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Minnesota's Variable Approach to State Constitutional Claims

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MINNESOTA'S VARIABLE APPROACH TO STATE CONSTITUTIONAL CLAIMS

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INTRODUCTION

The Minnesota Supreme Court recently construed various provisions of the Minnesota Bill of Rights,[1] thus demonstrating both its resolve to enforce the protections found in the state constitution, but at the same time, a lack of consistency in its approach to deciding state constitutional issues. For example, while *State v. Hershberger*[2] (*Hershberger II*) and *State v. French*[3] provide the framework for analysis of article I, section 16 of the Minnesota Constitution,[4] those decisions do not offer guidance as to when the court should apply the state constitu-

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1. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) [hereinafter *Hershberger II*] (MINN. CONST. art. I, § 16); State v. French, 460 N.W.2d 2 (Minn. 1990) (MINN. CONST. art. I, § 16).

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

3. 460 N.W.2d 2 (Minn. 1990).

4. This clause protects Minnesota citizens' "right . . . to worship God according to the dictates of his own conscience . . ." MINN. CONST. art. I, § 16.

tion rather than the federal Constitution to the case.[5] The travels of *Hershberger* through the judicial system, with two stops at the Minnesota Supreme Court and an intervening stop at the United States Supreme Court, illustrates the Minnesota Supreme Court's haphazard approach to applying its state constitution.

Minnesota's judiciary needs to develop a consistent approach to state constitutional issues. The *Hershberger* case is an unfortunate illustration of Minnesota's reluctance to ground its decisions, when possible, in the Minnesota Constitution rather than the federal Constitution.[6] Adopting a policy of applying state constitutional law first offers Minnesota courts the opportunity to not only approach constitutional claims in a consistent manner, but also to develop and declare state constitutional policy without federal oversight.[7]

The Minnesota judiciary, however, has avoided state constitutional claims on many occasions by deciding only the federal claim,[8] or by deciding both claims[9] under a single, unified anal-

5. This situation arises when a litigant bases a claim for relief on alleged violations of both a state and federal constitutional provision. *See, e.g.*, State v. Hershberger, 444 N.W.2d 282 (Minn. 1989) [hereinafter *Hershberger I*] (state and federal claims presented with only federal claim resolved), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990).

6. The *Hershberger I* decision is unfortunate primarily because the additional rights afforded by the state constitution were not recognized. The decision also illustrates the inefficiency of deciding a case solely on federal grounds when a state claim is raised. The United States Supreme Court's vacation of the Minnesota Supreme Court's *Hershberger I* opinion renders the state opinion of little, if any, precedential value. Further, the Minnesota court expended additional judicial resources on the case when it heard oral argument for a second time to decide the state constitutional issue. *See* Massachusetts v. Upton, 466 U.S. 727 (1984). "If such a violation [of the state constitution] did take place, much of [the state] court's first opinion and all of this Court's opinion are for naught." *Id.* at 735 (Stevens, J., concurring).

7. *See* Michigan v. Long, 463 U.S. 1032 (1983). In *Long*, the United States Supreme Court reversed the Michigan Supreme Court, which based its decision almost entirely on federal precedent. The Supreme Court stated, however, that a state court can prevent federal review by clarifying that it is using federal precedents for guidance only. State court decisions will not be reviewed if they are "based on bona fide separate, adequate, and independent grounds . . . ." *Id.* at 1041. " 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.' " *Id.* (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

8. *See, e.g., Hershberger I*, 444 N.W.2d at 284 (Because application of the free exercise clause of the federal Constitution "disposes of this appeal, we do not address appellant's claim that the statute as applied violates the appellant's right to freedom of conscience guaranteed them by . . . the Minnesota Constitution."); Clover Leaf Creamery Co. v. State, 289 N.W.2d 79 (1979) (State and federal constitutional

ysis.[10] This approach, perhaps the result of the predominance of federal law in constitutional litigation,[11] hinders the judici-

claims were raised but the court discussed only the federal claim.), *rev'd*, 449 U.S. 456 (1981).

9. *See, e.g.*, State v. Lanam, 459 N.W.2d 656, 661-62 (Minn. 1990) (state and federal confrontation clause claims raised; case decided under both state and federal law); State v. Conklin, 444 N.W.2d 268 (Minn. 1989) (state and federal confrontation clause claims raised; case decided under federal law); State v. Friberg, 435 N.W.2d 509, 515 (Minn. 1989) (right to jury trial under state and federal constitutions raised; case decided by analysis of federal precedent); Lienhard v. State, 431 N.W.2d 861, 867 (Minn. 1988) (state and federal equal protection claims raised; case decided by reference to federal law); Sisson v. Triplett, 428 N.W.2d 565, 568 (Minn. 1988) (procedural due process, substantive due process, and equal protection claims raised under both the federal and state constitutions; case decided by reference to federal law alone); Bernthal v. City of St. Paul, 376 N.W.2d 422, 424-45 (Minn. 1985) (state and federal equal protection claims raised; case decided under federal precedent); State v. Sports & Health Club, Inc., 370 N.W.2d 844, 851-53 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986) (state and federal free exercise claims raised; case decided on federal constitutional grounds only); State v. Janetta, 355 N.W.2d 189, 193 (Minn. 1984) (search and seizure issues raised under state and federal constitutions; case decided without separating claims); Omdahl v. Hadler, 459 N.W.2d 355, 361 (Minn. Ct. App. 1990) (equal protection challenge under state and federal constitutions; case decided by federal law analysis); Olson v. Blaeser, 458 N.W.2d 113, 117 n.1 (Minn. Ct. App. 1990) (court acknowledged same analysis used for state and federal equal protection claims; case decided without identifying on which document its analysis was based); State v. Lieder, 449 N.W.2d 485, 487 (Minn. Ct. App. 1989) (search and seizure challenge under state constitution); State v. Ri-Mel, Inc., 417 N.W.2d 102, 106-08 (Minn. Ct. App. 1987) (equal protection and due process claims raised; case decided under state and federal constitutions without separating them); Collins v. State, 385 N.W.2d 52, 54 (Minn. Ct. App. 1986) (state and federal self-incrimination claims raised; case decided by relying on federal precedent).

10. This single, unified analysis apparently seeks to conform interpretations of the state constitution to interpretations of the federal Constitution when the respective constitutional provisions are similar or identical. "This court has stated that '[t]he standards of the equal protection clause of the fourteenth amendment are synonymous with the standards of equality under Minn. Const. art. 1, § 2 . . . .' State v. Forge, 262 N.W.2d 341, 347 n. 23 (Minn. 1977)." *Bernthal*, 376 N.W.2d at 424.

The state's autonomy, however, is not ignored completely. "While a United States Supreme Court interpretation of the identical federal provision is therefore of inherently persuasive, although not compelling, force, . . . the Minnesota Supreme Court remains the final authority on the interpretation and enforcement of our state constitution." *Collins*, 385 N.W.2d at 54-55 (citations omitted); O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) (distinguishing its result from a contrary United States Supreme Court fourth amendment case in which the Minnesota court's analysis included federal and state decisions by noting "our decision rests not only on the Fourth Amendment of the United States Constitution, but also on article I, section 10 of the Minnesota Constitution"). The *O'Connor* decision further demonstrates that the Minnesota court recognizes its power to reach state constitutional claims, but typically analyzes both claims simultaneously without distinguishing the separate purposes and policies that guide state and federal constitutions.

11. There is no single reason for the predominance of federal law in the constitutional arena. One of the most common reasons advanced is the activism of the War-

ary's effort to provide practitioners and citizens with the direction necessary for upholding and enforcing the protections extended by Minnesota's constitution. The too frequently muddled analysis of constitutional claims should be replaced with an organized approach that recognizes and preserves the independence of the protections offered by the state bill of rights.

The Minnesota Supreme Court has recently shown a cautious return to decision making based solely on its own bill of rights.[12] This article supports that return, and argues for even

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ren Court. In this period, the United States Supreme Court paved the way for development of individual rights and freedoms by requiring states, through the fourteenth amendment, to adhere to the guarantees in the federal Bill of Rights. *See generally* 2 R. ROTUNDA, J. NOWAK & J.N. YOUNG, CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 15.6, at 70-79 (1986) (discussing the Supreme Court's path in applying Bill of Rights protections to the states).

The addition of federal constitutional protections provides litigants with two possible constitutional claims for relief. Most litigants, however, rely solely on the federal Constitution. *See* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382 (1980) [hereinafter Linde, *First Things First*]. Additionally, most law school curricula focus on federal constitutional law to the exclusion of state constitutional law. The reason for this preference for federal law is, most likely, uniformity. Uniformity concerns do not, however, excuse the total lack of reference to a state constitution in constitutional law courses. *See, e.g.*, Collins, *Reliance on State Constitutions: Some Random Thoughts*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 5-6 (B. McGraw ed. 1985) [hereinafter Collins, *Some Random Thoughts*].

12. *See, e.g.*, State v. French, 460 N.W.2d 2, 11 (1990); *In re* Schmidt, 443 N.W.2d 824, 827 (Minn. 1989) ("We address the constitutional issues raised by appellant in the instant case solely under the Minnesota Constitution . . . ."); Castor v. City of Minneapolis, 429 N.W.2d 244, 245 (Minn. 1988) (applied takings clause of state constitution); State v. Hamm, 423 N.W.2d 379, 386 (Minn. 1988) (right to twelve person jury in misdemeanor cases protected by the Minnesota Constitution, article I, section 6); Jarvis v. Levine, 418 N.W.2d 139, 148 (Minn. 1988) (applied the Minnesota Constitution's right to privacy to protect a patient's right to refuse forced medication); State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) (recognized a right of privacy under the Minnesota Bill of Rights); *cf.* Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 452 (Minn. 1988) (applied due process clause of state constitution, but referenced federal interpretation); Friedman v. Commissioner of Public Safety, 455 N.W.2d 93 (Minn. Ct. App. 1990) (applied right against self-incrimination with minimal reference to federal law), *review granted*, (Minn. July 6, 1990). *See generally* Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REVIEW 51 (1984).

Hamm and *Jarvis*, both authored by Justice Yetka, illustrate the principle that should guide the court in state constitutional decision making. In both opinions, Justice Yetka stressed the importance of safeguarding the fundamental rights offered Minnesota citizens by the state constitution:

> It is important to remember that we sit today in our role as the highest court of the State of Minnesota interpreting our own constitution, framed and ratified by the people of this state. *While a decision of the United States Supreme Court interpreting an identical provision of the federal Constitution may be*

greater use of that document.[13] The Minnesota Supreme Court should embark on further excursions into its state constitutional jurisprudence to maintain the independent vitality of its bill of rights. Moreover, further reliance on the state constitution will allow the court to develop a principled method for determining when to apply the state constitution, or when to defer to federal decisions construing analogous federal provisions.[14]

This article reviews the Minnesota Supreme Court's approach to decision making under the state bill of rights and suggests a model for reviewing state constitutional claims.[15]

> *persuasive, it should not be automatically followed or our separate constitution will be of little value.* We may be required to interpret our own constitution more stringently than the federal Constitution, but we certainly do not do so lightly. . . . *However, we must remain independently responsible for safeguarding the rights of our own citizens and for insuring that the intent of the people in Minnesota in adopting our constitution is continued forward.* In our view, the conclusion of the United States Supreme Court . . . that the sixth amendment to the federal Constitution does not mandate 12-person juries, is of little relevance here today.

Hamm, 423 N.W.2d at 382 (citations omitted) (emphasis added).

13. Indeed, it would seem the Minnesota judiciary has a personal stake in doing so. Otherwise, it remains bound by the United States Supreme Court's interpretation of a particular provision, even if the Minnesota court's view differs.

> To [fail to examine differing interpretations of a state constitution] is to denigrate not only the state constitution, but the state supreme court as well by suggesting that the earlier [state court] decision, no matter how well-reasoned, must be sacrificed to a decision by another court interpreting another constitution.

Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 318 (1977).

14. There is no consistent approach by the Minnesota Supreme Court to questions of state constitutional law. *Compare Hamm*, 423 N.W.2d at 380 (raised only state constitutional claim), *and Jarvis*, 418 N.W.2d at 148 (upheld state constitutional right to privacy but, without explanation, did not address the federal claim), *and Gray*, 413 N.W.2d at 109-10 (reached state constitutional claim when intervening Supreme Court decision eliminated the federal constitutional claim) *with Hershberger I*, 444 N.W.2d at 289, *and State v. Sports & Health Club*, 370 N.W.2d 844, 851-52 (Minn. 1985) (raised both state and federal constitutional claims in each case but court effectively addressed only the federal claim). Although these cases were decided within three years of each other, no logical method of reaching state constitutional claims instead of federal constitutional claims can be discerned.

15. Minnesota's haphazard approach to state constitutional claims has been the focus of an earlier commentary. *See* Fleming & Nordby, *supra* note 12. The commentary and case law on this topic are extensive. Since this article focuses on Minnesota's approach to its state constitution, few decisions from other states resolving state constitutional issues are referenced. *See, e.g.*, People v. Kern, 75 N.Y.2d 638, 555 N.Y.S.2d 647, 554 N.E.2d 1235, *cert. denied*, 111 S. Ct. 77 (1990) (recognizing under the New York Constitution a due process right in favor of the state for racially balanced juries, thus the defendants' attempt to structure the racial balance of the jury through peremptory strikes was unconstitutional); *In re* T.W., 551 So. 2d 1186 (Fla.

The Minnesota Supreme Court's recent decisions under the state religious freedom clause are then analyzed to demonstrate the application of the decision-making approach promoted in this article. The thesis of this article is that the state judiciary and practitioners should recognize the state bill of rights as the primary protector of Minnesota citizens' individual liberties, and not just as a supplement to the rights recognized under the analogous federal document.[16]

I. State Constitutional Law

A. *Overview of State Constitutional Law*

Most Minnesota citizens are likely familiar with some of the

1989) (recognizing a right to abortion under the right of privacy in Florida's constitution); State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986) (adopting a framework for reaching state constitutional issues over federal constitutional issues when both presented in one case). *See also* Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. Cin. L. Rev. 317 (1986) (identifying major state constitutional law developments); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1328 n.20 (1982) [hereinafter *Developments in the Law*] (listing the major articles in this field).

16. A caveat must also be offered. While a call for greater reliance on a state constitution can be interpreted as a call for a return to the type of judicial activism seen in earlier years,

> [i]t may not be wide of the mark, however, to suppose that [state courts returning to their state constitutions] discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, [certain federal constitutional protections].

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977). This article does not specifically propose such a result. Instead, the intended purposes of this article are to increase awareness of the functional importance of Minnesota's Bill of Rights, and to develop a consistent and principled analysis of state constitutional claims based on the theory that state constitutional claims are primary to, and independent of, the federal Constitution.

One commentator criticizes Justice Brennan's advocacy of state constitutional interpretation as a veiled request for further expansion of individual rights and liberties. "Brennan's primary message thus becomes clear: state courts should vindicate personal liberties along the lines undertaken by the Warren Court by reading their state constitutions expansively and should justify their actions by referring to the 'neutral' principle of federalism." Maltz, *False Prophet — Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L.Q. 429, 432 (1988). The possibility of state court reaction to Supreme Court rulings, either through expansive or restrictive interpretations of state constitutions, cannot be denied. *See, e.g., French*, 460 N.W.2d at 8 (uncertainty of federal freedom of religion jurisprudence noted, and decision based on state constitutional provision). Professor Maltz' criticism of Justice Brennan's argument, however, fails to acknowledge that regardless of one's agreement with the reason for the differing interpretation, the state retains the authority to disagree with or reject the Supreme Court's analysis of an analogous provision.

constitutional rights which protect them against unwanted or undesirable interference by the government in their personal lives. The popularity of police and lawyer television shows has acquainted people with their "Miranda" rights. Yet, most people are probably aware of only their federal, as opposed to state, constitutional rights.[17] This ignorance is reinforced by the tendency of some state courts to view United States Supreme Court opinions as dispositive of any constitutional claims, even state constitutional claims.[18] "It is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution."[19]

In fact, both state[20] and federal courts[21] recognize the au-

17. *See, e.g.*, Collins, *Some Random Thoughts*, *supra* note 11, at 5. Professor Collins argues that constitutional law has become "lopsided" due to an assumption that if an act does not offend the federal Constitution, there is no constitutional infringement. *See also* Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174-75 (1984) [hereinafter Linde, *E Pluribus*]. Justice Linde, of the Oregon Supreme Court, demonstrates the dominance of federal law by pointing to citizens' desire to "take the fifth," or journalists' invocation of their "first amendment rights." *Id.* Citizens think and speak in the language of federal constitutional rights without reference to state constitutional rights. In fact, however, state constitutions may offer additional protections beyond those of the federal Constitution. For example, the Minnesota Bill of Rights provides its citizens with a "certain remedy in the laws for all injuries or wrongs." *See* MINN. CONST. art. I, § 8.

18. *See, e.g.*, *Hershberger I*, 444 N.W.2d at 284 (resolution of federal claim disposed of need to address state constitutional claim); *see also* Collins, *Some Random Thoughts*, *supra* note 11, at 2 (noting state courts' tendency to make a "federal case" out of state law issues). Of course, the issues a state court *should* resolve, and the issues the state court *can* resolve, depend a great deal on the claims raised by the attorneys in the case. *See* Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 715 (1983) (pointing out that court is hampered in its ability to review state constitutional claims where the attorneys raise only federal constitutional claims).

19. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 964 (1982).

20. *See, e.g.*, State v. Hamm, 423 N.W.2d 379, 382 (Minn. 1988); O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979).

21. *See, e.g.*, Massachusetts v. Upton, 466 U.S. 727, 735-39 (1984) (Stevens, J., concurring) (State courts should decide state constitutional issues under their respective constitutions even though an identical provision exists in the federal Constitution.); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (States may exercise police power or sovereign right to adopt constitutional provisions for individual liberties that are more expansive than those conferred by the federal Constitution.); South Dakota v. Opperman, 428 U.S. 364, 396 (1976) (Marshall, J., dissenting) (United States Supreme Court ruling on a federal constitutional issue does not preclude a state from resolving the issue to the contrary under its own constitution.); Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting) (Supreme Court should not review state supreme court decision concerning its own state constitutional issues.); Cooper v. California, 386 U.S. 58, 62 (1967) (States may require

thority of state courts to interpret their state constitutions to extend greater protections than those provided by analogous federal provisions. This authority makes the continued reliance on federal constitutional law to the exclusion of state constitutional law, or the mixed analysis of state and federal constitutional claims, even more puzzling. The reliance on United States Supreme Court decisions construing a federal provision to resolve a state constitutional claim implies that state-created rights are dependent on the federal Constitution.[22] In contrast, during the early history of this country the states' bills of rights were viewed as the broad protectors of citizens' rights and liberties, with the federal Constitution intended to plug any gaps.[23] With the functional independence of states' bills of rights obscured by the surge of federal law, however, state courts began to adopt the analysis and rules of

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higher standards than those required under the federal Constitution and when those standards are violated a state may review the issue under its own constitution without review by the Supreme Court.).

22. *See, e.g., Developments in the Law, supra* note 15, at 1328 (The dominance of federal constitutional law raised questions as to the relevance of state constitutions' bills of rights.). In fact, the opposite scenario is more plausible: federal constitutional law, at its beginning, was dependent on the analysis and results developed by state courts construing analogous state constitutional provisions. *See* Abrahamson, *Homegrown Justice: The State Constitution*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 306, 311 (1985) [hereinafter Abrahamson, *Homegrown Justice*]. Justice Abrahamson, of the Wisconsin Supreme Court, points out that some states had adopted criminal procedural rights decades prior to the landmark federal decisions in Mapp v. Ohio, 367 U.S. 643 (1961), and Gideon v. Wainwright, 372 U.S. 335 (1963). The United States Supreme Court, while charting new territory in federal constitutional law, was only adopting a uniform national standard based on the decisions and experiences of state courts. Abrahamson, *Homegrown Justice, supra*, at 311. *See also Upton*, 466 U.S. at 738 (Stevens, J., concurring) ("Whatever protections [the state constitution] does confer are surely disparaged when the [state supreme court] refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States."); Linde, *First Things First, supra* note 11, at 382 (states applied the individual guarantees provided by their own constitutions long before federal Bill of Rights was applied to the states).

23. This fact is well-documented and accepted in the state constitutional literature. *See, e.g.*, Cohen, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 619 (1989) (participants at Constitutional Convention thought a federal Bill of Rights would be superfluous in light of the protections afforded by state constitutions); Linde, *E Pluribus, supra* note 17, at 174; Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 243 (1985) [hereinafter Utter, *Freedom and Diversity*] (early constitutional history of the United States proves that state declarations of rights were never intended to be dependent on or interpreted in light of United States Bill of Rights); *Developments in the Law, supra* note 15, at 1327-28.

law announced by the United States Supreme Court in federal constitutional cases, without engaging in any independent analysis of the relevant state provision.[24]

Recent years, however, have seen a revival of state constitutions. Several developments occurring during the late 1970s created a resurgence in decision making based on state constitutions.[25] Furthermore, recent United States Supreme Court decisions have reflected a retreat from, or at least reluctance to, expanding the individual rights and liberties recognized by the Warren Court. Such decisions have resulted in state courts seeking additional room in their state constitutions for certain individual liberties.[26]

United States Supreme Court review of state court decisions may also have sparked the revived interest in state constitutions.[27] Although Supreme Court review is generally limited

24. *See, e.g.*, State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) (Minnesota Supreme Court applied analysis and rules of law used by the United States Supreme Court to determine scope of the right to privacy under Minnesota's constitution); State v. Murphy, 380 N.W.2d 766, 770-71 (Minn. 1986) (Minnesota Supreme Court applied United States Supreme Court analysis and rules to determine scope of the privilege against self-incrimination); State v. Century Camera, Inc., 309 N.W.2d 735, 738 n.6 (Minn. 1981) (protection of free speech guaranteed by the Minnesota Constitution no more extensive than the federal Constitution); Willette v. The Mayo Foundation, 458 N.W.2d 120, 122-23 (Minn. Ct. App. 1990) (analyzed due process and remedies claims brought under state and federal constitutions without indicating to which claim the analysis pertained); Olson v. Blaeser, 458 N.W.2d 113, 117 (Minn. Ct. App. 1990) (noted that analysis "is the same for state and federal equal protection claims," but failed to address the claims separately).

25. For an example of the extent of this resurgence, see *Developments in the Law*, *supra* note 15, at 1328 n.20 (a partial list of commentators discussing this topic).

26. *See, e.g.*, State v. French, 460 N.W.2d 2, 8 (Minn. 1990) (avoided federal issue given unforeseeable changes in federal law). The state court reaction to Supreme Court interpretations of constitutional rights has been called the "new federalism." Some critics suggest that this rediscovery of state constitutions is nothing more than a reaction to unpopular civil rights decisions and judicial activism by the United States Supreme Court. *See, e.g.*, Maltz, *supra* note 16. Justice Shirley Abrahamson, of the Wisconsin Supreme Court, contends the new federalism is not so much a liberal reaction to the federal courts' retrenchment on constitutional rights as a doctrine based on the concept of strong state governments. Abrahamson, *Homegrown Justice*, *supra* note 22, at 307. A state constitution first policy encourages stability for the citizens of a state, since the state does not have to adapt to the changing political nature of the federal courts, and also recognizes the local expertise of state courts. *Id.* at 311.

27. The Minnesota Supreme Court has experienced Supreme Court review of cases where state law issues were either presented or decided. *See, e.g.*, *Hershberger I*, 444 N.W.2d 282 (Minn. 1989), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990); State v. Murphy, 324 N.W.2d 340 (Minn. 1982), *rev'd and*

to issues of federal law, *Michigan v. Long*[28] clarified that state court decisions are subject to Supreme Court review unless based on both an adequate and independent state ground.[29] This rule of review makes even more dangerous the practice of resolving state and federal constitutional claims without a separate analysis of the individual claims presented.

B. The Approaches to State Constitutional Issues

State courts have turned increasingly to state constitutions to resolve the constitutional issues presented. In doing so, however, the court must decide the role federal law will play in state constitutional interpretation and adjudication. Minnesota's increasing reliance on its bill of rights is welcome, but does not fully resolve the problems the judiciary faces when presented with competing constitutional claims. Courts which have relied heavily on federal constitutional law in the recent past have little state precedent to guide their analysis of undeveloped state constitutional provisions and the application of those provisions to the claims presented.[30] The United States

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remanded, 465 U.S. 420 (1984); Clover Leaf Creamery Co. v. State, 289 N.W.2d 79 (Minn. 1979), *rev'd*, 449 U.S. 456 (1981).

28. 463 U.S. 1032 (1983).

29. *Id.* at 1041. The *Long* Court announced an almost formalistic rule that requires state courts to declare that their decision is based solely on state law in order to avoid federal review. *Id.* This rule, while technically demanding, cannot be faulted in view of state court opinions that fail to provide a clear analysis of the federal and state issues presented. *See, e.g.*, State v. Sports & Health Club, 370 N.W.2d 844, 851-53 (Minn. 1985), *cert. denied*, 478 U.S. 1015 (1986) (addressed only federal issue when presented with both state and federal constitutional challenges). The *Sports & Health Club* decision illustrates opinion writing that fails to meet the Supreme Court's demand for a clear statement of the legal basis for the court's opinion. *See* Note, *Fulfilling the Goals of* Michigan v. Long*: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1046-47 (1988).

30. The Minnesota Supreme Court, for example, prior to *Hershberger II*, 462 N.W.2d 393 (Minn. 1990) and State v. French, 460 N.W.2d 2 (Minn. 1990), had not decided a case based solely on the religious freedom clause, article I, section 16 of the state constitution for over twenty years. Of course, the state court can still draw on state constitutional cases decided prior to the heavy impact of federal jurisprudence on constitutional litigation. These cases did not, however, identify an approach to resolving competing constitutional claims because the issue of a possible federal constitutional claim was rarely raised. Therefore, older cases, while still "good law," offer only guidance in deciding the state claim once the state court decides the role played by federal law in state constitutional jurisprudence.

The state court can take guidance from its analysis of state constitutional provisions with no analogous federal counterpart. For example, the Minnesota Constitution guarantees its citizens a "certain remedy" at law. *See* MINN. CONST. art. I, § 8 ("Every person is entitled to a certain remedy in the law for all injuries or wrongs

Supreme Court's interpretations of analogous federal provisions may guide the court's decision-making process. The danger the state court must avoid, however, is allowing its constitution to simply "mirror" the federal Constitution by adopting without critical analysis the interpretations and rules federal courts follow in similar cases.[31] Therefore, the important decision the state court must make is the degree of guidance it will take from federal constitutional jurisprudence.[32] A method of analysis must be developed to guide the court's approach to state constitutional claims. Fortunately, the revival of state constitutional law has led to the emergence of three possible methods of analysis.

1. The Primacy Model

The primacy model is based on the principle that, where state law addresses and resolves an issue, federal law and any federal claims presented are irrelevant. This approach, advocated initially by Justice Hans Linde of the Oregon Supreme Court, views the state constitution as entirely distinct from the body of federal constitutional law.[33] A state court's decision to

. . . ."). The Minnesota Supreme Court has a well-developed body of case law that utilizes state constitutional history and policy in analyzing the protections offered by this clause. *See, e.g.*, Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 (Minn. 1986) (analyzed MINN. CONST. art. I, § 8 in connection with MINN. STAT. § 145.424 (1984)); Calder v. City of Crystal, 318 N.W.2d 838, 843 (Minn. 1982) (analyzed MINN. CONST. art. I, § 8 in connection with MINN. STAT. § 541.051 (1980)); Rambaum v. Swisher, 423 N.W.2d 68, 73-74 (Minn. Ct. App. 1988), *aff'd*, 435 N.W.2d 19, 24 (Minn. 1989) (analyzed MINN. CONST. art. I, § 8 in connection with MINN. STAT. § 604.07 (1986)); Kleeman v. Cadwell, 414 N.W.2d 433, 438-39 (Minn. Ct. App. 1987) (analyzed MINN. CONST. art. I, § 8 in connection with MINN. STAT. § 604.07 (1986)); Johnson v. Farmers Union Cent. Exchange, Inc., 414 N.W.2d 425, 429-31 (Minn. Ct. App. 1987) (analyzed MINN. CONST. art. I, § 8 in connection with MINN. STAT. § 604.07 (1986)); Troupe v. Sunrise Elec., Inc., 360 N.W.2d 633, 636 (Minn. Ct. App. 1985) (analyzed MINN. CONST. art. I, § 8 in connection with MINN. STAT. § 176.061, subd. 6(c) (1982)).

31. *See, e.g.*, *infra* note 54.

32. A state court facing state constitutional law issues must also resolve the order in which competing state and federal constitutional claims will be decided, and the principles that guide construction of state constitutional protections in order to avoid federal review. These issues, and others, are all interrelated to the development of a consistent method of analyzing state constitutional claims. *See* Utter, *Freedom and Diversity*, *supra* note 23, at 240; Note, *Federalism, Uniformity, and the State Constitution*, 62 WASH. L. REV. 569, 572 (1987) (discussing factors that state courts must consider when creating an analytical procedure to interpret its constitution).

33. *See generally* Linde, *E Pluribus*, *supra* note 17 (discussing the legitimacy of judicial review of constitutional questions by the United States Supreme Court); Linde,

depart from federal law, therefore, does not depend on the United States Supreme Court's recognition of the state's ability to provide greater protection under its own bill of rights than is available under federal law.[34] Instead, Justice Linde argues that the state court does not need the federal court's "permission" to interpret its state constitution differently since the state court already has that authority as an independent judiciary.[35] Thus, the rights guaranteed by the state constitution are viewed as independent of, rather than supplemental to, the rights guaranteed by the federal Constitution.[36] "The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand."[37]

The primacy model claims judicial efficiency in its favor as the state court need only address the issues necessary to resolve the case. For example, if the state court addresses the

First Things First, *supra* note 11 (emphasizing the principle that state bills of rights should come before the federal Bills of Rights in addressing constitutional claims).

34. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). "Our reasoning . . . does not *ex proprio vigore* limit the authority of the State . . . to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id. See also* State v. Murphy, 380 N.W.2d 766, 770 (Minn. 1986) (cited *Pruneyard* but declined to depart from federal precedent in construing state provision against self-incrimination); State v. Fuller, 374 N.W.2d 722, 726-27 (Minn. 1985) (cited *Pruneyard* as authority for its ability to depart from federal precedent and independently interpret its own state constitution, but declined to do so when construing the state double jeopardy clause); State v. Schroepfer, 416 N.W.2d 491, 493 (Minn. Ct. App. 1987) (cited *Pruneyard* but declined to adopt federal law's pretrial procedure following a defendant's request for a mistrial); State v. Gabbert, 411 N.W.2d 209, 213-14 (Minn. Ct. App. 1987) (cited *Pruneyard* but declined to adopt federal law's good faith exception to the exclusionary rule).

35. *See* Linde, *E Pluribus*, *supra* note 17, at 176.

36. *See* Utter, *Freedom and Diversity*, *supra* note 23, at 243.

37. Linde, *E Pluribus*, *supra* note 17, at 179. A variation but close relation of the primacy model is illustrated by former Justice Brennan's theory of state constitutional law. Justice Brennan's approach also calls for state court vigilance with respect to their citizens' state constitutional rights. "[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." Brennan, *supra* note 16, at 491. Justice Brennan suggests, however, that federal constitutional rights should be viewed as the "floor," or the point below which the state court cannot venture. Thus, the state court is free to interpret its constitutional protections as rising above the federally established floor, or at the very least, leveling off with the floor. *Id.* at 502. The pure primacy model advocated by Justice Linde is at odds with Justice Brennan's theory to the extent that Justice Brennan begins by determining the minimal federal standards.

federal question first, the court will generally also address the state law question if only to note that the state constitutional issue is resolved by the federal discussion.[38] When the state law question is addressed first, however, it is unnecessary to address the federal question, since an opinion on the federal issue becomes only advisory; resolution of the state claims renders the federal claims superfluous.[39] This result is a corollary to the rule that an appellate court should refrain from opinions on constitutional issues when some other resolution of the case renders that opinion unnecessary. The primacy model therefore advocates addressing and resolving state issues first, followed, if necessary, by federal issues. This system results not only in organized, structured opinions, but also in opinions that address only those issues necessary to the resolution of the case.

The primacy model further places the responsibility for development of state law on the shoulders of the states. This is a

38. *See, e.g., Hershberger I*, 444 N.W.2d 282, 284 (Minn. 1989), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990); McDonnell v. Commissioner of Pub. Safety, 460 N.W.2d 363, 368-69 (Minn. Ct. App. 1990). Of course, in the unfortunate case where the state claim is not addressed because the federal claim disposes of the case, the state court may be faced with additional work if the United States Supreme Court vacates its federally based decision. *See, e.g., Hershberger I*, 444 N.W.2d 282 (Minn. 1989), *vacated and remanded*, 110 S. Ct. 1918, *on remand*, *Hershberger II*, 462 N.W.2d 393 (Minn. 1990); State v. Murphy, 324 N.W.2d 340 (1982), *rev'd and remanded*, 465 U.S. 420 (1984), *on remand*, 380 N.W.2d 766 (1986) (decided state law claim in line with analogous federal provision); *In re* Jenison, 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded*, 375 U.S. 14, *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963) (decided state's interest in obtaining competent jurors in line with the first amendment of the federal Constitution).

39. *See* Collins, *Some Random Thoughts*, *supra* note 11, at 34 n.65. *See, e.g., McDonnell*, 460 N.W.2d at 367-68. In *McDonnell*, several constitutional challenges were raised to the state's implied consent law. The Minnesota Court of Appeals addressed the state and federal claims differently for each claim. Thus, the court first addressed the state and federal right to counsel claims under the sixth amendment. *Id.* at 367. This analysis included only one paragraph on the state constitutional claim. The court concluded the sixth amendment analysis stating "[t]his court will not extend the state constitutional right to counsel beyond the bounds recognized by the [Minnesota] supreme court." *Id.* at 368. Next, the court addressed the self-incrimination claims by separately analyzing the state and federal claims, even though the court acknowledged that the state claim had not been raised in the trial court. *Id.* at 368-70. Finally, the court addressed the equal protection claims, but never identified whether those claims were brought under the state and/or the federal constitutions. *Id.* at 374.

Efficiency concerns seem to dictate that the court should adopt one approach to identifying, addressing, and resolving the claims presented. The *McDonnell* court's approach, utilizing three different methods in one opinion, represents an inefficient, and perhaps confusing method of constitutional analysis.

logical placement of this burden since, as independent governments, states are traditionally responsible for those developments.[40] Thus, "a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right."[41]

The distinctive feature of the primacy model is its view that the state constitution is autonomous from its federal counterpart.[42] This unbridled assertion of superiority over the federal Constitution, to the extent that federal claims are unresolved, has drawn criticism. Some commentators suggest that deciding a state constitutional issue without reference to the well-developed body of federal law renders the state decision less convincing and inefficient.[43] Other commentators suggest that to avoid the body of federal constitutional law does not reflect the reality of constitutional jurisprudence, "for the very vocabulary of constitutional law is a federal vocabulary."[44]

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40. *See* Utter, *Freedom and Diversity*, *supra* note 23, at 247.

41. Linde, *E Pluribus*, *supra* note 17, at 178.

42. The corollary of this viewpoint requires that practitioners present state constitutional claims prior to federal claims. This approach is argued most forcefully by Professor Collins.

> Aside from the fact that state law does not cease to be law simply because it coexists with the federal Constitution, there are practical reasons why courts should encourage the complaining party to address state law prior to federal. . . . [T]oday's resolution of a federal claim does not answer the question raised by tomorrow's factually identical case brought under state law.

Collins, *Some Random Thoughts*, *supra* note 11, at 8. Thus, when only the federal claim is presented, practitioners present an incomplete picture and, correspondingly, present an inadequate opportunity for the appellate court.

43. These propositions were stated best as follows:

> When federal protections are extensive and well articulated, state court decision making that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the Supreme Court and commentators.

Developments in the Law, *supra* note 15, at 1357. Another commentator suggests that state courts can assist federal courts in development of federal constitutional analysis by commenting on similar state constitutional provisions. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1030-41 (1985) [hereinafter Utter, *Swimming in the Jaws*].

44. Spaeth, *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 736 (1988). The author argues that the pervasive nature of federal constitutional law has caused most citizens to think of their federal citizenship and rights before their respective state citizenship and rights. Therefore, he argues, "[w]e simply cannot reason or argue about what state constitutional law should be without resort to principles of federal constitutional law, for the

2. *The Interstitial Model*

The interstitial model views state constitutional law as a vehicle for filling gaps in federal constitutional law. Thus, in contrast to the priority asserted by advocates of the primacy model, state constitutional law occupies a secondary position, to be used as a means of supplementing or clarifying federal law.[45] Federal law is viewed as the floor, not to be departed from unless factors warranting elaboration of state constitutional doctrine dictate a different result.[46]

Advocates of the interstitial model argue that it is grounded in the reality of the dominant role of federal law in constitu-

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very vocabulary of constitutional law is a federal vocabulary." *Id.* This conclusion seems to beg the question. Admittedly, constitutional law is a federal vocabulary, but only because the actors in the system—judges, lawyers, and law schools—have placed an overwhelming emphasis on the federal Constitution in the last fifty years. Prior to that time, state courts did not hesitate to look to their state constitutions to protect their citizens. Further, Judge Spaeth's conclusion ignores the form of government adopted by the states:

> The really distinctive feature of the federal government by contrast with the states is that its powers are carefully enumerated and delegated . . . . By contrast all other governmental powers not thus delegated to the federal government are by constitution declared to belong [to the states] . . . . The federal government therefore by no constitutional possibility can add to or diminish the powers of the states . . . .

J. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 3-4 (1915). Although Judge Spaeth supports the call for reexamination of state constitutions, his criticism of the primacy model's lack of deference to federal law is part of the reason why state constitutions have fallen into disuse. Supporters of the primacy model argue that the "federal vocabulary" was developed only because of state court inertia in the area of state constitutional law. *See, e.g.*, Collins, *Some Random Thoughts*, *supra* note 11, at 3-4.

45. *See Developments in the Law*, *supra* note 15, at 1357-58. This model has also been described as the reactive or independent approach. *See also* Maltz, *supra* note 16, at 439-40.

46. *Developments in the Law*, *supra* note 15, at 1358. The authors of this comment propose the following analysis:

> The interstitial model proposes three questions that the state court should address sequentially when presented with a state constitutional issue. First, do established principles of federal law dictate a result; that is, does the alleged unconstitutional action fall below a federal floor? If so, the case can be decided without the elaboration of state constitutional doctrine. If not, the second question asks what factors, if any, warrant a divergence from federal doctrine. If the court identifies reasons to diverge, the final question is how to proceed in elaborating the contours of the state constitutional doctrine . . . .

Id.

The authors of an earlier article on Minnesota's Bill of Rights advocated an approach similar to the interstitial model, although not denominated as such. These authors suggest that the Minnesota courts consider several state specific factors to decide whether departure from federal doctrine is warranted. *See* Fleming & Nordby, *supra* note 12.

tional litigation. "In a community that perceives the Supreme Court to be the primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base."[47]

This model, however, suffers from two major drawbacks. First, by asserting the primacy of federal constitutional law—in the sense that the case should be disposed of on federal grounds if possible—the interstitial model abdicates the functional independence of the state constitution. Thus, even though a state claim is raised, the interstitial model views that claim as irrelevant if the case can be disposed of on federal grounds.[48] Second, this model is at odds with the Supreme Court's principles of reviewing cases involving state and federal constitutional issues. If a state court, following the interstitial model, allows federal law to control its analysis of the state constitutional issue, the state court risks Supreme Court review and reversal.[49]

The interstitial model, also, creates the possibility of useless advisory opinions where the Supreme Court accepts jurisdiction of a case decided by reliance on federal law or by mixing the analysis of federal and state claims. If the Supreme Court reverses and remands the case, the state court is free to adopt the same initial result by relying exclusively on state law prece-

47. *Developments in the Law*, *supra* note 15, at 1357.

48. This is arguably the approach taken by the Minnesota court in *Hershberger I*, 444 N.W.2d 282, 284 (Minn. 1989) (state claim not analyzed because case disposed of on federal grounds), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990).

49. *See* Collins, *Some Random Thoughts*, *supra* note 11, at 13. In Michigan v. Long, 463 U.S. 1032, 1040-41 (1983), the Supreme Court declared that it would take jurisdiction over state cases deciding constitutional rights, even if based on state grounds, if the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . ." This rule requires state courts to state explicitly that their holding is based on state law, and that federal law, if cited at all in an opinion, was referred to only for guidance. *Id.* at 1041.

Minnesota has experienced this risk of review on several occasions. *See, e.g.*, *Hershberger I*, 444 N.W.2d at 282; State v. Murphy, 324 N.W.2d 340 (Minn. 1982), *vacated and remanded*, 465 U.S. 420 (1984); Clover Leaf Creamery Co. v. State, 289 N.W.2d 79 (Minn. 1979), *rev'd*, 449 U.S. 456 (1981); *In re* Jenison, 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded*, 375 U.S. 14 (1963). In each case, Supreme Court review and the additional work involved on remand could have been avoided by basing the initial decision on the state claim presented in the case. Ultimately, the state claim was relied on in the remand cases in *Hershberger II*, 462 N.W.2d 393 (Minn. 1990), and State v. Murphy, 380 N.W.2d 766 (Minn. 1986).

dent, thus rendering both the first state court opinion and the Supreme Court opinion advisory.[50]

The interstitial model, in contrast to the judicial efficiency advocated by the primacy model, suffers from a degree of judicial inefficiency. Its advocates argue, however, that this model offers the ability to resort to a well-developed body of law that can guide a court's decision-making process. A careful analysis of Supreme Court precedent of an analogous federal provision can help a state court reach a well-reasoned decision under its own constitution. This method of decision making, while cautious, helps to avoid analytically unsound decisions.[51]

3. The Lockstep Approach

The lockstep approach views the state constitution's protections as fully consistent with the United States Supreme Court's interpretations of analogous federal constitutional protections. Thus, changes and modifications in federal law lead to the same changes or modifications in state law.[52] This approach typifies Minnesota's approach to many constitutional issues in the sense that the court will typically resolve the constitutional issues raised under two different constitutions by relying exclusively on precedent construing the analogous federal provision,[53] or by holding with minimal analysis that the protections under the two constitutions are synonymous.[54]

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50. *See* Massachusetts v. Upton, 466 U.S. 727, 735 (1984) (Stevens, J., concurring); *see also* Note, *Fulfilling the Goals of* Michigan v. Long*: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1042-44 (1988). The author of this Note points out the difficulty encountered by state courts faced with federal and state constitutional claims. Some courts operating without an organized approach to the constitutional issues resolve the case without specifically identifying on which constitutional provision the analysis is based. *Id.* at 1063-65. This type of analysis leaves the state court open to the Supreme Court's *Michigan v. Long* jurisdiction, resulting in the inefficient and useless rendering of advisory opinions. Furthermore, this type of analysis fails to give the state constitution the respect it deserves. *Id.* at 1068-69.

51. *See Developments in the Law*, *supra* note 15, at 1357.

52. Maltz, *supra* note 16, at 437-38.

53. *See, e.g.*, State v. Conklin, 444 N.W.2d 268 (Minn. 1989) (confrontation clause issue); State v. Friberg, 435 N.W.2d 509 (Minn. 1989) (jury trial right); Lienhard v. State, 431 N.W.2d 861 (Minn. 1988) (equal protection issues); State v. Murphy, 380 N.W.2d 766 (Minn. 1986) (self-incrimination challenge); State v. Sports & Health Club, Inc., 370 N.W.2d 844 (1985) (free exercise challenge).

54. An example of this is seen in the analysis of claims brought under the equal protection clauses of the Minnesota Bill of Rights, and the federal Bill of Rights. In Bernthal v. City of St. Paul, 376 N.W.2d 422 (Minn. 1985), where the plaintiff raised equal protection claims under both constitutions, the court stated: "The standards

The lockstep approach has received the most criticism for its apparent abdication to the federal judiciary of state constitutional development.[55] This approach also creates difficulties for the state supreme court in terms of its workload and auton-

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of the equal protection clause of the fourteenth amendment are synonymous with the standards of equality under MINN. CONST. art. 1, § 2 . . . ." *Id.* at 424 (quoting State v. Forge, 262 N.W.2d 341, 347 n.23 (Minn. 1977)). In *Forge*, the court relied on Minneapolis Federation of Teachers, Local 59 v. Obermeyer, 275 Minn. 347, 354, 147 N.W.2d 358, 363 (1966), which in turn relied on C. Thomas Stores Sales System, Inc. v. Spaeth, 209 Minn. 504, 514, 297 N.W. 9, 16 (1941). The *Spaeth* court relied on National Tea Co. v. State, 205 Minn. 443, 447-48, 286 N.W. 360, 362 *vacated*, 308 U.S. 547 (1939), *judgment reinstated on rehearing*, 208 Minn. 607, 294 N.W. 230 (1940), and State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N.W. 496 (1912).

Therefore, *Bernthal*'s statement ultimately relies on the validity of *National Tea* and *Bridgeman & Russell*. However, *National Tea* is a taxation case and did not involve the application of article I, § 2 of the Minnesota Bill of Rights. *See National Tea Co.*, 205 Minn. at 446-47, 286 N.W. at 362.

Bridgeman & Russell, while involving both article I, § 2 and the fourteenth amendment, does not state on which constitutional provision its analysis is based. Nor does the case state that the provisions are to be construed analogously. Thus, the justification for construing the Minnesota equal protection clause synonymously with its federal counterpart has not yet been offered. This is particularly curious when the synonymously construed clauses are so textually different. Article I, § 2 of the Minnesota Bill of Rights states, "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof . . . ." MINN. CONST. art I, § 2.

In contrast, the federal equal protection clause is derived from the fourteenth amendment, which states,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (1987). Yet, without offering any analysis of the clauses, the history of the protection, or the policies of the state and federal government in assuring equal protection, Minnesota courts continue to follow the federal law in this area. *See, e.g., Lienhard*, 431 N.W.2d at 867 (stating that limitation on tort claims not violative of plaintiff's right to equal protection under the fourteenth amendment); *see also* State v. Century Camera, Inc., 309 N.W.2d 735, 738 n.6 (Minn. 1981) (without analysis or support, stating that free speech protection in Minnesota Bill of Rights construed synonymously with analogous federal protection); State v. Scholberg, 412 N.W.2d 339, 344 (Minn. Ct. App. 1987) (following *Century Camera*).

55. *See, e.g.*, Collins, *Some Random Thoughts*, *supra* note 11, at 5-6; Maltz, *supra* note 16, at 440. Professor Maltz sees the lockstep approach, along with the other approaches, as a choice between options for delegating lawmaking authority. He suggests that "activist" courts (apparently those that reject the Supreme Court's approach to a constitutional issue) advocate judicial lawmaking authority, as opposed to legislative lawmaking authority. Maltz, *supra* note 16, at 441-43. States which take the lockstep approach take "account of an unalterable reality—the existence of federal judicial review—in determining the allocation of authority among state governing bodies." *Id.* at 443. Thus, since the lockstep state follows the Supreme Court consistently, federal judicial review is always available, albeit perhaps in an unrelated case, and state judicial lawmaking is therefore unnecessary. "State courts employing

omy. First, the United States Supreme Court's decision in *Michigan v. Long* allows its intervention to the extent that the state court declares state constitutional rights coterminous with federal rights without actually analyzing state law.[56] Second, a state supreme court faced with reversal by the United States Supreme Court loses a certain degree of autonomy as the court with the final word on the litigants' state constitutional rights.[57] Further, the state supreme court is perhaps viewed as subject to the changing political whims of the United States Supreme Court which responds to a national constituency, rather than to a smaller regional constituency.[58]

C. A Model of Adjudication for Minnesota

The Minnesota Supreme Court's current approach to claims based on the Minnesota Bill of Rights has at least been diverse. The court's recent willingness to address state constitutional claims raised by litigants is hampered by its past failure to provide clear guidelines on its approach to resolving these claims.[59] The court often does not address the state and fed-

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lockstep analysis simply choose to allocate maximum power to their state legislatures." *Id.*

The difficulty with Professor Maltz' theory is in its reliance on federal judicial review. He suggests no reason why a state court interpreting a state constitution should rely on federal judicial review to resolve any problems in its state constitutional interpretation. Reliance on federal judicial review to define the parameters of state constitutional protections seems to be the height of abdication of judicial responsibility for a state constitution by a state court.

56. This problem results in repeat appearances of cases before the state court. *See, e.g.*, State v. Murphy, 324 N.W.2d 340 (Minn. 1982), *vacated and remanded*, 465 U.S. 420 (1984), *rev'd on remand*, 380 N.W.2d 766 (Minn. 1986) (Since the federal and state self-incrimination constitutional provisions are identical, the court was required to rehear and use federal decisions for guidance.); *In re* Jenison, 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded*, 375 U.S. 14, *rev'd on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963) (The court relied on federal precedent to hold that constitutional guarantees of religious freedom permit an individual to refuse jury duty because of religious beliefs.).

57. The loss of autonomy may have occurred when the state court failed to separately analyze the state and federal constitutional issues. *See Lienhard*, 431 N.W.2d at 866. This form of opinion writing may stem in part from the manner in which the issues are presented to the court as a single constitutional issue. *See, e.g.*, Appellant's Brief and Appendix, *Lienhard*, 431 N.W.2d at 861 (No. C8-87-1002). Thus, the autonomy sacrificed is a result of practices engaged in by both the state court and attorneys appearing before that court.

58. For a discussion of the different concerns motivating the Supreme Court and state courts, see *infra* note 86.

59. Of course, this assumes that attorneys appearing before the court have separately raised the state constitutional issue.

eral constitutional issues separately, preferring instead to resolve them as one issue.[60] Obviously, counsel should routinely raise separate state and federal constitutional claims.[61] This approach presents the court with the opportunity to address the state claim separately from the federal claim. The Minnesota judiciary, however, for the benefit of the parties appearing before it, and in order to develop a sound body of constitutional law, still needs to adopt a consistent approach to analyzing those claims. Its current approach,[62] while varying between interstitial and lockstep, is deficient in several respects. The approach advocated here is the primacy model described earlier.

The primacy model would benefit Minnesota in several respects. First, this model promotes certainty in constitutional

60. *See, e.g.*, State v. Lanam, 459 N.W.2d 656, 658 (Minn. 1990) (self-incrimination claims); State v. Friberg, 435 N.W.2d 509, 512-14 (Minn. 1989) (right to a speedy trial); Sisson v. Triplett, 428 N.W.2d 565, 571-74 (Minn. 1988) (self-incrimination claims); State v. Hanson, 285 N.W.2d 483, 486 (Minn. 1979) (constitutional challenges to venue location of criminal trial); Omdahl v. Hadler, 459 N.W.2d 355, 360-61 (Minn. Ct. App. 1990) (due process challenges); Willette v. Mayo Found., 458 N.W.2d 120, 122-23 (Minn. Ct. App. 1990) (due process challenges); City of Edina v. Dreher, 454 N.W.2d 621, 622 (Minn. Ct. App. 1990) (due process challenges); State v. Lieder, 449 N.W.2d 485, 487 (Minn. Ct. App. 1989) (search and seizure challenges); State v. Jannetta, 355 N.W.2d 189, 194-95 (Minn. Ct. App. 1984) (search warrant challenges).

61. This article, therefore, also advocates modifying appellate briefs and arguments so that the state constitutional claims are always presented first, with the federal claims presented as alternative grounds for resolution. *Cf.* Appellant's Brief and Appendix, *Hershberger I*, 444 N.W.2d 284 (Minn. 1989), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990) (No. C9-88-2623) (federal claim briefed and argued first).

62. This approach is subject to some criticism since the court, when finding that a state's constitutional protection is synonymous with its federal counterpart, offers little critical analysis in reaching that decision. For example, the court has construed the free speech protection extended by the Minnesota Constitution as no more extensive than the protection offered by the first amendment. *See* State v. Century Camera Inc., 309 N.W.2d 735, 738 n.6 (Minn. 1981). The two constitutional provisions, however, differ dramatically. The Minnesota Constitution makes free speech "inviolate," while the federal Constitution directs that free speech "shall not be infringed." *Compare* MINN. CONST. art. I, § 3 *with* U.S. CONST. amend. I. *See also* State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) (holding that the right of privacy implicit in the Minnesota Bill of Rights is no more extensive than the federal right of privacy as currently construed by the United States Supreme Court); State v. Hanson, 285 N.W.2d 483, 486 (Minn. 1979) ("There seems no reason to interpret the State Constitution [differently]" from the federal Constitution concerning the location for a criminal trial.). The Minnesota court can reach the decision it believes is most consistent with its constitution; however, to be a persuasive decision, these differences need to be addressed and explained.

litigation and jurisprudence. The decision-making process under the primacy model will always resolve first the state claim, and then, if necessary, the federal claim. Counsel currently have little guidance on the court's decision-making process when faced with concurrent federal and state constitutional claims. It is difficult for practitioners to develop and advance state constitutional claims when the court before which it argues that claim does not explore the legal basis for the claim.[63] Indeed, independent state constitutional claims that are briefed and argued by counsel can be ignored by the court in reaching its decision.[64] The primacy model offers the certainty of knowing that state claims will be addressed and resolved first, and that federal claims will be reached only if necessary.

Second, the primacy model offers the Minnesota judiciary the unique opportunity to reacquaint itself with its constitution and decide for itself, without the controlling hand of federal courts or federal law, the parameters of the constitutional protections shielding Minnesota citizens. The court's current approach, focusing largely on the federal constitutional claim, is objectionable given the resulting subordination of the state's bill of rights. Decision making may be easier given the plethora of federal constitutional decisions which provide the framework for the state court's analysis.[65] The continued resort to this process, however, hampers the court's ability to become familiar with and develop the protections extended by

63. In recent years, with the dominance of federal law in constitutional litigation, the state court was often presented only with a federal constitutional claim. *See, e.g.*, Appellant's Brief and Appendix, State v. Olson, 436 N.W.2d 92 (Minn. 1989) (No. C3-88-687), *aff'd*, 110 S. Ct. 1684 (1990) (presented only federal fourth amendment issue). Justice Linde, however, argues that this should not hinder the state court in resolving the case on state grounds. Linde, *First Things First*, *supra* note 11, at 383. "[The state court] owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time." *Id.*

This approach, of course, threatens the well-established procedural rule that an appellate court will not address an issue not raised below. Furthermore, adopting this policy does not force attorneys to become as well-acquainted with the state constitution as the judges before whom they appear.

64. *See, e.g.*, *Hershberger I*, 444 N.W.2d at 289-90 (declined to address state constitutional issue since case resolved by deciding federal constitutional issue); State v. Sports & Health Club, 370 N.W.2d 844, 850 (Minn. 1985) (failed to separately address state constitutional issue by relying solely on federal law for resolution of claim).

65. *See, e.g.*, *Hershberger I*, *supra* note 5, at 286-89 (applied Supreme Court free exercise challenge four-part test).

the state constitution. The court has already construed several provisions of the Minnesota Bill of Rights consistently with Supreme Court decisions on analogous federal provisions.[66] There are, however, other unique provisions that may be invoked by litigants[67] thereby requiring the court to determine the construction of its own constitutional provisions.[68]

Third, the stability encouraged by the primacy model is a welcome benefit. The Minnesota judiciary's previous wholesale adoption of United States Supreme Court precedent and analysis in certain constitutional areas raises questions about the precedential value of the state court opinion when the Supreme Court reverses itself, or takes a course different from that adopted by the state court.[69] For example, the Supreme Court's recent decision in *Employment Division, Department of*

66. *See, e.g.*, *Gray*, 413 N.W.2d at 111 (right to privacy); State v. Murphy, 380 N.W.2d 766, 771 (Minn. 1986) (privilege against self-incrimination); *Century Camera*, 309 N.W.2d at 736, 738 n.6 (freedom of speech); *Hanson*, 285 N.W.2d at 486 (constitutional venue challenge); Chock v. Commissioner of Pub. Safety, 458 N.W.2d 692, 694 (Minn. Ct. App. 1990) (following Supreme Court's decision on the constitutionality of roadblocks to stop intoxicated drivers).

67. *See, e.g.*, MINN. CONST. art. I, § 1 (object of government); MINN. CONST. art. I, § 12 (no person shall be imprisoned for debt); MINN. CONST. art. I, § 8 (certain remedy clause); MINN. CONST. art. I, § 9 (treason clause); MINN. CONST. art. I, § 14 (military power subordinate to civil power); MINN. CONST. art. I, § 16 (freedom of conscience protected); MINN. CONST. art. I, § 17 (religious tests as qualification for office prohibited).

68. As Professor Maltz points out, the primacy model does not require ignoring United States Supreme Court precedent. Rather, the state court has the option of relying on Supreme Court precedent, or simply relying on the decisions of other states construing similar state constitutional provisions. *See* Maltz, *supra* note 16, at 435-37.

69. *See, e.g.*, McDonnell v. Commissioner of Pub. Safety, 460 N.W.2d 363, 370 (Minn. Ct. App. 1990), *review granted*, (Nov. 9, 1990); Friedman v. Commissioner of Pub. Safety, 455 N.W.2d 93 (Minn. Ct. App. 1990), *review granted*, (July 6, 1990). *McDonnell* and *Friedman* both involved state and federal self-incrimination challenges based on the admission of a defendant's refusal to submit to a test to determine intoxication. These courts acknowledged that a previous Minnesota Supreme Court decision, State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973), which upheld a self-incrimination challenge based on the admission of the defendant's refusal to take a test had not been explicitly overruled in light of South Dakota v. Neville, 459 U.S. 553 (1983), which reached the opposite conclusion. Further, the Minnesota Supreme Court acknowledged that the holding in *Andrews* under the *state constitution* was not affected by *Neville*. *See* State v. Willis, 332 N.W.2d 180, 183 n.1 (Minn. 1983).

The Minnesota Court of Appeals ultimately held that *Andrews* was of questionable precedential value. *Freidman*, 455 N.W.2d at 97-98. The court further declined "to interpret the [state constitution] more broadly than the federal constitution as to the issue presented here as well." *McDonnell*, 460 N.W.2d at 370. While *Andrews*' validity is doubtful, its presence and the subsequent decisions created confusion in resolving the state constitutional claims.

Human Resources of Oregon v. Smith,[70] represents a departure from previous decisions involving the free exercise clause of the first amendment.[71] The Minnesota Supreme Court has already expressed its dissatisfaction with this change in course, and apparently retreated from the Supreme Court's interpretation of the federal Constitution's religious freedom clause. In *State v. French*,[72] the Minnesota Supreme Court expressly relied on the Minnesota Constitution to resolve a free exercise claim because of the United States Supreme Court's change in interpretation. "In light of the unforeseeable changes in established first amendment law set forth in recent decisions of the United States Supreme Court, justice demands that we analyze the present case in light of the protections found in the Minnesota Constitution."[73]

While the Minnesota Supreme Court can legitimately disagree with the United States Supreme Court's interpretations, especially when the state court is construing its own constitution, the approach followed in *French* does not promote stability in constitutional law. Instead, the message derived from *French* is that the court will resort to the state constitution *only when* the court disagrees with the United States Supreme Court, rather than *whenever* a state constitutional claim is presented.

Fourth, the primacy model promotes judicial efficiency. For example, if the state court addresses the federal question first, the court is still obligated to address the state constitutional law question in order to resolve the issues raised by the parties.[74] If the state constitutional law question is addressed first,

70. 110 S. Ct. 1595 (1990).

71. The *Smith* decision seems to reverse the decision in Wisconsin v. Yoder, 406 U.S. 205 (1972), as well as departing from the test used to analyze free exercise clause claims developed in Sherbert v. Verner, 374 U.S. 398 (1963). *See Smith*, 110 S. Ct. at 1598-1606. This raises questions about the precedential value of the Minnesota Supreme Court's decision in *In re* Jenison, 265 Minn. 96, 125 N.W.2d 588 (1964), in which the court upheld a person's right to refuse jury duty based on a first amendment free exercise claim. The court reached this decision after the United States Supreme Court vacated its earlier decision denying the claim and directed the Minnesota court to reconsider the case in light of *Sherbert*. In *In re* Jenison, 375 U.S. 14 (1963), the plaintiff raised both state and federal constitutional claims, but the Minnesota Supreme Court resolved both claims by relying on federal law.

72. 460 N.W.2d 2 (Minn. 1990).

73. *Id.* at 8.

74. *See, e.g.*, McDonnell v. Commissioner of Pub. Safety, 460 N.W.2d 363, 369-70 (Minn. Ct. App. 1990).

however, it is unnecessary to address the federal question since the decision on the federal issue becomes only an advisory opinion.[75]

Finally, the decision on the state claim is also a final decision, unreviewable by the federal court.[76] The primacy model therefore offers the Minnesota Supreme Court a protective shield against unwanted United States Supreme Court oversight. The Minnesota Supreme Court has already experienced the difficulty of deciding a case by reference to federal constitutional law, and having the Supreme Court vacate the decision and send it back for additional consideration.[77] The Supreme Court has only been able to exercise jurisdiction over these cases because of its policy to review state court decisions that do not clearly invoke state law grounds as the basis for the decision.[78] A state court avoids Supreme Court review and reserves for itself the interpretation of its state constitution by following a state claim first policy of constitutional litigation. This approach does not preclude reference to Supreme Court precedent.[79] Instead, the Minnesota court is free to look to those decisions, but for guidance only. Indeed, the *Long* Court suggested that its demand for an adequate and independent state ground would encourage state courts "to develop state jurisprudence unimpeded by federal interference. . . ."[80]

The other models used in state constitutional analysis, the lockstep approach and the interstitial model, present disadvantages that are not outweighed by the only apparent benefit, the state court's ability to rely on a well-developed body of federal

75. *See* Collins, *Some Random Thoughts*, *supra* note 11, at 34 n.65.

76. *Id.* at 35.

77. *See supra* note 38.

78. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

79. Indeed, given the similar structure and wording of certain state and federal provisions, reference to Supreme Court decisions can be expected. Under the primacy model, however, the weight given to Supreme Court decisions is no greater than that given to the decision of a sister state construing an analogous state constitutional provision. *See, e.g.*, Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 14 (1981) [hereinafter Collins, *Reactionary Approach*].

80. *Long*, 463 U.S. at 1041. Thus, to avoid Supreme Court review, the state court relying on Supreme Court precedent must make a clear statement that it looked to federal law for guidance only. *Id.* The plain statement rule thus becomes the "rubber stamp" by which state courts avoid Supreme Court review. *See* Case Comment, Michigan v. Long: *The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 160 (1987).

law. Minnesota's use of the lockstep approach has resulted, on some occasions, in duplicative work for the court when cases are returned for further consideration.[81] Furthermore, the lockstep approach can be condemned because of the resulting diminishment of the state constitution, a result that should offend a state court concerned with interpreting and enforcing the protections enumerated in its constitution. No jurist would agree that the state constitution does not have the independent significance which deserves independent attention. Finally, the uniformity in constitutional law that results from the lockstep model, since state and federal claims are resolved analogously, is an insufficient justification for the resulting neglect of the development of the state constitution.[82]

The interstitial model is dangerous in light of the Supreme Court's willingness to review state court decisions ostensibly based on state law grounds.[83] The only suggested reason for avoiding the claim that the court before which it is presented can best resolve,[84] is the dominance of federal law in the constitutional arena.[85] This rationale fails, however, to explain adequately why the state court, entrusted with the responsibility for interpreting and preserving the rights enumerated in the state constitution, should rely on the decisions of a federal court interpreting a different document.[86]

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81. *See supra* note 38.

82. *See supra* note 54. Indeed, it is the difference between state and federal constitutions, and state and federal judicial systems that detract from imposing uniform interpretation requirements on those documents and bodies.

83. *See Long*, 463 U.S. at 1032; *see also* Collins, *Some Random Thoughts*, *supra* note 11, at 13. "The [interstitial] model is unstable if only because it places an unreal demand on the bar to set aside state law to the client's detriment and expense." *Id.*

84. State courts are considered experts on such state-specific issues as family law, workers compensation law, and landlord-tenant law. The requirements and rules of these areas of law can vary widely from state to state. Thus, interpreting a state constitutional provision unique to that state should pose no difficulties for a state court. *See* Collins, *Reactionary Approach*, *supra* note 79, at 14. This difference in local laws among the states further diminishes the argument made by Judge Spaeth that federal rights should be primary since citizens are conscious only of their federal citizenship status. *See* Spaeth, *supra* note 44, at 734-36. In fact, citizens are more likely to be aware of the different protections offered by their individual state.

85. *See Developments in the Law*, *supra* note 15, at 1357.

86. This is particularly puzzling in light of the fact that the United States Supreme Court acts out of concerns different from those motivating the state courts. *See, e.g.*, Utter, *Swimming in the Jaws*, *supra* note 43, at 1045; *Developments in the Law*, *supra* note 15, at 1348-51 (Supreme Court motivated by concerns of national uniformity, while state courts have only regional impact). These objective factors do not suggest that Supreme Court decisions on analogous provisions in a different docu-

This model also suffers from historical drawbacks. The interstitial model's relegation of the state constitution to a "fall back" position is particularly unsettling when, historically, the state constitution has occupied a primary position. The interstitial model requires a court to at least acknowledge that the federal Constitution initially defines the scope of the constitutional right at issue. Since the federal courts initially looked to the state courts to define the scope of federal rights,[87] the interstitial model takes a position that, historically, is indefensible. A state court interested in preserving its autonomy, and avoiding United States Supreme Court review, would avoid the interstitial model.

II. The Religion Clause Cases

Minnesota's return to its state constitution is reflected in two recent decisions, *State v. Hershberger* [*Hershberger II*],[88] and *State v. French*.[89] The Minnesota Supreme Court based its decisions in both cases solely on the freedom of religion clause in the state constitution.[90] These cases are unique not only for their exclusive reliance on the state constitution, but also due to the relative obscurity of the religious freedom clause.[91] Thus, the *Hershberger* and *French* cases provide a unique opportunity to critique the Minnesota Supreme Court's reliance on and use of its state constitution.

A critique of these opinions, however, requires an understanding of the factors that framed the court's analysis. The leading elements in the Minnesota court's analysis of article I, section 16, are the language of the provision at issue and the subject matter of the litigation.[92] A review of the language of the religious freedom clause demonstrates the reason for the prominence of these factors in the court's analysis:

> The right of every man to worship God according to the

ment are entitled to any more persuasive weight than those of a state court interpreting a similar state constitutional provision.

87. *See* Abrahamson, *Homegrown Justice*, *supra* note 22, at 311.

88. 462 N.W.2d 393 (Minn. 1990).

89. 460 N.W.2d 2 (Minn. 1990).

90. Minn. Const. art. I, § 16 [hereinafter freedom of conscience clause].

91. *See supra* note 30.

92. The factors the court relied on were identified in Fleming & Nordby, *supra* note 12, at 67-75. In addition, these authors also identified state constitutional history, Minnesota precedent, and conditions unique to Minnesota as factors the court should consider. *Id.* at 67-77.

> dictates of his own conscience shall never be infringed, . . . nor shall any control of or interference with the rights of conscience be permitted, . . . but the liberty of conscience hereby secured shall not be so construed as to . . . justify practices inconsistent with the peace or safety of the State . . . .[93]

The strong language of this section and its mandatory tone required that the court confront the differences in text and purpose between the Minnesota Constitution and federal Constitution. With these factors in mind, an analysis of the *French* and *Hershberger* decisions demonstrates that the Minnesota court has laid an adequate foundation for future claims based on this clause.[94]

A. State v. French

State v. French[95] provided the Minnesota Supreme Court with its first opportunity in several years to construe article I, section 16 of the Minnesota Constitution, the freedom of conscience clause.[96] The defendant in *French* was a landlord who refused to allow an unmarried couple to live in his rental property based on his religious belief that living together outside of marriage is sinful.[97] The prospective tenant filed a discrimination complaint with the Minnesota Human Rights Department which issued a complaint against the defendant for marital status discrimination.[98] Both the administrative law judge and the Minnesota Court of Appeals[99] found the defendant engaged in unlawful discrimination, with the court of appeals rejecting the defendant's constitutional challenge.[100]

The defendant argued before the Minnesota Supreme Court that his constitutionally protected free exercise of religion precluded imposition of any penalty for the discrimination. The defendant's argument was based on both the first amendment

93. MINN. CONST. art. I, § 16.

94. It is important to point out that this section's analysis does not critique the merits of the court's decision, but only critiques its approach to analyzing and applying this clause.

95. 460 N.W.2d 2 (Minn. 1990).

96. MINN. CONST. art. I, § 16.

97. *French*, 460 N.W.2d at 3-4.

98. *Id.* at 4. Marital status discrimination in property rental is prohibited by MINN. STAT. § 363.03, subd. 2(1)(a) (1990).

99. State v. French, No. C2-89-1064 (Minn. Ct. App. Oct. 31, 1989).

100. *Id.*

of the federal Constitution, and section 16 of the Minnesota Constitution.[101] A plurality[102] of the Minnesota Supreme Court agreed with the defendant's state constitutional argument, and held that the freedom of conscience clause protected the defendant from being penalized for his acts.[103]

The plurality's initial approach to the state constitutional issue highlights the Minnesota judiciary's inconsistent approach to state constitutional issues. The plurality acknowledged that the defendant in *French* "emphasized" the federal constitutional issue, but decided that it would only address the state constitutional issue: "In light of the unforeseeable changes in established first amendment law set forth in recent decisions of the United States Supreme Court, justice demands that we analyze the present case in light of the protections found in the Minnesota Constitution."[104] This approach is curious at best, and leaves the court open to criticism that it is result-oriented. By acknowledging that it avoided the federal issue simply because of unforeseen changes in federal law, the court implicitly acknowledged its disagreement with those changes. That disagreement suggests that the court would not have turned to state law but for those changes.

The primacy model eliminates these undercurrents from a court's opinion. The primacy model's state law first policy allows the court to always turn to state law regardless of any changes in federal law. The *French* court's apparent need to distinguish itself from federal law would have been unnecessary had the Minnesota judiciary not been so entrenched in addressing and resolving federal issues prior to state law issues.

Aside from the plurality's introductory problem, its analysis of the freedom of conscience clause is well structured. The plurality looked initially to the language of the clause and its historical importance to guide its interpretation.[105] The plurality recognized that the language of this section is considera-

101. *French*, 460 N.W.2d at 8.

102. Justice Yetka, joined by Justices Kelley and Coyne, held that the marital status discrimination prohibited by MINN. STAT. § 363.03 does not encompass cohabiting couples, and that article I, section 16 protected the landlord's actions. *Id.* at 11. Justice Simonett joined in the plurality's decision on the statutory issue, but, finding that issue dispositive, did not join the constitutional decision. *Id.* Chief Justice Popovich and Justices Wahl and Keith dissented from the court's holding. *Id.* at 11, 21.

103. *Id.* at 11.

104. *Id.* at 8.

105. *Id.* at 8-9.

bly broader than its federal counterpart, which simply prohibits any "law . . . prohibiting the free exercise [of religion] . . . ."[106] Minnesota's freedom of conscience clause is expressed in strong language—rights of conscience *shall never be infringed*, and interference with rights of conscience *shall not be permitted*.[107] Given the breadth of this language and the invocation of religious liberty in the preamble to the constitution, the court concluded that religion is a deeply held value for Minnesotans.

The court next considered the "exception" language of section 16. Practices "inconsistent with the peace or safety of the State" are not entitled to the protection of this clause.[108] The plurality relied again on the strength of the language and the importance of religious freedom to support its conclusion that the Minnesota Constitution protects the religious practice unless a "compelling and overriding state interest" is demonstrated by the state.[109]

The structure of this provision arguably supports a method of analysis similar to the three-part test of *Sherbert v. Verner*,[110] and the court's reliance on a "compelling interest" test suggests that the federal test was present in the minds of the plurality. The strong, mandatory language of section 16, limited only by a narrow exception,[111] suggests that if interference is permissible, it can only be demonstrated by a compelling state interest, as the plurality held.[112]

The *French* dissent agreed with the outline of the plurality's analysis. In particular, the dissent acknowledged that a compelling interest must be shown but disagreed on the outcome of that showing, arguing that the state's interest in eradicating

106. U.S. CONST., amend. I.

> [T]he state Bill of Rights expressly grants affirmative rights in the areas of free press, free speech and religious worship while the corresponding federal provision simply attempts to restrain governmental action. In effect, the language of the state constitution appears to afford Minnesota citizens greater protection than does the Federal Constitution. It also serves to lessen the force of United States Supreme Court decisions which only refer to the more limited protection afforded by the Federal Bill of Rights.

Fleming & Nordby, *supra* note 12, at 67 (citations omitted).

107. *See* MINN. CONST. art. I, § 16 (emphasis added).

108. *Id.*

109. *French*, 460 N.W.2d at 9.

110. 374 U.S. 398, 404 (1963).

111. For a discussion of this caveat, see *infra* note 132 and accompanying text.

112. *French*, 460 N.W.2d at 9.

discrimination was sufficiently compelling to deny the constitutional challenge.[113] The *French* dissent's analysis of the state constitutional issue, however, is faulty in two respects.

First, the dissent argued that the plurality's interpretation of the state's freedom of conscience clause[114] failed to follow the court's decision in *Sports & Health Club*.[115] Contrary to this argument, however, the opinion in *Sports & Health Club* provided *no* analysis of the Minnesota Constitution. The Minnesota Constitution was mentioned in only two places,[116] neither of which involved any analysis of the language, meaning or purpose of the clause. In fact, *Sports & Health Club* relies entirely on *federal* precedent construing the first amendment of the *federal* Constitution. Therefore, the *Sports & Health Club* opinion provides no guidance or analysis on the extent of the protection extended by Minnesota's freedom of conscience clause. The dissent's reliance on *Sports & Health Club* for analysis of the Minnesota Constitution is therefore misplaced.[117]

Second, the structure of the dissent's analysis of the constitutional issue can be faulted for its failure to identify and resolve the independent constitutional issues presented. Although the dissent claimed to base its decision on the Minnesota Constitution, even a cursory reading of the opinion demonstrates complete reliance on federal precedent construing the federal Constitution. The dissent engaged in the analysis typically seen in federal constitutional cases to support its argument concerning a state constitutional provision, but completely failed to address the major factor relied on by the plurality in reaching its holding, the textual differences between

113. *See id.* at 16-18 (Popovich, C.J., dissenting).

114. "Our leading case [*Sports & Health Club*] establishes a four-part test for analyzing a request for an exemption from a statute based on the free exercise of religion under both the federal and state constitutions . . . ." *French*, 460 N.W.2d at 14 (citation omitted). "The majority ignores the *Sports & Health Club*'s holding. Since it is not overruled, we are obliged to follow its precedent." *Id.* at 17 (citation omitted).

115. State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985).

116. *Id.* at 851 n.13.

117. The dissent argued that the *Sports & Health Club* decision, finding the state's interest in eliminating discrimination a compelling interest, controlled the outcome. *See French*, 460 N.W.2d at 17. Factually, these cases are very similar and, but for the different constitutions on which the constitutional challenge was based, the outcomes should have been consistent. The overwhelming reliance on federal precedent in *Sports & Health Club*, however, diminishes the weight that holding carries when the state constitution is at issue.

the constitutions.[118]

The plurality's analysis of the freedom of conscience clause is reminiscent of federal analysis of the first amendment. The importance of the plurality's analysis, however, is that it is not based on federal decisions interpreting the first amendment. Rather, the court reached its decision based on state-specific factors: the demanding language of the freedom of conscience clause, and a recognition of the depth with which the state values religious freedom. A fine line separates decisions which claim to analyze state constitutional claims and decisions which actually engage in that analysis. The *French* plurality maintained that separation by relying only on factors unique to the Minnesota Constitution to reach its result. Therefore, *French* provides the basic framework for future freedom of conscience challenges brought under the Minnesota Constitution.

B. State v. Hershberger

In 1989, Amish residents of southeastern Minnesota who travel on state highways by horse and buggy claimed their religious beliefs exempted them from a state statute requiring slow-moving vehicles to display a blaze-orange triangular sign when traveling on any public highway.[119] The defendants in *Hershberger* argued that their religion, which rejects loud colors and "worldly symbols," prohibited them from displaying the triangle on the back of their black, horse-drawn buggies.[120] The Minnesota Supreme Court, when initially presented with this claim, based its decision on the first amendment to the federal Constitution,[121] despite the presence of a state constitutional claim based on article I, section 16 of the Minnesota Bill of Rights.[122]

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118. The dissent's reliance on *Sports & Health Club* for its interpretation of the Minnesota Constitution is unsupported by that opinion. *Sports & Health Club* did not, as the dissent suggests, interpret or analyze the claim under the state constitution.

119. *Hershberger I*, 444 N.W.2d 282, 284 (Minn. 1989), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990). The statute requires a triangular sign for all animal-drawn vehicles and agricultural machinery which are designed for operation at a speed of less than twenty-five miles per hour. MINN. STAT. § 169.522, subd. 1 (1988). The fourteen defendants in *Hershberger*, who operate horse-drawn black buggies, believe that displaying "loud" colors and "worldly symbols" conflicts with the teachings of their religion. *Hershberger I*, 444 N.W.2d at 284.

120. *Id.* at 283.

121. *Id.* at 284.

122. *See supra* text accompanying note 93.

The United States Supreme Court vacated *Hershberger I*, and remanded the case to the Minnesota Supreme Court for reconsideration in light of *Employment Division, Department of Human Resources of Oregon v. Smith*.[123] The *Smith* Court radically modified the three-part test developed in *Sherbert v. Verner*,[124] so that upon remand to the Minnesota Supreme Court, it was unlikely the *Hershberger* defendants would succeed on a claim based on the federal Constitution.[125]

Thus, on remand, the Minnesota Supreme Court focused on the state constitutional claim. Given the earlier *French* decision, the path was already partially paved for the court. Furthermore, the scenario was essentially the same: each defendant sought an exemption from an otherwise valid statute, and the state claimed its competing interest in enforcing the statutes prevailed over the defendants' religious beliefs.

The *Hershberger II* court began, as did the *French* court, with the language of section 16: "Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, section 16 *precludes* even an *infringement* on or an *interference* with religious freedom."[126] The court, in relying on these language differences, thus recognized the possibility of different outcomes under the state and federal constitutions.

The court then recognized that the limited nature of the government exception granted by section 16 placed a corre-

123. Minnesota v. Hershberger, 110 S. Ct. 1918 (1990) (vacating the Minnesota Supreme Court's decision in light of Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990)). The *Smith* decision rejected a claim that the free exercise clause in the federal Constitution protects criminal conduct that is inspired by religious beliefs. This decision will likely have a serious effect on free exercise claims. However, that discussion is beyond the scope of this article.

124. 374 U.S. 398, 404 (1963).

125. The *Smith* Court held that

> [i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [state law at issue] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended . . . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.

Smith, 110 S. Ct. at 1600. The *Smith* Court did not consider any burdens or compelling state interests in reaching this result. Rather, *Smith* had the effect of condemning the *Hershberger* defendants' federal claim. The defendants in *Smith*, like those in *Hershberger*, sought exemption from a state statute that was "otherwise valid." The Minnesota court, on remand, declined to consider this issue. *See Hershberger II*, 462 N.W.2d 393, 397 (Minn. 1990).

126. *Hershberger II*, 462 N.W.2d at 397 (emphasis in original).

spondingly high burden on the state: "Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution."[127] Since the challenged activity in this case directly impacted public safety, i.e., buggies traveling on state roads, the court was faced with a recognized exception, and therefore compelling interest, to enforcement of religious beliefs. Relying on *French*, the court held that the importance of religious freedom, reflected in the language of section 16 and the preamble, required that religious freedom be accommodated by all possible means, including any alternative measures that satisfy the state's interests.[128] The Amish defendants had proposed an alternative, outlining their buggies with silver reflective tape. Since the state had not demonstrated that this alternative would not satisfy its public safety concerns, the defendants' constitutional challenge was upheld.[129]

The *Hershberger II* court's job was made easier by the earlier *French* decision. The court already had the basic framework in place and was faced only with an application of that framework. The *Hershberger II* decision took the *French* holding one step further, however, by adopting the least restrictive means test. While the "compelling interest" and "least restrictive means" tests are reminiscent of federal tests,[130] their use in this case is justified by the structure of the clause to which they are applied. These concepts, which impose a stiff burden on the state, comport with the extent of the protection extended by section 16. More importantly, these concepts appear to be consistent with earlier interpretations of state religious freedom clauses.

First, requiring the state to meet a demanding standard is justified by the need to protect the strongly held value defined by section 16.[131] Moreover, given the breadth of protection conferred by section 16, the caveat language should be narrowly construed.[132] The sweeping nature of this language im-

127. *Id.*
128. *Id.* at 399.
129. *Id.*
130. *See* Sherbert v. Verner, 374 U.S. 398 (1963).
131. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 1251 (2d ed. 1988).
132. Application of the exception in this case also seems unwarranted because the solutions proposed by the Amish accommodated safety concerns. The problems with

plies that the religious exemption should be the rule, rather than the exception.

Second, this interpretation is consistent with the few earlier opinions addressing claims under section 16. Although the court's previous interpretations of section 16 do not reflect unwavering support for religious freedom, the court has acknowledged the strength of the language in that section.[133] For example, the Minnesota Supreme Court has previously used equally strong language in analyzing its religious freedom clause. "[I]n framing state constitutions the idea was dominant to protect religious liberty. Divine worship according to the dictates of the individual conscience was deemed essential to the welfare of every person and of importance to the state, by the peoples of every state."[134]

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encountering a black buggy traveling slowly during the day may be minimized by the sight of the buggy, but the problem is exacerbated at night. The Amish therefore proposed outlining their buggies in silver reflective tape, rather than use either of the state's prescribed signs, to accommodate the state's safety concerns. Thus, the buggy itself would serve as a warning during the day, and the tape would identify the buggy at night. Additionally, the state's safety interests are served because the county in which the majority of the Amish reside posts horse and buggy signs along the county roads to alert nonresidents to the possibility of encountering the Amish buggies. *See* Brief for Appellants at 19-22, *Hershberger I*, 444 N.W.2d 282 (Minn. 1989), *vacated and remanded*, 110 S. Ct. 1918, *aff'd on remand*, 462 N.W.2d 393 (1990) (No. C9-88-2623).

133. Similarly strong provisions are found in the constitutions of states near Minnesota. *See, e.g.*, ARK. CONST. art. II, § 24 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); MO. CONST. art. I, § 5 ("[N]o human authority can control or interfere with the rights of conscience . . . ."); N.D. CONST. art. I, § 3 ("The free exercise of religion and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . . ."); S.D. CONST. art. VI, § 3 ("The right to worship God according to the dictates of conscience shall never be infringed."); WIS. CONST. art. I, § 18 ("The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . ."). *But see* IOWA CONST. art. I, § 3 ("The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

The language of other states' free exercise clauses is particularly important in construing the breadth of Minnesota's clause. As territories achieved statehood, the constitutional provisions of the state from which the territory was separated were often adopted. *See* J. Dealey, GROWTH OF AMERICAN STATE CONSTITUTIONS 9 (1915). Thus, the significance of the federal Constitution and its free exercise clause is diminished. "[T]he real models consistently followed in making or revising constitutions have been the constitutions of existing states and territories." *Id.*

134. Kaplan v. Independent School Dist. of Virginia, 171 Minn. 142, 146, 214 N.W. 18, 19 (1927). "No man must feel that his religion is tolerated. His constitutional 'rights of conscience' should be indefeasible and beyond the control or interference of man. The Constitution says so." *Id.* at 156, 214 N.W. at 23 (Wilson, C.J.,

Thus, the *Hershberger II* opinion added further to the framework for a state constitutional claim based on the freedom of conscience. Again, the significance of *Hershberger II* is seen in its independent interpretation of the state constitution. The court was essentially left with only the state claim, rather than with the competing federal and state claims. The court's approach to that single claim demonstrates the Minnesota Supreme Court's willingness to enforce the protections provided by the Minnesota Bill of Rights.

CONCLUSION

The Minnesota Supreme Court's past decisions reflect an inconsistent approach to state constitutional claims. Although the court has recently issued thoughtful, well-analyzed decisions involving state constitutional claims, there is no guarantee that a litigant presenting state and federal constitutional challenges will see the state claim resolved. In order to ensure the functional independence of the state constitution and its bill of rights, the Minnesota judiciary should adopt a policy of addressing and resolving state claims first when faced with competing state and federal constitutional claims.

This approach promotes the interests and values protected by the Minnesota Constitution, rather than leaving them dependant on unsatisfactory federal decisions. The Minnesota

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dissenting). Unfortunately, in *Kaplan*, the court rejected the religious freedom claim. *See also* Americans United Inc. as Protestants v. Independent School Dist. No. 622, 288 Minn. 196, 213, 179 N.W.2d 146, 155 (1970) ("We simply inject a caveat that the limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed by [the first amendment of the United States Constitution].").

Although the *Kaplan* decision suggests Minnesota has a historic tradition of protecting religious freedom, no support for this position is found in the debates of Minnesota's constitutional convention. These debates, recording the proceedings of the separate Democratic and Republican conventions, are worthy reading for any constitutional researcher. *See* Fleming & Nordby, *supra* note 12, at 70-72 (discussing the history of the separate conventions). Unfortunately, the religion clause of the Minnesota Bill of Rights did not spark any debate. The reason for this may lie in the fact that separate conventions were held by the state's two political parties.

> From the fact that a portion of the Delegates-elect to the Convention, representing one of the great political parties of the Territory, not only refused to co-operate with the Convention in its proceedings, but constituted for themselves a rival organization, leaving the body composed entirely of Democratic members, many topics usually forming the bone of contention in such assemblies were disposed of with little discussion and almost entire unanimity . . . .

Smith, *Reporter's Preface*, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION (1857).

Constitution should be the primary focus for the Minnesota judiciary, thereby ensuring the enforcement of the constitutional protections it extends to Minnesota citizens.