Property Rights Protection under Article I, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures

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Suppose that yesterday Smith moved to Minneapolis to start her freshman year of college. She met Johnson, her new dormitory roommate, and they began unpacking Smith’s personal items and arranging their dormitory room. As they were working, Johnson received an emergency phone call from her parents that required her to fly home for several days. Before leaving, Johnson left her car keys with Smith, so Smith could deliver the car to Johnson’s boyfriend.

Officer Brown, a Minneapolis police officer, saw Smith pull out of the dormitory parking lot in Johnson’s car. The car had only one working headlight. Officer Brown stopped Smith, ordered her out of the car, and began a systematic search of the interior of the vehicle. Finding nothing, he obtained the car keys from Smith, opened the trunk, and found a bottle of pills under the spare tire. Brown seized the pills and transported Smith to the Hennepin County jail. After a test revealed the pills were amphetamines, Smith was charged with unlawfully possessing the prohibited substance.1

Because the fourth amendment to the United States Constitution2 prohibits unreasonable government searches and seizures, Smith might be able to contest Brown’s search and seizure as a violation of the fourth amendment.3 If successful, a

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1. Unauthorized possession of over 50 grams of amphetamines is a felony in Minnesota. See MINN. STAT. § 152.022(2)(2) (1990). Although arguably not in physical possession of the pills, Smith would probably be charged with constructive possession of the contraband. See State v. Florine, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975).

2. The fourth amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.

3. See infra notes 24-25 and accompanying text.
court would be required to exclude as evidence the pills seized by Brown in violation of Smith's fourth amendment rights. Before the court will suppress the pills as evidence, however, Smith must first show a fourth amendment interest in either the car or the pills, and then that the search and seizure infringed this interest.

The scope of individual interests protected by the fourth amendment has undergone substantial change over the years. Focusing exclusively on property rights, early federal courts required defendants to show the government had violated a property interest in the place searched or the object seized before challenging the lawfulness of a search and seizure. Later courts expanded the scope of the amendment, protecting both privacy and property interests. More recently, courts have focused exclusively on privacy protections to interpret the amendment as protecting only those property interests that create privacy interests.

By requiring a property interest in the searched area or seized object, early courts placed persons charged with possessory crimes in the untenable position of having to admit to possession to challenge the legality of the search or seizure. Thus, before allowing the defendant to challenge a search and seizure, courts required the defendant to present evidence showing she had an ownership, possessory, or participatory interest in the seized item. The prosecutor could then use this evidence at trial to help establish that the defendant possessed the item and therefore violated the possession statute.

The Warren Court fashioned three remedies to avoid this dilemma. It granted possessory crimes defendants "automatic standing" to challenge the legality of a governmental search or seizure, expanded the amendment's protections to privacy as

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4. See infra notes 21-23 and accompanying text.
5. See infra notes 24-25 and accompanying text.
6. See infra note 26 and accompanying text.
7. See infra notes 27-32 and accompanying text.
8. See infra notes 33-45 and accompanying text.
9. This Note uses the phrase "possessory crime" to describe a criminal offense that prohibits the possession of a particular item.
11. See infra note 30 and accompanying text.
12. See infra note 26 and accompanying text.
13. See infra note 30 and accompanying text.
14. See infra notes 27-31 and accompanying text.
well as property,\footnote{See infra note 32 and accompanying text.} and made a defendant's suppression testimony inadmissible on the issue of guilt.\footnote{See infra notes 43-44 and accompanying text.} The Burger Court, however, discarded the automatic standing rule, and limited the amendment's protections to privacy by requiring possessory crimes defendants to demonstrate a "legitimate expectation of privacy" in the area searched or the object seized to challenge a search or seizure.\footnote{See infra notes 33-39 and accompanying text.} Because of dissatisfaction with the "legitimate expectation of privacy" standard, several state courts have interpreted the search and seizure provisions of their state constitutions to protect both property and privacy interests, and grant automatic standing to persons charged with possessory crimes.\footnote{See infra notes 50-63 and accompanying text.}

This Note considers whether Minnesota courts should construe article I, section 10 of the Minnesota Constitution to protect property interests as well as privacy interests from unlawful searches and seizures. Part I briefly traces the development of the United States Supreme Court's interpretation of the fourth amendment, and surveys the state court responses to recent Supreme Court interpretations. Part II analyzes the factors that the Minnesota Supreme Court considers when determining whether to interpret a Minnesota Constitutional provision differently than a parallel federal constitutional provision. Part III applies these factors to determine whether Minnesota courts should interpret article I, section 10 to protect property rights from unreasonable searches and seizures. The Note concludes that, because Minnesota courts should interpret article I, section 10 to protect property rights, Minnesota courts should grant possessory crimes defendants automatic standing to challenge unreasonable searches and seizures.\footnote{This Note considers solely whether article I, § 10 protects property rights and should be interpreted to provide automatic standing to possessory crimes defendants to challenge allegedly unreasonable searches and seizures. The Note does not consider whether a particular search should be considered reasonable or unreasonable. This Note assumes, however, that a defendant who establishes standing and the unreasonableness of the search and seizure will be entitled to suppression of the item as evidence from the trial.}

I. JUDICIAL INTERPRETATION OF FOURTH AMENDMENT PROTECTIONS

The fourth amendment of the United States Constitution

\footnote{See infra note 32 and accompanying text.}
was intended to protect persons from indiscriminate searches and seizures of private property by state and federal governments.\(^\text{20}\) A brief recount of the United States Supreme Court's interpretation of the fourth amendment reveals that, in the past twenty years, the Court has moved from an interpretation of the amendment protecting only property rights to one protecting only privacy rights. This move has coincided with a narrowing of the amendment's protections. As a result, the Court's current interpretation of the fourth amendment inadequately protects possessory crimes defendants from government abuses. Although the Minnesota Supreme Court currently adheres to the United States Supreme Court's interpretation of the fourth amendment, other states have turned to their state constitutions for authority to provide additional protections to possessory crimes defendants.

### A. Federal Interpretation of the Fourth Amendment

Under the "exclusionary rule," illegally-obtained evidence is not admissible at trial.\(^\text{21}\) The main purpose of this rule is to deter future police misconduct, rather than redress individual

\(\text{20}\) For a more comprehensive discussion of the history of the federal fourth amendment, see N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 396-401 (1974).

A primary cause of the American Revolution was colonial opposition to the British policy of searching for and seizing contraband smuggled into the American colonies. Simien, The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches, 41 ARK. L. REV. 487, 510-11 (1988). Historians maintain that this opposition was the "the first in the chain of events which led directly and irresistibly to revolution and independence." Id. at 510 (quoting A. HART, AMERICAN HISTORY LEAFLETS, No. 33, Introduction, quoted in N. LASSON, supra, at 51). After the Revolution, states enacted constitutions that protected their citizens from illegal searches and seizures and other abuses by state governments. See J. HALL, JR., SEARCH AND SEIZURE § 19 (1982) (observing that before the United States Constitutional Convention, every state had a search and seizure provision in its constitution). A search and seizure provision was later applied to the federal government in the fourth amendment to the United States Constitution. See Scudiere, "In Order to Form a More Perfect Union": The United States, 1774-1791, in THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 3, 14, 20 (1988) (noting that the Bill of Rights was added to the Constitution after several states demanded protection from federal abuses).

\(\text{21}\) See Weeks v. United States, 232 U.S. 383, 398 (1914). The United States Supreme Court required states to implement the exclusionary rule via the due process clause of the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643, 669 (1961).
violations.22 At a pre-trial suppression hearing, a court will suppress evidence the government intends to use against a defendant at trial if the defendant can show that the evidence was obtained in violation of the fourth amendment.23 To establish such a violation, the defendant must satisfy a two-part test: a personal interest protected by the fourth amendment,24 and a violation of that interest by an unreasonable government search or seizure.25 Early federal courts applied the "trespass doctrine" to the first part of the test. In so doing, the courts confined fourth amendment protections to property interests by denying fourth amendment "standing" to any defendant un- able to show either an ownership or possessory interest in a


In Sheppard, the Court described the "good faith exception" standard as an "objectively reasonable basis for the officers’ mistaken belief" that the warrant was valid. Sheppard, 468 U.S. at 988. For commentary on Leon, Sheppard, and related cases, see Bradley, The “Good Faith Exception” Cases: Reasonable Exercises in Futility, 60 IND. L.J. 287 (1985); LaFave, "The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications, 1984 U. ILL. L. REV. 895 (1984).


24. In applying the first part of the test, the United States Supreme Court has consistently held that “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” Alderman v. United States, 394 U.S. 165, 174 (1969). Thus, a person may only challenge governmental conduct that infringes his own fourth amendment rights, rather than another’s rights. See also Doernberg, "The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. REV. 259, 263 (1983). Doernberg notes the Supreme Court’s longstanding opinion that constitutional rights may not be vicariously asserted, and that constitutional remedies are available only to “the class for whose sake the constitutional protection is given.” Id. (quoting Hatch v. Reardon, 204 U.S. 152, 160 (1907)).

In the 1960s, the Warren Court rejected the “trespass doctrine” and expanded the interests that the fourth amendment protects. In 1960, a unanimous Court denounced the doctrine in *Jones v. United States,* holding that possessory crimes defendants would have “automatic standing” to challenge unlawful searches and seizures. Consequently, possessory crimes defendants no longer were required to show a property interest to exclude the seized object as evidence, but could exclude the ob-

26. See, e.g., *Ingram v. United States*, 113 F.2d 966, 968 (9th Cir. 1940); *Cravens v. United States*, 62 F.2d 261, 266 (8th Cir. 1932), *cert. denied*, 289 U.S. 733 (1933); *Shore v. United States*, 49 F.2d 519, 522 (D.C. Cir.), *cert. denied*, 283 U.S. 865 (1931); *In re Dooley*, 48 F.2d 121, 122 (2d Cir. 1931); *United States v. De Vasto*, 52 F.2d 26, 29 (2d Cir.), *cert. denied*, 284 U.S. 676 (1931); *Graham v. United States*, 15 F.2d 740, 742 (8th Cir. 1926), *cert. denied sub nom.* O'Fallon v. United States, 274 U.S. 943 (1927); *Goldberg v. United States*, 297 F. 98, 101 (5th Cir. 1924); *Driskill v. United States*, 281 F. 146, 147-48 (9th Cir. 1922); see also *Commonwealth v. Sell*, 504 Pa. 46, 51, 470 A.2d 457, 460 (1983) (observing that early “federal courts of appeals generally required an affirmative claim of ownership or possession of the seized property or a substantial possessory interest in the premises searched to establish Fourth Amendment standing”).

27. *362 U.S. 257* (1960). The defendant, Jones, was charged under a two-count indictment after the government found narcotics in an apartment where he was a guest. Id. at 258-59. The first count charged him with violating 26 U.S.C. § 4704(a) by “having ‘purchased, sold, dispensed, and distributed’ narcotics . . . in or from the ‘original stamped package.’” The second count charged Jones under 21 U.S.C. § 174 “with having ‘facilitated the concealment and sale of’” the narcotics. Under both statutes, possession of the narcotics was sufficient proof for conviction, and “[p]ossession was the basis of the Government’s case against [Jones].” Id. at 258.

Before trial, Jones sought to exclude the narcotics as evidence, citing Fed. R. CRIM. P. 41(e), which provided that “[a] person aggrieved by an unlawful search and seizure” could move to suppress evidence obtained via an unlawful search. 362 U.S. at 259-60. The government contested the defendant’s standing to challenge the search and seizure on the grounds that Jones “alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an ‘invitee or guest.’” Id. at 259. Jones admitted he did not lease the apartment, but stated that it belonged to a friend who allowed Jones to stay there and gave Jones a key. Id. Jones testified that he had clothing at the apartment and had stayed there “maybe a night.” Id. The trial court denied Jones’s motion to suppress the evidence obtained via the search. Id.

28. The *Jones* Court held that automatic standing would be available in cases in which the defendant is charged with possession of the seized evidence at the time of the search and seizure. See *Jones*, 362 U.S. at 263-65; see also *Brown v. United States*, 411 U.S. 223, 229 (1973) (holding that because the defendant was not charged with an offense “that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure,” the defendant was not entitled to automatic standing). Thus, a possessory crimes defendant would be unable to challenge a search and seizure occurring when he did not possess the contraband. Id.; see also 3 W. LAFAYE, SEARCH AND SEIZURE § 11.3, at 589-95 (1978).
ject merely by showing that the search and seizure were unreasonable.\(^29\) In reaching its decision, the Court criticized the trespass doctrine for forcing a possessory crimes defendant to confront a "self-incrimination dilemma": the defendant either testified to possession, an essential element of the alleged crime, to challenge the search and seizure, or did not testify and allowed the search and seizure to go unchallenged.\(^30\) The Court further condemned the doctrine because it allowed the government to contradict itself by arguing that the defendant had a property interest in the contraband sufficient to violate a possession statute, but insufficient to warrant fourth amendment protection.\(^31\) Later cases expanded the amendment's pro-

\(^{29}\) Jones, 362 U.S. at 263.

\(^{30}\) Id. at 261-62. The Court acknowledged that it is normally appropriate to require that a defendant establish that "he himself was the victim of an invasion of privacy." Id. at 261. The Court, however, further stated:

[PROSECUTIONS LIKE THIS ONE HAVE PRESENTED A SPECIAL PROBLEM. . . . Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

\(^{31}\) Id. at 261-62. The Court further noted that "several Courts of Appeals have pinioned a defendant within this dilemma." Id. at 262 (citations omitted).

\(^{31}\) Id. at 263-64. The Court wrote:

Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.

\(^{1261}\) Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.

\(^{1261}\) The Court concluded that the possession charge itself constituted a sufficient demonstration of a fourth amendment interest, and held that possessory crimes defendants therefore had "automatic standing" to challenge allegedly illegal government searches and seizures. Id. at 264.

In an alternative holding, the Court held that "[e]ven were this not a prosecution turning on illicit possession," Jones had a sufficient connection to the premises to challenge the search. Id. at 263. The Court criticized lower court opinions granting and denying standing based on "[d]istinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest'" that had only "historical" validity and were "often only of gossamer strength." Id. at 266. The Court thus
tions even further to protect privacy as well as property interests from unreasonable searches and seizures.\textsuperscript{32}

In the 1970s, the Burger Court voiced its concern that the Warren Court had interpreted the fourth amendment too broadly, and rolled back the amendment's protections by limiting them solely to privacy interests. In \textit{Rakas v. Illinois},\textsuperscript{33} the

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\textsuperscript{32} See, e.g., \textit{Katz v. United States}, 389 U.S. 347, 352-53 (1967). The Court held in \textit{Katz} that the government violated the fourth amendment when it electronically eavesdropped on the defendant's side of a telephone conversation in a public telephone booth. The Court maintained:

\textit{[W]e have expressly held that the Fourth Amendment governs not only seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under...local property law." Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people — and not simply "areas" — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.} \textit{Id.} at 353 (citation omitted).

Declining to frame the issue as whether the telephone booth was a "constitutionally protected area," the \textit{Katz} Court considered whether the caller's expectation of privacy from governmental intrusion was "reasonable." \textit{Id.} at 351-52. The Court recognized that the fourth amendment also protects property interests, however, in its statement that the amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." \textit{Id.} at 350.

Writing separately, Justice Harlan theorized that in order to demonstrate a fourth amendment interest via a "reasonable expectation of privacy," a defendant must satisfy a twofold requirement: (1) an actual expectation of privacy in the area searched, and (2) a finding by the court that this expectation is reasonable. \textit{Id.} at 361. Justice Harlan wrote:

\textit{As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."}

\textit{Id.} (Harlan, J., concurring).

\textsuperscript{33} 439 U.S. 128 (1978). In \textit{Rakas}, the defendants were passengers in a car in which police found a rifle and ammunition used in an armed robbery. \textit{Id.} at 130. The defendants challenged the search, but did not assert a property or privacy interest in either the searched automobile or the seized items. \textit{Id.} Instead, they argued that the alternative \textit{Jones} "legitimately on the premises
Court held that the sole standard for determining whether the government violated the fourth amendment was whether it violated the defendant's "legitimate expectation of privacy."34 Under this test, a defendant was required to show that the government violated an expectation of privacy subjectively held by the defendant that the Court was willing to find objectively "legitimate."35 Although the Rakas Court did not completely abandon the notion that possession is sufficient by itself to challenge government conduct,36 the Court in Rawlings v. Kent-

34. Rakas, 439 U.S. at 143. The Rakas Court cited Katz as the primary source of this new test. Id. But see Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 VAND. L. REV. 1289, 1298-99 (1981) (arguing that "[a]lthough commentators credit Katz with having clearly established the shift from a property to a privacy model of the fourth amendment, the privacy concept actually has a more detailed and complex history"); id. at 1298-1302 (citing cases).

35. Rakas, 439 U.S. at 143-44 n.12. Writing separately, Justice Powell cited Justice Harlan's twofold "reasonable expectation of privacy" standard and attempted to identify some of the factors the Court would consider in determining whether a particular defendant had a legitimate expectation of privacy: (1) whether the defendant took normal precautions to maintain his privacy; (2) the way the defendant used the location; (3) whether the particular type of government intrusion has historically been perceived to be objectionable; and (4) whether the defendant had a common-law property interest invaded by the search or seizure. Id. at 151-53 (Powell, J., concurring).

36. The majority was careful to stipulate that "a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered." 439 U.S. at 143 n.12. The Court required that the defendant's subjective expectation be "one which the law recognizes as 'legitimate,'" and referred to "concepts of real or personal property law or to understandings that are recognized and permitted by society" as the proper sources of legitimacy. Id. Thus, on the one hand, the Court "adher[ed] to the view expressed in Jones and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like ought not to control," and stressed that "[e]xpectations of privacy protected by the Fourth Amendment . . . need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." Id. at 143 & n.12. On the other hand, the Court maintained that in determining whether a subjective expectation is legitimate, "the Court has not altogether abandoned use of
The majority gave conflicting signals regarding whether a possessory interest alone generates a "legitimate expectation of privacy" in an item. The Court implied that had the defendants demonstrated a property interest in the seized evidence, they would have had standing to contest the search. *Id.* at 142 n.11 (maintaining "[t]his is not to say that such [defendants] could not contest the lawfulness of the seizure of evidence or the search if their own property were seized"). Nevertheless, the majority speculated that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Id.* at 143-44 n.12.

37. 448 U.S. 98 (1980). In *Rawlings*, the defendant was charged with unlawfully possessing narcotics found in his companion's purse. *Id.* at 100-01. Police officers had ordered Rawlings's companion, Cox, to empty the contents of her purse. Cox complied, extracting several items including a jar containing LSD and number of smaller vials containing other illegal drugs. After emptying the purse, Cox turned to Rawlings and told him to "take what was his." Rawlings immediately claimed ownership of the contraband, and was arrested and charged with possession with intent to sell the various controlled substances. *Id.* at 101.

The defendant challenged the legality of the search, arguing that because he had both ownership and possessory interests in the drugs, he had standing to invoke the fourth amendment. *Id.* at 105-06. The majority rejected the defendant's argument, holding that an ownership or possessory interest in items seized pursuant to a search is insufficient by itself to render the search or seizure unreasonable for fourth amendment purposes. *Id.* The majority noted that the defendant had testified that he had no subjective expectation of privacy in the purse. *Id.* at 104 n.3. The Justices further observed that Rawlings had only known Cox for a few days, had not kept any personal items in the purse before the day of the search, and had no right to exclude others from the purse. Moreover, other persons had access to the purse, and Rawlings placed the items in the purse with little or no discussion with Cox. The Court found that under these circumstances, "the precipitous nature of the transaction hardly supports a reasonable inference that [Rawlings] took normal precautions to maintain his privacy." *Id.* at 105. Because Rawlings could not present other factors showing a legitimate expectation of privacy, his fourth amendment challenge was rejected. *Id.* at 106.

38. As support for its holding that only privacy interests are protected by the fourth amendment, the majority cited the Court's opinion in *Rakas*, where it maintained that "arcane" property law concepts should not control fourth amendment analysis. *Id.* at 105. Ironically, in making this statement, the *Rakas* majority was attempting to assure the *Rakas* dissenters that fourth amendment protections would not be limited to those who owned or possessed property. *Rakas*, 439 U.S. at 149-50 n.17. The *Rakas* majority had insisted that because the *Rakas* defendants "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized," they could not challenge the search and seizure. *Id.* at 148 (emphasis added); cf. *Rawlings*, 448 U.S. at 114-15 (Marshall, J., dissenting).
generates a "legitimate expectation of privacy."39

This shift in fourth amendment analysis was applied to possession cases in *United States v. Salvucci,*40 the companion case to *Rawlings,* in which the Court discarded the *Jones* automatic standing exception for possessory crimes defendants.41 The *Salvucci* Court reasoned that after *Rawlings,* the government could now argue without contradiction that the defendant illegally possessed the seized good, but nevertheless was not subjected to a fourth amendment deprivation, because the defendant had no "legitimate expectation of privacy" violated by the search that led to the seizure.42 The majority further concluded that the Court's holding in *Simmons v. United States,*43

39. In *Rawlings,* the Court appeared to recognize that the challenged conduct involved two acts: a search of a purse belonging to the defendant's acquaintance, and a seizure of contraband, belonging to the defendant, found in the purse. 448 U.S. at 105-06. Rather than allow the defendant to contest only the seizure, based on his possessory interest in the seized item, but not the search, as he had no legitimate expectation of privacy in the purse, the *Rawlings* Court found that "the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner." *Id.* at 106. The Court thus sharply restricted the amendment's protections by fashioning a "neo-trespass doctrine" that limits fourth amendment challenges to persons whose privacy interests, rather than property interests, are infringed.

40. 448 U.S. 83 (1980). The defendant, Salvucci, was charged with possessing stolen mail found by police during a search of a third party's apartment. *Id.* at 85. The defendant relied on automatic standing to contest the search and seizure. *Id.* The government appealed after the trial court granted the defendant's motion to suppress, and the appellate court affirmed. *Id.*

41. *Id.* at 95.

42. *Id.* at 91-93 (noting that after *Rawlings,* "legal possession in a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest").

43. 390 U.S. 377 (1968). In *Simmons,* a defendant charged with armed robbery made incriminating statements at a suppression hearing while attempting to establish standing to challenge a search and seizure. *Id.* at 381. The defendant's statements were later admitted on the issue of guilt in defendant's trial, and the defendant was convicted. *Id.* Although recognizing that *Jones* removed the need for possessory crimes defendants to establish standing to challenge searches, the Court noted that "there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing." *Id.* at 390. The Court further observed that "[t]he only, or at least the most natural, way in which [defendant] could have found standing to object to the admission of the suitcase was to testify that he was its owner," and that admission of this testimony at trial was highly prejudicial to defendant's case. *Id.* at 391. The Court reasoned that if pre-trial testimony were admissible at trial, defendants would be deterred from asserting their fourth amendment rights, especially in "marginal" cases where the defendant has a substantial fourth amendment claim but still isn't sure his motion to suppress will succeed. *Id.* at 392-93. Finding this situation "intolera-
which prohibits the prosecution from using a defendant’s suppression-hearing testimony in its case-in-chief, adequately resolved the Jones “self-incrimination dilemma.”\(^4\) In short, the Court overruled the Jones automatic standing rule in favor of the Rakas “legitimate expectation of privacy” test for possessory crimes defendants.\(^4\)

The significance of the Supreme Court’s new interpretation for possessory crimes defendants can be illustrated by contrasting the application of Jones and Salvucci to the hypothetical in the introduction. Under Jones, because Smith is charged with possessing amphetamines at the time they were seized in a police search, she would be granted automatic standing at the pre-trial hearing to challenge the search and seizure as unreasonable. Because Officer Brown did not have probable cause to search the trunk of the automobile, a court would likely find that he violated Smith’s fourth amendment rights and would suppress the pills as evidence. With no other evidence against Smith, the possession charge against her probably would be dismissed.

After Rawlings and Salvucci, however, Smith is required to show that Officer Brown’s search and seizure violated her legitimate expectation of privacy. Consequently, the prosecutor can argue that Smith had no legitimate expectation of privacy in the automobile because she was not using the car for her own purposes.\(^4\) If Smith attempts to establish a legitimate expectation of privacy by testifying she owned other items found in the automobile, she might (or might not) demonstrate an ex-

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\(^4\) See supra notes 29-30 and accompanying text (discussing the Jones Court’s conclusion that requiring a possessory crimes defendant to testify at a pre-trial hearing forces him to admit to an essential element of his alleged crime). The Salvucci majority argued that the protection offered by Simmons was even broader than the Jones automatic standing remedy, as it covered defendants in both possession and non-possession cases. Salvucci, 448 U.S. at 90. Nonetheless, the Court echoed the Rakas majority’s statement that Jones “creates too broad a gauge for measurement of Fourth Amendment rights,” and that automatic standing “serves only to afford a windfall to defendants whose Fourth Amendment rights have not been violated.” Id. at 92-93, 95 (emphasis in original).

\(^4\) Salvucci, 448 U.S. at 94-95.

\(^4\) See State v. Robinson, 458 N.W.2d 421, 424 (Minn. Ct. App. 1990) (holding that a possessory crimes defendant had no legitimate expectation of privacy in an automobile, as “his driving of the car was a single-instance use of the car,” and “[h]e was not using the car for his own purposes, but was transporting the car to the owner”), review denied (Sept. 14, 1990).
pectation of privacy sufficient for fourth amendment standing.\textsuperscript{47} If her showing is insufficient, however, or if the court grants standing but finds the search and seizure nonetheless reasonable, the motion to suppress will fail and the pills will be admitted as evidence.\textsuperscript{48} Moreover, the prosecutor may introduce Smith's testimony that she owned other items in the car as impeachment if Smith testifies differently at trial.\textsuperscript{49}

Many states find the defendant unfairly disadvantaged under these circumstances. Accordingly, these states reject the United States Supreme Court's interpretation of the fourth amendment and turn to their state constitutions for guidance.

B. STATE COURT REACTION TO THE UNITED STATES SUPREME COURT'S FOURTH AMENDMENT INTERPRETATIONS

As the Burger Court reformulated the Warren Court's fourth amendment interpretations,\textsuperscript{50} state courts questioning the Court's analysis used their state constitutions for authority to provide more expansive protections against searches and seizures.\textsuperscript{51} The courts usually employed a two-step approach.

\textsuperscript{47} See id. (noting that the defendant “made no claim that he had any possessions of his own in the car”).

\textsuperscript{48} See supra notes 24-25 and accompanying text (recounting the Court's requirement that the defendant show she has a protected interest before challenging the search or seizure, as well as the unreasonableness of the search or seizure, to suppress the unlawfully-obtained item as evidence).

\textsuperscript{49} See infra notes 152-61 and accompanying text (discussing Minnesota rules allowing pre-trial testimony to be used against the defendant as impeachment).

\textsuperscript{50} See supra notes 33-45 and accompanying text (discussing the Burger Court's retrenchment in the area of fourth amendment standing).

\textsuperscript{51} The United States Supreme Court has long held that a state court's decision is not reviewable by a federal court if made on independent and adequate state grounds. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967); see also Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1156-57 (1985) (noting general acceptance of state power to interpret its own constitution more broadly); Fleming & Nordby, The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist," 7 Hamline L. Rev. 51, 51-53 nn.1-2 (1984) (observing that the Minnesota Supreme Court recognizes that states may interpret their own constitutions more broadly, and counting 32 other states that have interpreted their own constitutions more expansively); Greenhalgh, Independent and Adequate State Grounds: The Long and the Short of It, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 15, 15-64 (P. Barmberger ed. 1985) (discussing generally the states' reliance on state constitutions to maintain safeguards in criminal procedure); Utter, State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?, 64 Wash. L. Rev. 19, 27 (1989) (reporting "more
First, citing one or more of the shortcomings in the Supreme Court’s current interpretation of the fourth amendment, the courts concluded that the Supreme Court’s “legitimate expectation of privacy” standard provides insufficient protection against government abuses. Having reached this conclusion, the courts then interpreted their state constitutions broadly to provide greater opportunity for possessory crimes defendants to challenge unreasonable searches and seizures.

In reaching their decisions, these courts rejected the “legitimate expectation of privacy” approach. Instead, they usually interpreted their state constitutions to provide that an owner-

than 450 published state court opinions interpret[ing] state constitutions as going beyond federal constitutional guarantees”.

52. See infra notes 55-57 and accompanying text (discussing various state court opinions criticizing the United States Supreme Court’s “legitimate expectation of privacy” test).


In a ninth case, State v. Simons, 86 Or. App. 34, 38-39, 738 P.2d 590, 592 review denied, 304 Or. 437, 746 P.2d 1166 (1987), the Oregon Court of Appeals adopted automatic standing as a matter of state constitutional law. Although the Oregon Supreme Court has not yet expressly adopted automatic standing, it has largely rejected the United States Supreme Court’s “legitimate expectation of privacy” test. See, e.g., State v. Tanner, 304 Or. 312, 321 n.7, 745 P.2d 757, 762 n.7 (1987) (noting that the Oregon Constitution protects substantive rights, rather than expectations of privacy). Moreover, besides denying review in Simons, the state supreme court denied standing to a defendant who challenged a search and seizure that took place before he possessed the contraband, on the ground that the defendant had no privacy or property right in the item at the time of the search and seizure. See State v. Kosta, 304 Or. 549, 553-54, 748 P.2d 72, 75 (1987). This is consistent with the automatic standing rule, which provides standing only to those defendants accused of illegally possessing an item at the time of the contested search or seizure. See Brown v. United States, 411 U.S. 223, 228-29 (1973); Jones v. United States, 362 U.S. 257, 263-65 (1960).

Despite these developments, there is still some confusion over whether Oregon has retained the automatic standing rule. For example, in State v. McDonald, 105 Or. App. 102, 105, 803 P.2d 1211, 1213 (1990), the Oregon Court of Appeals held that a possessory crimes defendant who threw a bindle out of an automobile window during a high-speed chase had no standing to contest the subsequent seizure of cocaine found inside. Rather than consider whether the defendant remained in constructive possession of the contraband at the time of the search and seizure, the court implied that automatic standing was no longer available in Oregon. See id. at 104, 803 P.2d at 1212 (stating that Simons “is no longer controlling in light of Kosta”).
ship, possessory, or participatory interest in the searched or seized object is sufficient for standing to challenge the government's conduct.\textsuperscript{54} Under this approach, the state courts criticized the "legitimate expectation of privacy test" as vague,\textsuperscript{55} overly narrow,\textsuperscript{56} or contrary to the plain meaning or purpose of the search and seizure provision in the state constitution.\textsuperscript{57} Discuss-

\textsuperscript{54} See, e.g., Alston, 88 N.J. at 227-28, 440 A.2d at 1319; Sell, 504 Pa. at 67, 470 A.2d at 468; Wood, 148 Vt. at 489-90, 536 A.2d at 905-09. For a more thorough discussion of state court opinions adopting automatic standing via their state constitutions, see generally Comment, \textit{Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course}, 63 TEMPLE L. REV. 559, 570-81 (1990) (discussing state courts' reliance on state constitutional provisions in rejecting the "legitimate expectation of privacy" test and retaining automatic standing).

\textsuperscript{55} See, e.g., Alston, 88 N.J. at 226, 440 A.2d at 1319 (citation omitted) (criticizing the Rakas standard as vague, and subject "to the potential for inconsistent and capricious application"); see also Ashdown, supra note 34, at 1310, 1329-41 (maintaining that "the lack of clarity and predictability inherent in the inquiry of which privacy expectations are constitutionally legitimate leaves the police and the courts without standards to guide their conduct and decisions; this uncertainty, in turn, further exacerbates the diminished protection available to complainants under the Supreme Court's view of fourth amendment privacy"); see also Junker, \textit{The Structure of the Fourth Amendment: The Scope of the Protection}, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1165-66 (1989) (noting various ambiguities in the "expectation of privacy" standard); W. LAFAVE, \textit{supra} note 28, § 11.3 (Supp. 1986).

\textsuperscript{56} See, e.g., Sell, 504 Pa. at 66-67, 470 A.2d at 468 (finding the United States Supreme Court's reasons for abandoning automatic standing "unpersuasive," and maintaining that the Supreme Court's use of the "legitimate expectation of privacy" standard "needlessly detracts from the critical element of unreasonable governmental intrusion").

\textsuperscript{57} See, e.g., Sell, 504 Pa. at 66, 470 A.2d at 468 (adherence to "legitimate expectation of privacy" test would "undermine the clear language" of the state constitution); Wood, 148 Vt. at 487-88, 536 A.2d at 907-08 (noting that the state judiciary is responsible for preserving the "unalienable" rights retained by the people in the state constitution, and that the Rakas test frustrates judicial review of governmental abuses by misplacing the focus on the defendant's ability to challenge a search or seizure, rather than on the search or seizure itself).

Commentators also argue that the majority's restriction of fourth amendment protections to privacy interests is contrary to the historical underpinnings of the amendment. See supra note 20 (citing commentators noting that the fourth amendment was a response to English \textit{writs of assistance}, which were used to search for and seize contraband).

Courts and commentators also maintain that the Rawlings/Salvucci formulation contradicts a wide body of cases finding property rights protected by the fourth amendment. For example, the Alston court found Rawlings to be contrary to the "authoritative precedents and policies underlying the law of searches and seizures." Alston, 88 N.J. at 227, 440 A.2d at 1319 (citations omitted); see also Ashdown, supra note 34, at 1321-29 (arguing that by renouncing property interests as protected by the fourth amendment, the Court ignored the plain language of the amendment and the Court's own precedents); Simien, supra note 20, at 509 (noting that "[o]ne of the most troubling points
carding the federal standard for cases arising under the state criminal code, they focused on the defendant's relationship to the property searched or seized, rather than any privacy interest in the property, to determine whether the defendant can challenge the government's conduct. Thus, the state courts argued that when the state accuses the defendant of illegally possessing a seized item, the state effectively concedes that the defendant has a substantial relationship to the item. Because of this implied admission, these courts reasoned that defendants should be granted automatic standing to contest the search and seizure.

Other approaches provided automatic standing by focusing more closely on the legitimate expectation of privacy test's shortcomings, or by emphasizing the incomplete protection Simmons provides possessory crimes defendants, without con-

With the Rakas progeny is that the Court rewrote the fourth amendment and in doing so struck the amendment's protections of papers and effects right out of the Constitution.

In Katz, the Supreme Court noted that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its intrusions go further, and often have nothing to do with privacy at all." Katz v. United States, 389 U.S. 347, 350 (1967) (emphasis added); see also Ashdown, supra note 34, at 1310, 1323 (maintaining that the "legitimate expectation of privacy" standard "is at best confusing and at worst exhibits infidelity to the privacy notions expressed in Katz," and observing that "[i]ndeed, the Court made it clear that it did not intend to disavow property interests in [Katz]").

58. These courts reject the "legitimate expectation of privacy" standard as a basis for conferring standing under their state constitutions, regardless of whether the defendant is accused of unlawful possession. The main inquiry is thus whether the defendant had an ownership, possessory, or participatory interest in the searched or seized item. See State v. Wood, 148 Vt. 479, 489, 536 A.2d 902, 908 (1987).

59. See State v. Alston, 88 N.J. 211, 228, 440 A.2d at 1311, 1320 (1981) (finding that the automatic standing rule is justified "in pretrial proceedings involving possessory offenses, where the charge itself alleges an interest sufficient to support a fourth amendment claim"); Commonwealth v. Sell, 504 Pa. 46, 66-67, 470 A.2d 457, 469 (1983) (holding that because a property interest in searched or seized property is sufficient for standing, "it necessarily follows that a person charged with a possessory offense must be accorded automatic standing" to challenge a search or seizure).

60. See, e.g., State v. Settle, 122 N.H. 214, 219, 447 A.2d 1284, 1287 (1982) (noting that the "legitimate expectation of privacy" standard "is no boon to the general administration of [the] criminal justice system," as it is vague, leads to inconsistent results, and provides insufficient guidance to police officers).

61. See, e.g., State v. Simpson, 95 Wash. 2d 170, 179-80 nn.2-3, 622 P.2d 1199, 1205-06 nn.2-3 (1980) (noting that under Harris, Havens, and Washington court rules, a defendant's suppression hearing testimony might be used against
considering whether property interests are protected by state constitutional provisions. Yet another approach relaxed the prohibition on “third-party” standing by allowing any person against whom the state offers evidence to challenge the search and seizure leading to the discovery of the evidence. Under all of these approaches, the courts construed the search and seizure provisions of their state constitutions to provide greater protection than the fourth amendment because they recognized the deficiencies in the United States Supreme Court’s current interpretation of fourth amendment protections.

C. MINNESOTA’S REACTION TO THE UNITED STATES SUPREME COURT’S FOURTH AMENDMENT INTERPRETATIONS

Like most other states, Minnesota has followed the United States Supreme Court’s recent fourth amendment interpretations in virtual lock-step fashion. Like all other state courts, Minnesota courts adhere to the exclusionary rule. Minnesota courts also have followed the United States Supreme Court’s expansion and restriction of fourth amend-

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62. See supra note 24 (noting the United States Supreme Court traditionally requires that the defendant show she was the victim of the fourth amendment violation, rather than vicariously assert another’s fourth amendment rights).

63. See State v. Owen, 453 So. 2d 1202, 1204-05 (La. 1984). Under yet another approach, New York grants automatic standing when the state imputes possession to the defendant on the basis of a statutory presumption. See People v. Millan, 69 N.Y.2d 514, 519, 508 N.E.2d 903, 905, 516 N.Y.S.2d 168, 170 (1987) (holding that the state “may not predicate defendant’s guilt solely on the constructive possession of the weapon attributed to him as a passenger . . . and simultaneously deprive him of the right to challenge the search”). Rather than rely solely on the New York Constitution, the court retained automatic standing as a matter of both federal and state law. Id. at 519, 508 N.E.2d at 906, 516 N.Y.S.2d at 171.

64. See Comment, supra note 54, at 572 (noting that “[s]ince the Supreme Court revised its standing analysis a decade ago, forty-two states have followed the Supreme Court’s analysis”). Since those words were written, a ninth state, Massachusetts, has rejected the United States Supreme Court’s approach and retained automatic standing for possessory crimes defendants. See Amendola, 406 Mass. at 592, 550 N.E.2d at 126 (granting automatic standing under the state constitution).

ment protections over the last thirty years. In none of these cases has the Minnesota Supreme Court considered whether the Minnesota Constitution independently protects individual privacy or property against intrusive governmental conduct. Nor has the court considered whether the Simmons rule adequately resolves the Jones self-incrimination dilemma.

Although the Minnesota Supreme Court acknowledges that article I, section 10 of the Minnesota Constitution may provide greater protection than the fourth amendment, the court has not yet decided whether the state constitution provides possessorv crimes defendants with automatic standing to contest

66. Minnesota courts implemented the Jones rule granting persons charged with possessorv crimes automatic standing to challenge searches and seizures, as indicated by contemporary literature regarding criminal procedure in the state. See, e.g., MINNESOTA PUBLIC DEFENDER'S OFFICE, MINNESOTA AND FEDERAL CRIMINAL LAW AND PROCEDURE 1966, at 41 (1966) (noting that under Jones, possessorv crimes defendants are entitled to standing to object to searches and seizures). The Minnesota Supreme Court followed the United States Supreme Court's expansion of fourth amendment protections under Katz in State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970), where the court held that evidence of consensual sodomy obtained by secretly spying on a defendant in a public restroom violated the defendant's reasonable expectation of privacy. Id. at 208, 177 N.W.2d at 802. The Minnesota Supreme Court adhered to the Rakas Court's fourth amendment interpretation in State v. Tun
gland, 281 N.W.2d 646 (Minn. 1979), when the court held that because the defendant had not shown a property interest in the premises searched or the items seized, nor a legitimate expectation of privacy, he was not entitled to challenge the government's conduct. Id. at 649-50. Finally, in State v. Guy, 298 N.W.2d 45 (Minn. 1980), the Minnesota Supreme Court followed the Rawlings and Salvucci opinions interpreting the fourth amendment as protecting only privacy interests, and discarded the automatic standing rule for possessorv crimes defendants. Id. at 45.

67. See Comment, supra note 54, at 572 n.119 (citing State v. Kumpula, 355 N.W.2d 697, 701 (Minn. 1984), and State v. Christenson, 371 N.W.2d 228, 232 (Minn. Ct. App. 1985), for the proposition that Minnesota courts have implemented the "legitimate expectation of privacy" approach without indicating whether the test is required under both the state and federal constitutions).

68. See infra notes 152-61 and accompanying text (examining Minnesota rules allowing pre-trial testimony to be used against a defendant later at trial as impeachment). The court has not considered the effectiveness of the Simmons rule despite its earlier recognition of the Jones self-incrimination dilemma in State v. Thompson, 273 Minn. 1, 23, 139 N.W.2d 490, 507, cert. denied, 385 U.S. 817 (1966). Subsequent court opinions have been silent on the issue, with the exception of Christenson, 371 N.W.2d at 232 (observing that "[t]estimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of guilt at trial and can be used only for impeachment purposes, if at all").

69. See O'Connor v. Johnson, 287 N.W.2d 400, 404 (Minn. 1979); see also State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985) (observing that "[i]t is axiomatic that a state supreme court may interpret its own constitution to offer greater protection of individual rights than does the federal constitution").
Thus, whether the Minnesota Constitution provides automatic standing to possessory crimes defendants is still an open question.

II. CRITERIA USED BY MINNESOTA COURTS TO DETERMINE WHETHER THE MINNESOTA CONSTITUTION PROVIDES BROADER PROTECTION THAN THE FEDERAL CONSTITUTION

A. FACTORS APPLIED BY MINNESOTA COURTS TO DETERMINE WHETHER THE MINNESOTA CONSTITUTION PROVIDES BROADER PROTECTION THAN THE FEDERAL CONSTITUTION

Although generally accepting that the Minnesota Supreme Court may interpret a Minnesota constitutional provision differently than a parallel federal constitutional provision, both courts and commentators acknowledge that the state court

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70. In State v. Willis, 320 N.W.2d 726 (Minn. 1982), the state supreme court refused to consider the defendant's contention that the court should adopt automatic standing as a matter of state law, on the ground that even if the defendant had standing, the challenged search was reasonable. Id. at 727. The court wrote:

[Defendant] contends that the automatic standing rule should be retained as a matter of state law. We see no need to even consider this issue because we are satisfied that even if defendant had a reasonable expectation of privacy in the area under the seat, his Fourth Amendment rights were not violated . . . .

Id. Subsequent state supreme court opinions have analyzed search and seizure challenges under the federal "legitimate expectation of privacy" test only. See, e.g., State v. Olson, 436 N.W.2d 92, 95 (Minn. 1989), aff'd, 110 S. Ct. 1684 (1990); State v. Brown, 345 N.W.2d 233, 237 (Minn. 1984).

71. See supra note 51 and accompanying text (recognizing general acceptance of the notion that state courts may interpret state constitutional provisions differently than federal constitutional provisions).

72. See, e.g., Fuller, 374 N.W.2d at 726 (noting that although "[s]tate courts are, and should be, the first line of defense for individual liberties within the federalist system[,] [t]his, of course, does not mean that we will or should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution" (footnote omitted)); see also State v. Gunwall, 106 Wash. 2d 54, 60, 720 P.2d 808, 811-12 (1986) (maintaining that many of the courts relying on their state constitutions inadequately explain their decisions).

73. See Abrahamson, supra note 51, at 1176 (maintaining that, when interpreting a parallel provision differently, it is important for the state court to explain why the United States Supreme Court's reasoning is not persuasive); Fleming & Nordby, supra note 51, at 63 (observing that "[m]uch criticism has been directed at result-oriented use of state constitutions which 'establish[es] no principled basis for repudiating federal precedent and, accordingly, furnish[es] no basis for predicting the future course of decisional law'" (quoting
should not do so lightly. The state court should explain in its opinion why it considers the federal interpretation unpersuasive and give appropriate weight to precedent and the policies underlying the constitutional right at issue. More importantly, to provide guidance to state citizens and government agents, the court should develop objective standards for determining whether a state constitutional provision should be interpreted differently than its federal counterpart.

Like many other states, the Minnesota Supreme Court has articulated several objective factors for determining whether to interpret a state constitutional provision differently than a parallel federal constitutional provision:

Deukmejian & Thompson, All Sail and No Anchor — Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975, 989 (1979)).


75. See Fleming & Nordby, supra note 51, at 63-66.

76. See, e.g., Gunwall, 106 Wash. 2d at 61-62, 720 P.2d at 812-13, where the Washington Supreme Court articulated six criteria relevant to whether, in a particular case, a state constitutional provision should be interpreted more expansively than a parallel provision in the United States Constitution: (1) the textual language of the state constitutional provision; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) differences in structure between the federal and state constitutions; (4) state constitutional and common law history; (5) pre-existing state law; and (6) matters of particular state interest or local concern. Id.; see also State v. Novembrino, 105 N.J. 95, 164, 519 A.2d 820, 860 (1987) (Handler, J., concurring) (noting previous New Jersey Supreme Court opinions relying on legal traditions, state constitutional history, and public policy considerations in deciding whether to interpret a state constitutional provision more broadly than a parallel federal constitutional provision); People v. P.J. Video, Inc., 68 N.Y.2d 296, 302-04, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) (focusing on differences in text, structure, and historical underpinnings between the two constitutions, as well as whether there is “a judicial perception of sound policy, justice and fundamental fairness” to be advanced by construing the state provision differently), cert. denied, 479 U.S. 1091 (1987); State v. Flores, 280 Or. 273, 279-80, 570 P.2d 965, 968 (1977) (finding that relevant criteria are similarities between the state and federal constitutions, relevant state precedents, unique local conditions, positions taken by the United States Supreme Court and a possible need for national uniformity).

Commentators support the multi-factored approach to state constitutional interpretation. See, e.g., Fleming & Nordby, supra note 51, at 71-77 (suggesting that several factors are relevant, inter alia: (1) the textual language of the parallel provisions; (2) state constitutional history; (3) Minnesota precedent (i.e., state common law); and (4) matters of unique or local concern); see also Abrahamson, supra note 51, at 1182 (noting that several state courts departing from federal precedent consider “the state constitutional language, the state constitutional history, English and American common law, prior state case law, and the historical development of federal and state doctrine”).

77. See Friedman v. Commissioner of Pub. Safety, 455 N.W.2d 93, 96 (Minn. Ct. App. 1990) (noting the Minnesota Supreme Court’s reliance on ob-
(1) whether textual similarities between the state and federal provisions reflect the framers’ intent that the two provisions be interpreted similarly;78
(2) whether Minnesota's constitutional and common law history indicate that a different interpretation is appropriate;79
(3) whether existing state law defines the scope of the state constitutional provision;80 and
(4) whether matters of particular state interest or local concern justify a different interpretation.81
An analysis of cases applying these factors sheds some light on the policies underlying each factor, the scope of the factor, and the factor's relevance to whether the Minnesota Supreme Court should interpret article I, section 10 of the state constitution more broadly than the federal fourth amendment.

B. CASES APPLYING FACTORS TO DETERMINE WHETHER THE MINNESOTA CONSTITUTION PROVIDES BROADER PROTECTION THAN THE FEDERAL CONSTITUTION


When evaluating a state constitutional claim, the Minnesota Supreme Court often considers whether textual similarities between parallel state and federal provisions provide a
deductive factors when deciding whether to construe a state constitutional provision more broadly than its federal counterpart).

78. See State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985) (noting that “a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that . . . is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force”).
79. See State v. Hamm, 423 N.W.2d 379, 382-86 (Minn. 1988) (analyzing jurisprudence under the territorial laws and declining to overrule over 700 years of English and American common law history in holding that the drafters of the state constitution assumed that a jury meant a body of 12 persons).
80. See State v. Nordstrom, 331 N.W.2d 901, 904-05 (Minn. 1983) (noting that “regardless of federal constitutional underpinnings, Minnesota law has established a broad-based right to counsel which goes beyond the dictates of [United States Supreme Court decisions]”).
81. See State v. Murphy, 380 N.W.2d 766, 771 (Minn. 1986) (in reaching its decision that a defendant's confession to his probation officer is admissible under the self-incrimination provision of the Minnesota Constitution, the court considered “whether the unique relationship between probationer and probation officer as seen in the light of the philosophy of the Minnesota criminal justice system requires us to adopt a view contrary to that expressed by the United States Supreme Court”).
basis for interpreting the Minnesota constitutional provision in the same fashion as its federal counterpart. Adherence to this factor presumably helps to fulfill the original intent of the state constitution’s framers, as well as to achieve consistency in decision-making. By enacting a state constitutional provision textually identical to its federal counterpart, the framers may have intended the two provisions to be interpreted similarly. Such a presumption is not controlling, however, and a United States Supreme Court interpretation of a federal provision need not apply automatically to an identical state provision.

82. See, e.g., Fuller, 374 N.W.2d at 727; Murphy, 380 N.W.2d at 771.
83. See Keyser, State Constitutions and Theories of Judicial Review: Some Variations on a Theme, 63 Tex. L. Rev. 1051, 1063 (1985). Keyser explains the “artificial canon of construction that identical language . . . should be read identically” as our “concern for consistency [which] outweighs our interest as judges in arriving at the ‘true meaning’ of the language.” Id. Keyser also maintains that the canon “signal[s] to framers of future state constitutions that, if they wish to broaden rights under the state constitution beyond those guaranteed by the federal constitution, they must make that purpose clear within the text itself.” Id. at 1064; cf. Deukmejian & Thompson, supra note 73, at 991 (arguing that because California’s constitutional protections against unreasonable searches and seizures are identical to federal guarantees, they “were derived directly from the Federal Constitution, and, therefore, offer no apparent basis for . . . divergent interpretation”); Van de Kamp & Gerry, Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California Constitution, 33 Hastings L.J. 1109, 1118-19 (1982) (questioning whether, in several California Supreme Court cases construing state constitutional provisions more broadly than their federal counterparts, the courts attempted to discern the intent of the drafters).
84. This notion underlies the canon of statutory interpretation that a statute borrowed from another jurisdiction should be interpreted consistently with the other jurisdiction’s construction. See, e.g., Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94, 99 n.6 (Minn. 1979) (recognizing that “where a constitutional or statutory provision is taken from another state . . . the construction placed upon it by the court of that state is presumed to be adopted with the provision”); see also Zerbe v. State, 583 P.2d 845, 846 (Alaska 1978) (noting that “the settled interpretations of the highest court of the other jurisdiction . . . are presumptively intended by the lawmaker to be adopted with the statute”). This theory, however, has less force with regard to the other state’s interpretations made after the second state has adopted the parallel provision. See State v. Ritschel, 220 Minn. 578, 586, 20 N.W.2d 673, 677 (1945) (stressing that the adopting state is not bound to follow decisions made by the other state after the provision has been adopted).
85. See, e.g., People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975). In Brisendine, the California Supreme Court maintained:

It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterparts. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.
When deciding whether to construe a state constitutional provision differently than an identical federal constitutional provision, the Minnesota Supreme Court considers a United States Supreme Court interpretation of the federal provision to be persuasive, but not binding, precedent. In such cases, the United States Supreme Court interpretation will not be applied if any one of the other three factors set forth above indicates that a different interpretation is appropriate. When refusing to follow a Supreme Court interpretation that undermines a state constitutional right, the Minnesota Supreme Court reaffirms not only the independence of the state constitution, but also its own role as the guardian of these rights for Minnesotans. Thus, although the Minnesota Supreme Court should presume the “legitimate expectation of privacy” test is

Id. at 550, 531 P.2d at 113, 119 Cal. Rptr. at 329; see also Zerbe, 583 P.2d at 847 (recognizing that “the presumption [that the legislature intended for a borrowed provision to conform with the other state’s constitution] is, in any event, not conclusive,” and declaring that “[i]t is conceivable, indeed likely, that if a precedent underlying an adopted statute were no longer vital or were poorly reasoned, we would decline to follow it” (citation omitted)); State v. Gunwall, 106 Wash.2d 54, 61, 720 P.2d 808, 812 (1986) (noting that identical provisions need not be interpreted identically); Brennan, supra note 74, at 500 (stressing that “[e]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased” (emphasis added)); Fleming & Nordby, supra note 51, at 68.

86. See State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985) (holding that a United States Supreme Court interpretation of an identical provision is “of inherently persuasive, although not necessarily compelling, force”).

87. See supra notes 79-81 and accompanying text (listing the other three factors the Minnesota Supreme Court has considered when construing a state constitutional provision differently than a parallel federal constitutional provision).

88. See, e.g., State v. Hamm, 423 N.W.2d 379, 382 (Minn. 1988) (noting that “[w]hile a decision of the United States Supreme Court interpreting an identical provision of the federal Constitution may be persuasive, it should not be automatically followed or our separate constitution will be of little value”); see also State v. Guminga, 395 N.W.2d 344, 346-49 (Minn. 1986) (holding that a statute imposing vicarious criminal liability for selling intoxicants to minors violates the due process clause of the Minnesota Constitution, even if the United States Supreme Court were to uphold such a statute under the identically worded due process clause of the United States Constitution, because the statute intrudes too severely on individual liberty and the state can accomplish deterrence by alternative means); State v. Nordstrom, 331 N.W.2d 901, 904-05 (Minn. 1983) (stating that existing Minnesota rules and precedents providing an expansive right to counsel and exceeding federal constitutional requirements must be observed, “regardless of federal constitutional underpinnings,” to ensure the fair administration of justice in Minnesota).

89. See, e.g., Hamm, 423 N.W.2d at 382 (noting that “[the Minnesota
the appropriate standard to apply in all cases, this presumption
may be rebutted if one or more of the above factors indicate
the need for a different interpretation.

2. State Constitutional and Common Law History

The Minnesota Supreme Court considers state constitutional
and common law history to determine the intent of the
drafters in creating a constitutional provision. The drafters' statements may indicate whether they intended a particular provision to provide protection independent of the federal constitution. A broader interpretation may be necessary to adhere to these statements, as well as to the language of other provisions guaranteeing rights in the state constitution. In addition, state case law may reveal whether the judiciary has interpreted the state bill of rights in general, and the disputed provision in particular, as providing greater protection than the federal constitution. Similarly, examining Minnesota's consti-

Supreme Court] must remain independently responsible for safeguarding the rights of our own citizens.

90. See supra notes 78-81 and accompanying text (listing the four factors the Minnesota Supreme Court has considered when deciding whether to construe a state constitutional provision differently than a federal constitutional provision).

91. See Crowell v. Lambert, 9 Minn. 267, 276-77 (1864) (examining the debates of the Democratic convention in analyzing the article on the judiciary); Fleming & Nordby, supra note 51, at 70 (maintaining that "[a]lthough only rarely used by Minnesota lawyers or courts, the Minnesota convention debates are a potentially significant resource when the Minnesota Bill of Rights is in issue" (footnote omitted)).

92. State v. Gunwall, 106 Wash. 2d 54, 61, 720 P.2d 808, 812 (1986); see also Fleming & Nordby, supra note 51, at 69-70 (arguing that the "plenary safeguards" in article I, § 8 of the Minnesota Constitution provide "a legitimate basis, even an affirmative mandate, for Minnesota courts to go beyond the minimum standards of justice established by the Federal Constitution").

93. This factor was considered by the Minnesota Supreme Court in State v. Hamm, where the court held that a statute allowing six, rather than 12, person juries in misdemeanor cases violated the Minnesota Constitution. The Hamm court analyzed the case in light of the United States Supreme Court's holding in Williams v. Florida, 399 U.S. 78, 103 (1970), that the word "jury" in the federal constitution allows a jury of six. Against this holding, the court weighed hundreds of years of English common law history and long-standing Minnesota precedent recognizing a jury as a body of 12 persons. The court determined that in order to fulfill its responsibility for preserving state constitutional rights and adhering to the framers' intent, it was required to reject the United States Supreme Court's position and find that the word "jury" in the Minnesota Constitution required a body of 12 persons. See State v. Hamm, 423 N.W.2d 379, 382-84, 386 (Minn. 1988).

The Hamm court's analysis reveals the state supreme court's commitment to preserving state constitutional protections that it believes are in danger of
tutional and common law history may help to determine whether the drafters intended the state search and seizure provision to provide greater protection than the Supreme Court’s current fourth amendment interpretation.

3. Existing State Law

Minnesota courts also examine existing state law to determine whether to provide Minnesotans heightened constitutional protections. Laws enforcing state constitutional guarantees may help define the scope of the constitutional right and serve as a justification for providing different protection than the federal rule.94 Rather than contradict these state

being undermined. The Hamm court struck down the authorizing statute as unconstitutional under the state constitution despite the fact that Minnesota courts already had been conducting six-person jury trials in criminal cases for over 15 years. Id. at 386. Moreover, as pointed out by the dissent, the number of jurors had always been defined by statute in Minnesota, suggesting that “the framers intended no fixed and unchanging number” of jurors. Id. at 387-88. The majority discounted these facts, however, deciding that it must preserve the rights of Minnesota citizens and the intent of the framers by interpreting the constitution to guarantee 12-person juries. Id. at 385-86.

Other states consider this factor when analyzing the scope of a state constitutional guarantee. See Abrahamson, supra note 51, at 1182 (noting that several states have departed from federal precedent after reviewing, among other things, “English and American common law, prior state case law, and the historical development of federal and state doctrine”).

94. See State v. Nordstrom, 331 N.W.2d 901, 905 (Minn. 1983); see also Gunwall, 106 Wash. 2d at 61-62, 66, 720 P.2d at 812, 815.

The Minnesota Supreme Court cited existing law in Nordstrom when it declined to follow Justice Blackmun’s opinion in Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam). Nordstrom, 331 N.W.2d at 904-05. In Baldasar, the defendant protested the use of an earlier uncounseled guilty plea to a prior offense to enhance his charge from a misdemeanor to a felony. 446 U.S. at 223. In a 4-1-4 split, the United States Supreme Court held that the defendant’s right to counsel was violated by the enhancement use of the uncorrected guilty plea, even though the defendant was not actually imprisoned for the prior offense and the previous conviction was thus valid under Scott v. Illinois, 440 U.S. 367 (1979). Id. at 224. In his concurring opinion, Justice Blackmun agreed with the result on the narrower ground that because the defendant’s earlier offense was punishable by more than six months, he should be entitled to counsel at the prior proceeding. 446 U.S. at 229-30 (Blackmun, J., concurring).

In Nordstrom, the state relied on Marks v. United States, 430 U.S. 188, 193 (1977), in arguing that Blackmun’s opinion was controlling in Baldasar. Brief for Appellee at 6, State v. Nordstrom, 331 N.W.2d 901 (Minn. 1983) (No. C0-82-1069). The state thus argued that because the defendant had been charged in the earlier case with a crime punishable by only 90 days imprisonment, and because the defendant was not indigent at the prior proceeding, he was not entitled to counsel. Id. at 8; Nordstrom, 331 N.W.2d at 905. Despite Blackmun’s opinion and despite a federal constitutional interpretation requiring counsel
rules, the court will apply the state constitution in conformity with the rules, if it finds the protections necessary to preserve state constitutional guarantees. Existing Minnesota law may likewise define the scope of the protection against unreasonable searches and seizures, and indicate the proper standard for granting standing to persons wishing to challenge such governmental conduct.

4. Matters of Particular State Interest or Local Concern

Minnesota courts also consider whether matters of particular state interest or local concern dictate interpreting a Minnesota constitutional provision differently than a parallel federal provision. Unfortunately, discerning the scope of this factor and the policies undergirding it is difficult, because Minnesota courts have not explained the factor in detail. Generally, only if the defendant is actually imprisoned, the Nordstrom court recognized its long-standing state constitutional rule that counsel be provided in any case which may lead to the defendant's incarceration. Id. at 904-05 (comparing State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967) with Scott v. Illinois, 440 U.S. 367 (1979)). The court thus held that an uncounseled guilty plea to a misdemeanor offense could not be used to enhance a subsequent offense under any circumstances unless the record reflected a valid waiver of counsel. Id. at 905.

95. The Nordstrom court did not expressly ground its holding in the Minnesota Constitution. See McDonnell v. Commissioner of Pub. Safety, 460 N.W.2d 363, 368 (Minn. Ct. App. 1990) (noting that Nordstrom is not based on express constitutional guarantees, but on the court's supervisory powers). The Nordstrom court, however, strongly indicated that its holding was necessary to safeguard Minnesotans' constitutional and statutory right to counsel. 331 N.W.2d at 905. Insisting that "[the] right to counsel and the Rules of Criminal Procedure we have established to protect it must be observed," the court cited MINN. R. CRIM. P. 15.09 as requiring courts to preserve a record of guilty pleas in misdemeanor cases. Id. The court implied that this rule not only enforced the state constitutional right to counsel, but helped define the scope of that right, as it applied to all guilty pleas to misdemeanors punishable by incarceration. Id. at 904. The court determined that its requirement of counsel in all misdemeanor cases where the defendant might be imprisoned, coupled with the record-keeping requirements of Rule 15.09, required that the prior uncounseled guilty plea indicate a valid waiver of counsel to be used for enhancement purposes in all cases, regardless of whether the defendant was actually imprisoned for the previous offense. Id. at 905. Thus, rather than contradict the procedural rule, the court adopted an interpretation different than the United States Supreme Court, and imposed a broader record-keeping requirement for cases in Minnesota. Id.

96. This factor was considered in State v. Murphy, 380 N.W.2d 766, 771 (Minn. 1985). After the United States Supreme Court held in Minnesota v. Murphy, 465 U.S. 420 (1984), that the defendant's confession to his probation officer was not "compelled" and thus not violative of the fifth amendment of the United States Constitution, id. at 440, the confession was admitted at defendant's trial on remand. Murphy, 380 N.W.2d at 770. The defendant was
however, commentators suggest that application of this factor requires the resolution of several lesser questions: whether the state court is in a better position than the federal courts to decide the controversy because of its superior knowledge, experience with, and proximity to the controversy; whether the controversy requires individualized rather than broad, uniform resolution; and whether other unique circumstances mandate a decision contrary to the existing federal interpretation.9 This factor may therefore be relevant if individual Minnesota conditions require a different test for standing than those of other states adhering to the federal "legitimate expectation of privacy" standard for standing to contest searches and seizures.

III. ARTICLE I, SECTION 10 OF THE MINNESOTA CONSTITUTION PROTECTS PROPERTY RIGHTS AND PROVIDES POSSESSORY CRIMES DEFENDANTS WITH AUTOMATIC STANDING TO CONTEST UNREASONABLE SEARCHES AND SEIZURES

An application of the Minnesota Supreme Court's factors suggests that article I, section 10 of the Minnesota Constitution protects personal property from unreasonable government seizures, regardless of whether the seizure implicates privacy rights. These factors, and the policy concerns they reflect, reveal that the court will not hesitate to interpret a state constitutional provision more broadly than its federal counterpart if necessary to preserve the original intent of the framers or to protect the constitutional rights of Minnesotans. Applying these factors to the Minnesota Bill of Rights reveals that the framers intended to protect property rights from government intrusion, and that automatic standing is necessary to preserve these rights for Minnesotans accused of possessory crimes.

then convicted of first-degree murder. Id. at 768. The defendant appealed his conviction on the ground that the confession was compelled under the identical self-incrimination provision in the Minnesota Constitution. See MINN. CONST. art. I, § 7. The state supreme court, in considering "whether the unique relationship between probationer and probation officer as seen in the light of the philosophy of the Minnesota criminal justice system requires ... a view contrary to that expressed by the United States Supreme Court in this very case," concluded that it did not and that the United States Supreme Court had correctly stated the law under the state constitution as well as the federal constitution. Id. at 771. The court provided no guidance as to how or why it reached this conclusion.

97. Fleming & Nordby, supra note 51, at 76.
A. TEXTUAL SIMILARITIES BETWEEN PARALLEL STATE AND FEDERAL PROVISIONS

Article I, section 10 of the Minnesota Constitution and the fourth amendment of the United States Constitution are virtually identical. The state constitutional provision reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

This textual similarity with the fourth amendment may indicate that the framers intended that the scope of the state search and seizure provision be co-extensive with that of the federal fourth amendment. The fact, however, that the two provisions are virtually identical is not necessarily dispositive if any one of the other three factors set forth above suggest the need for a different interpretation.

In addition, the Minnesota Supreme Court has indicated that article I, section 10 may be interpreted more broadly than the United States Supreme Court has interpreted the federal fourth amendment. Relying on this proposition, the Minnesota Supreme Court has interpreted the federal fourth amendment.

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98. MINN. CONST. art. I, § 10. The fourth amendment of the United States Constitution has the same text but slightly different punctuation. See supra note 2 (quoting the text of the fourth amendment).

99. See supra notes 83-84 and accompanying text (recognizing the rule of statutory construction that the other jurisdiction's interpretation is presumed to have been adopted with a borrowed provision).

100. See supra notes 79-81 and accompanying text (listing the three other factors the Minnesota Supreme Court has considered when considering whether to construe a state constitutional provision differently than a parallel federal constitutional provision).

101. See supra notes 85-89 and accompanying text (noting courts' and commentators' arguments that identical provisions should not necessarily be interpreted similarly).

102. See O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979).

103. See State v. Herbst, 395 N.W.2d 399, 404 (Minn. Ct. App. 1986) (refusing to apply the United States Supreme Court's "good faith" fourth amendment exception to article I, § 10). By refusing to apply the "good faith" exception, the Herbst court implied that the exclusionary rule is not only intended as a deterrent to wrongful police conduct in Minnesota, but also as a means to protect citizens against erosion of their rights and preserve the integrity of the judicial process. See infra notes 130-32 and accompanying text (inerring that by providing broader protection under the state exclusionary rule, state courts have found that the state rule has a broader purpose than the federal rule). This expansive approach is contrary to United States Supreme Court rulings regarding the purpose of the exclusionary rule. See supra note 22 and accompanying text (citing Supreme Court cases noting that the main purpose of the exclusionary rule is deterrence).
Minnesota Court of Appeals applied section 10 to find broader protection for Minnesota citizens against unreasonable searches and seizures than that found in the fourth amendment.¹⁰⁴ Thus, despite the identical language of the state and federal provisions, Minnesota courts generally recognize that the state search and seizure provision may be construed more expansively than the federal fourth amendment if other factors require a different result.

B. MINNESOTA CONSTITUTIONAL AND COMMON LAW HISTORY

As noted above,¹⁰⁵ Minnesota's constitutional and common law history may be useful in determining whether to construe the state search and seizure provision more broadly than the federal provision. Between the two, Minnesota's constitutional history may be of relatively limited assistance. Because the delegates of the Republican and Democratic parties refused to meet together, the Minnesota Constitution was promulgated at two separate conventions.¹⁰⁶ Moreover, delegates at both con-


¹⁰⁵. See supra notes 91-93 and accompanying text (discussing generally Minnesota cases examining state constitutional and common law history).

¹⁰⁶. The Minnesota Constitutional Convention was created in separate Republican and Democratic Conventions after the two parties refused to meet together. Each party drafted its own constitution in a separate wing of the capitol building, and the two sides then formed a conference committee which drafted a compromise constitution. For a detailed recount of these events, see W. ANDERSON & A. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 69-114 (1921).

Given this split between the delegates, the value of the Minnesota constitutional debates as an aid to interpreting particular provisions may be questionable. See Taylor v. Taylor, 10 Minn. 81, 99 (1865) (arguing that "[constitutional] debates should not influence a court in expounding a constitution in any case," but that even if such an inquiry were ordinarily proper, "it seems quite obvious that such a rule could not properly be followed in this case" given the division between the two conventions); W. ANDERSON & A. LOBB, supra, at 113 (reasoning that "[w]hen all the facts are considered ... it is impossible to escape the conclusion that the debates in the two wings of the Minnesota constitutional convention have for legal purposes far less value than is ordinarily the case with constitutional debates").

Apparently, even the delegates to the two conventions disagreed on the value of the debates as an aid to interpreting the state constitution. Compare
ventions had little to say while adopting their respective search and seizure provisions. These circumstances tend to make the constitutional drafters' intent somewhat obscure.

Despite these limitations, Minnesota's constitutional and common law history can be helpful. The constitutional history reveals that several drafters stated their desire that the Minnesota Constitution be interpreted independently of the federal constitution, while others expressed their understanding that

The Debates and Proceedings of the Minnesota Constitutional Convention 599 (F. Smith ed. 1857) [hereinafter Democratic Convention] (statement of Delegate Sherburne assuring the members of the Democratic convention that there was no meaningful difference between what the Democrats had proposed and what the compromise committee had adopted) with Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota 583 (T. Andrews ed. 1858) [hereinafter Republican Convention] (statement by Delegate Robbins that "to say that our debates have any relevance to this constitution, seems to me to be erroneous").

At the Republican Convention, delegates argued briefly about whether to restrict searches and seizures to those based on written complaints, and adopted a version nearly identical to the federal fourth amendment. Republican Convention, supra note 106, at 105. Also, note the following exchange at the Republican Convention:

Mr. ALDRICH. I move to amend [§ 10] by inserting after the word "but" the words "on complaint in writing."

Mr. PERKINS. The language used in this section is the same as that employed in the Constitution of the United States, and it seems to me to be sufficient. The Legislature can carry out the provision in detail.

Id. After additional debate, the proposed amendment failed. Id.

The delegates to the Democratic Convention adopted an identical provision with no debate at all. See Democratic Convention, supra note 106, at 204-11, 276-94, 307-49, 361-73 (proposing a search and seizure provision textually identical to the federal fourth amendment, and adopting the provision with no debate).

See, e.g., Republican Convention, supra note 106, at 97. The delegates considered the merits of a proposed amendment to what is now § 4. Id. In response to a statement that a proposed provision should be adopted because it was textually identical to one found in most other state constitutions, one delegate argued:

Now I am not one of those who deem it my special duty to follow what is prescribed in some other instrument. The gentleman from Winona . . . in every instance in which he has spoken in favor of any measure, has based his views upon the fact that some other instrument has contained a provision similar to the one under consideration. While I would pay due regard to all other Constitutions, I am not willing to bind myself to follow their example in all respects. I am not afraid of adopting some new ideas, if they seem reasonable and proper. I believe we may well make some improvements.

Id. (statement of Delegate Colburn). Another delegate agreed, stating that "[if] it is true, as [Delegate Colburn] says, that improvements should be made upon the Constitutions which have been made before. It is equally true that
article I protections are fundamental. Moreover, debate about other article I provisions suggests that the framers intended to define the scope of property rights protected in the Minnesota Bill of Rights.

The language of article I, section 8, also strongly suggests that the framers intended to protect property rights from unreasonable government conduct, without regard to whether those rights generate a "legitimate expectation of privacy." Article I, section 8 reads:

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

Construing article I, section 10 to protect property interests only if privacy interests also are violated undermines section 8's comprehensive protection of property rights. Although a search may implicate both privacy and property interests, a

no Constitution was ever framed which was in itself perfect, and not susceptible of some improvement." Id. at 98 (statement of Delegate Perkins).

Similar sentiments were expressed at the Democratic Convention, where Delegates Gorman and Brown debated whether the United States Constitution is "wrong" in giving the President the power to adjourn both houses of Congress. See Democratic Convention, supra note 106, at 378 (statements of Delegates Gorman and Brown).

109. See Republican Convention, supra note 106, at 101. For example, at one point, a delegate to the Republican Convention proposed that § 5 (regarding bail, excessive fines, and cruel and unusual punishment) and § 6 (regarding the accused's rights to a jury trial, compulsory process, counsel, etc.) be moved from article I to an article dealing with the judiciary. Id. at 100-02. Other delegates, however, opposed the proposal on the ground that the two sections belonged in the Bill of Rights, which "set[s] forth to the world those fundamental ideas and principles which underlie our Constitution." Id. at 101 (statement of Delegate Perkins).

110. For example, at the Democratic Convention, in a lengthy discussion over the conflict between the federal government's power to supervise the primary disposal of land and the state's power to supervise the inheritance of property, several delegates indicated that they believed the states generally have the power to administer property rights, subject to the limited powers expressly granted to the federal government. See Democratic Convention, supra note 106, at 288-94, 307-41. In particular, a former Governor of the Minnesota Territory stressed that the delegates "must not confound political rights with the rights of property," the latter which are within the province of the states. Id. at 328-29 (statement of Delegate Gorman); see also id. at 319, 333 (statements of Delegate Sibley that "the law of the United States... does not regulate the right of inheritance in Minnesota," and that "the State ha[s] the right to regulate the Law of Descent"). A majority of the delegates eventually voted against a proposal to deny full enjoyment of property rights to aliens who were not bona fide residents. Id. at 334, 339-40.

seizure is likely to implicate only property interests, unless the property by its nature generates privacy interests. By restricting the provision to protect only defendants who can demonstrate that the government violated their "legitimate expectation of privacy," a court denies the provision’s protections to a large class of defendants whose property rights are violated by government seizures. Moreover, seizing and examining an item to determine whether it is contraband is effectively a "search" and a violation of the owner’s privacy interest in the seized item. Thus, by interfering with possession, an unrea-

112. For example, a suitcase. See Simien, supra note 20, at 501; see also Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) (noting that "[t]he [fourth] [a]mendment protects two different interests of the citizen — the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter"); United States v. Lisk, 522 F.2d 228, 231 (7th Cir. 1975) (holding that although the government’s seizure of contraband implicated the defendant’s fourth amendment rights, the government did not violate the defendant’s privacy interest; thus, the defendant was without standing to challenge the government’s misconduct).

113. See Simien, supra note 20, at 501.

114. For example, if the government seizes a substance that it suspects is cocaine, and tests the substance in order to determine whether it is indeed cocaine, it has conducted a "search" of the substance. See id. at 510. But see United States v. Jacobsen, 466 U.S. 109 (1984), where the Court held that seizing and testing a substance to determine whether it is contraband does not violate any fourth amendment interest, and no fourth amendment “seizure” occurs:

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy . . . . But even if the results are negative — merely disclosing that the substance is something other than cocaine — such a result reveals nothing of special interest. Congress has decided — and there is no question about its power to do so — to treat the interest in “privately” possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably “private” fact, compromises no legitimate privacy interest.

Id. at 123 (citation omitted).

Simien responds:

[This view of the fourth amendment] violates a basic tenet of property law; namely, that the nature of the possessor's interests are irrelevant unless the one objecting to his possession can show a better claim to title. In addition, this analysis allows the action of the government to be justified by its results, a heretofore untenable position in fourth amendment jurisprudence.

Simien, supra note 20, at 510 (footnotes omitted). Simien also notes that such an interpretation contradicts “the historical developments and underpinnings of the amendment.” Id.; see also supra note 20 (noting the origin of the amendment as a response to indiscriminate governmental searches and seizures of contraband).

Simien’s comments lead to an inescapable conclusion: the Supreme Court’s Jacobsen analysis drastically reduces the social benefits of fourth
A reasonable seizure of one's property constitutes an "injury or wrong" within the meaning of article I, section 8, regardless of whether the seizure also violates the possessor's "legitimate expectation of privacy."

When a court denies a defendant standing to invoke article I, section 10 to protect property rights violated by a search and seizure, the court denies the defendant the benefits of the exclusionary remedy. This refusal to provide a suitable remedy contradicts the language of article I, section 8, which expressly guarantees a remedy for property rights violations. A court, however, acts consistently with section 8's guarantees if it interprets article I, section 10 to protect against unreasonable seizures of property, excluding as evidence property unreasonably seized. Therefore, to be consistent with section 8's guarantee of a remedy for property rights violations, courts should interpret article I, section 10 to protect property rights, and provide the exclusionary remedy when a search and seizure violates a defendant's property rights.

Minnesota common law also provides evidence that the Minnesota Bill of Rights protects property rights from government intrusion. In some early cases, the Minnesota Supreme Court applied the protections of article I, section 8 to public officials, holding that the government cannot deny the benefits of the judicial process to rebels, nor drive paupers from their amendment protections. After all, one can safely assume that the only persons seeking vindication of their fourth amendment rights via the exclusionary rule are those who stand to gain from suppressing the evidence; i.e., the guilty. By allowing only the innocent to seek exclusion, the Court greatly reduces the number of fourth amendment challenges. With fewer of its unlawful acts unpunished, the government may feel free to commit increasing numbers of unlawful searches and seizures. See, e.g., United States v. Payner, 447 U.S. 727, 730 (1980) (noting the lower court's finding that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties"). This undercuts the exclusionary rule's deterrent effect, which is, according to the Court, the primary purpose of the rule. See supra note 22 and accompanying text; see also Comment, supra note 54, at 582 (arguing that "if privacy rights are to be protected from state intrusion, defendants must, at the very least, be able to challenge illegal searches or seizures").

115. Besides acting consistently with article I, § 8, the court would comply with § 8's "affirmative mandate" to generally provide broader protections for Minnesotans. See Fleming & Nordby, supra note 51, at 70.

116. See Davis v. Pierse, 7 Minn. 13 (1862) (relying on article I, § 8 in invalidating an 1862 law that suspended the right of confederate rebels to have access to Minnesota courts).
homes and force them to live in separate towns.\textsuperscript{117} Thus, the court found that, although not specifically enumerated, the full enjoyment of property rights nevertheless is inherent in the Minnesota Bill of Rights.\textsuperscript{118}

In other early cases, however, the Minnesota Supreme Court seemed to undercut the full enjoyment of property rights for defendants charged with possessing contraband by holding that defendants charged with possessing contraband could not suppress as evidence contraband obtained by unreasonable searches and seizures.\textsuperscript{119} These holdings suggest that article I, section 10 may protect only lawful ownership interests while leaving possessory interests in contraband unprotected.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{117} See Theide v. Town of Scandia Valley, 217 Minn. 218, 14 N.W. 2d 400 (1944), where the government, acting pursuant to statute, forcibly removed a family in sub-zero weather to another town in order to obtain poor relief. The court invalidated the statute on the ground that it was inconsistent with "fundamental law," and therefore unconstitutional. \textit{Id.} at 226, 14 N.W.2d at 406.

\item \textsuperscript{118} \textit{Id.} at 224-25, 14 N.W.2d at 405. The \textit{Theide} court declared:

  The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and unalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations — all under equal and impartial laws which govern the whole community and each member thereof. ... The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions.

\item \textsuperscript{119} See State v. Pluth, 157 Minn. 145, 195 N.W. 789 (1923). In \textit{Pluth}, the defendant was charged with illegally possessing liquor that officers found in his automobile. \textit{Id.} at 147, 195 N.W. at 789-90. At his arraignment, the defendant moved that the liquor be suppressed as evidence and returned to him, on the ground that the search and seizure had violated, inter alia, the fourth amendment and article I, \textsection{} 10 of the Minnesota Constitution. \textit{Id.} at 147, 195 N.W. at 790. Although the court agreed with the defendant that the search and seizure were unlawful, it held the evidence was admissible, citing a line of Minnesota cases admitting evidence seized pursuant to an illegal search. \textit{Id.} at 153-55, 195 N.W. at 792-93.

\item \textsuperscript{120} In \textit{Pluth}, for example, the court noted:

  \textit{[T]he [illegal possession] statutes ... declare that no property right shall exist in property of any kind used or intended for use in [violating the statute]. ... The defendant had no property right in the liquor seized. It was contraband and forfeited to the state, and he was not entitled to have it returned to him.}

\item \textsuperscript{121} \textit{Id.} at 156, 195 N.W. at 793. The court concluded that because the defendant was not entitled to have the liquor returned to him, it was the state's property, and could lawfully be used as evidence. \textit{Id.} at 157, 195 N.W. at 793-94.
\end{itemize}
A better reading of these early cases, however, is that although the searches and seizures violated the constitutional rights of the defendants, the court nevertheless refused to allow the defendants to suppress the illegally-obtained items as evidence. Thus, the court did not hold that defendants charged with possessing contraband were without standing to challenge the searches and seizures as unconstitutional. Nor did the court hold that the searches and seizures were lawful. Instead, the court concluded that even though the searches and seizures were unlawful, the defendants were legally entitled to suppress items unlawfully obtained only if they were entitled to return of the contraband. Consequently, because the defendants had no statutorily protected property interest in the contraband, the court held that they were not entitled to either the contraband's return nor its suppression as evidence.

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121. Subsequent Minnesota Supreme Court opinions support this narrow interpretation of Pluth. See, e.g., State v. Kaasa, 198 Minn. 181, 184, 269 N.W. 365, 366 (1936) (citing Pluth and other cases for the proposition ‘liquor or other property, though forcibly seized, and even though unlawfully seized, may be received in evidence’ (quoting City of Mankato v. Grabowenski, 154 Minn. 265, 267 191 N.W. 603, 603 (1923))).

122. See generally Pluth, 157 Minn. at 152, 195 N.W. at 792 (neglecting to address the issue of standing, and concluding that the search was unreasonable).

123. Id.

124. See id. at 153, 195 N.W. at 792. The court said:

The statute gives authority to seize but not to search, and an officer acting under it is authorized to seize only what he may discover without the unreasonable search prohibited by the Constitution. . . . A search which is unlawful when it begins is not made lawful by the discovery that an offense has been committed. . . . The fact that defendant was transporting liquor not being discoverable without a search, the offense of transporting it was not committed in the presence of the officers, and they had no authority to arrest him therefor without a warrant, and the search was unlawful because made without a warrant and not as an incident to an unlawful arrest.

Id. (citations omitted).

125. See id. at 155, 195 N.W. at 793 (holding that the defendant had no right to suppression of the evidence, “for the defendant had no right to the liquor in question, and no right to the possession of it at the time it was seized, and is not entitled to have it returned to him”).

126. The Pluth court believed that “[e]ven the federal rule, as we understand it, does not forbid the use of evidence against the accused of property taken from his possession in an unlawful search unless he is entitled to have it returned to him and makes timely application for its return.” Id. at 155, 195 N.W. at 792. Federal courts implementing the federal exclusionary rule apparently disagreed. See, e.g., United States v. Jeffers, 187 F.2d 498, 502 (D.C. Cir. 1950) (holding that suppression of an illegally-obtained item as evidence is appropriate, even if the defendant is not entitled to return of the item), aff'd,
These early cases, however, are no longer valid precedent because, for the past thirty years,\textsuperscript{127} Minnesota courts have applied the exclusionary rule to suppress as evidence contraband obtained by unlawful searches and seizures.\textsuperscript{128} Thus, when deciding whether to suppress illegally-obtained evidence, Minnesota courts no longer consider the nature of the seized item, but rather focus on the reasonableness of the search and seizure.\textsuperscript{129} Moreover, when applying the exclusionary rule, Minnesota courts\textsuperscript{130} have suggested that the policy undergirding the state

\textsuperscript{127} 342 U.S. 48 (1951); Simmons v. United States, 18 F.2d 85, 89 (8th Cir. 1927) (excluding illegally-obtained whisky as evidence in illegal possession case).

\textsuperscript{128} Ever since the United States Supreme Court applied the exclusionary remedy to the states in \textit{Mapp} v. \textit{Ohio}, Minnesotans charged with possessory crimes who have been victimized by unreasonable searches and seizures have been entitled to exclusion of the illegally-obtained evidence. \textit{See supra} notes 21, 65 and accompanying text.


\textsuperscript{130} The \textit{Pluth} line of cases merely reflects the Minnesota Supreme Court's inclination against adopting the exclusionary rule as a matter of state law, especially for possessory crimes. At the time of the \textit{Pluth} opinion, the states were not required to implement the federal exclusionary remedy. \textit{See} State v. Pluth, 157 Minn. 145, 154, 195 N.W.2d 789, 792 (1923) (maintaining that "enforcement of criminal law would be most seriously handicapped in many instances, if not wholly crippled, by adherence to [the exclusionary] rule" (citation omitted)). Thus, in Minnesota, evidence obtained via an unreasonable search or seizure was not excluded from trial. \textit{See} State v. Rigg ex rel. Farrington, 259 Minn. 483, 485, 107 N.W.2d 841, 842 (1961) (citing \textit{Pluth} and other cases in noting that the rule in Minnesota is that "evidence is admissible even when it has been obtained by unlawful search"). Rather, the law provided a remedy for unreasonable searches and seizures in the criminal courts. \textit{See} MINN. STAT. § 621.17 (1947) (repealed 1963), which provided in pertinent part:

\textit{Oppression under color of office}. Every public officer, or person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority:

\textsuperscript{1} (2) seize or levy upon another's property; ... or
\textsuperscript{2} (4) do any other act whereby another person shall be injured in his person, property, or rights —

Commits oppression, and shall be guilty of a gross misdemeanor.

\textit{Id.} Since the 1963 \textit{Mapp} opinion made the exclusionary rule applicable in Minnesota, the remedy for an unreasonable search or seizure has been exclusion of the evidence from trial. \textit{See supra} notes 21, 65, 127-28 and accompanying text.

\textsuperscript{130} \textit{See} State v. Herbst, 395 N.W.2d 399 (Minn. Ct. App. 1986). In \textit{Herbst}, the Minnesota Court of Appeals strongly suggested that article I, § 10 requires suppression of contraband seized in an unreasonable search, and that this remedy has a broader purpose than the federal exclusionary rule. The \textit{Herbst} court refused to adopt the federal "good faith" exception to the exclusionary
exclusionary rule is not only deterrence, but also preservation of government and judicial integrity.

Minnesota's constitutional and common law history thus indicate the purpose of article I, section 10 was to protect property, as well as privacy, from unreasonable searches and seizures. Minnesota courts should therefore recognize that property rights are protected by article I, section 10, and allow a defendant standing to challenge an unlawful search and seizure that infringes the defendant's property interest.

Providing persons charged with possessory crimes automatic standing to challenge a search and seizure is a logical way rule for cases where the evidence is unlawfully, albeit innocently, seized by officers. Id. at 404. Although the court apparently concluded that the "good faith" exception, even if adopted, did not apply in the Herbst case, it stated expressly that it refused to adopt the exception as matter of state constitutional law. Id. (holding "[w]e do not believe this is an appropriate case in which to make such a dramatic change in the interpretation of the Minnesota Constitution"). Despite numerous requests by state prosecutors to adopt the Leon good faith exception to the exclusionary rule, courts have so far refused to do so. See, e.g., State v. Albrecht, 465 N.W.2d 107, 109 (Minn. Ct. App. 1991); State v. Lindsey, 460 N.W.2d 632, 635 (Minn. Ct. App. 1990); State v. McClosky, 451 N.W.2d 225, 229 (Minn. Ct. App. 1990), rev'd on other grounds, 453 N.W.2d 700 (Minn. 1990); Minnesota State Patrol Troopers Ass'n ex rel. Pince v. Minnesota Dep't of Pub. Safety, 437 N.W.2d 670, 676 (Minn. Ct. App. 1989).

131. See supra note 22 and accompanying text (noting that the United States Supreme Court has expressly stated that the sole purpose of the exclusionary rule is deterrence). For an excellent discussion of federal treatment of the exclusionary rule, see Note, The Erosion of the Exclusionary Rule Under the Burger Court, 33 BAYLOR L. REV. 363 (1981).

132. Minnesota courts have repeatedly refused to adopt the Leon exception. See cases cited supra note 104. This indicates that the courts have found a broader purpose in the state exclusionary rule.

In Herbst, for example, despite the agents' apparently subjective belief that the warrant was valid, the court maintained that:

[t]he purposes of the exclusionary rule are furthered by suppressing evidence obtained pursuant to such a warrant. Law enforcement personnel must abide by the constitutional limitation on their ability to search private dwellings. The requirements of the fourth amendment to the United States Constitution and the Minnesota Constitution with respect to search and seizure are not unduly burdensome. Where, as here, due care is not taken to meet those requirements, suppression is the appropriate remedy.

Herbst, 395 N.W.2d at 399. The court thus held the police to the technical requirements imposed by the fourth amendment and article I, § 10. The court apparently believed that it must protect the integrity of the system implementing article I, § 10 to prevent erosion of the constitutional right to be free of unreasonable searches and seizures. The court implied that protection of government and judicial integrity, as well as deterrence, are purposes of the exclusionary rule. See also Note, supra note 22, at 968-69 (recognizing that one goal of the exclusionary rule is to preserve judicial integrity, and that implicit in this goal is a desire to redress constitutional violations).
to safeguard the property rights protected by sections 8 and 10. First, by alleging that the defendant unlawfully possessed a particular item, the state effectively concedes she has a possessory interest in the item.\textsuperscript{133} Providing a possessory crimes defendant with automatic standing to contest the seizure of the item recognizes her property interest and is consistent with the drafters' guarantee of a remedy for persons deprived of property.\textsuperscript{134} The automatic standing rule also helps preserve the rights guaranteed in the state search and seizure provision by deterring police from illegally obtaining evidence to use against persons who are unable to challenge the government's misconduct.\textsuperscript{135} In addition, the rule helps preserve the judiciary's integrity by increasing the application of the exclusionary rule.\textsuperscript{136} When courts punish unlawful police conduct, the public recognizes that the courts are fulfilling their role as guardians of state constitutional rights. This recognition in turn ensures that the public will trust and value the judiciary.

C. EXISTING STATE LAW

Existing state law may also help to define the scope of the constitutional interest. In the area of search and seizure, Minnesota courts provide greater protections against government misconduct than the United States Supreme Court. For example, Minnesota courts do not allow custodial arrests and searches for minor traffic offenses, which federal law permits.\textsuperscript{137} In addition, Minnesota courts have implied that article

\begin{footnotesize}
\textsuperscript{133} See, e.g., Commonwealth v. Sell, 504 Pa. 46, 67-69, 470 A.2d 457, 469 (1983) (holding that because a property interest in searched or seized property is sufficient for standing, "it necessarily follows that a person charged with a possessory offense must be accorded automatic standing" to challenge a search or seizure).

\textsuperscript{134} See supra notes 112-15 and accompanying text (noting that by providing the exclusionary remedy only for privacy rights violations, courts contradict article I, \$ 8's guarantee of a remedy for property rights violations).

\textsuperscript{135} See supra note 114 (citing Payner as evidence that the government may deliberately commit unlawful searches and seizures to obtain evidence against persons without standing to challenge the misconduct); see also Comment, supra note 54, at 587 (arguing that "[b]y limiting the ability of defendants to obtain standing [through restrictive application of the legitimate expectation of privacy test], the Court limits the effectiveness of the exclusionary rule, a rule that has served as the only meaningful method of controlling police conduct").

\textsuperscript{136} See supra notes 130-32 and accompanying text (concluding that Minnesota courts meant to maintain judicial integrity in cases providing broader protections under the state exclusionary remedy than under the federal rule).

\textsuperscript{137} Compare State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971) and State v. Gannaway, 291 Minn. 391, 191 N.W.2d 555 (1971) with United States v.
I, section 10 provides broader protection than the fourth amendment, and that the state exclusionary rule has a broader purpose than the federal rule.\textsuperscript{138}

Existing state law indicates that article I, section 10 protects property rights. Under Minnesota law, only the person "aggrieved by an unlawful search and seizure" can seek the return of seized property or exclude the property as evidence.\textsuperscript{139} In addition, a Minnesota statute requires an officer who lawfully seizes property to leave a receipt with the person dispossessed of the property, rather than the person whose privacy rights are infringed.\textsuperscript{140} regardless of whether the seized property is contraband.\textsuperscript{141} By requiring the officer to provide the dispossessed person with a receipt, the law recognizes that the

\textsuperscript{138} See supra notes 130-32 and accompanying text (discussing Minnesota cases providing greater protection under the state exclusionary remedy than under the federal rule).

\textsuperscript{139} Under MINN. STAT. § 626.21:

[a] person aggrieved by an unlawful search and seizure may move the . . . court . . . for the return of the property and to suppress the use, as evidence, of anything so obtained on the ground that (1) the property was illegally seized, or (2) the property was illegally seized without warrant, or (3) the warrant is insufficient on its face, or (4) the property seized is not that described in the warrant, or (5) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (6) the warrant was illegally executed, or (7) the warrant was improvidently issued.

MINN. STAT. § 626.21 (1990).

\textsuperscript{140} MINN. STAT. § 626.16 (1990), which provides the dispossessed person with proof of ownership should he be entitled to return of the property, mandates:

DELIVERY OF COPY OF WARRANT AND RECEIPT. When the officer conducts the search the officer must give a copy of the warrant and, when property or things are taken, a receipt therefor (specifying it in detail) to the person in whose possession the premises or the property or things taken were found; or, in the absence of any person, the officer must leave such copy of the warrant and receipt in the place where the property or things taken were found. Such delivery of a copy of the warrant shall constitute service.

MINN. STAT. § 626.16 (1990) (emphasis added).

Other statutory provisions provide for similar notice to persons dispossessed of property by a government seizure. See, e.g., id. § 27.185(3) (1990); id. § 60B.12 (1) (1990) (liquidation of insurers); id. § 974.225 (1990); id. § 198.33 (1990) (protecting residents of Minnesota Veterans Homes).

\textsuperscript{141} See, e.g., State v. Mollberg, 310 Minn. 376, 385-87, 246 N.W.2d 463, 469-70 (1976). The Mollberg court ruled that the police officers' failure to leave with the defendant a copy of the search warrant describing the property taken constituted a "defect." Because the defect was cured the next day, however, by providing the defendant with a copy of the warrant and an inventory of the
state has deprived the person of his property. Such recognition indicates that the person deprived of property during a search is the person whose property rights are violated when a court determines that the search and seizure were unlawful. Moreover, because this person is the person "aggrieved by an unlawful search and seizure," only this person can invoke the exclusionary rule to exclude evidence obtained during the unlawful search and seizures.\textsuperscript{142} By tying the ability to exclude evidence to the possession of the evidence, Minnesota law indicates that the state constitutional search and seizure provision protects not only privacy, but property interests as well.\textsuperscript{143}

The alleged illegality of the seized item should not invalidate a defendant's constitutional property interest, because existing law already protects a defendant charged with illegal possession. Even when the government alleges that seized property is contraband, the defendant can exclude the evidence if the seizure infringed his constitutional rights.\textsuperscript{144} Moreover,

\begin{enumerate}
\item See supra note 139 and accompanying text (quoting MINN. STAT. § 626.21 (1990) (providing that a victim of an unlawful search and seizure may seek suppression of the seized item as evidence and petition the court for its return)).
\item Other statutory provisions suggest that the state legislature is concerned about persons who are wrongfully dispossessed of their property. See, e.g., MINN. STAT. § 35.14(2) (1990) (requiring livestock detectives to file a $2000 bond with the state for any potential damage claims by persons whose property is wrongfully seized).
\item MINN. STAT. § 198.33 (1990), which states that "[r]esidents of the Minnesota veterans homes have the right to a legitimate expectation of privacy in their persons and property against unreasonable searches and seizures" is not inconsistent with this analysis. The statute simply recognizes that privacy interests are protected by the fourth amendment of the United States Constitution and article I, § 10 of the Minnesota Constitution. The statute indicates that property interests are also protected. For example, the administrator of the home must provide written authorization "for each resident whose room or property is to be searched;" the resident must be informed of the reasons for the search and allowed to be present during the search; and a copy of the administrator's authorization must be provided to the resident, as well as a receipt for any property seized. \textit{See id.}
\item See supra notes 127-28 and accompanying text (citing opinions excluding evidence in possessory crimes cases); see also Jeffers v. United States, 187 F.2d 498, 502 (D.C. Cir. 1950) (holding that the illegality of the seized object does not defeat a defendant's constitutional property interest in the item), aff'd, 342 U.S. 48 (1951).
\end{enumerate}
the defendant is presumed innocent of the charges against him; whether the seized item is contraband is a fact properly decided by the jury, not a judge at a suppression hearing.\(^{145}\)

By providing a person whose property is seized standing to contest the constitutionality of that seizure, courts act consistently with the laws created to implement state search and seizure rules. The rules recognize that the search and seizure deprives the defendant of a constitutional interest, and provide the defendant not only with proof of ownership, but also with exclusion of the item as evidence if the government unlawfully seized the item. Providing automatic standing to possessory crimes defendants is consistent with these rules. Automatic standing also helps preserve constitutionally-protected property interests by providing greater opportunity to vindicate those interests.\(^{146}\)

privacy rights, are infringed by illegal government action. Moreover, even assuming such an interpretation, examining a substance to determine whether it is contraband constitutes a search, and implicates one's legitimate expectation of privacy in the substance, regardless of whether it turns out to be contraband. See supra note 114. This interpretation also contradicts precedent providing the exclusionary remedy to possessory crimes defendants whose privacy, but not property, interests have been violated by government misconduct. See supra notes 127-28 and accompanying text (citing Minnesota opinions excluding unlawfully obtained evidence in possessory crimes cases).

145. Unlike the question of whether the defendant had a "legitimate expectation of privacy" violated by the search and seizure, the question of whether the seized substance is contraband is an element of the state's case against the defendant. It is therefore possible that resolving such a question at the suppression hearing violates the defendant's constitutional right to a jury. Moreover, even if this issue were resolved against the defendant in the suppression hearing, holding that the otherwise unlawful search and seizure of contraband does not violate the possessory defendant's rights would violate the rule in \textit{Pluth} that "[a] search which is unlawful when it begins is not made lawful by the discovery that an offense has been committed." See \textit{State v. Pluth}, 57 Minn. 145, 152, 195 N.W. 789, 792 (1923). Furthermore, allowing the government to use the contraband as evidence in such cases would be inconsistent with prior cases suppressing such evidence, condone an "ends justify the means" principle, and greatly undermine the deterrent effect of the exclusionary rule. See supra note 135 and accompanying text (citing at least one case where the government deliberately executed unconstitutional searches and seizures to obtain evidence against persons without standing to contest the misconduct).

146. See supra notes 130, 132-34 and accompanying text (citing Minnesota opinions providing broader protection under the state exclusionary rule than under the federal rule).
D. Matters of Particular State Interest or Local Concern

When courts consider whether matters of particular state interest or local concern indicate a need to provide greater protection than federal law, courts apply a series of questions to the issue before them: whether the Minnesota Supreme Court is in a better position than the federal courts to make the particular determination because of its superior knowledge of, experience with, and proximity to the controversy; whether the controversy should be resolved on an individualized basis, or requires a broad, uniform resolution of nation-wide applicability; and whether other circumstances mandate an interpretation independent of the federal provision. Resolution of these questions reveals that unique Minnesota concerns require a broader rule than that of other states.

Independent application of a state constitutional provision is most appropriate in the area of criminal procedure because the overwhelming majority of criminal prosecutions occur at the state level. Because in criminal cases courts usually are involved more with procedural than with substantive questions, the state court has the expertise to determine what constitutes a fair trial without referring to the federal constitution. Moreover, the United States Supreme Court's lack of unanimity when deciding matters of criminal procedure indicates that "the determination of what is constitutionally appropriate often differs among reasonable people." Whether article I, section 10 of the Minnesota Constitution protects a person's property interest from unlawful searches and seizures

147. See supra note 98 and accompanying text.
148. Fleming & Nordby, supra note 51, at 74. The authors quote Michigan v. Long, 463 U.S. 1032 (1983), where the United States Supreme Court noted: The state courts handle the vast bulk of all criminal litigations in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Colombia. . . . By comparison, approximately 32,700 criminal suits were filed in federal courts during the same year. Id. at 1042 n.8.
149. See Fleming & Nordby, supra note 51, at 74.
150. Id.
151. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 SUFFOLK U.L. REV. 887, 921 (1980), quoted in Fleming & Nordby, supra note 51, at 75. One cannot help but note that one of the rare cases of Supreme Court unanimity in the area of criminal procedure came in Jones v. United States, 362 U.S. 257 (1960), where the Court unanimously held that possessory crimes defendants were entitled to automatic standing. See supra note 27.
and whether possessory crimes defendants are entitled to automatic standing to challenge unlawful seizures, is thus an appropriate question for the Minnesota Supreme Court to resolve.

An examination of relevant local court rules suggests that the Minnesota Supreme Court should provide automatic standing to possessory crimes defendants. In Minnesota, the presentation of evidence in omnibus hearings is governed by Minnesota Rule of Criminal Procedure 11.02, which provides that both the prosecution and the defense may present evidence and cross-examine the other’s witnesses. A possessory crimes defendant wishing to challenge a search or seizure must testify not only on direct examination to establish a connection with the contraband sufficient for a “legitimate expectation of privacy,” but also is subject to cross-examination on the subject. Consequently, the prosecution is likely to obtain information regarding the defendant’s guilt that may be used to investigate the case and develop prosecutorial strategy.

Moreover, unlike other jurisdictions, Minnesota courts

152. In Minnesota, the requirement of an omnibus hearing was first imposed in State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 551-54, 141 N.W.2d 3, 12-14 (1965). Under Rasmussen, the state must inform the defendant at arraignment if it intends to use evidence obtained by a search and seizure. The defendant may move the court to suppress the evidence at a pre-trial fact hearing. Id. at 554, 141 N.W.2d at 14.

153. MINN. R. CRIM. P. 11.02 states:

Subd. 1. Evidence. If the defendant or prosecution has demanded a hearing on either of the issues specified by Rule 8.03, the court shall hear and determine them upon such evidence as may be offered by the prosecution or the defense.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses.

154. Id.

155. In his dissent to Salvucci, Justice Marshall noted that even if the testimony wasn't used at trial, it might be helpful to the prosecution in developing its case or deciding its trial strategy. He thus concluded that the need for automatic standing for possessory crimes defendants remained. United States v. Salvucci, 448 U.S. 83, 96 (1980) (Marshall, J., dissenting).


Other state courts have also refused to admit suppressed evidence as impeachment, as a matter of state constitutional law. See, e.g., People v. Disbrow, 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 369 (1976); Common-
allow the prosecution to use suppressed evidence for impeachment purposes.\textsuperscript{157} Minnesota also admits a defendant's prior statement as impeachment under Minnesota Rules of Evidence 613 and 801(d)(1).\textsuperscript{158} These rules, applied together, suggest that a defendant's suppression hearing testimony is admissible as impeachment at trial.\textsuperscript{159} Therefore, unlike other states that completely suppress pre-trial testimony as evidence,\textsuperscript{160} Minnesota allows a defendant's suppression hearing testimony to be admitted against him at trial to establish credibility or to im-


157. See United States v. Havens, 446 U.S. 620, 628 (1980) (holding that the government may introduce illegally obtained evidence as impeachment to contradict the defendant's response to a proper cross-examination question); Harris v. New York, 401 U.S. 222, 226 (1971) (holding that the government may cross-examine and impeach the defendant about any statements taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), after the defendant testifies to the contents of the statement on direct examination); Walder v. United States, 347 U.S. 62, 65 (1954) (holding that the government may impeach the defendant on cross-examination with illegally-seized evidence after the defendant "opened the door" on direct by denying he had seen the evidence). Minnesota follows these precedents. See State v. Forcier, 420 N.W.2d 884, 887 (Minn. 1988); State v. Provost, 386 N.W.2d 341, 343 (Minn. Ct. App. 1986).

158. MINN. R. EVID. 613(b) provides, in pertinent part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." MINN. R. EVID. 801(d)(2) provides that a statement is not hearsay if "[t]he statement is offered against a party and is the party's own statement, in either an individual or representative capacity."

159. See Salvucci, 448 U.S. at 96-97 (Marshall, J., dissenting) (suggesting that Simmons and Harris leave open the possibility that suppression-hearing testimony can be used for impeachment purposes). The Salvucci majority hinted that this is so, but did not attempt to resolve the issue. \textit{Id.} at 93-94; see also W. LAFAVE, supra note 28, § 11.3 (criticizing the Salvucci majority for "sidestep[ping]" the impeachment problem left open in Simmons); Comment, supra note 54, at 585-86 (discussing the impeachment problem left open by Simmons).

The official comment to Minnesota's omnibus hearing rules also recognize this possibility: "[Rule 11.02] leaves to judicial interpretation the consequences of the defendant's testimony at a[n] [omnibus] or similar evidentiary hearing, that is, whether it may be used against him at trial substantively or by way of impeachment." MINN. R. CRIM. P. 11 (official comment) (citations omitted); see also H. MCCARR, MINNESOTA PRACTICE § 24.4, at 186-87 (1990) (reaching a similar conclusion).

160. See supra note 156 and accompanying text (observing at least two states that do not allow suppressed evidence as impeachment).
peach the defendant's trial testimony.\textsuperscript{161}

These local rules reveal the need for automatic standing if possessory crimes defendants are to avoid the "self-incrimination dilemma."\textsuperscript{162} In the introductory hypothetical case, Smith may be discouraged from testifying at the suppression hearing, for fear that the prosecution will use her suppression hearing testimony against her as impeachment if she later testifies at trial.\textsuperscript{163} By remaining silent at the hearing, however, she is not

\textsuperscript{161} See State v. Christenson, 371 N.W.2d 228, 232 (Minn. Ct. App. 1985) (stating that "[t]estimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of guilt at trial and can be used only for impeachment purposes," adding almost as an afterthought, "if at all").

\textsuperscript{162} An alternative approach might be to refuse to apply the Harris rule to suppression-hearing testimony, and interpret Simmons to protect Smith from the use of such testimony on the issue of credibility, as well as guilt. Although seemingly persuasive, this approach would be inadequate. First, the United States Supreme Court was careful to limit Simmons to pre-trial testimony used in the state's case-in-chief. See Simmons v. United States, 390 U.S. 377, 394 (1968). Moreover, the Salvucci Court indicated that the Harris rule allowing suppressed evidence as impeachment could be extended to pre-trial testimony. See Salvucci, 448 U.S. at 83-94. Thus, an opinion applying Simmons to impeachment evidence would likely be overruled as a matter of federal constitutional law.

Second, even if grounded in the Minnesota Constitution, such a solution would provide Smith with only partial protection from the "self-incrimination dilemma." Although the prosecutor would no longer be able to use her testimony as impeachment, he still might use the testimony in investigating his case against Smith, and thereby gain an advantage from her incriminating statements. See United States v. Salvucci, 448 U.S. 83, 96 (1980) (Marshall, J., dissenting). Thus, Smith would still be deterred from testifying at the pre-trial hearing.

Third, adherence to the federal "legitimate expectation of privacy" test ignores the evidence suggesting that the framers intended to protect property rights against unreasonable searches and seizures. Failing to provide automatic standing permits the state to continue to argue contradictory positions, i.e. that Smith possessed the pills for purposes of the criminal statute, but did not possess them for purposes of the state constitution. See Commonwealth v. Amendola, 406 Mass. 592, 600, 550 N.E.2d 121, 125 (1990) (finding that because possession of the seized objects is a factor in determining whether a defendant had a legitimate expectation of privacy, the government still contradicted itself by arguing that the defendant did not possess the contraband for standing purposes, but did possess it for purposes of the criminal statute). Furthermore, adhering to the federal standard ignores the independent protections provided by the Minnesota Constitution, and the courts' role in preserving those protections. Providing automatic standing is thus the most logical, and complete, remedy for possession crimes defendants. See also Comment, supra note 54, at 590 (arguing that the automatic standing rule "avoids wasteful pretrial motions, because the government's charge itself provides the basis for standing").

\textsuperscript{163} See Salvucci, 448 U.S. at 96 (Marshall, J., dissenting). A possessory crimes defendant would be understandably reluctant to testify to possession of alleged contraband to establish a constitutionally-protected interest in the seized item, if his testimony is admissible later as impeachment. This is true
likely to establish standing to suppress the illegally-obtained evidence.\textsuperscript{164} If Minnesota courts grant Smith automatic standing to contest the search, however, she will not face the self-incrimination dilemma. The automatic standing rule thus supports her constitutional right to testify in her own defense,\textsuperscript{165} as well as challenge unreasonable searches and seizures.\textsuperscript{166}

**CONCLUSION**

In the last twenty years, the United States Supreme Court has greatly reduced the effectiveness of the fourth amendment, limiting the provision’s protections to those who have a “legitimate expectation of privacy” in the area searched or the item seized. This rule is vague, unworkable, subject to judicial ma-

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\textsuperscript{164} See Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (noting that “petitioner’s ownership of the drugs is undoubtedly one fact to be considered in this case” in determining whether he had a legitimate expectation of privacy). Although in theory the evidence is only to be considered for the purpose of evaluating the defendant’s credibility, this theory is impractical, as the evidence is normally highly incriminating. See Note, supra note 131, at 374 n.81 (1981); see also W. LaFave, supra note 28, § 11.3.

There is some indication that even persons accused of non-possessory crimes are deterred from testifying at pre-trial hearings. See Christenson, 371 N.W.2d at 232. Such deterrence applies a fortiori to possessory crimes defendants, who may be required to admit to an essential element of their alleged crime to get standing.

\textsuperscript{164} See supra note 24 and accompanying text (noting the United States Supreme Court’s long-held rule limiting fourth amendment challenges to those who can show they are entitled to the amendment’s protections).

\textsuperscript{165} It is well accepted that a defendant’s right to testify in her own defense is fundamental to due process in a criminal case. See, e.g., Rock v. Arkansas, 483 U.S. 44, 49-53 (1987); State v. Rosillo, 281 N.W. 2d 877, 878 (Minn. 1979).

\textsuperscript{166} See supra notes 27-30 and accompanying text (examining the Jones Court’s conclusion that a possessory crimes defendant enters a “self-incrimination dilemma” if forced to testify at a pre-trial suppression hearing). Several state courts have found similarly, even under the “legitimate expectation of privacy” test. See, e.g., Amendola, 406 Mass. at 600, 550 N.E.2d at 125; State v. Settle, 122 N.H. 214, 217-19, 447 A.2d 1284, 1286-87 (1982); State v. Alston, 88 N.J. 211, 228, 440 A.2d 1311, 1320 (1981); Commonwealth v. Sell, 504 Pa. 46, 66, 470 A.2d 457, 468 (1983); State v. Simpson, 95 Wash. 2d 170, 179-80, 622 P.2d 1199, 1206 (1980).

One might argue that even if Smith has standing to contest the seizure, it was only made unreasonable by the illegal search, which she does not have standing to contest. Thus, Smith should not be allowed to suppress the amphetamines as evidence if the officer had probable cause to suspect they were contraband. This analysis, however, ignores the substantial policy reasons for allowing Smith to cite the illegality of the search that led to the seizure in arguing that the seizure was unreasonable. See Simien, supra note 20, at 558-59; see also supra note 114.
nipulation, and provides insufficient protection to persons accused of possessory crimes. For these reasons, several states have responded by interpreting their state constitutions to protect property rights, and have granted automatic standing to possessory crimes defendants to challenge allegedly unreasonable searches and seizures.

The Minnesota Supreme Court should interpret article I, section 10 of the Minnesota Constitution to protect property rights, as well as privacy rights, against unreasonable searches and seizures. Such an interpretation is consistent with the drafters' intent, state common law, and existing state law defining the scope of the state constitutional provision. Moreover, the court should grant automatic standing to persons accused of possessory crimes to contest allegedly unlawful searches and seizures. This result would be consistent with the property rights interpretation of article I, section 10, and would help preserve those rights for Minnesota citizens.

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