Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa

Eric M. Hartmann[*]

ABSTRACT: Between 2010–2015, the Iowa Supreme Court decided multiple cases under article 1, section 8 of the Iowa Constitution. However, the court's reasons for deciding issues under the Iowa Constitution were less than principled. The Iowa Supreme Court's current practice of spontaneously interpreting the Iowa Constitution raises significant jurisprudential problems: it does not necessarily require lawyers to adequately argue, brief, and preserve state constitutional issues for appeal, it does not prioritize federal or state constitutional claims in any order, and the approach seems arbitrary on its face. A more principled approach to state constitutional interpretation could remedy these issues. The primacy approach is an approach to state constitutional interpretation under which state supreme courts decide issues under the state constitution when the parties adequately argue and brief the state constitutional issue. This Note argues that the Iowa Supreme Court should adopt the primacy approach to state constitutional interpretation to continue the Court's role as an important part of the United States' federalist system and an imperative protector of Iowans' individual rights, to improve the efficiency of state constitutional interpretation, and to improve the process by which the Iowa Supreme Court reaches issues under the Iowa Constitution.

[*] J.D., University of Iowa College of Law, 2017; B.A., Drake University, 2014. Thank you to Peter Chalik, Elizabeth Heffernan, and Michael Kaufmann for their helpful advice and suggestions throughout the publication process.

I. INTRODUCTION

In a 1977 *Harvard Law Review* article, Justice Brennan argued that state courts[1] should independently interpret their state constitutions to maximize individual liberty.[2] Motivated by federalism, Justice Brennan feared the Supreme Court's approach to constitutional interpretation would inadequately protect individual rights.[3] Justice Brennan urged state courts to independently interpret their state constitutions, and not to simply mirror federal precedent defining the Bill of Rights.[4]

Other scholars and courts have echoed Justice Brennan's rationales for independent state constitutional interpretation. Generally, scholars advocate for independent interpretation of state constitutions based on principles of federalism.[5] Additionally, they note that state courts have a different role than the Supreme Court due to their local concerns, and should be mindful of their role as imperative protectors of individual rights.[6] There are three

1. This Note uses the phrase "state courts" to refer to the courts of last resort in each state that have the power to definitively interpret their state's constitution.

2. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

3. *Id.* at 495.

4. *Id.* at 501.

5. *See infra* Part II.

6. *See infra* Part II.B.

popular approaches to state constitutional interpretation: the primacy approach, the supplemental approach, and the lockstep approach.[7] Under the primacy approach, a state court will always attempt to resolve disputes under the state constitution first when the parties adequately brief and argue the state constitutional issue.[8] Under the supplemental approach, state courts only look to the state constitution if the Federal Constitution does not protect the right at issue.[9] Finally, under the lockstep approach, state courts will only interpret the state constitution if the text of the state constitution is substantially different from its counterpart provision in the Federal Constitution.[10]

Some state courts, like the Iowa Supreme Court, do not apply a method of interpretation but an ad-hoc approach to interpretation, which is not ideal.[11] The Iowa Supreme Court's approach to state constitutional interpretation is neither consistent nor predictable.[12] The Iowa Supreme Court applies an "independent" approach when interpreting Iowa Constitution.[13] This approach has troubled justices on the court because of its "result-oriented" appearance.[14] Moreover, under this "independent"

7. *See infra* Part II.A.

8. *See infra* Part II.B. If the state constitution does not provide the requested relief, the court will then analyze the Federal Constitution. *See infra* Part II.B.

9. *See infra* Part II.B. The Iowa Supreme Court's approach is probably closest to a supplemental approach. *See infra* Part III.E.

10. *See infra* Part II.B. There are two variations of the lockstep approach. Under a more extreme lockstep approach, state courts apply the same meaning to state and federal constitutional provisions even where their text is substantially different. *See infra* Part II.B. In a limited lockstep regime, state courts presume that federal interpretations of federal constitutional provisions are presumptively correct, and only depart from those interpretations when they are persuaded to do so. *See infra* Part II.B.

11. *See infra* Part III.

12. *See, e.g.*, State v. Gaskins, 866 N.W.2d 1, 6 (Iowa 2015) (applying Iowa's approach to state constitutional interpretation, in which the court "reserve[s] the right to apply [state and federal] principles differently" even though the parties did not argue for a different constitutional principle under the Iowa Constitution (quoting King v. State, 797 N.W.2d 565, 571 (Iowa 2011))); State v. Young, 863 N.W.2d 249, 276–77 (Iowa 2015) (noting "federal precedent has a bearing on our interpretation of state law only to the extent its reasoning persuades us"); State v. Short, 851 N.W.2d 474, 491 (Iowa 2014) (noting that the court utilizes the constitutional standards argued by the parties, but "reserve[s] the right" to apply a different standard under the Iowa Constitution even when the parties do not argue for it); State v. Baldon, 829 N.W.2d 785, 790 (Iowa 2013) (deciding a consent-to-search issue under the Iowa Constitution because the Supreme Court had not yet "weighed in" on the issue under the Fourth Amendment); State v. Pals, 805 N.W.2d 767, 771–72 (Iowa 2011) (noting that the court "will engage" in independent analysis of the Iowa Constitution, and will follow federal precedent "solely upon its ability to persuade us with the reasoning of the decision" (quoting State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010))); *Ochoa*, 792 N.W.2d at 266–67 (rejecting "a lockstep or lockstep-lite approach" and adopting an "independent" approach to state constitutional interpretation).

13. *See infra* Part III.

14. *See Gaskins*, 866 N.W.2d at 42 (Waterman, J., dissenting) ("The majority repeats a result-oriented approach of playing 'gotcha' with the State to avoid alternative grounds to uphold a

approach, the court has recently decided issues under the Iowa Constitution that parties did not argue in district court, and did not discuss on appeal.[15] This is problematic because it deprives the court of the benefit of the adversarial system: a record developed in trial court anticipating a state constitutional argument on appeal, as well as creative argument and briefing to guide the court's resolution of potential state constitutional issues. It also runs counter to the idea that a court decides cases and controversies presented to it for resolution, which is common to our judicial system.

To resolve these issues, the Iowa Supreme Court should adopt the primacy approach. Under the primacy approach, state courts decide issues under the state constitution before they reach any issues under the Federal Constitution.[16] To ensure judicial restraint, state courts that employ the primacy approach will only reach state constitutional issues when the parties preserve error, and adequately argue and brief the state issues on appeal.[17] This Note argues that the Iowa Supreme Court should adopt the primacy approach to fully protect Iowans' individual rights under the United States' federalist system because it is consistent with the court's tradition of interpreting the Iowa Constitution with an eye for individual rights.[18]

Part II explores the modern development of state constitutional interpretation and outlines the three most common methods of state constitutional interpretation. Part III analyzes the Iowa Supreme Court's "independent" approach. Part IV argues that the Iowa Supreme Court should abandon its independent approach and adopt the primacy method of state constitutional interpretation.

II. DEVELOPMENT AND METHODS OF STATE CONSTITUTIONAL INTERPRETATION

State courts and state constitutions are imperative protectors of liberty in the United States' federalist system of government.[19] United States Supreme

police search, while forgivingly considering a defendant's bare mention of the Iowa Constitution in district court to be sufficient for our court to make new state constitutional law.").

15. *Id.* at 42–43 n.19 (discussing the court's recent approach when it interpreted the Iowa Constitution and its inconsistent approach to reaching the state constitutional issue in those cases). This Note expresses no opinion on the *Gaskins* court's decision to adopt stricter standards governing police searches of vehicles under the Iowa Constitution that differ from federal constitutional standards. However, the dissenters in *Gaskins*, *Baldon*, and *Pals* certainly had a right to feel that the majority only decided the issues in those cases because it had a particular rule in mind. As Justice Waterman pointed out in *Gaskins*, the court either raised the state constitutional issue *sua sponte* or ignored error preservation rules to get to the state constitutional issue in its recent cases. *Id.*

16. *See infra* Part II.B.

17. *See infra* Part II.B.

18. Although this Note focuses on Iowa, its rationales could easily apply in other states.

19. Brennan, *supra* note 2, at 503. "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." *Id.* at 491. Justice Brennan was irked

Court decisions "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[20] Since the Supreme Court frequently does not broadly apply constitutional protections to individual liberties under the Federal Constitution because it assumes that States will adopt protections under state constitutions where they find the Court's decisions inadequate or unpersuasive, state supreme courts should not simply adopt federal decisions interpreting the Federal Constitution into their state constitutional law.[21] As independent protectors of liberty, state courts should interpret their state constitutions—and should not blindly adopt the meaning of similar or identical provisions in the Federal Constitution.[22]

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because the Supreme Court, in his view, was providing a less-than-ideal scope of constitutional rights under the Constitution. *Id.* at 502–03. Thus, he wrote to encourage a view of federalism that protects individual constitutional rights at both the state *and* the federal level. *Id.* ("Federalism is not served when the federal half of that protection is crippled."). This Note argues that the Iowa Supreme Court should adopt the primacy approach to accommodate these concerns.

20. *Id.* at 502. Justice Brennan noted that state courts disagree with Supreme Court decisions establishing the scope of individual rights under the Federal Constitution. *Id.* at 495–98. He also described "enlighten[ed]" state courts that found individual rights under their state constitution. *Id.* at 498–501. Justice Brennan was not the first legal mind to suggest that state courts should interpret state constitutions to maximize citizens' liberty; other state courts had already written decisions that applied the practice. *See* People v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) (declining to adopt federal precedent altering "*Miranda* and its California progeny" under the California Constitution), *superseded by constitutional amendment*, CAL. CONST. art. I, § 28, *as recognized in* People v. Lessie, 223 P.3d 3 (Cal. 2010); State v. Santiago, 492 P.2d 657, 664 (Haw. 1971) (holding, contrary to federal law, that the Hawaii Constitution required certain protective measures to allow a prosecutor to use an accused's statements to impeach an accused's credibility on the witness stand under *Miranda*). The *Disbrow* court found that the California Constitution should have a different meaning than the Federal Constitution even though the two provisions at issue were substantially the same. *Disbrow*, 545 P.2d at 280. *Compare* CAL. CONST. art. I, § 15 ("Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . ."), *with* U.S. CONST. amend. V ("[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ."). The *Santiago* court found that the Hawaii Constitution had a different meaning than the Federal Constitution under the same circumstances. *Santiago*, 492 P.2d at 664. *Compare id.* ("[N]or shall any person be compelled in any criminal case to be a witness against himself." (citing HAW. CONST. art. I, § 8 of 1968)), *with* U.S. CONST. amend. V ("[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ."). This Note argues that the Iowa Supreme Court should examine the Iowa Constitution's meaning even where its text is identical or substantially similar to the Federal Constitution. *See supra* Part I; *infra* Part IV.

21. Brennan, *supra* note 2, at 501–03 ("This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. . . . [T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them.").

22. *Id.* at 491 ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution.").

A. A State Court's Role in State Constitutional Interpretation

State constitutional interpretation is embedded in the United States' federal system of government. The structure of the Federal Constitution gives the Supreme Court the power to interpret the Federal Constitution.[23] The States necessarily retain the power to interpret their respective constitutions.[24]

The Framers of the Federal Constitution intended state courts to independently interpret state constitutions. James Madison envisioned a federalist system where "States will retain under the proposed Constitution a very extensive portion of active sovereignty . . . ."[25] States retain the police power, and state courts retain the ability to regulate that power under both the state and federal constitutions.[26]

The idea that a state court can and should interpret provisions of its state constitution independently of the Federal Constitution also has strong roots in Supreme Court precedent. In *Cooper v. California*, the Court analyzed the Fourth Amendment's Search and Seizure Clause.[27] The Court held that the Fourth Amendment did not bar prosecutors from introducing evidence at a forfeiture proceeding that officers found when they searched a car they seized from the defendant.[28] However, in his opinion for the Court, Justice Black noted that the "holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."[29]

Other Court opinions and dissents also support the idea that a state court should not confine its analysis of a state constitution's meaning to the exact contours of its federal counterpart.[30] Justice Stevens has even asserted that

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23. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

24. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see infra* note 32.

25. THE FEDERALIST No. 45, at 229 (James Madison) (Lawrence Goldman ed., 2008).

26. *See id.* at 232 ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . ."); *see also* THE FEDERALIST No. 17, at 85 (Alexander Hamilton) (Lawrence Goldman ed., 2008) ("There is one transcendent advantage belonging to the province of the State governments[—]the ordinary administration of criminal and civil justice."); *infra* note 32.

27. *See generally* Cooper v. California, 386 U.S. 58 (1967).

28. *Id.* at 62.

29. *Id.* Justice Black also noted that state constitutional standards are not subject to Supreme Court review. *Id.*

30. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution [under the Fourth Amendment]."); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (noting that the Court's reasoning in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)—which held that a shopping center owner can prohibit persons from distributing handbills unrelated to the center's operation on center premises under the First

courts that "confine" their state constitutions to the parameters that the Supreme Court establishes for the U.S. Constitution have a "misplaced sense of duty."[31] This language—written by the very people who interpret the Federal Constitution—clearly shows that state courts can and should interpret state constitutions independently of the Federal Constitution.

Legal scholars have also argued that state courts should independently interpret state constitutions. State constitutional interpretation is imperative because the Framers only devised the Bill of Rights as an afterthought to the Federal Constitution.[32] Thus, the bills of rights in state constitutions are important because for a period of our nation's history they were the only legal documents protecting citizens' liberty in our federal system.[33]

Scholars also note that state constitutions are important because of their important role in the United States' federalist system. "For this system to function properly, state constitutions can be neither 'clones' nor 'shadows' of the Federal Constitution."[34] This assertion is true even where a state provision

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Amendment—does not prevent a state from holding that the state constitution can prevent that same action); Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." (emphasis omitted)); Lego v. Twomey, 404 U.S. 477, 489 (1972) (noting that the States are free to adopt a more stringent standard under state law than the Sixth Amendment's requirement that the prosecution prove voluntariness by a preponderance of the evidence); Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."). In fact, in 2003, the New Hampshire Supreme Court overruled *Greenwood* under its state constitution, and held that warrantless searches of garbage violate Part I, Article 19 of the New Hampshire Constitution. State v. Goss, 834 A.2d 316, 320 (N.H. 2003).

31. Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting).

32. *See Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1326–29 (1982) (explaining that the original state constitutions were the first legal documents to protect American citizens' liberty, and that the Bill of Rights was merely an afterthought to garner more support for the federal government); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 329–30 (2011) ("State Constitutions are the oldest things in the political history of America," and were the basis for the Federal Constitution.) (quoting 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 413 (2d rev. ed. 1891)); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984) (noting that "most protection of people's rights against their own states entered the federal Constitution only in the Reconstruction amendments of the 1860's"); Robert F. Williams, *Response: Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 904–05 (noting important differences of state constitutions, such as content, quality, and origins).

33. *See, e.g.*, Rachel E. Fugate, Comment, *The Florida Constitution: Still Champion of Citizens' Rights?*, 25 FLA. ST. U. L. REV. 87, 89 (1997) (stating that "when the federal Constitution took effect, only state constitutions protected individuals from government intrusion"); Linde, *supra* note 32, at 174 ("[T]he federal Bill of Rights was drawn from the earlier state declarations of rights adopted at the time of independence . . . ."); Williams, *supra* note 32, at 905 (noting the broad democratic rights that state constitutions give to its citizens and that many state constitutions "were adopted *before* the Federal Constitution").

34. Scott L. Kafker, *America's Other Constitutions: Book Review of* The Law of American State Constitutions, 45 NEW ENG. L. REV. 835, 838 (2011).

and a federal provision are similarly or identically worded.[35] Although a state constitution and the Federal Constitution may have similar or identical wording, a state provision might *not* have the same meaning as the Federal Constitution.[36] Even where state and federal provisions are identically worded, "[t]he right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand."[37] Subpart C outlines the three major approaches to state constitutional interpretation: the primacy approach, the supplemental approach, and the lockstep approach.

B. APPROACHES TO STATE CONSTITUTIONAL INTERPRETATION

The primacy approach requires courts to first analyze adequately argued and briefed state constitutional issues, and then any claims under the Federal Constitution.[38] Many state courts apply the primacy approach.[39] "Courts that use the 'primacy' approach to state constitutions treat federal doctrine regarding parallel constitutional interests as relevant, but not presumptively correct and certainly not binding."[40] Under the primacy approach, U.S.

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35. 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, § 1.03[2], at 1-10–11 (4th ed. 2006); Kafker, *supra* note 34, at 838 ("[E]ven where state and federal clauses are identical in wording, state policy and history *may* counsel a different [state] interpretation that current federal doctrine offers.").

36. *See* Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341, 414 (1985) (suggesting that if state courts fail to construe and apply state constitutions, the bills of rights in state constitutions become surplusage).

37. Linde, *supra* note 32, at 179. The primacy approach's "chief feature is . . . that it prefers to *attempt* to resolve disputes on state grounds, whatever state law turns out to be." 1 FRIESEN, *supra* note 35, § 1.06[3], at 1-50. Notably, "[c]onsistent independence does not necessarily mean 'divergence' from parallel federal rulings: it implies nothing in particular about results. Using independent interpretation, a court might reach the same or a different result than the federal one, using the same or different standards or theories." *Id.* § 1.06[1], at 1-44.

38. *See infra* notes 44–46 and accompanying text.

39. These states include: Arizona, Connecticut, Florida, Hawaii, Idaho, Louisiana, Mississippi, Montana, New Hampshire, North Carolina, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming. *See* 1 FRIESEN, *supra* note 35, § 1.05[1], at 1-28–29 n.115. Arguably, the Iowa Supreme Court has employed something similar to the primacy approach. *See* State v. Baldon, 829 N.W.2d 785, 790 (Iowa 2013) (interpreting article I, section 8 of the Iowa Constitution because "it would be inconsistent with our judicial role under the circumstances to eschew our state constitution and interpret the issue under the Federal Constitution unless relief would not be available to a claimant under our state constitution"). However, *Gaskins* indicates otherwise. *See* State v. Gaskins, 866 N.W.2d 1, 6 (Iowa 2015) (analyzing whether a search of a defendant's car was valid under the Iowa Constitution even though the defendant merely mentioned the state constitution in district court); *see also id.* at 42 (Waterman, J., dissenting) (arguing that "a defendant's bare mention of the Iowa Constitution in district court [is insufficient] for our court to make new state constitutional law"); *infra* Part III.E.

40. 1 FRIESEN, *supra* note 35, § 1.06[1], at 1-43 (footnote omitted) (quoting Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992)).

"Supreme Court opinions have no more weight than opinions from sister states construing a similar clause."[41]

Courts that use the primacy approach will demand that attorneys adequately argue, brief, and preserve state constitutional issues, and not just cite the state constitution as a Hail Mary attempt to secure reversal on appeal.[42] Under the primacy approach, attorneys should make their state constitutional arguments first.[43] When possible, primacy courts will decide issues on state constitutional grounds and only turn to the Federal Constitution if the state constitution does not settle the dispute.[44] Courts that employ the primacy approach "look to common law history, state history, state policy, and [state] constitutional structure as sources for independent interpretation."[45] If a court "conclude[s] that a state provision is 'less' protective than the federal counterpart," then it will address any Fourteenth Amendment issues.[46] Essentially, under the primacy approach, the state's constitution is the primary protector of individual rights.

Under the supplemental approach, state courts only examine state constitutions when the Federal Constitution "does not protect the right asserted."[47] State courts using the supplemental approach presume current federal doctrine is the correct standard for state constitutional law, except when they find persuasive reasons to "depart" or "diverge" from Supreme Court opinions and rationales.[48] State courts that use the supplemental approach "may engage in independent interpretation; unlike primacy courts, [they] do[] so only sometimes, for reasons that [they] announce[]."[49]

Lockstep occurs when state courts conform the meaning of their state constitution's provisions to the corresponding federal provisions.[50] A milder form of the lockstep approach treats federal rulings as presumptively correct,

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41. *Id.*

42. *Id.* § 1.06[1], at 1-44 ("When a court employs the primacy approach, it will demand that state constitutional issues be adequately briefed and analyzed, not merely cited in conjunction with federal analogues.").

43. *Id.*

44. *See id.* For example, if a defendant argued that a police officer's search of his vehicle was invalid under both a state constitution's search and seizure clause and the Federal Constitution's Search and Seizure Clause, the state court would analyze the claim under the state's search and seizure clause first, if the court concluded that the issue was properly preserved for appeal. If the court's interpretation of the state's search and seizure clause did not resolve the case, the court would analyze the Fourth Amendment's Search and Seizure Clause.

45. *Id.*

46. *Id.* § 1.06[1], at 1-44 to -45.

47. *Id.* § 1.06[3], at 1-47. This approach is also sometimes referred to as an "independent" approach. *Id.*

48. *Id.* § 1.06[3], at 1-48.

49. *Id.* Friesen's description of the supplemental approach eerily resembles the Iowa Supreme Court's approach. *See infra* Parts III, IV.

50. 1 FRIESEN, *supra* note 35, § 1.06[2], at 1-45; Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 906 (2011).

rather than conclusively correct.[51] Some state courts even apply forms of the lockstep approach to differently worded state clauses that cover the same general subject matter.[52]

III. IOWA'S INDEPENDENT APPROACH

The Iowa Supreme Court's approach to state constitutional interpretation is inconsistent, and not easily categorized under one of the approaches described in Part II.[53] The court has a "proud tradition of concern for individual rights."[54] The court describes its approach as "independent."[55] The following five cases outline the court's current inconsistent approach to state constitutional interpretation, under which the court has considered issues under the Iowa Constitution when the parties: did not argue issues under the Iowa Constitution, did not argue that the Iowa Constitution should provide a different standard, or did not preserve error on state constitutional arguments.[56]

A. STATE V. OCHOA

State v. Ochoa introduced the Iowa Supreme Court's current approach: the independent approach. In *Ochoa*, the court analyzed whether article I, section 8 prohibited warrantless searches of parolees consistent with *State v. Cullison*,[57] or reflected the Supreme Court's approach in *Samson v. California*,[58] which allowed warrantless searches of parolees without reasonable

51. 1 FRIESEN, *supra* note 35, § 1.06[2], at 1-46 n.190.

52. *Id.* § 1.06[2], at 1-45.

53. State v. Gaskins, 866 N.W.2d 1, 8 (Iowa 2015). *But see* State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010) (applying an "independent approach," and beginning its analysis with the text of the Iowa Constitution).

54. State v. Roth, 305 N.W.2d 501, 510 (Iowa 1981) (McCormick, J., dissenting); *see also* State v. Short, 851 N.W.2d 474, 507 (Iowa 2014) (Cady, C.J., concurring) ("As Iowans, we are deservingly proud of a long history of rejecting incursions upon the liberty of Iowans, particularly because we have so often arrived to the just result well ahead of the national curve.").

55. *Gaskins*, 866 N.W.2d at 7 (exercising its independent authority to construe the Iowa Constitution); *Ochoa*, 792 N.W.2d at 267; *see also Short*, 851 N.W.2d at 481–92 (outlining the principles of the court's independent approach); State v. Baldon, 829 N.W.2d 785, 821–22 (Iowa 2013) (Appel, J., concurring) (noting that the court has not yet adopted the primacy approach, but that it has adopted a "more measured" approach that allows the court to use discretion and decide whether to interpret the Iowa or the Federal Constitution first); State v. Pals, 805 N.W.2d 767, 771–72 (Iowa 2011) ("When, as here, a defendant raises both federal and state constitutional claims, the court has discretion to consider either claim first or consider the claims simultaneously."). "Independent," however, might really just be how the Iowa Supreme Court interprets the Iowa Constitution when it wants to, even when parties have not adequately addressed or preserved a state constitutional issue. *See infra* Part III.A–E.

56. These cases are not an exclusive list; however, they do paint a picture of the court's inconsistent approach.

57. State v. Cullison, 173 N.W.2d 533 (Iowa 1970). The *Cullison* court established that parolees do not lose any Fourth Amendment rights due to their status as parolees. *Id.* at 537.

58. Samson v. California, 547 U.S. 843 (2006).

suspicion.[59] At trial, the district court granted Ochoa's motion to suppress the evidence a police officer discovered in Ochoa's hotel room because his parole agreement conflicted with applicable Iowa Fourth Amendment precedent.[60] The State filed an interlocutory appeal, and the court of appeals reversed the district court.[61]

On further review of the interlocutory appeal, Justice Appel announced the court's current independent approach.[62] The opinion stated that "[w]hen both federal and state constitutional claims are raised, we may, in our discretion, choose to consider either claim first in order to dispose of the case, or we may consider both claims simultaneously."[63] The court compared the text of article I, section 8 to the Fourth Amendment, and noted that the only difference between section 8 and the Search and Seizure Clause was a semicolon in section 8.[64] The court found this punctuation difference caused an unclear linguistic difference between the state and federal clauses.[65] The court then reviewed the history and cases surrounding both the state and federal constitutional provisions.[66] The court also analyzed Fourth Amendment precedent, search and seizure precedent from other state appellate courts, and academic background.[67]

The court held that article I, section 8 did not allow parolees to be subject to "broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search."[68] The court reached a different result than *Samson* for policy reasons: it found the breadth of the test in *Samson* troublingly large, it disagreed with many of the assumptions the U.S. Supreme Court made in *Samson*, and it decided the Federal Constitution did not adequately protect Iowans' homes from unreasonable searches—the primary purpose of article I, section 8.[69] After *Ochoa*, the court's right to use its discretion is the only clear indicator of when it will interpret the Iowa Constitution, and the court does not prioritize the

59. *Ochoa*, 792 N.W.2d at 275–91.

60. *Id.* at 263–64. The trial court also found that Ochoa's consent was not voluntary. *Id.* at 264.

61. *Id.* at 264.

62. *Id.* at 267. "This court has to date generally developed a body of independent state constitutional law in the search and seizure area slowly and cautiously." *Id.* at 265. The court noted that its "older cases embrace[d] . . . a 'lockstep' approach to interpretation of state constitutional provisions." *Id.* at 266. The court specifically abandoned the lockstep approach. *Id.* at 265–67.

63. *Id.* at 267. However, the court treats the phrase "are raised" lightly when it considers whether an appellant has raised a state constitutional claim. *See infra* Part III.C.

64. *Ochoa*, 792 N.W.2d at 268–69.

65. *Id.* at 269.

66. *Id.* at 269–83.

67. *Id.* at 267, 275–87.

68. *Id.* at 291

69. *Id.* at 287–91.

order in which it considers the Iowa Constitution and the Federal Constitution when attorneys raise claims under both documents in a case.[70]

B. STATE V. PALS

In *State v. Pals*, the court again applied its independent approach, even though the parties did not argue for a different standard under the Iowa Constitution.[71] The district court denied Pals' motion to suppress evidence found in Pals' truck after a simple traffic stop, and found him guilty of possession of marijuana.[72] The court of appeals affirmed the district court's decision to suppress the evidence.[73]

On further review, the Iowa Supreme Court found that the sheriff had probable cause to search Pals' car under both the Fourth Amendment and the Iowa Constitution because Pals was committing "an ongoing civil offense."[74] The court then considered whether Pals' consent to the search was voluntary.[75] Pals did not specify whether his consent argument rested on the Iowa Constitution or the Federal Constitution.[76] The court outlined the Fourth Amendment totality-of-the-circumstances test established in *Schneckloth v. Bustamonte*,[77] but also noted that other state courts had declined to apply *Schneckloth* to their state constitutions.[78] The court ultimately applied a stricter test than the federal totality-of-the-circumstances test, and held that Pals' consent was involuntary under the Iowa Constitution.[79] The court analyzed the federal law, the concurring and dissenting opinions associated with the federal test, precedent from other states, Iowa history and cases, and scholarly materials to determine whether Pals' consent was voluntary.[80] Again,

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70. *See supra* note 63 and accompanying text.

71. State v. Pals, 805 N.W.2d 767, 771–72 (Iowa 2011). In *Pals*, the Worth County Sheriff pulled Randall Pals' truck over because he knew Pals' dogs were on the loose. *Id.* at 770. The sheriff requested Pals' insurance, but Pals could not produce any proof of insurance. *Id.* Both men returned to the sheriff's car, where they discussed how Pals could avoid a ticket for lack of insurance. *Id.* The sheriff then asked Pals, sitting in the front seat of the sheriff's police vehicle, if he could search Pals' truck. *Id.* Pals consented, and the sheriff found marijuana in the car. *Id.*

72. *Id.* at 771.

73. *Id.*

74. *Id.* at 775.

75. *Id.* at 777–84.

76. *Id.* at 784 (Waterman, J., dissenting).

77. *Id.* at 777 (majority opinion). Under *Schneckloth* and *Robinette*, federal courts examine whether, under the totality of the circumstances, including knowledge of a right to refuse an officer's consent to search, the consent was voluntary. *Id.* at 777–78. The *Pals* court also acknowledged Justice Stevens' dissent in *Schneckloth*, which noted that the Ohio Supreme Court was free to require officers to notify suspects that they are not required to consent to the search under the Ohio Constitution. *Id.* at 778.

78. *Id.* at 779.

79. *Id.* at 782–84 (holding that Pals' consent was involuntary under "an Iowa version of the *Schneckloth*-type 'totality of the circumstances' test").

80. *Id.* at 776–82.

it is unclear what caused the court to engage in its independent analysis, especially because Pals did not argue for a different standard under the Iowa Constitution.[81]

Justice Waterman dissented in *Pals*.[82] First, he pointed out that Pals never argued that the Iowa Constitution should provide greater protection than the Fourth Amendment.[83] Additionally, he noted that the court traditionally interpreted similarly-worded federal and state provisions identically, unless a party argued for greater protection under the Iowa Constitution.[84] Justice Waterman aptly summarized a problem with the court's independent approach post-*Pals*: it allows the court to decide an issue under the Iowa Constitution even where the parties do not argue for additional protections under the state constitution. After *Pals,* there was not a clear test for when the court will apply its independent approach.

C. STATE V. BALDON

The issue of whether and when to apply the court's independent approach continued in *State v. Baldon*.[85] The court almost set out a principle to guide when it will analyze an issue under the Iowa Constitution, and indicated a preference for interpreting the Iowa Constitution prior to considering any Federal Constitution issues raised by the parties.[86] However, the court stopped short of formally adopting any approach.[87]

In *Baldon,* the district court denied Baldon's motion to suppress the evidence of the marijuana seized from his vehicle, and held that the search of his car and motel room was voluntary because Baldon consented to the

81. *See id.* at 784 (Waterman, J., dissenting) (noting that Pals "never argued our state constitution provided broader protection" before the court requested supplemental briefing).

82. *Id.* at 784–90.

83. *Id.* at 784–85. The dissent quoted Pals' brief, which acknowledged that the Iowa search and seizure clause and the Search and Seizure Clause in the Federal Constitution are "substantially identical in language." *Id.* at 784. Pals also stated that "[t]he Court consistently interprets the scope and purpose of article I, section 8 of the Iowa Constitution to be the same as federal interpretations of the Fourth Amendment." *Id.*

84. *Id.* at 786.

85. State v. Baldon, 829 N.W.2d 785, 789–91 (Iowa 2013). In *Baldon*, a Bettendorf police officer noticed that the license plate of a car parked at The Traveler motel indicated that a parolee, Isaac Baldon III, was staying at the hotel. *Id.* at 787–88. Three police officers knocked on Baldon's hotel room door, and explained that Baldon's parole agreement allowed them to search his motel room and his car. *Id.* at 788. The officer did not find any incriminating evidence on Baldon's person or in his hotel room. *Id.* However, the officer found "a large quantity of marijuana" in Baldon's car. *Id.*

86. *See id.* at 790 ("[I]t would be inconsistent with our judicial role under the circumstances to eschew our state constitution and interpret the issue under the Federal Constitution unless relief would not be available to a claimant under our state constitution.").

87. *See id.* ("[W]e need not comb for textual differences between the Fourth Amendment and article I, section 8 to determine if different results might be achieved under the two constitutions . . . .").

searches when he signed his parole agreement.[88] On appeal, the Iowa Supreme Court only considered whether Baldon's parole agreement constituted consent under article I, section 8 of the Iowa Constitution.[89] The court noted that the U.S. Supreme Court had not yet addressed the consent issue, but that it had upheld a search under a parole agreement on general reasonableness grounds.[90] The court then addressed the two principles it valued in search and seizure cases: parolee rights and the rights of persons who live with parolees.[91] The court was persuaded by decisions of other state courts, which held that parolees had no bargaining power and could not consent to the parole agreements, and held Baldon's agreement invalid under the Iowa Constitution.[92]

Despite the majority opinion's emphasis on the court's duty to interpret the Iowa Constitution before looking to the Federal Constitution, Justice Appel concurred and wrote to reaffirm the court's independent approach.[93] Justice Appel reasoned that the court's independent approach allows it to "choose the clearest path to the resolution of a case."[94] Justice Appel's concurrence left the court's guidelines for applying the independent approach to the court's discretion, and did not articulate when and why the court will analyze the meaning of the Iowa Constitution.[95]

Justice Mansfield brought up yet another issue with the court's independent approach in his dissent: Allowing parties to bypass error preservation rules prevents the party opposing a new test under the state constitution from developing a record on the issue in district court. He dissented because he thought the court's approach to state constitutional interpretation was arbitrary.[96] He also noted: "Baldon is being granted relief under a separate state constitutional argument he never made below. Yet we deny to the State the opportunity to go back to the district court and try to defend the search under our remade case law. Why?"[97] His dissent noted a

88. *Id.* at 788.

89. *Id.* at 790–91.

90. *Id.* at 792.

91. *Id.* at 795.

92. *Id.* at 795–97, 802–03.

93. *Id.* at 803, 821–22 (Appel, J., concurring) ("To date, we have yet to adopt the primacy approach to state constitutional law. . . . Instead, we have adopted a more measured approach under which we are free to consider either state or federal constitutional provisions first.").

94. *Id.* at 822.

95. *See id.* (noting that the court has "adopted a more measured approach under which [it] is free to consider either state or federal constitutional provisions first").

96. *Id.* at 843 (Mansfield, J., dissenting) ("The issue is not whether we have the authority to independently interpret our own constitution. Clearly we do. Nor is the issue whether we are the final arbiters of the meaning of that constitution. Clearly we are. The issue is whether this substantial authority should be exercised . . . with a degree of self-imposed modesty and restraint."). This Note argues that the Iowa Supreme Court should adopt the primacy approach, and only interpret the Iowa Constitution when adequately argued and briefed by the parties.

97. *Id.* at 847.

practical problem with the court's independent approach: It does not encourage the parties to develop a record in district court to allow a more thorough review.[98]

D. STATE V. SHORT

In *State v. Short*, the court again applied its independent approach and interpreted the Iowa Constitution.[99] The court had some clear reasons to interpret the Iowa Constitution in *Short*—Short argued for it, the district court discussed *Ochoa* in its ruling, and Short briefed the issue.[100] At Short's trial, the district court denied Short's motion to suppress evidence because it held that the police had reasonable suspicion to search the home "within the [terms] of the probation agreement."[101] On further review, the Iowa Supreme Court declined to follow the U.S. Supreme Court, and held that warrantless searches of probationers' homes violate article I, section 8 of the Iowa Constitution.[102] The court noted that recent cases, including *Ochoa*, *Pals*, and *Baldon*, outlined its independent approach and decided to reaffirm that approach.[103]

E. STATE V. GASKINS

The court found a stricter standard under the Iowa Constitution in *State v. Gaskins* even though Gaskins did not argue for a different standard under the Iowa Constitution. In *Gaskins*, the State of Iowa charged Gaskins with "possessing marijuana with intent to deliver, knowingly transporting a revolver in a vehicle, and failing to affix a drug tax stamp" to his marijuana.[104] Gaskins moved to suppress the evidence the State obtained when an officer

98. *See id.* (arguing that the State could not have argued that the search was enforceable under both constitutions in district court because the court had not yet decided *Ochoa*).

99. State v. Short, 851 N.W.2d 474, 478–80 (Iowa 2014). In *Short*, the Plymouth County police initially responded to a burglary, where burglars had taken two televisions and two jewelry boxes after breaking a doorjamb to gain entry. *Id.* at 476. The police used a signature on a stolen gift card receipt from a restaurant to obtain a search warrant to search Justin Short's girlfriend's residence. *Id.* The warrant, however, did not have the correct address. *Id.* When the police showed up at the wrong address, the resident at the incorrect address told police that people were coming and going from an adjacent apartment "all the time." *Id.* The police called the owner of the adjacent apartment, and discovered that Short and his girlfriend lived there. *Id.* They called the judge who issued the search warrant and the judge modified the warrant to allow the police to search the apartment. *Id.* The police searched the apartment, and found two televisions, two jewelry boxes, and the stolen gift card. *Id.* at 477.

100. *Id.* at 478–80.

101. *Id.* at 477. The court of appeals upheld Short's appeal, and the Iowa Supreme Court granted further review. *Id.*

102. *Id.* at 506.

103. *Id.* at 492. The court also reaffirmed its right to interpret the Iowa Constitution to provide greater rights than the Federal Constitution even where the parties did not advocate for greater protections. *Id.*

104. State v. Gaskins, 866 N.W.2d 1, 4 (Iowa 2015).

searched Gaskins' locked safe in his car.[105] Gaskins argued that the warrantless search of his locked safe violated his right to privacy protected under article I, section 8 of the Iowa Constitution and the Fourth Amendment.[106] However, Gaskins did not specifically argue that the Iowa Constitution provided greater rights than the Federal Constitution.[107] The district court denied Gaskins' motion because it found the search fell within the Fourth Amendment's search-incident-to-arrest exception to the warrant requirement under *Arizona v. Gant*.[108]

On further review, the Iowa Supreme Court again employed its independent approach to interpret the Iowa Constitution.[109] Yet again, the court interpreted article I, section 8 of the Iowa Constitution to give citizens greater protection than the Fourth Amendment.[110] The court rejected one of *Gant*'s reasons for allowing a warrantless search-incident-to-arrest, but adopted a rule allowing police to search a vehicle within reaching distance of the driver—*Gant*'s "'reaching distance' rationale."[111] The court "conclude[d] the search of Gaskins' locked safe was not a valid [search incident to arrest] under article I, section 8."[112]

Justice Waterman dissented. Although he disagreed with the merits of the majority opinion, he also wrote separately to urge the majority to adopt a more principled approach to state constitutional interpretation: neutral divergence criteria.[113] His dissent introduced another major concern with the

105. *Id.*

106. *Id.*

107. *Id.* at 6. In *Gaskins*, Jesse Gaskins was driving a van with expired license plates. *Id.* at 3. A Davenport police officer noticed the expired plates, and stopped Gaskins' van. *Id.* The officer noticed the smell of burnt marijuana, and asked Gaskins about the smell. *Id.* Gaskins initially lied about having any marijuana in the van. *Id.* However, after the officer told Gaskins there was a drug dog on duty in Davenport that night, Gaskins produced "a partially-smoked marijuana blunt from the van's ashtray." *Id.* After a second officer arrived, the officers arrested Gaskins and placed him in a police car. *Id.* The arresting officer told the second officer to search the van to look for drugs, guns, and other illegal contraband. *Id.* The second officer found a locked safe between the driver's seat and the rear passenger seats. *Id.* The officer found a key to the safe on the key ring with the van's key, which was still in the van's ignition. *Id.* The officer unlocked the safe, and "found a loaded handgun with a defaced serial number, several baggies of raw marijuana, several pipes, and some large plastic freezer bags that smelled of marijuana." *Id.* at 3–4.

108. *Id.* at 4; Arizona v. Gant, 556 U.S. 332, 335 (2009).

109. *Gaskins*, 866 N.W.2d at 6.

110. *Id.* at 13.

111. *Id.* This rule was based on *Gant*'s "'reaching distance' rationale." *Id.*

112. *Id.* at 14.

113. *Id.* at 50 (Waterman, J., dissenting) ("In our prior cases debating the use of [neutral divergence] criteria, the State had been blindsided by the majority's departure from settled federal precedent . . . ."). The neutral divergence criteria in Justice Waterman's dissent are: (1) "Development of the claim in the lower courts"; (2) "constitutional text"; (3) "constitutional history, including reports of state constitutional debates and state precedent"; (4) "decisions of sister states, particularly when interpreting similar constitutional text"; and (5) "practical consequences, including the need for national uniformity." *Id.* at 51–52. This Note does not

court's independent approach: "illegitimate pleas for result-oriented departures from federal law."[114] Essentially, his dissent argued that appellants cite the Iowa Constitution because they hope the court will interpret the Iowa Constitution to provide a test under the state constitution that will reverse their conviction, not because they legitimately believe the reasons for the U.S. Supreme Court's decisions are flawed, wrong, or otherwise inadequately protect individual rights.[115]

Justice Appel concurred to reaffirm Iowa's independent approach. He also refuted the idea that the court should adopt neutral divergence criteria.[116] Thus, even after *Gaskins*, it is unclear when the Iowa Supreme Court will apply its approach.

The Iowa Supreme Court's independent approach is not easily categorized as one of the approaches outlined above.[117] It is not a lockstep approach of any kind because it does not conform the Iowa Constitution's meaning to the Federal Constitution's meaning.[118] It is also not a form of the primacy approach because it does not prioritize deciding issues under the Iowa Constitution prior to the Federal Constitution when properly argued in district court and preserved for appeal.[119] It is probably closest to a supplemental approach because the court appears to reach the Iowa Constitution only when it decides a federal constitutional standard is inadequate.[120] The court retains discretion to consider the Iowa Constitution, however, the court does not require parties to adequately brief or preserve the state constitutional issues in district court before it decides them.[121] The approach has some clear shortcomings: It requires the court to answer questions parties do not present to it, ignoring the benefits of the adversary

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advocate for neutral divergence criteria because they problematically assume that a state court is obligated to follow federal precedent. This Note instead advocates for a different principled approach to state constitutional interpretation that does not assume a state court is obliged to follow federal precedent when it interprets its state's constitution. The reasons discussed in Justice Appel's *Gaskins* concurrence aptly show that divergence criteria presume federal decisions are correct, which is contrary to our federal system of government. *See infra* note 154 and accompanying text; *see also* Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting) (discussing a "misplaced sense of duty" when a state court "confines" its interpretation of its state constitution to "boundaries marked by [the Supreme Court] for the Federal Constitution").

114. *Gaskins*, 866 N.W.2d at 52.

115. This Note expresses no opinion about whether those arguments are illegitimate.

116. *Gaskins*, 866 N.W.2d at 22–23 (Appel, J., concurring). Justice Appel found neutral divergence criteria problematic because the word diverging presumes that U.S. Supreme Court constitutional decisions are correct "and should generally be adopted by state supreme courts." *Id.* at 22.

117. *See* State v. Short, 851 N.W.2d 474, 515 (Iowa 2014) (Waterman, J., dissenting) ("What label best describes the majority's approach today?").

118. *See supra* notes 50–52 and accompanying text.

119. *See supra* notes 38–46 and accompanying text.

120. *See supra* notes 47–49 and accompanying text.

121. *See supra* Part III.A–E.

system; it causes the court to apply new tests under the state constitution to a record the parties did not develop in anticipation of a new test in district court; and it lacks a sense of principle and self-restraint. Part IV argues that the court should adopt the primacy approach to address these issues.

IV. A PRIME SOLUTION

The Iowa Supreme Court should abandon its independent approach to state constitutional interpretation and adopt the primacy approach. The primacy approach would allow the court to zealously guard the rights of Iowans under the Iowa Constitution consistent with its stated tradition in past cases[122] and the United States' federalist system of government. Adopting the primacy approach would also eliminate the jurisprudential inconsistencies with the court's current approach without limiting the court's goal to guard individual rights of Iowans under the Iowa Constitution.[123] Finally, the primacy approach would allow the court to reach a result that was argued for and anticipated by the parties, and would give the court a degree of "self-imposed modesty and restraint."[124] This Part outlines why the primacy approach is an ideal approach for the Iowa Supreme Court to adopt, why the lockstep and supplemental approaches are not better substitutes for the court's independent approach, and how Iowa lawyers and the Iowa Supreme Court can implement the primacy approach.

A. ARGUMENTS FOR THE PRIMACY APPROACH

Many rationales support the primacy approach. Historically, many state bills of rights were established before the federal Bill of Rights.[125] This shows that many states intended to protect their citizens from types of government behavior before the Federal Bill of Rights was adopted. Additionally, many "criminal procedural rights were also recognized by the states before they were incorporated into the [F]ourteenth [A]mendment."[126] Since state courts frequently develop bodies of law before the U.S. Supreme Court adopts similar rules under federal law, state courts should prioritize interpreting their state constitutions. The U.S. Supreme Court can then develop better

122. *See supra* note 54 and accompanying text.

123. *See supra* Part III (discussing the inconsistences). Notably, this would not foreclose the court's ability to consider "issues of public importance" in which "a decision would provide guidance to law enforcement personnel and judicial officers faced with similar situations in the future." State v. Hernandez-Lopez, 639 N.W.2d 226, 235 (Iowa 2002) (considering a facial challenge to Iowa Code section 804.11, even though the appellant's as-applied challenge was moot).

124. State v. Baldon, 829 N.W.2d 785, 843 (Iowa 2013) (Mansfield, J., dissenting).

125. 1 FRIESEN, *supra* note 35, § 1.03[1], at 1-7 to -8.

126. *Id.* § 1.03[1], at 1-9.

federal protections based on protections states establish for similarly worded state constitutional provisions.[127]

Second, "state policy and history may counsel a different interpretation than current federal doctrine offers."[128] In essence, a state's history and local policy concerns may offer better insight to a state constitutional provision's meaning than the U.S. Supreme Court's interpretation of a similarly worded federal provision.[129] The primacy approach allows a state court to reach a decision that is more suited to the state because it allows the court to examine the law, history, and policy of the state implicating relevant state constitutional provisions.

Third, the primacy approach encourages diversity between state and federal constitutional doctrine. Since the U.S. Supreme Court is frequently limited by the national effect of its decisions, state courts should examine the proper limits of local government, which is an intended consequence of the United States' federalist system.[130] When state courts interpret their state constitutions as stand-alone documents, and not just mirrors of the Federal Constitution, they ensure that their citizens receive two layers of protection from government, another intended and beneficial consequence of our federal system.[131]

Fourth, the primacy approach reduces "result-oriented" concerns that a court may face when interpreting its state constitution.[132] State courts that use the primacy method merely comply with the United States' federalist government structure because the Fourteenth Amendment only mandates that states apply, at minimum, the protections the U.S. Supreme Court gives the Federal Bill of Rights.[133] A state court examining its state constitution under the primacy approach examines state constitutional issues properly presented to it for consideration regardless of whether the result of its interpretation will lead to the same or a different result than the U.S. Supreme Court's interpretation of a similar provision of the Federal Constitution.

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127. *Id.* Important commentators have encouraged this practice. *See generally* Brennan, *supra* note 2 (arguing that when a state court interprets its state constitution, it can be a laboratory of democracy and can protect citizens' rights beyond the U.S. Supreme Court's federal floor).

128. 1 FRIESEN, *supra* note 35, § 1.03[2], at 1-11.

129. *Id.*

130. *Id.* § 1.03[3], at 1-12. Moreover, if state courts routinely interpret and apply state constitutions, stability and clarity in local laws will emerge in the state courts' respective communities because lawyers, judges, and law enforcement will know whether the state court will follow its own precedent or the most recent U.S. Supreme Court opinion. *Id.* at 1-13.

131. *Id.* § 1.03[3], at 1-13.

132. *See supra* Part II.C.

133. *See* Mills v. Rogers, 457 U.S. 291, 300 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.").

B. ARGUMENTS AGAINST THE PRIMACY APPROACH ARE UNPERSUASIVE

The arguments against the primacy approach allege that the primacy approach: creates uncertainty in the law, is unprincipled, and is simply a way to achieve results different than federal constitutional law with which a state court disagrees. However, all are unpersuasive.

The argument that state courts should not use the primacy approach because independent constitutional interpretation makes things "more complicated" for lawyers and government officials is extremely unpersuasive.[134] "The argument for making uniformity of rights the highest priority also denies another basic premise of federalism, as it would result in a functional repeal of great portions of democratically created state constitutions, depriving states of sovereignty as well as local control."[135] Americans adopted the United States' federal system over two-hundred years ago, and state supreme courts should not shy away from creating a different rule simply for the sake of uniformity.[136] When the United States adopted a federalist government, its citizens (and lawyers) accepted the difficulties and differences that accompany the federalist structure.

Moreover, the primacy approach does not encourage result-oriented decisions. Rather, primacy should mitigate concerns that a decision is result-oriented when state courts correctly apply the primacy approach.[137] "Far from being unprincipled, a state court that undertakes seriously to develop its own law in every case where such claims are raised is fulfilling its responsibility to decide state law *and* acting consistently with the expectations of the state's founders."[138] Courts employing the primacy approach do not reach decisions because of a certain result; they reach decisions solely because of their duty to decide issues under the state constitution when those issues are properly preserved and argued on appeal.[139]

Additionally, interpreting state constitutions before turning to the Federal Constitution to decide a case has many benefits. It comports with "[t]he normal hierarchy of judicial review[, which] encourages courts to dispose of cases on grounds other than federal constitutional grounds, whenever possible."[140] If a state court can dispose of a federal claim by basing its ruling on the state constitution, it assures an authoritative state law decision

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134. *See* 1 FRIESEN, *supra* note 35, § 1.03[4][b], at 1-15.

135. *Id.* § 1.03[4][a], at 1-14 (citing Sanders v. State, 585 A.2d 117, 145 (Del. 1990)).

136. *Id.* § 1.03[4][b], at 1-15.

137. *Id.* § 1.03[4][c], at 1-16.

138. *Id.*

139. Justices also cannot avoid political pressures that accompany protecting individual rights, just as they cannot prevent fears that the U.S. Supreme Court may withdraw federal protections over individual rights. *Id.* § 1.03[4][e], at 1-17 to -18. It is simply an argument that applies to most judges in most states, regardless of what type of jurisprudential theories a particular judge or court uses to decide cases.

140. *Id.* § 1.04[2], at 1-20.

and "avoids the risk of an erroneous federal ruling . . . ."[141] Moreover, interpreting state constitutions first allows state judges to uphold their oath to interpret their state's constitution and use their power as the final arbiter of that document.[142] Additionally, the primacy approach avoids the situation where a state court makes a ruling on both federal and state constitutional grounds, the U.S. Supreme Court reverses that ruling, and then the state court upholds its original ruling based solely on the state constitution.[143]

C. THE SUPPLEMENTAL AND LOCKSTEP APPROACHES ARE UNPERSUASIVE

1. The Cons of the Lockstep Approach Are Too High

On its face, the lockstep approach's primary benefit is uniformity. When identical words have identical meanings, the law is necessarily clearer. However, the lockstep approach also has drawbacks: Applying the approach essentially makes state constitutional provisions meaningless when two provisions are worded the same; and the approach can unnecessarily tie decisions under a state constitution to the Federal Constitution in a way that could cause the Supreme Court to reverse the state court's decision.

"To the extent that a state court treats a Supreme Court opinion as the authoritative, rather than only persuasive, source for interpreting a particular state provision, the state provision becomes essentially superfluous."[144] Moreover, when a court interprets its state constitution in conformity with the Federal Constitution, the U.S. Supreme Court can potentially review those cases and override state judges.[145] This result is undesirable because it interferes with the federalist concept that state supreme courts are the final arbiters of their respective state constitutions.

An example of this is *Delaware v. Van Arsdall*. In *Van Arsdall*, the U.S. Supreme Court considered whether the Delaware Supreme Court correctly applied the Confrontation Clause in the Fifth Amendment.[146] The Delaware

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141. *Id.* Under the primacy approach, courts can be efficient and avoid claims that their decisions are result-oriented by declining to "formally decide the validity of [a constitutional challenge] under federal law," and simply explore relevant federal precedent for persuasive guidance when deciding a matter under the state constitution. *Id.* § 1.04[5], at 1-28.

142. *Id.* § 1.04[3], at 1-21. This Note does not argue that the Iowa Supreme Court should interpret the state constitution whenever possible. Instead, this Note argues that the Iowa Supreme Court should adopt the primacy approach because it is *more principled* that the court's current approach.

143. *Id.* § 1.04[4], at 1-24. "[A] rule of routine reliance on available state law in preference to federal—even when the rules run on parallel tracks—avoids any doctrinal showdown when federal precedent does prove to be undesirable." *Id.* § 1.06[3], at 1-50; *see also supra* notes 77–79 and accompanying text.

144. 1 FRIESEN, *supra* note 35, § 1.06[2], at 1-46.

145. *Id.* (citing Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (explaining the Supreme Court can review state court judgments under the federal constitution absent a plain statement that the decision is under the state constitution)).

146. *See generally* Delaware v. Van Arsdall, 475 U.S. 673 (1986).

Supreme Court held that the trial court violated the Confrontation Clause "per se" when it prevented a defendant from cross-examining a witness.[147] On appeal, the Supreme Court disagreed with the Delaware Supreme Court, and remanded the case to allow the Delaware Supreme Court to analyze whether the trial court's error was harmless beyond a reasonable doubt.[148]

Justice Stevens dissented and asserted that the Court wrongly presumed the Delaware Supreme Court's decision rested on federal constitutional grounds.[149] Justice Stevens believed the Court's presumption conflicted with the Court's limited subject matter jurisdiction.[150] He was also concerned that the Court may have erroneously overturned the Delaware Supreme Court because it was not clear the court based its ruling on federal constitutional grounds.[151] Justice Stevens' dissent in *Van Arsdall* aptly illustrates the problem a court can face when employing the lockstep approach.[152] Lockstep courts that unnecessarily tie their state's constitutional law to federal constitutional law could have their opinions reversed and remanded if the Supreme Court believes the state court improperly applied federal law or a changed the federal doctrine.[153]

However, the argument that a state provision becomes superfluous under the lockstep approach is not always true. A state, of course, could have written its constitution and intended to create the same protections as similar provisions in the Federal Constitution. Yet, the lockstep approach could very easily encourage courts to blindly follow federal precedent when two provisions are similarly worded without conducting any critical research to determine whether the state constitutional provision means something

147. *Id.* at 677–78.

148. *Id.* at 684 (White, J., concurring).

149. *Id.* at 689–90 (Stevens, J., dissenting). Justice Stevens thought the Court's presumption was wrong because he disagreed with the Court's holding in *Michigan v. Long*. *Id.* In *Long*, the Court held that it presumes state court decisions that use both state and federal constitutional case law rest on the Federal Constitution unless there is a "plain statement" that the state court based its holding on the state constitution. *Long*, 463 U.S. at 1041.

150. *Van Arsdall*, 475 U.S. at 692 (Stevens, J., dissenting) ("Like all other federal courts, this Court has only the power expressly given it."); *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."); *id.* § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ."); *id.* (establishing that the Supreme Court's jurisdiction is usually limited to appellate review, but the Court has original jurisdiction when a case "affect[s] Ambassadors, other public Ministers and Consuls, and [cases] in which a State shall be a Party").

151. *Van Arsdall*, 475 U.S. at 700 (Stevens, J., dissenting).

152. *See supra* note 149 and accompanying text.

153. *See* 28 U.S.C. § 1257(a) (2012) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.").

different.[154] The idea that state constitutions should blindly copy the Federal Constitution is "[p]ure applesauce."[155]

The lockstep approach is also plagued with more practical problems. Assume a state court adopts the U.S. Supreme Court's interpretation of the Search and Seizure Clause for its state constitution's search and seizure clause. When the U.S. Supreme Court changes the federal interpretation, the last state court opinion on the issue becomes "stranded doctrine."[156] In that hypothetical situation, the state's bench and bar can become unsure whether to follow the U.S. Supreme Court's most recent decision or the state court's "stranded doctrine."[157]

In addition to the "stranded doctrine" issue, the lockstep approach allows the U.S. Supreme Court to overrule a state's precedents because the state precedents become tied to federal meaning.[158] Some state court judges object to the lockstep approach because the U.S. Supreme Court can change the state's constitutional law by changing its interpretation of the Federal Constitution.[159] The lockstep approach essentially abrogates the state court's authority to be the final arbiter of its state constitution, which is the state court's duty.

2. The Supplemental Approach is Also Unpersuasive

The supplemental approach—reaching the state constitution only when the federal constitution is unpersuasive—is also problematic. As mentioned above, when a state court chooses not to interpret the state constitution and bases its ruling on federal grounds, the U.S. Supreme Court could reverse the

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154. State courts, of course, could intend this result. However, allowing the U.S. Supreme Court to dictate the meaning of a state constitution is not consistent with the United States' federalist structure of government.

155. King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

156. 1 FRIESEN, *supra* note 35, § 1.06[2], at 1-46 n.193; *see also* State v. Ochoa, 792 N.W.2d 260, 266 (Iowa 2010) (noting that the Iowa Supreme Court's previous cases engaging in "[t]he lockstep approach has resulted in instances of whipsawing where this court was in the awkward position of reversing recent precedent in response to Supreme Court cases").

157. *See Ochoa*, 792 N.W.2d at 266 (noting how the lockstep approach required the court to change interpretations of the Iowa Constitution whenever the U.S. Supreme Court changed a similar provision in the Federal Constitution); *see also In re* J.C., No. 14-0357, 2015 WL 2089363, at *7 (Iowa Ct. App. May 6, 2015), *aff'd*, 877 N.W.2d 447 (Iowa 2016) (Tabor, J., dissenting). Judge Tabor noted that although *Ohio v. Clark*, 135 S. Ct. 2173 (2015), may give courts more guidance on when out-of-court statements are admissible at trial, she noted, "we are currently bound to follow our supreme court's ruling in *Bentley*." *Id.* at 7 & n.6. Even though Judge Tabor was right, and *Clark* did give courts more guidance on out-of-court statements, her dissent in *In re J.C.* illustrates how any state district court or appellate court could become bound to apply stranded doctrine.

158. 1 FRIESEN, *supra* note 35, § 1.06[2], at 1-46 to -47 & n.194 (citing People v. Collins, 475 N.W.2d 684, 685 & n.2 (Mich. 1991) (applying the most recently adopted Supreme Court search and seizure doctrine to Michigan's search and seizure clause)).

159. *Id.* § 1.06[2], at 1-47 (citing State v. Seibel, 471 N.W.2d 226, 237 n.1 (Wis. 1991) (Bablitch, J., dissenting) (arguing that "the framers of the Wisconsin Constitution, and the voters who approved it, did not intend Art[icle] I, Sec[tion] 11, to be a 'potted plant'")).

state supreme court's decision.[160] Additionally, when a court only selectively decides to interpret the state constitution, there is not "a reliable body of state doctrine to guide . . . lower courts and public officials."[161] Finally, when a state court selectively uses the state constitution to obtain particular results, judges and commentators allege unprincipled approaches.[162]

This approach might be best for a

> state court that appreciates the powers and obligations that inhere in the state constitution . . . [and is] disposed to place a high value on uniform national rules in matters of individual constitutional rights. A court with this philosophy might find the supplemental . . . method attractive, because it . . . allows sufficient respect for federal law and its (theoretically at least) consistent rules, while reserving a more modest role for state innovation when appropriate.[163]

The supplemental approach is inconsistent with the United States' federalist system because it assumes federal constitutional law is correct when interpreting a state constitution.[164]

D. IMPLEMENTING THE PRIMACY APPROACH

Two groups must take action for the Iowa Supreme Court to successfully adopt the primacy approach. First, lawyers must argue issues under the state constitution—they must make the arguments necessary to develop a record in district court, and subsequently brief the state constitutional arguments for the Iowa Supreme Court.[165] Lawyers should also argue and brief the state constitutional issues just as well as their additional issues for appeal.[166]

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160. *Id.* § 1.06[2]–[3], at 1-46 n.191, 1-48; *see also supra* Part II.C.

161. 1 FRIESEN, *supra* note 35, § 1.06[3], at 1-48.

162. *Id.* Elisabeth Archer discussed principled interpretation criteria state courts should employ when they decide whether to deviate from the U.S. Supreme Court's interpretation of the Federal Constitution when the state constitutional provision and the federal constitutional provision have materially similar text. Elisabeth A. Archer, Note, *Establishing Principled Interpretation Standards in Iowa's Cruel and Unusual Punishment Jurisprudence*, 100 IOWA L. REV. 323, 352–53 (2014). However, the Iowa Supreme Court balked when the State urged it to adopt these factor-based analytical standards. *See* State v. Gaskins, 866 N.W.2d 1, 7 n.4 (Iowa 2015) ("We recently addressed and rejected the notion of [neutral interpretive principles or divergence criteria], and do so again here."). The Iowa Supreme Court believes a criteria approach "distorts" constitutional interpretation because criteria approaches only encourage discussion of the factors in the criteria analysis, and not the broader values of the constitutional provision at issue. State v. Short, 851 N.W.2d 474, 490 (Iowa 2014) (citing ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 162, 167–68 (2009)). In addition, "[t]heorists have often pointed out that it is unnecessary—unless a court places itself in this position—to *justify* (as opposed to simply discuss) any 'divergence' from federal law, or to characterize federal analysis as 'flawed' as a stepping-stone to independent analysis." 1 FRIESEN, *supra* note 35, § 1.06[3], at 1-50.

163. 1 FRIESEN, *supra* note 35, § 1.06[3], at 1-49 to -50.

164. *See supra* Part III.C; *supra* Part IV.A–B.

165. *See supra* Part II.B.

166. *See supra* Part II.B.

Second, the Iowa Supreme Court must prioritize arguments that advance issues under the Iowa Constitution, meaning it must decide what Iowa's Constitution means before it turns to any federal question in a case.[167] Importantly, this part of the primacy approach does *not* require the court to decide that a state provision means something different than the Federal Constitution. After considering the parties' arguments and the relevant text, history, precedent from other states and the Supreme Court, and state policy, the court is free to find that the Iowa Constitution means the same thing as a similar provision of the Federal Constitution.

Unless attorneys have adequately argued, briefed, or preserved the state constitutional issue for review, the court should decline to consider the state constitutional issue.[168] If the state constitutional issue resolves the case, the court should decline to consider any issues under the Federal Constitution[169]—this will avoid potential reversals on appeals to the U.S. Supreme Court and fit with normal principles of constitutional interpretation, including the doctrine of constitutional avoidance.[170]

The court's current independent approach has some troublesome inconsistencies. One cannot allege that the Iowa Supreme Court neglects the Iowa Constitution, and one cannot say that the Iowa Supreme Court blindly follows the Supreme Court's precedent on the Federal Constitution.[171] But sometimes the court uses the Iowa Constitution as a sword—one it picks up without prompting from either party—and not a shield a party requests the court to apply to the facts of a particular case. The court merely reserves the right to interpret the state constitution.

The primacy approach will both remedy the inconsistencies of the Iowa Supreme Court's independent approach and benefit the bench and bar.

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167. *See supra* Part II.B. The court will develop a critical body of state law that the bench and bar can rely on when it decides issues under the state constitution first.

168. This requirement is important because it should ensure that the court exercises the appropriate degree of "self-imposed modesty and restraint" Justice Mansfield advocated for in *Baldon*. State v. Baldon, 829 N.W.2d 785, 843 (Iowa 2013) (Mansfield, J., dissenting). The primacy approach should not mean that the court routinely disregards normal error preservation principles and rules. The court should require state constitutional issues to be fully developed in the lower courts, as well as argued and briefed on appeal, to make sure the court's decision benefits from our adversarial judicial system. For a good example of attorneys properly presenting issues for appellate review, and the court addressing those claims, see State v. Senn, 882 N.W.2d 1, 6 (Iowa 2016) (plurality opinion) ("Senn asks us to hold . . . that the right to counsel under article I, section 10 of the Iowa Constitution attached before the State filed criminal charges against him while he was under arrest for suspicion of drunk driving . . . . The State contends . . . that the constitutional right to counsel had not yet attached . . . .").

169. *See supra* Part II.B.

170. Chief Justice Cady did not join the plurality or the dissent in *Senn*. He instead opined that Senn could not show constitutional harm even with a right to counsel that applied prior to his criminal charge, and declined to reach a constitutional issue under the doctrine of constitutional avoidance. *Senn*, 882 N.W.2d at 32 (Cady, C.J., concurring).

171. *See supra* Part III.

Under the primacy approach, the court can continue to occupy its important role as a guardian of Iowans' individual rights under the Iowa Constitution.[172] Additionally, lawyers will know that if and only if they adequately argue, brief, and preserve the state constitutional issues, the court will decide those issues. Parties will not receive unexpected results under the state constitution.[173] If the court consistently applies the primacy approach, the bench and bar will benefit from the certainty of state law—regardless of whether that state law substantively differs from its federal counterpart.

V. CONCLUSION

State courts play an important role as protectors of individual rights because of their power to interpret state constitutions. The Iowa Supreme Court's current independent approach, however, leaves the bench and bar in the dark on a number of issues. District court judges deciding issues under the Federal Constitution are unsure whether they will be reversed on appeal based on a previously un-argued state constitutional claim. Moreover, the court has delivered unexpected results under the Iowa Constitution, even when attorneys did not argue for those results. The independent approach fosters uncertainty and frustration because it does not dictate when the court should or should not decide issues under the Iowa Constitution.

Adopting the primacy approach would solve these issues. The court would continue its role as the stateside protector of individual rights in our federalist system. However, by only deciding state constitutional questions when they are adequately argued, briefed, and preserved for appeal, the Iowa Supreme Court can develop a more consistent approach to state constitutional interpretation. With adequate argument, briefing, and a developed record, the court should be able to efficiently decide the meaning of state constitutional provisions, and provide the bench and bar with a solidified body of state constitutional law.

When the Framers created the U.S. Supreme Court, they intended its Justices to be the final arbiters of the Federal Constitution. Those Justices provide a great federal floor for individual rights. Likewise, when the framers of the Iowa Constitution drafted the Iowa Constitution, they intended the justices of the Iowa Supreme Court to perform a similar role. When lawyers adequately argue, brief, and preserve state constitutional issues for the Iowa Supreme Court, the justices should decide those issues—any other approach is inconsistent with the United States' federalist structure of government.

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172. *See supra* Part II (noting the history of state court protections of individual rights under state constitutions).

173. *See* State v. Pals, 805 N.W.2d 767, 785 (Iowa 2011) (Waterman, J., dissenting) (noting that the court's decision to interpret the Iowa Constitution was problematic because neither party advocated for different rights under the Iowa Constitution).