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The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip

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THE *AMBIGUOUS* INDEPENDENT AND ADEQUATE STATE GROUND IN CRIMINAL CASES: FEDERALISM ALONG A MÖBIUS STRIP

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In topology a Möbius strip is a one-sided surface formed by holding one end of a rectangle fixed, rotating the opposite end 180 degrees, and joining the two ends.[1] In Supreme Court jurisdiction the independent and adequate state ground doctrine forms a similar figure by joining, on one side, the power of the Court to revise the judgments of state courts on issues of federal law with, on the other side, the Court's lack of any general power to reexamine issues of state law. Each figure has an inherent ambiguity. Both the topological figure and the jurisdictional figure are the one-sided result of joining a two-sided figure with a twist. While the twist in the former is a 180 degree rotation, the "twist" in the latter is our federalism. My essay is about the ambiguity that yields such a jurisdictional figure.

Since the First Judiciary Act, state courts, including state supreme courts, have had either exclusive or concurrent jurisdiction over most federal questions.[2] For as long, the Supreme Court has possessed the power to revise judgments of state courts on issues of federal law.[3] The Court, however, long has rejected the view that the existence of a federal question in a state case empowers it to decide every question raised or even every federal question raised. If the judgment rests on a nonfederal ground which is independent

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[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1450 (unabr. ed. 1981).

[2] *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844-962 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER]; C. WRIGHT, THE LAW OF FEDERAL COURTS § 17 (4th ed. 1983).

[3] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

of the federal question in the case and which is adequate to support the judgment irrespective of the correctness of the state court's resolution of the federal question, the Supreme Court will stay its hand. This principle is something of a creation of judicial will sounding in political philosophy and apparently screens the Constitution and the jurisdictional statute.

The doctrinal twist comes in the application to a state court's ambiguous judgment in which the federal and state grounds are indistinct. The Supreme Court limns the important boundary between the state legal systems and the federal system by defining the requisite independence and adequacy in such cases. My purpose is not to provide still another general exegesis of the independent and adequate state ground doctrine. A short summary will do. I emphasize instead the difficult applications in criminal cases. Significantly, the ascertainment and disposition of the ambiguously grounded judgments took on a new methodology in 1983 in *Michigan v. Long*.[4] The measure of this new methodology must be taken against principles of federal jurisdiction, federalism, constitutional theory both federal and state, and the proper institutional role of the Supreme Court. This is how I propose to analyze this Möbius jurisdiction.

I. SUMMARY AND SOURCE

I resist the scholarly temptation to trace the independent and adequate state ground doctrine back to the Rosetta Stone.[5] Justice Jackson once proclaimed, "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."[6] My concern here is the general authority of the Supreme Court to decide if a state ground actually has been passed

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[4] 462 U.S. 1032 (1983).

[5] *See generally* HART & WECHSLER, *supra* note 2, ch. V; 12 J. MOORE, H. BENDIX, & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶¶ 511.01-.02 (2d ed. 1982); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 216-31 (1980); R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 116-54 (R. Wolfson & P. Kurland 2d ed. 1951); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 230-45 (5th ed. 1978); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE §§ 4019-4032 (1977) [hereinafter cited as WRIGHT & MILLER].

Throughout this discussion, I will emphasize the criminal application of the doctrine. Much of what I say and many of my authorities will apply to state civil cases, as well.

[6] Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

upon and to review the independence and adequacy of that ground to support the state court's judgment.[7]

Basic policies of Supreme Court jurisdiction introduce the doctrine.[8] The Supreme Court does not have a plenary appellate power to review state court decisions that involve only a question of state law. The Court, however, is possessed of an ample power to review state court decisions of federal questions. The supremacy clause, of course, obliges state courts to adhere to the Constitution and laws of the United States, that is, to decide federal questions when properly presented. State court decisions which include both state law questions and federal law questions occasion the exercise of the independent and adequate state ground doctrine. In these cases, Supreme Court review is precluded if the state law question is independent and adequate to support the judgment regardless of how the federal question is decided or if the state court has applied appropriate procedural reasons for not reaching the federal question. These policies have led to "an intricate set of doctrines designed to identify the circumstances in which the Court may supersede state court determinations of state law."[9]

The doctrines cluster around the twin criteria of independence and adequacy. These two criteria have been considered at different times to be the same criterion,[10] alternative criteria,[11] and conjunctive criteria.[12] Today they must be considered distinct.[13] They are related theoretically: an independent state ground may be set aside if deemed inadequate.[14]

First, the state ground must be independent;[15] the state ground must not be intertwined with or dependent upon a federal question either explicitly or implicitly.[16] Dependence, which calls for

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[7] Exercise of the authority to do so has been traced back to Chapman v. Goodnow's Adm'r, 123 U.S. 540 (1887). *See generally* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 954-55 nn.42-43 (1965) (tracing history of Court's authority).

[8] *See generally* WRIGHT & MILLER, *supra* note 5, §§ 4019-4032.

[9] *Id.* § 4019, at 662.

[10] *See* Moran v. Horskey, 178 U.S. 205, 215 (1900).

[11] Giles v. Teasley, 193 U.S. 146, 160 (1904).

[12] Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917).

[13] Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375, 1382 (1961).

[14] WRIGHT & MILLER, *supra* note 5, § 4019 at 662.

[15] *See generally* WRIGHT & MILLER, *supra* note 5, §§ 4023, 4029 (procedural grounds discussed in § 4023 and substantive grounds in § 4029).

[16] *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Minnesota v. National Tea Co.,

the exercise of Supreme Court jurisdiction, connotes a relationship between the state law question and the federal question such that a change in the determination of the latter would necessarily result in a change in the former.[17] For example, if a state constitutional provision has been interpreted by the state supreme court to compel a result identical to a parallel federal constitutional provision, the Supreme Court would exercise jurisdiction as if the dependent state provision did not exist.[18]

Second, the state ground must be deemed adequate;[19] the state ground must be bona fide,[20] broad enough to sustain the judgment and to dispose of the case,[21] and of sufficient significance to justify the Supreme Court's declination to consider the federal issue.[22] The Supreme Court will reach the federal question if the state ground is inadequate, if it is untenable, and found to be without any substantial basis.[23]

One last distinction must be made explicit. The independent and adequate state ground doctrine has two isomers, one substantive and the other procedural. Usually, the Supreme Court applies the doctrine in situations in which the state court has decided two substantive issues, one state and one federal. There is also a procedural form. State procedural law always influences the way the

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309 U.S. 551, 557 (1940).

[17] *See, e.g.*, Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 133 (1945); Standard Oil Co. v. Johnson, 316 U.S. 481, 483 (1942); State Tax Comm'n v. Van Cott, 306 U.S. 511, 514 (1939).

[18] *See* Delaware v. Prouse, 440 U.S. 648, 652 n.4 (1979) (DEL. CONST. art. I, § 7 held substantially similar to fourth amendment). *See generally* Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289 (1969) (touchstone is whether federal law is operative).

[19] *See generally* WRIGHT & MILLER, *supra* note 5, § 4028.

[20] *See, e.g.*, Hathorn v. Lovorn, 457 U.S. 255, 263 (1982) (state procedural rules must be applied consistently, not just as a device for avoiding federal questions); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (state procedural requirements not regularly followed cannot deprive the Court of review).

[21] *See, e.g.*, Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 634 (1875).

[22] *See, e.g.*, Henry v. Mississippi, 379 U.S. 443, 447 (1965); Davis v. Wechsler, 263 U.S. 22, 24-25 (1923).

[23] *See, e.g.*, Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 543 (1930); Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1920).

This principle is not unlike the requirement of a substantial federal question in appeals as of right from state supreme courts. *See generally* Note, *The Supreme Court Dismissal of State Court Appeals for Want of a Substantial Federal Question*, 15 CREIGHTON L. REV. 749 (1982) (considering the repercussions and question raised when the court dismisses an appeal for want of a substantial federal question).

federal question is presented and perceived, at least subtly. The doctrine has dramatic application in situations in which the state court has refused even to consider a federal question because of a failure to comply with a procedural requirement of state law. Federal questions, like other questions, must be raised in accordance with state procedure, so long as the state procedure is itself constitutional, independent, and adequate.[24]

The modern doctrine permits the Supreme Court to set aside a state ground that appears sufficiently broad to support the judgment if it is deemed sufficiently inadequate, but the modern doctrine also obliges that the Court refrain from reviewing federal questions actually decided by a state court if the state ground is both independent and adequate. Why? How?

I might begin to answer the "why" question by identifying some rationale for the doctrine. The Supreme Court has not explained the doctrine's complicated rules in terms of modern federal jurisdiction, however. Theoretical underpinnings for the doctrine do exist and must be identified to appreciate the content of the independence and adequacy requirements and to consider how the ambiguously grounded decision should be handled. Some leading commentators have ventured a summary rationale:

> The basic propositions . . . are that the role of state law is always subject to federal control; that the existence of Supreme Court jurisdiction should not, of itself, alter the ordinary balance between state and federal law; that when state law applies, the existence of Supreme Court jurisdiction is not alone enough to warrant redetermination of state law; that Supreme Court jurisdiction to protect federal rights requires distinction between state procedural grounds and state substantive grounds in an assessment of independence and adequacy; that there is at best little room to reconsider state law in order to avoid constitutional questions; that the commonly offered advisory opinion rationale is both circular and misde-

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[24] *See generally* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1083-86 (1978) (analyzing the Court's disposition of State procedural grounds in criminal cases); Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977) (advocating the rule of review whether the issue of state law was substantive or procedural).

> scriptive; and that the attribution of jurisdictional force to present doctrine is unnecessary in principle and occasionally misleading in describing practice.[25]

It seems the "how" question is just as involved and the answer equally indistinct. The mechanism authorizing or requiring the independent and adequate state ground doctrine may be considered on three levels: constitutional, statutory, and prudential.

Of course, the Constitution does not explicitly authorize the Supreme Court to review state court decisions. And while it is unusual for a court of one sovereign to review the court of another sovereign, "federalism itself is—or was when the Constitution was adopted—an unusual system."[26] Article III does list cases and controversies within the judicial power of the United States and within the Supreme Court's appellate jurisdiction without assigning them exclusively to the federal courts.[27] The Supreme Court's constitutional power to review a state court's holding on a federal question is within the tautology of the supremacy clause and is inherent in our federalism subject, of course, to congressional empowerment.[28] The Court's power to review the independence and adequacy of the state law holding before reaching the federal question is another matter. The Constitution does not *require* the doctrine. Authority to *support* the doctrine, however, has been found in several places in the Constitution. The independent

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[25] WRIGHT & MILLER, *supra* note 5, § 4021, at 675. Consistent with this rationale, the same authors venture a synthesis of the doctrine:

> The Supreme Court retains jurisdiction and authority to determine whether federal law should displace state law generally on a given matter; to determine whether there is any possible outcome of a federal issue that would require a different result than state grounds; and to determine the adequacy of state grounds that, if adequate, would independently sustain the judgment. All of these questions may be so easily determined that they do not require assertion of full jurisdiction to decide. Once it has been concluded that federal law permits state law to control, and a controlling basis for decision is found in state law, the state question will not be reexamined further. Acceptance of the state basis for decision precludes any need to inquire into the independent federal issues, and jurisdiction to decide them is denied. The major difficulties emerge in seeking tests to measure both the independence and the adequacy of the state grounds, not in understanding the reasons why state courts should be afforded great leeway in shaping state law.

Id. § 4021, at 695-96.

[26] C. WRIGHT, *supra* note 2, § 107, at 736.

[27] *Id.*

[28] *See infra* notes 142-279 and accompanying text.

and adequate state ground doctrine may be authorized by the supremacy clause. Jurisdiction to determine jurisdiction includes, so the argument goes, the determination whether the state court has given proper respect to the federal interest in deciding the state law question.[29] The argument is circular, however, as the federal interest is protected if the state interest adequately protects the federal interest, and the Court's adequacy inquiry is rendered merely derivative. The net effect is to regard the federal interest as the only issue in the case.[30] Due process is a second locus for constitutional authority, at least when the state ground is procedural.[31] If the state procedure denies a fair opportunity to be heard on the federal claim, allowing the result would violate procedural due process.[32] Finally, it has been suggested that the doctrine is part of our "working constitution," those premises underlying our constitutional schema which have always been.[33]

The important distinction to be made is that the doctrine is not constitutionally required, although it has several possible constitutional authorizations. From time to time, the debate finds its way into the Court's opinions, but this distinction is not always made.[34] Were the doctrine constitutionally required, the Court would be without power ever to decide the federal question without first examining possible state grounds for the decision. Yet, it does. Furthermore, pendent and ancillary jurisdictions define the outer limits of article III far beyond such a requirement.[35] The power is

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[29] NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297 (1964); Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1920).

[30] Hill, *supra* note 7, at 959.

[31] When the state ground is substantive, due process seems as inapt as substantive due process generally. *But see* Hill, *supra* note 7, at 962.

[32] *See* Bouie v. City of Columbia, 378 U.S. 347, 354 (1964); Michel v. Louisiana, 350 U.S. 91, 96-100 (1955). *See generally* WRIGHT & MILLER, *supra* note 5, § 4025, at 725-29 (due process tests of adequacy); Hill, *supra* note 7 (exploring the doctrinal basis for the Court's review).

[33] Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 188-89; *see also* Hart, *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 111 n.80 (1959).

[34] *See, e.g.*, Fay v. Noia, 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 641 (1875) (Bradley, J., dissenting).

[35] Comment, Michigan v. Long: *Presumptive Federal Appellate Jurisdiction Over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081, 1087 n.66 (1984). Of course, there are distinctions between the Court's appellate jurisdiction and the lower courts' original jurisdiction.

there.[36] While the doctrine is within the constitutional contemplation it is not compelled by article III.[37]

The same can be said about the statutory basis of the doctrine. The Supreme Court has always interpreted the Judiciary Act to exclude jurisdiction to review state law grounds in state cases.[38] It is quite another principle, however, to decline to decide a federal question because the case includes an independent and adequate state ground. The statute, as interpreted, permits but does not require this deference. Indeed, the interpretation affording the Court this discretion flies "in the face of statutory amendments that seem to point the other way."[39] The statute would seem to allow the Court to decide the federal and state claim so long as a federal question has been raised and presented within the case or controversy.[40] Thus, no more so than the Constitution does the statute compel the Court to apply the doctrine.

The independent and adequate state ground doctrine is best explained on a prudential level. While neither constitutionally nor statutorily required, the doctrine is a judicial creation crafted from policies of prudent judicial administration and forged in the crucible of federalism.[41] While the policy that the Supreme Court may review state court decisions of federal questions is grounded in the dual sovereignty of our federalism, the independent and adequate

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[36] *Contra* Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273, 282 (1978).

[37] *See generally* WRIGHT & MILLER, *supra* note 5, § 4020, at 669, § 4021, at 676-96.

[38] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1257 (1983)). For the full text of the successive enactments, see R. ROBERTSON & F. KIRKHAM, *supra* note 5, at 931-41 app. A. Their history is traced in HART & WECHSLER, *supra* note 2, at 439-41; and WRIGHT & MILLER *supra* note 5, § 4006, at 543-53, § 4020, at 662-75.

[39] WRIGHT & MILLER, *supra* note 5, § 4021, at 675. *See generally* Elison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177, 180-82 (1984) (discussion of statutory basis of the Court's power to review). As a result, the Court has saved itself from having to unravel the Gordian knot of the constitutionality of its discussion of state law. *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 502-04 (1954).

[40] Presumably, the state law decision by the federal court would only be the law of the case and would not be binding on the state court, despite the supremacy clause, because of tenth amendment limits and the state's own sovereignty in our federal system. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-32, at 120 (1978).

[41] Of like dimension are the nonconstitutional prudential principles of standing doctrine, such as the general rule against representative standing. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 474-75 (1982).

state ground limitation is only indirectly implicated.[42] Best understood, the doctrine is viewed as a policy of self-restraint, as a power held back. Modern notions of federalism and judicial economy lie at its foundation.[43] The Court chooses not to exercise a power to decide the federal question based on important concerns for federal jurisdiction, federalism, constitutional theory, and institutional role.

Perhaps the best indication that the doctrine is of a prudential nature is the Court's experience with ascertaining and disposing of the ambiguously grounded decision, a context in which the Court has experimented with several approaches. Such judicial experimentation could not be possible if the doctrine were of a constitutional or statutory nature and mandatory. In the ambiguously grounded cases, too, the prudential concerns are in the forefront. In a leading case, the Court explained:

> It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action.[44]

Surely the Court has the power to decide the federal questions in such cases, if not the state law questions. The doctrine is not jurisdictional in the sense of the power to decide; that bugaboo should be laid to rest.[45]

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[42] *See* Note, *Supreme Court Disposition of State Decisions Involving Non-Federal Questions*, 49 YALE L.J. 1463, 1463-64 (1940).

[43] *See* Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 761-62 (1976) [hereinafter cited as Note, *State Constitutional Guarantees*]; Note, *Supreme Court Review of State Court Decisions Involving Multiple Questions*, 95 U. PA. L. REV. 764, 768 (1947) [hereinafter cited as Note, *Supreme Court Review*].

[44] Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). *See generally* Note, *Federal Review of Ambiguous State Court Decisions—An Opportunity for Judicial Centralization*, 27 VA. L. REV. 900 (1941) (analysis of *Minnesota v. National Tea Co.* and other ambiguous state decisions).

[45] Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory*: Michigan v. Long, 18 CREIGHTON L. REV. 1, 45 (1984).

II. Ascertainment and Disposition

The doctrine of the independent and adequate state ground has proved difficult of discernment and troublesome in application for as long as the Supreme Court has been reviewing state court decisions.[46] This has been so despite the fullness of the Court's jurisdictional design and the historical length of its development constitutionally, statutorily, and prudentially. The Court has found it especially difficult to employ the doctrine in ambiguously grounded decisions. The Court admitted its own confusion in *Michigan v. Long*: "Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue."[47] I next discuss some reasons for the difficulty and summarize the *Long* attempt at solution.[48]

A. *The Inevitability of Ambiguity*

The adequate state ground doctrine has two stages of analysis: ascertainment and disposition. In the first stage, the Supreme Court takes the measure of the state ground to determine whether the independence and adequacy requirements are satisfied. In the second stage, the Court must enter a disposition, must grant or deny the writ and must affirm, reverse, or vacate the state court judgment. If the ascertainment shows clearly that the state court judgment is *not* based on an independent and adequate state ground, the disposition should include a straightforward decision of the federal question. If the ascertainment shows clearly that the state court judgment *is* based on an independent and adequate state ground, the disposition should omit any decision on the merits of the federal question. In the unusual case, however, when the ascertainment is unclear, the disposition decision is likewise con-

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[46] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). For the view that this famous case would not be reviewable under the modern doctrine, see G. Gunther, Constitutional Law 57 n.9 (11th ed. 1985).

[47] *Long*, 463 U.S. at 1038 (footnote omitted).

[48] Ambiguity in Supreme Court jurisdiction is not limited to the independent and adequate state ground doctrine. *See* Wilson v. Cook, 327 U.S. 474 (1946) (ambiguity between appeal and certiorari); Honeyman v. Hanan, 300 U.S. 14 (1937) (ambiguity among multiple federal questions). This essay is so limited however.

fused. Logically, the dispositional choice is to treat the ambiguous decision in one of three ways. First, the ambiguous decision could be disposed of as if the state ground were *not* independent and adequate. Second, the ambiguous decision could be disposed of as if the state ground *were* independent and adequate. Third, the Court could use a compromise, some third variety of disposition. Throughout the history of the doctrine, the Court has used each of these dispositional techniques. The vice to be found in the dispositional history has been the ad hoc nature of selection of one disposition over the others. Even after *Long*, "there is no clear statement of the considerations that lead the Court to choose one response over another."[49] As we shall see, *Long* made clear what disposition will follow an ascertainment that the ground is ambiguous: ambiguously grounded decisions will be treated as if the state ground is *not* independent and adequate. The universe of state decisions has been reorganized so that ambiguously grounded and clearly inadequate or dependent decisions are grouped together at the dispositional level, although, at least in theory they are distinct at the ascertainment level. Difficulty in ascertainment remains, however, for the Court must still draw a line between the clearly state-grounded and ambiguously grounded categories and assign

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[49] WRIGHT & MILLER, *supra* note 5, § 4032, at 769 (footnote omitted).

The same authors list the various dispositional choices before discussing them:

> State court litigation may be disposed of without any opinion to indicate the grounds chosen by the state court. Even if an opinion is written, it may not clearly reveal whether decision was rested on independent state grounds. The Supreme Court has employed a wide array of devices in responding to such uncertainties. The strictest response is to invoke the rule that parties asserting its jurisdiction must establish that there was no independent and adequate state ground, and to dismiss the case if uncertainty exists. Alternatively, the Court may choose to resolve the uncertainty for itself, and to decide the federal questions if it infers that there was no controlling state ground; at times this approach has been followed even in face of an admission that independent state grounds may have controlled the state court decision. A third approach has been to refer to clarifying statements that the parties have obtained from the state court. Beyond these older techniques, newer techniques have developed that involve more complex interactions between the Supreme Court and state courts. The most modest technique has been to grant a request of counsel that the Supreme Court continue its proceedings in order that an application may be made to the state court for clarification. Beyond that, the Supreme Court may itself take the lead in seeking clarification from the state court, even to the point of vacating the state judgment and remanding with a direct request for clarification.

Id. But cf. id. § 4032, at 439 (Supp. 1985) ("A clear approach to ascertaining the grounds of state court decisions has been articulated in the 'plain statement' rule adopted in Michigan v. Long.") (footnote omitted).

decisions to them. That ascertainment function continues.

At the risk of regress, I suggest that this ascertainment of ambiguity is itself ambiguous. One might suggest, for example, that the Court should ascertain and label ambiguous any state decision in which there is a significant probability that the decision is based on federal grounds. This would trigger a disposition as if the decision were clearly not independently and adequately based on state law. The obvious difficulty is how to determine exactly how much probability is significant for this purpose, a task to which the Court is not equal if experience with the doctrine is any indication.[50] Ultimately, any configuration of the independent and adequate state ground doctrine must be reduced to the Court's tolerance of ambiguity. The dispositional category, which after *Long* includes both federally grounded and ambiguously grounded state court decisions, waxes and wanes with the Court's tolerance for ambiguity. If the tolerance is low the category is enlarged; if the tolerance is high the category is diminished. The key to understanding the doctrine in these difficult applications is not in defining ambiguity but in taking the measure of the Court's tolerance of ambiguity.

Just as the ambiguously grounded decision lies on a spectrum between the clearly independent and adequately grounded decision, at one extreme, and the clearly dependent or inadequately grounded decision, at the other extreme, so too are there relative degrees of ambiguity in between. Ultimately, the Court must decide if the state decision is too ambiguous to be the object of deference under the independent and adequate state ground doctrine.[51] Before *Long*, the Court matched the ascertained degree of ambiguity with the disposition.[52] After *Long*, there are fewer dispositional

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[50] Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 COLUM. L. REV. 822, 834 (1962).

[51] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455 (1958); Black v. Cutter Labs, 351 U.S. 292, 298 (1956); *see also* Kramer, *State Court Constitutional Decisionmaking* 1983 ANN. SURV. AM. L. 277, 285 n.34 (listing cases).

[52] Under the pre-*Long* dispositional law, multiple dispositions corresponded to variations in ambiguity. *See supra* note 49. When the state court expressly based the decision upon two grounds, one federal and one state, the Court did not view if the state ground was independent and adequate. Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935). When the state court decision was placed solely on a state ground, but a federal ground was asserted, the Court did not review as conclusive the failure to reach the federal ground and heard the case if the state ground was inadequate. Wood v. Chesborough, 228 U.S. 672, 672-80 (1913).

options, connoting a lower tolerance for ambiguity. Yet, ambiguity still is inevitable.

On an ideal docket, the Court should first evaluate whether the state ground jeopardizes the actual federal interest involved; second, determine if the state court judgment furthered some substantive state policy or merely took advantage of the federal interest; and third, conduct the appropriate supremacy clause and preemption analyses.[53] Consider instead, the dilemma facing the Court in the ambiguously grounded state court decision.[54] Its own subjective evaluation may be wrong no matter what disposition is selected for the ascertained-as-ambiguous decision. If the Court incorrectly exercises jurisdiction, the federalism canon of state court autonomy over state law may be honored in the breach, at least until the remand to the state court. If the Court incorrectly refuses to exercise jurisdiction, the Court's institutional role as final arbiter of federal law goes unperformed and federal law suffers in the process. The Court's tolerance for ambiguity is that significant. Furthermore, this dilemma often is not apparent but may be lurking in a case and found only with extraordinary effort and even then may not present itself until after the filing of briefs on the merits or after the oral argument.[55]

When both state law and federal questions were raised and the state court decided without an opinion, the Court assumed that the decision was based on the state ground, but went on to determine adequacy and would review the inadequately based case rather than infer that the state court proceeded on an inadequate basis. *See* Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54 (1934). If the state court expressly based its judgment on a federal question, it made no difference that the state court might have relied on an independent and adequate state ground in the case. *E.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192, 197-98 (1944); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 98-99 (1938).

[53] L. TRIBE, *supra* note 40, § 3-33, at 122 n.11. *See generally* Harmon & Helbrush, *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 Golden Gate L. Rev. 1, 81-97 (1974) (procedure for deciding whether to retain a state rule).

[54] *See* Note, *Supreme Court Review*, *supra* note 43, at 773.

[55] *See* SUP. CT. R. 34. Jurisdiction is to be addressed in the petition for certiorari and in the jurisdictional statement. SUP. CT. R. 15, 21. The focus there, however, is if a federal question has been presented. Schleuter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1087 n.49 (1984). The issue was first raised in *Michigan v. Long* at oral argument, obviously after considerable effort had been expended on the merits by the parties and the Court. *Id.* at 1088 n.50 (citing Transcript of Oral Arugument at 30). Sometimes cases must be dismissed after oral argument. SUP. CT. R. 53. *E.g.*, Florida v. Casal, 462 U.S. 637 (1983); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

Ambiguity is inevitable. State courts will not do away with it on their own accord and nothing the Supreme Court can say or do will eliminate all ambiguity. Nor will the Justices inevitably agree on when a state decision is ambiguous. From the state court perspective, ambiguously grounded decisions may result from any number of causes, bad lawyering, deliberate obfuscation, incompetence, negligent lapses, a decision with no opinion, or from some other cause. Furthermore, I submit that some ambiguity is an inevitable byproduct of the judicial decisionmaking process. Judicial expression in opinion writing generally has its own limits, but in difficult cases dealing with complex issues the intellectual process is peculiarly fleeting.[56] State court decisionmaking in a federal system is complicated, sophisticated, and theoretical. From the Supreme Court perspective, a state court opinion and judgment is not a mere shibboleth to be pronounced one way to allow review and another way to prohibit review. The Justices cannot be expected always to agree that the level of ambiguity is or is not tolerable in a given case. To expect that would be to blink at the many strident disagreements over the years at the ascertainment level of the independent and adequate state ground doctrine.[57] Ambiguity inheres in state judicial decisionmaking in a federal system. We cannot expect a Supreme Court docket without this feature. Best understood, as a prudential principle, the independent and adequate state ground doctrine in its application to the ambiguously grounded decision may be likened to a rheostat, varying the intensity of Supreme Court review over the years in response to the larger environment of federalism. Only by focusing narrowly on the treatment of ambiguous decisions and, at once, by focusing broadly on the Court's constitutional philosophy and sense of role can we hope to penetrate the doctrine's inner workings.

B. *The New Methodology of* Michigan v. Long

Much already has been written about the Court's new methodol-

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[56] *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1262-63 (1978).

[57] Court division on the application of the doctrine is something of a tradition that has continued to the present day. *E.g.*, Ponte v. Real, 105 S. Ct. 2192 (1985); Montana v. Jackson, 460 U.S. 1030 (1983); Delaware v. Prouse, 440 U.S. 648 (1979); Murdock v. City of Memphis, 87 U.S. (10 Wall.) 590 (1874). *See generally* Annot., 59 L. Ed. 2d 924 (1980) (collecting cases).

ogy for ascertainment and disposition of ambiguously grounded state decisions announced in *Michigan v. Long*.[58] I mean to summarize here the opinions within the framework of this essay only so that I can assess the broader implications of the Court's new approach.[59]

When faced with an ambiguously grounded state decision, the Supreme Court traditionally has used four techniques:

> (1) since the burden is on the party invoking the jurisdiction of the Supreme Court to establish that that Court has jurisdiction, it may dismiss if its jurisdiction is ambiguous; (2) it may vacate the judgment below and remand so that the state court will have an opportunity to clarify what it has ruled; (3) it may continue the case to give the parties an opportunity to apply to the court below for clarification; or (4) if it considers that any state ground that might be advanced for the decision is insubstantial, or that the federal question seems necessarily to have been decided, it may take jurisdiction and decide the federal question.[60]

Over the years leading up to *Long*, the Court had used all of these techniques choosing among them on an ad hoc and largely unexplained basis.[61] If the Court knew, it was not telling. The rest of us were left to guess that the choice was "made on the basis of the Court's perception of the importance of the federal interest involved as well as its conception of appropriate federal/state court relations."[62]

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[58] 463 U.S. 1032 (1983). *See, e.g.*, Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92 (1984); Elison & NettikSimmons, *supra* note 39; Schleuter, *supra* note 55; Seid, *supra* note 45; Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118 (1984); Comment, *supra* note 35; Comment, Michigan v. Long: *The Supreme Court Establishes Presumptive Jurisdiction over State Court Cases*, 20 N. ENG. L. REV. 123 (1984-85).

[59] *See generally* WRIGHT & MILLER, *supra* note 5, § 4032, at 439-41 (Supp. 1985).

[60] C. WRIGHT, *supra* note 2, § 107, at 752-53 (footnotes omitted).

[61] *See id.* § 107, at 752-53 nn.95-98 (citing examples of each of the four categories). Explanation for a given choice was rare and reasoned explanation virtually nonexistent. *See* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 200-01 (1965) (importance and widespread interest in the case justified remand for clarification rather than dismissal); Note, *supra* note 50, at 842.

[62] Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 838 (1983). *See supra* text accompanying note 53.

In *Long*, the Supreme Court of Michigan had reversed a state criminal conviction, holding that evidence seized from the defendant's automobile should have been suppressed.[63] In the state court opinion, the state constitution was twice mentioned in a general discussion of federal law under the incorporated fourth amendment.[64] The Supreme Court held that the state decision was not independently and adequately grounded on Michigan constitutional law[65] and announced a new methodology for ascertaining and disposing of ambiguously grounded state court decisions.[66]

Justice O'Connor,[67] speaking for the majority[68] admitted that the Court had "thus far not developed a satisfying and consistent

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[63] People v. Long, 413 Mich. 461, 473, 320 N.W.2d 866, 870 (1982), *rev'd*, 463 U.S. 1032 (1983).

[64] The court cited the state and federal constitutions in a footnote. *Id.* at 471 n.4, 320 N.W.2d at 869 n.4. In its conclusion, the court wrote, "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution." *Id.* at 472-73, 320 N.W.2d at 870.

[65] Despite the Michigan court's conclusory assertion, *supra* note 64, the Supreme Court performed its own evaluation of Michigan constitutional law. The Court's tolerance for ambiguity seemed quite low, as its understanding of state law confirmed that the state ground was neither independent nor adequate. *Long*, 463 U.S. at 1044 n.10. In the process, the Court appeared intolerant of the style of the Michigan Supreme Court's opinion. *See supra* text accompanying note 60 (choice (4)). Such legal differences are somewhat surprising. *See* Collins, *supra* note 58, at 94. *Compare* People v. Long, 413 Mich. at 469, 320 N.W.2d at 868 ("closed folding Browning knife") *with* Michigan v. Long, 463 U.S. at 1036 ("large hunting knife").

[66] On the incorporated fourth amendment merits, the Court expanded the permissible scope of a search under Terry v. Ohio, 392 U.S. 1 (1968), to allow a limited protective search of a suspect's vehicle based on a reasonable belief that the suspect is dangerous and may gain immediate access to a weapon. *Long*, 463 U.S. at 1049. The merits do not interest me for now. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.8, at 183-84 (1985); O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363 (1984); Note, *Fourth Amendment—Officer Safety and the Protective Automobile Search: An Expansion of the Patdown Frisk*, 74 J. CRIM. L. & CRIMINOLOGY 1265 (1983).

[67] There is a certain irony that Justice O'Connor, a former state court judge, would be author of such an opinion. *See infra* note 139.

[68] Five Justices approved of the new methodology. Justice Blackmun concurred, but refused to join the ambiguous state ground holding seeing "little efficiency and an increased danger of advisory opinions in the Court's new approach." *Long*, 463 U.S. at 1054 (Blackmun, J., concurring in part and concurring in the judgment). Justice Brennan, joined by Justice Marshall, dissented from the incorporated fourth amendment holding and simply announced his "agree[ment] that the Court has jurisdiction to decide this case." *Id.* at 1054 n.1 (Brennan, J. dissenting). Justice Stevens dissented from the majority's presumption of dependence and inadequacy and would have imposed the opposite presumption. He also urged that the discretionay docket was misused to review a state decision that upheld a criminal defendant's federal rights. *Id.* at 1065 (Stevens, J., dissenting).

approach for resolving this vexing issue."[69] No member of the Court seemed willing to perpetuate the ad hoc approach.[70] The Justices agreed on the need for a single, straightforward method of ascertainment and disposition in ambiguously grounded state court decisions. They disagreed, however, on the choice. Rejecting the ad hoc approach meant that there were four possible uniform approaches: (1) undertaking an independent examination of state law; (2) allowing for state court clarification by vacating or entering a continuance; (3) presuming that adequate state grounds are not independent; (4) presuming that adequate state grounds are independent. The majority chose the last approach, as the least difficult.[71] Examining the state law was unsatisfactory because the Court would be venturing into unfamiliar territory typically without the parties' guidance. Vacation and continuance were rejected because of inherent delay and inefficiency and especially because of the burdensome consequences for state courts effectively to determine the Court's jurisdiction. A presumption against the jurisdictional predicate would have frustrated the important need for uniformity.

Rejecting these approaches the Court announced a new methodology for ascertaining and disposing of ambiguously grounded state decisions which assumes the jurisdictional predicate:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[72]

This methodology truncates the ascertainment function. Now the surface appearance of a dual basis is enough. Even so, "[f]air appearances, primary reliance and interweaving are not self-applying

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[69] *Id.* at 1038.

[70] *Id.* at 1039 (majority opinion); *id.* at 1066 (Stevens, J., dissenting).

[71] *Id.* at 1040-41.

[72] *Id.* The new approach was anticipated by some commentators who divided over its propriety. *Compare* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972) *with* Falk, *Foreward* to Note, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973).

concepts."[73] Ambiguity of some degree is inherent and the Court's application of these ascertainment measures still obliges the Court to assess how much ambiguity it will tolerate. The state courts remain the authors of ambiguity. The Court proclaimed a rule of plain statement that preserves the state courts' control through the formal device of their expressly announcing independence and adequacy.[74] The Court imposed a new uniformity at the disposition phase which equated the ambiguously grounded decision with the inadequate or dependently grounded decision: Supreme Court review follows either ascertainment. In pronouncing the new dispositional rule, the Court admitted the rule-proving exception that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action."[75] That qualification takes away from the Court's announced effort at "doctrinal consistency" if that goal is understood to mean a rigid single rule of disposition.[76] Nor does the qualification appear to be merely a meaningless editing concession to some opinion-joining Justice to hold a vote, although it reads that way.[77] The Court has acted since the *Long* decision to vacate a state judgment and remand for clarification of the independence and adequacy of a state ground.[78]

Precedentially, the *Long* holding is consistent with the most significant recent trend in the case law on independent and adequate state grounds.[79] The holding is the culmination of a rethinking

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[73] WRIGHT & MILLER, *supra* note 5, § 4032, at 440 (Supp. 1985).

[74] The Court stated:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Long, 463 U.S. at 1041.

[75] *Id.* at 1041 n.6.

[76] Justice O'Connor noted, "this *ad hoc* method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. *Id.* at 1039.

[77] Justice Rehnquist revealed the true significance of footnotes in a recent interview. "I used to think, you know, if there were an expression in a footnote in an opinion that I disagreed with, that we're going to be stuck with that footnote for years. Well, it turns out that any time five people decide that we're not stuck with the footnote, we're not stuck with the footnote!" Jenkins, *The Partisan: A Talk With Justice Rehnquist*, N.Y. Times, Mar. 3, 1985, § 6 (Magazine, at 28, 31, col.2.)

[78] Capital Cities Media, Inc. v. Toole, 104 S. Ct. 2144 (1984).

[79] *See generally* Bamberger, *Methodology for Raising State Constitutional Issues* in RE-

process that began in 1975.[80] Over the last decade the Court progressively has expanded the scope of its jurisdiction over state decisions by narrowing the independent and adequate state ground category in application.[81] Now theory conforms to practice. Whether the theory withstands close scrutiny remains to be discussed. *Long* itself is short on theory. The rationale identified with the doctrine, and which justified the new methodology, was limited to "[r]espect for the independence of state courts" and the "avoidance of rendering advisory opinions."[82] Practice under the new rule suggests its viability. In the three Terms since *Long*, the Court has adhered to the new methodology of ascertainment and disposition.[83] How much Supreme Court practice has changed remains unclear, in part, from the inevitable uncertainty in the Court's ascertainment and tolerance of ambiguity and from the hidden nature of the Court's discretion over its docket.[84] How much the requirement of a plain statement will affect state courts also remains to be seen. If nothing else, *Long* was the culmination of the Court's frustration with the "un-methodology" of the old ad hoc approach. Whether the new rule will be confirmed and justified remains to be considered.[85]

III. A CRITIQUE OF THE NEW METHODOLOGY

In *Michigan v. Long*, the independent and adequate state ground doctrine took on a new methodology of ascertainment and

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CENT DEVELOPMENTS IN STATE CONSITUTIONAL LAW 291-96 (1985); Kramer, *supra* note 51, at 285-88 (tracing the trend of case law on independent and adequate state grounds).

[80] *See* Oregon v. Hass, 420 U.S. 714 (1975).

[81] The Court seems to have internalized a view that these cases are important review vehicles, removing a deep barrier to its discretionary jurisdiction. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553 (1983); Oregon v. Kennedy, 456 U.S. 667 (1982); Delaware v. Prouse, 440 U.S. 648 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); *see also Long*, 463 U.S. at 1032 n.8. *See generally* Elison & NettickSimmons, *supra* note 39, at 193-95 (recent development of the doctrine of independent and adequate state grounds).

[82] *Long*, 463 U.S. at 1040. *See* Schleuter, *supra* note 55, at 1089. *See generally infra* notes 182-279 and accompanying text.

[83] *E.g.*, Caldwell v. Mississippi, 105 S. Ct. 2633, 2638-39 (1985); Ohio v. Johnson, 104 S. Ct. 2536, 2540 n.7 (1984); California v. Ramos, 463 U.S. 992, 997 n.7 (1983). *See infra* notes 182-279.

[84] Both the process of certiorari and of appeal-selection for plenary review screen inquiry into the application of the doctrine. WRIGHT & MILLER, *supra* note 5, § 4032, at 441 (Supp. 1985).

[85] *Id.*

disposition in its application to ambiguously grounded decisions. To be validated, that new methodology must be analyzed in terms of the justifications for the prudential doctrine. I approach those justifications seriatim under the rubrics of federal jurisdiction, federalism, constitutional theory, and institutional role. Justice Frankfurter once explained how all these concerns lie behind the questions of Supreme Court jurisdiction: "The law of the jurisdiction of this Court raises problems of a highly technical nature. But underlying their solution are matters of substance in the practical working of our dual system and in the effective conduct of the business of this Court."[86]

A. Federal Jurisdiction

General principles of federal jurisdiction are matters of first importance under our Constitution, since federal courts are limited courts of a limited sovereign.[87] Before a federal court may decide a case or controversy, the decision to act must be within the article III empowerment and within some enabling act of Congress.[88] From the beginning then, the party invoking the federal power must affirmatively rebut a presumption against jurisdiction.[89] At first blush, the presumption in *Michigan v. Long* seems to violate this basic policy.

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[86] Flournoy v. Wiener, 321 U.S. 253, 263-64 (1944) (Frankfurter, J., dissenting).

[87] "Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act." Edgar v. MITE Corp., 457 U.S. 624, 653 (1982) (Stevens, J., concurring); *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 77 (1807) (Marshall, C.J.) (tracing the sources of the Court's jurisdiction).

[88] *See* Sheldon v. Sill, 49 U.S. 453, 454, 8 How. 441, 442 (1850) (statute); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809) (Constitution). *See generally* Hill & Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 3-7 (1983). Of course, the original jurisdiction of the Supreme Court is unique to this jurisdictional sequence. *See generally* C. WRIGHT, *supra* note 2, §§ 105-110, at 725-74 (overview of the courts orginal and appellate jurisdiction). The equivalent effect is achieved in Supreme Court jurisdiction by a twist of logic. Soon after the First Judiciary Act was passed, the Court ruled that the explicit statutory definition of categories of its appellate jurisdiction created an implicit denial of other categories not listed but possible under article III. This has been the rule since the Court's ruling in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 620 (1875); Durousseau v. United States, 10 U.S. 307, 314, 6 Cranch 177, 180 (1810). *See generally* WRIGHT & MILLER, *supra* note 5, § 4002.

[89] Turner v. President of the Bank of N. Am., 4 U.S. (4 Dall.) 8 (1799); Wisecart v. D'Auchy, 3 U.S. (3 Dall) 321 (1796). *See generally* C. WRIGHT, *supra* note 2, § 7, at 22-26. Of course, the burden is on the petitioner or the appellant to establish the Court's jurisdiction. *See* R. STERN & E. GRESSMAN, *supra* note 5, § 1.15, at 36-38.

The first point to be made is that the independent and adequate state ground doctrine is not jurisdictional in the strictest sense. Neither the Constitution nor the statute necessarily requires that the doctrine be followed, as it is merely a prudential principle of judicial creation for dealing with cases concededly within those two jurisdictional empowerments.[90] Second, the *Long* Court does not "presume" jurisdiction, although admittedly the majority and dissenting opinions were not too deftly phrased.[91] The Court is not presuming jurisdiction, but only that one predicate guiding the exercise of its jurisdiction, the absence of an adequate and independent state ground, is satisfied. The predicate is merely a prudential principle of the Court's discretionary power over its docket, contemplated but not compelled by Constitution and by statute. The Court itself has recognized that *Long* does not create a true presumption by creating and invoking the exception to remand to the state court for clarification.[92] Applying the *Long* rule only means that there is one less reason for the Supreme Court to refrain from reviewing the case.[93] That is all.

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[90] The general concept that federal courts may decide state law questions is not the subject of debate, although the scope of the power has been the subject of much controversy in such areas as pendent and ancillary jurisdiction, diversity, and the eleventh amendment. *See generally* Baker, *Federal Jurisdiction*, 16 TEX. TECH. L. REV. 145, 148-50, 167-79 (1985) (broad survey). The idea that a federal court would decide a federal issue in a case despite the inclusion of a state issue is all the more unremarkable.

[91] In the text, the majority opinion used the term "assume": "[W]e merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Long*, 463 U.S. at 1042 (footnote omitted). In the footnote to this statement, however, the majority invoked "certain presumptions in deciding jurisdictional issues." Id. at 1042 n.8. Justice Stevens, in his dissent, repeatedly uses the terms "presumption" and "presumes." *Id.* at 1066-67, 1071 (Stevens, J., dissenting). *See* Schleuter, *supra* note 55, at 1097.

[92] *See supra* text accompanying notes 221-32. There is a problem with the timing of the *Long* rule which operates simultaneously with the Court's decision to review. Once the Court grants review, the assumption that an adequate and independent state ground is lacking will be all but impossible to rebut within the "four corners" of the state court opinion. *See Long*, 463 U.S. at 1040-41; Comment, *supra* note 45, at 9-11.

[93] *But see* Seid, *supra* note 45, at 9-11. The *Long* rule considers but one particular ingredient in the proper jurisdiction of the Supreme Court to review state court decisions. Others, for example, that the federal question must be substantial and that the judgment must be final and decided by the highest state court, are beyond the scope of this essay. *See generally* WRIGHT & MILLER, *supra* note 5, §§ 4001-4033, at 490-789. Other general justiciability requirements, such as standing, likewise go unconsidered here. *See* Schleuter, *supra* note 55, at 1097.

The *Long* ruling also relied on the advisory opinion prohibition.[94] This was unfortunate. At best, this rationale is incomplete and inaccurate, although it has proved remarkably resilient in Supreme Court thinking.[95] Properly understood, the ban on advisory opinions is an incident of the separation of powers between the coordinate federal branches.[96] Review of state court judgments does not implicate the concern for separated powers.[97] The article III "case or controversy" requirement obliges the Court to decide real disputes between adverse parties on a concrete set of facts. The doctrine of independent and adequate state grounds presupposes a case or controversy already decided by the state court.[98] To rely on the advisory opinion rationale is circular and does not comport with the Court's actual range of practice under the doctrine.[99]

The advisory opinion rationale has less currency in ambiguously grounded decisions, which present state law and federal questions in an adversarial setting in which a Supreme Court decision would dispose of the judgment on review.[100] In the ambiguous decisions, the application of the doctrine is only *akin* to the ban on advisory opinions. Should the Supreme Court decide the federal question and reverse, on remand the state court could independently assert the state law holding and issue a second judgment with the same result as the first which, in turn, would be insulated from further

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[94] *See Long*, 463 U.S. at 1040, 1041. This is one area where the substantive and procedural branches of the doctrine are very distinct. The advisory opinion rationale is used substantively but not procedurally. The procedural branch relies on the respect due the integrity of state procedure. Henry v. Mississippi, 379 U.S. 443, 447 (1965). *Long*, of course, was a substantive case.

[95] *E.g.*, Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting); Fay v. Noia, 372 U.S. 391, 465 (1963) (Harlan, J., dissenting).

[96] *See* Baker, *Constitutional Law*, 27 LOY. L. REV. 805, 814 (1981); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007 (1924).

[97] *Cf.* Baker v. Carr, 369 U.S. 186, 210 (1962) (justiciability doctrine is not a concern of federal-state relations).

[98] *See* Elison & NettikSimmons, *supra* note 39, at 201.

[99] WRIGHT & MILLER, *supra* note 5, § 4021, at 688-89, 692, 694. For example, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), ruled that the federal question should be answered before determining the questions of independence and adequacy. The reasoning set forth in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), the source of the modern advisory opinion rationale, is simply wrong. How else can we explain the practice under the procedural branch of the rule that allows Supreme Court review when the state court waives the state procedural bar? WRIGHT & MILLER, *supra*, § 4021, at 694-95.

[100] *See* Note, *Supreme Court Review of State Court Decisions*, 97 HARV. L. REV. 224, 225 n.12 (1983).

Supreme Court review. The Supreme Court's holding would retrospectively become akin to an advisory opinion on the federal question.[101] This sequence of the state court trumping with state law has occurred throughout the history of the doctrine.[102] Keep in mind, however, that the independent and adequate state ground doctrine is a prudential feature of the Court's jurisdiction to determine jurisdiction, accomplished within its discretionary control over its docket.[103] Understood in this context, the *Long* rule is another example of the more general principle of self-restraint which requires that the Court not indulge in needless dissertations on constitutional law.[104] The Court has acknowledged that ambiguously grounded decisions call for a particularly sensitive application of this general principle.[105]

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[101] *See* Galie & Galie, *supra* note 36, at 286 n.75; Schleuter, *supra* note 55, at 1109. Following much the same analysis, commentators sometimes analogize to the mootness doctrine. *See* Elison & NettikSimmons, *supra* note 39, at 201-202; Note, *supra* note 13, at 1379 n.21. That doctrine serves as a constitutional reminder to the federal courts that they are courts. *See generally* Hill & Baker, *supra* note 88, at 18.

[102] Note, *Mandatory Directions by Supreme Court to State Court Treated as Advisory Where Deemed Infringing State Jurisdiction*, 59 HARV. L. REV. 132 (1945); *see also infra* note 181.

[103] *But cf.* Seid, *supra* note 45, at 14, 18, 32 (accumulating principles into jurisdiction).

[104] *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549, 568-75 (1947) ("[T]his Court has followed a policy of strict necessity in disposing of constitutional issues."); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Burton v. United States, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). *See generally* WRIGHT & MILLER, *supra* note 5, § 4021, at 675; Seid, *supra* note 45, at 49-50.

[105] Justice Douglas stated:

> It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertin whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication: that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not en-

The *Long* methodology is something of a calculated risk. When ambiguity is ascertained, the Court has chosen the dispositional technique of deciding the federal question. This approach creates a potential for more frequent state court trumping with state law. One careful study found that the state courts trumped almost sixty percent of the Court's decisions in initially ascertained ambiguously grounded decisions.[106]

The *Long* rule does not depart from the general principle of self-restraint without justification. First, both the retroactive advisory opinion concern and the narrower general reluctance to decide constitutional questions[107] are most relevant to selecting a proper disposition once the state ground has been ascertained to be independent and adequate. Although admittedly intolerant of ambiguity, *Long* is a rule of ascertainment, a methodology for equating the ambiguously grounded decision and the clearly inadequately or dependently grounded decision. Second, far from being "needless," the Court's decision serves to affirm authoritatively a federal question or remove it from the subsequent state court dispute. Such a decision serves the state court system in the immediate case and goes beyond to affect the persuasive impact of the preliminary state decision of the federal question.[108] The *Long* approach affords the Supreme Court ultimate control over the substantive federal law, which is coterminous with its jurisdiction.[109] This rule of ultimate control legitimates the *Long* departure from the general approach to avoid deciding constitutional questions and makes it appropriate to disregard prudential principles. Therefore, *Long* is consistent with general principles of federal jurisdiction.

> croach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

[106] Welsh, *supra* note 62, at 847; *see also infra* note 181.

[107] The distinction may be gleaned from Justice Brandeis' famous opinion in Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *see also* Rescue Army v. Muncipal Court, 331 U.S. 549, 568-75 (1947).

[108] Bice, *supra* note 72, at 765-66; *see also* Sandalow, *supra* note 33, at 197-98.

[109] *See generally* Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Judiciability Analysis*, 25 ST. LOUIS U.L.J. 473 (1981) (exploring the sources of the Supreme Court's power to adjudicate).

B. Federalism

Federalism "may mean all things to all people."[110] What I mean by it is the necessary accommodation required by our federal structure of dual court systems, state and national. Aggrandizement by federal courts of the responsibility and function of state courts does just as much damage to the structure as any other improper federal assumption of state sovereign power.[111] The question of how this structure of judicial federalism should be maintained is a political issue that has been debated throughout our history. Our dual court system, made up of two complete and autonomous systems, is "comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference."[112] This is why the case law of federal jurisdiction suffers from an inherent ambiguity.[113] A line of venerable precedents glorifies the impor-

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[110] Baker, *The History and Tradition of the Amount In Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 317 (1984).

[111] *Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 95 (1971) (statement of H. Wechsler); *id.* at 183 (statement of J. Moore).

Justice Black used the heartfelt phrase "our federalism":

> This underlying reason for restraining [federal] courts of equity from interfering with [state] criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activites of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44-45 (1971).

[112] Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981).

[113] Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 684

tance of federal tribunals as the primary protectors of federal rights; a second equally venerable line of precedents emphasizes the same primary role for the state courts.[114] The independent and adequate state ground doctrine combines both of these, as concerns for federalism lie at the heart of the doctrine.[115] The *Long* methodology may be understood as the latest adjustment in this tension consistent with the present Court's commitment to maintaining the structure of our federalism.[116]

Different philosophies of federalism have held sway at different times in our history.[117] Noting such shifts in philosophy helps our understanding of the independent and adequate state ground doctrine. For present purposes, I will identify three philosophies of federalism, labelled "dual," "cooperative," and "new."[118]

Dual federalism was the philosophy of the Framers who held that "the federal government and the separate states constituted two mutually exclusive systems of sovereignty, that both were supreme within their respective spheres, and that neither could exercise its authority in such a way to intrude, even incidentally, upon the sphere of sovereignty reserved to the other."[119] It happens to be my philosophy, as well. Register me a Madisonian.[120] More significantly, the philosophy of dual federalism continues to dominate federal-state relations in the area of criminal law.[121] The separate

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(1981) (describing the structural ambiguity as a "schizophrenia").

[114] *Id.* at 684-86.

[115] "The [independent and adequate state ground] rule is a salutory one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plenitude of their powers." Adams v. Russel, 229 U.S. 353, 361 (1913); *see also* Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). *See generally* WRIGHT & MILLER, *supra* note 5, § 4007, at 553.

[116] *See* Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 598 (1983).

[117] Federalism is related to constitutional theory. Our federal court system is a creature of the Constitution, but in this section I mean to discuss structural assumptions and philosophies in our dual court system which form the framework for constitutional development. *See infra* notes 142-81 and accompanying text.

[118] *See generally* Wisdom, *Foreward: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984) (broad overview).

[119] A. KELLY, W. HARBISON, & H. BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 517 (6th ed. 1983).

[120] *See* Cover, *supra* note 112, at 641; Hellman, *supra* note 116, at 583-84; Welsh, *supra* note 62, at 833; *see also* Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980).

[121] *See* Note, *State Constitutional Guarantees*, *supra* note 43, at 748.

or dual sovereignty theory accounts for much of present day constitutional criminal procedure.[122] Dual federalism has not pursued decentralization without regard for the dual responsibility of state and federal courts. Within this structure, as will be discussed, the federal courts build the floor and the state courts build the ceiling.[123] State courts cannot invoke federalism to diminish federal constitutional rights. The Supreme Court cannot invoke federalism to establish maximum guarantees for the states. These are the basic assumptions of dual federalism.

The independent and adequate state ground proceeds on these same two assumptions. These dual assumptions create the doctrine's inherent ambiguity that we have been considering. Early in the history of the doctrine, dismissal was used as the disposition for ambiguously grounded decisions to afford the utmost autonomy to the state courts.[124] The Court in *Long*, of course, opted for the opposite approach of presumptively reviewing all ambiguously grounded state court decisions. The disposition announced there is thus narrowed to the state decisions for which the ascertainment is unclear. Intrusion into state court affairs will be rare and at the same time minimal.[125] Furthermore, the state court is given the opportunity for requiring deference to its plain statement. When that

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[122] In United States v. Lanza, 260 U.S. 377, 382 (1922), the Court stated: "We have here two sovereignties deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *See also* Abbate v. United States, 359 U.S. 187 (1959) (upheld federal prosecution after state conviction for same crime); Bartkus v. Illinois, 359 U.S. 121 (1959) (upheld state conviction after federal acquittal for same crime); *cf.* Heath v. Alabama; No. 84-5555, slip op. (U.S. Dec 3, 1985) (dual sovereignty between states).

[123] *See infra* notes 142-181 and accompanying text. *See generally* Welsh, *supra* note 62, at 833-34.

> The Supreme Court has jurisdiction to prescribe only the minimum that a state must grant. It does not have the authority to establish the maximum. Although a state court cannot expand a state provision to the point where it conflicts with a countervailing federal right, short of such a collision the states have the power to enlarge individual liberties as much as they deem appropriate.

Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 285 (1973) (footnotes omitted).

[124] Welsh, *supra* note 62, at 839-41; *see also* Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981) (comity as a vague abstraction to shield the arbitrary assignment of cases between state and federal courts).

[125] Schleuter, *supra* note 55, at 1096; *see also* Wechsler, *supra* note 24, at 1056; *supra* notes 58-85 and accompanying text.

plain statement is lacking, dual federalism allows the Supreme Court to treat the decision as within its domain.

More recently, at least in noncriminal areas, "cooperative federalism" has been a competing philosophy of our dual court structure. This philosophy views state and federal governments as complementary parts of a single governmental process.[126] The two court systems are deemed but one system of justice to protect individual freedom from government excess.[127] This philosophy may be blamed for the ad hoc approach to disposing of ambiguously grounded decisions that ended with *Long*. Frequently, but not always, the Court would choose to remand for state court clarification in ambiguously grounded decisions.[128] The new rule's automatic review disposition and low tolerance for ambiguity frustrate this philosophy.[129] The familiar metaphor of federalism that likens states and state courts to laboratories is related to the cooperative philosophy.[130] Whether *Long* only allows state court experimentation that narrows individual rights, as some critics argue, remains to be seen.[131] It is important to note that the philosophy of dual federalism encourages experimentation but also contemplates that "experiments are sometimes unsuccessful."[132] The Court did invoke the "important need for uniformity in federal law" in *Long*.[133] But dual federalism does afford the Supreme Court the last word on federal questions. No one would quarrel with the Court's steadfast position, reaffirmed in *Long*, that the Court must have the last word on the independence and adequacy of the state

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[126] *See* Wright, *The Advisory Commission on Intergovernmental Relations: Unique Features and Policy Orientations*, 25 PUB. AD. REV. 193, 199 n.26 (1965).

[127] Hart, *supra* note 39, at 489; *see also* Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561 (1954); Note, *Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism—Past and Present*, 35 VAND. L. REV. 161 (1982).

[128] *See* Welsh, *supra* note 62, at 843-46.

[129] Recall that *Long* was a criminal case. See *supra* text accompanying notes 119-25.

[130] The metaphor was used often by Justices Holmes and Brandeis and remains *au courant*, especially in criminal procedure. *See* Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (criminal procedure); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting); Cover, *supra* note 112, at 672-73; Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976).

[131] Welsh, *supra* note 62, at 856-59; *see infra* notes 182-279 and accompanying text.

[132] Schleuter, *supra* note 55, at 1100.

[133] *Long*, 463 U.S. at 1040; *see* Elison & NettikSimmons, *supra* note 39, at 205.

ground.[134]

Most recently in criminal law, commentators have called for a "new federalism," a philosophy about as satisfying to a dual federalist like me as is the "new" Coke to a "classic" Coke lover.[135] The new federalism embraces a single goal that the individual right receive its most expansive reading, by either the Supreme Court establishing a higher "floor" or by the state supreme courts raising the ceiling under state constitutions. It matters not which court and which constitution, so long as the individual wins and the government loses. This philosophy would prefer an assumption of adequacy and independence or an assumption of inadequacy and independence by gauging the era's relative sympathies of the state supreme courts and the Supreme Court to individual rights on the merits.[136] Measured against this philosophy, presumably, *Long* made the wrong choice. Today, many of those who view federalism this way believe that the individual has more of a chance to win in state supreme courts under state constitutions than in and under their federal counterparts. *Long* is a clear rejection of this philosophy.[137] Under the *Long* approach, the decisionmaking responsibility is assigned on the basis of structural responsibility: state courts decide state law and federal courts decide federal law; the ambiguously grounded cases stay in the Supreme Court.

A related phenomenon is the current debate on the so-called "parity" issue. The debate about whether federal judges are better than state judges and hence dispense a juster justice presently seems far from resolution, if one is possible.[138] I decline to decide

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[134] The constitutional structure that honors state grounds that the Court finds adequate and independent is a federalism analogue to the political question doctrine in the federal structure of separated powers. Political questions are constitutionally beyond the power of the Court, but the Court decides what is a political question. *See* Powell v. McCormack, 395 U.S. 486, 519 (1969).

[135] *See infra* notes 142-279 and accompanying text.

[136] *See* Welsh, *supra* note 62, at 843-48.

[137] Wisdom, *supra* note 118, at 1069-72; *see also* Schleuter, *supra* note 55, at 1080. Justice Stevens' dissent seems to embrace this view. *See infra* notes 246-77 and accompanying text.

[138] *See generally* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). Some of the judges have participated in the debate. Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545, 548-53; Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984).

which I favor, federal judges or state judges. My problem is that I respect both groups. The *Long* rule only tangentially enters the debate. Federal judges, the Supreme Court Justices, are given the upper hand in disposing of ambiguously grounded decisions. But any advantage may be ephemeral so long as the state judges have the power to follow the plain statement requirement and clearly announce an independent and adequate state ground for their decision. That would insulate the judgment from any federal review.

Admittedly, the two faces of federalism may see *Long* differently. Indeed, Justice O'Connor, the author of *Long*, seems to have viewed federal-state court relations differently from the state bench than she does now.[139] The plain statement rule places pressure on state judges to expand criminal rights, if at all, under their state constitutions under pain of suffering review and possible reversal under the federal Constitution. But the federal structure imposes that requirement. At the ascertainment level, *Long* seems to signal a more intense surveillance of state court decisions of federal

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[139] As a state judge, she observed:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.

O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981).

Apparently her perspective changed on the federal bench, as foretold by a speech she delivered in 1983:

> There is a fine line, of course, between a state court holding that an action independently violates both the State and Federal Constitutions, and holding that the State Constitution is violated because the Federal Constitution is violated. Recently, there has been a tendency for the Supreme Court to find no independent state ground and to assert its power to review if it appears that both federal and state constitutional provisions are cited by the state court, that the state cases generally follow the federal interpretation, and the state court does not clearly and expressly articulate its separate reliance on independent state grounds.
>
> The point of this discussion is to emphasize that, as state court judges, you have a very real power to decide cases, whether they are civil or criminal, on state grounds alone, if they exist, or to indicate clearly and expressly that the decision is alternatively based on separate and independent grounds . . . .

Address by Justice O'Connor, National Judicial College, Reno, Nevada (May 13, 1983), *quoted in* Schleuter, *supra* note 55, at 1089 n.63 (citations omitted).

law.[140] At the dispositional level, *Long* shows greater deference to state courts than the unpredictable ad hoc approach. From a practical assessment of federalism, the holding is another marginal development.[141] As a matter of philosophy, however, *Long* goes far to serve the classical approach that state courts must make their own decisions under state law, and the opportunity to guarantee deference by the plain statement preserves that state court domain.

C. *Constitutional Theory*

The holding in *Michigan v. Long* has implications for our constitutional theory, both federal and state. While I cannot possibly describe those theories in all their complexity, I hope to summarize the relative significance for them of the independent and adequate state ground doctrine and the Court's new methodology of ascertainment and disposition in ambiguously grounded state decisions. From these two vantages, the new methodology may be better understood.[142]

1. Federal Constitutional Theory. Everyone knows enough about the incorporation of the Bill of Rights into the fourteenth amendment due process so that I may merely invoke a context within which to discuss the *Long* rule.[143] I begin with the observation that twelve of the twenty-three rights in the first eight amendments concern criminal procedure so that the doctrine of incorporation and the *Long* rule, for the most part, involve criminal issues. Our federal constitutional theory obliges the Supreme Court to establish minimum federal values of individual rights. State courts, of course, are free to provide greater protection. This shared responsibility gives rise to the familiar "floor" and "ceiling" metaphors.[144] The role of the federal court is to set the minimum. The minimum established is the level of protection justifiably imposed on the states by the Court's fourteenth amendment hocus pocus. It is the sort of lowest common denominator affording "those minimal historic safeguards for securing trial by reason . . . and below

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[140] Comment, *supra* note 35, at 1096.

[141] *See* Monaghan, *The Burger Court and "Our Federalism,"* 43 LAW & CONTEMP. PROBS. 39, 49 (Summer 1980).

[142] *See generally* Welsh, *supra* note 62; Welsh, *supra* note 58.

[143] *See generally* W. LAFAVE & J. ISRAEL, *supra* note 66, §§ 2.1-2.8, at 32-67 (1985).

[144] *See supra* note 123.

which we reach what is really trial by force."[145] The Supreme Court, however, has obligated itself to protect values affirmatively beyond some shock-the-conscience standard of due process.[146] All rights "fundamental to the American scheme of justice" apply to the states.[147] Once applied to the state, the scope of the right is the same as the limit on the federal government.[148] There is nothing new here. The doctrine of the independent and adequate state ground furthers the Supreme Court's constitutional primacy. When a state court advances a federal justification for a judgment as well as a state law justification, the Court may exercise a prudential self-restraint if the state law justification is independent and adequate. This self-restraint preserves the federal role of establishing the "floor." The *Long* rule for ambiguously grounded decisions does not change the role of the Supreme Court. The rule allows for greater surveillance of state court rationales, however, which affects the role of the state supreme courts in developing federal constitutional theory.

The role of the state supreme courts in federal constitutional theory remains unclear.[149] As we have seen, traditional theory obliges them to accept the Supreme Court interpretations of minimum federal guarantees and authorizes them to interpret their state constitutions freely to set the state "ceiling" above the federal "floor."[150] Uncertainty surrounds the state court role in inter-

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[145] McNabb v. United States, 318 U.S. 332, 340 (1943). *See* Welsh, *supra* note 62, at 820 n.7.

[146] *See* Rochin v. California, 342 U.S. 165, 169 (1952).

[147] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[148] *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964). Admittedly, a few Justices have concluded that the scope of the federal right is reduced in its application to the states, but their view never has commanded a majority. *See* Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Powell, J., concurring); Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring and dissenting).

[149] *See* Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158 (1981).

[150] *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967).

Criminal procedure has been a very active arena for this process. *See generally* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 891 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 422 (1974) [hereinafter cited as Wilkes, *The New Federalism*]; Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 [here-

preting federal constitutional law, in establishing, or to pursue the analogy, in resurfacing the "floor."[151] Let me try to explain what is at work here. At a telling juncture of her *Long* opinion, Justice O'Connor noted that the vast bulk of criminal litigation occurs in state courts which must apply incorporated federal constitutional standards. Because state courts "necessarily create a considerable body of 'federal law' in the process," she explained, the Supreme Court "has become more interested in the application and development of federal law by state courts."[152] The debate over the proper role of the state courts in interpreting federal guarantees continues until the present day. At issue is the propriety of the state courts acting as the functional equivalent of a federal court.[153] If we think about the interpretations of the Bill of Rights as a quasi-constitutional "federal common law of liberties,"[154] the state courts are no less competent than the Supreme Court to formulate federal doctrine based on the broad constitutional principles,[155] or so the argument goes. Some state courts have tried this. The Supreme Court has rejected these efforts at imposing greater *federal* constitutional restrictions on state government than those imposed by the Supreme Court.[156] The state court must behave as a lower federal court, it cannot claim the same sovereign power over federal law that it enjoys over state law. The Court has embraced a federal constitutional law theory that insists "when a state court reviews state [action] challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of

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inafter cited as Wilkes, *More on New Federalism*]; Note, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596 (1979).

[151] A related issue of state court role involves cases in which two federal liberties are in conflict and state constitutional law prefers one over the other. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 911-16, 592 P.2d 341, 348-51, 153 Cal. Rptr. 854, 861-64 (1979) (Richardson, J., dissenting), *aff'd*, 447 U.S. 74 (1980). That is wholly another article. *See* Peterkort, *supra* note 149, at 172-79.

[152] *Long*, 463 U.S. at 1042 n.8. *But cf. supra* note 77.

[153] *See infra* notes 142-81 and accompanying text. *Compare* M. REDISH, *supra* note 5, at 116 (functional equivalent position) *with* Welsh, *supra* note 58, at 1133-41 (divided sovereignties position).

[154] Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

[155] Antieau, *Our Sometimes Injudicious Review*, 50 GEO. L.J. 765, 782 (1962); Friendly, *The Bill of Rights as a Code of Criminal Procedures*, 53 CALIF. L. REV. 929, 954 (1965).

[156] *See, e.g.*, California v. Byers, 402 U.S. 424, 427-58 (1971); California v. Green, 399 U.S. 149, 153-64 (1970).

federal constitutional law than this Court has imposed."[157] The real substantive difficulty with the Court's approach is that while federal guarantees remain uniform they also remain a kind of lowest common denominator.[158] But that is the "floor" theory.

The new methodology in *Michigan v. Long* establishes how the Supreme Court will supervise state court developments of federal law. A state court cannot raise the federal "floor;" a state court only can establish a higher state law "ceiling." During the halcyon days of incorporation, the Court reversed state courts for results falling below the federal minimum. During the present renaissance of federalism, the Court reverses state courts for results that are above the federal minimum unless they are independently and adequately grounded in state law. Thus, federal constitutional theory is served by the *Long* rule.[159] Shifting Supreme Court majorities have not changed the federal constitutional theory, despite changing allegiances among the justices.[160]

2. *State Constitutional Theory.* I face a dilemma. For me to consider *Michigan v. Long* only in terms of federal constitutional theory would deny the federalism I so revere.[161] On the other hand, the prospect of discussing fifty disparate documents intimidates me in the writing as much as I think it would intimidate my audience in the reading. My compromise is to begin with a few generalizations, then to consider three types of relationships between federal and state constitutional law, and finally to conclude with an assessment of state supreme court reaction to the *Long* methodology.

Let me not count the ways state constitutions are different one

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[157] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981). Commentators remain undaunted by these holdings. *See, e.g.*, Sager, *supra* note 56, at 1248.

[158] This was the reason for Justice Harlan's rejection of incorporation. *See* Williams v. Florida, 399 U.S. 78, 118, 131 n.14 (1970) (Harlan, J., concurring and dissenting). *See generally* Welsh, *supra* note 62, at 865-68.

[159] Of course if the Court gets it wrong, the state court is always free to reassert an independent and adequate state ground on remand. *See infra* note 180.

[160] Justice Brennan's view of this aspect of federal constitutional theory has changed over the years. At one time he advocated a minor role for state constitutions and a primary role for federal protections. Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 955 (1964). More recently he has campaigned for state courts and state constitutions to assume an ascendency in individual rights. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). See *infra* text accompanying note 278.

[161] *See* Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

from the other and all from the federal.[162] State constitutions do have some similarities worth mentioning.[163] In the typical state constitution, a declaration of rights is part of the document formally and is a priority in the state constitutional philosophy. Various rights are declared, some of which correspond to the federal counterpart, some of which are unique. Many trace their lineage to sources before the federal Bill of Rights. Frequently, the declaration of rights includes some statement of political philosophy as well. The emphasis is that identified fundamental rights are supreme over other sources of law as a matter of political and legal philosophy.

There are three extant theories of the relationship between a state constitution and the federal Constitution.[164] First, the primacy theory views the state constitution as the primary source of individual rights and calls for analysis of state right claims before considering claims under the Constitution. Under this view the state court will reach the federal claim if, and only if, it denies the state right claim. The primacy theory is supported by the history that state constitutional protections applied to state actions long before federal protections were incorporated. Federalism is served by the theory in affording more stability in the face of federal changes and greater state autonomy than under a national standard.[165] Second, the supplemental theory views the state constitution as supplemental to the Constitution. Claims under the latter are resolved before consideration of the former to determine if the state constitution justifies a different result when the federal claim

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[162] For a collection of recent articles on state constitutional law, see Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 972-74 (1982); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328 n.20 (1982); *see also Rebirth of Reliance on State Charters—A Fresh Look at Old Issues*, Nat'l L.J., Mar. 12, 1984, at 25, col.1 (bibliography).

[163] *See generally* Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Mazor, *Notes on a Bill of Rights in a State Constitution*, 10 UTAH L. REV. 326 (1966).

[164] *See generally* Bamberger, *supra* note 79, at 301-06; *see also* Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 64 (1983).

[165] Linde, *supra* note 161, at 178-79; Linde, *supra* note 162, at 383-84; Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 377, 389-90 (1984); *see, e.g.*, Ravin v. State, 537 P.2d 494 (Alaska 1975); State v. Cadman, 476 A.2d 1148 (Me. 1984); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983).

is unsuccessful. This approach is frequently justified by the pragmatic admission of the recent federal dominance and depends on a general notion of supremacy of federal law and on the idea of the federal "floor."[166] Third, the coequal theory views the state constitution and the Constitution as simply coequal. Claims under both are separately and independently considered and decided because, according to the theory, both constitutions independently protect rights.[167]

Beyond question, our constitutional history and theory justify the independent existence of a body of state constitutional law.[168] Chief Justice Burger made the point: "The 50 states cannot exercise leadership in a national sense, but that does not mean they should not be allowed the independence and freedom that was plainly contemplated by the concept of federalism."[169] The Court's methodology in *Michigan v. Long* creates an imperative that the state supreme courts confront their independent role under their state charter. The rule's assumption for ambiguously grounded decisions places the onus on the state court to choose a theory of state constitutional law. The plain statement rule affords the state court the means to make the choice explicit. The most difficult issue facing state supreme courts under any of the three theories is to articulate criteria for reaching a different result under a state constitution than the Supreme Court has reached under the Constitution.[170] The *Long* methodology allows the state courts to do that, but does not tell them how to decide.

By equating ambiguously grounded decisions with inadequate and dependently state law grounded decisions, the *Long* Court

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[166] Linde, *supra* note 161, at 177; Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465, 469-75 (1985); Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provision of the United States Constitution*, 14 SUFFOLK U.L. REV. 887, 889 (1980); Williams, *supra* note 165, at 385-87; *see, e.g.*, State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983); People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983).

[167] Bamberger, *supra* note 79, at 304-05; Pollack, *Adequate and Independent State Grounds as a Means of Balancing the Federalist Judicial System*, __ __ TEX. L. REV. __ __ (1985); *see e.g.*, State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984).

[168] *See generally* Linde, *supra* note 162, at 380; Sedler, *supra* note 166, at 475; Williams, *supra* note 165, at 365.

[169] Burger, *The Interdependence of Our Freedoms*, 9 AKRON L. REV. 403, 406 (1976).

[170] *See generally* Williams, *supra* note 165, at 385-404 (suggesting several such criteria).

seemed to prefer the supplemental theory. The choice rejected in *Long*, to equate the ambiguously grounded decision with the adequate and independently state law grounded decisions, would have favored the primacy theory. The coequal theory was rejected in *Long*, by implication, by both the choice made and the choice rejected.[171] The primacy theory should yield few ambiguously grounded decisions. The state constitutional question is first decided and only when the assertion of the state right is rejected will the state court reach the federal question. The supplemental theory should yield some more ambiguously grounded decisions depending on how the merits of the two claims are decided. For example, when the federal issue is first decided in favor of the claim and the argued state issue is not reached, the resulting decision would have been ascertained as ambiguous and disposed of under the ad hoc approach before *Long*. The new rule would call on the Court to exercise review. The coequal theory should yield the most ambiguously grounded decisions. When the state and federal claims are reviewed and upheld separately, without more, the effect is a federal holding beyond the state amending process and a state holding beyond further federal review.[172] After *Long*, such cases should be reviewable by the Supreme Court.

The key to the *Long* analysis under these three theories of state constitutional law is the requirement of a plain statement by a state court when relying on state law. The state court may choose any of the three theories. And, within any of the three theories of state constitutional law, the state court may choose an adequate and independent state ground. If the state court should choose to rely on state law, how must that decision be cast? It is not clear, for example, whether a state court may choose the primacy theory in one opinion for all time or whether the independent and adequate choice must be made express on a case-by-case basis.[173] The decision in *Michigan v. Long* raises many questions for state courts and for the Supreme Court alike, depending on how the Supreme

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[171] *See* Welsh, *supra* note 58, at 1120.

[172] *See* Bice, *supra* note 72, at 756-57; Falk, *supra* note 72, at 281-82.

[173] *See* Collins, *supra* note 58, at 93. The commentators are divided. *Compare* Seid, *supra* note 45, at 11 (suggesting boilerplate for each opinion) *with* Roberts, *The Adequate and Independent State Ground: Some Practical Considerations*, 19 LAND & WATER L. REV. 647, 650 (1984) (suggesting that the Supreme Court reduce its workload by denying review to state court decisions granting relief under federal law).

Court interprets the plain statement requirement under each of the different theories of state constitutional law.[174] In a coequal theory jurisdiction, the state court must always invoke the plain statement rule to protect any state constitutional autonomy. If the state court's efforts to comply with the plain statement rule are well-received, the state court's choice between the primacy and supplemental theories is less important. A niggardly approach to finding that the plain statement requirement is satisfied, however, might push state courts away from the supplemental theory and toward the primacy theory.

Before leaving the subject of state constitutional law, I wish to report a few preliminary observations on the state court experience under the *Long* methodology. The immediate effect at the philosophical level has not been very profound. Few state courts have been moved to embrace formally one of the three theories of the relationship of the state and federal constitutions. Instead, state supreme court understandings may be grouped only inferentially among the primacy theory,[175] the supplemental theory,[176] and the coequal theory.[177] The theories are not used with much precision. Adherence or reliance on *Long*'s plain statement corollary seems to favor a case-by-case approach over the once-and-for-all announcement.[178] The form of the state court statement of independence

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[174] Pollock, *supra* note 167.

[175] *See, e.g.*, Cannaday v. State, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983); State v. Tapply, 124 N.H. 318, 470 A.2d 900 (1983); State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983) (en banc).

[176] *See, e.g.*, State v. Jackson, 672 P.2d 255 (Mont. 1983); State v. Bruzzese, 94 N.J. 210, 463 A.2d 320 (1983), *cert. denied*, 104 S. Ct. 1295 (1984).

[177] *See, e.g.*, State v. Ferrell, 191 Conn. 37, 463 A.2d 573 (1983); Krenzelak v. Krenzelak, 503 Pa. 373, 469 A.2d 987 (1983); *In re* T.R., 502 Pa. 165, 456 A.2d 642 (1983); Kearns-Tribune Corp. v. Lewis, 685 P.2d 515 (Utah 1984); State v. Bartholemew, 101 Wash. 2d 631, 683 P.2d 1079 (1984); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) (en banc); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983).

[178] *See, e.g.*, Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (equal protection); State v. Binet, 192 Conn. 618, 473 A.2d 1200 (1984) (due process); State v. Tapply, 124 N.H. 318, 470 A.2d 900 (1983) (self incrimination and search and seizure); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984) (freedom of speech); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) (en banc) (search and seizure). *But see* State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983) (en banc) (in the area of search and seizure Oregon courts will always enforce Oregon law before turning to claims under the federal constitution).

On occasion, a state supreme court will "give-up" on a whole area of federal law, for example, search and seizure. *See, e.g.*, State v. Caraher, 293 Or. 741, 756, 653 P.2d 942, 950 (1982) (in the area of search and seizure "the citizens of Oregon are entitled to an analysis

and adequacy does not seem critical so long as the explicitness requirement is satisfied.[179] While many state courts seem almost unaffected by the *Long* holding, other courts have shown beginning efforts of separating the state and federal grounds of decision rather than suffer the risk of possible Supreme Court review.[180] Finally, it is clear that the independent and adequate state ground doctrine remains a doctrine of state court last word. In several recent decisions, the Supreme Court has reversed a state court decision apparently grounded on the federal Bill of Rights only to have the state court reinstate its judgment under an otherwise comparable provision in the state constitution.[181] To that extent, state

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of the protections afforded by the Oregon Constitution independent of the United States Constitution."); *Chrisman*, 100 Wash. 2d at 818, 676 P.2d at 422 (complete rejection of federal court decisions in the area of search and seizure).

[179] *See, e.g.*, State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984) (search and seizure); People v. Hill, 37 Cal. 3d 491, 691 P.2d 989, 209 Cal. Rptr. 323 (1984) (right to a speedy trial); Gaines v. Manson, 194 Conn. 510, 481 A.2d 1084 (1984) (right to a speedy trial); People v. Gonyea, 421 Mich. 462, 365 N.W.2d 136 (1984) (right to counsel); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983) (search and seizure); State v. Von Bulow, 475 A.2d 995 (R.I), *cert. denied*, 105 S. Ct. 233 (1984) (search and seizure); Love v. State, 687 S.W.2d 469 (Tex. App. 1985) (warrantless arrest); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) (en banc) (search and seizure).

[180] *See, e.g.*, State v. Cohane, 193 Conn. 474, 479 A.2d 763, *cert. denied*, 105 S. Ct. 397 (1984); State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983) (en banc); State v. Von Bulow, 475 A.2d 995 (R.I.), *cert. denied*, 105 S. Ct. 233 (1984); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) (en banc). *But see, e.g., In re* Midland Publishing Co., 420 Mich. 148, 362 N.W.2d 580 (1984); State v. Jackson, 672 P.2d 255 (Mont. 1983); Brown v. State, 657 S.W.2d 797 (Tex. Crim. App. 1983) (en banc). *See generally* Elison & NettikSimmons, *supra* note 39, at 210-12 (state court options after *Michigan v. Long*); Note, *Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals*, 9 SW. U.L. REV. 1157 (1977) (examining the rationale for doctrine that states are the ultimate expositors of state law and the importance of its preservation).

[181] *See, e.g.*, People v. Ramos, 37 Cal. 3d 136, 150-59, 207 Cal. Rptr. 800, 807-14, 689 P.2d 430, 437-44 (1984) (on remand, rejecting the Supreme Court's fifth amendment ruling in California v. Ramos, 463 U.S. 992 (1983), based upon article I, § 7 and article I, § 15 of the California Constitution), *cert. denied*, 105 S. Ct. 2367 (1985); Commonwealth v. Upton, 394 Mass. 363, 370-73, 476 N.E.2d 548, 553-55 (1985) (on remand, rejecting the Supreme Court's fourth amendment ruling in Massachusetts v. Upton, 104 S. Ct. 2085 (1985), based on article 14 of the declaration of rights of the Massachusetts Constitution); State v. Neville, 346 N.W.2d 425, 427-29 (S.D. 1984) (on remand, rejecting the Supreme Court's fifth amendment ruling in South Dakota v. Neville, 459 U.S. 553 (1983), based upon article VI, § 9 of the South Dakota Constitution); State v. Chrisman, 100 Wash. 2d 814, 817-22, 676 P.2d 419, 422-24 (1984) (en banc) (on remand, rejecting the Supreme Court's fourth amendment ruling in Washington v. Chrisman, 455 U.S. 1 (1982), based upon article I, § 7 of the Washington Constitution).

In the course of such a remand, the Supreme Court's opinion becomes retroactively advisory. *See supra* notes 87-109 and accompanying text. The Supreme Court has given us no

courts seem undaunted by the new methodology.

D. The Role of the Supreme Court

That the Supreme Court of the United States does not have a responsibility to review state court decisions of state law always has been "a central fact of American federalism."[182] That "the Court as now constituted could not possibly discharge such a responsibility" will be accepted.[183] The supremacy of federal law and the Court's role as the Constitution's ultimate protector oblige the Court to balance federal and state interests in "adjust[ing] the distribution of judicial power between the parts of our federalism."[184] In adjusting the independent and adequate state ground doctrine, the Court must take the measure of this tension.

The Supreme Court qua appellate court necessarily participates in the dual appellate functions of the correction of error (or pronouncing correctness) in the case sub judice and the declaration of law by creation, clarification, elaboration, or overruling.[185] In the former function, the governing legal principles are settled and the question is whether the appeal presents a correct or incorrect application. In the latter, the Court's emphasis is on the creation and harmonization of legal principles.[186]

Operating within these generalizations, the independent and adequate state ground doctrine removes state law issues from Supreme Court review of the state court's interpretation of federal

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indication whatsoever that state supreme courts are not the final arbiters of state constitutional law within federal constitutional limits. Thus, the risk to the state court of the ambiguously decided decision remains low.

In any event, the litigator must be alert to preserve and to arrange state constitutional issues to set the stage for state court review. *See* Commonwealth v. Sumerlin, 393 Mass. 127, 469 N.E.2d 826 (Mass. 1984); State v. Schmid, 84 N.J. 535, 557, 423 A.2d 615, 627 (1980), *appeal dismissed*, 455 U.S. 100 (1982); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1981). Justice Pollack reads a great deal into the denial of certiorari in State v. Von Bulow, 475 A.2d 955 (R.I.), *cert. denied*, 105 S. Ct. 233 (1984), to conclude that a reasonably clear statement of independence will satisfy the Court. Pollack, *supra* note 167.

[182] Hart, *supra* note 39, at 499.

[183] *Id.* at 499 n.26.

[184] Note, *Supreme Court Review*, *supra* note 43, at 774 (footnote omitted).

[185] P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2-3 (1976) [hereinafter cited as P. CARRINGTON].

[186] *See generally* Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983) (overview).

law. When the state law and federal law in a particular case are the respective constitutions, the significance of the ascertainment and disposition methodology becomes dramatically evident.[187] There are three federal interests implicated which are not diminished by the coincident state law issue which may or may not place the state judgment beyond the reach of the Court.[188] First, even though federal law does not alone support the state court judgment, federal law should be applied correctly. Second, the Court is the annointed final arbiter of the Constitution and bears some responsibility of interpretative leadership.[189] Finally, the importance of national uniformity in federal constitutional law must be considered. The state court's use of federal law implicates each of these.

The state court's interpretation of federal law may be incorrect. The error may be advertent or inadvertent. Some commentators have been concerned about the risk that state judges might effect a purposeful ambiguity in grounding the decision both to evade Supreme Court review of the federal ground and to insulate the state ground from the state political process.[190] The propriety of error correction within the independent and adequate state ground doctrine may be shaded by whether the case is on appeal from a criminal conviction.[191] Two notions compete in criminal cases. One views criminal cases as a category of disputes defining the relationship of our government to us citizens. The other views them as important government exercises to protect us all.[192] That there is truth to each explains the failure of either view to prevail.[193] Struc-

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[187] *See supra* note 105.

[188] Note, *State Constitutional Guarantees*, *supra* note 43, at 747-55.

[189] Recall Justice Jackson's famous aphorism: "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[190] *See supra* note 172.

[191] *Cf.* Hellman, *supra* note 186, at 800 n.34 (distinguishing civil from criminal proceedings on direct review on the basis of the availability of federal habeas corpus review in the latter).

[192] *See infra* text accompanying notes 247-76.

[193] *But see* O'Neill, *supra* note 66, at 386-87. The competing views and one accomodation were offered by Justice Frankfurter:

> It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment.

turally, the separation between the offense and the Court, over time, distance, and function, serves to emphasize the general over the particular view.[194] The influence of the merits of the federal question on the Court's application of the adequate and state ground doctrine of discretionary jurisdiction is uncertain. Logic dictates that the Court would evaluate its discretion to exercise jurisdiction first and the merits second. But experience with the doctrine over the years discloses examples of just the inverse approach.[195] In part, this look ahead at the merits may be due to the origins of the doctrine, during the era when the Court performed the error-correcting function as well as the law-making function.[196] The need to correct federal errors in law still may be felt in the immediate case, from the the likelihood or permissibility of successful reprosecution in the specific case and from other potential prosecutions which might contain similar claims. The state court's erroneous application of federal law creates a precedential potential for more error in the deciding court's state and elsewhere.[197] Today it must be conceded that the Court operates as a "Court of Selected Error."[198] When the demand for error correction overwhelms, the Court responds to the particulars despite the more appropriate emphasis on the law-making function. Generally, it

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United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

[194] Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956). "The more remote the court, the easier it is to consider the case in terms of a hypothetical defendant accused of crime, instead of a particular man whose guilt has been established." *Id.*

[195] *See* Comment, *Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions*, 61 COLUM. L. REV. 255, 277 (1961).

[196] *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). In an 1832 diversity suit the Court explained:

> On all questions arising under the Constitution and laws of the Union, this Court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this Court . . . .

Green v. Neal's Lessee, 31 U.S. 235, 240, 6 Pet. 291, 298 (1832); *see also* Shelby v. Guy, 24 U.S. 160, 162, 11 Wheat. 361, 367 (1826) (fixed and received construction by a state in its own courts, makes a part of the statute law).

[197] Murphy, *supra* note 109, at 487.

[198] WRIGHT & MILLER, *supra* note 5, § 4004, at 525.

should not, but that it does is without dispute.[199] These instances always are rife with disagreement about the propriety of the particular exercise.[200] Of more concern for present purposes is the perception by some Justices of the Court's "increasing frequency . . . to disregard important differences" between state and federal cases.[201] Pure error correction is proper, if at all, only in federal litigation in which the Supreme Court wields the power of the court of last resort with full supervisory power. Something more must justify error correction of state court decisions, as I already have suggested. The *Long* methodology does not change this notion of role.

A second federal interest present by virtue of the federal question and still relevant despite the state law ground is the Supreme Court's leadership role in maintaining doctrinal coherence in matters of national concern.[202] By constitutional design and practical dominance the Court is the final arbiter of federal constitutional law.[203] At this level, the Court, in a kind of common law role, resolves broad national issues having significance beyond the interests of the individual litigants by giving content to federal rights. This role must be reconciled with the independent and adequate

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[199] The most recent comprehensive study of the Court's jurisdiction concluded:

> [C]ases in which a state court has invalidated state action on a federal ground should not be heard by the Court in the absence of a conflict or a decision to treat the case as a vehicle for a major pronouncement of federal law. Without further percolation, there is ordinarily little reason to believe that such an issue is one of recurring national significance; and correction of error, even regarding a matter of constitutional law, is not a sufficient basis for Supreme Court intervention. Here, unlike a federal court's invalidation of state action, structural justification for intervention is generally missing, given the absence of vertical federalism difficulties and the built-in assurance that state courts functioning under significant political constraints are not likely lightly to invalidate state action even on federal grounds . . . [The Court] should not grant. . . . merely to correct perceived error.

Estreicher & Sexton, New York University Supreme Court Project, Executive Summary 22-23 (1985) (as of this writing, the full report is still forthcoming); *see also id.* at 14.

[200] *E.g.*, California v. Carney, 105 S. Ct. 2066, 2071-74 (1985) (Stevens, J., dissenting).

[201] Florida v. Rodriquez, 105 S. Ct. 308, 311 (1984) (Stevens, J., dissenting).

[202] Note, *State Constitutional Guarantees*, *supra* note 43, at 757. *See generally* P. CARRINGTON, *supra* note 185, at 100. Recall that the need for "doctrinal consistency" in the Court's own jurisdiction was an important part of the rationale in *Long* itself. The Court rejected the ad hoc ascertainment and disposition methodology to achieve this goal. *Long*, 463 U.S. at 1039.

[203] Powell v. McCormack, 395 U.S. 486, 549 (1969) (against coordinate branches); Cooper v. Aaron, 358 U.S. 1, 17-19 (1958) (against state officials). *See generally* Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 J.L. REFORM 1, 8-9 (1983).

state ground doctrine.[204] The doctrine effectively reduces the pool of cases that the Court may use to guide lower federal courts and state courts.[205] When this reduction serves important interests in federalism, the lost opportunity for leadership is offset. The *Long* methodology of ascertainment recognizes that the opportunity for doctrinal coherence is not to be given up without some such justification. A state court cannot invoke comity and federalism to defend an erroneously decided federal question. When there is an independent and adequate state law ground, that is reason enough. In ambiguously grounded decisions, however, the rule anticipates Court review. There is no clear justification for restraint. The Court has evolved beyond a common law role of deciding a lawsuit toward a role as leader of federal law in state and federal court alike. Federal rights are to be vindicated in state courts and lower federal courts, with the Supreme Court acting the role of superintendant. Any lesser requirement would jeopardize the Court's essential leadership role in matters of federal law, a role the Court must guard jealously.[206] A less demanding standard less rigorously applied would forfeit the Court's control over doctrinal coherence.[207]

The danger toward the other extreme is resolved by the Court's plain-statement rule. The Supreme Court's federal pronouncements have a significant side effect on state constitutional law, an area in which the constitutional design forbids a leadership role. Supreme Court pronouncements limiting federal guarantees do have an impact on state court innovation. On the part of many state judges "[t]here is a reluctance to depart from Court rulings limiting rights and a greater reluctance to consider novel ap-

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[204] *See* Note, *State Constitutional Guarantees*, *supra* note 43, at 757.

[205] *See supra* notes 58-85 and accompanying text.

[206] *See* Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363 (1973); *cf.* Wilkes, *The New Federalism*, *supra* note 150, at 446 ("There may be reason to believe that evasive actions by state courts will deprive the Supreme Court of opportunities to decide important questions concerning the extent of the federal rights of the accused.").

[207] G. GUNTHER, *supra* note 46, at 58 n.10; *see also* Elison & NettikSimmons, *supra* note 39, at 212-13. The Court seems to be reaching out to decide issues, in part, out of a concern that a second chance may not present itself. The state court may use the state constitution to prevent an after-remand decision on the federal issue. This is part of the Court's maturing in its leadership role. *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (similar approach in finality doctrine). *See generally* Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 29-30 (1979).

proaches once the Court has issued its view of the matter."[208] Such leadership is noncoercive, however, as the Court's federal holdings are merely persuasive authority. The state judges choose whether to be persuaded. Most commonly, this happens when the state judges have interpreted a provision of their state charter to be coincident with a federal counterpart.[209] The *Long* rule presents the state court with the option of following the federal lead and choosing dependence and review, or refusing to follow by a plain statement and insulating their judgment.[210]

The third federal interest present even in the independently and adequately state law grounded decision is uniformity.[211] Indeed, the need for uniform interpretation of federal law was considered of such primary importance as to justify the single expansion of

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[208] Welsh, *supra* note 62, at 836. The California Court of Appeals noted:

> Decisions of the United States Supreme Court construing constitutional phraseology are highly persuasive .... By the nature of federal and state jurisdiction that court has acquired a degree of expertise not shared by any state court.... The more courts feel free to adopt ground rules unpersuaded by contrary decisions of other courts, the greater the likelihood there is of uncertainty in those ground rules. The uncertainty is mitigated if proper deference is paid United States Supreme Court holdings.

People v. Norman, 112 Cal. Rptr. 43, 48-49 (1974), *superseded* 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).

[209] The Court of Criminal Appeals of Texas did just this in Brown v. Texas, 657 S.W.2d 797 (Tex. Crim. App. 1983); Judges Clinton and Teague were not terribly persuaded.

> Merely to parrot opinions of the Supreme Court of the United States interpreting the Fourth Amendment is to denigrate the special importance our Texan forebearers attached to their rights to privacy and other guarantees vouchsafed by the Bill of Rights they first declared and then insisted on retaining in every successive constitution.

Id. at 807 (Clinton, J., concurring).

> To the plurality's implicit holding that the members of this Court now have the role of being nothing more than mimicking court jesters of the Supreme Court of the United States, taps should be blown, and flags flown at half-mast—on behalf of what was formerly a Court that was a part of the independent appellate judiciary of the State of Texas.

Id. at 810 (Teague, J., dissenting).

[210] While the dependency option exists in each of the three philosophies on state constitutional law, the likelihood of following the federal lead seems to increase as you move from the primacy theory to the supplemental theory to the coequal theory. *See* State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983) (en banc)(primacy); Brown v. Texas, 657 S.W.2d 797 (Tex. Crim. App. 1983) (supplemental); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984) (en banc) (coequal).

There also are occasions of Supreme Court Justices trying too hard to lead. *See* Colorado v. Nunez, 104 S. Ct. 1257 (1984) (White, J., concurring); Florida v. Casal, 462 U.S. 637, 637-39 (1983) (Burger, C.J., concurring).

[211] *See* Note, *State Constitutional Guarantees*, *supra* note 43, at 755.

Supreme Court jurisdiction in the history of the Republic.[212] Uniformity, however, is but a means to an end and not an end in itself. Principles of federalism "call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise."[213] The Court recognized this need for uniformity in federal constitutional law in *Long*[214] and buttressed that need with a concern to protect nonjudicial state officials from untoward state court pronouncements of federal law.[215] While the goal of uniformity underlies the entire jurisdiction of the Supreme Court over state court decisions, how much uniformity is possible is another question.[216] The problem is that the Court's capacity to achieve complete uniformity, if ever possi-

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[212] In 1914, Congress expanded the jurisdictional statute to include state decisions upholding federal law, for the express purpose of imposing uniformity. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM 193-98 (1928); Note, *Wider Jurisdiction for the United States Supreme Court*, 28 HARV. L. REV. 408 (1915).

[213] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[214] Justice O'Connor noted:

> [I]t cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion.

Long, 463 U.S. at 1040.

[215] *Id.* at 1042 n.8.

[216] The need for uniformity featured prominently in the decision upholding the Court's power over the state judiciaries:

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (emphasis added); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 631-32 (1874).

ble, surely today is overwhelmed. The hegemony of the Court over the thirteen courts of appeals in federal questions is too attenuated to achieve complete unity.[217] The fifty state supreme courts make inevitable some balkanization of the Constitution. Complete uniformity would include correction of every error, and as we have seen, that effort is beyond the Court's capacity and institutional role. Uniformity then becomes a relative goal. During the incorporation debate some justices even questioned the need for uniformity for federal questions in the state courts. That view proved too tolerant of diversity to suit the majority as a matter of federal constitutional theory.[218] Still, state court experiments are extolled and sometimes emulated.[219] Furthermore, the emphasis is on uniformity in federal law, not uniformity in general. The independent and adequate state ground doctrine itself contemplates a disharmony of state law. The power of imposing a minimal harmony over federal law is more an *in terrorem* device than a doctrine of actual practice. The Court's power of review keeps state courts on key.[220] While the supremacy clause is constitutional basis enough for this

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[217] P. CARRINGTON, *supra* note 185, at 209.

> The problem of national uniformity derives from a weakness in the federal appellate hierarchy. The weakness is the result of overgrowth: the hegemony of the Supreme Court of the United States is too attenuated to be effective as the unifying arch of the structure. By combined force of numbers of cases and complexity, the national law has outgrown the Court's supervisory capacities. The Court is forced to scan many of the matters for which it bears the ultimate responsibility.

Id.

[218] *E.g.*, Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring) ("imagination unimpended by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal justice system."); California v. Green, 399 U.S. 149, 171-72 (1970) (Burger, C.J., concurring) ("The circumstances of this case demonstrate again that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States."); Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan, J. concurring and dissenting) ("one of [our national government's] basic virtues is to leave ample room for governmental and social experimentation in a society as diverse as ours."); *see also supra* note 148.

[219] *E.g.*, Argersinger v. Hamlin, 407 U.S. 25, 27 n.1 (1972); *id.* at 57 n.21, 59-61 (Powell, J., concurring in result); Williams v. Florida, 399 U.S. 78, 134-43 (1970) (Harlan, J., concurring and dissenting).

[220] Justice Holmes once wrote: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." O.W. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920). *See generally* Sager, *supra* note 56, at 1250-53 (nonuniformity as a possible result of state courts being allowed to expand the application of federally underenforced constitutional norms).

as an ideal, common sense admits the concept is precatory.[221]

Considering the independent and adequate state ground doctrine as a prudential approach to the Court's discretionary jurisdiction highlights the true nature of uniformity as a policy not pursued to the extreme. The same need for uniformity in federal law is present in a state court decision of a federal question which also includes a state law ground. Yet, the Court will decline the opportunity to unify federal law when the state ground is independent and adequate. Federalism's diversity overtakes uniformity. The *Long* methodology has the potential to achieve greater uniformity without sacrificing any diversity. Ambiguously grounded decisions serve as vehicles to achieve some further measure of uniformity. State courts may invoke the rule of plain statement and maintain diversity. Thus, the rule preserves the federal plan of sufficient uniformity and protected diversity.

The Supreme Court's experience with the *Long* rule is not yet sufficient to make any more than preliminary observations about the effect on the Court's institutional role vis-à-vis the state courts. The question posed by the ambiguously grounded decision remains the same: to review or not to review. The answer continues to depend on the Court's tolerance for ambiguity, a threshold admittedly established very minimally in *Long*. Under the methodology for ascertainment and disposition announced there, the more ambiguous the state judgment is, the more likely it will be reviewed. Now a state court opinion that simply includes some analysis of the state constitution is not enough to ward off the Supreme Court. The state decision clearly and expressly must be based on state law exclusively, or if as an alternative to a federal holding, on "bona fide separate, adequate, and independent [state] grounds."[222] The Court has not escaped the problem of ambiguity because the prudential doctrine properly obliges the Court to decide if the proper predicate of independence and adequacy exists to decline review.

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[221] *See* Schleuter, *supra* note 55, at 1099.

> To permit each state to interpret federal law in its own terms and to the extent it deems worthwhile would simply open the doors to judicial balkanization; respecting a state's autonomy is a worthwhile goal, but usurping the Supreme Court's prerogative to serve as the final arbiter of federal constitutional law is an unacceptable cost.

Id.

[222] *Long*, 463 U.S. at 1041.

Preliminary experience discloses that the Supreme Court strictly adheres to the *Long* methodology for ascertainment and disposition.[223] At the ascertainment level, the *Long* doctrine and its application connote a lesser tolerance for ambiguity requiring increased explicitness of state courts relying on state law to insulate the judgment from Supreme Court review.[224] The new disposition methodology amounts to an effective presumption favoring Supreme Court review,[225] although clarification may be sought.[226] Some factors which helped buttress the pre-*Long* determination to review[227] continue to be relevant under the new approach. These factors include the failure to cite a state constitutional provision or decision,[228] the extended analysis of the Constitution without separating state constitutional analysis,[229] the use of precedents that are premised on federal authority,[230] and the absence of a plain

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[223] *See, e.g.*, Caldwell v. Mississippi, 105 S. Ct. 2633, 2638-39 (1985); Ake v. Oklahoma, 105 S. Ct. 1087, 1092-93 (1985); Uhler v. AFL-CIO, 105 S. Ct. 5, 6 (Rehnquist, Circuit Justice 1984); Oliver v. United States, 104 S. Ct. 1735, 1739 n.5 (1984); Colorado v. Nunez, 104 S. Ct. 1257, 1258 (1984) (White, J., concurring in writ dismissal).

It is noteworthy that the *Long* rule is viewed as so well established that the Court has applied it to the procedural part of the independent and adequate state ground doctrine. *See* Caldwell v. Mississippi, 105 S. Ct. 2633, 2638-39 (1985); Ake v. Oklahoma, 105 S. Ct. 1087, 1092-93 (1985); *cf.* Three Affiliated Tribes v. Wold Engineering, 104 S. Ct. 2267, 2277 (1984) (analogy to state jurisdiction).

[224] *See, e.g.*, Caldwell v. Mississippi, 105 S. Ct. 2633, 2639 (1985); California v. Carney, 105 S. Ct. 2066, 2068 n.1 (1985); Florida v. Meyers, 104 S. Ct. 1852, 1853 n.* (1984); California v. Ramos, 463 U.S. 992, 997 n.7 (1983).

[225] *See, e.g.*, Florida v. Meyers, 104 S. Ct. 1852, 1853 n.* (1984); Oliver v. United States, 104 S. Ct. 1735, 1739 n.5 (1984); Colorado v. Nunez, 104 S. Ct. 1257, 1258 (1984) (White, J., concurring); California v. Ramos, 463 U.S. 992, 997 n.7 (1983).

The Court seems to have suggested that the requirement of a plain statement imposed by *Long* in ambiguously based decisions may extend to decisions based on state law. *See Meyers*, 104 S. Ct. at 1854 n.1 (Stevens, J., dissenting). In any event, the Court has made it very clear that its reading of the state opinion will control. California v. Carney, 105 S. Ct. 2066, 2068 n.7; *see also* Welsh, *supra* note 62, at 848.

[226] *See supra* note 78.

[227] *See generally* Bamberger, *supra* note 79, at 306-07.

[228] *See, e.g.*, Colorado v. Nunez, 104 S. Ct. 1257, 1258 (1984) (White, J., concurring); Delaware v. Prouse, 440 U.S. 648, 653 (1979).

[229] *See, e.g.*, Massachusetts v. Upton, 104 S. Ct. 2085, 2089-90 (1984) (Stevens, J., concurring); South Dakota v. Neville, 459 U.S. 553, 560 (1983).

Justice Stevens used the bully pulpit of the reporter to chastise the Supreme Judicial Court of Massachusetts for "rest[ing] its decision on the Fourth Amendment to the United States Constitution without telling us whether the warrant was valid as a matter of Massachusetts law." *Upton*, 104 S. Ct. at 2085, 2089 (Stevens, J., concurring) (footnote omitted).

[230] *See, e.g.*, Ohio v. Johnson, 104 S. Ct. 2536, 2540 n.7 (1984); Oliver v. United States, 104 S. Ct. 1735, 1739 n.5 (1984); Oregon v. Kennedy, 456 U.S. 667, 671 (1982).

statement of independence which explains any federal reliance as independent and merely persuasive.[231] This last factor has emerged as the controlling feature of the Supreme Court's ascertainment of ambiguity.[232] The Court's lowered tolerance for ambiguity, coupled with the uniform disposition of review if there is doubt about the state ground, has enlarged the Court's power of review over state courts in theory and in fact.[233]

The methodology of *Michigan v. Long* presents something of a paradox when considered in the context of other recent doctrinal developments in federal jurisdiction. The contemporary Supreme Court has invoked federalism—some would say with a vengeance, others would say with a vision—to restrict general access to the federal courts. Yet, as we have seen, the *Long* methodology in theory and in fact increases the power of review of the Supreme Court over state supreme courts. Exploring this paradox offers one last vantage on the doctrine.

The theme of this recrudescent federalism is that the state courts are the primary guardians of individual rights. Noting a few examples of recent limits on access to federal courts makes my point. During the mid-1970's, the prior trend toward broadening standing doctrine came to an end and since then there have been suggestions of a pullback.[234] The doctrine of "Our Federalism," or *Younger* abstention,[235] requires that "[b]ased on considerations of

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[231] *See, e.g.*, Caldwell v. Mississippi, 105 S. Ct. 2633, 2639 (1985); New York v. Quarles, 104 S. Ct. 2626, 2637 n.2 (1984) (O'Connor, J., concurring in part and dissenting in part); Ohio v. Johnson, 104 S. Ct. 2536, 2540 n.7 (1984); *Long*, 463 U.S. 1032, 1040-42 (1983).

[232] *See, e.g.*, Caldwell v. Mississippi, 105 S. Ct. 2633, 2639 (1985); New York v. Quarles, 104 S. Ct. 2626, 2637 n.2 (1984) (O'Connor, J., concurring in part and dissenting in part); Ohio v. Johnson, 104 S. Ct. 2536, 2540 n.7 (1984); *Long*, 463 U.S. 1032, 1040 (1983); *see also* WRIGHT & MILLER, *supra* note 5, § 4032, at 441 (Supp. 1983).

[233] *See, e.g.*, Ake v. Oklahoma, 105 S. Ct. 1087, 1093 (1985); Ohio v. Johnson, 104 S. Ct. 2536, 2540 n.7 (1984); *id.* at 2543 n.* (Stevens, J. dissenting); Florida v. Meyers, 104 S. Ct. 1852, 1853 n.* (1984); Colorado v. Nunez, 104 S. Ct. 1257, 1259 (1984) (Stevens, J., concurring); California v. Ramos, 463 U.S. 992, 1031 (1983) (Stevens, J., dissenting); *see also* Bamberger, *supra* note 79, at 296.

[234] C. WRIGHT, *supra* note 2, § 13, at 67-74. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). *See generally* Nichol, *Backing into the Future: The Burger Court and the Federal Forum*, 30 U. KAN. L. REV. 341, 345-50 (1982) (overview of that trend in the Burger Court).

[235] The doctrine may be traced to a 1971 decision and its sequelae. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37, 44 (1971).

equity, comity, and federalism, a federal district court must abstain from granting either declaratory or injunctive relief when a state criminal action or its equivalent is pending against the federal plaintiff."[236] Similarly based procedural restrictions have been placed on the federal habeas corpus jurisdiction over state prisoners.[237]

Consider the postconviction procedures open to the convicted state defendant:

> Today a criminal defendant typically can take six steps after a conviction in the state courts. (1) he may seek review by the state's appellate court (if there is an intermediate appellate court, there may be a two-stage appellate process), and (2) he may follow postconviction procedures in the state court that provide a basis for entry into the federal courts. Next, (3) the defendant can petition for a writ of certiorari or a direct appeal to the United States Supreme Court. If access to the United States Supreme Court is denied, as is most often the case, (4) the defendant then, by filing a petition for writ of habeas corpus, may go to the federal district court. If denied relief there, (5) he may appeal to the United States circuit court of appeals, and if he loses there, (6) he may go back again to the United States Supreme Court, this time from the decision of the court of appeals.[238]

This sequence provides a procedural context for the independent and adequate state ground doctrine and poses the paradox between *Long* and recent habeas decisions. Over the years, the Court's manipulation of federal habeas corpus jurisdiction exemplifies the duality of federalism, alternating between exalting the federal and the state forum.[239] In recent years, the Court has cho-

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[236] Baker, *supra* note 90, at 176-77. *See generally* Nichol, *supra* note 234, at 350-56 (examining the *Younger* doctrine).

[237] Non-jurisdictional, substantive limits have narrowed the federal court role, as well, in such areas as procedural due process, state action, and the eleventh amendment. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984) (eleventh amendment); Hewitt v. Helms, 459 U.S. 460 (1983) (procedural due process); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (state action); *see also* Seid, *supra* note 45, at 52-62; Wisdom, *supra* note 118, at 1072-78.

[238] Cameron, *supra* note 138, at 554. The procedures are mapped in Meyer & Yackle, *Collateral Challenges to Criminal Convictions*, 21 U. KAN. L. REV. 259, 275 (1973).

[239] *Compare* Fay v. Noia, 372 U.S. 391, 406-26 (1963) (federal relief authorized unless

sen the latter course.[240] The exhaustion doctrine, requiring the state prisoner to have had presented the substance of the federal claim to the state court as a condition of federal relief, has received new emphasis.[241] State procedural defaults have been afforded controlling significance in the federal postconviction process.[242] State court findings have been accorded a presumption of correctness.[243] Finally, the Court has held that if the state court "has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[244] At each phase, the Court has reduced the jurisdiction of federal courts to reconsider state criminal convictions. The independent and adequate state ground doctrine, with the effect of enlarging the Court's review of state criminal convictions, seems contrary.[245]

The origin of this paradox lies in the nature of the doctrine, in the ambiguity of our federalism. The explanation was suggested in Justice Stevens' view of the Court's role. Justice Stevens took the low road of solitary dissent in *Long*.[246] He agreed that the ad hoc

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there was a "deliberate bypass" of state procedural requirements) *with* Wainwright v. Sykes, 433 U.S. 72, 78-85 (1977) (federal relief *not* authorized unless state prisoner demonstrates "cause and prejudice"). *See generally* Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984) (broad overview).

[240] *See generally* McMillian, *Habeas Corpus and the Burger Court*, 28 ST. LOUIS U.L.J. 11 (1984) (examining the Court's recent decisions in habeas corpus proceedings).

[241] *See* Anderson v. Harlass, 459 U.S. 4, 6 (1982); *see also* Rose v. Lundy, 455 U.S. 509, 518-19 (1982) (requiring dismissal of state prisoner's petition containing exhausted and unexhausted claims); Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (ineffective assistance of counsel claim must be exhausted).

[242] A state prisoner barred by a procedural default from raising a constitutional claim in state court may not litigate the claim on federal habeas consideration without demonstrating some cause for and actual prejudice from the default. Engle v. Isaac, 456 U.S. 107, 110 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

[243] Marshall v. Lonberger, 459 U.S. 422, 432 (1983); Sumner v. Mata, 455 U.S. 591, 592-93 (1982).

[244] Stone v. Powell, 428 U.S. 465, 494 (1976) (footnote omitted). *See generally* Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1 (1982).

[245] The paradox cuts across the substantive and procedural halves of the adequate and independent state ground doctrine. *Cf. supra* note 223 (equating two halves of the doctrine under *Long* methodology). *See generally* Hill, *supra* note 24.

[246] *Long*, 463 U.S. at 1065 (Stevens, J., dissenting). Justice Stevens' tenure has been characterized by a running commentary on the Court's institutional behavior. *See* R. Collins,

approach was unsatisfactory and that a presumptive disposition was appropriate in the decisions ascertained to be ambiguously grounded; however, his presumption would have the Court refuse review in ambiguously grounded decisions as if the decision was state law grounded.[247] In his conception of the Court's relationship with the state courts, Justice Stevens concluded "the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[248] This concept of role would oblige the Court to rationalize the discretionary power over the docket, as I have struggled to do, within our dual court system.[249] In a later dissent Justice Stevens elaborated upon this theme to suggest an absolute rule against review when a state court has upheld a claim of a federal right unless a significant conflict existed or the Court selected the case to make a major pronouncement of federal law.[250] A corollary to this theme emerged in Justice Stevens' *Long* dissent. He observed a pronounced tendency for the Court to review and reverse state court civil liberties decisions holding that the state court had interpreted the Constitution too expansively.[251] He traced the history of this tendency back to the

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State Constitutional Law—Justice Stevens Becomes an Advocate of States' Role in the High Court, Nat'l L.J., Aug. 27, 1984, at 20, col. 1.; L. Greenhouse, *Working Profile: Justice John Paul Stevens—In the Matter of Labels, a Loner*, N.Y. Times, July 23, 1984, at A8, col. 3; *see also* Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982).

[247] *Long*, 463 U.S. at 1067-72. His initial reading of the precedents revealed that this presumption was established in the adequate and independent state ground doctrine's stare decisis. *Id.* at 1067.

[248] *Id.* at 1068. This view of role is neither original to *Michigan v. Long* nor limited to Justice Stevens. *See* Ponte v. Real, 105 S. Ct. 2192, 2198 n.3 (1985) (Stevens, J., concurring); *id.* at 2209 n. 21 (Marshall, J., dissenting); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 479 (1981) (Stevens, J., dissenting); Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting).

[249] *See* note, *supra* note 100, at 230.

Justice Stevens' position is provocative precisely because it represents a tentative step toward a conception of Supreme Court review that looks squarely to the federal interests implicated and discards reliance on the formal basis of a state court's decision. The challenge that remains is to complete this move from formalism by developing criteria that the Court can apply to determine when review is appropriate. Suitable criteria, while demarking the conditions under which federal interests should be protected, would respect a state's autonomy to evolve a jurisprudence neither stifled by unreviewed misapprehensions of substantive federal mandates nor confined— by a court's fear of unwarranted reversal—in the endeavor to use the full suggestive force of the growing resources of federal law.

Id.

[250] California v. Carney, 105 S. Ct. 2066, 2072-74 (1985) (Stevens, J., dissenting).

[251] *Long*, 463 U.S. at 1069-70 (Stevens, J., dissenting); *see also* Welsh, *supra* note 58, at

mid-1970's when the independent and adequate state ground doctrine began to change toward the *Long* majority's approach.[252] Rather than some individual's claim of deprivation of federal right, these petitions ask for review on behalf of state officials who urge reversal because, as the Court once explained in such a case, "a State [court] may not impose such greater restrictions [on the State] as a matter of *federal constitutional law* when this court specifically refrains from imposing them."[253] Justice Stevens thus renewed his attack on the certiorari practices of the Court, challenging that "the Court is more interested in upholding the power of the State than in vindicating individual rights."[254] Finally, he accused the Court of "grant[ing] prosecutors relief from [state court] suppression orders with distressing regularity."[255] These views apparently reflect a larger theory of the Court and its relationship to the states. Justice Stevens seems to have endorsed the managerial theory of the Supreme Court's role put forward by the New York University Supreme Court Project.[256] That metaphor of

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[252] *Long*, 463 U.S. at 1069-70 (Stevens, J., dissenting) (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)); *see supra* note 81; *see also* Elison & NettikSimmon, *supra* note 39, at 182-95 (tracing the development of Supreme Court review).

[253] Oregon v. Hass, 420 U.S. 714, 719 (1975); *see supra* notes 142-81 and accompanying text.

[254] Idaho Dep't of Employment v. Smith, 434 U.S. 100, 104-05 (1977) (Stevens, J., dissenting); *see also* Colorado v. Nunez, 104 S. Ct. 1257, 1259 (1984) (Stevens, J. concurring).

[255] New Jersey v. T.L.O., 105 S. Ct. 733, 761 (1985) (Stevens, J., dissenting) (footnote omitted). Justice Stevens listed 23 examples since the October Term 1982. *Id.* at 761 n.12. *Michigan v. Long*, was such a search and seizure case. *See supra* note 66. Justices Stevens and Marshall have made this point elsewhere arguing against grant of certiorari. *See* Ponte v. Real, 105 S. Ct. 2192, 2199 (1985) (Stevens, J., concurring); *id.* at 2209 n.21 (Marshall, J. dissenting); Florida v. Meyer, 104 S. Ct. 1852, 1855 (1984) (Stevens, J., dissenting).

[256] Justice Stevens cited and quoted the Executive Summary of the Report with approval in California v. Carney, 105 S. Ct. 2066, 2073 n. 8 (1985).

Justice Stevens' view of the relationship includes an important role for state courts:

> The maintenance of the proper balance between the respective jurisdictions of state and federal courts is always a difficult task. In recent years I have been concerned by what I have regarded as an encroachment by this Court into territory that should be reserved for state judges. The maintenance of this balance is, however, a two way street. It is also important that state judges do not unnecessarily invite this Court to undertake review of state court judgments. I believe the Supreme Judicial Court of Massachusetts unwisely and unnecessarily invited just such review in this case [by refusing to consider a parallel state constitutional argument]. Its judgment in this regard reflects a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts.

Massachusetts v. Upton, 104 S. Ct. 2085, 2090 (1984) (Stevens, J., concurring) (citations

role likens the Court to a manager marshalling scarce judicial resources, who "should intervene only when a binding, authoritative decision is truly demanded."[257] The ascertainment and disposition methodology announced in *Long* went beyond Justice Stevens' self-restrained, narrow view of role.

On this level of role and doctrinal context, *Michigan v. Long* may best be understood. I have several parries to the twin thrusts that the Court's discretionary docket should never be used to review state court judgments that uphold a claim of federal right and that the present Court's exercise of this discretion improperly favors prosecutors, especially in search and seizure suppression cases.[258]

First, Justice Stevens offers no recent authority for his narrow view of the Court's role on review as *solely* to vindicate denied federal rights. To reason from the general importance of that role to conclude it is exclusive goes beyond precedent and logic.[259]

Second, Justice Stevens' view would leave no room for the Court's constructive inquiry under its statutory jurisdiction. His rationale would not be restricted only to state decisions which are arguably supported by adequate and independent state grounds. Apparently, Justice Stevens believes that even if the decision rests exclusively on federal grounds the Court should not review judgments if the federal right was upheld.[260] The *Long* majority's analysis properly defers to the decision clearly grounded on state law because Supreme Court review cannot change the outcome when the individual right will be upheld independently.[261] But the am-

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omitted); *see also supra* notes 142-81 and accompanying text.

[257] Estreicher & Sexton, New York University Supreme Court Project, Executive Summary 15 (1985). That Executive Report described the managerial approach further:

> Absent relatively rare justifications for immediate intervention, the Court as manager should accord a presumption of regularity or validity to the decisions of lower courts and should defer articulation of binding national law until all of the issues have been sufficiently ventilated after a period of percolation in the state and lower federal courts.

Id.; *see also Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1342-47 (1982) (suggesting review only on a clear absence of an independent state ground).

[258] *See* Schleuter, *supra* note 55, at 1093-98.

[259] *Id.* at 1093 n.86.

[260] *Long*, 463 U.S. at 1043 n.8; *see supra* notes 110-41 and accompanying text.

[261] *See* Sandalow, *supra* note 33, at 199; *see also supra* notes 142-81 and accompanying text.

biguously grounded decision may amount to a federally grounded decision. Today, it seems "elemental" that an exclusively federally grounded state decision should be subject to Supreme Court review whether the state decision upheld or denied the federal claim.[262] Congress changed the Court's jurisdictional statute to accomplish that very thing in 1914.[263]

I am not sure how Justice Stevens proposes to rollback the 1914 statutory amendment, although I suppose that the Court could get away with it, as the Court has succeeded in downgrading appeals under the mandatory review statute to discretionary review. The question is *should* the Court try to get away with it. I think not, for a third reason. Lost in such a per se approach would be important federal interests in error correction, institutional leadership, and uniformity. These features of the Court's role are too valuable to forsake once and for all. Justice Stevens' clever invocation of sovereignty, in which he likens the Court's relationship with state courts to the Court's relationship with the courts of a foreign country, is inappropriate.[264] Our federalist structure and our constitutional theory belie the comparison between the independent and adequate state ground theory and the Court's role vis-à-vis the courts in the Republic of Finland.

Fourth, Justice Stevens has not convinced me that the *Long* methodology will necessarily result in dramatic increases in the demand on scarce Court resources. Indeed, the opposite effect might result. As state courts and litigants become more savvy, holdings expanding individual liberties will be anchored in state constitutional law and insulated from Supreme Court review by the clear statement of a state law ground. This reliance on state constitutional law may result in fewer review applications on the Court's

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[262] HART & WECHSLER, *supra* note 2, at 122-23 (Supp. 1981).

[263] Originally, the Court's jurisdiction was limited as Justice Stevens would limit it today: Supreme Court review of state decisions was permitted only when the federal claim had been denied. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1257 (1983)). As a response to state court decisions expanding the federal due process, Congress added jurisdiction over state cases sustaining a federal claim. *See* F. FRANKFURTER & L. LANDIS, *supra* note 212, at 188-98. That remains the law today. 28 U.S.C. § 1257 (3) (1983). *See also* WRIGHT & MILLER, supra note 5, § 4006, at 545.

Justice Stevens surely is aware of the 1914 amendment, yet seems to have conveniently overlooked the statutory implication for his theory. *See* Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 11 n.54 (1983).

[264] *Long*, 463 U.S. at 1072 (Stevens, J., dissenting).

discretionary docket. More important, the state courts will be performing their constitutional role in our federalism.[265] All signs indicate they are capable of operating within this clarified role.[266] I have difficultly understanding the "threat" behind a doctrine which has such an effect.

Fifth, to my mind, *Stone v. Powell*[267] explains much about the new methodology in *Long* and the present Court's seeming penchant for state court search and seizure decisions. The effect of *Stone* was to narrow federal overview of incorporated fourth amendment claims to the exclusive province of the Supreme Court.[268] Sheer numbers account for some of the search and seizure increase on the Court's docket.[269] *Long* itself was a search and seizure decision.[270] The *Long* methodology of ascertainment and disposition furthers the Court's effectiveness at overseeing the state supreme courts. Some of the recent substantive upheavals in search and seizure doctrine further support the need for the *Long* methodology and the inevitability of the Court's docket emphasis in search and seizure.[271] Wholesale changes in substantive doctrine necessitate some Supreme Court policing. Revamping the independent and adequate state ground doctrine allowed the Court greater

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[265] Collins, *supra* note 58, at 94; Schleuter, *supra* note 55, at 1098.

[266] *See supra* notes 175-81.

[267] 428 U.S. 465 (1976); *see supra* note 244.

[268] Then Judge (now Justice) O'Connor, the author of the *Long* majority opinion, made the point previously:

> In the next decade, there will probably be significant additional state court variations in cases involving the issue of illegal search and seizure under the fourth amendment. Since *Stone v. Powell*, state criminal defendants who have had a "full and fair opportunity" to raise their claims of illegal search and seizure in the state courts may not, thereafter, obtain federal habeas corpus relief. We do not yet know the tests to be employed in determing what is a "full and fair opportunity." However, assuming the state courts are providing a full and fair opportunity for the claims to be raised, and that federal habeas corpus review is unavailable, the state courts are more likely than their federal counterparts to reach widely varying results on search and seizure issues. Even the federal cases on search and seizure are not models of clarity and simplicity. The standards tend to be confusing and obtuse in some instances.

O'Connor, *supra* note 139, at 804 (footnotes omitted).

[269] *See Long*, 463 U.S. at 1043 n.8.

[270] *See supra* note 66.

[271] *See, e.g.*, Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) (good faith exception); Illinois v. Gates, 462 U.S. 213 (1983) (warrant procedure); Rakas v. Illinois, 439 U.S. 128 (1978) (standing); *see also* Hellman, *supra* note 116, at 530-49; Seid, *supra* note 45, at 19, 58.

review capability to this end.[272] Given the large number of cases in the Supreme Court pipeline, the diminished role of the lower federal courts, and the Court's change of direction in doctrine, the new methodology fits in nicely. The doctrine is shaped by the tensions sought to be accommodated. The adequate and independent state ground doctrine of an expansionist incorporation era was not compatible with the present Court's direction or sense of purpose.

My last reason to disagree with Justice Stevens' criticism is also my best reason. His frustration with the Court's granting review of federal questions on state prosecutors' petitions and reversing state court judgments entered on behalf of defendants seems to suggest that there is something wrong with the practice. I do not agree. I do not believe that the Court should decide in favor of the criminal defendant or not at all. Justice Stevens' avenue to Court review is one-way. Mine is a middle road on which travel in both directions is proper.[273]

Consider the constitutional theory. Justice Rehnquist has explained that the objects of this jurisdiction, the provisions in the Bill of Rights, "simply represent decisions on the part of the ex-

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[272] *See* G. GUNTHER, *supra* note 46, at 58; Collins, *supra* note 58, at 92.

[273] I shall allow Judge Aldisert to defend me on the charge of breaking ranks with the intelligentsia:

> Judging constitutional law cases is made difficult because the predominant academic literature applauds only dogma that extends individual rights and liberties. A court decision that comes down with no such extension or comes down flatly in favor of society against an individual either receives no kudos or becomes the subject of vehement criticism. I recognize fully that one institutional role of the courts is to interpose themselves between the individual and the brute force of the majority, but I am not at all certain that judges should be worshipped for deciding in favor of the individual in every case. Judges who do so are advocates and not judges. The nature of today's legal climate is that both the professional and the lay public pick up sides in constitutional adjudication, assigning the name "liberal" or "conservative" (whatever these mean in terms of today's convoluted issues implicating competing individual, public, and social interests) to each judge. They are wont to criticize judges who decide one way in one case, another way in another, and to describe them as "swing" or "wishy washy" or "inconsistent." They seemingly forget that the appellate judge's task is to decide the particular case on the particular record and the particular issues raised by the particular adversaries. At one time, a judge with preconceived notions, unreceptive to arguments before him, was considered a bad judge. Now he or she is a bad judge only if he or she does not thrust, at every turn, regardless of the record presented, the federal court into new facets of the daily lives of state and local agencies or private individuals.

Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821, 831-32 (1981) (footnotes omitted). *Cf. supra* note 256 (quoting Justice Stevens).

traordinary majority required to amend the United States Constitution to remove from the authority of temporary majorities who may be in control . . . the authority to take action forbidden by the amendment in question."[274] That is all. Certainly that is enough. Behind Justice Stevens' criticism is a common but inadequate way of thinking about government and individuals solely as opponents in some criminal justice sporting event. Justice Brennan reminded us recently that "[t]he government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law."[275] Both responsibilities are for the government; a view toward one without the other is incomplete. Justice Stevens' approach to the role of the Court, which says only the criminal defendant can gain review, furthers the first half of Justice Brennan's definition but tellingly ignores the second half. In his John A. Sibley Lecture, reprinted in the pages of this *Review* last year, Solicitor General Lee defended the Court from attacks such as Justice Stevens' *Long* dissent complaining that the present Court majority favors the government over the individual:

> What is wrong is that this characterization—government versus the individual—tells only part of the story.
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> [The 1983 Supreme Court Term] criminal cases illustrate the point. Why is it that governments are on the opposite side of the [criminal defendants] of this world? This answer is obvious. It is not because governments have some inevitable and

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[274] Rehnquist, *Government by Cliche: Keynote Address of the Earl F. Nelson Lecture Series*, 45 Mo. L. REV. 379, 389-90 (1980) (footnote omitted). *See* Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 107-38 (1985) (rights of accused and law-abiding); *see also supra* notes 142-181 and accompanying text.

[275] New Jersey v. T.L.O., 105 S. Ct. 733, 755 n. 5 (1985) (Brennan, J., dissenting). Justice Brennan was faulting the majority for thinking about only one part of the government's responsibility:

> I speak of the "government's side" only because it is the terminology used by the Court. In my view, this terminology itself is seriously misleading. The government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law. Consequently, the government has *no* legitimate interest in conducting a search that unduly intrudes on the privacy and security of the citizen. The balance is not between the rights of the government and the rights of the citizen, but between opposing conceptions of the constitutionally legitimate means of carrying out the government's varied responsibilities.

Id.

> mysterious compulsion always to oppose individuals. It is that one of government's jobs is to keep its citizens as free as it can from the depredations of which these [criminal defendants] were accused: drug dealing, murder, and rape. The "governmental interest" in preventing crime is really derivative. It is not asserted on behalf of some impersonal, unidentifiable, bureaucratic nonentity. It is a people interest, an individual interest. The individuals affected are larger in number than the criminally accused, but they are nonetheless individuals—individuals whose interest is in the security of their persons, their property, and their homes.[276]

This is not new; Justice Stevens' point of view is new. The position of the individual as the focal point of judicial concern did not emerge in this country until after the Second World War. The constitutionalization of state criminal procedures occurred during the last twenty-five years. Today the Court reflects a societal balance missing in the judicial period before and during the fever pitch of the incorporation of the Bill of Rights into the fourteenth amendment due process clause.[277] I do not mean to suggest that the individual always should lose; that would make me guilty of the same error Justice Stevens commits. My preference is for a balance, for taking the measure of the tension and adjusting our federalism. Federal interests in error correction, coherence of doctrine, and uniformity outweigh Justice Stevens' argument that it is somehow a prudent exercise of the Court's power to insulate a state court ruling against a state prosecutor on a federal question simply by noting that the action benefited the state defendant. Indeed, he would take away all opportunities to affirm a judgment in favor of a federal claim. Ignoring neutral principles, Justice Stevens' real problem is that, on the merits, the sides have changed.[278] Instead of reversing state court judgments because they fall below the federal minimum, the present Court reverses state court judgments on

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[276] Lee, *The Supreme Court's 1983 Term: Individual Rights, Freedom, and the Statue of Liberty*, 19 GA. L. REV. 1, 2-3 (1984); *see also* Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15, 19 (1984).

[277] Chief Justice Burger has become an ardent spokesman for the broader view of individual rights that includes the law-abiding. *See, e.g.*, United States v. Hasting, 461 U.S. 499, 507 (1983); Morris v. Slappy, 461 U.S. 1, 14-15 (1983).

[278] *See supra* note 160.

the federal merits for affording too much protection.[279] As a neutral principle, the ascertainment and disposition methodology announced in *Michigan v. Long* allows both approaches to the merits. In that regard, nothing has changed.

IV. Conclusion

As we have seen, the independent and adequate state ground doctrine is something of a synecdoche for federal jurisdiction, federalism, constitutional theory, and institutional role. This is because the doctrine deals with the appellate jurisdiction of the Supreme Court, what one of its best students once called "a great national achievement."[280] Until *Michigan v. Long*, the doctrine had been an ad hoc process of uncertain dimension in the ambiguously grounded state court decision. The Court seemed content to abandon the doctrine "in an undeveloped, unrationalized, and uncertain state."[281] The *Long* methodology for ascertainment and disposition of the ambiguously grounded state decision is significant as an all too rare occasion of rationalizing Supreme Court procedure, but it is more. The methodology represents the latest adjustment in the tension between the power of the Court to revise state court judgments on federal questions and the sovereign power of state courts over state law questions. The issue is not which will have the last word, for each does in its appropriate province. The issue is what procedure in ambiguously grounded decisions will best ensure that each court fulfills its constitutional function. We have an answer, for where we are now on the Möbius strip of our federalism.

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[279] Welsh, *supra* note 62, at 820.

[280] Wechsler, *supra* note 24, at 1064. Professor Wechsler introduced his topic by explaining:

> My subject, as you know, concerns the jurisdiction of our highest court, the tribunal that is certainly without an analogue throughout the world in the magnitude of its responsibilities, measured by the difficulty and importance of the issues it confronts, the finality of many of its most transforming judgments short of constitutional amendment, the number of judicial systems from which cases on its docket may derive and the complexity of the mixed legal system in the ordering of which it has the final voice.

Id. at 1043.

[281] Field, *supra* note 113, at 721.