THE *EFFLER* SHOT ACROSS THE BOW: DEVELOPING A NOVEL STATE CONSTITUTIONAL CLAIM UNDER THE THREAT OF INEFFECTIVE ASSISTANCE OF COUNSEL

TABLE OF CONTENTS

I. INTRODUCTION

In April 2009, the Iowa Supreme Court found itself in the national spotlight when it held the state's statutory prohibition on same-sex marriage was unconstitutional under Iowa's equal protection clause.[1] The opinion described the court's long history of protecting its citizens' civil liberties—often well before the rest of the nation, or the United States Supreme Court, had extended similar rights.[2] The Iowa Supreme Court, like most state supreme courts, has repeatedly stated it "zealously guards" its right to independently determine a citizen's rights under the state constitution.[3] Naturally, some litigants often rely upon this judicial

1. *See* Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

2. *See id.* at 877. The court noted Iowa had rejected the concept of slaves being considered property seventeen years before the United States Supreme Court's infamous *Dred Scott* decision. *Id*. (citing *In re* Ralph, 1 Morris 1, 9 (Iowa 1839)). Likewise, the court began to dismantle segregation in public schools eighty-six years before the Court's *Brown v. Board of Education* decision. *Id*. (citing Coger v. Nw. Union Packet Co., 37 Iowa 145 (1873); Clark v. Bd. of Dirs., 24 Iowa 266 (1868)). Finally, Iowa was the first state to admit and allow a woman to practice law. *Id*. (citing *Admission of Women to the Bar*, 1 CHI. LAW TIMES 76, 76 (1887)).

3. State v. Wilkes, 756 N.W.2d 838, 842 n.1 (Iowa 2008); *see also* State v. Olsen, 293 N.W.2d 216, 219–20 (Iowa 1980) ("[W]e recognize and will jealously guard

independence and raise both federal and state constitutional claims.[4] However, many attorneys decide not to raise a separate state constitutional claim—or merely mention it within the brief as an afterthought—particularly in situations where federal precedent appears to have foreclosed the issue.[5]

A May 2009 Iowa Supreme Court decision, *State v. Effler*, raises the stakes for attorneys as they consider this aspect of their litigation strategy.[6] Although *Effler* certainly did not receive the national or even state-wide attention garnered by *Varnum v. Brien*, *Effler*'s long-term impact on attorneys practicing within Iowa is likely to be much greater. In a strongly worded opinion, several justices indicated that failing to raise a state constitutional claim could constitute ineffective assistance of counsel—even if the proposed state claim clearly contradicts standing federal or state

our right and duty . . . ."). Iowa is far from unique in this respect; each state reserves the right to interpret its own state laws and constitution. Penick v. State, 440 So. 2d 547, 551 (Miss. 1983) ("We must, however, reserve for [ourself] the sole and absolute right to make the final interpretation of our state Constitution . . . ."); State v. Doe, 254 N.W.2d 210, 216 (Wis. 1977) ("This court . . . will not be bound by the minimums . . . imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded."); Turley v. State, 59 P.2d 312, 316–17 (Ariz. 1936) ("We have the right, however, to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions based on that Constitution.").

4. For example, instead of simply claiming an illegal search in violation of the Fourth Amendment, a defendant would also claim a violation of Iowa's search and seizure provision. *See* U.S. CONST. amend. IV; IOWA CONST. art. I, § 8.

5. *See infra* Part II.

6. State v. Effler, 769 N.W.2d 880 (Iowa 2009). Due to the legal posture of the *Effler* decision, the case was ultimately decided by operation of law: six Iowa Supreme Court justices split three-to-three on the outcome, with one abstaining due to his participation in the Iowa Court of Appeals's previous decision on the issue. The opinion of Chief Justice Ternus, regarding the outcome by operation of law, was joined by Justices Cady and Streit. Citation to Chief Justice Ternus's opinion will be denoted with the following parenthetical: (Ternus, C.J.). Justice Streit also wrote an opinion, arguing for the affirmation of the district court's judgment. Citation to Justice Streit's opinion, joined by Chief Justice Ternus and Justice Cady, will be denoted with the following parenthetical: (Streit, J.). Justice Wiggins wrote an opinion, arguing for the affirmation of the court of appeals' decision. Justice Wiggins's opinion, joined by Justices Appel and Hecht, will be denoted with the following parenthetical: (Wiggins, J.). Finally, Justice Appel also wrote separately, seeking to affirm the court of appeals's decision. Although Justice Appel's decision, which was joined by Justices Hecht and Wiggins, is referred to as a "Special Concurrence" in the Northwest Reporter, it will be denoted with the following parenthetical: (Appel, J.).

precedent.[7] As a clear warning from the court, the opinion creates several challenges an attorney must consider. For example, how does an attorney know when the court may be receptive to a novel state constitutional argument? Likewise, how should an attorney preserve the issue for appeal and then develop that argument in a manner that will find the most receptive audience with the court? This Note attempts to answer those questions, as well as provide a framework attorneys can utilize when forced to develop this sort of state constitutional claim.

Part II of the Note examines *State v. Effler*, particularly Justice Appel's opinion, which explains why attorneys arguing in Iowa should be familiar with the *Effler* opinion. Part III provides context to the issue of "new judicial federalism," an arguably recent trend where state courts independently interpret their state constitutions with varying degrees of reliance on existing federal precedent.[8] Part IV analyzes two examples of judicial federalism from the Iowa Supreme Court and its specific departure from the United States Supreme Court's holding and analysis.[9] These cases provide insight into how the Iowa court approaches an independent review of the state constitution, as well as the components necessary to prevail before the bench. Finally, Part V takes the insight provided by the Iowa Supreme Court, as well as decisions from other state courts, and outlines a basic framework that can be used in developing a case involving novel state constitutional claims.

7. *Id*. at 897 (Appel, J.). Justices Appel and Wiggins both wrote separate opinions disagreeing with the ultimate outcome of the case, which is described by Chief Justice Ternus's opinion. This Note will primarily focus on Justice Appel's opinion, which was joined by Justices Wiggins and Hecht. *See id.* at 894–99 (Appel, J.). In Iowa, a defendant claiming ineffective assistance of counsel must demonstrate "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." State v. Lane, 743 N.W.2d 178, 183 (Iowa 2007).

8. This Note is not intended as a comment on the merits of new judicial federalism. As Part III demonstrates, judicial federalism has, and will continue to be, the topic of intense scholarly and political debate. However, just as the debate will surely continue, so will judicial federalism by the states. Attorneys who disagree with either the concept or the court's implementation of judicial federalism must be prepared to argue before an Iowa Supreme Court that has clearly embraced the doctrine.

9. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 5–6 (Iowa 2004) [hereinafter *RACI II*] (interpreting the equal protection clause of the Iowa Constitution); State v. Cline, 617 N.W.2d 277, 293 (Iowa 2000) (declining to adopt a good-faith exception to the exclusionary rule under the Iowa Constitution).

II. *STATE V. EFFLER*: CHANGING THE LANDSCAPE FOR IOWA ATTORNEYS

James Effler was convicted of first-degree kidnapping after sexually abusing a two-year-old girl in a Des Moines public library.[10] At trial, the district court denied Effler's motion to suppress the incriminating statements he made while being interrogated by detectives.[11] Effler contended the statements were made after he requested counsel, and thus were inadmissible.[12] He also claimed ineffective assistance of counsel, arguing his attorney failed to challenge the use of the incriminating statements under the Iowa Constitution.[13] The Iowa Court of Appeals reversed the conviction, holding Effler's request for counsel was sufficient and that the use of his subsequent statements from the interrogation violated his Fifth Amendment rights.[14] The Iowa Supreme Court granted further review.[15]

Procedurally, *Effler* was somewhat unique in that it resulted in a three-to-three split of the court.[16] Given the split, Effler's conviction was

10. *Effler*, 769 N.W.2d at 882 (Ternus, C.J.).

11. *Id.* at 885 (noting Effler's confession to the detective that he took the young girl into the bathroom, locked the door, and proceeded to sexually assault her).

12. *Id.* at 886. After being read a *Miranda* waiver form, Effler stated, "I do want a court-appointed lawyer." *Id.* at 885. The detective replied, "Okay," to which Effler continued, "If I go to jail." *Id.*

13. *Id.* at 886. Effler's attorney did raise a Fifth Amendment claim at trial. *Id.* This federal claim formed the basis of his appeal to the Iowa Supreme Court. *Id.*

14. *See* State v. Effler, No. 06-1417, 2008 WL 942051, at *5–6 (Iowa Ct. App. Apr. 9, 2008), *vacated*, 769 N.W.2d 880 (Iowa 2009).

15. Under Iowa's deflective appellate structure, the initial appeal is to the Iowa Supreme Court. The court then chooses whether to immediately accept the case for review or to deflect it to the Iowa Court of Appeals. IOWA R. APP. P. 6.1101 (identifying six types of cases normally retained by the supreme court and two types of cases normally deflected to the court of appeals). The supreme court may then grant a final appellate review once the court of appeals has heard the case. *Id.* at 6.1103(1).

16. Three justices—Chief Justice Ternus and Justices Cady and Streit—believed the district court's judgment was correct and would have vacated the court of appeals's decision to overturn the conviction. *Effler*, 769 N.W.2d at 882 n.1. Three other Justices—Wiggins, Hecht, and Appel—would have affirmed the court of appeals's decision and overturned the conviction. *Id.* The seventh member of the court, Justice Baker, did not take part in the case because he had heard the initial appeal while seated on the Iowa Court of Appeals. *See Effler*, 2008 WL 942051, at *5–6 (overturning Effler's conviction). In effect, four of the justices on the Iowa Supreme

affirmed by operation of law, and the court of appeals' decision was vacated.[17] Justice Streit, writing the substantive opinion to uphold the conviction, relied primarily on the United States Supreme Court's decision in *Davis v. United States*.[18] In *Davis*, the Court held a request for counsel must be both unambiguous and unequivocal.[19] Moreover, police are not required to ask clarifying questions when presented with an ambiguous or equivocal request for counsel.[20] Justice Streit also pointed to two Iowa cases where the supreme court held the request for counsel was not sufficiently clear to invoke Fifth Amendment protection.[21] He acknowledged the United States Supreme Court had not directly addressed the type of conditional request made by Effler.[22] However, he noted the Arizona and California supreme courts had considered conditional requests for counsel and held such requests ambiguous under the *Davis* analysis.[23] Justice Streit ultimately determined Effler's "if I go to jail" conditional statement was sufficiently ambiguous because a reasonable police officer could have understood the statement to merely indicate an interest in counsel, not a request.[24]

Justice Streit next addressed Effler's claim that he was denied

Court believed the conviction should have been overturned, though for Mr. Effler, this was surely nothing more than a hollow moral victory.

17. *Effler*, 769 N.W.2d at 884 (Ternus, C.J.). The court interpreted the statutory language—the "'judgment of the court below shall stand affirmed'" when the supreme court is equally divided—to refer to the district court, not the court of appeals. *Id.* at 882 (citing IOWA CODE § 602.4107 (2009)).

18. *Id.* at 886 (Streit, J.) (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

19. *Davis*, 512 U.S. at 459 (stating that the request must "present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney").

20. *Id.* at 461.

21. *Effler*, 769 N.W.2d at 887. Justice Streit noted the phrases "'If I need a lawyer, tell me now'" and "'I think I need an attorney'" were both insufficient. *Id.* (quoting State v. Harris, 741 N.W.2d 1, 6 (Iowa 2007); State v. Morgan, 559 N.W.2d 603, 608 (Iowa 1997)).

22. *Id.* The Court does not appear inclined to provide additional guidance on this issue, as it denied Effler's petition for certiorari on December 14, 2009. Effler v. Iowa, 130 S. Ct. 1024, 1024 (2004) (denying certiorari).

23. *Effler*, 769 N.W.2d at 887–88 (citing State v. Newell, 132 P.3d 833, 842 (Ariz. 2006) ("'If I'm going to jail, I want to talk to my lawyer.'"); People v. Gonzalez, 104 P.3d 98, 102 (Cal. 2005) ("'[I]f for anything you guys are going to charge me I want to talk to a public defender too, for any little thing.'")).

24. *Id.* at 888–89 (reiterating officers are not obligated to stop questioning unless the request is unambiguous and unequivocal).

effective counsel when his attorney failed to challenge the admissibility of his statements under article I, sections 9 and 10 of the Iowa Constitution.[25] Justice Streit quickly rejected Effler's article I, section 9, due process argument by citing *State v. Morgan*, in which the court held that clarifying questions are not mandated by the Iowa Constitution.[26] Effler's article I, section 10, right to counsel argument was deemed not applicable.[27] The court noted that cases involving equivocal and ambiguous requests for counsel are evaluated under the Fifth Amendment and its correspondingly equivalent state provisions, not the Sixth Amendment.[28] In Iowa, the state's equivalent of federal Sixth Amendment protections only attach when adversarial criminal proceedings have been initiated.[29] Because article 1, section 10 has been determined to be "substantially the same as the Sixth Amendment," Effler would not have had a valid claim even if it had been raised by his attorney.[30] Given the precedents of *Davis* and *Morgan*, and because Iowa does not require attorneys to be able to predict changes in established precedent,[31] Justice Streit held Effler had not been

25. *Id.* at 889–90; *see also* IOWA CONST. art. I, §§ 9–10. Article I of the Iowa Constitution is the state's equivalent of the United States Constitution's Bill of Rights. Section 9 of the Iowa Constitution provides, "The right of trial by jury shall remain inviolate . . . [and] no person shall be deprived of life, liberty, or property, without due process of law." IOWA CONST. art. I, § 9. Thus, it combines aspects of both the Fifth Amendment's Due Process Clause and the Sixth Amendment's Trial by Jury Clause of the United States Constitution. *See* U.S. CONST. amends. V, VI. Section 10 of the Iowa Constitution provides "a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him[;] . . . to be confronted with the witnesses against him[;] . . . and, to have the assistance of counsel." IOWA CONST. art. I, § 10. It is the functional equivalent of the Sixth Amendment of the United States Constitution. IOWA CONST. art. I, §§ 9–10; *see also* U.S. CONST. amend. VI.

26. *Effler*, 769 N.W.2d at 889–90 (citing State v. Morgan, 559 N.W.2d 603, 609 (Iowa 1997)).

27. *Id.*

28. *Id.* The court made note of similar treatment by other states. *See, e.g.*, State v. Risk, 598 N.W.2d 642, 647 (Minn. 1999); State v. Hoey, 881 P.2d 504, 523 (Haw. 1994).

29. *See* State v. Peterson, 663 N.W.2d 417, 426 (Iowa 2003); *see also* State v. Johnson, 318 N.W.2d 417, 432 (Iowa 1982) (holding that an arrest by itself does not equate to a formal accusation by the state).

30. *Effler*, 769 N.W.2d at 890; *see* Doerflein v. Bennett, 145 N.W.2d 15, 18 (Iowa 1966) (stating that article I, section 10 of the Iowa Constitution contains similar provisions as the Sixth Amendment and is thus substantially similar in meaning).

31. *See* State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982) (holding that attorneys do not need to be "crystal gazer[s] who can predict future changes in established rules of law"); Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981) (holding attorney was not guilty of ineffective assistance of counsel when he failed to challenge

denied effective assistance of counsel.[32]

Justices Wiggins and Appel disagreed with Justice Streit's analysis and both wrote opinions, although each approached the issue differently.[33] Justice Wiggins argued Justice Streit's opinion failed to consider the circumstances surrounding Effler's statement, and thus, in effect, reduced *Miranda* to nothing more than a mere formality.[34] He sought to distinguish Effler's statement from that of *Gonzales* by stressing the detective in this case knew Effler would be booked and sent to jail.[35] Justice Wiggins argued that although Effler's statement may have been conditional, it was far from ambiguous.[36] He noted the conversational nature of the interrogation, the fact the detective knew Effler would be booked and sent to jail, and the communication of this fact to Effler seconds before he requested counsel would have led any reasonable officer to understand the conditional statement as an unambiguous and unequivocal request for counsel.[37] Justice Wiggins's opinion concluded by acknowledging that even without the statements, there was additional incriminating evidence offered at trial against Effler.[38] However, given the graphic details of Effler's own statements, the three justices believed the statements likely contributed to the jury's verdict.[39] Thus, the three justices would have awarded Effler a new trial.[40]

Whereas Justice Wiggins's opinion sought to distinguish Effler's statement from the opposing justices' framing of the *Davis*, *Morgan*, and

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an issue supported by established precedent).

32. *Effler*, 769 N.W.2d at 889–90.

33. Justices Wiggins and Appel each joined the other's opinion, and both were also joined by Justice Hecht. *Id.* at 891 (Wiggins, J.); *id.* at 894 (Appel, J.).

34. *Id.* at 891 (Wiggins, J.).

35. *Id.* at 891–93 (noting the detective not only previously talked with witnesses at the library to obtain sufficient information to charge Effler, but also indicated Effler would likely spend at least a night in jail for a public intoxication charge). Justice Wiggins found the detective's actions in *Effler* distinguishable from *Gonzales* because a reasonable officer in that case would not have known if the condition—the defendant being charged with murder—would be met because it was not up to the officer to charge the defendant, and this distinction was explained to the defendant. *Id.* (citing People v. Gonzales, 104 P.3d 98, 106 (Cal. 2005)).

36. *Id.* at 894.

37. *Id.* at 893.

38. *Id.* at 893–94 (citing physical evidence provided by the examining doctor as well as witnesses describing the scene at the library).

39. *Id.* at 894.

40. *Id.*

Gonzales precedent, Justice Appel sought to remove the case from that framework entirely.[41] Specifically, he directly attacked the wisdom of following the United States Supreme Court's precedent in *Davis*.[42] He noted *Davis* had been decided by a slim five-to-four margin and described Justice Souter's "powerful" argument as a well-reasoned, common-sense counter to the majority.[43] Indeed, in the years following *Davis*, several states seized upon Justice Souter's opinion and refused to follow the majority's analysis when interpreting their own state constitutions.[44] Although Iowa followed the *Davis* majority in deciding *Morgan*, Justice Appel questioned the vitality of that decision in his *Effler* opinion.[45] He argued *Morgan* was merely a conclusory opinion that simply followed the authority of *Davis* without ever analyzing the underlying issues or engaging in an in-depth analysis of the arguments under a state constitutional lens.[46] Given the Iowa Supreme Court's willingness to consider an independent state constitutional analysis, Justice Appel believed that *Morgan* may not survive a state constitutional challenge.[47] However, because Effler's attorneys failed to raise the state constitutional claim, the issue of *Morgan's* continued basis as good law remains undecided.[48]

Although Justice Appel ultimately chose not to determine whether

41. *Id.* at 896 (Appel, J.).

42. *Id.*; *see also* Davis v. United States, 512 U.S. 452, 459 (1994) (holding law enforcement had no obligation to clarify an ambiguous request for counsel).

43. *Effler*, 769 N.W.2d at 896. Justice Souter argued that the majority's approach in *Davis* provided too much freedom to the officer when determining whether a suspect's request for counsel was ambiguous. *Davis*, 512 U.S. at 473. (Souter, J., concurring in judgment). He believed that clarifying questions designed to determine if the suspect was invoking the right to counsel would be the most logical way to resolve any ambiguity. *Id.* at 474–75.

44. *Effler*, 769 N.W.2d at 896 (citing State v. Risk, 598 N.W.2d 642, 648–49 (Minn. 1999) (determining a "stop and clarify" approach that required police, when faced with an ambiguous request for counsel, to cease interrogation and ask clarifying questions designed to determine the accused's actual intent, provided the requisite protection under the Minnesota Constitution); State v. Chew, 695 A.2d 1301, 1318–19 (N.J. 1997) (retaining the court's requirement that officers halt an interrogation and ask only clarifying questions when an accused makes a statement that could arguably amount to a request for counsel)).

45. *Id.*

46. *Id.* (citing State v. Morgan, 559 N.W.2d 603, 608 (Iowa 1997)).

47. *Id.* at 896–97.

48. Justice Appel, in dicta, does encourage law enforcement to consider following Justice O'Connor's advice in *Davis* to provide clarifying, follow-up questions to resolve potentially ambiguous or equivocal requests for counsel. *Id.* at 897 (citing *Davis*, 512 U.S. at 461).

this failure technically constituted ineffective assistance of counsel, his opinion makes his displeasure clear.[49] In what can fairly be called a shot across the bow, the opinion warns those attorneys who fail to raise state constitutional claims, even if those claims conflict with existing state and federal precedent, with the following:

> I write separately to emphasize the need for criminal counsel to explore thoroughly the possibility that this court will approach the Iowa Constitution in a different fashion than the United States Supreme Court approaches parallel provisions of the Federal Constitution. . . . [Recent holdings represent] an unmistakable message to defendants and their lawyers that this court is prepared to depart from the precedents of the Supreme Court on major issues of constitutional law. . . . [C]ounsel should ordinarily scour these sources to determine if there is a solid legal basis for asserting an independent interpretation of the Iowa Constitution which would be more beneficial to the accused than is available under the Federal Constitution.[50]

While the implications are clear, significant questions were left unanswered by the court. As Justice Appel's opinion notes, the Iowa Supreme Court has shown a greater willingness over the last decade to diverge from United States Supreme Court precedent and analysis.[51] Although the court clearly wants attorneys to develop these state constitutional arguments—even threatening to sustain ineffective assistance of counsel charges for failing to do so—the court is less clear as to which legal issues are most susceptible to these state challenges and how attorneys can identify those issues to then craft a persuasive legal argument. In order to address these unresolved questions and to ultimately develop the subsequent legal framework that can be used by attorneys, it is important to understand the context of Justice Appel's opinion. Specifically, one must understand the history of how and why

49. *Id.* (declining to decide the ineffective assistance of counsel question in part because of the unusual three-to-three disposition of the court).

50. *Id.* at 894–95. Justice Appel's opinion is, in some respects, a much stronger reiteration of a similar point he made in *State v. Feregrino*. State v. Feregrino, 756 N.W.2d 700, 703–04 n.1 (Iowa 2008) (refusing to interpret the state's due process clause differently than the Fourteenth Amendment Due Process Clause because the attorney did "not present any argument suggesting [the clause] . . . should be interpreted differently"). Justice Appel's *Effler* opinion, however, adds weight behind this warning by discussing the threat of ineffective assistance of counsel. *Effler*, 769 N.W.2d at 894–97.

51. *See supra* note 9; *see also infra* Part IV.

states such as Iowa are willing to disregard Supreme Court precedent and forge an independent state constitutional body of law.

III. NEW JUDICIAL FEDERALISM

Iowa is not alone in its willingness to independently interpret its state constitutional provisions, even if it clashes with or contradicts the United States Supreme Court's interpretation of correspondingly similar provisions within the Bill of Rights.[52] In and of itself, the concept of judicial federalism is unremarkable—it simply refers to the allocation of power between the federal and state courts.[53] Indeed, it is well established that state supreme courts have the unquestioned responsibility of interpreting their own state constitutions.[54] Thus, in today's cases involving individual rights and liberties, one can turn both to the United States Constitution and the Supreme Court as well as one's state constitution and state supreme court for protection.

It was not always that way, however. Prior to 1925, the Bill of Rights provided little to no protection for the individual when confronted with state or local government action.[55] State constitutions provided the only

52. *See supra* note 3.

53. *See* THE FEDERALIST NO. 39, at 214 (James Madison) (E.H. Scott ed., 1898) (arguing the United States Constitution is designed to ensure that the states continue to retain "residuary and inviolable sovereignty over all . . . objects" that are not enumerated to the federal government); *see also* Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 SAN DIEGO L. REV. 523, 526–27 n.5 (2000) (emphasizing the United States Constitution embodies a grant of enumerated powers, whereas the state constitutions are documents that limit otherwise unfettered power).

54. *See* California v. Greenwood, 486 U.S. 35, 43 (1988) ("[S]tates may surely construe their own constitutions as imposing more stringent constraints . . . than does the Federal Constitution."); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (noting the Court's ruling does nothing to limit a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); *see also* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (stating the "[r]espect for the independence of state courts . . . [has] been the cornerstone[] of this Court's refusal to decide cases where there is an adequate and independent state ground").

55. Technically, the Bill of Rights still only applies directly to the federal government. The Fifth Amendment does not apply to the states, and this holding has never been expressly overruled. Barron v. Mayor & City Council of Balt., 32 U.S. 243, 250–51 (1833). The Court in *Barron* held the Bill of Rights was "obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government," and was thus not applicable to the states. *Id.* at 248. Today, of course, most provisions of the Bill of Rights apply to the states, but only as

potential safe haven, but states varied dramatically in the level of protection they offered their citizens.[56] Not until 1908 did the Court first indicate the Due Process Clause of the Fourteenth Amendment may protect some of the fundamental rights of the Constitution against state government action.[57] The Court's subsequent, albeit prolonged, decision to incorporate provisions of the Bill of Rights through the Fourteenth Amendment suddenly offered individuals a new venue to pursue expanded civil liberties and protection.[58] In many instances, the level of protection that was now offered by the Court surpassed what was being provided by the state courts and their constitutions.[59] The Warren Court accelerated this expansion, resulting in a litany of landmark cases that clearly established the Court and the United States Constitution as the primary protectors of individual rights and liberties.[60]

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incorporated through the Fourteenth Amendment. *See infra* notes 56–57 and accompanying text.

56. *See* Shirley S. Abrahamson & Diane S. Gutmann, *New Federalism: State Constitutions and State Courts, in* A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS 103, 105–08 (Burke Marshall ed., 1987) [hereinafter Abrahamson].

57. Twining v. New Jersey, 211 U.S. 78, 100, 110 (1908) (indicating in dicta that some rights may be so fundamental that due process requires universal protection).

58. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 5–6 (2d ed. 2002). The First Amendment's protection of freedom of speech applies to the states through the incorporation of the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). The process of selective incorporation slowly continued for the remainder of the century until all but four provisions of the Bill of Rights were incorporated. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262, 276–77 n.2 (1989) (refusing to incorporate the Eighth Amendment's prohibition against excessive fines); Minn. & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222–23 (1916) (refusing to incorporate Seventh Amendment right to jury trial in civil cases); Hurtado v. California, 110 U.S. 516, 538–39 (1884) (refusing to incorporate Fifth Amendment right to a grand jury indictment in criminal cases). Though the Second Circuit has incorporated the Third Amendment—quartering of soldiers—the Court has not. *See* Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).

59. Abrahamson, *supra* note 56, at 105–08 (noting the United States Constitution became, in many respects, a new floor—a minimum level of individual rights and liberties that often exceeded what states had provided—and the Court assumed the role of enforcement when states failed to meet this new minimum).

60. The cases read like a syllabus for a first-year Constitutional Law class. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating an anti-miscegenation statute and recognizing marriage as a fundamental right); Miranda v. Arizona, 384 U.S. 436, 491–98 (1966) (condemning many police practices common throughout the country and thus instituting a mandatory procedural safeguard); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (recognizing a personal right of privacy);

The Court's umbrella of protection, however, soon reached its apex in the late 1960s. With the appointment of Chief Justice Warren Burger in 1969, this protection slowly began to constrict, much to the chagrin of Justice William J. Brennan.[61] In response, Justice Brennan appealed directly to the states in his 1977 *Harvard Law Review* article, which is generally recognized as the impetus for the state constitutionalism movement often described as "new federalism" or "judicial federalism."[62] Lamenting the recent Court decisions, and likely foreseeing the future direction of the Court, Justice Brennan urged states to become a new "font of individual liberties" by independently looking to their own state constitutions.[63] He implored the state courts to not simply rely upon the Court's constitutional rulings and interpretations and instead encouraged them to protect rights and liberties beyond the minimum floor dictated by the Court.[64] Indeed, just as Justice Appel warned Iowa attorneys about the failure to challenge *Davis* under a state constitutional lens, Justice Brennan indicated "it would be most unwise these days not also to raise the state constitutional questions."[65]

Justice Brennan's article, a call to arms of sorts, was enthusiastically

Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (requiring that states provide counsel for defendants in criminal cases); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (ending the doctrine of "separate but equal" for public education).

61. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–98 (1977).

62. *Id.*; *see* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1.01[1] & n.9 (4th ed. 2006). This Note also refers to the movement as "new judicial federalism." Whereas judicial federalism simply refers to the allocation of power between the federal and state courts, new judicial federalism refers, more narrowly, to the increased tendency of state courts to interpret their state constitutions as independent sources of rights separate from the United States Supreme Court and United States Constitution. 1 FRISEN, *supra* note 62, § 1.01[1].

63. Brennan, *supra* note 61, at 491.

64. *Id.* (arguing "the full realization of our liberties cannot be guaranteed" without state courts exercising their independent role of carving out and protecting rights based on state law).

65. *Id.* at 503; *see also* State v. Effler, 769 N.W.2d 880, 894 (Iowa 2009) (Appel, J.) ("I write separately to emphasize the need for criminal counsel to explore thoroughly the possibility that this court will approach the Iowa Constitution in a different fashion than the United States Supreme Court approaches parallel provisions of the Federal Constitution."). Justice Brennan also noted that as a tactical litigation strategy, the courts' state constitutional decisions could not be overturned, emphatically stating, "We are utterly without jurisdiction to review such state court decisions." *Id.* at 501.

embraced by state courts around the country.[66] In general, these courts have used three different interpretive methodologies when asked to reconcile similar state and federal constitutional provisions.[67] The first approach, "lockstep," is where the state court simply follows the precedent and analysis provided by the United States Supreme Court.[68] Justice Appel was critical of this lockstep used by the Iowa Supreme Court in *Morgan*.[69] The second approach, "criteria," is where the state court examines several factors to determine if the state constitution demands a departure from federal precedent.[70] Although the Iowa Supreme Court has not explicitly couched its analysis in terms of the "criteria" language other courts have used, it has nevertheless conducted a similar process to determine if state constitutional provisions are similar to their federal counterpart. If the provisions are similar, the state supreme court will likely defer to the United States Supreme Court.[71] For example, in *Effler*, the court noted article 1, section 10 of the Iowa Constitution was "substantially similar" to the Sixth Amendment.[72] The court thus gave deference to the Court's prior holdings that ambiguous requests for counsel should be evaluated

66. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 94 n.4 (2000).

67. *Id.* at 94–95.

68. *Id.* at 95.

69. *See Effler*, 769 N.W.2d at 896 (Appel, J.). Many states have explicitly rejected the lockstep approach for certain constitutional reasons. *See* State v. Popenhagen, 749 N.W.2d 611, 657–68 (Wis. 2008) (noting the court's right to part from United States Supreme Court precedent when the state constitution demands greater protection). *But cf*. People v. Caballes, 851 N.E.2d 26, 31 (Ill. 2006) (adopting a "limited lockstep" that follows the federal Constitution unless the language of the state constitution requires a different reading).

70. Friedman, *supra* note 66, at 95. In New Jersey, for instance, the state supreme court examines the textual language, legislative history, preexisting state law, state traditions, and public attitudes to help determine whether the state provision requires a unique analysis. *See* State v. Hunt, 450 A.2d 952, 965–67 (N.J. 1982). Other courts, such as Illinois, only construe the provisions differently when it is clear the state framers intended a different construction. *See* People v. DiGuida, 604 N.E.2d 336, 342 (Ill. 1992).

71. *See* State v. Olsen, 293 N.W.2d 216, 219–20 (Iowa 1980) (identifying an interest in harmonizing state constitutional decisions with the Court's decisions whenever reasonably possible). *But see* Bierkamp v. Rogers, 293 N.W.2d 577, 579 (Iowa 1980) (noting that the Supreme Court's analysis is persuasive, but not binding).

72. *See Effler*, 769 N.W.2d at 890; *see also* Doerflein v. Bennett, 145 N.W.2d 15, 18 (Iowa 1966) (stating article I, section 10 of the Iowa Constitution contains similar provisions as the Sixth Amendment and is substantially similar in meaning).

under the Fifth, not the Sixth, Amendment.[73] The third and final approach, "primacy," is where the state court undertakes a completely independent constitutional analysis, using federal law merely for guidance.[74] Hans Linde, a former justice of the Oregon Supreme Court, is credited with developing the primacy approach.[75] Linde argues that state courts should always first look to their own constitutions.[76] Only if the state constitution and state law are unclear should the court then look to the federal courts for guidance.[77] Although many state courts engage in an independent state constitutional analysis, no court exclusively utilizes the primacy approach; indeed, New Hampshire, Oregon, and Maine are the only courts that consistently look to their state constitutions before turning to federal precedent.[78]

Justice Brennan's call to arms, as well as the approaches subsequently used by state courts, have been the subject of criticism by some scholars as being overly results-oriented as opposed to being based on sound judicial philosophy and analysis.[79] Others question the very legitimacy of state courts reinterpreting what the United States Supreme Court has previously held.[80] It is important to note most critics do not challenge the right of the state supreme courts to act as the final adjudicator of their own state constitution.[81] Rather, the question of legitimacy arises primarily when the state supreme courts provide an interpretation that differs from the United States Supreme Court regarding a constitutional provision that is textually and substantively similar, if not identical, in both the state and federal constitutions. This tension is most evident in the primacy approach and is

73. *See supra* note 28 and accompanying text.

74. Friedman, *supra* note 66, at 95.

75. *Id.* at 106; *see generally* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) (encouraging state courts to use state constitutions in resolving questions of state constitutional rights).

76. *See generally* Linde, *supra* note 75.

77. Friedman, *supra* note 66, at 95.

78. John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?* 54 U. PITT. L. REV. 1019, 1025–26 (1993) (citing State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); State v. Ball, 471 A.2d 347, 350–51 (N.H. 1983); Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981)).

79. *See* Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 432 (1988).

80. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 355 n.3 (1984).

81. *See supra* notes 53–54 and accompanying text.

one of the reasons it attracts significant criticism. It is also likely the reason most courts tend to remain in the lockstep or criteria camps.[82] Similarly, even supporters of judicial federalism criticize state courts when their decisions fail to fully articulate why they are diverging from existing United States Supreme Court precedent and interpretation.[83]

Despite the criticisms, support for judicial federalism is widespread and sure to continue within the state supreme courts. Proponents of judicial federalism raise several compelling arguments. First, state constitutions are undeniably a source of individual rights and liberties.[84] Indeed, one of the arguments against the Bill of Rights was that the existing state constitutions already provided sufficient protection and the people would inherently retain any rights not granted to the federal government.[85] States should thus be encouraged to interpret their own constitutional provisions free from the restraints of federal influence. Indeed, in many respects, the very notion of federalism requires a strong state judicial branch to counter its federal counterpart. Second, constitutional interpretation is far from a science and certainly does not have a single correct answer.[86] United States Supreme Court Justices

82. The primacy approach is also most likely to invoke claims of "judicial activism" by critics of the courts, especially when the courts' decisions run counter to the opponents' own political viewpoints.

83. *See, e.g.*, Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 266–69 (2007) (illustrating "the negative consequences of reactive and incompletely theorized state constitutional decision making"). Friedman believes new "judicial federalism" is an important part of the judicial dialogue between the federal and state courts. *Id*. As such, he advocates the primacy approach, in part, because he believes it forces the state courts to engage in a thorough, analytical decision-making process that most fully contributes to his desired dialogue. *Id*. Thus, he argues, state courts that simply determine their constitution offers greater protection than the Court has found in similar text within the United States Constitution fail to contribute anything of value to that dialogue. *Id*. Rather, the decisions appear reactive and results-oriented, thereby undermining the entire concept of judicial federalism. *Id*.

84. *See supra* notes 52–56 and accompanying text.

85. *See* THE FEDERALIST NO. 84, at 469 (Alexander Hamilton) (E.H. Scott ed., 1898) ("Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. . . . But a minute detail of particular rights, is certainly far less applicable to a Constitution like that under consideration . . . . I go further, and affirm that Bills of Rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous.").

86. *See* Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1155 (1993); *see also* Brown v. Allen, 344

routinely disagree, and the Court itself shifts over time despite a stated preference for stare decisis. State courts should not be inhibited from engaging in an independent analysis; rather, these decisions help inform the Court and provide a more nuanced and complete judicial framework.[87] Third, some advocates of judicial federalism point to an argument that can be summarized as analogous to the well-known "states as laboratories" concept.[88] Judicial federalism, the argument goes, is by definition limited in scope to the citizens of each respective state. Given this limited scope, states can be innovative in their constitutional interpretation without burdening the rest of the country.[89] Other states, as well as the federal courts, can then handpick the most logical and well-reasoned jurisprudence from around the country. In the end, both the federal and state courts benefit from this collective effort.

Despite its critics, new judicial federalism is unlikely to disappear from the jurisprudence landscape. Indeed, the Iowa Supreme Court's recent decisions indicate it is more than willing to consider novel state constitutional claims that diverge from federal precedent. *Effler* foreshadows the potential ramifications for attorneys who decide not to engage in this independent state constitutional argument. While the implications and consequences were made clear in *Effler*, the process remains opaque. The Iowa Supreme Court has yet to develop a comprehensive and formulaic framework for attorneys to utilize. However, as Part IV will illustrate, the court's prior opinions do provide some insight into how attorneys should proceed when developing their arguments. This guidance will, in turn, provide the basis for a proposed framework offered in Part V.

IV. LEARNING FROM PREVIOUS IOWA SUPREME COURT RULINGS

The Iowa Supreme Court has often diverged from the United States

U.S. 443, 540 (1953) (Jackson, J., concurring) (noting the Court is "not final because we are infallible, but we are infallible only because we are final").

87. *See supra* note 83 and accompanying text.

88. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). The Court immediately noted, however, that it "has the power to prevent [such] an experiment." *Id.*

89. *See* Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71 (2001).

Supreme Court's holdings and constitutional interpretation. Although the examples mentioned in Part I of this Note dealt with issues of slavery and women's rights—and were written as long ago as 1839—the Iowa Supreme Court continues to engage in judicial federalism.[90] In particular, two cases decided in the last decade provide insight as to how the court examines a state constitutional claim when it clashes with existing federal or state precedent. Although the cases do not provide all the answers, they do provide a basic foundation for attorneys grappling with when and how to pursue an independent state constitutional argument before the Iowa courts.

A. Racing Association of Central Iowa v. Fitzgerald

The first case, *Racing Association of Central Iowa v. Fitzgerald*, was decided in 2004 and involved an equal protection challenge to the state's tax on gambling receipts generated at racetracks.[91] The state taxed racetrack gambling receipts at a rate nearly double that imposed on similar receipts generated from riverboat gambling.[92] The Iowa Supreme Court—applying a rational basis test—initially ruled the disparate tax structure was unconstitutional because it violated the equal protection clauses of both the state and federal constitutions.[93] The United States Supreme Court—also applying a rational basis test—unanimously reversed the portion of the decision that held the tax structure violated the United States Constitution, and remanded the case back to the Iowa Supreme Court.[94] Faced with the Court's analysis of the federal constitutional issue, the Iowa Supreme Court was, in effect, forced to re-evaluate its prior decision regarding the state constitutional claim.[95] Once again, however, the Iowa Supreme Court

90. *See supra* note 2.

91. *RACI II*, 675 N.W.2d 1, 3–4 (Iowa 2004).

92. *Id*. Iowa Code imposed a maximum rate of twenty percent on annual adjusted gross receipts received from gambling games. *See* IOWA CODE § 99F.11 (1999). However, racetrack gambling receipts were exempted from the maximum, and the racetracks' tax rate had steadily increased to thirty-six percent by 2004. *RACI II*, 675 N.W.2d at 4.

93. Racing Ass'n of Cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 562 (Iowa 2002) (reversing the district court's summary judgment for the State) [hereinafter *RACI I*], *vacated in part*, 539 U.S. 103 (2003).

94. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109–10 (2003) (finding three purposes sufficient to justify the twenty percent/thirty-six percent tax differential under a rational basis level of review and noting "one has no difficulty finding the necessary rational support").

95. Technically, the United States Supreme Court did not reverse the portion of the Iowa Supreme Court's decision dealing with the state constitutional issue. *Id.* at

held the tax statute violated the equal protection clause of the Iowa Constitution.[96] The court applied the same rational basis analytical framework the United States Supreme Court used, but it ultimately disagreed with the Court's determination that the statute was rationally related to any legitimate state interest.[97] The decision sparked criticism in some corners and led to a sharply worded dissent comparing the holding to the infamous *Lochner* decision.[98]

Despite the criticism, the case offers important insight into how the Iowa Supreme Court approaches judicial independence. Although not a complete roadmap, there are several key points attorneys need to be aware of and integrate into an argument before the court. First, the court reiterates it has the exclusive prerogative to determine the scope and meaning of statutes under the Iowa Constitution.[99] Although a basic legal concept, it is important for the attorney to signal to the justices that the case before them involves a *state* constitutional claim.[100] This is especially critical in situations where the court is being asked to diverge from existing federal precedent.

Second, in *RACI II*, the court identified two methodologies for analyzing a state equal protection claim.[101] Although specifically discussed in the context of equal protection, the dual-track framework is applicable in other cases. The court first discussed what it calls an "independent

110. However, it did remand the case "for further proceedings not inconsistent with the opinion." *Id.* Because the Iowa Supreme Court used the federal rational basis test in determining the statute was unconstitutional under both the federal and state constitutions, the court would have been hard-pressed to simply uphold the state portion of its previous ruling without addressing how the same test could lead to different, yet consistent, results under the state and federal equal protection clauses.

96. *RACI II*, 675 N.W.2d at 16.

97. *Id.* at 9–16.

98. *Id.* at 17–28 (Cady, J., dissenting) (citing Lochner v. New York, 198 U.S. 45 (1905)).

99. *Id.* at 4–5 (majority opinion).

100. This statement also helps the court fulfill its requirement to signal the United States Supreme Court as to whether the state court is deciding an issue on state or federal grounds. *See* Michigan v. Long, 463 U.S. 1032, 1044 (1983) (state court must specific explicit reliance on state law in order to avoid review by the Court because the Court will otherwise presume the state court was construing federal constitutional law in its decision).

101. *RACI II*, 675 N.W.2d at 5–7. The court relied heavily on material from a 1985 *Texas Law Review* article discussing the nature and differences of equal protection clauses within state constitutions. *Id.* (citing Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985)).

analysis."[102] Under this approach, a court dispenses with the prevailing federal analytical framework and applies its own test.[103] This approach is most useful if a substantial distinction can be made between the scope, import, or purpose of the provisions in the state and federal constitutions. Unless this distinction is made, the court is unlikely to reject the federal analytical framework.[104] The independent analysis approach brings with it significant challenges. An attorney must begin by conducting a comprehensive historical and textual analysis of the state and federal constitutional provisions in order to determine if a state-specific legal framework and test would be more appropriate. In addition, even if a distinction exists, the attorney faces an uphill battle. The attorney must demonstrate the federal test is fundamentally flawed or incompatible with the distinct state provision. Moreover, the court is highly unlikely to dispense with the federal framework—even if it agrees the framework is inadequate or flawed—unless the attorney offers an alternative.[105] Because the court is hesitant to consider such arguments unless they have been fully briefed and argued, it is imperative an attorney prepares for this approach from the beginning of a claim in order to preserve the issue for appeal. Although the court in *RACI II* identified the basic concept of independent analysis and indicated a willingness to entertain such an approach, it ultimately decided the case before it was not the proper forum.[106]

Instead of using the independent analysis approach, the court used what it called an "independent application" of the federal test.[107] Relying heavily on Justice Brennan's 1977 article, the court noted it is free to apply the same basic federal test yet come to a different conclusion.[108] Indeed,

102. *Id.*

103. *Id.*

104. *Id.* at 5 (stating the court "has not foreclosed the possibility that there may be situations . . . [that] warrant divergent analyses"). The court noted that some scholars have suggested there are differences between the state, "Jacksonian" equality provisions, and the United States Constitution's Fourteenth Amendment. *Id.* (citing Williams, *supra* note 101, at 1207–08).

105. *See, e.g.*, *In re* Detention of Garren, 620 N.W.2d 275, 280 n.1 (Iowa 2000) (deciding to utilize the federal analysis for a state constitutional claim because the party "ha[d] suggested no legal deficiency in the federal principles . . . , nor ha[d] he offered an alternative test or guidelines").

106. *RACI II*, 675 N.W.2d at 6 (noting the court was declining, in part, because the issue of independent analysis had not been thoroughly briefed and explored by the parties or the court).

107. *Id.* at 6–7.

108. *Id.* (citing Brennan, *supra* note 61, at 491).

the court stated, "'[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where state and federal constitutions are similarly or identically phrased.'"[109] In short, under the independent application method, the court *accepts* the basic federal framework, but *rejects* the Supreme Court's application for a particular claim. This approach of independent application, as opposed to independent analysis, will likely be the path most attorneys pursue when crafting a novel state constitutional claim before the Iowa Supreme Court. As was touched on in Part II, the Iowa courts have already ruled that many of the state constitutional provisions are substantially similar in scope and meaning to their federal counterparts.[110] Thus, when the provisions have been deemed substantially similar, it becomes more difficult to argue the federal framework is unable to be applied to the state provision. However, under the independent application approach, attorneys can bypass having to develop their own comprehensive framework and instead focus on showing why past federal and state precedents are simply incorrect applications of that framework.[111] In *RACI II*, the court began this process by first acknowledging the federal rational basis test was still appropriate—although it did note that in Iowa, it is not a "toothless" test.[112] The court next examined the three state interests posited by the United States Supreme Court, ultimately rejecting each of them as not rationally related to the statute.[113]

There were two dissents in *RACI II*. The first, by Justice Carter, argued there were at least two additional legitimate and rationally related reasons for the statute.[114] Similarly, Justice Cady's dissent argued that the legislature is normally given its broadest discretion in economic matters such as tax statutes.[115] Given this broad discretion, he felt it inappropriate

109. *Id.* (quoting Brennan, *supra* note 61, at 500).

110. *See supra* Part II.

111. *See* Williams, *supra* note 101, at 1219 ("Courts that apply the federal constructs independently . . . often reach results that directly conflict with those reached by the federal courts."); *see also* Brennan, *supra* note 61, at 502 ("[D]ecisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.").

112. *RACI II*, 675 N.W.2d at 9 (citing several cases where the Iowa Supreme Court held economic and social legislation violated the state's equal protection provisions).

113. *Id.* at 9–16.

114. *Id.* at 16–17 (Carter, J., dissenting).

115. *Id.* at 18 (Cady, J., dissenting).

for the majority to inject itself into tax legislation, a forum firmly in the realm of the legislature.[116] Invoking the language of *Lochner*, he directly questioned the wisdom and vitality of the majority opinion.[117] More notably, he accused the majority of improperly using Brennan's judicial federalism as a protective umbrella from the United States Supreme Court.[118] Although Justice Cady disagreed with the majority regarding the wisdom of interfering with the legislative branch in this matter, he also expressed a powerful structural argument about the role of the state judiciary, which is thus informative for attorneys pursuing the independent application approach.[119] He correctly noted judicial federalism simply stands for the proposition that state courts have the authority to independently review their own constitution.[120] It does not, however, mean state courts can simply disregard or ignore the legal principles and analysis offered by the Court.[121] In reviewing *RACI I*, the United States Supreme Court applied the rational basis test and found the statute rationally related to legitimate state interests.[122] For Justice Cady, the Iowa Supreme Court's subsequent rejection of the statute under the same rational basis test went beyond judicial federalism.[123] The court did more than just create an independent body of law separate from the federal system; it offered the case up to the Court and then simply rejected its decision without refuting any of the underlying *legal* principles.[124] Although Justice Cady's dissent

116. *Id.*

117. *Id.* at 19–20 ("The grave error committed by the majority is that it steps back one hundred years into the long abandoned *Lochner* era and engages in a social and economic debate over the objectives and purposes of the tax legislation that, up until today, was securely within the realm of the legislative branch of government.").

118. *Id.* at 18–19. Justice Cady acknowledged judicial federalism is a vital aspect of constitutional law and did not argue state judicial independence is improper in every circumstance; rather, his disagreement with the majority was the use of judicial independence as a stand-alone basis for disregarding the United States Supreme Court's ruling. *Id.*

119. *Id.* ("This unprecedented action by the majority in this case is offensive to the institutional integrity of our system of justice in this country and is disruptive to the essential balance of power between the judicial and legislative branches of government in this state.").

120. *Id.* at 17–18 n.8.

121. *Id.*

122. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109 (2003).

123. *RACI II*, 675 N.W.2d at 26 (Cady, J., dissenting).

124. *Id.* (arguing the majority's decision effectively made the United States Supreme Court's ruling advisory in nature, and stating "[t]his is an affront to the Supreme Court and the principles of federalism that underlie the entire judicial system.").

made clear he believed the statute was constitutional under a rational basis level of review, it is also clear he would not have been as upset had the Iowa Supreme Court initially held it was only examining the claim under a state constitutional lens and not a federal lens as well.[125] While he still would have disagreed with the majority, his disagreement would have been limited to the legal application of the rational basis test and not the additional structural shortcomings he believed undermined the court's opinion and credibility in *RACI II*.[126] His dissent again underscores the importance of framing the issue from the beginning of the claim as a specific state constitutional issue.

B. State v. Cline

Whereas *RACI II* reflected the Iowa Supreme Court's willingness to apply legal principles differently than its federal counterpart, the second case, *State v. Cline*, reflects the court's willingness to completely break from federal and state precedent in order to provide greater individual rights than what is required by the United States Supreme Court.[127] *Cline* involved a Fourth Amendment challenge to evidence discovered during a

125. Noting the language used in *Michigan v. Long*, Justice Cady said the court failed to signal to the United States Supreme Court that the 2002 *RACI I* decision was based solely on "adequate and independent state grounds." *Id*. at 27 (citing Michigan v. Long, 463 U.S. 1032, 1037–42 (1983)). As such, once the Court assumed jurisdiction, he argued it was offensive and intellectually inconsistent to "tak[e] a second bite at an apple that has long since dropped and rolled away from our tree." *Id*. at 27–28. For him, the decision was legally incorrect, but also structurally flawed in that it disrupted "the principles of federalism on which our entire system operates." *Id.* at 28.

126. *See id.* at 20 (suggesting his disagreement with the majority's application of the rational basis test by stating, "Today, a rational basis test continues to be employed that accords a presumption of constitutionality to economic legislation . . . ."). Justice Cady's belief in a strong signal informing the United States Supreme Court that the case is being decided on strictly a state constitutional basis is reflected in the unanimous opinion he wrote in *Varnum*. *See* Varnum v. Brien, 763 N.W.2d 862, 879 n.6 (Iowa 2009) ("Plaintiffs' challenge . . . is based on the equal protection guarantee in the Iowa Constitution and *does not implicate* federal constitutional protections. Generally, we view the federal and state equal protection clauses as 'identical in scope, import, and purpose.' At the same time, we have jealously guarded our right to 'employ a different analytical framework' under the state equal protection clause as well as to independently apply the federally formulated principles. Here again, we find federal precedent instructive in interpreting the Iowa Constitution, but we refuse to follow it blindly.") (emphasis added) (citations omitted).

127. State v. Cline, 617 N.W.2d 277 (Iowa 2000), *overruled in part on other grounds by* State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

pat down—essentially a search incident to a traffic citation.[128] Shortly following the arrest, and in a separate case, the United States Supreme Court ruled such searches violated the Fourth Amendment.[129] Given the Court's ruling and in order to preserve the evidence, the State in *Cline* initially argued the officer had probable cause, but the State alternatively argued the search was made in good faith and was thus subject to the good faith exception to the exclusionary rule.[130] In a unanimous opinion, the court rejected the State's probable cause argument.[131] More importantly, however, the court also rejected the good faith exception to the exclusionary rule under the Iowa Constitution.[132]

As in *RACI II*, several points can be gleaned from the case. First, it demonstrates the need for attorneys to develop a comprehensive legislative, textual, and historical argument prior to asking the court to depart from precedent.[133] Even if the historical analysis is not dispositive, like in this case, it should be a required component of any brief or oral argument before the court. Second, even if the state and federal constitutional provisions are substantially similar, or even identical, it is important to realize the court may be willing to interpret the text differently.[134] Although the court admits it strives for consistency, it is also willing to extend state constitutional protection beyond that which is guaranteed by the United States Constitution. As the court acknowledges, the United States Supreme Court merely establishes a baseline; while states cannot provide less protection, they certainly can provide more than the minimum.[135]

128. *Cline*, 617 N.W.2d at 279.

129. Knowles v. Iowa, 525 U.S. 113 (1998) (holding a search incident to citation violates the Fourth Amendment).

130. *Cline*, 617 N.W.2d at 279–80.

131. *Id.* at 283 (finding the officer may have had reasonable suspicion that the defendant may have been involved in illegal activity, but not enough to support probable cause).

132. *Id.*

133. The court began its analysis with a thorough review of the development of the exclusionary rule under both federal and state law. *Id.* at 283–85.

134. *Id.* at 285 ("[I]t is the responsibility of this court, not the United States Supreme Court, to say what the Iowa Constitution means. . . . [O]ur court would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law.") (citation omitted).

135. *Id.* ("[T]here is no principle of law that requires this court to interpret the Iowa Constitution in line with the United States Constitution, as long as our interpretation does not violate any provision of the federal constitution."). It is worth noting Iowa is not the most criminal-friendly state with regard to the amount of

The third aspect of *Cline* worth discussing is how the court developed its argument in choosing to break from the United States Supreme Court. Although the independent analysis–independent application dichotomy was not fully discussed until four years later in *RACI II*, the court appears to classify its prior *Cline* ruling as an example of independent application.[136] While the distinction may be splitting hairs, as it appears there were elements of both approaches in the decision, *Cline* is perhaps a better example of independent analysis rather than application. Although not a test or framework like the levels of review for an equal protection claim, *Cline* does represent the court's independent analysis using historical, philosophical, and constitutional arguments. In *Cline*, the court disagreed with the United States Supreme Court's characterization of the exclusionary rule as merely a deterrent to police conduct.[137] The court instead held the exclusionary rule served its own important function to help preserve the rights of the individual.[138] The good faith exception, the court held, dilutes and undermines the Fourth Amendment itself, leaving individuals without a remedy when faced with a violation of their constitutional rights.[139] Moreover, the court argued the integrity of the entire court and criminal justice system could be damaged if a good faith exception was recognized.[140] Finally, it disagreed with the United States Supreme Court's cost–benefit determination.[141] The court concluded there is an inherent value in protecting one's individual Fourth Amendment rights against unconstitutional searches and seizures, and that consideration must be included in any cost–benefit analysis.[142] The

protection it provides criminal defendants beyond that which is required by the United States Supreme Court. A 2002 study found Iowa was in the lower tier of states providing some extended protection—such as the absence of a good-faith exception—but far less friendly than many states. *See* David C. Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75, 80 tbl. 2a (2002).

136. In *RACI II*, *Cline* was cited in the discussion regarding independent application, not independent analysis. *See RACI II*, 675 N.W.2d 1, 6 (Iowa 2004).

137. *Cline*, 617 N.W.2d at 289 ("[T]he validity of the Court's analysis depends initially on the accuracy of the Court's underlying premise that the exclusionary rule's only purpose is to deter police misconduct and that the rule has no laudatory effect on the actions of the judicial or legislative branches. We disagree with both propositions.").

138. *Id.*

139. *Id.* at 291.

140. *Id.* at 289.

141. *Id.* at 292.

142. *Id.*

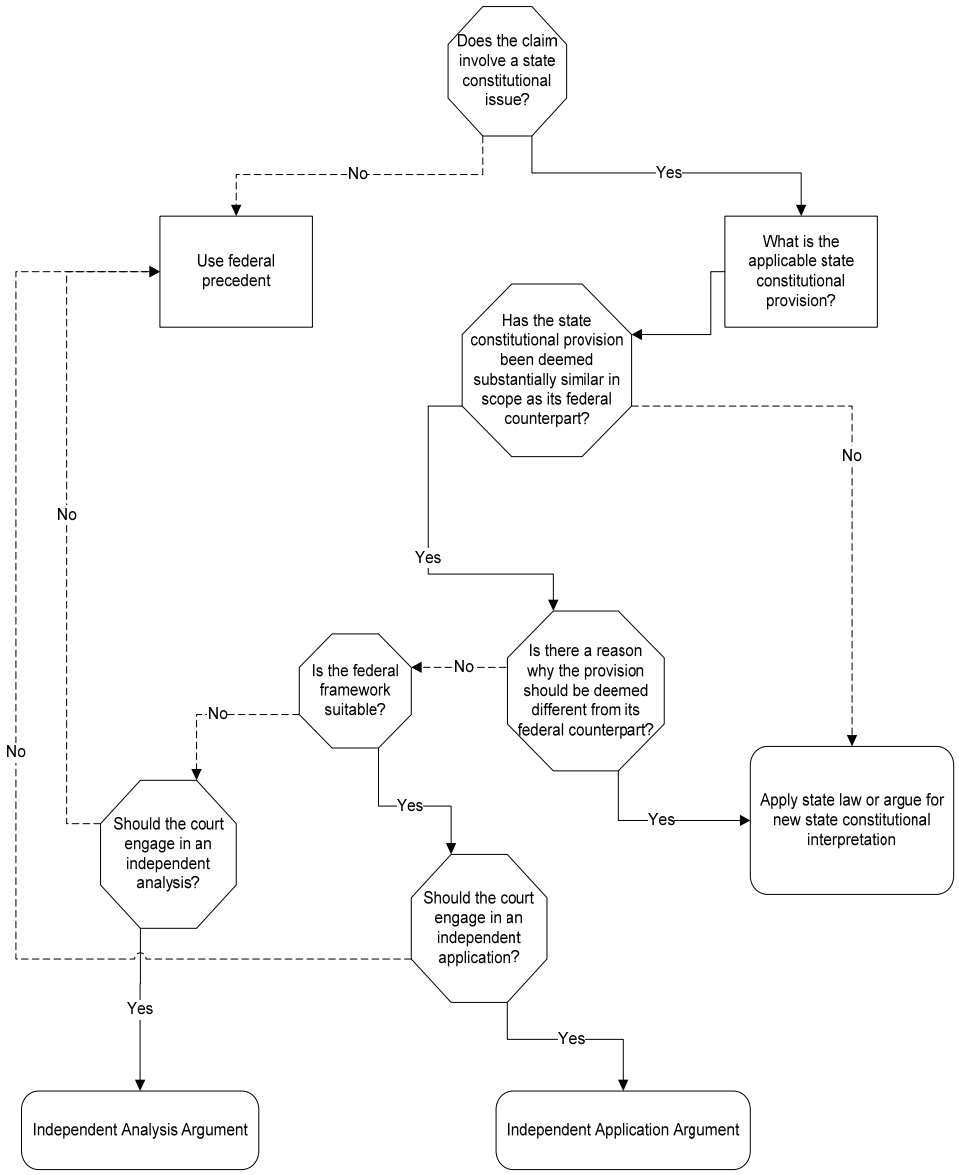
arguments outlined above do not seem to fit within the independent application approach. Rather, it appears the court independently analyzed the Fourth Amendment (and its Iowa counterpart) and determined a good faith exception was inconsistent with the text and history of that protection. Although critics might contend it is a distinction without a difference, the Iowa Supreme Court apparently felt the distinction was worth analyzing for three pages in its *RACI II* opinion.[143] As such, attorneys should take the time to determine which path they are asking the court to pursue and recognize that each path requires a different approach to developing the argument.

V. DEVELOPING A NOVEL STATE CONSTITUTIONAL CLAIM FLOWCHART

Although the Iowa Supreme Court's statements in cases such as *Cline*, *RACI II*, and most recently *Effler* clearly indicate the court expects attorneys to develop and pursue claims specific to a state constitutional interpretation, the court has been less clear in identifying a framework or process attorneys can utilize as they develop those arguments. Some courts, such as the Minnesota Supreme Court, have taken the next step and developed a basic decision tree to help attorneys determine when and how to pursue a novel state constitutional claim.[144] However, even these decision trees are broadly constructed and fail to provide any real insight an attorney could utilize. Although the Iowa Supreme Court has not explicitly provided attorneys with a process they can follow, Part III and IV of this Note demonstrate the court has provided some insight in its prior cases. The following flowchart takes this insight and provides attorneys with a basic process that can help orient their arguments and frame them in a manner conducive to the court's current philosophy.

143. *See RACI II*, 675 N.W.2d 1, 5–7 (Iowa 2004).

144. *See* Kahn v. Griffin, 701 N.W.2d 815, 824–25 (Minn. 2005) (providing attorneys a decision-tree approach to decide issues of individual rights); *see also* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 867–68 (2007) (analyzing the *Kahn* decision and how the Minnesota State Supreme Court interpreted its state constitution differently than the United States Constitution).



As indicated in the flowchart, the process begins simply by determining if there is a state constitutional claim. If not, the analysis is complete and there is no choice but to rely upon the United States Constitution and its corresponding precedent. However, if the claim does

involve a state constitutional issue, it should be clearly identified for the court from the beginning of the claim.[145] Once the applicable constitutional provision has been identified, the attorney should determine whether the Iowa Supreme Court has previously held that the provision is substantially similar in scope and meaning to its federal counterpart.[146] If the court has held the Iowa provision is unique, then neither the court nor the attorney will be bound to federal precedent. The attorney can simply argue based on existing state precedent. In most cases, this path will not be an option as the court has already held most of the state constitutional provisions are substantially similar to their United States Constitution counterparts. However, even if the court has previously held a provision is similar to the federal constitution, an attorney can try to argue the court's ruling was erroneous. Of course, the attorney must be prepared to provide substantial historical and legislative evidence to demonstrate a distinction is appropriate.

The next step in the process requires attorneys to determine if the federal framework and test are suitable, and if not, why the court should engage in its own independent analysis. As previously discussed, this approach requires an attorney to demonstrate the federal test is somehow deficient or erroneous given the court's interpretation of the constitutional provision in question. Likewise, attorneys must also offer their own proposed framework for the court. The court is unlikely to abandon the federal framework unless a suitable alternative is offered.[147] Even if the federal framework is deemed suitable for analyzing the state constitutional claim, or if the court rejects the attorney's alternative approach, the attorney can still ask the court to engage in an independent application. This approach requires attorneys show existing federal precedent is incorrect. This can entail arguing the United States Supreme Court has made a significant departure from precedent involving individual rights, or that the federal precedent simply does not provide adequate protection for its state citizens under a state constitutional inquiry.[148] Throughout this flowchart process attorneys should recognize the need for a comprehensive legal analysis that relies heavily on the following sources: (1) text of the state constitutional provision, (2) relevant state precedent, (3) historical and legislative background of the state constitutional provision, (4) text of the United States Constitution, (5) relevant federal precedent, (6)

145. *See supra* notes 123–25 and accompanying text.
146. *See, e.g.*, *supra* note 25 and accompanying text.
147. *See supra* note 105 and accompanying text.
148. *See supra* notes 110–13 and accompanying text.

historical and legislative background of the United States Constitution, (7) relevant precedent from other states that have considered the issue, (8) policy considerations unique to the state, and (9) academic literature. These sources were all used to varying degrees in *Cline*, *RACI II*, and *Effler* and will undoubtedly be critical for any novel state constitutional claim.

Of course, the flowchart outlined above is not the only approach to determine when and how to develop a novel state constitutional claim. And in most instances, the path will lead back to the federal precedent. Given the court's desire for a harmonious state and federal jurisprudence, in most cases the court is unlikely to diverge from existing federal precedent and adopt an independent, state-specific constitutional interpretation. However, given the court's stern warning in *Effler*, every attorney must at least be aware of how to proceed should the claim require a novel state argument.

VI. CONCLUSION

The Iowa Supreme Court shows no signs of abandoning its judicial independence. Moreover, the court's 2009 *Effler* decision indicates attorneys appearing before the court must be prepared to argue a state-specific constitutional claim—even if the claim goes against existing federal precedent—or face a charge of ineffective assistance of counsel.[149] Over the next decade, the court will likely see an increase in these types of claims as attorneys try to ensure they are not exposing themselves to charges of ineffective assistance. Undoubtedly, some of these claims will only pay lip service to the state constitutional claim, hoping the mere mention will assuage the court. Unfortunately, these cursory mentions of the state claim do nothing to advance the overall body of state constitutional jurisprudence. Hopefully the court will not rely on these types of incomplete arguments as it decides when to break from the United States Supreme Court. The court should also continue to refine its framework for assessing novel state constitutional claims and, in the process, provide greater clarity for attorneys on how to develop their arguments. In the meantime, attorneys must be content with the sporadic guidance provided in cases such as *RACI II* and *Cline* or possibly the flowchart outlined in this Note. Judicial federalism remains a critical component of our nation's judicial process, and the Iowa Supreme Court appears ready to play a

149. *See* State v. Effler, 769 N.W.2d 880, 897 (Iowa 2009) (Appel, J.).

significant role in its development. Iowa attorneys must be prepared to play their part in this process as well.

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