and fourteenth amendments. See, e.g., Adair v. U.S., 208 U.S. 161 (1908) (invalidating congressional labor legislation as violation of fifth amendment due process); \textit{Lochner} v. New York, 198 U.S. 45 (1905) (invalidating New York State labor law as violation of fourteenth amendment due process). At that time, equal protection arguments were summarily dismissed: "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." Buck v. Bell, 274 U.S. 200, 208 (1927). As recently as 15 years ago, the Minnesota Supreme Court, citing Buck v. Bell, brushed aside a federal equal protection challenge, saying "[t]hat ground is not a favored constitutional argument." Johnson v. State Civil Service Dep't, 280 Minn. 61, 68, 157 N.W.2d 747, 752 (1968) (requirement that state employees resign in order to run for public office did not deny equal protection or infringe first amendment); cf supra notes 112-26 and accompanying text (discussion of \textit{Nelson}). Commentators have noted the contemporary shift from due process to equal protection as the preferred vehicle of many courts engaging in substantive review. See, e.g., Linde, supra note 8.
\textsuperscript{151} See \textit{Lochner}, 198 U.S. at 74-76 (Holmes, J., dissenting).
ties.' Justice Stone advocated substantive review for the last two categories of legislation. Today, strict scrutiny is applied to all three types of legislation.

In the 1960's, the Supreme Court employed substantive due process in another area. The Court invalidated a statutory ban on contraceptives and found a constitutional right of privacy which included the right to make childbearing decisions. This decision and subsequent decisions based on substantive review have received much commentary. With the judicial and scholarly embrace of substantive review to protect individual rights, yet another branch of constitutional theory emerged. In the 1970's, commentators feared that the recent federal developments in individual rights would be undone. Their solution was to recommend principled, independent state constitutional law development as additional protection.

154. Id.
155. The exception to this statement is legislation affecting black persons, since protection from official race discrimination against former slaves was clearly the original intent of the fourteenth amendment. See Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 1972 Wash. U.L.Q. 421.
156. See supra notes 13-18 and accompanying text.

Standing somewhat apart from this group as an important contemporary advocate of state constitutional theory is Judge Hans Linde. See Linde, supra note 68; Linde, supra note 72. Linde argued that when addressing constitutional issues, state courts should look to their own bills of rights before construing the fourteenth amendment. This was in part a matter of deference to the judicial principle of reaching a decision on the narrowest possible grounds. If a statute violated the state constitution, there would be no reason for a state court to consider the federal Constitution.

In a larger sense, then Professor Linde was concerned with redressing the imbalance
The Minnesota Supreme Court decisions discussed in this Article reflect the contemporary spirit favoring substantive review and state constitutional law development.\textsuperscript{160} In these cases, the court faced statutes that reconciled competing public policies without implicating any specific constitutional guaranty or interest warranting strict scrutiny. Nevertheless, in each case the court independently determined whether the resulting statutory balance was satisfactory. Unfortunately, this practice places great strain on the courts, statutory law, and constitutional theory.

\textbf{A. The Effect on the Judicial System}

Substantive review burdens the courts because its open-endedness requires courts to give particular values a special status without the guidance of a constitutional text.\textsuperscript{161} Without referring to a constitutional provision more specific than "equal protection," courts have difficulty justifying why one interest rather than another merits constitutional protection. Attempting to act with integrity, courts refrain from designating specific interests for heightened equal protection scrutiny. They do so because no constitution mentions such interests as employment or welfare benefits. Thus restrained, the courts cannot discuss a particular interest; they may only refer generally to rationality or fairness. The price of this tactic is precedent which appears confused and result-oriented.\textsuperscript{162}


\textsuperscript{161} Linde, supra note 68, at 175-81. For the view that the acceptance of judicial review as an institution gives judges authority to assign greater importance to certain values, see Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049, 1095 (1979); Grey, Do We have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975); see also Symposium, Judicial Review and the Constitution—The Text and Beyond, 8 U. Dayton L. Rev. 443 (1983) (discussing different aspects of constitutional review, past and present).

\textsuperscript{162} See Simonett, supra note 145. For example, in Thomale v. Schoen, 309 Minn. 285, 244 N.W.2d 51 (1976), the Minnesota Supreme Court upheld a statute denying additional pay to departing prisoners with wage credits of $100 or more earned during incarceration. Nevertheless, in Ondler, see supra notes 50-66 and accompanying text, the same court invalidated a statute denying additional death benefits to on-duty peace officers who suffered
Some commentators have argued that the state courts' role in the federal system permits them greater freedom to experiment with constitutional theory.163 This rationale justifies some state constitutional law developments, but it does not support substantive review. State courts are not bound by the federal judiciary’s obligation to respect the states’ role in the federal system,164 but they are not without responsibility to state legislatures.165 Since the judicial and legislative branches are coequal, as a matter of respect courts should refrain from arbitrariness in judicial review. Further, because judicial review has become a fixed feature of our government, courts should exercise judicial review in a manner that legislatures can follow. State courts cannot rely upon the “real” constitutional arbiter in Washington to correct aberrant constitutional decisions. The United States Supreme Court lacks jurisdiction over decisions made on independent and adequate state grounds.166

Commentators have also suggested that state court constitutional decisions can be more innovative than federal court rulings because the elected and politically connected state judiciary is not as anti-majoritarian as the life-tenured, remote federal judiciary.167
State judges, however, are not primarily accountable political officials. Although state judges are elected, neither they nor the voters believe the judicial function is to represent particular viewpoints.\textsuperscript{168} State judges are not closely connected with the party system that shapes the public policy agenda. Whether initially elected or appointed to office, some judges may have a history of involvement in partisan politics. On the bench, however, they generally avoid political activism or identification with public issues. The Code of Judicial Conduct\textsuperscript{169} and the judiciary’s own sense of professional propriety impose these restraints.\textsuperscript{170}

Insulating judges so they can serve as impartial arbiters of disputes reduces their public accountability and capacity for identifying societal values. In a democracy, this insulation reduces the judiciary’s fitness to make decisions having broad public policy ramifications.\textsuperscript{171} Since constitutional decisions are characterized

\begin{footnotes}
\footnotetext[168]{See, e.g., Spaeth, \textit{Reflections on a Judicial Campaign}, 60 \textit{Judicature} 10 (1976). Judge Spaeth of the Pennsylvania Superior Court, an intermediate appellate court, recommends that parties seeking to change the law should address the legislature rather than the judiciary. \textit{Id.} at 19.}
\footnotetext[169]{\textit{Code of Judicial Conduct}, Canon 7 (1983).}
\footnotetext[170]{See generally H. Glick, \textit{Supreme Courts in State Politics} (1971). The author studied supreme court justices in two states with partisan elections (Pennsylvania and Louisiana) and two states where judges are chosen by gubernatorial appointment (Massachusetts and New Jersey). \textit{Id.} at 134-35. Twenty-six of the justices believed it was not permissible for judges to have any relationship with political parties. \textit{Id.} at 126-27. Four justices in Louisiana believed a judge could maintain a relationship with a political party in order to participate in his own reelection. \textit{Id.} at 123. All the justices believed that involvement with a political party would create the appearance or reality of bias in the performance of their official duties. \textit{Id.} at 124.}
\footnotetext{171}{See Sandalow, supra note 165, at 459; see also Griswold v. Connecticut, 381 U.S. at 519 (Black, J., dissenting) (judges cannot take a “Gallup Poll”). Even Justice Traynor,}
\end{footnotes}
by such ramifications, courts should proceed cautiously and avoid the hazards of substantive review.

B. The Effect on Statutory Law

Substantive review inevitably strains statutory and constitutional law. Statutory law suffers two opposite and equally serious strains: instability and rigidity. Substantive review's open-endedness tempts lawyers to challenge every adverse statute using a constitutional argument. According to Judge Linde, lawyers feel obligated to make the attempt because it takes little effort and might succeed.172

The open-endedness of substantive equal protection creates the impression that it can be implicated anywhere, even in a statute not involving classifications.173 Frequent use of substantive review can cause undesirable rigidity by cutting off the legislative-judicial interplay in the development of law. When courts wield the constitutional weapon, they end all legislative experimentation and debate between the branches.174

who believes the judiciary's insulation from politics is an advantage rather than a handicap in formulating public policy, recommends restraint in issuing constitutional decisions. Traynor, The Limits of Judicial Creativity, 63 IOWA L. REV. 1, 13 (1977).

For a view acknowledging the political role of the judiciary and demanding accompanying public accountability, see, e.g., P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980); Hannah, Competition In Michigan's Judicial Elections: Democratic Ideals vs. Judicial Realities, 24 WAYNE L. REV. 1267 (1978).

172. Linde, supra note 68, at 129.
173. See, e.g., Price v. Amdal, 256 N.W.2d 461 (Minn. 1977). In Price, the court found a violation of equal protection in a statute affording a presumption of due care to decedents, but not survivors, in wrongful death actions. Id. at 465. The court found that the Minnesota comparative negligence statute, when considered with the presumption of due care, arbitrarily divided persons into the classes of survivors or decedents. Id. at 469. Thus, the court invalidated the statutory presumption of due care as a violation of equal protection. Id. The use of substantive review could have been avoided by analyzing the statute under article one, section eight of the Minnesota Constitution. See supra note 146.

174. A comparison of two cases is instructive on this point. In Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975), the court abolished sovereign immunity in the area of tort law. Id. at 132, 235 N.W.2d at 603. Although statutes governed certain aspects of sovereign immunity, the court concluded that it was a court-created doctrine which could be abrogated as part of common law development. Id. at 125-28, 238 N.W.2d at 600-01. The court did not consider the constitutionality of sovereign immunity but carefully left the area open for further legislative and common law case development.

At the other end of the spectrum is Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982); see supra notes 127-39 and accompanying text. The Thompson court found that the survival requirement to an intentional tort action violated the state equal protection clause. 319 N.W.2d at 406. To minimize the apparent contravention of the legislative intent, the court indicated precisely how the statute should be amended to comply with its opinion. Id. at 407.
Under substantive equal protection theory, statutes in effect for years may successfully be challenged as violating equal protection. This phenomenon was illustrated by *Wegan v. Village of Lexington*. *Wegan* invalidated provisions of the Dram Shop Act that differed from the common law negligence action available to plaintiffs not covered by the Act. The court noted in *Wegan* that it might be confusing or awkward if multiple plaintiffs were injured, some covered by the statute and some not. Nevertheless, the problem could have been reconciled without constitutionally invalidating a statute.

An unworkable legislative act can be changed the following session. A common law decision can be replaced by legislation, overruled, or distinguished. By nature, however, constitutional decisions are more permanent. Legislatures are powerless to over-turn them and courts are more strictly bound by stare decisis in constitutional decisions. Commitment to values enunciated in the text of constitutions, such as free speech and racial equality, rightly continues over a span of centuries. Yet the degree of protection provided other interests, such as those of tortfeasors or injured parties, should be allowed to change from decade to decade.

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175. It is worth noting the work of two scholars who have focused on the problem of statutes which they consider obsolete and in need of replacement. See G. Calabresi, *A Common Law for the Age of Statutes* (1982); Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979). Calabresi's approach derives from the courts' function of developing the common law. He specifically warns against using constitutional theory in this area. G. CALABRESI, supra, at 10-12. Davies has proposed an act authorizing judicial modification of laws over 20 years old. Davies, supra, at 230. He has rejected the use of constitutional law to modify obsolete statutes since it "creates a legal rigidity that is worse than the statutory obsolescence." *Id.* at 228; see supra notes 172-73 and accompanying text.

176. 309 N.W.2d 273 (Minn. 1981).
177. *Id.* at 279-81; see supra notes 86-111 and accompanying text (discussion of *Wegan*).
179. Kossak v. Stalling, 277 N.W.2d 30 (Minn. 1979), is one illustration of the fluctuation in protections accorded certain interests. The statute in *Kossak* granted municipalities a shorter limitations period than other tortfeasors. When tort law's primary focus was spreading losses to compensate injured parties, the statute seemed harsh. Cf. Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 713 (1965) (delineates functions of tort law). Nevertheless, during an era concerned with rising insurance premiums, spiraling property taxes, and alleged spurious claims, the municipal limitations period represented an effort to restore the balance. The Minnesota Supreme Court expressed its awareness of cost-containment issues in contemporary tort litigation in *Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982).
C. The Effect on Constitutional Theory

Substantive review can also harm constitutional theory. It can dilute constitutional doctrine when it is used on behalf of interests having little basis in the state or federal constitutions. If any group injured by a legislative policy choice can argue that the harm it suffers violates the constitution, equal protection will become meaningless. Rather than protecting fundamental values in a representative democracy, equal protection as embodied in Nelson becomes a weapon for any disgruntled group coming before the court. Invalidating legislation under substantive equal protection review may lead not to more egalitarian laws but to public cynicism about judicial interference with the majority's will, legislative ineptitude, and constitutional ubiquity.

180. This process of dilution was evident in Nelson v. Peterson, 313 N.W.2d 580 (Minn. 1981); see supra notes 112-26 and accompanying text. There, the court held that state-employed workers' compensation petitioners' attorneys had a constitutional right to be considered for administrative law judge positions without waiting two years after terminating their employment as petitioners' attorneys. The invalidated statute did not affect a suspect class or a fundamental right. No general democratic theory supported a right to immediate access to public employment for all. Nevertheless, without allowing for the countervailing policy goal of reducing administrative law judge bias, the Nelson court declared the two year delay unconstitutional.

181. Delivering the Harlan Fisk Stone Lecture on Footnote 4 of the Carotene Products case, Justice Powell observed that in one sense any group that loses a legislative battle can be regarded as both 'discrete' and 'insular.' It is discrete because it supported or opposed legislation not supported or opposed by the majority. It is insular because it was unable to form coalitions to achieve its desired ends through the political process. Powell, Carotene Products Revisited, 82 COLUM. L. REV. 1087, 1090 (1982). He cautioned against carrying that observation to its furthest limits.

182. Some commentators have suggested that public dissatisfaction with state court doctrinal innovations can be cured by constitutional amendment. See Developments, supra note 72, at 1354. Although state constitutions are more frequently amended than the federal Constitution, see id. at 1354 n.108, advocating amendments as a routine safety valve is not a practical alternative in Minnesota. The Minnesota Constitution does not permit voters to initiate amendments. The requirement that amendments proposed by the legislature be ratified by a majority of those voting at the election, rather than only a majority voting on the amendment, means that persons who fail to vote on the question count as "No" votes. MINN. CONST. art. IX, § 1 (1857, amended 1974). The apparent purpose of the provision is to stop a dedicated minority from ratifying a change to which the majority is indifferent. In recent years its effect has been to require the approval of 55% of those voting on an amendment to achieve ratification.

Even if the Minnesota Constitution were more easily amended, using it to overrule the court has disadvantages. Frequent amendment would clutter the constitution with authorizations for particular legislative programs and diffuse the present outline of fundamental rights, processes, and government structures. It would also diminish respect for the
V. CONCLUSION

Substantive judicial review places stress on the courts, statutory law, and constitutional theory. Most importantly, it conflicts with the theory and practice of representative government. In a democracy, a simple majority of the legislators with the signature of the chief executive enact statutory law. Substantive judicial review defeats democratic government in two ways. First, it purports to examine the logic of a statute, and second, it attempts to compensate for the alleged under-representativeness of the legislative branch.

Legislation is in fact never irrational. It represents a large or small step toward a desired goal which managed to garner a majority vote in the legislative chambers. It may signify varying degrees of support or opposition for the goal, or a difference of opinion as to the efficacy of the means taken. The political, economic, and administrative compromises in legislation may not produce a model of efficiency. Nevertheless, legislation represents the reasoned judgment of those who must accommodate numerous competing concerns to achieve a publicly acceptable result.

Commentators have argued that groups without access to or influence in the legislature need the judicial arena to present their claims. If legislatures are not sufficiently open to the public, court, by encouraging the perception that unpopular constitutional decisions, like unpopular legislators, should simply be voted out.

For the view that the ease of amending state constitutions is in fact an argument for judicial restraint, see G. Calabresi, supra note 175, at 12-13.

183. See Minn. Const. art. IV, §§ 22, 23 (1857, amended 1974).


185. On federal constitutional issues, see, e.g., Bennett, supra note 161, at 1102-03; Parker, supra note 158, at 227. In the state constitutional field, free enterprise is deemed the interest in greatest need of judicial protection from legislative actions. See Howard, supra note 23, at 879; Kirby, supra note 23; see also Fleming & Nordby, supra note 160 (state bill of rights needs more expansive interpretation).

186. The openness of the legislature cannot be attacked in Minnesota. The legislative process is open at all stages including committee hearings, floor sessions, and conference committees. Lobbyist registration and campaign contribution reports are required by law. Minn. Stat. §§ 10A.03, 10A.20 (1982). Representatives of public employees, private employers, and the tort bar exercise their right to influence the process. See Ethical Practices Board, Lobbying Disbursement Summary 1983. The Summary indicates
they should be made more open rather than having their function transferred to a branch of government that is not politically accountable. If the legislature is accessible to the public, permitting groups to obtain judicial relief for their losses in the legislature defeats democratic principles. As a result, the legislature's sense of responsibility to the public and the public's perception of the legislature's importance are weakened.

Meanwhile, the legitimacy of government is undermined by the lack of theoretical foundation for judicial intervention. Democratic theory underlies the policymaking function of legislatures. However imperfectly the legislative process operates in practice, it remains the ultimate political avenue for most Americans. When courts substitute their guidance, even as modified by traditional notions of judicial review, the democratic basis is lost. Consequently, substantive review is a troubling phenomenon whenever it appears in constitutional adjudication.

expenditures by each registered lobbyist organization, exclusive of salaries and personal expenses.

187. The appellate process is inappropriate for routine policymaking because it excludes public participation. Although the judiciary has access to social science materials and an expert factfinding capacity similar to the legislature's, it purposely avoids the other important ingredients of the legislative process: public testimony, telephone calls, letters, and demonstrations in the hallways. Participation in appellate briefing and arguments is limited to the parties and a few approved intervenors or amici; the judicial conference itself is closed. This structure promotes efficiency and guards against bias and intellectual distraction in the resolution of disputes between individual parties that may create legal doctrine applicable to others in similar situations. The structure is also appropriate when the court determines the relationship between a particular statute and a value found in the constitution. In both of these areas, society generally agrees that neutral intellectual principles should be applied. In making general public policy, however, we are less concerned with the rationality of the product than with the degree of democracy present in its formulation. The appellate process cannot satisfy this requirement.

188. See Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162 (1977); Sandalow, supra note 163, at 447.