MN HOUSE RESEARCH

Unconstitutional Laws

The Effect of Court Rulings and Options for Legislative Responses

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Executive Summary

After legislators pass a bill and the governor signs it into law, it may be challenged as being unconstitutional. Since the United States Constitution and Minnesota Constitution are the supreme law of the state, a law that conflicts with those constitutions cannot be enforced. It is up to the courts to determine whether there is a conflict, but courts must consider many components when assessing a constitutional challenge. Courts must determine whether the person challenging the law has the standing to bring a lawsuit. Then, courts need to decide whether the law requires a higher level of scrutiny because it impacts fundamental rights or distinguishes people based on their race, religion, or natural origin. In addition, they often decide whether the law is facially unconstitutional, meaning it is unconstitutional in every case, or unconstitutional as applied in the specific situation the case presented.

Court rulings are not always clear. They may issue decisions that avoid answering constitutional questions, appear narrow but have a broader impact, or make strong comments about a law without actually making a ruling. Even when a court issues a decision, there can be confusion about whether, or to what extent, a law conflicts with the constitution. The purpose of this publication is to provide some background on constitutional challenges, present questions legislators can consider when reviewing court decisions, and identify some legislative options for assessing policy changes following court opinions.

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The Relationship Between the State and Federal Constitutions

Under our federalist system of government, the United States Constitution is the supreme law of the land while each state constitution is the supreme law of that state. The U.S. Constitution grants certain powers to the federal government and, primarily through the Bill of Rights and other amendments, reserves other powers to the states and guarantees a minimum level of protection to individuals. As long as a state constitution does not conflict with the federal constitution, it is the supreme law of that state.

Because the federal constitution offers a minimum level of protection to individuals, a state constitution cannot provide a lower level of protection. It can, however, provide greater protections in some cases. That is, "[a]s a separate source of rights, the Minnesota Constitution may under certain circumstances provide greater protection than the United States Constitution." *State v. McMurray*, 860 N.W.2d 686, 690 (Minn. 2015). While the Minnesota Supreme Court will generally act with "restraint and some delicacy" when determining whether the state constitution provides greater protections than the federal constitution, the court may find those protections after considering factors like differences in the two texts, the state's history, or state-specific policy concerns. *Kahn v. Griffin*, 701 N.S.2d 815, 828-29 (Minn. 2005).

As a result of the potential for differences between the two constitutions, challenges to the constitutionality of a law usually argue that the law violates both the state and federal constitutions. A Minnesota court could find that a law violates the state constitution even if it does not violate the federal constitution.

Passage of Laws

The legislature, attorney general, and governor do not decide whether a law is constitutional—the courts do. But courts in Minnesota do not provide advisory opinions and will not comment on whether a bill is likely to be found unconstitutional. Even if a court issued a decision on an identical law, the separation of powers doctrine prevents a court from telling the legislature what it can or cannot pass. Therefore, while there may be situations in which a law is likely to be found unconstitutional, the courts cannot limit or prohibit legislation before it becomes law.

As a result, the legislature does not have to justify the passage of a bill by showing that it is constitutional, and the governor can sign a bill into law without commenting on the constitution.

Challenges to Laws

Once a law has been passed, it can be challenged as being unconstitutional. A person or group may file a civil lawsuit challenging some or all of a particular statute, or a defendant may raise the issue in a criminal prosecution. Under the court rules for both Minnesota and federal courts, a party that intends to argue that a statute is unconstitutional must serve notice on the Attorney General of the United States if the party is challenging a federal statute, or on the

Minnesota Attorney General if the party is challenging a state statute. Many laws have a delayed effective date, and a party can challenge a law after it passes and before it takes effect in some cases.

Judges, not juries, determine whether a statute is constitutional. In a court proceeding, juries have the responsibility to find facts and apply those facts to the law that the court gives them. Courts determine questions of law, and assessing whether a statute violates the constitution is a question of law.

Challenges often face an uphill battle because courts presume that most statutes are constitutional. *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). The Minnesota Supreme Court has made it clear that most "Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." In *re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). There is an exception. Statutes that restrict a fundamental right or affect a suspect class are not presumed to be constitutional. *State v. Castellano*, 506 N.W.2d 641 (Minn. 1993); *Rio Vista Non-Profit Housing Corp. v. Ramsey County*, 335 N.W.2d 242 (Minn. 1983).

Assessing constitutionality can be a complicated process. Courts must determine whether the party challenging a statute has the right to make that challenge, what standard applies, and whether the statute is unconstitutional under every situation or only in some cases.

Standing

The question of who can challenge the constitutionality of a statute is called "standing." In general, a person or entity can only start a lawsuit challenging a law's constitutionality if the legislature specifically granted standing to a group that includes that person, or if the person or entity suffered some actual injury. *Warth v. Seldin*, 422 U.S. 490 (1975); *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996). Issues related to standing, and whether a case should be brought in state or federal court, can be complicated. But, at its core, standing prevents a person or group who dislikes a law from raising a challenge in court unless the person or group is directly affected by the law.

Standard of Review

The constitution protects rights, but those rights are not absolute. In some situations the government has an interest in limiting an individual's rights in order to promote another goal. For example, the constitution guarantees the equal protection of the laws. But that guarantee does not necessarily mean a law requiring a business that sells food to be licensed and submit to health inspections is unconstitutional when there is no similar requirement for a business that sells books. In most cases, courts reviewing a constitutional challenge balance the interests of the individual against the current interests of the government.[1] Some individual interests are

[1] Laws that restrict an individual's right to keep and bear arms for the purpose of self-defense are an exception. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, --- S.Ct. ----, No. 20-843, 2022 WL 2251305 (June 23, 2022), the Court rejected the use of a balancing test, which it referred to as "means-end" scrutiny. Instead, a

given greater weight than others and courts have developed a range of tests to measure the balance of conflicting interests. Those tests are referred to as standards of review.

Once a party with standing challenges the constitutionality of a statute, a court must determine what standard of review applies and which party carries the burden of proof. In general, the standard of review falls into one of two categories.[2] Within those general categories of review, there may be specific questions a court must answer depending on the nature of the challenge. Decisions by state and federal courts can change those questions and legislators concerned about possible constitutional challenges to a proposed law may wish to seek more detailed advice on how a court would be likely to assess a specific challenge to a particular law.

Strict Scrutiny

A law may be subject to "strict scrutiny" if it operates to disadvantage a suspect class or impinges on a fundamental right. *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993). Suspect classes include race, national origin, and religion. Fundamental rights are the rights listed in the Bill of Rights such as the right to free speech and freedom of religion, and also include some rights which the court has identified in case law such as the freedom to travel between states, marry, or parent one's children. If a law is subject to strict scrutiny, the government has the burden to prove that the law is narrowly tailored to further a compelling state interest. *Johnson v. California*, 543 U.S. 499 (2005).[3]

regulation is only constitutional if it "is consistent with this Nation's historical tradition." *Id.*, at 8. A court must first determine whether a law restricts the type of firearm that is commonly used for personal defense. If so, then the government has the burden to show that the regulation is consistent with the history of firearm regulation as understood when the Second Amendment was adopted in 1791 and when the Fourteenth Amendment was adopted in 1868. New regulations do not need to be identical to historic regulations and the "historical inquiry that courts must conduct will often involve reasoning by analogy." *Id.*, at 13. The Court did not provide specific guidance or limits on reasoning by analogy, but indicated that lower courts could consider "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. The case only applies to firearms that are commonly used for self-defense, and it does not limit the ability of governments to prohibit individuals from carrying firearms in sensitive places such as schools, courts, and government buildings.

[2] Not every challenge falls under one of these two standards. Some forms of review draw from standards established in the constitutional language. For example, a court will not apply either strict scrutiny or rational basis review to a challenged search. Instead, the court will decide whether the search violated the prohibition on "unreasonable" searches under the Fourth Amendment. That review includes determining whether there was a valid warrant for the search and, if not, whether the search was consistent with established exceptions that prioritize specific government interests.

[3] Statutes that distinguish individuals based on sex or whether children were born out of wedlock are subject to "intermediate scrutiny." Intermediate scrutiny is sometimes referred to as a subset of strict scrutiny. Under the intermediate scrutiny test, a law must further an important government interest and do so by means that are substantially related to that interest.

Rational Basis

A law that does not concern fundamental rights or a suspect class of people is subject to rational basis review. When a law is subject to rational basis review, the court presumes that it is constitutional and the party challenging the law must prove that the law is unconstitutional. *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). In general, the test as to whether there is a rational basis for a law asks if the law provides a reasonable means to achieve a permissive goal and is not arbitrary or capricious. *State v. Rey*, 905 N.W.2d 490 (Minn. 2018).

Historically, the rational basis test Minnesota courts apply to an equal protection challenge has been different from the test under federal law. The federal test asks whether a challenged classification has a legitimate purpose and whether it was reasonable for lawmakers to believe that use of that challenged classification would promote the purpose. In contrast, the Minnesota test required:

1) that there be a genuine and substantial distinction between those included in, and excluded from, the classification so that there is a natural and reasonable basis to justify legislation adapted to particular conditions and needs;
2) there must be an evident connection between the needs peculiar to the class and the prescribed remedy; and
3) the state must be able to legitimately achieve the purpose of the statute.

Greene v. Commissioner of Minnesota Dept. of Human Services, 755 N.W.2d 713 (Minn. 2008).

More recently, the Minnesota Supreme Court has moved away from that test. In a 2020 decision, the court described this as a formulation "to describe rational basis review…rather than a strict checklist that must be run down in every case." *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 21 (Minn. 2020). The court concluded that a law that does not impact fundamental rights or create a suspect class does not violate the Minnesota Constitution "when it is a rational means of achieving the legislative body's legitimate policy goal." *Id*., at 22. The court reiterated this standard in 2022, noting that there must be some fit "between the means used and the ends to be achieved." *State v. Lee*, No. A20-0758, 2022 WL 2232339, at *6 (Minn. June 22, 2022). That decision emphasized that the court would be deferential to the legislature's analysis and determination of facts.

Facial or As-Applied Challenges

A challenge to a law can argue that a statute is unconstitutional "facially" or "as applied." A statute is facially unconstitutional when "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739 (1987). However, a statute is unconstitutional as applied when it violated a particular party's constitutional rights.

A decision that a statute is unconstitutional "as applied" only affects the person who brought the claim, leaving the statute otherwise in place. Court opinions finding that a law is unconstitutional do not always make it clear whether the decision was based on a facial or as-

applied challenge. And decisions based on an as-applied challenge may have an impact broader than a single case.

The Meaning of a Court Decision

In order to understand the effect of a court ruling, it is important to understand what court issued the decision and what the ruling actually ordered. Some helpful questions include the following.

The Court Issuing the Decision

What court issued the decision?

A ruling by a Minnesota district court does not apply to the entire state because that decision does not bind other district courts.[4] As a result, if a district court judge in Ramsey County finds a statute unconstitutional, a district court judge in Rice County can reach a different conclusion. In fact, a different judge in Ramsey County could also reach a different conclusion. As a result, a district court's opinion that a law is unconstitutional is unlikely to be the final decision on the question. When a court issues a decision against the government at that level, the government is likely to appeal.

A decision by the Minnesota Court of Appeals does apply to the entire state. Its decisions can be appealed to the state's supreme court but, with a few exceptions, the Minnesota Supreme Court chooses which cases it hears. If that court decides it will not review a decision by the court of appeals, or if the government does not ask the supreme court to review the case, the decision by the court of appeals is a final decision.

If the case is in federal court, it will also begin at the district court level. While some states are divided into more than one district (Wisconsin, for example, is divided into eastern and western districts), Minnesota is a single district. There are four federal courthouses in Minnesota,[5] but a decision by any judge can apply to the entire state. However, while federal district courts prefer to follow the decisions of their colleagues, a decision by one judge does not bind any other judge. In the same way that two state district court judges can issue conflicting opinions, two

[4] There has been some suggestion that decisions by a state district court become binding on other district courts if they are not appealed. No statute, court rule, or appellate opinion supports that position. State district courts have rejected the argument. See, *State v. Prigge*, No. 27-CR-16-13286, 2017 WL 10701462, at *2 fn. 2 (Minn. Dist. Ct. March 9, 2017) ("…the State also provided the court with an Order by another district court judge on this identical issue. Recognizing that this court is not bound by the Orders of another district court, this court nevertheless considered the approach of the court…."). The Minnesota Supreme Court referenced this position in 2018, but did not formally endorse or reject it: "Holloway also raised a novel legal argument that a 2014 order from Hennepin County became 'binding state law when Hennepin County failed to appeal,' and that it was thus error for the Olmsted County district court not to follow that 'binding' law. Because Holloway's attorney withdrew this issue at oral argument, we do not consider it here." *State v. Holloway*, 916 N.W.2d 338, 344 fn. 4 (Minn. 2018).

[5] Minnesota's federal courthouses are in St. Paul, Minneapolis, Duluth, and Fergus Falls.

federal district court judges can issue conflicting opinions. As a result, an opinion by the federal district court can create some uncertainty—it is binding on the state, but another judge could reach a different conclusion. For that reason, a district court decision that a law is unconstitutional is likely to be appealed to the federal appellate court.

Decisions by the state's supreme court or the federal appellate court for the circuit which includes Minnesota (the 8th Circuit) are more likely to be final decisions unless a party appeals the decision to the U.S. Supreme Court and that court agrees to take the case.

A ruling by another state's court is unlikely to involve Minnesota law. A ruling by a court in another state, even on a law identical to one in Minnesota, does not bind Minnesota. However, such a ruling would make a challenge to the Minnesota law more likely and a Minnesota court could find the decision from another state to be persuasive.

The Law That Was Challenged

What law was challenged?

Most decisions from Minnesota courts will address Minnesota laws, but there are occasions in which a Minnesota court can apply and rule on federal laws or laws from other states. The U.S. Supreme Court, however, can rule on federal laws or the laws of other states.

If Minnesota's law was not challenged, does the decision affect Minnesota law?

Decisions from courts in other states do not have a binding effect on Minnesota. But, as mentioned above, Minnesota courts may find those decisions persuasive. Decisions from the U.S. Supreme Court can bind Minnesota even if the case did not directly address a Minnesota law. For example, a decision finding that the warrantless use of a thermal imaging device on a person's home violates the U.S. Constitution would make any Minnesota law authorizing such use unconstitutional even if Minnesota's law was not discussed by the Supreme Court.

Ruling on Constitutionality

Did the court actually rule on constitutionality?

A case may raise a constitutional issue and a court may rule in favor of one party. However, the ruling may not decide the constitutional question. In general, courts avoid ruling on a constitutional issue if it is possible to resolve the case on some other basis. This is sometimes referred to as the doctrine of constitutional avoidance.[6]

[6] The term "constitutional avoidance" can also be applied to refer to situations where a court strikes down some portion of a statute while leaving other portions intact.

Did the court rule that the law was unconstitutional on its face, or as applied?

It is not always easy to determine if a court has limited its decision to the specific facts of a case, or made a broader ruling. Even in cases where the court specifically addresses the decision to the facts, it may be difficult to determine if any other set of facts would produce a different result.

Did the court find an entire statute unconstitutional, or only a part?

If a court can leave any part of a statute intact, it will generally do so. As a result, a court's ruling may not change the majority of a statute and it may continue to serve its intended purpose. However, the ruling may leave a less significant piece of policy in place and effectively eliminate the purpose of the statute.

The Effect of a Ruling That a Statute is Unconstitutional

If a court with jurisdiction over the state issues a final decision saying that a Minnesota law is unconstitutional, that law cannot be enforced. If the government tries to enforce the law, or relies on the law when it takes an action, a person harmed by that action can challenge the government's action and the court will rule in the person's favor. In practical terms, the government will almost always change its behavior and act as though the law does not exist.

However, the Minnesota Revisor of Statutes will not delete the law.[7] The courts, legislature, and executive branch have clear roles when it comes to establishing and reviewing Minnesota's laws, and no branch can order another branch to perform its lawmaking function in a particular way. The courts cannot order the governor to veto legislation, and they cannot order the legislature to pass a bill that amends or repeals a law.

Legislative Options to Respond to Court Rulings

If a court rules that a law is unconstitutional, the revisor's office has the responsibility to notify legislators. Pursuant to Minnesota Statutes, section 3C.04, subdivision 3, the revisor's office provides the legislature with a report in every even-numbered year regarding "any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the Supreme Court or Court of Appeals of Minnesota." Legislators may learn of a ruling from that

[7] The revisor does add a note to statutes that have been ruled unconstitutional and includes the court case in which the ruling was made. The revisor also maintains a list of statutes that remain on the books but for which a court has ruled are either unconstitutional or cannot be applied because of a conflict with federal law. The list can be found at: https://www.revisor.mn.gov/statutes/unconstitutional.

report or through other sources. Under either scenario, the legislature may take any of three paths: (1) do nothing, (2) amend the statute, or (3) repeal the statute.

Take No Action

There are several reasons that the legislature may choose to take no action following a court decision finding that a statute is unconstitutional. As discussed above, the decision may have limited effect for a variety of reasons. It may come from a lower court and be appealed to a higher court, and the legislature may choose to wait for that later decision. Alternatively, the decision may be fact-specific, finding that the law was unconstitutional as applied. That decision would not automatically invalidate the entire statute.[8] Or, the decision may be from another state or address a law that is similar, but not identical, to the Minnesota law. In that case, the legislature may choose to wait for a decision from a court that directly addresses the Minnesota law.

Even in situations where a final decision clearly invalidates Minnesota law, the legislature may make a pragmatic or political decision to take no action. If a court's opinion concerns a controversial topic, the legislature may choose to leave an unenforceable statute in place to avoid additional controversy and attention. In other situations, legislators may believe that the U.S. Supreme Court is likely to issue a future decision that overrules an opinion and effectively reinstates that law. Under that scenario, legislators may believe that it is easier to leave the law in place rather than attempt to re-pass it in the future.

In addition, an attempt to amend, repeal, or replace a statute could fail if the bill does not receive majority approval in both bodies of the legislature and a signature by the governor.

Amend the Statute

The legislature may choose to amend a statute that has been found unconstitutional. In some cases, the court may suggest a change that it believes would make the statute constitutional. But in most cases the court does not make suggestions or speculate about possible changes. If the legislature hopes to save a policy that the court invalidated, the legislature must reshape the statute and attempt to address the issues identified by the court. Predicting how a court will react to a change can be particularly difficult when an opinion relies heavily on the specific facts of a certain case. For example, if the court found that a regulation was too restrictive because it set some limit too low for a particular person, that decision does not tell the legislature whether the regulation would be acceptable if the limit was increased slightly, doubled, or increased in some other way.

[8] It is important to consider whether the ruling undermines the intended impact of the law even if it does not directly invalidate the entire statute.

Repeal the Statute

The legislature may choose to repeal a statute that has been found unconstitutional. If a statute is facially unconstitutional, the courts have stated that it cannot be enforced and the legislature may choose to repeal an unconstitutional statute to avoid confusion or to replace that statute with a new version that seeks to reach similar policy goals.

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