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ESSAYS

AN INTRODUCTION TO ESSAYS ON THE MINNESOTA CONSTITUTION

JOHN E. SIMONET†

In the last fifteen years, our state constitution has found itself the object of considerable attention. No longer the shy wall-flower, by itself, alone at the edge of the dance floor, it now finds itself courted, never at a loss for admiring partners, dancing every dance.

During the fifties, sixties and seventies, when I practiced law, there seemed to be few occasions to invoke the state constitution. Lawyers knew about the "uniformity of taxation" clause, the constitutional sanctity of the homestead, and the guaranty of "just compensation" for property taken or damaged by the state. Due process, of course, was important, but it was as much a common law doctrine of instinctive fairness as a constitutional concept. And assertions of unconstitutional delegation of legislative authority were thought useful to inveigh against administrative regulations.

Generally, when one thought of constitutional law—if one thought of it at all—it was understood to be the Federal Constitution and its interpretation by the United States Supreme Court. In criminal cases, state judges and practitioners looked to the Federal Constitution for the rights of the suspect and the accused. This was equally true for the great civil liberties of freedom of speech, press, and religion. Today, however, the practitioner challenged by a constitutional issue on individual rights must consider the impact of the state as well as the Federal Constitution.

How does one explain the nationwide re-emergence of state constitutions? There are many reasons. In the 1960s, the Fed-

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1. Dunnell's explains that its constitutional law chapter covers the basic principles of federal and state governments, "with particular emphasis on the state constitutional system." 7 DUNNELL MINN. DIG., Const. Law 193 (4th ed. 1990).
eral Bill of Rights was extended to the states. At the same time, the social ferment of the sixties combined with the post-war population boom and the boiling over of the American "melting pot" to create new pressures on constitutional liberties. And *Brown v. Board of Education*, although decided on federal grounds, alerted the bench and bar to the immense possibilities of the equal protection clause as a lever to pry this diverse nation into fairness.

Perhaps as great a factor as any in focusing attention on state constitutions in the area of individual rights has been the loss of space. In this country, until the sixties and seventies, if one felt crowded, one could always move to more open spaces, or at least one felt that one could. But no longer. As subdivisions, condominiums, infrastructures, and shopping malls devour acreage and square footage, and automobiles, airplanes, and telecommunications diminish distance, the inevitable friction that results from loss of elbow room has created a demand for psychic space to compensate for today's physical closeness. To a large extent, law, and especially constitutional law, is being increasingly called upon to define this new kind of space where people may be themselves. It is not surprising, then, that people, restless in the "lonely crowd," would take a renewed interest in the governmental charter closest to them.

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

2. "It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 493 (1977).


4. For instance, restrictions have been placed on the number of canoeists who may enter Minnesota's "legendary" Boundary Waters Canoe Area. *See* Bill Kramer, *Slamming the Door on the BWCA*, Star Tubb. (Mpls.), Sept. 29, 1991, at 19A. In addition, a record 3.1 million people visited Yellowstone National Park in 1992 and the amount is expected to increase in the following years. *See* Kurt J. Repanshek, *Yellowstone Suffers in Budget Squeeze*, L.A. Times, June 27, 1993 at 24A.

INTRODUCTION

This issue of the *William Mitchell Law Review* is, then, most timely.

In this introduction to the series of essays that follow, I should like to identify the special considerations that the bench and bar need to take into account when interpreting and applying the provisions of our state constitution.

I.

"[W]e must never forget," said Chief Justice John Marshall, "that it is a constitution we are expounding."6 Why, though, would Marshall find it necessary to state the obvious? Two reasons come to mind. In part, there is the tendency to think of a constitution as a statute—a very special kind of statute, but a statute nevertheless. Then, too, there is the equally distorting tendency to consider constitutional law and its explication as little different from common law and equity jurisprudence. State courts are particularly susceptible to these distortions because statutory interpretation and common law development are the familiar daily fare of state courts.

State courts deal with statutes every day; consequently, it is easy for them to think of their state constitution as a kind of super-statute dealing with basic and fundamental rights. The rules of construction for our state constitution, the Minnesota Supreme Court has stated, "are substantially the same as rules applicable to the construction of statutes."7 But is this really true? The object of all interpretation of our statutes is "to ascertain and effectuate the intention of the legislature,"8 but in construing a constitution, it is the intention of the sovereign people, not the legislature, that is sought to be effectuated; and the occasion involved, the object sought, and the circumstances pertinent, are quite different. In *Board of Supervisors v. Heenan*,9 the Minnesota Supreme Court points out the differences between a constitution and a statute. The latter are more directory, said the court, because statutes are committed "in minute detail, of the whole working system of the government," whereas a consti-

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7. *State ex rel. Matthews v. Houderscheidt*, 15 Minn. 167, 170, 186 N.W. 294, 236 (1922). See also *Willis v. Mahon*, 48 Minn. 140, 50 N.W. 1110 (1892). Here, Justice Mitchell suggests that a constitution is "but a higher form of statutory law." *Id.* at 150, 50 N.W. at 1111.
9. 2 Minn. 330, 2 Gil. 281 (1892).
tution "is confined to the more general establishment of the fundamental principles upon which, and the conditions and limitations under which, the system is to operate."10

Statutes tend to deal with the mundane and the immediate while constitutions deal with larger and more lasting pronouncements of principle. Particularly is this true of the state’s bill of rights, as Justice Mitchell pointed out, in another early case, Allen v. Pioneer Press Co. 11 Justice Mitchell observed that the civil liberties guaranteed by article I of our constitution "are but declaratory of general fundamental principles."12 And he added, "[t]hese constitutional declarations of general principle are not, and from the nature of the case, cannot be, so certain and definite as to form rules for judicial decision in all cases, but up to a point must be treated as guides to legislative judgment, rather than as absolute limitations of their power."13 It is in this area of civil liberties, where the bill of rights provisions of the federal and state constitutions overlap, that most of the current activity in state constitutional law arises.

This emphasis on broad guidelines rather than specific rules distinguishes constitutional law from the common law, as well as from statutory law. Unbounded by any charter and relying on the general experience of the people, the common law is free to develop its own rules for tort, contract and the like, doing so incrementally, building on its own precedent, modifying and changing that precedent as the need arises, and sticking close to the facts of the particular case. The common law is the special preserve of state jurisprudence, and the state court is at home here as the federal court is not.14 Witness, for example, the recent difficulties of the United States Supreme Court in attempting unsuccessfully to deal with the size of punitive damages awards on a substantive due process basis.15 The danger, however, as commentators have pointed out, is that state courts, now

10. Id. at 332, 2 Gil. at 283.
11. 40 Minn. 117, 41 N.W. 936 (1889).
12. Id. at 122, 41 N.W. at 938.
13. Id.
15. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) ("With respect to . . . whether a particular punitive award is so ‘grossly excessive’ as to violate the Due Process Clause, this Court need not, and indeed cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.").
venturing into the expanding field of state constitutional law, will confuse the two kinds of law, either by constitutionalizing their common law or by incorporating generic federal constitutional law into common law rulings.\textsuperscript{16}

Another difference of constitutional law is that it professes to take stare decisis more seriously than the common law. If a state constitution deals with "fundamental" law, then any judicial decision construing that constitution is also "fundamental," and consequently should not be easily set aside, or at least not as easily as common law precedent. Although one suspects constitutional law is not as impervious to change as is commonly thought, it is nevertheless true that constitutional stare decisis has unique characteristics. For example, the legislature may, and frequently does, enact new legislation overruling a court decision interpreting a statute or creating a common law rule;\textsuperscript{17} but if the court pronounces a statute unconstitutional, no legislative re-enactment may reverse the court's pronouncement. After the Minnesota Supreme Court in \textit{State v. Hamm}\textsuperscript{18} declared a state statute providing for six-member juries violated the state constitution, it took a constitutional amendment to reverse this decision. In any event, this sense that constitutional law concerns itself with enduring principles has led to the belief that constitutions should be applied with caution,\textsuperscript{19} and only when necessary.\textsuperscript{20}


\textsuperscript{17} See, e.g., \textit{Minn. Stat.} § 604.10 (1992) (reformulating in part the Minnesota Supreme Court's decision in \textit{Hapka v. Paquin Farms}, 458 N.W.2d 683 (Minn. 1990) (dealing with the "economic loss" rule in products liability cases)).

\textsuperscript{18} 423 N.W.2d 379, 380 (Minn. 1988).

\textsuperscript{19} See Justice Brandeis' concurrence in \textit{Ashwander v. Tennessee Valley Auth.}, 297 U.S. 288, 346-48 (1936), setting out seven situations under which the United States Supreme Court "has avoided passing upon a large part of all the constitutional questions pressed upon it for decision," \textit{Id.} at 346 (Brandeis, J., concurring).

\textsuperscript{20} It is sometimes said that the unconstitutionality of a statute must be shown beyond a reasonable doubt. See, e.g., \textit{Wegan v. Village of Lexington}, 309 N.W.2d 273, 279 (1981). This should not be taken literally. Facts necessary for a constitutional violation are usually established by a fair preponderance of the evidence. See, e.g., \textit{State v. Linder}, 268 N.W.2d 734, 735 (Minn. 1978) (applying a preponderance of evidence standard for constitutional issues raised at suppression hearing); \textit{see also Nix v. Williams}, 467 U.S. 431, 444 (1984) (applying a preponderance of the evidence standard to prove inevitable discovery). In protecting individual rights, where, for example, the court engages in balancing competing interests or in applying different levels of scrutiny, the court does not attempt to prove anything beyond a reasonable doubt. Introducing a burden of proof standard in this situation or in construing statutory language is only confusing. When a court says the unconstitutionality of a statute must be proven be-
On occasion the Minnesota Supreme Court, wishing to avoid a federal constitutional issue, has done so not by invoking the state constitution, but by finding nonconstitutional error, as, for example, by finding a violation of the state rules of criminal procedure. The court is then in position to use harmless, or prejudicial, common law error as a flexible sanction for the violation.\(^{21}\) Recently, the court refused to rule that the "cruel or unusual" clause of the Minnesota Constitution\(^{22}\) guarantees proportionality in criminal sentences, observing that "[t]o do as appellant asks would be to constitutionalize the sentencing guidelines."\(^{23}\)

When Alfred North Whitehead was asked, "Which are more important, facts or ideas?", he replied, "Ideas about facts."\(^{24}\) In a way, this is a pretty good definition of law because law is neither ideas alone nor facts alone, but an interaction of the two. One of the seductive attractions of constitutional law is its tendency to concentrate on the "idea" side of the equation. To be free of the fact-bound inquiries of the common law with its eponymous reasonable person standard, and to explore the abstract qualities of the great individual freedoms, can be a liberating experience for the state judge who customarily works with the Uniform Commercial Code, the sentencing guidelines, and the ambiguities of insurance policies. It is no wonder many law students select constitutional law as their favorite subject. Yet, always tugging against the law's abstractness is the law's need to be grounded in fact. Every common law lawyer instinctively warms to Justice Holmes' statement that the First Amendment "would not protect a man on falsely shouting fire in a theatre..."\(^{25}\) We like a legal proposition that is solidly concrete, forgetting that in the case in which Justice Holmes made his remark, there was no fire and no theatre.\(^{26}\)

\(^{21}\) See, e.g., State v. Thompson, 430 N.W.2d 151 (Minn. 1988).
\(^{22}\) MINN. CONST. art. I, § 5.
\(^{23}\) State v. Stirens, 506 N.W.2d 302, 305 (Minn. 1993).
\(^{24}\) DIALOGUES OF ALFRED NORTH WHITEHEAD 271 (Lucien Price, ed. 1954).
\(^{26}\) Id. Sometimes state constitutions show evidence of the common law lawyer's instinct for the concrete. See, e.g., MINN. CONST. art. XIII, § 7 ("Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor.")
INTRODUCTION

Constitutional law also weds facts to law, albeit in a somewhat different fashion than the common law, perhaps because it does not use the jury for its factfinding as does the common law. Indeed, when facts "incorporate standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights," the court "reserves to itself the fashioning and application of those standards and criteria."27 Thus we see judges applying a "totality of the circumstances" test, selecting this fact and downgrading another, in deciding if a defendant's confession is constitutionally "voluntary."28

Charles P. Curtis, Jr., says that constitutional law is not really law at all.29 Perhaps so. Even in this age of specialization, there are no constitutional law departments in the big law firms, nor do constitutional law boutiques abound. Constitutional doctrine is more a presence hovering over all the law. If state conduct violates the constitution, it seems somehow incorrect to say the conduct is "illegal"; we prefer to say it is "unconstitutional." But if a law is held to be constitutional, it seems more accurate to say the law is "not unconstitutional."30

Curtis says, "[w]hen the Court holds a statute unconstitutional, it is laying a taboo on the state."31 He then quotes from Frazer's The Golden Bough, where Frazer speaks of kings and royal taboos:

A King of this sort lives hedged in by a ceremonious etiquette, a network of prohibitions and observances, of which the intention is not to contribute to his dignity, much less to his comfort, but to restrain him from conduct which, by disturbing the harmony of nature, might involve himself, his people, and the universe in one common catastrophe.32

In a sense, then, constitutional law deals with what the sovereign cannot do, and is concerned with what the sovereign can do only to the extent it does not cross the line.

31. CURTIS, supra note 29, at 57.
32. Id. at 57-58 (citing JAMES FRAZER, THE GOLDEN BOUGH: THE MAJIC ART AND EVOLUTION OF KINGS, (1935)).
II.

This leads us, then, to a consideration of the state constitution under this nation’s system of federalism, where the Federal Constitution, with its Supremacy Clause, is controlling. The Federal Constitution, it is said, establishes a floor, a level of protection for individual liberties, beneath which a state constitution may not go. A state constitution may raise the floor by adding additional guaranties, but it may not lower the level. And if the state court should raise the floor but not make it clear that it is doing so only under its own state constitution, the United States Supreme Court may intervene. Also, the state may not raise its constitutional protection for a particular civil liberty so far above the federal floor that it bumps against the federal floor for some other competing civil right; in this case the federal floor becomes a ceiling.

All this is clear enough, but the question then arises as to whether the state court uses as its point of departure (or rest) the federal floor or a floor of its own. For example, if the state court is satisfied that the matter before it is unconstitutional regardless of which constitution is applied, i.e., that both constitutions reach the same floor level, the state court has several options. For example, the court can apply, so to speak, both the federal floor with its oak planks and the state constitution with either its own pine-wood floorboards or by plugging in the federal oak planks. In other words, a court confronted with both state and federal constitutional challenges has to consider questions of approach (i.e., whose floor to use?) and of methodology (whose floorboards?).

In approaching a constitutional issue, the state court must initially decide which constitution to use and, if both, which one first. Some commentators and courts argue that the state constitution should invariably be applied first, while others argue that the state constitution should be held in reserve and used only “interstitially” to fill in the gaps in federal constitutional doctrine. 35

34. The red pine (Pinus resinosa), more commonly known as Norway pine, is designated as the official state tree of Minnesota. See Minn. Stat. § 1.143, subd. 1 (1992).
So far, the Minnesota Supreme Court has varied its approach. In *Friedman v. Commissioner of Public Safety*[^36] involving the right to counsel in criminal cases, the court applied only its own constitution but used the federal “critical stage” methodology. In *Jarvis v. Levine*[^37] involving mentally ill patients receiving narcoleptic medication, the court disclaimed any reliance on the Federal Constitution and put the patients’ right to privacy solely on state constitutional grounds. Then, in *State v. Davidson*[^38] the court, noting that the United States Supreme Court has held that obscenity is not protected speech, added that it saw no reason to apply the state constitution differently.

There appear to be no clear criteria for which constitution to apply and, if both, in what order. At times a little chutzpa asserts itself, as when the Vermont Supreme Court quoted with approval the assertion that the state constitution “is our birthright, which we have sold for a bowl of federal porridge.”[^39] A major factor is the importance that state judges attach to the particular civil right under consideration; the more important the right, the more likely the state court will endeavor to place that right on unassailable state grounds. In some cases the constitutional issue may suggest a wait-and-see attitude, letting federal constitutional doctrine evolve first. This makes for an interesting reversal of roles, with the federal government rather than the state being the “laboratory” for experimentation[^40]. The importance of the constitutional issue to the state court will depend on the importance placed on the issue by the people of the state. Each state has a personality of its own[^41] and its hopes and fears for the future and the present are conditioned by that state’s cultural, social, economic and legal history and traditions.[^42]

[^36]: 473 N.W.2d 828 (Minn. 1991).
[^37]: 418 N.W.2d 139, 148-49 (Minn. 1988).
[^38]: 481 N.W.2d 51, 57 (Minn. 1992).
[^41]: “Of course, I’ve been from Minnesota since I was born, so the book really isn’t all that useful to me, but it’s got to be helpful to visitors.” HOWARD MOHR, HOW TO TALK MINNESOTAN (A VISITOR’S GUIDE) at vii (1987).
[^42]: After reviewing United States Supreme Court and Minnesota Supreme Court opinions from 1880 to 1925, Professor Carol Chomsky found that the Minnesota Supreme Court, while citing federal “liberty of contract” rubric, deferred to legislative solutions to economic regulation to a far greater extent than did the United States Supreme Court. But how to explain? “Part of the answer,” she concluded, “may be found in the wide public and political consensus for moderate progressive reform in
So far it has been assumed that the state court is deciding which constitution to use. But what if, as is likely to happen more and more, it is the federal court that is confronted with dual constitutional claims? The state supreme court, of course, has the final word on the interpretation of its own constitution. But, unlike the case originating in state court, if the federal court chooses to decide the case on state constitutional grounds, there may be no opportunity for the state supreme court to speak to the issue, unless the federal court chooses to certify the state constitutional claim to the state supreme court, or to abstain.

Federal courts, of course, follow the well-settled doctrine that federal constitutional issues should be avoided if a case can be decided on state law grounds. But the Ninth Circuit has held that "federal constitutional issues should be avoided even when the alternative ground is one of state constitutional law." Thus in a case involving free speech, the Ninth Circuit, finding no "substantial uncertainty" in California's liberty of speech clause, chose to apply the state constitution. Because application of a constitutional principle can itself be an interpretation of constitutional doctrine, it would seem that the federal court must be particularly careful in deciding whether or not to apply the state constitution. Put another way, a state constitution may be "state law," but it is state law of a different dimension.

In the meantime, while these questions remain to be sorted out, we have the interesting situation of state courts being of two minds as to whether to make primary use of the state or Federal Constitution, while the federal courts are being urged to prefer the state constitution over the federal.


43. Reed v. Bjornson, 191 Minn. 254, 257, 253 N.W. 102, 104 (1934) ("Our interpretation of our own Constitution is of course final.").


45. See Askew v. Hargrave, 401 U.S. 476, 478 (1971) (indicating that conflict between state and federal law would be certified to the state supreme court for interpretation).

46. Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985). See also Hewitt v. Joyner, 940 F.2d 1561, 1565 (9th Cir. 1991).

47. Carreras, 768 F.2d at 1043 n.5. In support of its statement that the federal court will apply the state rather than the Federal Constitution when the former is available, the Carreras court cited Askew v. Hargrave, 401 U.S. 476, 478 (1971), although conceding Askew was an abstention situation. Arguably the same deference in nonabstention situations is more problematic.
In recent years the Minnesota Supreme Court on two occasions has declared certain state action to be unconstitutional under the Federal Constitution, only to have the United States Supreme Court disagree and remand for further consideration. In the first case, *Hershberger I*, the state supreme court had applied the Federal Free Exercise of Religion Clause to hold that application of a traffic law to the Amish was unconstitutional. In the second case, *Cohen*, the court had ruled that application of an estoppel theory to a reporter’s promise of confidentiality would violate the free press guaranty of the First Amendment. On remand, the *Hershberger II* court chose to apply its own state constitution and again declared enforcement of the traffic law against the Amish was unconstitutional. In *Cohen*, on remand, the court declined to extend the protection of its own free press clause beyond the federal protection.

Some have observed that if *Hershberger I* had been decided initially on state constitutional grounds, there would have been no need for an appeal to the United States Supreme Court, with the resultant waste of time and expense. While there is merit to this criticism, it is likewise true that by the time *Hershberger I* reached the United States Supreme Court, that Court had radically changed its test for a free exercise case from what it had been at the time *Hershberger I* was decided. And, indeed, on remand, although *Hershberger II* was decided on the basis of the state’s “liberty of conscience” clause, the court used the basic outlines of the old federal balancing test abandoned by the United States Supreme Court, but substituted the state constitution’s “peace or safety” language. Arguably, the time and expense involved in Hershberger’s tortured route was well spent; although the end result was the same for the Amish, the result for state constitu-


49. Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990) [hereinafter *Cowles I*], on remand, 479 N.W.2d 387 (Minn. 1992) [hereinafter *Cowles II*].

50. *Hershberger II*, 362 N.W.2d at 397-99.

51. *Cowles II*, 479 N.W.2d at 390-91.

52. See supra note 48 and accompanying text.
tional doctrine was a more carefully considered methodology for the liberty of conscience clause.\textsuperscript{53}

The approach of the Minnesota Supreme Court, at least to now, is perhaps best described in \textit{State v. Fuller.}\textsuperscript{54} There the court declined to expand the protection of the state's double jeopardy clause beyond that afforded by the United States Supreme Court under its interpretation of the Federal Double Jeopardy Clause. In a passage frequently quoted, Justice Peterson, writing for the court, said that state courts are "the first line of defense for individual liberties within the federalist system."\textsuperscript{55} But he then added, this "does not mean that we will or should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution."\textsuperscript{56}

III.

Once the decision is made to apply the state constitution to the issue at hand, the next question is the manner in which it is to be applied. This is a question of methodology.

If the constitutional text and its application are clear, there is no need for interpretation and, in good Minnesota Lutheran tradition, the Minnesota court will apply the constitutional provi-

\textsuperscript{53} Sometimes a state trial court or intermediate appellate court will use a case with particularly egregious facts to challenge the state supreme court to re-evaluate a particular precedent. A state supreme court may also do the same with a federal constitutional doctrine. \textit{See, e.g.}, \textit{State v. Murphy}, 324 N.W.2d 340 (Minn. 1982) [hereinafter \textit{Murphy I}].

In \textit{Murphy I} the state supreme court applied federal constitutional doctrine to hold that a confession to a horrible crime, obtained from the defendant by his probation officer without a \textit{Miranda} warning, required suppression of the confession. The court added, "[w]hen the enormity of this decision is contemplated, we wonder whether there may be some other solution than the exclusion of otherwise trustworthy evidence." \textit{Id.} at 344 (applying \textit{Miranda v. Arizona}, 384 U.S. 436 (1966)).

Accepting this invitation to review, the United States Supreme Court reversed and remanded in \textit{Minnesota v. Murphy}, 465 U.S. 420 (1984). On remand, the defendant urged the state court to suppress his confession on state constitutional grounds. \textit{See} \textit{State v. Murphy}, 380 N.W.2d 766 (Minn. 1986) [hereinafter \textit{Murphy II}]. Instead, the Minnesota Supreme Court affirmed suppression, stating that the United States Supreme Court's interpretation of the self-incrimination clause "is also a correct statement of the law under article 1, section 7 of the Minnesota Constitution." \textit{Id.} at 771.

\textsuperscript{54} \textit{State v. Fuller}, 374 N.W.2d 722 (Minn. 1985).

\textsuperscript{55} \textit{Id.} at 726 (footnote omitted).

\textsuperscript{56} \textit{Id.} at 726-27.
sion as written. But if the court must apply its constitution to new situations never contemplated by the framers, as is usually the case, the court must then search further for guidance. "Original intent" is not a particularly helpful approach. Reports of our state's constitutional conventions are quite barren of discussions on the merits of the various provisions. Our state, for example, has nothing comparable to the Federalist Papers. The citizens of Minnesota in the mid-nineteenth century, among them the convention delegates, were recently-arrived immigrants, many from the East Coast. Consequently, the history of the drafting of our state constitution is not particularly enlightening, except as one might be able to trace specific provisions back to even earlier constitutions in other states. "The lasting quality of the constitution," wrote Val Björnson, "attests to its rootage in the experience of older States. There was extensive borrowing, and 'no very important innovations were proposed' in either of the two conventions."

Perhaps the doctrine of "original intent," which has attained almost mystic properties, means only that there is a line beyond which the citizens of the state expect that the court will not go. The line may change from generation to generation, but the line is there and cannot be ignored. "Original intent" is a reminder that it is the aspirations of a sovereign people, not the personal predilections of judges, that governs constitutional interpretation.

Methodology becomes especially tricky when the federal and state constitutional provisions read in essentially the same way and the state provision is applied using federal methodology. If the state court arrives at a different result in these instances, there may be a perception by the general public that state constitutional doctrine is only interested in results. The fact is, however, that constitutional interpretation is more than a linguistic

57. "As the Lutherans are supposed to have argued with regard to Biblical interpretation, 'It stands written,' Minnesota's pioneer legislators had similar feelings about constitutional authority." 1 Val Björnson, History of Minnesota, 152-53 (1969). Because the new constitution set the date for the first session of the state legislature, explained Björnson, the legislators decided to meet on that date, even though Minnesota was not yet a state and was not to be admitted to the Union for another five months. Id. at 153.


59. Id. at 150. See also Hershberger II, 462 N.W.2d 393, 399 (Minn. 1990) (Simonett, J., concurring).
exercise; and if public cynicism is to be avoided, state constitutional doctrine must develop its own distinctive, principled approach.

Nelson v. Peterson, a 1982 case decided a year after Cloverleaf Creamery, is an instructive example of the Minnesota Supreme Court's struggle for a distinctive equal protection analysis. At that time the Department of Labor employed attorneys to assist injured workers with their workers' compensation claims. The legislature enacted a statute that limited appointment of these attorneys as compensation judges. The attorneys went to court claiming that this discrimination lacked a rational basis. The case was argued, briefed, and decided in the trial court on federal equal protection grounds, and the court found the statute constitutional. The case was then submitted to the Minnesota Supreme Court on the trial briefs. On August 14, 1981, the same day Wegan v. Village of Lexington was decided, the supreme court, with Cloverleaf Creamery very much in mind, ordered the parties to brief the constitutional issues. A month and a half later, on October 1, the court took the unusual step of issuing a second order, requesting supplemental briefs on whether the constitutionality of the statute could be tested by any provision of the Minnesota Constitution, and, if so, how the appeal should be resolved under such a test.

Appellants filed a supplemental brief quoting liberally from Justice Brennan's law review article; the state's brief centered on the three-factor equal protection test of Guilliams, a tax case. In due course, the supreme court issued its opinion, reversing, six to three, the trial court, finding that the statute did not meet the first and third factors of the three-part Guilliams test. The court said, "[f]or these reasons we hold that section 103 violates the equal protection guaranties of the United States and Minnesota constitutions." The court, in other words, found that the statute violated both constitutions. Interestingly, the Nel-

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60. 313 N.W.2d 580 (Minn. 1981).
63. 309 N.W.2d 273 (Minn. 1981).
64. See Brennan, supra note 2, at 489.
65. See Guilliams v. Commissioner of Revenue, 299 N.W.2d 138, 142 (Minn. 1980).
son v. Peterson opinion did not discuss federal equal protection but simply concluded that the result would be the same. By stressing its reliance on the state equal protection test, the court was avoiding another Cloverleaf reversal. The court did not, however, consider how the federal and state rational basis formulae differed, nor did the court explore (because there was no need to) whether the state guaranty would use the federal levels of scrutiny and, if so, how.

Interpretation and application of the state's equal protection guaranty is especially challenging. Because so many legal disputes lend themselves to claims of unequal treatment, equal protection is probably the most frequently invoked constitutional guaranty. It is ironic, therefore, that there is no equal protection clause in the state constitution. Even though there is some disagreement as to where equal protection is to be found in our constitution, there is no doubt that the guaranty is firmly embedded therein, and it is equally certain that our state equal protection analysis continues to evolve.

There are, of course, other state constitutional provisions waiting to receive attention. The phrase “law of the land” in article I, section 2, may mean the same thing as due process of law (Justice Mitchell thought so). But might it also mean something

67. Id. at 583.
68. See supra note 48 and accompanying text.
69. See Iijima, supra note 62, at 348-49.
70. One of the more charming equal protection cases is City of St. Paul v. Nelson, 404 N.W.2d 890 (Minn. Ct. App. 1987), where a city ordinance prohibited the keeping of a chicken without a permit. Plaintiff, owner of a pet rooster, claimed the ordinance was a denial of equal protection because parrots could be kept in the city without a permit. The claim was denied. Id. at 892.
71. In Nelson, 313 N.W.2d at 580, appellants argued in their supplemental brief that the state's equal protection guaranty was to be found in Minn. Const. art. I, § 7 (mandating no person shall be “deprived of life, liberty or property without due process of law”). The majority opinion in State v. Russell, 477 N.W.2d 886, 891 (Minn. 1991), found the guaranty in Minn. Const. art. I, § 2 (directing no one is to be “deprived of any of the rights or privileges secured to any citizens thereof, unless by the law of the land”), while the concurring opinion in Russell found the equal protection guaranty confirmed in Minn. Const. art. I, § 16 (“The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people.”).
more? Article I, section 3, protects "liberty of the press," but in language different from the federal free press guaranty. And we have already referred to the uniqueness of our "liberty of conscience" clause in article I, section 16. The "Magna Charta concepts embodied in the great words of [article I], [section] 8," such as the "certain remedies" clause and the "right to obtain justice freely" clause, perhaps remain for further exegesis. Article 13, entitled "Miscellaneous Subjects," contains a number of unique provisions, such as the eminent domain clause (section 4) and the education clause (section 1). Recently the education clause was construed by the court to contain a "fundamental" right, indeed, even a constitutional entitlement, to an adequate education, but equal protection rational basis analysis was applied to resources that might be committed above the entitlement.

State courts should, of course, attempt to develop their own state constitutional nomenclature where appropriate. To use generic federal constitutional terms indiscriminately in applying the state constitution will not go far to quiet public suspicions that state constitutional doctrine is result-oriented, no matter how emphatically this is disavowed. There is no need to be dogmatic in this regard, however, as there will be occasions when time-tested federal constitutional constructs might well be incorporated into state constitutional doctrine.

IV.

If there are any lessons to be learned, it would seem to be that in applying the provisions of our state constitution, and especially those of the bill of rights, the court should proceed pru-

74. MINN. CONST. art. 1, § 3.
75. MINN. CONST. art. 1, § 16.
76. In re O'Rourke, 300 Minn. 158, 165, 220 N.W.2d 811, 815 (1974).
77. LINDE, supra note 16, at 220.
78. The Minnesota Supreme Court has not shied away from using federal methodology in nonconstitutional cases, where appropriate. See, e.g., Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986). The court, utilizing the McDonnell Douglas test noted, "[i]n analyzing cases brought under the [Minnesota Human Rights] Act, we have often applied principles developed in the adjudication of claims arising under Title VII of the [federal] Civil Rights Act . . . because of the substantial similarities between the two statutes." Id. at 719 (citing McDonnell Douglas v. Green, 411 U.S. 792 (1973)).
dently, fashioning its own analytical formula when feasible, and not allowing rhetoric to outdistance facts. Care should be taken in creating precedent because any precedent in constitutional law is perceived by the public to partake of the enduring and fundamental character of the constitution itself. And, finally, constitutional law and common law should be kept separate; there will be occasions when an issue, although couched in constitutional terms, might nevertheless be just as easily and more appropriately resolved under the state's common law.

In 1857, fifty-four years after Marbury v. Madison,81 the Minnesota Constitution was adopted. Apparently the idea of judicial review was by then already so entrenched that it was taken for granted by the Minnesota Supreme Court, and the court, at that time, felt no need to cite Marbury v. Madison nor to explain or justify its right and power to declare acts of the state legislature unconstitutional under the state constitution. It would be a mistake, however, to take the doctrine of judicial review for granted. Each new generation of citizens must be taught the meaning of the judicial process, how it works, its justification, and its limits.83 Particularly is this necessary at the state level of government where the role of state constitutional doctrine is less familiar to the citizenry.

81. 5 U.S. (1 Cranch) 137 (1803).
82. In Board of Supervisors v. Heenan, 2 Minn. 330, 2 Gil. 281 (1892), Justice Flan dreau, who had been a delegate to the constitutional convention, seemed to take judicial review for granted, albeit with a rather curious concept of jurisdiction: "It will be conceded at once, that should a law violate any of the restrictions in the constitution pertaining to the subject matter, as by restraining the liberty of the press, denying the right of trial by jury, introducing slavery, or otherwise, it would be void; this result would, however, be solely because the legislature had exceeded its jurisdiction." Id. at 333, 2. Gil. at 284.
83. One observer has stated:
[I]t is clear to me that for those of us who are concerned with the health of the [judicial] system in the long haul, the answers at least include educating, or reeducating, ourselves, and the public generally, regarding the role of courts—including particularly state courts as well as federal courts—in our society. During the campaign I spoke to many people and many groups—and I was struck with the lack of understanding on these subjects.
Joseph R. Grodin, Judicial Elections: The California Experience, JUDICATURE, Apr.-May 1987, at 365, 369. In this article, Justice Grodin describes his unsuccessful election campaign for retention of his seat on the California Supreme Court. Id.
It is worth remembering that Jefferson disagreed with Marbury v. Madison, writing: "The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch." See 3 Albert J. Beveridge, The Life of John Marshall 144 (1919) (referring to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
State constitutional cases are decided by state judges serving fixed terms at the will of their neighbors. A state court decision on individual rights will inevitably be contrasted with the United States Supreme Court's treatment of the same question, and the decisional process, again inevitably, will be seen in political rather than jurisprudential terms unless the process insists on a distinctive, principled and credible body of state constitutional doctrine.

Now, while the slate is relatively clean, is the time to get it right.