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Invoking the State Constitution to Invalidate Legislation: Who's Guarding the Guardians?

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NOTES

INVOKING THE STATE CONSTITUTION TO INVALIDATE LEGISLATION: WHO'S GUARDING THE GUARDIANS?

I. INTRODUCTION

In *Friedman v. Commissioner of Public Safety*,[1] the Minnesota Supreme Court construed article 1, section 6, of the Minnesota Constitution as conferring a more expansive right to counsel than its federal counterpart. Holding that a person suspected of driving while intoxicated has a limited right to consult an attorney before deciding whether to submit to chemical testing, the court invalidated the implied consent statute[2] to the extent that it denies the accused this right.[3]

Subsequently, in *State v. Russell*,[4] the supreme court construed the state constitutional guarantee of equal protection as conferring broader protections than the federal guarantee.[5] By invoking a less deferential standard of review than required by federal law, the court invalidated a state statute[6] imposing harsher penalties for possession of "crack" cocaine than powder cocaine.[7]

The *Friedman* and *Russell* decisions are the most recent in a series of Minnesota Supreme Court decisions construing the state constitution as conveying broader protections than the federal Constitution.[8] Since 1987, the Minnesota Supreme Court has construed the state constitution as bestowing broader protections than the federal Constitution in the areas of religion,[9] jury trials,[10] privacy,[11] right to counsel,[12] and equal protection.[13] It is evident that these decisions represent only the shadow of what is to come on the constitutional horizon as the court has unequivocally demonstrated its willingness to rely on the state constitution as an alternative avenue for relief.[14]

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1. 473 N.W.2d 828 (Minn. 1991).
2. MINN. STAT. § 169.123 (1990).
3. *Friedman*, 473 N.W.2d at 833-34.
4. State v. Russell, 477 N.W.2d 886 (Minn. 1991).
5. *Id.* at 888.
6. MINN. STAT. § 152.023, subd. 2 (1990).
7. *Russell*, 477 N.W.2d at 888.
8. *See infra* part III.
9. *See* State *ex rel.* Cooper v. French, 460 N.W.2d 2 (Minn. 1990); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).
10. *See* State v. Hamm, 423 N.W.2d 379 (Minn. 1988).
11. *See* Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988).
12. *See* Friedman v. Commissioner of Public Safety, 473 N.W.2d 828 (Minn. 1991).
13. *See* State v. Russell, 477 N.W.2d 886 (Minn. 1991).
14. *See* State v. Berge, 464 N.W.2d 595 (Minn. Ct. App.) (holding that state constitutional privilege against self-incrimination does not require suppression of evidence of refusal to submit to alcohol testing), *aff'd*, 474 N.W.2d 828 (Minn. 1991); Hill-Murray Fed'n of Teachers v. Hill-Murray High School, 471 N.W.2d 372 (Minn. Ct. App. 1991) (holding that application of state Labor Relations Act to school violated state constitutional guarantee of religious protection), *rev'd*, 487 N.W.2d 857 (Minn. 1992).

These decisions are dramatically redefining the scope of Minnesotans' constitutional rights as the supreme court undertakes to develop an independent body of state constitutional law. As the highest authority on issues of state law, the Minnesota Supreme Court need only articulate that its decision rests on adequate and independent state grounds to insulate the decision from federal review.[15] While the goal of establishing an independent body of state constitutional law is laudable and has been hailed as fundamental to the protection of individual liberties in a federalist system,[16] the Minnesota Supreme Court's recent decisions fail to provide textual or historical evidence demonstrating that the decisions are truly grounded in the state constitution.

State constitutional adjudication that lacks a cogent methodology for analyzing state constitutional claims has been criticized as "constitution-shopping" or "result-oriented adjudication" in which the court invokes the state constitution to achieve a result not readily available elsewhere. It has been argued that this has the effect of reallocating power from the legislature to the judiciary. Moreover, the absence of a cogent methodology makes it difficult for counsel to predict the future course of state constitutional law.

On the other hand, supporters of a more active approach to the state constitution have countered that implementing a methodology to determine when the court may expansively interpret the state constitution would unnecessarily inhibit the court in developing an independent and vital body of state constitutional law. They contend that restrictions imposed upon the method of state constitutional adjudication ultimately detracts from the free exercise of the state's sovereign power, which is at the very core of our federalist system. Moreover, they argue that imposing interpretive criteria would create an unwarranted presumption in favor of the validity of federal law.

This Note examines criticism of the activist approach in the context of recent Minnesota constitutional decisions. Part II presents a brief overview of the state judiciary's power to construe its constitution more expansively than the federal Constitution and the nationwide exercise of this power which has come to the forefront in recent years. Parts II and III present an overview of Minnesota constitutional developments. Part IV analyzes the *Friedman* and *Russell* decisions in light of their divergence from federal law and considers the strength of the state constitutional claims. Part V evaluates the criticism, presents an alternative approach to state constitutional adjudication implemented by other jurisdictions, and applies the

15. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1041 (1983).

16. *See, e.g.*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

alternative approach to the *Friedman* and *Russell* decisions. This Note argues that the alternative approach is the sounder judicial approach toward the development of an independent body of state constitutional law.

II. Overview of State Constitutional Adjudication

A. *The Power of a State to Construe its Constitution More Expansively than the Federal Constitution*

Although a state court may not restrict individual liberties beyond the threshold of protections articulated by federal law,[17] state courts have always retained the power to construe their constitutions so as to confer broader protections than the federal Constitution.[18] This power flows from a federalist structure of government that envisions independent layers of federal and state protections whereby one entity may safeguard rights not protected by the other. As James Madison recognized, this structure creates a "double security [that] arises to the rights of the people."[19]

The federal judiciary has long respected the role of the state judiciary as final arbiter on issues of state law.[20] This respect is reflected by various obstacles to the exercise of federal jurisdiction.[21] To insulate a state constitutional decision from federal review, the state court need only articulate that its decision is based on adequate and independent state grounds.[22] If the decision is intertwined with federal Constitutional law, the court must articulate that it cites federal law merely for guidance and not as binding authority.[23]

In most instances, the reach of federal jurisdiction has not been

17. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975).

18. *Id.*; *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

19. Madison theorized that:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

THE FEDERALIST No. 51 (James Madison).

20. *See* Murdock v. Memphis, 87 U.S. 590 (1874) (holding that repeal of a proviso of the Judiciary Act of 1789 limiting Supreme Court review of state decisions to federal questions did not confer jurisdiction to decide questions of state law).

21. In Herb v. Pitcairn, 324 U.S. 117 (1945), the Court recognized the limits to its jurisdiction as grounded in the Article III prohibition against rendering advisory opinions. The court held:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-26.

22. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

23. *Id.* at 1040-41.

problematic for state courts resorting to their constitutions.[24] The discovery of the state constitution as an alternative source for protecting individual liberties has produced striking results nationwide as state courts turn to their constitutions with increasing frequency. In what has been coined "the new federalism,"[25] state judiciaries across the nation have undertaken to develop independent bodies of state constitutional law.

B. The Nationwide Exercise of Power

Historically, the state constitution was the mainstay for protecting individual liberties. Many state constitutions predated the federal Constitution, and the debates of the federal constitutional convention reflect no intent that the state bill of rights be dependent upon the federal bill of rights.[26] Moreover, until the federal bill of rights was extended to the states through the process of selective incorporation, these protections existed only as a check on the exercise of federal power.[27] Accordingly, the state constitution offered the only protection available against arbitrary state action.

Despite the historical role of the state constitution as primary protector of individual liberties, the document has, in modern jurisprudence, remained largely ignored.[28] Before the expansion of individual protections under the Warren Court, few states invoked their constitutions to bestow broader protections than federal law required. Under the Warren court, the federal Constitution was used to establish a floor of minimum protections, and many states

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24. In many situations when the state court has been reversed by the United States Supreme Court, the state court has reinstated its original decision by invoking the state constitution as an independent ground. *See e.g.*, State v. Chrisman, 619 P.2d 971 (Wash. 1980), *rev'd*, 455 U.S. 1 (1982), *on remand*, 676 P.2d 419 (Wash. 1984) (plain view doctrine); State v. Opperman, 228 N.W.2d 152 (S.D. 1975), *rev'd*, 428 U.S. 364 (1976), *on remand*, 247 N.W.2d 673 (S.D. 1976) (inventory search); People v. P.J. Video, 483 N.E.2d 1120 (N.Y. 1985), *rev'd*, 475 U.S. 868 (1986), *on remand*, 501 N.E.2d 556 (N.Y. 1986) (probable cause to support warrant); *see also* William W. Greenhalgh, *Independent and Adequate State Grounds: The Long and Short of It*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 211 (Bradley D. McGraw ed., West 1985) (discussing state constitutional adjudication in context of *Long* doctrine).

25. *See* Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

26. *See* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 496-97 (1984).

27. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2, at 332 (4th ed. 1991).

28. Commentators have cited the dominance of federal constitutional analysis as the primary reason for the diminished role of the state constitution. *See, e.g.*, Robert F. Williams, *In The Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court's Reasoning and Result*, 35 S.C. L. REV. 352 (1984).

only reluctantly complied with the federal threshold.[29] As the federal tide shifted toward judicial conservativism, the state judiciary was in a quandary. Confounded by the federal course of events, the state judiciary was presented with the choice of restricting constitutional doctrine in accordance with federal doctrine or reviving the state constitution to maintain or amplify these protections.[30] Many courts chose the latter course.

In response to the increasing conservatism of the United States Supreme Court,[31] state constitutional litigation has reached a level unprecedented in modern jurisprudence. Almost every state has turned to its constitution to maintain or expand the scope of individual protections. Many state courts have invoked the state constitution to reinstate a decision that was reversed by the United States Supreme Court.[32] In this respect, the state effectively has the power to reverse the United States Supreme Court within the Court's juris-

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29. Justice Stanley Mosk of the California Supreme Court has colorfully commented:

> Before Warren, state courts were guilty of a dismal performance in enforcing provisions of their own constitutions. At the same time, the United States Supreme Court tolerated an era that was characterized by a benign acceptance of racism, political rotten boroughs, disability of the poor, an Anthony Comstock approach to sexual matters, denial of universal suffrage, egregious imposition on the rights of the criminally accused. Under Chief Justice Warren and his merry men, the court abandoned an apathetic approach to overt injustice in society and elected to employ the federal constitution to achieve a liberating and egalitarian impact in the areas of political opportunity, criminal justice, and racial equality. The states were compelled to fall in line, some of them were dragged kicking and screaming. Despite the furor over many of the decisions, notably in the areas of reapportionment and protection of the rights of criminal defendants, state courts swallowed their provincial prejudices and obediently embarked on the designated new course. The nation and the states truly experienced a legal revolution.

Stanley Mosk, *State Constitutionalism after Warren: Avoiding the Potamic's Ebb and Flow*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 24, at 201.

30. Justice Mosk further comments:

> When the Supreme Court careens from one side of the constitutional spectrum to the other, state courts have two alternatives. They can shift gears and once again change directions, thus resuming the course upon which they were originally embarked pre-Warren. Or they can retain existing individual rights by reliance on the independent nonfederal grounds found in the several state constitutions.

Id. at 203.

31. *See* Brennan, *supra* note 16, at 493-95.

32. *See, e.g.*, State v. Chrisman, 619 P.2d 971, 975 (Wash. 1980), *rev'd*, 455 U.S. 1 (1982), where the Washington Supreme Court held that a campus police officer's warrantless entry and search of a college dormitory room violated the Fourth Amendment of the United States Constitution. On appeal to the United States Supreme Court, the Washington Supreme Court's decision was reversed and remanded, the United States Supreme Court characterizing the state's holding as a "novel reading" of the Fourth Amendment. *Chrisman*, 455 U.S. at 6. On remand, the Washington Supreme Court reinstated its original decision by stating that the deci-

dictional boundaries. Criminal protections, most notably search and seizure, continue to be the most fertile areas for state constitutional challenges.[33] However, many other rights have been successfully invoked under the state constitution, most visibly in areas of privacy,[34] speech,[35] and equal protection.[36]

III. EARLY MINNESOTA CONSTITUTIONAL DEVELOPMENTS

The Minnesota Supreme Court has repeatedly professed its power to interpret the state constitution more expansively than the federal document.[37] But until fairly recently, it has stopped short of asserting this power.[38] Although members of the court acknowledged the power of the state judiciary to confer heightened protections under the state constitution as early as 1974,[39] there was tension within the court over whether to interpret state rights beyond federal Constitu-

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sion was based "solely and exclusively" on the state constitution. State v. Chrisman, 676 P.2d 419 (Wash. 1984).

33. *See* Barry Latzer, *Into the 90's: More Evidence that the Revolution has a Conservative Underbelly*, 4 EMERGING ISSUES STATE CONST. L. 17 (1991).

34. Some states have explicitly recognized the right to abortion under the state constitution. *See* Doe v. Director of Dep't of Social Services, 468 N.W.2d 862, 875 (Mich. Ct. App. 1991) (holding that statute prohibiting Department of Social Services from paying for abortion impinges upon fundamental right under state constitution), *rev'd*, 439 N.W.2d 650 (Mich. 1992); Planned Parenthood League v. Operation Rescue, No. CIV.A.89-2487-F, 1991 WL 214047, (Mass. Super. Ct. Oct. 17, 1991) (holding that right to abortion is a substantive right guaranteed by both federal and state constitutions). In addition, many states have recognized an elevated right to privacy under the state constitution. *See In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989); State v. Kam, 748 P.2d 372, 377 (Haw. 1988); State v. Vanderlinder, 575 So.2d 521, 523 (La. 1991); State v. Griffith, 808 P.2d 1171, 1174 (Wash. 1991); *see also* Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215.

35. *See* People v. Diguida, 576 N.E.2d 126, 134 (Ill. Ct. App. 1991) (holding that state constitution's speech and press provisions may be interpreted more expansively than federal counterpart), *rev'd*, 1992 WL 246027, — N.E.2d — (Ill. 1992); Acara v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1986) (holding, after reversal by United States Supreme Court on federal constitutional grounds, Acara v. Cloud Books, Inc., 478 U.S. 697 (1986), that state constitutional freedom of expression provision prevents closing of adult bookstore).

36. *See* State v. Anthony, 810 P.2d 155, 157 (Alaska 1991) (holding that state equal protection clause confers greater protection than federal clause); State v. Brayman, 751 P.2d 294, 303 (Wash. 1988) (same).

37. *See, e.g.*, State *ex rel.* McClure v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979).

38. *See* State v. Fuller, 374 N.W.2d 722 (Minn. 1985) (recognizing power to interpret the double jeopardy provision more expansively than the federal provision but declining to do so); State v. Gray, 413 N.W.2d 107 (Minn. 1987) (recognizing that state constitution confers a right to privacy but declining to find a protectable privacy interest in commercial sexual activity).

39. *See* State v. Welke, 298 Minn. 402, 414, 216 N.W.2d 641, 649-50 (Minn. 1974) (Otis, J., concurring) (arguing that court abdicated its responsibility in failing to evaluate obscenity ordinance under the state constitution).

tional protections.[40] For many years the court proceeded with caution.[41]

It was not until roughly 1985 that the Minnesota Supreme Court focused its attention on the state constitution.[42] Since 1985, the court has interpreted Minnesota's constitution as conveying broader protections than the federal Constitution in the areas of search and seizure,[43] jury trials,[44] religion,[45] privacy,[46] due process,[47] right to counsel,[48] and most recently, equal protection.[49] The court has expressed its willingness to consider the state constitution on issues of

40. In State v. Guminga, 395 N.W.2d 344 (Minn. 1986), the court held that the legislative scheme imposing vicarious criminal liability upon an employee whose employer served liquor to a minor violated both state and federal due process. *Id.* at 345. To insulate the decision from federal review, the court articulated that its holding was based exclusively on the state constitution. *Id.* at 349. A vigorous dissent by Justice Kelley argued that the majority was overriding strong Minnesota policy and over 80 years of legislative intent by holding the statute unconstitutional. *Id.* at 349-50.

This tension was also apparent in State v. Fuller, 374 N.W.2d 722 (Minn. 1985). In *Fuller*, the majority acknowledged its power to extend the double jeopardy doctrine by using the state constitution but declined to do so. Justice Wahl filed a dissenting opinion arguing that the court should not be inhibited from exercising its responsibility to apply the independent protection of the state constitution. *Id.* at 727 (Wahl, J., dissenting) (citing Brennan, *supra* note 16, at 491).

41. Beginning in 1985, the court considered but rejected most arguments to expand the state constitution. *See, e.g.*, State v. Gray, 413 N.W.2d 107 (Minn. 1987) (holding that although state constitution affords right to privacy, it does not encompass the right to engage in acts of sodomy for compensation); State v. Fuller, 374 N.W.2d 722 (Minn. 1985) (reversing appellate court's finding that state double jeopardy clause bars retrial of defendant when prosecutor elicited inadmissible evidence from defendant concerning his prior record); State *ex rel.* McClure v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985) (declining to strike down Human Rights Act as violative of state freedom of religion clause).

This atmosphere of caution was reflected by Justice Peterson in *Fuller* when he stated, "State courts are, and should be, the first line of defense for individual liberties within the federalist system. This, of course, 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". *Fuller*, 374 N.W.2d at 726-27 (footnote omitted).

42. *See* O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (holding that art. I, § 10, of the state constitution prevents the search of the office of an attorney who is not suspected of criminal wrongdoing where no threat exists that documents sought will be destroyed).

43. *Id.*

44. State v. Hamm, 423 N.W.2d 379 (Minn. 1988).

45. *See* State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); State *ex rel.* Cooper v. French, 460 N.W.2d 2 (Minn. 1990).

46. Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988).

47. State v. Guminga, 395 N.W.2d 344 (Minn. 1986).

48. Friedman v. Commissioner of Public Safety, 473 N.W.2d 828 (Minn. 1991).

49. State v. Russell, 477 N.W.2d 886 (Minn. 1991).

obscenity,[50] self-incrimination,[51] and the establishment clause.[52] Although recent challenges invoking the state constitution have resulted in expansive treatment of various provisions, the persistence of forceful dissenting opinions indicates that there is still a considerable degree of tension within the court over how to interpret the Minnesota constitution.[53] The following sections delineate the most visible developments in Minnesota constitutional law.

A. Religion

The textual disparity between the state freedom of religion provision and the federal free exercise provision[54] makes the state provi-

50. State v. Davidson, 471 N.W.2d 691 (Minn. Ct. App. 1991), *rev'd*, 481 N.W.2d 51 (Minn. 1992).

51. State v. Berge, 464 N.W.2d 595 (Minn. Ct. App. 1991) (holding that state constitutional protection against self-incrimination does not preclude admission of evidence of refusal to submit to chemical testing under implied consent statute), *aff'd*, 474 N.W.2d 828 (Minn. 1991).

52. Hill-Murray Fed'n of Teachers v. Hill-Murray High School, 471 N.W.2d 372 (Minn. Ct. App. 1991) (holding that application of state Labor Relations Act to school violates religious protection clause of state constitution), *rev'd*, 487 N.W.2d 857 (Minn. 1992).

53. Most opinions construing state constitutional provisions more expansively have been written by Justice Yetka. *See* State *ex rel.* Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (holding that state constitutional freedom of religion provision protects landlord's right to exclude cohabitating tenants); State v. Hamm, 423 N.W.2d 379 (Minn. 1988) (holding that statute providing for six-person jury in misdemeanor and gross misdemeanor cases violates state constitutional right to jury); Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988) (holding that state constitutional right to privacy requires judicial approval prior to forcible administration of medication to physiatric patients); State v. Guminga, 395 N.W.2d 344 (Minn. 1986) (holding that statute imposing vicarious criminal liability for state liquor violations violates due process clause of state constitution). Justice Wahl has also authored several opinions construing the state constitution expansively. *See also* State v. Russell, 477 N.W.2d 886 (Minn. 1991) (holding that statute imposing disparate penalties for possession of "crack" cocaine than powder cocaine which results in disparate racial impact violates state guarantee of equal protection); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (holding that art. I, § 10, of state constitution prevents the search of attorney's office who is not suspected of criminal wrongdoing where there is no threat that documents sought will be destroyed).

However, Justice Coyne has expressed her dissatisfaction with the majority's reasoning in several strenuous dissenting opinions. *See* State v. Russell, 477 N.W.2d 886, 895-903 (Minn. 1991) (Coyne, J., dissenting); Friedman v. Commissioner of Public Safety, 473 N.W.2d 828, 838-47 (Minn. 1991) (Coyne, J., dissenting). These decisions suggest that the court is polarized, with Justices Yetka and Wahl advocating a more active use of the document and Justice Coyne advocating greater judicial restraint when invoking the state constitution to invalidate a statute.

54. The federal provision provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances.

sion especially susceptible to expansive treatment. Earlier decisions invoking the religious protection clause employed a federal analysis, giving only cursory mention to the state constitution. For example, in *State ex rel. McClure v. Sports & Health Club*,[55] the Minnesota Supreme Court employed a federal analysis to uphold the constitutionality of the Minnesota Human Rights Act[56] against a free exercise challenge.[57] The court reasoned that the elimination of discrimination in the workplace was a compelling governmental interest that justified some abridgement of the right to religious freedom.[58] A dissenting opinion by Justice Peterson argued that the court had failed to give adequate consideration to the force of the state constitutional claim.[59]

Recent Minnesota decisions have embraced the state freedom of religion provision holding that "it grants far more protection of religious freedom than the broad language of the United States Constitution".[60] In *State ex rel. Cooper v. French*,[61] the Minnesota Supreme Court reasoned that an independent consideration of the state constitutional claim was necessary "[i]n light of the unforeseeable changes . . . of the United States Supreme Court".[62] The *French* case involved a free exercise challenge brought by a landlord who had been assessed civil penalties under the Minnesota Human Rights Act for refusing to rent to an unmarried couple that intended to cohabi-

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U.S. CONST. amend. I. The Minnesota provision provides:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship.

MINN. CONST. art. 1, § 16.

Moreover, the preamble of the Minnesota Constitution also suggests the strength of the guarantee to religious freedom:

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

MINN. CONST. pmbl.

55. 370 N.W.2d 844 (Minn. 1985).

56. MINN. STAT. § 363.01 *et seq.* (1990).

57. *McClure*, 370 N.W.2d at 851-53.

58. *Id.* at 853. In *McClure*, the Commissioner of Human Rights sought to enjoin the owners of a Health Club from questioning prospective employees about marital status and religion, terminating employees due to differences in religious beliefs, and refusing to promote employees due to differences in religious beliefs. *Id.* at 846. The owners of the club challenged the Human Rights Act as violative of both state and federal constitutional guarantees of freedom of religion. *Id.* at 852-53.

59. *Id.* at 873-75 (Peterson, J., dissenting).

60. State *ex rel.* Cooper v. French, 460 N.W.2d 2, 9 (Minn. 1990).

61. *Id.*

62. *Id.* at 8.

tate.[63] The court held the assessment violative of the landlord's state constitutional right to religious freedom.[64] By invoking the state constitution, the court was able to make a complete shift away from *McClure* to hold that the state guarantee of religious freedom superseded the interest of the state in eliminating discrimination.

The court took a similar approach in *State v. Hershberger*.[65] After an earlier decision was summarily vacated and remanded by the United States Supreme Court,[66] the Minnesota Supreme Court held that a state statute requiring Amish citizens to display a slow-moving vehicle emblem on their horse-drawn carriages was violative of the state guarantee of religious freedom.[67] The court reasoned that although public safety was a compelling state interest, a less discriminatory alternative was available.[68]

By invoking the state constitution, the Minnesota Supreme Court has extended broader religious protection to state citizens than required by federal law, which does not require religious exemptions from facially neutral statutes of general applicability.[69] *French* and *Hershberger* strongly suggest that freedom of religion challenges predicated upon the state constitution will succeed.

B. Criminal Protections

In *O'Connor v. Johnson*,[70] the Minnesota Supreme Court invoked article I, section 10 of the state constitution to declare unreasonable a warrant authorizing the search of an attorney's office.[71] The court held that a subpeona duces tecum was required to search an attorney's office where the attorney was not suspected of criminal wrongdoing and where there was no risk that the attorney would destroy evidence.[72] Reasoning that the weight of federal authority was unclear,[73] the court turned to the state constitution as an independent

63. *Id.* at 3.

64. *Id.* at 9.

65. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

66. *See* State v. Hershberger, 444 N.W.2d 282 (Minn 1989), *rev'd*, 495 U.S. 901 (1990), *on remand*, 462 N.W.2d 393 (Minn. 1990).

67. *See Hershberger*, 462 N.W.2d at 399.

68. *Id.*

69. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that state statute prohibiting sacramental use of peyote does not violate free exercise clause of federal constitution).

70. 287 N.W.2d 400 (Minn. 1979).

71. *Id.* at 405.

72. *Id.*

73. The United States Supreme Court, in Zurcher v. Stanford Daily, 463 U.S. 547 (1978), held that a subpeona duces tecum was not constitutionally required to search the premises of a third party. The Minnesota Supreme Court distinguished the case on grounds that in *Zurcher*, the third party had threatened to destroy the documents. *O'Connor*, 287 N.W.2d at 405.

ground for the decision.[74] In *State v. Hamm,*[75] the court construed article I, section 6 of the state constitution as requiring twelve-person juries in misdemeanor and gross misdemeanor prosecutions.[76] Arguing that federal law delineating the scope of the right[77] had little relevance under an independent state constitutional analysis, the court invalidated a state statute reducing the number of jurors in non-felony cases from twelve to six.[78]

The court cited three factors that supported divergence from the federal standard. First, the court believed that the framers intended a twelve-person jury when drafting the provision.[79] Second, this number was reinforced by judicial decisions fixing the number at twelve as early as 1869.[80] Finally, early legislative history revealed resort to the formal amendment process to revise the unanimity requirement, indicating that the legislature feared revising the right through other means was unconstitutional.[81] Based on these factors, the court construed the state provision as granting greater protection than its federal counterpart.

C. *Privacy*

In *State v. Gray,*[82] the Minnesota Supreme Court recognized a right to privacy under the state constitution.[83] The court acknowledged that it was neither bound by federal precedent in the classification of fundamental rights nor limited in scope to those rights expressly enumerated in the state constitution.[84] However, the court declined to find a protectable privacy interest in homosexual prostitution,

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74. *Id.*

75. 423 N.W.2d 379 (Minn. 1988).

76. *Id.* at 382.

77. *See* Williams v. Florida, 399 U.S. 78, 103 (1970) (holding that the federal constitution does not require a state to provide 12-person juries in certain non-capital criminal offenses).

78. The statute provided:

> Notwithstanding any law or rule of court to the contrary, a petit jury is a body of six persons impaneled and sworn in any court to try and determine, by a true and unanimous verdict, any question or issue of fact in a civil or criminal action or proceeding, according to law and the evidence as given them by the court.

MINN. STAT. § 593.01, subd. 1 (1986) (repealed 1990).

79. *Hamm,* 423 N.W.2d at 382.

80. *Id.* (citing State v. Everett, 14 Minn. 439 (1869)).

81. In 1890, the state constitution was amended to authorize the legislature to permit verdicts agreed upon by only five-sixths of the jury in civil actions. *See* 1891 Minn. Laws 17. The court reasoned that amendment of the constitution was perceived as necessary to allow the legislature to tamper with jury requirements. *Hamm,* 423 N.W.2d at 381.

82. 413 N.W.2d 107 (Minn. 1987).

83. *Id.* at 111.

84. *Id.*

noting that its public nature was a factor weighing against its classification as a fundamental right.[85]

In the subsequent decision of *Jarvis v. Levine*,[86] the supreme court further refined the state constitutional right to privacy. In *Levine*, the court held that the forcible administration of drugs to an involuntarily committed patient without prior judicial approval violated the state constitutional right to privacy.[87] The court concluded that an expansive interpretation of the right to privacy under the state constitution was supported by judicial decisions affirming the protection of bodily integrity.[88]

Most recently, in *State v. Davidson*, the Minnesota Supreme Court declined to invalidate an obscenity law on the basis of the state right to privacy.[89] In *Davidson*, Minnesota's obscenity statute[90] was challenged on state and federal Constitutional grounds of privacy, overbreadth, vagueness, and freedom of speech.[91] Although the court commented that "the privacy guaranteed under article I, sections 1, 2, and 10, is broader than the privacy right read into the comparable federal constitutional provision,[92] the court reaffirmed that the state right to privacy does not extend to transactions in sexual commerce.[93]

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85. *Id.* at 114. The Minnesota Supreme Court specifically limited its holding to commercial sexual conduct. *Id.* Note that controlling federal precedent does not extend privacy protections to consensual homosexual activity. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

86. 418 N.W.2d 139 (Minn. 1988).

87. *Id.* at 150. Federal law held that in certain circumstances, a patient's rights are adequately protected by the professional judgment of the treating physician, and that these judgments are entitled to a presumption of validity. *See* Youngberg v. Romeo, 457 U.S. 307 (1982).

88. The court stated, "Although judicial recognition of a constitutional right of privacy in Minnesota may be relatively recent, the protection of bodily integrity has been rooted firmly in our law for centuries." *Id.* at 148-49.

89. 481 N.W.2d 51, 57 (Minn. 1992).

90. MINN. STAT. § 617.241 (1990).

91. The text of the free speech provision provides, "The liberty of the press shall remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. CONST. art. I, § 3. The court declined to construe the state constitutional guarantee of free speech to encompass obscene material because the plain language of the provision permits the state to hold citizens accountable for the abuse of the right. *Davidson*, 481 N.W.2d at 55.

92. *Id.* at 57.

93. *Id.* The *Davidson* and *Gray* decisions suggest that while the court is willing to consider privacy challenges under the state constitution, it will not find a protectable privacy interest in sexual commerce. *See Davidson*, 481 N.W.2d at 57; *Gray*, 413 N.W.2d at 113-14.

IV. Recent Minnesota Constitutional Developments

A. Right to Counsel

1. The Federal Right

The United States Supreme Court has never directly addressed the issue of whether the Sixth Amendment right to counsel attaches prior to chemical testing of a person suspected of drunken driving.[94] However, under federal Sixth Amendment doctrine, a "critical stage" triggering the right to counsel does not arise until formal adversarial proceedings are commenced against the accused.[95]

In *Kirby v. Illinois*, a plurality of the United States Supreme Court held that the right to counsel does not attach until the initiation of adversary judicial proceedings.[96] This requirement is supported by the text of the provision, which by its terms applies only to "criminal prosecutions."[97] Under most state statutory schemes, the process of chemical testing is merely an investigatory stage which necessarily precedes the decision to prosecute. As a result, a majority of states have concluded that the Sixth Amendment right to counsel does not attach prior to chemical testing.[98]

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94. The Minnesota decision of Nyflot v. Commissioner of Pub. Safety, 369 N.W.2d 512 (Minn. 1985), *cert. denied*, 474 U.S. 1025 (1985), held on federal grounds that the right to counsel did not attach since formal adversarial proceedings had not yet commenced. Review by the United States Supreme Court was denied "for want of substantial federal question." *See Nyflot*, 474 U.S. 1027 (1985).

95. *See, e.g.*, Kirby v. Illinois, 406 U.S. 1027 (1972).

96. The court stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth amendment are applicable.

Kirby, 406 U.S. at 689-90. The subsequent Supreme Court decision of Moran v. Burbine, 475 U.S. 412 (1986), reinforced the *Kirby* decision by holding that the mere possibility that the proceeding may have important consequences at trial is not enough to trigger the Sixth Amendment right to counsel. *Moran*, 475 U.S. at 432. *Accord* United States v. Gouveia, 467 U.S. 180 (1984) (holding that prisoners in administrative segregation are not entitled to court-appointed counsel prior to initiation of formal adversarial proceedings).

97. U.S. Const. amend. VI.

98. *See* Campbell v. Superior Court, 479 P.2d 685 (Ariz. 1971); State v. Vietor, 261 N.W.2d 828 (Iowa 1978); State v. Jones, 457 A.2d 1116 (Me. 1983); Homberg v. 54-A Judicial District Judge, 231 N.W.2d 543 (Mich. 1975); Spradling v. Deimeke, 528 S.W.2d 759 (Mo. 1975); State v. Petkus, 269 A.2d 123 (N.H. 1970) *cert. denied*, 402 U.S. 932 (1971); Seders v. Powell, 259 S.E.2d 544 (N.C. 1979); McNulty v. Curry, 328 N.E.2d 798 (Ohio 1975); State v. Newton, 636 P.2d 393 (Or. 1981); Law v. Danville, 187 S.E.2d 197 (Va. 1972).

2. *The State Right*

Before the Sixth Amendment was extended to the states through the process of selective incorporation,[99] the right to counsel was protected only by the Minnesota Constitution or by statutory provisions delineating the scope of the right.[100] Early Minnesota decisions interpreting the scope of Sixth Amendment rights reveal a general hostility toward right to counsel challenges.[101]

With the expansive treatment of criminal protections under the Warren Court, the state judiciary was required to comply with a threshold of sixth amendment protections established by federal law. As a result, during this period, state constitutional analysis was essentially superseded by federal analysis. The right to counsel afforded by the Minnesota constitution was not invoked again by the courts as an independent source of protection until the *Friedman* decision.

The argument that chemical testing under the implied consent statute[102] constitutes a critical stage was first advanced in *State v.*

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99. *See* Gideon v. Wainright, 372 U.S. 335 (1963).

100. *See* State v. Utecht, 233 Minn. 434, 47 N.W.2d 99 (1951) (noting that MINN. CONST. art. I, § 6, and MINN. STAT. § 630.10 are the only guarantees of the right to counsel in state criminal prosecutions).

101. The judicial history prior to incorporation of the right reveals that there were numerous Sixth Amendment challenges, only a handful of which were successful. Those decisions finding violations usually consisted of quite egregious conduct on the part of the state. *See* State v. Rigg, 251 Minn. 120, 86 N.W.2d 723 (Minn. 1957) (holding that state right to counsel was violated when court-appointed counsel failed to consult with accused before advising him to plead guilty); *see also* State v. Martineau, 257 Minn. 334, 101 N.W.2d 410 (Minn. 1960) (holding that state right to counsel was violated when court-appointed attorney was required to represent two defendants who were jointly charged, and attorney could make no decision of any consequence without harming other defendant). This hostility is best illustrated by State *ex rel.* Welper v. Rigg, 254 Minn. 10, 93 N.W.2d 198 (1958), in which the court stated:

> Our state constitution provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel in his defense. This is merely a declaration of the right, and it has been noted that there is nothing in this section which requires a court to inform defendant of his right to have an attorney or to appoint one for him where he is unable to hire one for himself. Any such rights, if they are conferred at all, are conferred by statute, and even then, not every denial thereof is a violation of the state or federal due process clauses. *Id.* at 14, 93 N.W.2d at 201-02.

102. MINN. STAT. § 169.123, subd. 2(b), provides, in pertinent part:

> (b) At the time a test is requested, the person shall be informed:
>
> (1) that Minnesota law requires the person to take a test to determine if the person is under the influence of alcohol or a controlled substance . . .
>
> (2) that if testing is refused, the person may be subject to criminal penalties, and the person's right to drive will be revoked for a minimum period of one year or, if the person is under the age of 18 years, for a period

Palmer.[103] In *Palmer*, the Minnesota Supreme Court rejected the argument that the right attaches at chemical testing on grounds that a license revocation proceeding under the statute was civil and not criminal.[104] Five years later in *Prideaux v. State Department of Public Safety*, the court held that the implied consent statute provided a limited right to consult an attorney prior to chemical testing.[105] The court avoided resting its decision on federal constitutional grounds, choosing instead to construe the language of the statute as inconsistent with legislative intent.[106] However, in dictum, the majority expressed its belief that chemical testing should be treated as a critical stage.[107] In response to *Prideaux*, the legislature amended the statute to allow a limited consultation with counsel prior to testing.[108] However, in 1984 the legislature again amended the statute, expressly denying the right to consult an attorney prior to testing.[109] The

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of one year or until the person reaches the age of 18 years, whichever is greater . . .

. . .

(4) that after submitting to testing, the person has the right to consult with an attorney and to have additional tests made by someone of the person's own choosing . . .

103. 291 Minn. 302, 191 N.W.2d 188 (Minn. 1971).

104. *Id.* at 306-07, 191 N.W.2d at 190-91. The classification of the proceeding as civil obviates the need to address the question of whether a critical stage arises since, by its terms, the Sixth Amendment applies only to "criminal prosecutions".

105. 310 Minn. 405, 420-21, 247 N.W.2d 385, 394 (1976).

106. At the time of decision, the statute did not expressly deny the right to counsel. The court held that since the statute recognized a right to consult an attorney and others for the purpose of securing additional tests, there was no evidence that the legislature intended to deny this right prior to chemical testing. *Id.* at 421, 247 N.W.2d at 394.

107. The court also argued that the proceeding was a critical stage under federal law. As authority for this view, the court cited United States v. Wade, 388 U.S. 218 (1967), for the view that chemical testing presented a stage in which the presence of counsel was necessary to preserve the right to a fair trial. The court apparently did not feel bound by the plurality opinion in Kirby v. Illinois, 406 U.S. 682 (1972), which had held that even if the presence of counsel is fundamental to a fair trial, the right to counsel does not attach until formal adversarial proceedings have begun.

108. *See* 1978 Minn. Laws 788, ch. 727, § 3.

109. The right to counsel amendment was one of several changes to the implied consent statute devised to discourage persons from refusing the test. Senator Pogemiller introduced an amendment to the statute which would make refusal to submit to chemical testing a crime. The policy underlying the amendment was to encourage persons suspected of drunken driving to submit to testing, thus making prosecution easier. At the time of amendment, statistics indicated that approximately one-third of persons suspected of drunken driving were refusing to submit to testing. Statistics further indicated that approximately 60% to 70% of repeat offenders were refusing. Thus, the statute was amended to require a person suspected of drunken driving to submit to testing. MINN. STAT. § 169.123, subd. 2(b)(1) (1990).

Interestingly, Senator Pogemiller's version of the bill allowed consultation with an attorney prior to chemical testing. Senator Pogemiller believed that allowing con-

newly amended statute was challenged on federal constitutional grounds in *Nyflot v. Commissioner of Public Safety*,[110] where the Minnesota Supreme Court declined to characterize the proceeding as a critical stage since formal adversarial proceedings had not yet commenced.[111] The *Nyflot* majority noted that although the decision of whether to refuse testing under the implied consent statute was a situation in which the advice of counsel may be useful, "there being no right under the constitution to consult with counsel in this context, the decision whether or not to provide that right is one for the legislature to make."[112]

3. *The* Friedman *Decision*

The right-to-counsel controversy continued, and the implied consent statute was challenged again in *Friedman v. Commissioner of Public Safety*.[113] Joy Friedman was taken to the police station for an intoxilyzer test after she failed the preliminary test.[114] Friedman asked what her rights were and whether she could consult an attorney.[115] The officer responded by reading her the implied consent advisory which stated that refusal to submit to testing would result in revocation of her license for one year, that the refusal could be used as evidence against her at trial, and that she could consult an attorney after testing was completed.[116] The advisory was read to Friedman three times, after which she expressed confusion over why she was required to submit to further testing.[117] The trial court deemed

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sultation with counsel would help neutralize an unpleasant situation for parties involved in testing. However, concern was expressed during the debates that permitting consultation with an attorney would render consultation meaningless since an attorney cannot ethically advise a client to violate the law. It was further pointed out that persons accused of other crimes are not entitled to consult an attorney during the evidence-gathering stage.

Norm Coleman, Assistant Attorney General, testified that a statute that made refusal a crime yet permitted a right to consult an attorney for the purpose of deciding whether to refuse was logically inconsistent. He argued that permitting a right to counsel would not facilitate the goal of encouraging persons to submit to testing and would send mixed signals to a person in such a situation. *Mandatory Testing: Hearings on S. 1336 Before the Judiciary Subcomm. on Criminal Law of the Judiciary Comm.*, 73d Minn. Leg., (Mar. 1 & 9, 1984).

110. 369 N.W.2d 512 (Minn. 1985), *cert. denied*, 474 U.S. 1027 (1985).

111. *Id.* at 515-16.

112. *Id.* at 517. Justice Yetka, whom Justice Wahl joined, filed a lengthy dissenting opinion, characterizing the majority's holding a "grave intrusion on the dignity of the individual" which "is more akin to the laws prevailing in totalitarian states." *Id.* at 521, 525.

113. 473 N.W.2d 828 (Minn. 1991).

114. *Id.* at 829.

115. *Id.*

116. *Id.*

117. *Id.*

Friedman's behavior a refusal, and her license was revoked for one year.[118]

Friedman appealed the suspension, alleging that the statute violated her state constitutional right to counsel.[119] The Court of Appeals declined to construe the state right to counsel more expansively than the federal right, holding that Friedman had not made an adequate showing that she was entitled to expansive treatment under the state constitution.[120]

The Minnesota Supreme Court reversed. Justice Yetka, writing for the majority,[121] began the majority analysis by espousing the importance of the right to counsel in general terms.[122] The majority then acknowledged its power to interpret the state constitution independently from the federal source, and noted the nationwide revival of the state constitution.[123] The majority next turned to Minnesota history, arguing that "Minnesota has a long tradition of assuring the right to counsel."[124] As evidence of this tradition, the majority cited Minnesota Statute section 481.10, which was enacted in 1887 and requires the state to allow consultation with counsel to persons restrained of their liberty "as soon as practicable."[125] The court then turned to Minnesota case law, distinguishing *Nyflot* on the basis that

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118. *Id.*

119. Friedman v. Commissioner of Pub. Safety, 455 N.W.2d 93 (Minn. Ct. App. 1990), *rev'd*, 473 N.W.2d 828 (Minn. 1991).

120. Then-Minnesota Appellate Court Judge Gardebring held that none of the factors the Supreme Court had relied on in prior cases to expansively interpret the state constitution were present, nor had Friedman demonstrated any other unique factors that would dictate a higher standard of protection under the state constitution. *Id.* at 96.

121. Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828 (Minn. 1991). Only three of seven justices joined in the majority opinion. Neither Justice Simonett nor Justice Gardebring took part in the decision; Justice Coyne and Justice Keith dissented.

122. The majority opinion traced the English and American common law history as support for its assertion that the right to counsel is firmly rooted in American jurisprudence. *Friedman*, 473 N.W.2d at 829-30.

123. *Id.* at 830.

124. *Id.* at 831.

125. *Id.* at 832. The full text of the statute provides that:

> All officers or persons having in their custody a person restrained of liberty upon any charge or cause alleged, except in cases where imminent danger of escape exists, shall admit any resident attorney retained by or on behalf of the person restrained, or whom the restrained person may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify any attorney residing in the county of the request for a consultation with the attorney. Every officer or person who shall violate any provision of this section shall be guilty of a misdemeanor and, in addition to the punishment prescribed therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.

MINN. STAT. § 481.10 (1990).

it was decided on federal and not state constitutional grounds.[126]

Citing a federal decision, the majority adopted a broad definition of a "critical stage" as "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel."[127] Under this definition, the limitation articulated by federal law that the right attaches only after formal adversarial proceedings have commenced[128] was deemed irrelevant.[129] The majority concluded that although there exists great public concern over the problem of drunken driving, such concern does not justify "cancelling out the protection offered by over 100 years of precedent in Minnesota."[130]

A dissenting opinion by Justice Coyne, joined by Justice Keith,[131] argued that the proper role of the judiciary is to determine whether a statute meets the minimum requirements of the state and federal constitutions rather than to substitute its political judgment for that of the legislature.[132] The dissenters maintained that there was little evidence in support of the majority's position that the result was compelled by the state constitution and that the "members [of this court do not] constitute a continuing constitutional convention with a 'roving commission' to substitute its will for the will of the people as expressed in the words of the state constitution."[133]

B. Equal Protection

1. The Federal Right

Under federal equal protection analysis, a statute which has a disparate impact on a protected class but is not facially discriminatory does not trigger strict scrutiny absent proof of purposeful discrimi-

126. *Friedman*, 473 N.W.2d at 832.

127. *Id.* at 833 (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

128. *See* Moran v. Burbine, 475 U.S. 412 (1986); Kirby v. Illinois, 406 U.S. 682 (1972).

129. *See Friedman*, 473 N.W.2d at 834.

130. *Id.* at 834.

131. Justice Keith wrote a separate opinion charging that "the majority discards a workable, sensible, and bright line test for the attachment of the right to counsel derived from a nearly identical clause of the federal Constitution." *Id.* at 847 (Keith, C.J., dissenting).

132. Justice Coyne stated:

> Had I been a member of the Minnesota legislature in 1984, it is quite possible that I would have voted against the law that today's majority holds violative of the Minnesota Constitution. My role, however, as a judge of the Minnesota Supreme Court is not to decide whether the legislature's policy would have been my legislative choice. It is not our opinion of the wisdom of Minn. Stat. § 169.123 subd. 2(b)(4) (1990), which is at issue here; the question is whether the statute rises to the minimum requirements of article I, section 6 of the Minnesota Constitution . . . .

Id. at 838 (Coyne, J., dissenting).

133. *Id.* at 845.

nation.[134] Thus, in *Washington v. Davis*,[135] the United States Supreme Court held that the District of Columbia did not violate the federal guarantee of equal protection by administering an intelligence test to police recruits that resulted in a racially disparate impact.[136] As the Court explained in its subsequent decision of *Arlington Heights v. Metropolitan Housing Corporation*, the fact that the legislature is properly concerned with balancing numerous competing interests requires judicial deference absent a showing of invidious discriminatory purpose.[137]

The Federal Sentencing Guidelines impose a substantially higher penalty for the possession of cocaine base than for equal amounts of powder cocaine.[138] In *United States v. Watson*, the Guidelines were challenged on the basis of disparate racial impact.[139] Finding no intent to discriminate, the Fifth Circuit invoked a minimum rationality standard.[140] The court concluded that the rationale offered by the legislature—that cocaine base is more addictive, more dangerous, and can be sold in smaller quantities—was sufficient to withstand this standard of review.[141]

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134. *See* Washington v. Davis, 426 U.S. 229 (1976).

135. *Id.* at 252.

136. *Id.* The court stated: "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242 (citations omitted).

137. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-66 (1977). In *Arlington Heights*, the Court articulated the process by which it searches for discriminatory intent. The Court held that disparate racial impact, while not determinative by itself, may provide an important starting point in the analysis. *Id.* at 266. If the disparate impact is so profound as to be inexplicable on grounds other than racial discrimination, the statute violates equal protection. *Id.* However, the Court noted that such impact is rare. Other sources for determining purposeful discrimination include the legislative history leading up to the enactment, the extraneous events prior to the enactment, and the procedural and substantive departures from the usual legislative process. *Id.* at 267-68.

138. The disparity in the federal guidelines is much more pronounced than in the Minnesota statute. Under federal guidelines, possession of 1.5 kilograms of cocaine base is treated as equal to the possession of 150 kilograms of powder cocaine. *See* U.S.S.G. § 2D1.1(c)(4).

139. United States v. Watson, 953 F.2d 895, 897 (5th Cir. 1992).

140. *Id.* at 897.

141. *Id.* The circuit court noted the *Russell* decision in passing, stating:

> To our knowledge, the only court that has not dismissed this equal protection challenge to the difference in sentences for possession of cocaine base and cocaine powder is the Minnesota Supreme Court. In *State v. Russell*, a divided Minnesota Supreme Court held that a Minnesota state sentencing provision which provided for higher penalties for possession of crack cocaine than for equal quantities of powder cocaine violated the equal protection clause of the Minnesota Constitution. The *Russell* court noted that the

2. *The State Right*

Unlike the federal guarantee of equal protection, the state guarantee is not explicit in the text of the constitution but has been characterized as a "unenumerated right."[142] The right is distilled from various constitutional provisions, including the privileges and immunities clause,[143] the uniformity clause,[144] and the special legislation clause.[145]

State judicial history suggests an intent to treat the state guarantee of equal protection coextensively with the federal guarantee.[146]

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rational basis test applied under the Minnesota Constitution . . . is more stringent than its federal counterpart . . . .

Id. at 898 n.5 (citations omitted).

142. "The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people." MINN. CONST. art. 1, § 16.

143. "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgement of his peers." MINN. CONST. art. 1, § 2.

144. "Taxes shall be uniform upon the same class of subjects . . . ." MINN. CONST. art. X, § 1.

145.

> In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2. Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law authorizing the laying out, opening, altering, vacating or maintaining of roads, highways, streets or alleys; remitting fines, penalties or forfeitures; changing the names of persons, places, lakes or rivers; authorizing the adoption or legitimization of children; changing the law of descent or succession; conferring rights on minors; declaring any named person of age; giving effect to informal or invalid wills or deeds, or affecting the estates of minors or persons under disability; granting divorces; exempting property from taxation or regulating the rate of interest on money; creating private corporations, or amending, renewing, or extending the charters thereof; granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever or authorizing public taxation for a private purpose. The inhibitions of local or special laws in this section shall not prevent the passage of general laws on any of the subjects enumerated.

MINN. CONST. art. XII, § 1.

146. Many decisions have stated explicitly that, even though worded differently, the standard of review under the state constitution requires the same level of scrutiny as that required by the federal constitution. *See In re* Estate of Turner, 391 N.W.2d 767, 770 n.2 (Minn. 1986) ("the rational basis standard used in Minnesota equal protection analysis is the same as the standard used in federal equal protection analysis"); AFSCME v. Sundquist, 338 N.W.2d 560, 570 n.12 (Minn. 1983) ("the prohibition against arbitrary legislative action embodied in the state equal protection clause, Minn. Const. art. I, § 2, the state uniformity clause, Minn. Const. art. X, § 1, and the state special legislation clause, Minn. Const. art. XII, § 1, are coextensive with those afforded by the federal equal protection clause, U.S. Const. amend. XIV, § 1"); Schumann v. Commissioner of Taxation, 253 N.W.2d 130, 132 (Minn. 1977) (holding that MINN. STAT. art. 1, § 2, and art. 10, § 1, impose no greater restriction on legislative power to establish classifications than the Fourteenth Amendment to the Constitution); Minneapolis Fed'n of Teachers v. Obermeyer, 275 Minn. 347, 354, 147 N.W.2d

Under the rational basis standard of review employed by federal

358, 363 (Minn. 1966) (holding that the standards of the Equal Protection Clause of the Fourteenth Amendment are the same as the standards of equality under MINN. STAT. art. 1, § 2, and art. 4, §§ 33 & 34).

Decisions that did not explicitly state that the tests were coextensive have done so implicitly by subjecting state constitutional challenges to the same level of scrutiny employed by federal law. *See, e.g.*, Bernthal v. City of St. Paul, 376 N.W.2d 422, 425 (Minn. 1985) (holding that a statute passes state constitutional scrutiny if it has a legitimate purpose and it is reasonable for the legislature to believe the classification will promote that purpose). Under the federal test, the statute is sustained if the court can find any conceivable set of facts to support the distinction. *See* Rio Vista Non-Profit Housing Corp. v. County of Ramsey, 335 N.W.2d 242, 246 (Minn. 1983). Thus, for example, in Miller Brewing Co. v. State, 284 N.W.2d 353 (Minn. 1979), although the court invoked the three-pronged standard, it held that the uniformity clause of the state constitution was no more restrictive than the Equal Protection Clause of the federal Constitution, thereby suggesting that although worded differently, the level of scrutiny was the same. *Id.* at 356 n.3.

The three-pronged rationality test invoked by *Russell* first appeared in its present form in Loew v. Hagerle Bros., 266 Minn. 485, 33 N.W.2d 598 (1948). *Loew* involved a constitutional challenge based on the prohibition against special legislation embodied in MINN. STAT. art. XII, § 1. The *Leow* court stated:

> The constitutional prohibition against special legislation . . . does not prevent the legislature, with whom the responsibility of classification primarily rests, from dividing a subject into classes, and a classification made pursuant to a public purpose, which has a rational basis upon any conceivable state of the facts, although the court does not perceive all the facts justifying the classification, will be held proper if:
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> (a) The classification uniformly, without discrimination, applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation;
>
> (b) The distinctions which separate those who are included within the classification from those who are excluded are not manifestly arbitrary or fanciful, but are genuine and substantial so as to provide a natural and reasonable basis in the necessity or circumstances of the members of the classification to justify different legislation adapted to their peculiar conditions and needs; and
>
> (c) If the classification is germane or relevant to the purpose of the law, i.e. there must be an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Id. at 488-89, 33 N.W.2d at 601 (citations omitted).

In *Loew*, the plaintiff challenged a special enactment which deprived him of disability benefits. *Id.* at 487, 33 N.W.2d at 600. The statute stated that all persons who had been disabled 20 years prior to passage of the statute but whose weekly compensation payments terminated subsequent to July 1, 1939, but before January 1, 1940, were deprived of payments from the special compensation fund. Given the specificity of the statute, it was clear that the legislature was purposefully discriminating against the plaintiff. Under the three-pronged test, the court struck down the classification as arbitrary and fanciful. *Id.* at 490, 33 N.W.2d at 602. The three-pronged standard appeared later. McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984) (holding that statute limiting civil damages for seller of hard liquor, but not for seller of 3.2 beer violated state guarantee of equal protection); Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981) (distinction in dramshop statute requiring more

courts, a statute will survive constitutional scrutiny if it has a legitimate purpose and the court finds that it was reasonable for the legislature to believe the classification would promote the intended purpose.[147] However, in several decisions the Minnesota Supreme Court has invoked a test worded with less deference than the rational basis test imposed by federal law.[148] More recent decisions, however, have returned to the earlier stance holding that the state equal protection standard, though worded differently, entails no greater scrutiny than the federal standard.[149]

3. *The* Russell *Decision*

In *State v. Russell,*[150] the Minnesota Supreme Court invalidated a state statute[151] imposing a greater penalty for the possession of cocaine base than for possession of powder cocaine. The defendants, five African American men charged under the statute with possession of cocaine base, moved to dismiss the charges on grounds that the statute violated federal and state guarantees of equal protection.[152]

The defendants conceded that the statute was not facially discriminatory but charged that the legislature knew the classification would result in a disparate racial impact. Accordingly, the defendants argued that the statute should be subject to a strict scrutiny standard of review.[153] Finding no intent to draw a suspect classification, the trial

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exacting procedural requirements for litigation with sellers of 3.2 beer than sellers of stronger liquor violated state guarantee of equal protection); Guilliams v. Commissioner of Revenue, 299 N.W.2d 138 (Minn. 1980) (holding that classification of persons under farm loss modification law does not violate state guarantee to equal protection); *Miller Brewing Co.*, 284 N.W.2d 353 (holding that statutory classification permitting tax credit to producers of malt beverage with facilities in state yet denying credit to producers without facility in state did not violate state guarantee of equal protection); Schwartz v. Talmo, 295 Minn. 356, 205 N.W.2d 318 (1973) (denying compensation benefits to family of beneficiary who committed suicide did not violate state guarantee of equal protection).

147. *See, e.g.*, Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981).

148. *See McGuire*, 346 N.W.2d 605; *Wegan*, 309 N.W.2d 273; *Guilliams*, 299 N.W.2d 138; *Schwartz*, 295 Minn. 356, 205 N.W.2d 318; *Loew*, 226 Minn. 485, 33 N.W.2d 598.

149. *See, e.g.*, *In re* Estate of Turner, 391 N.W.2d 767, 770 n.2 (Minn. 1986); AFSCME v. Sundquist, 338 N.W.2d 560, 570 n.12 (Minn. 1983).

150. 477 N.W.2d 886 (Minn. 1991).

151. *Id.* at 891. MINN. STAT. § 152.023, subd. 2, provides, in pertinent part:

> A person is guilty of controlled substance crime in the third degree if:
>
> (1) the person unlawfully possesses one or more mixtures of a total weight of three grams or more containing cocaine base;
>
> (2) the person unlawfully possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug . . . .

152. *Russell*, 477 N.W.2d at 887.

153. Brief for Respondents at 14, State v. Russell, 477 N.W.2d 886 (Minn. 1991) (Nos. C3-91-92, C7-91-203).

court applied the traditional rational basis test employed by federal law. However, the court invalidated the statute on grounds that there was no rational basis for the classification.[154]

The Minnesota Supreme Court granted defendant's petition for accelerated review.[155] Although the court recognized that a rational basis standard was applicable, it reasoned that the state guarantee of equal protection imposed greater scrutiny than the federal standard.[156] The state standard, originating from prior judicial decisions,[157] delineated a three-pronged test requiring that:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.[158]

Employing this three-part test, the majority rejected, as factually unsubstantiated, three separate justifications proffered by the state for the disparate treatment.[159]

Again, a forceful dissenting opinion by Justice Coyne argued that under established equal protection standards, a statute may not be declared unconstitutional in the absence of clear evidence of intent to draw a suspect classification.[160] She argued that proof of discriminatory intent requires more than a showing that the legislature relied on evidence that the court perceived to be factually unsubstantiated.[161] Justice Coyne's dissent concluded that by circumventing the traditional rational basis test under the guise of a less deferential Minnesota test, the majority was effectively engaging in substantive review of the kind rejected in *Lochner v. New York*,[162] and thereby substituting its political judgment for that of the legislature.[163]

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154. *Id.*

155. *Id.*

156. *Russell*, 477 N.W.2d at 888.

157. *See supra* note 146 and accompanying text.

158. *Russell*, 477 N.W.2d at 888 (quoting Wegan v. Village of Lexington, 309 N.W.2d 273, 280 (Minn. 1980)).

159. The state argued that the classification served to target street level dealing because, based upon state sources, three grams was the level at which dealing, not merely personal use, took place. The state also argued that cocaine base was more addictive and associated with greater violence than powder cocaine. *Russell*, 477 N.W.2d at 889-91.

160. *Id.* at 896.

161. *Id.*

162. 198 U.S. 45 (1905).

163. *Russell*, 477 N.W.2d at 902.

V. ANALYSIS

A. The Problem with Unprincipled Constitutional Adjudication

Although the *Friedman* majority announced that "over 100 years of precedent in Minnesota" compelled a finding that the right to counsel under the state constitution confers broader protection than the federal right,[164] it offered very little by way of textual or historical evidence to demonstrate that the decision was grounded in the state constitution. In the face of a state provision virtually identical to the federal provision,[165] the majority proclaimed the importance of the right to counsel in general terms.[166] Its examination of state-specific history disclosed only one statute, which has arguably been preempted by a more recent articulation of legislative intent that is embodied in the implied consent statute.[167] As further support for its decision, the majority selectively drew from Minnesota case law, overriding recent but contrary state precedent that did not facilitate the result.[168]

In *Russell*, the majority invalidated a statutory provision imposing harsher penalties for possession of crack cocaine than powder cocaine on the strength of the state guarantee of equal protection.[169] As evidence of this strength, the majority cited to a handful of deci-

164. Friedman v. Commissioner of Public Safety, 473 N.W.2d 828, 834 (Minn. 1991).

165. The federal Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Minnesota Constitution provides, "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense." MINN. CONST. art. I, § 6.

166. The majority began its analysis with the assertion that the right to counsel is a deeply entrenched principle of American jurisprudence. *Friedman*, 475 N.W.2d at 829. The majority then traced the historical origins of the right to counsel. *Id.* at 829-30. Although the right may be firmly rooted in American jurisprudence, these general assertions do little to elucidate the importance of the right under the state constitution.

167. As the court recognized in an earlier implied consent decision, a statute which is later in time and more specific in scope preempts the older, more general statute as the most accurate articulation of legislative intent. Prideaux v. Department of Pub. Safety, 247 N.W.2d 385, 393 (Minn. 1976).

168. The majority emphasized dicta in *Prideaux* which characterized the proceeding as a "critical stage." *Friedman*, 473 N.W.2d at 832. The majority then minimized the precedential effect of *Nyflot* holding that "we do not find the *Nyflot* analysis persuasive under our constitution." *Friedman*, 473 N.W.2d at 832. Earlier state constitutional decisions, such as State v. Hamm, 423 N.W.2d 379 (Minn. 1988), had warned that "a more cautious judicial frame of mind is required when a court is faced with the possibility of overruling prior decisions. We should not be quick to overrule long-standing precedent, especially when we are construing our constitution." *Id.* at 380.

169. 477 N.W.2d 886 (Minn. 1991).

sions advocating what appeared[170] to be a less deferential rational basis standard of review.[171] The majority bypassed contemporaneous judicial decisions which held that the state equal protection standard was coextensive with the federal standard.[172] By invoking a less deferential standard of review, the majority systematically rejected three separate justifications advanced by the legislature for disparate treatment.[173] Although the majority applied what they deemed a "rational basis" standard, the analysis performed by the court was more akin to strict scrutiny, permitting the court to reject the legislature's reasons for disparate treatment as factually unsubstantiated.[174]

Earlier Minnesota decisions invalidating statutes by invoking state constitutional protections were more cautious, requiring a stronger showing of textual or historical evidence to depart from federal standards.[175] These decisions were grounded in the strength of the text, or in pre-existing bodies of state law. For example, the decisions construing the freedom of religion clause relied on the strength of the text,[176] and the decision construing the jury trial provision relied on the clarity of state decisional law and legislative history suggesting enhanced historical protection.[177] These decisions reflect greater deference to the legislature by requiring a stronger showing of textual or historical evidence to invalidate a statute by resort to the state constitution. *Friedman* and *Russell* represent a departure from this traditional deference to both the legislature and the court's prior decisions.

State courts are not required to implement criteria to determine when the history of the state warrants departure from federal consti-

170. As discussed above, *see supra* note 146, there is some question as to whether this standard, though worded differently, amounted to the same standard of review as that employed by federal equal protection analysis.

171. *Russell*, 477 N.W.2d at 888-89.

172. *See, e.g., In re* Estate of Turner, 391 N.W.2d 767, 770 n.2 (Minn. 1986); AFSCME v. Sundquist, 338 N.W.2d 560, 570 n.12 (Minn. 1983).

173. *Russell*, 477 N.W.2d 886, 889-91 (Minn. 1991).

174. *Id.* at 890. A prior decision by the court advocated the view that "it is not the role of the judiciary, in applying a rational basis standard, to question either the factual accuracy or political wisdom of the reasoning and judgments underlying legislative enactments." *AFSCME*, 338 N.W.2d at 570.

175. *See* State v. Hamm, 423 N.W.2d 379, 380 (Minn. 1988) (holding that duly enacted statute is presumptively constitutional and court must proceed with great caution and invalidate statute only if proven unconstitutional beyond a reasonable doubt).

176. *See supra* part III.A.

177. *See supra* part III.B; *see also* Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (Minn. 1967) (holding that state constitution confers right to trial by jury in all criminal prosecutions, regardless of gravity); State v. Gress, 250 Minn. 337, 84 N.W.2d 616 (Minn. 1957) (holding that state constitution guarantees trial by impartial jury to all persons charged with crime).

tutional standards. Some have argued that to do so would detract from the independence of state courts in establishing independent bodies of state constitutional law and would create an unwarranted presumption in favor of federal doctrine.[178] They contend that requiring analytical justification to depart from established federal standards results in unnecessary limitations that would inhibit the free exercise of the state's sovereign power.

The concern with a principled approach is closer to home than critics contend. A systematic approach to the state constitution is more intimately concerned with the allocation of power within the state than with the allocation of power between state and federal entities. Implementing interpretive criteria provides a mechanism to ensure that constitutional review truly flows from the constitution.[179] Framed in this light, the question is not whether analytical restraints will unnecessarily inhibit the state's sovereign power but whether such restraints will preserve the allocation of power within the state.[180]

Moreover, judicial review proceeds from the premise that a statute

178. *See* State v. Hunt, 450 A.2d 952, 959-61 (N.J. 1982) (Pashman, J., concurring) (arguing that the judicially imposed criteria advocated by the majority and concurring opinions imposes unnecessary limitations on the power of the state court to interpret its constitution independently); *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984) (arguing that the imposition of criteria reflects an implied delegation of state power to the Supreme Court).

179. As Justice Linde of the Oregon Supreme Court has argued:

> [I]f a state court undertakes to evolve an independent jurisprudence under the state constitution, it must give as much attention and respect to the different constitutional sources, and to striving for some continuity and consistency in their use, as we ask of United States Supreme Court justices in their respective constitutional views, even when they differ among themselves. This will not be accomplished by searching ad hoc for some plausible premise in the state constitution only when federal precedents will not support the desired result.

Hans A. Linde, *Without Due Process: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 146 (1970); *see also* Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005 (1989); Robert F. Utter, *Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts*, 1 EMERGING ISSUES STATE CONST. L. 217 (1988).

180. State legislators have expressed their dissatisfaction with the supreme court's recent invalidations of legislative enactments. During hearings of the Senate Judiciary Committee held to redraft the statute invalidated by the *Russell* decision, Senator Belanger commented: "The problem I have is that it appears that the state courts have made a questionable decision and then cloaked themselves in the state constitution . . . . Clearly the courts are legislating in this area which is our prerogative." Hearings on S.11 Before the Senate Judiciary Committee, 77th Leg., (Jan. 8, 1992);

is to be declared unconstitutional only as a last resort.[181] The judicial doctrine of avoiding constitutional questions is premised upon the philosophy that invalidating a statute is fundamentally inconsistent with the democratic process and should be exercised sparingly and only when strictly necessary.[182] Therefore, the judiciary should present compelling reasons demonstrating that a statute is unconstitutional when invoking the state constitution.[183] Without a principled approach for determining when the history of the state requires a more expansive reading of the state provision, the judiciary acts as a legislative rather than interpretive body.[184]

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see also Donna Halvorsen, *Judicial, Legislative Check, Balance; Branches Feel Some Tension*, MPLS. STAR TRIB., Feb. 9, 1992, at 1B.

181. *See, e.g.*, State v. Hamm, 423 N.W.2d 379, 380 (Minn. 1988) (stating that a duly enacted statute is presumptively constitutional and the court must proceed with great caution, invalidating the statute only if proven unconstitutional beyond a reasonable doubt).

182. As Professor Laurence Tribe has commented:

> The critics start from the assumption that, in a political society which aspires to representative democracy or at least to popular representation, exercises of power which cannot find their justification in the ultimate consent of the governed are difficult, if not impossible, to justify. Judicial review is thus immediately and doubly suspect. The judges who declare statutes and executive actions to be unconstitutional do not acquire their positions through popular election; once appointed, they cease to be accountable even to the elected officials who nominated and confirmed them but rather are secured in their independence by life tenure and guaranteed salary. Perhaps even more significantly, judicial review is itself said to be antidemocratic since its result is the invalidation of government action, legislative or executive-action that, however indirectly, did have the sanction of the electorate. It is obvious, the critics argue, that if judicial review cuts against the grain of representative democracy, judges should invoke their power to strike down legislative and executive action only sparingly.

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 62 (2d ed. 1988) (footnote omitted). This antidemocratic flare is perhaps mitigated by the fact that supreme court justices are subject to the political electoral process. The Minnesota Constitution provides that the governor "shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified." MINN. CONST. art. 6, § 8. After appointment, supreme court justices serve six-year terms and are thereafter subject to the electoral process. MINN. CONST. art. 6, § 7. In recent history, these constitutional provisions have not been ignored. Page v. Carlson, 488 N.W.2d 274, 280 (Minn. 1992) (holding that governor may not extend a judge's term solely to cancel a scheduled election).

183. Constitutional review by the Minnesota Supreme Court is almost always prefaced by a recognition of this restraint. *See, e.g.*, *Hamm*, 423 N.W.2d at 380.

184. Another reason for judicial deference is that the state constitution was structured for easy amendment. It has been suggested that the reason for the ease with which the constitution may be amended was an overall dissatisfaction with the document arising from the political turmoil under which the document was adopted. *See* William Anderson, *The Need for Constitutional Revision in Minnesota*, 11 MINN. L. REV. 189, 192 (1927). The Minnesota Constitution was born amid considerable political feuding which resulted in both the Republican and Democratic parties drafting, in secret, their own version of the constitution. *Id.* Thus, an amendment procedure

Other reasons reinforce the desirability of implementing criteria to justify departure from federal standards. Federal law has provided an analytical framework which has dominated constitutional adjudication for decades. Although this should not prevent a state judiciary from tailoring constitutional doctrine to meet the unique requirements of the state,[185] it does suggest that some deference should be accorded to federal analysis. Given the dominance of federal constitutional analysis, it is impossible to construe the state constitution in a vacuum.[186] Implementing criteria to depart from federal standards enhances stability by preserving certain expectations and providing a means to predict the future of state constitutional law.

In response to these criticisms, several states have implemented interpretive criteria to guide the court in determining when heightened state constitutional protections are warranted. These courts have identified and applied state-specific factors that evidence the strength of the state constitutional claim.[187] Although no single factor is conclusive, certain factors are generally accorded greater weight. The criteria guides the court in determining when the history of the state requires divergence from federal standards, and helps ensure that the process is principled, well-reasoned and predictable.

B. The Alternative Approach: Criteria for Adjudication

The decisions of a growing number of jurisdictions reflect the belief that a systematic methodology for interpreting the state constitution is necessary.[188] Some jurisdictions, most notably New Jersey and Washington, have adopted criteria to assist the court in analyz-

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was implemented which would permit amendment by a simple majority vote in each house, and thereafter approved by a majority of voters at annual elections. *Id.*

185. The freedom of the state to experiment has been encouraged as fundamental to federalism. In a frequently quoted dissenting opinion, Justice Brandeis argued:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be frought with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

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

186. *See* State v. Hunt, 450 A.2d 952, 964 (Handler, J. concurring) (arguing that since "national judicial history and traditions closely wed federal and state constitutional doctrine . . . [i]t is not realistic, sound or historically accurate to regard the separation between federal and state systems as a schism").

187. *Id.*

188. *See* State v. Hurley, 741 P.2d 257 (Ariz. 1987); Gannett Co., Inc. v. State, 571 A.2d 735 (Del. 1989); People v. Perlos, 462 N.W.2d 310 (Mich. 1990); State v. Hunt, 450 A.2d 952 (N.J. 1982); People v. P.J. Video, 501 N.E.2d 556 (N.Y. 1986); State v. Flores, 570 P.2d 965 (Or. 1977); Commonwealth v. Edmunds, 586 A.2d 887 (Pa.

ing the strength of state constitutional claims. Both of these states have well-developed bodies of state constitutional law and a strong history of conferring broader protections under their state constitutions.[189]

In *State v. Hunt*,[190] the New Jersey Supreme Court recognized that although sound reasons may justify departure from federal precedent, divergent interpretations that lack a reasoned basis are "unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same."[191] In *Hunt*, the court concluded that the Fourth Amendment of the New Jersey Constitution prevented warrantless seizures of an individual's long-distance billing records. The court's examination of state history revealed a strong legislative and judicial history of conveying broad protections to telephonic communications.[192]

In a frequently cited concurring opinion, Justice Handler recognized the vitality of the state constitution as an independent source for protecting individual liberties but noted the danger when state courts turn uncritically to their constitutions for convenient solutions to problems not readily available elsewhere.[193] Reasoning that "it is not entirely realistic, sound or historically accurate to regard the separation between the federal and state systems as a schism," Handler

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1991); State v. Lafferty, 749 P.2d 1239 (Utah 1988); State v. Gunwall, 720 P.2d 808 (Wash. 1986).

189. For Washington cases, see Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988) (holding that use of sobriety checkpoints violate state constitutional guarantee of privacy); State v. Brayman, 751 P.2d 294 (Wash. 1988) (holding that state constitutional guarantee of equal protection confers greater protection than federal constitution); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984) (holding that state constitutional prohibition against cruel and unusual punishment confers greater protection than federal guarantee); State v. Chrisman, 676 P.2d 419 (Wash. 1984) (holding that state constitution requires heightened protection for warrantless searches).

For New Jersey cases, see Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (holding that state constitution requires enhanced equal protection be accorded to individual right to health and privacy); State v. Ercolano, 397 A.2d 1062 (1979) (holding that privacy-based freedom from unreasonable searches and seizures applied to motor vehicles); State v. Saunders, 381 A.2d 333 (N.J. 1977) (holding that state constitution confers right of sexual privacy); *In re* Quinlan, 355 A.2d 647 (N.J. 1976) (holding that state constitution recognizes right to terminate life-support as aspect of right to privacy).

190. 450 A.2d 952 (N.J. 1982).

191. *Id.* at 955.

192. In 1930 the New Jersey legislature enacted a statute making it a misdemeanor to tap a telephone line. The statute was replaced in 1968 by a similar ban incorporated in the state Wiretapping and Electronic Surveillance Control Act. In addition, state case law provided broad protection to telephonic communications. *See Hunt*, 450 A.2d at 955.

193. *Id.* at 962-63.

articulated seven factors that he believed would serve to guide the court in conferring heightened state constitutional protections.[194] The factors were: (1) the textual language; (2) the legislative history; (3) the judicial history; (4) structural differences between the state and federal constitution; (5) matters of particular state interest or local concern; (6) state traditions; and (7) public attitudes.[195] Applying these factors, Justice Handler concluded that strong legislative and judicial histories warranted heightened protection under the New Jersey Constitution.[196]

A similar approach was taken by the Washington Supreme Court in *State v. Gunwall.*[197] In *Gunwall*, the court recognized that decisions that lack a principled approach for repudiating federal precedent "furnish little or no rational basis for counsel to predict the future course of state decisional law."[198] The court reasoned that a methodology was necessary to ensure that recourse to the state constitution does not "spring from pure intuition, but from a process that is at once articulable, reasonable and reasoned."[199] The court argued that criteria were also valuable to suggest to counsel where briefing was necessary in cases urging independent state constitutional grounds.[200]

The *Gunwall* court articulated six factors: (1) the text; (2) significant differences in the language of parallel provisions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitution; and (6) matters of particular state interest or local concern.[201] An examination of each factor provided evidence to support the court's con-

194. *Id.* at 964.
195. *Id.* at 965-66.
196. *Id.* at 968-69.
197. 720 P. 2d 808 (Wash. 1986).
198. *Id.* at 812.
199. *Id.* at 813 (citation omitted).
200. *Id.* at 813. In the subsequent decision of State v. Wethered, 755 P.2d 797, 800-01 (Wash. 1988), the court held that it will not consider state constitutional challenges where the interpretive factors articulated by *Gunwall* are not briefed. The court stated, "By failing to discuss at a minimum the six criteria mentioned in *Gunwall*, [the defendant] requests us to develop without benefit of argument or citation of authority the 'adequate and independent state grounds' to support his assertions." *Id.*

The briefing requirement responds to the problem that the court has limited resources to exhaustively research all factors when addressing state constitutional challenges. As Justice Linde of the Oregon Supreme Court has noted, "To make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely because one prefers the opposite result." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).
201. State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986).

clusion that the state constitution conferred broader protection to telephonic communications than the federal Constitution.[202]

The analytical approach taken by New Jersey and Washington provides a sounder basis for determining when the state constitution confers broader protections than the federal source. Implementing criteria ensures that the decision flows from considerations supported by the text or the history of the state, thereby preserving the allocation of power within the state. The diversity of sources that serve as criteria, as well as judicial discretion over how to properly balance the criteria, allow the court a degree of flexibility in the decisionmaking process. Minnesota should implement a similar approach.

C. *Interpretive Criteria for Adjudication*

Numerous courts and commentators have articulated criteria for analyzing state constitutional claims.[203] The major analytical difficulty in implementing criteria is determining what threshold showing must be made to justify expansive interpretation. Flexibility is essential to the judicial process. Clearly, state constitutional interpretation is not a mechanical test.

Some courts appear to advocate the view that a showing of one factor is sufficient to justify expansive treatment.[204] Other courts appear to suggest that the analysis is more akin to a balancing test of factors weighing in favor of and against expansive treatment.[205] This Note takes the view that textual factors are sufficient to warrant

202. The court's decision was supported by five of the six factors. The text of the Washington provision provides, "No person shall be disturbed in his *private affairs*, or his home invaded, *without authority of law*". *Id.* at 814 (emphasis in original). The constitutional history indicated that in 1889, the state constitutional convention specifically rejected a proposal to adopt language identical to the language of the Fourth Amendment. In addition, the court cited to several state statutes indicating broad protection of telephonic communications. Finally, the court reasoned that whereas the United States Constitution is a grant of limited power, the New Jersey Constitution imposes limitations on the otherwise plenary power of the state to do anything not expressly forbidden by law. *See Gunwall*, 720 P.2d at 814-15.

203. *See* State v. Hurley, 741 P.2d 257 (Ariz. 1987); Williams v. Coppola, 549 A.2d 1092 (Conn. Super. 1986); Gannett Co., Inc. v. State, 571 A.2d 735 (Del. Super. Ct. 1989), *cert. denied*, 495 U.S. 918 (1990); People v. Alvarez, 515 N.E.2d 898 (N.Y. 1987); State v. Flores, 570 P.2d 965, 968 (Or. 1977); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); *see also* Robert F. Utter, *supra* note 26, at 508-24; Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: 'Wrapt In The Old Miasmal Mist*, 7 HAMLINE L. REV. 51 (1984); Note, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

204. *See* State v. Hunt, 450 A.2d 952, 958 (N.J. 1982) (Handler, J., concurring).

205. *See Gunwall*, 720 P.2d at 815. In *Gunwall*, the court recognized that although the interest in national uniformity in obtaining telephone records was important, it was outweighed by overwhelming state policy reasons to the contrary. *Id.*

heightened protections by themselves. Other factors, such as judicial or legislative treatment of the right may be sufficient by themselves if there is also a plausible showing of intent to treat the right with heightened importance. Other, less influential factors should be accorded less weight and balanced against more influential factors. The following delineates the most frequently cited factors.

1. The Text

The most influential factor warranting expansive treatment is the text. The court should draw intent from the entire document, including the preamble and applicable amendments.[206] A provision that is worded more emphatically than the parallel federal provision, or for which there is no comparable federal provision, is strong evidence that the state drafters intended a more liberal reading of that right. For example, under the Minnesota constitution, a more liberal interpretation may be warranted under the freedom of religion and conscience,[207] liberty of the press,[208] and jury trial provisions.[209]

206. The Minnesota Constitution is a very malleable document which was structured to allow great freedom in the amendment process. *See supra* note 184. Between the adoption of the constitution in 1857 and the restructuring as to style and form in 1974, the document was amended over one hundred times. Therefore, consideration should be given to any amendments which may be indicative of intent to expand, revise, or limit a particular right.

207. The Minnesota Constitution provides:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

MINN. CONST. art. I, § 16. The federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . U.S. CONST. amend. I.

The explicit recognition of freedom of conscience sets the state constitution apart from the federal document. The fact that there is not a parallel provision in the federal Constitution suggests that the drafters of the Minnesota Constitution believed the "rights of conscience" particularly worthy of protection.

208. The Minnesota Constitution provides: "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. CONST. art. I, § 3. The federal Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances." U.S. CONST. amend I.

209. The Minnesota Constitution provides:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The leg-

Conversely, a state constitutional provision that is textually identical to the corresponding federal provision supplies persuasive, though not controlling, authority for construing the provision in accordance with the federal right.[210] Even in the face of a textually identical provision, expansive treatment may be warranted upon a showing that other interpretive factors justify heightened protection.

2. The Drafting History

The intent of the drafters is also clear authority for construing state provisions expansively. Unfortunately, concrete evidence of intent is often quite elusive. Although the clearest source for construing drafting intent is the wording of the provision itself, evidence can also be drawn from the debates of the constitutional convention, from specific events surrounding the adoption of a particular provision, or from early judicial interpretations of the right.[211] For example, the proceedings of the Minnesota Constitutional Convention[212] reveal an extensive debate over the right to free speech[213] which may be significant in the event of a state constitutional challenge.

3. The State Judicial History

Judicial history suggesting expansive treatment of a constitutional right may warrant expansive treatment of a constitutional provision. However, appeal to state constitutional decisions that appear unsettled or appear to shift from year to year should be given less weight. Consistent judicial interpretations of a right suggesting expansive treatment provide strong evidence that such treatment is constitutionally required.

State constitutional law is in a state of flux after years of dormancy. Since there are few decisions interpreting the state constitution, it is appropriate to resort to state interpretations of federal rights which appear to surpass minimum federal standards or which extend fed-

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islature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours deliberation, is a sufficient verdict.

MINN. CONST. art. I, § 4. The federal Constitution provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

210. *See, e.g.*, State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985) ("a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that . . . is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force").

211. For an annotation of early decisions interpreting the state constitution, see HAROLD F. KUMM, THE CONSTITUTION OF MINNESOTA ANNOTATED (1924).

212. EARLE S. GOODRICH, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION (1857).

213. *Id.* at 282-88.

eral protections to state citizens prior to the federal mandate under selective incorporation.[214]

4. The State Legislative History

Legislative history indicating that broad protection has traditionally been accorded a particular right may provide authority for construing a state constitutional provision expansively. For example, Minnesota legislative history reveals a strong intent to eliminate invidious discrimination. The Human Rights Act,[215] enacted in 1955, provides strong proof of such intent.

However, invoking prior legislative intent as authority to overturn a statute is inherently problematic given that such intent is naturally subject to change over time. Therefore, principles of statutory construction should be applied when invoking legislative intent as evidence that a statute is unconstitutional. Statutes that appear to conflict with the challenged statute should be reconciled whenever possible, and statutes that are more recent in time and more specific in scope should be given more weight than older, less specific statutes.

5. The Attitudes of the State's Citizenry

The attitudes of the state's citizenry toward the scope or protection of a particular right has been advanced as a factor worthy of consideration when resorting to the state constitution.[216] However, the difficulty in discerning these attitudes with any degree of accuracy should be taken into account when invoking this factor.[217]

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214. One example can be found in the Minnesota Supreme Court's treatment of coerced confessions. In State v. Schabert, 218 Minn. 1, 15 N.W.2d 585 (1944), the court held that a confession obtained by a murder suspect, held incommunicado after repeated requests for her parents, attorney, doctor and priest violated the federal guarantee of due process. The fact that *Schabert* was decided well before the extension of Fifth Amendment protections to the states in Malloy v. Hogan, 378 U.S. 1 (1964), suggests that the court perceived this right as particularly worthy of heightened protection. The United States Supreme Court has recently held that the admission of involuntary confessions is subject to a harmless error analysis. *See* Arizona v. Fulminate, 111 S. Ct. 1246, 1264 (1991). *Schabert* might be one factor used to fuel a state constitutional challenge of this practice.

215. MINN. STAT. § 363.01 et seq. (1990).

216. *See* People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986). Other courts have phrased this interpretive factor in terms of concerns unique to the state, a similar though not identical factor. *See, e.g.*, State v. Hunt, 450 A.2d 952 (N.J. 1982); State v. Gunwall, 720 P.2d 808 (Wash. 1986); *see also* Utter, *supra* note 26, at 521-24 (arguing that appeal to current values in construing the state constitution is necessary in order for the constitution to respond to the changing conditions of modern life).

217. Moreover, consideration should be given to the fact that it is traditionally the role of the legislature to interpret and respond to attitudes of the state citizenry.

If there is demonstrable concern by the state citizenry over the retention, revision or expansion[218] of a particular right, it is appropriate for the court to consider such expectations when interpreting the state constitution.[219] A compelling argument may be made if the challenger demonstrates that the right is one that the state's citizenry has come to expect, to rely on, or to conform its behavior to.[220] If the court demonstrates that there is a clear expectation of protection, the court is not merely substituting its ideological views for those of the legislature; rather it is preserving the legitimate expectations of the state's citizenry.

D. Application of Criteria: Balancing the Factors

An examination of the *Friedman* and *Russell* decisions under the alternative approach reveals the weaknesses of the state constitutional analyses applied there. A thorough examination of the criteria provides some evidence in favor of expansive treatment. However,

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218. Presumably, if public opinion reflects an intent to expand a particular right, the legislature will eventually respond to this desire. However, a more compelling argument for resort to the state constitution may be made when invoking this factor to preserve a right that has been previously conferred by the federal Constitution, but subsequently limited or retracted.

219. A certain degree of judicial flexibility is essential if constitutional interpretation is to respond to modern realities. As one commentator has argued:

> A process that identifies values perceived to be relevant and significant, and from them constructs principles of a fundamental nature, does not necessarily demean the constitution or contravene democratic principles. Pretending that such review represents the constitution speaking rather than the judiciary making it speak is less than candid and even deceitful. At the same time, projection of a sense of constitutional meaning is unfolding from within the document rather than being affixed to it reveals a judiciary deeply concerned with democratic imperatives. What eventually must be appreciated both by the Court and its detractors is that constitutional embellishment referenced to external values is legitimate, so long as the reason for it is convincing and its citizenry immediately or eventually subscribes to it.

DONALD E. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS 65 (1990).

220. This factor could be significant in interpreting the state constitution in the event of a privacy challenge on the issue of abortion. Public opinion polls may be helpful in ascertaining public attitudes. According to a *St. Paul Pioneer Press Dispatch* poll, Minnesotans approve of the current law permitting women access to abortions during the first three months of pregnancy by a margin of 56% to 40%. Three out of four persons believe that the decision is uniquely one for the woman to make, and six out of ten believe the government should not interfere with personal matters such as abortion. *See Abortion Poll Finds Minnesotans Divided*, ST. PAUL PIONEER PRESS DISPATCH, Feb. 11, 1990, at 1A.

This is not to suggest that resort to this factor should or can be evidenced by a clear consensus of public opinion. Any evidence demonstrating concern over the retention of a constitutional right is sufficient to invoke this factor for consideration. The fact that a right was previously conferred by federal law may be evidence, in and of itself, that state citizens have come to rely on that particular right.

there is insufficient evidence to warrant invalidating the statute by authority of the state constitution.

1. Right to Counsel

The Minnesota right to counsel provision is virtually identical to the federal provision. While not controlling, the existence of a provision that is textually identical to the federal provision provides persuasive authority for treating the provisions the same.[221] Moreover, there is no indication from the debates of the constitutional convention, or the history surrounding the adoption of the constitution, that the framers intended a more liberal interpretation of the state right to counsel than provided by the federal right.

Minnesota's judicial history reveals scant intent to treat the right to counsel as deserving of any greater protection than other criminal rights. As discussed previously,[222] in early years, the court was generally hostile toward right to counsel challenges. With the incorporation of federal Sixth Amendment protections,[223] the state right to counsel became commensurate with the federal right. The debate over whether the right attaches before chemical testing has resulted in numerous challenges in recent years, however, the weight of decisional authority favors denying rather than permitting consultation.[224]

There is significant state legislative history delineating the scope of the right.[225] It is significant that as early as 1887, the legislature provided a right to consult an attorney to persons restrained of their liberty.[226] However, as discussed earlier,[227] if the court invokes this factor to ascertain legislative intent as to the scope of the right, ordinary principles of statutory interpretation should apply.

It is possible to interpret Minnesota Statutes section 481.10, the statute relied upon by the *Friedman* majority, consistently with the implied consent statute. The statute requires consultation with counsel to "a person restrained of liberty . . . upon request of the person restrained, as soon as practicable, and before other proceedings shall be had."[228] "[A]s soon as practicable" suggests that the courts are to consider the practical consequences of immediate con-

221. *See, e.g.*, State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985) (holding that a decision of the Supreme Court interpreting a comparable provision is inherently persuasive though not compelling).
222. *See supra* part IV.A.2.
223. *See* Gideon v. Wainright, 372 U.S. 335 (1963).
224. *See supra* notes 102-112 and accompanying text.
225. *See* MINN. STAT. ch. 481 (1990).
226. *See* MINN. STAT. § 481.10 (1990).
227. *See supra* part V.C.4.
228. MINN. STAT. § 481.10 (1990).

sultation.[229] Under the implied consent statute, this means the potential loss of evidence. Principles of statutory construction also require the court to presume that the legislature did not intend an unreasonable result.[230] If "other proceedings" is interpreted to extend to all evidence-gathering procedures, then arguably every person subject to a valid search would be entitled to consult an attorney prior to the search.[231]

Finally, public sentiment in Minnesota has long focused upon the problem of drunken driving. Public opinion appears to be in favor of harsher penalties for drunken driving[232] rather than expanding criminal defendants' rights. The majority opinion recognized this concern,[233] but dismissed it, stating that the serious nature of the problem does not justify "cancelling out the protection offered by over 100 years of precedent in Minnesota".[234]

Under the alternative analysis, there are few factors suggesting that the history of the state favors expansive treatment of the right to counsel. Neither the text, nor the judicial history, nor the legislative history suggests heightened concern over the right to counsel. Nor is there any showing that the attitudes of state citizens support expansive treatment of the right. Under this analysis, the court should defer to the legislature.

2. *Equal Protection*

Since there is no equal protection provision in the state constitution that parallels the federal provision, a meaningful comparison to the federal provision is difficult. When there is no comparable provision, the language of the state guarantee can only be examined independently of the federal guarantee. The state right has been distilled

229. In *Friedman*, the state argued that allowing consultation with an attorney prior to testing would cause delay resulting in loss of evidence, and ultimately fewer convictions. *See Friedman*, 473 N.W.2d at 834.

230. *See, e.g.*, Krumm v. R.A. Nadeau Co., 276 N.W.2d 641, 643 (Minn. 1979).

231. In her dissenting opinion, Justice Coyne made a similar observation. She argued that permitting persons suspected of drunken driving to consult with counsel during the investigatory stage while denying the same right to those accused of other crimes constitutes preferential treatment. *Friedman*, 473 N.W.2d at 846.

232. *See, e.g.*, Donna Halverson, *Legislators Urged To Get Tough With First-Time Drunken Drivers*, MPLS. STAR TRIB., Jan. 15, 1992, at 3B; Mike Kaszuba, *Aggressive DWI Cops Draw Praise, Questions*, MPLS. STAR TRIB., Dec. 29, 1991, at 1A. *But see* Chuck Haga, *'Social Drinker' Forms Group To Counter MADD's Influence*, MPLS. STAR TRIB., Jan. 27, 1992, at 1B.

233. The majority in *Friedman* stated, "We do not disagree with the proposition that drunk driving is a very serious social as well as legal problem. The resolution, however, does not lie in eroding and weakening the Minnesota Bill of Rights and resorting to the law of the Old West." *Friedman*, 473 N.W.2d at 836.

234. *Id.* at 834.

from various state constitutional provisions,[235] most notably, the privileges and immunities clause. The Minnesota provision states:

> 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 judgement of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.[236]

Examination of the text suggests that the right is dependent upon the prevailing law and judicial process.

The constitutional history reveals that the framers actively debated issues of racial and social equality.[237] The concern reflected in the debates would be a factor weighing in favor of expansive treatment if there were any evidence to suggest purposeful discrimination. However, the trial record in *Russell* revealed no evidence of any purposeful intent to draw a suspect classification.[238]

There is little judicial history to support the contention that the judiciary intended a more liberal interpretation of equal protection than is provided by federal doctrine. Although several cases reflect some equivocation over whether the state equal protection test provided greater protection than the federal test, the weight of judicial authority suggests that the state test is no more protective than the federal test.[239]

There is extensive legislative history in Minnesota designed to eliminate purposeful discrimination.[240] However, the trial court in *Russell* was unconvinced that the legislature had any intent to discriminate on the basis of race by imposing disparate penalties to users of cocaine base.[241] Conversely, the *Russell* decision demonstrates that the disparate penalty was intended to deter the use of what the legislature believed to be a more addictive, more dangerous and more destructive drug.[242]

Finally, although difficult to ascertain with certainty, there is little

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235. *See supra* notes 142-149 and accompanying text.

236. MINN. CONST. art. I, § 2.

237. The delegates expressed concern that Minnesota would be a free state, and included an amendment outlawing slavery. *See* MINN. CONST. art. I, § 2. In addition, the delegates vigorously debated an equal suffrage provision which would have extended the right to vote to blacks. The provision was ultimately defeated. *See* GEORGE W. MOORE, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 367-82 (1858).

238. *See Russell*, 477 N.W.2d at 900 (Coyne, J., dissenting). Moreover, if the court had found any discriminatory intent, it could have simply invalidated the statute under a strict scrutiny analysis.

239. *See supra* notes 146-149 and accompanying text.

240. *See* MINN. STAT. ch. 363 (1990).

241. *See Russell*, 477 N.W.2d at 887.

242. *Id.* at 890.

support for the view that state citizens favor expanding criminal protections. Public opinion polls may even suggest the opposite, that citizens would favor diminishing criminal protections to alleviate the drug problem.[243] Under this analysis, the court should also defer to the legislature.

VI. CONCLUSION

The state constitution will play an increasingly important role in future years as the Minnesota Supreme Court develops an independent body of state constitutional law. The *Friedman* and *Russell* decisions illustrate the uncertainty inherent in adjudication which does not articulate and implement a cogent methodology for interpreting a state constitutional provision differently from a federal constitutional provision.

The political climate of federal law has dramatically changed. There are differences of opinion as to the wisdom of recent United States Supreme Court pronouncements, and invoking the "double security" of the state constitution is a vital expression of the state's independence when federal protections run dry. But the rush to the state constitution should not result in the diminished integrity of state constitutional law. Nor should it result in a discreet shift of power from the legislative to the judicial branches of government.

Implementing interpretive criteria will not prevent the judiciary from invoking the state protection when there is a compelling argument to do so. It will merely ensure that the interpretation of the state constitution is supported by the history, attitudes and concerns that are an integral part of our state. In reality, implementing criteria may actually enhance the likelihood that the document is expansively interpreted. Implementing an analytical framework to justify enhanced state protection will require counsel to actively debate the possibility of heightened constitutional protections. The court will be presented with reasons for expansive treatment that might otherwise remain unconsidered. This debate can only enhance the integrity of our state constitutional law.

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243. *See* Kathryn Kahler, *Rampant Crime Brings Call to Curb Civil Liberties; Some Fear a Police State if Rights are Cut*, MPLS. STAR TRIB., Mar. 23, 1992, at 4A. The article reports that a *Washington Post*-ABC News Poll found that "62 percent of Americans would be willing to give up 'a few of the freedoms we have in this country' to reduce illegal drug activity and its attendant crime." *Id.*