# The Constitutional Right to Garden

**OR**

# Give Me Zucchini or Give Me Death! *

***Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor.***

***Article XIII, Section 7***
***Minnesota Constitution***

By
Gregory Wilmes

Yes, there is a constitutional right to garden, or at least the right to sell tomatoes from your garden without a license. This has been a part of Minnesota's Constitution since, for better or for worse, it was amended by vote of the people in 1906. The citizenry first enshrined the gardeners' rights clause in our Bill of Rights, but the clause was relegated to the Constitution's miscellaneous category, Article XIII, in the restructuring of 1974. No slight to gardeners intended. Our state's constitutional affinity for gardening has roots predating even statehood.

Before Minnesota became a state in 1858, it was a territory created under a law called the Organic Act of 1849.This was before organic fruits and vegetables became so wildly popular that otherwise rational people would pay premium prices for them. Strangely, few recorded judicial decisions expound on this constitutional right. And an important constitutional right it is. Gardening aside, licenses are now required for almost everything. We need a license to marry,[1] fish,[2] drive[3] and trim fingernails commercially,[4] to mention but a few. Gardeners must have occupied a truly special place in the public heart at the turn of the century.

## Old Law Is Good Law

The legal roots of the constitutional right to garden are ancient. In fact, the law of the garden is the very oldest of the Judeo-Christian legal traditions, bar none. Who can forget Adam and Eve's brush with the law in Eden? If the first law (Don't eat the

fruit!)[5] had not been broken, all the law that followed might never have been needed.

The law of the soil was much on the minds of the founding gardeners at the constitutional convention in 1857. They included a constitutional provision declaring, "All lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited."[6]

What is allodial land anyway? An "alloid" (not to be confused with the popular mint candy Altoids) is apparently the opposite of a "feud." Allodial tenure is similar to udal tenure, which was a sort of Icelandic freehold held by the right of long possession.[7] Those holding allodial land do so without having to render service to the king or other royalty.

## Weeds, Seeds, Beer and the Fourteenth Amendment

Case law on gardeners' rights is sparse. Not every florist is a farmer nor every greenhouse a garden.[8] But at least some greenhouse flower growers have been deemed gardeners entitled to protection from local license requirements under statutes granting privileges similar to those expressed in the gardeners' rights clause of Minnesota's Constitution.[9] Those seeking refuge in the garden have not always been successful. In 1866, Charles Josselyn was criminally indicted for working in a field on Sunday.[10] His defense-that he was working in a garden, not a field-was rejected.[11] The court was equally unsympathetic to his defense that, because his plants were suffering from want of hoeing, his labor was a work of necessity or charity, both of which were legal on Sundays.

"Beer gardens" are probably not protected by the state constitution, although no case seems to directly address the point.[12] Beer garden patrons are nonetheless given some statutory protection, as the law says, "No person may be charged with or convicted of the offense of drunkenness or public drunkenness."[13] This law is no doubt of some comfort to a few gardeners and of great comfort to many lawyers, some of whom I know personally.

The IRS once trained its tax collecting eyes on "roof gardens." The Prohibition-era Revenue Acts of 1918 and 1921 imposed a tax on amounts paid for admission to any "roof garden, cabaret, or other similar entertainment."[14] Although its etymology is somewhat obscure, a "roof garden" is a restaurant or nightclub at the top of a building decorated to suggest an outdoor garden.[15] In tax law, a roof garden was an establishment charging admission for dancing privileges and where refreshments were sold in connection therewith.[16]

In Iowa, we know a few small grapevines, four or five small ailanthus trees, a row of rhubarb, and some blackberry bushes, with cucumbers and some melons, do not a garden make.[17] Why this is so we do not know. The Iowa justices noted that the melons "never amounted to much," and opined that Mary's garden, "with cockleshells, and

bright bluebells, and marigolds all in a row," approaches nearer the test.[18]

Mangel-wurzel and turnip seeds are not "garden seeds," at least according to an 1885 decision of the Supreme Court of the United States of America.[19] Cabbage and beet seeds are garden seeds.[20] It has been more than a century since the Supreme Court weighed in on this potentially divisive topic, and no current court watcher now dares to predict how the court would rule if the issue were to surface again.

The Minnesota Supreme Court would not be bound by these decisions if called upon to interpret our gardeners' rights clause. The state Constitution, itself an "organic" document,[21] often has been interpreted more expansively than the federal Constitution.[22] Turnip and mangel-wurzel eaters in Minnesota are well organized, and would no doubt spring to the defense of their rights should the need arise here.

Who could object to a constitutional provision with the noble goal of protecting gardeners' rights? In Minnesota, peddlers who did not garden were sometimes criminally charged with peddling without a license required by local ordinance. They claimed that ordinances requiring them, but not gardeners, to have a license violated the Fourteenth Amendment to the United States Constitution.[23] The court was sometimes receptive to these claims and sometimes not.[24]

## Statutory Law

The scarcity of case law dealing with the constitutional provisions on gardens and dirt suggests the drafters did a good job--drafting provisions so clear that few needed to ask a court to construe them and so fair that no one needed a court to enforce them.

This is not to say that lawyers and legislators totally forgot the garden. In fact, dozens of statutes in one way or another touch on the subject. Congress itself has spoken on the subject of weeds, having taken the trouble to define a weed as "any plant which grows where not wanted."[25]

For those who have difficulty with the concept, there is also a law that defines a "plant." According to our state lawmakers, a plant is "any living organism, consisting of one or more cells, which does not typically exhibit voluntary motion or possess sensory or nervous organs."[26] As one can see, this is quite a broad definition--my lazy younger brother is a living organism (barely), made up of more than one cell, who rarely exhibits voluntary motion of any sort. Most of the time, my brother is a plant. Brothers aside, what is immediately curious about our state's definition of a plant is that it excludes organisms made up of less than one cell. This is probably no great loss. In fact, some scientists would say that there are no organisms, properly speaking, made up of less than one cell. At least according to some popular encyclopedias, the cell is the basic unit of life itself.[27] What then might our tireless lawmakers have had in mind?

There are life forms made of less than one cell, and lots of them. Scientists call them viruses or bacteria or maybe prions. The exclusion of these life forms from planthood

has caused great concern among the trillions of organisms relegated to the non-plant kingdom. Whether these organisms are animals is even open to debate. Our lawmakers say animal "means every living creature except members of the human race."[28] Case law, however, defines an animal as any non-human being that is endowed with the power of voluntary motion.[29] Viruses and bacteria often move involuntarily (with a sneeze, for example), and no one really knows whether their other movements, such as they are, are truly voluntary.

Scientists, who were probably consulted about the definition of a plant, take a decidedly different view of plants than most gardeners. For scientists, plants are not things to be grown, nurtured and ultimately eaten or admired. Scientists prefer experimentation to eating. Experiment they do. Gene splicing-where scientists take genes from one kind of plant and insert it into a completely different plant altogether-is especially popular today. Sometimes, scientists even put genes from an animal into a plant. Who has not heard of the misguided researcher who tried to make a pumpkin glow in the dark by splicing into it the gene of a firefly? The experiment failed and the research was ultimately abandoned.[30] But technological advances continue and the law will one day be called upon to address this situation.

In fact, the Legislature now requires a license to release transgenic plants into the environment. The law prohibits the release of any "genetically engineered agriculturally related organism" without a permit issued by the commissioner of agriculture.[31] Is this a case where the constitutional right to garden is being trampled upon? You decide.

Although some laws seem to restrict gardeners' rights, others have a decidedly pro-gardener tilt. For example, if the weeds in your garden get really bad, you might be able to make the commissioner of agriculture weed your garden. Under the law, "If there is an infestation of noxious weeds beyond the ability of the person who owns or occupies the land to eradicate it, the commissioner may, upon request, put into operation the necessary means for the eradication of the weed."[32] This is but one example of the gardener welfare statutes that have become popular of late.

Our lawmakers have bestowed other benefits on the horticultural public. Fortunately, we are also blessed with a "seed potato[e] inspection fund."[33] What about the pumpkin growers protection fund? Is not this vegetable as worthy of its own fund as the lowly subterranean potato? It is also a crime, if only a misdemeanor, to sell at retail "any potato which is artificially colored."[34] The law permits people to color their hair, fingernails, eyelids and lips. Potatoes should have the same rights.

Perhaps we should not be surprised at all the laws now regulating the garden. Face it. Gardening is not the sedate bonding session with the soil it once was. In some circles, it has become a high stress avocation for overt social climbers. Limited regulation of the garden may now be necessary. In my neighborhood we need an ordinance prohibiting the nocturnal delivery of zucchini. Some gardeners (Ed and Becky, you know who I'm talking about) have taken to making unsolicited deliveries of zucchini to

the back steps of unsuspecting neighbors, usually at night. This could be outlawed without offending the Constitution, which grants only the right to "sell or peddle" the products of the garden. Lawmakers must take care, however, not to trample on the Constitution, and careful draftsmanship will be necessary.

Will the constitutional right to garden ever come to full bloom? Gardeners are not normally the litigious sort, and case law might develop slowly. Nonetheless, as lawyers we must be ever vigilant to identify and eliminate encroachments on this constitutional right. The Minnesota Gardeners' Rights Association, dedicated exclusively to protecting the constitutional right to garden, stands ready to oppose all threats to this important liberty. We also stand ready to receive all manner of gifts, grants and donations, of whatever form or size, to enable us to defend this most noble right.

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1 Minn. Stat. § 517.07.
2 Minn. Stat. § 97A.405.
3 Minn. Stat. § 171.02.
4 Minn. Stat. § 155A.07.
5 *Genesis 3:2-3.* The apple is often unfairly blamed. The exact fruit Eve ate is not identified in the King James version of the Bible.
6 Minn. Const. Art. I, § 15.
7 The First Hypertext Edition of the *Dictionary of Phrase and Fable*, www.bibliomania.com
8 Youngquist v. City of Chicago, 405 Ill. 21, 90 N.E.2d 205, 209 (Ill. 1950).
9 *Id.* at 209.
10 Commonwealth v. Josselyn, 97 Mass. 411 (1867).
11 *Id.* at 412.
12 A beer garden is "a place where intoxicating liquors are given away or sold." State v. Hall, 141 Wis. 30, 123 N.W. 251, 252 (1909).
13 Minn. Stat. § 340A.902.
14 *See* U.S. v. Broadmoor Hotel Co., 30 F.2d 440, 441 (D. Colo. 1929); Avalon Amusement Corporation v. United States, 165 F.2d 653 (7th Cir. 1948).
15 Webster's Ninth New Collegiate Dictionary (1989).
16 Avalon, supra, n. 14, 165 F.2d at 654.
17 Hubel v. McAdon, 180 N.W. 994, 995 (Iowa 1921).
18 *Id.*

19 Ferry v. Livingston, 115 U.S. 542 (1885).
20 *Id.*
21 State v. Sutton, 63 Minn. 147, 65 N.W. 262 (1895).
22 *See, e.g.,* Hill-Murray Federation v. Hill-Murray H.S., 487 N.W.2d 857, 856-66 (Minn. 1992).
23 *See* State v. Marcus, 299 N.W. 211 (Minn. 1941); State v. Pehrson, 287 N.W. 313, 316 (Minn. 1939).
24 *See, e.g.,* State v. Pehrson, 287 N.W. 313, 316 (Minn. 1939) ("[A] distinction between those who grow and those who do not grow the product which they sell is, when the purpose is to regulate selling from house-to-house, unreasonable and arbitrary . . . the ordinance is violative of the 14th amendment to the federal constitution."); But see State v. Marcus, 299 N.W. 241 (Minn. 1941) (requirement that wholesaler obtain license is not unconstitutional).
25 7 U.S.C. § 136(cc).
26 Minn. Stat. § 18.46 subd. 2.
27 Grolier's on computer.
28 Minn. Stat. § 343.20 subd. 2 (the cruelty to animals statute, which does not prohibit cruelty to humans).
29 Bernardine v. City of New York, 182 Misc. 609, 44 N.Y.S.2d 881, 883.
30 The research was conducted by the author, whose only laboratory equipment consisted of ordinary kitchen utensils. For related research, see Schauer et al's. fascinating article, *Visualizing Gene Expression in Time and Space in the Filamentaus Bacterium Streptomyces Loelicolor* Science (May 6, 1988) at p. 768. On a completely different subject, see Fleming T., *Suitability and the Rogue Investor,* The Hennepin Lawyer (July-August 1993) at 6.
31 Minn. Stat. § 18F.07.
32 Minn. Stat. § 18.291.
33 Minn. Stat. § 21.115.
34 *See* Minn. Stat. §§ 30.104 and 30.201.

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