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Introduction

With the advent of the more conservative Burger Court, commentators[1] and Supreme Court Justices[2] alike have reminded state courts that they are free to exercise final authority as arbiters of *state* law and adopt state standards that protect individual rights more than federal law. While state courts have responded to such urgings with expansive rulings, they have not always been careful about spelling out in their decisions whether they were relying on state law, federal law, or both. This judicial imprecision creates a jurisdictional dilemma for the Supreme Court when it is asked to review the state court decision.

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1 *See, e.g.*, Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821 (1981); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist,"* 7 HAMLINE L. REV. 51 (1984); Force, *State "Bills of Rights": A Case of Neglect and The Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339 (1978); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

2 *See, e.g.*, South Dakota v. Neville, 103 S. Ct. 916, 924-27 (1983)(Stevens, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 111-21 (1975)(Brennan, J., dissenting); Oregon v. Hass, 420 U.S. 714, 726-29 (1975)(Marshall, J., dissenting); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); 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 (1981). At least one commentator has criticized dissenting Justices for using their judicial opinions to encourage states to employ more expansive state law. *See* Bator, *supra* note 1, at 605 n.1.

If the state decision rests on independent and adequate state grounds, the Court will apply its self-imposed rule of judicial restraint and will decline review.[3] But the task of determining whether there is such a ground in the state court's decision is not always easy. Last term in *Michigan v. Long*,[4] the Court noted this problem and announced a new rule. Unless it clearly appears on the face of the state court's decision that it relied on independent and adequate state grounds, the Supreme Court will assume that no such grounds were present.

This case marks an important milestone in the Burger Court's so-called "new federalism," a policy which advocates greater deference to state courts' autonomy. The new rule is another in a series of attempts by the Court to strike a workable and delicate balance between the state courts' autonomy and the Supreme Court's role as final arbiter of federal law. This article examines that balance from both a theoretical and practical perspective.

Section I explores the underlying theories of Supreme Court review of state court decisions and the Court's self-imposed rule of restraint where the state decision rests on nonfederal grounds. Section I also examines the various avenues the Court uses to dispose of ambiguous state decisions where it is not clear whether those decisions are in fact based upon independent and adequate state grounds. Section II briefly reviews the holding in *Michigan v. Long*. It then measures that holding against the Court's oft-stated need to respect state courts' autonomy, the need for uniformity in federal law, and the need to avoid advisory opinions. Section III discusses the various recent state court responses to the Burger Court's view of federalism; it also offers some practical notes, both for state courts and counsel, in meeting the rule. Finally, Section IV addresses the perceived and actual impact of *Long* on state criminal defendants.

I. Supreme Court Review of State Court Decisions: An Overview

The general authority for Supreme Court appellate review of state court decisions rests in the broad language of article III, section 1 of the Constitution, which vests the judicial power of the United States in the Supreme Court (and in other inferior courts established by Congress),[5] and in article III, section 2, which extends that power to cases arising under the Constitution and laws of the United

3 Herb v. Pitcairn, 324 U.S. 117 (1945); *see* text accompanying notes 23-26 *infra*.

4 103 S. Ct. 3469 (1983).

5 U.S. CONST art. III, § 1.

States.[6] Through the years, Congress has further defined and refined the scope of the Supreme Court's appellate jurisdiction. The contemporary template for review of federal court decisions is laid out in 28 U.S.C. § 1254;[7] the Court's authority with regard to reviewing state court decisions is located in 28 U.S.C. § 1257.[8] Both provisions broadly address the circumstances under which an appeal may be taken to the Court and when the Court may exercise discretionary review through a writ of certiorari.[9]

These constitutional and statutory schemes for Supreme Court review reflect the original understanding that there would be two concurrent judicial systems in the new Republic—one state, the other federal.[10] An inherent tension, however, exists between these

6 U.S. CONST. art. III, § 2.

7 (1976). This section provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
>
> (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

8 (1976). This section provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

9 The Supreme Court's rules address the actual procedural framework for pursuing either the appellate or certiorari routes. *See* SUP. CT. R. 10, 19. For a discussion of considerations in determining which route to take, assuming counsel has a choice, see R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 168-172 (5th ed. 1978).

10 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 114 (1978)(The Constitution "presumes the existence of the states as lawmakers and governmental institutions distinct from the federal government."); *see also* THE FEDERALIST, No. 82 (A. Hamilton)(state courts have concurrent powers unless prohibited).

two individual systems.[11] To ensure that state court autonomy might remain firm and respected, the appellate jurisdiction of the Supreme Court may be exercised over state courts only where the Constitution or federal treaties or statutes are drawn into question.[12]

Despite this salutary framework, the Supreme Court's impact on the state courts and their cases has taken a number of sweeping turns, both as a result of congressional action and as a result of a sometimes activist Court. For example, the federal habeas corpus statute[13] has provided a well-traveled avenue for state criminal defendants to challenge state court convictions in the lower federal courts, and ultimately in the Supreme Court.[14] Another example is the Court's "incorporation" cases which have required state courts to apply various Bill of Rights protections to state criminal defendants through the fourteenth amendment. These and similar cases have provided the seeds for the Court's reevaluation both of its relationship with state courts, and of the manner in which it exercises its jurisdiction over those courts.

A. *The Effects of the Incorporation Doctrine*

Once planted in contemporary jurisprudence, the idea that the fourteenth amendment incorporated other specific Bill of Rights' protections quickly gained strength. Now, all but a few of the Bill of Rights' protections have been specifically applied to state criminal proceedings.[15] The concept of selective incorporation, however, as well as the Warren Court's far-reaching criminal procedure decisions, was initially resisted by many legal scholars and judges, includ-

11 See generally M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980) for materials covering a wide range of potential tensions in the two systems.

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

13 28 U.S.C. § 2254 (1976).

14 Once the state criminal defendant enters the federal judicial system through a habeas corpus petition, he may potentially pursue his federal remedies to the Supreme Court through either an appeal or writ of certiorari. He must first exhaust his state remedies, however. Ironically, his state appeals may have initially resulted in a denial of plenary review by the Supreme Court. *See, e.g.*, Adams v. Williams, 407 U.S. 143 (1972).

15 Duncan v. Louisiana, 391 U.S. 145 (1968)(trial by jury in a criminal case); Washington v. Texas, 388 U.S. 14 (1967)(compulsory process for witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967)(speedy trial); Pointer v. Texas, 380 U.S. 400 (1965)(confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964)(self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963)(right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961)(fourth amendment exclusionary rule); *In re* Oliver, 333 U.S. 257 (1948)(public trial). To date the Court has not made the bail clause of the eighth amendment or the right to grand jury indictment in the fifth amendment applicable to state criminal proceedings.

ing state court judges.[16] These judges were understandably disturbed at the prospect of the Supreme Court federalizing state affairs.[17] The Supreme Court placed the state courts in the position of having to decide an increasing number of federal constitutional challenges to state criminal procedures.[18] Because the vast majority of criminal prosecutions in this country are conducted in the state courts,[19] the Supreme Court's expansion of the Bill of Rights protections into state courts provided a bumper crop of litigants seeking direct and collateral review of state criminal convictions in the Supreme Court.

The mere fact that a state court addressed a Bill of Rights question in a particular case, however, does not necessarily require the Supreme Court to exercise its plenary powers. The state court judgment must have involved a substantial federal question,[20] and the decision must not have been based on a nonfederal ground. While this latter element has served as a check on runaway Supreme Court intervention, it has become a prime source of frustration for the Court in deciding whether to exercise its jurisdiction.

B. *The Court's Rule of Self-Restraint: Independent and Adequate State Grounds*

The genesis of the Court's "independent and adequate state ground" rule is generally considered to lie in *Murdock v. City of Memphis*.[21] In that case, the Court held that presence of a federal question in a state court decision did not empower the Supreme Court to decide state (or nonfederal) issues; if there was a state ground that sufficiently supported the judgment, the Supreme Court declined to

16 *See* Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789 (1981). The author, the Chief Justice of the Supreme Court of Minnesota, notes that the response was "hostile and defensive." *Id.* at 791.

17 Whether one views the Court's expansive rulings as right or wrong is irrelevant here. What is important is the impact these decisions had on state courts.

18 Indeed, any trial lawyer would have been remiss in not raising challenges at the state trial level on both state and federal grounds. *See* Rose v. Mitchell, 443 U.S. 545, 579 (1979)(Powell, J., concurring); *see also* O'Connor, *supra* note 2, at 802.

19 *See* 7 STATE CT. J. 18 (1983), *cited by Justice O'Connor in* Michigan v. Long, 103 S. Ct. 3469, 3477 n.8 (1983). That journal indicates that in 1982 over 12 million criminal actions, excluding traffic and juvenile violations, were filed in the state courts. In contrast, 32,700 criminal actions were filed in federal courts in the same period. Annual Report of the Director of the Administrative Office of the United States Courts 6 (1982).

20 The term "federal question" was apparently first used in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); *see* Note, *Supreme Court Review of State Court Decisions Involving Multiple Questions*, 95 U. PA. L. REV. 764 (1947).

21 87 U.S. (20 Wall.) 590 (1875).

exercise jurisdiction over the case.[22] The rationale supporting this self-imposed limitation was more clearly spelled out in *Herb v. Pitcairn*[23] where the Court stated:

> 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. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[24]

Thus, the two primary reasons for the Court's self-imposed limitation are its respect for state courts[25] and its reluctance to issue advisory opinions which would not be binding on the state courts.[26]

The rationale for this rule is sound not only in a constitutional sense, but also from a practical viewpoint. Unfortunately, the Court's application of this rule has been neither consistent nor manageable. The application problem can be attributed to two things: deciding what constitutes an independent and adequate state ground, and disposing of those cases where it is not clear whether the state court's decision in fact rests on such a ground.

1. What is an Independent and Adequate State Ground?

Deciding whether a state court decision was based on a sufficiently broad nonfederal ground generally involves two separate determinations: whether the state decision was grounded on *independent* state law, and, if so, whether that law was *adequate* to support the judgment. Sometimes, however, the court intertwines these two determinations in its analysis of a case.

The simplest, and perhaps rarest, case arises when the state court plainly states that it is resting its decision solely on a state

22 *Id.* at 635-36.

23 324 U.S. 117 (1945).

24 *Id.* at 125-26 (citations omitted).

25 *See* text accompanying notes 92-96 *infra*.

26 *See* text accompanying notes 131-39 *infra*.

ground, i.e., on an interpretation of the state's constitution.[27] However, where the court's decision appears to rest on both federal and state grounds, the Supreme Court must determine to what extent the state court actually relied on either or both grounds.[28] Moreover, the fact that the state court's decisions *might* have rested on a nonfederal ground will normally not be sufficient in itself to defeat Supreme Court jurisdiction.[29]

Assuming that the state court's decision was based on an identifiable, independent state ground, the Supreme Court must then determine if that independent state ground was *adequate* to support that decision. Again, the easiest case is where the state court has specifically declared a state statute or regulation invalid under the provisions of the state constitution.[30] However, where the federal and state grounds are intertwined, the Court must sort and measure. Measured alone, the nonfederal ground must be broad enough to support the state court's judgment.[31]

The Court is watchful for state grounds which are apparently contrived or arbitrary and are designed to frustrate the litigation of federal issues.[32] This sort of problem generally arises when a state has interposed a state procedural rule as a hurdle for resolving federal issues. As the Supreme Court noted in *Henry v. Mississippi*,[33] the state procedural ground will not be considered adequate unless it serves a legitimate state interest.[34]

If a state court decision is based upon an independent and adequate state ground, the Supreme Court will generally decline plenary review.[35] But it does not follow that the absence of a nonfederal ground will ensure plenary review. The petitioner or appellant must also demonstrate that the state court decision presents a substantial

27 *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

28 Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931). For example, where a state court relied on fourth amendment principles and referred repeatedly to Supreme Court and lower federal court decisions in the area, it is not likely that perfunctory statements that the state's constitution required the same result would be an *independent* state ground. *See, e.g.*, Michigan v. Long, 103 S. Ct. 3469 (1983).

29 Beecher v. Alabama, 389 U.S. 35, 37 n.3 (1967).

30 People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

31 Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875).

32 *See generally* R. STERN & E. GRESSMAN, *supra* note 9, at 239-44.

33 379 U.S. 443 (1965).

34 *Id.* at 447. *See generally* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

35 Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

federal question.[36] Even then, other hurdles, such as lack of justiciability, may stand in the way of federal review.[37] Thus, even in an appeal, plenary review is not guaranteed.[38]

2. Deciding Whether a Nonfederal Ground Exists: An Exercise in Frustration

In most state cases filed in the Supreme Court, the question of whether there is or is not an independent and adequate state ground for the state court's decision is normally clear-cut. But, in a significant number of decisions the matter is not so clear. In the typically ambiguous case, the state court will have focused almost exclusively on federal decisional law and then concluded that the result it reached was required under both federal and state law.[39] In that sort of case, does the state court judgment rest on an independent and adequate state ground? In some cases it does not matter because some other jurisdictional hurdle, such as the absence of a substantial federal question, already bars plenary review. However, in other cases the issue of whether the state court decision rested on nonfederal grounds is critical. In such cases the court has generally relied on three methods of determining the basis of the state court's decision.

Option One: Examine State Law. Where the state court's decision cites state law, the Court may attempt to determine what the state law is and whether the court below in fact relied upon it for resolution of the case.[40] The problem with this option is that the state courts are in the best position to say what the state law is and how it has been applied.[41] Thus, in deciphering the applicable state law the Court risks misinterpreting the law and offending the state court. Furthermore, this task is time consuming and burdensome for the Court, particularly since the Court must engage in this analysis to

36 *See* R. STERN & E. GRESSMAN, *supra* note 9, at 208-30 for a discussion of what constitutes a substantial federal question and how one goes about presenting it.

37 *See generally* L. TRIBE, *supra* note 10, at 52-112.

38 Sometimes plenary review pursuant to an "appeal" is expected as a matter of right, as distinguished from discretionary review under a writ of certiorari. But even in an appeal from a state or federal court, the Supreme Court will exercise its plenary jurisdiction sparingly. The merits of the appeal will be considered, but in most cases the Supreme Court will dispose of the appeal by summarily affirming or reversing federal court decisions or dismissing state court decisions "for want of a substantial federal question."

39 *See, e.g.*, Michigan v. Long, 103 S. Ct. 3469 (1983).

40 *See, e.g.*, Texas v. Brown, 103 S. Ct. 1535 (1983) (plurality opinion); Oregon v. Kennedy, 456 U.S. 667 (1982).

41 Michigan v. Long, 103 S. Ct. 3469, 3475 (1983); *see also* Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339 (1978).

determine whether it even has jurisdiction.[42]

Option Two: Ask the State Court. The safest way to decide whether the nonfederal ground is independent and adequate is to remand the case to the state court that rendered the decision. In effect, the Court either vacates[43] or continues[44] the case until the state court, on remand, has had an opportunity to clarify its position. Although effective, this option is time consuming for the state court[45] and can be viewed as demonstrating a lack of respect and confidence in the state court's decision.[46]

Option Three: Dismiss the Case. Where there is doubt as to the basis of the state court's decision, the Supreme Court may simply dismiss the case, concluding that the court below did rest its decision on independent and adequate state grounds.[47] Under this option, there is little risk of offending the state court, and neither court wastes its time in reviewing the decision. But there is a real risk that this option might cause a lack of uniformity in federal law, especially where it might just as safely be concluded that the state decision rested primarily on federal grounds.[48]

None of these options has proved entirely satisfactory. To further complicate matters, in some instances the nonfederal ground issue may not be raised or highlighted until the parties file their briefs on the merits[49] or present oral argument.[50] In those instances, the

42 If the Court decides that it has jurisdiction and grants plenary review, it runs a further risk that the state court, on remand, may evade the Court's holding on the federal issues by explaining that its first decision was indeed based on independent and adequate state grounds. In that situation, the Court has arguably rendered a nonbinding, advisory opinion. *See* text accompanying notes 131-39 *infra*.

43 *See, e.g.*, Montana v. Jackson, 103 S. Ct. 1418 (1983); Minnesota v. National Tea Co., 309 U.S. 551 (1940). *See generally* Note, *supra* note 20, at 773-75.

44 Herb v. Pitcairn, 324 U.S. 117 (1945).

45 Michigan v. Long, 103 S. Ct. 3469, 3475 (1983); Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241, 244 (1978)(Rehnquist, J., dissenting); Department of Motor Vehicles v. Rios, 410 U.S. 425, 427 (1973)(Douglas, J., dissenting).

46 In Herb v. Pitcairn, 324 U.S. 117, 128 (1945), the Court recognized that it is more desirable that state courts be asked, rather than told, what they meant. But in State v. Jackson, 672 P.2d 255 (Mont. 1983)(on remand from the U.S. Supreme Court for reconsideration of the state court's decision), the dissenting opinions expressed displeasure that the Court had intervened in the state court's affairs. *Id.* at 260-64; *see* text accompanying notes 180-94 *infra*; *see also* Dixon v. Duffy, 344 U.S. 143 (1952) (Supreme Court of California advised counsel for the petitioner that it doubted whether it had jurisdiction to reconsider its earlier decision).

47 *See* Lynch v. New York, 293 U.S. 52 (1934).

48 Michigan v. Long, 103 S. Ct. 3469, 3475 (1983); Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940); *see* text accompanying notes 119-30 *infra*.

49 *See* SUP. CT. R. 34. Note that petitioners and appellants are supposed to address the issue of jurisdiction in their petition for certiorari, SUP. CT. R. 21, or jurisdictional statements, SUP. CT. R. 15. However, neither rule specifically requires the parties to address the issue of

Court will dismiss the case[51] if it decides that nonfederal grounds were indeed the basis of the state court's decision.

On the whole, the problems associated with fair and consistent treatment of ambiguous state court decisions have understandably provided a source of frustration for the Court. From the Court's perspective, it was clearly an unsatisfactory condition growing worse. This sense of dissatisfaction gave impetus to the Court's rule in *Michigan v. Long*.[52]

II. The New Plain Statement Rule: Showing Respect For State Courts

A. Michigan v. Long: *A New Option*

In *Michigan v. Long*,[53] the Court addressed the question of whether police officers who have stopped a vehicle may conduct a *Terry v. Ohio*[54] protective search of the vehicle's interior. The Michigan Supreme Court had held that drugs seized during the search of Long's car were inadmissible because the sole justification for a *Terry*-protective search, protection of police officers and bystanders, was insufficient justification for the search.[55] The Michigan court relied heavily on its reading of federal law but made two brief references to the Michigan Constitution.[56] The Supreme Court granted the state's petition for certiorari[57] and reversed, concluding that under the fourth amendment a protective search of the interior of a vehicle was justified.[58] That conclusion is in itself noteworthy. But, more importantly from the perspective of federal-state relations is the Court's

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whether an independent state ground is present; the focus is on whether a federal question has been presented.

50 In Michigan v. Long, 103 S. Ct. 3469 (1983), the issue was also addressed in questions from the bench. *See* Transcript of Oral Argument at 30. Normally, the oral argument does not take place until months after the Court decides to take jurisdiction; by then, the parties and the Court have spent considerable time on the case.

51 *See* SUP. CT. R. 53 (Dismissing Causes); Florida v. Casal, 103 S. Ct. 3100 (1983) (per curiam dismissal of case as improvidently granted).

52 103 S. Ct. 3469 (1983).

53 *Id.*

54 392 U.S. 1 (1968).

55 People v. Long, 413 Mich. 461, 472, 320 N.W.2d 866, 869 (1982).

56 413 Mich. at 471 n.4, 320 N.W.2d at 869 n.4; 413 Mich. at 472-73, 320 N.W.2d at 870 ("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.").

57 103 S. Ct. 205 (1982).

58 *Id.* at 3481-82.

new framework for examining future cases when it is not clear that there are independent and adequate state grounds.

Writing for the majority,[59] Justice O'Connor traced the Court's struggles with deciding whether nonfederal grounds exist and candidly admitted that the Court had been unable to develop a "satisfying and consistent approach for resolving this vexing issue."[60] Identifying the various options used by the Court and expressing dissatisfaction with each,[61] Justice O'Connor next reiterated that the cornerstones of the Court's refusal to decide state cases where adequate nonfederal grounds for the decision exist are respect for the independence of state courts and avoidance of rendering advisory opinions.[62] The Court does not wish to continue to decide what the state law is or to require the state courts to reconsider and clarify their decisions. Justice O'Connor stated:

> 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. 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. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[63]

The majority in *Long* offered several justifications for this new rule.

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59 Justice O'Connor was joined by the Chief Justice and Justices White, Powell, and Rehnquist.

60 103 S. Ct. at 3474.

61 *Id.* at 3474-75; *see* text accompanying notes 40-48 *supra*.

62 103 S. Ct. at 3475.

63 *Id.* at 3476. Justice O'Connor foretold the new rule in a speech to the National Judicial College, Reno, Nevada, on May 13, 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 gener-

First, in most cases the new approach will eliminate the need to examine state law and preclude the possibility of giving an advisory opinion.[64] Second, the rule dispenses with the intrusive practice of asking the state courts what they meant.[65] This would in turn encourage state courts to develop state law unimpeded by federal intervention.[66] Third, the Court noted that it was not unusual for it to use certain presumptions in determining jurisdictional issues. As an example, it cited the rule that once the Court takes jurisdiction, there is a presumption that it has jurisdiction until proven otherwise.[67]

Using this new "framework," the Court concluded that the Michigan Supreme Court's decision was not based upon an independent and adequate state ground.[68] It appeared to the Court that the Michigan court had felt compelled by its understandings of federal constitutional law to construe its state law in the manner it did.[69] The Court added in a footnote, however, that even if it were to rely on the abandoned method of examining state law, it would reach the same conclusion because applicable Michigan law was in turn based upon federal constitutional considerations.[70]

Not all of the justices, however, agreed that the Court should use

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ally 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 state grounds . . . . [citations omitted].

64 103 S. Ct. at 3476. The Court, however, cautioned that there may be times when it would be necessary or desirable to take appropriate action to clarify the state court's decision. 103 S. Ct. at 3476 n.6. The Court recently did just that in Capital Cities Media, Inc. v. Toole, 104 S. Ct. 2144 (1984). The petitioners were barred by the respondent, a trial judge, from covering and reporting on certain aspects of a criminal trial. They subsequently filed a writ of prohibition in the Pennsylvania Supreme Court; that court denied relief without opinion. Because the record did not indicate whether the state court relied upon federal or state grounds, the Supreme Court remanded the case to the state court "for such further proceedings as it may deem appropriate to clarify the record." *Id.*

65 103 S. Ct. at 3476.

66 *Id.*

67 *Id.* at 3477 n.8; *see* County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

68 103 S. Ct. at 3478.

69 *Id*; *see also* Texas v. Brown, 103 S. Ct. 1535, 1540 n.3 (1983); Delaware v. Prouse, 440 U.S. 648, 653 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). In other words, a state-law ground is not sufficiently independent if it appears that the state court felt compelled to interpret its own law in terms of what it understood the federal Constitution to require. On the other hand, if the state court merely found federal precedent persuasive, as it would any other authority, then the state ground will probably be "independent."

70 103 S. Ct. at 3478 n.10.

this new "framework" in determining whether state court decisions were based on nonfederal grounds. In a brief concurring opinion, Justice Blackmun agreed that the Court had jurisdiction in *Long*, but could not join in "fashioning a new presumption of jurisdiction over cases coming here from state courts."[71] Despite his agreement that "uniformity in federal criminal law is desirable," he saw little efficiency in the new rule and an increased danger that the new approach would lead to rendering advisory opinions.[72]

Surprisingly, Justice Brennan,[73] one of the Justices who has long reminded state courts of their important and front-line role in forging protections for individual rights,[74] focused his dissent on the Court's disposition of the *Terry* protective search holding rather than on the jurisdictional issue.[75] Instead of explicitly supporting the new jurisdictional framework, he merely cited a footnote from the majority's opinion,[76] stating that there is nothing unfair about the plain statement rule and detailing why, even under an examination of Michigan law, the court would still have jurisdiction.[77] Although it could be argued that Justice Brennan was endorsing the new rule, a more conservative conclusion is that he preferred only to rest his finding of jurisdiction on an examinaton of state law and avoid any formal alliance with the "assumption" rule.[78]

Noting that the search and seizure issues were less important than the Court's new jurisdictional rule,[79] Justice Stevens provided a spirited challenge to the rule on several fronts. He first concluded that the Michigan Supreme Court's decision demonstrated that its reliance on the Michigan Constitution was clearly *adequate* to support its judgment.[80] While he recognized the difficulty of deciding

71 *Id.* at 3483 (Blackmun, J., concurring).

72 *Id.*

73 Justice Brennan was joined by Justice Marshall.

74 *See* Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977); Brennan, *State Court Decisions and the Supreme Court*, 31 PA. B. A. Q. 393 (1960).

75 103 S. Ct. at 3483-89 (Brennan, J., dissenting). Only in a footnote did Justice Brennan agree that the Court had jurisdiction to hear the case. *Id.* at 3483 n.1.

76 *Id.* at 3483 n.1 (citing the opinion of the Court at 3478 n.10).

77 *Id.* at 3478 n.10.

78 Also noteworthy is the fact that Justice Brennan did not join in Justice Stevens' view that the Supreme Court has no business reviewing cases in which the defendant's federal rights have been vindicated. However, in Florida v. Meyers, 104 S. Ct. 1852, 1854 (1984) (per curiam) (Stevens, J., dissenting), Justices Brennan and Marshall joined Justice Stevens in criticizing the Court for the manner in which it handles state court decisions, especially its propensity to review state cases which have vindicated a federal right.

79 103 S. Ct. at 3489 (Stevens, J., dissenting).

80 *Id.* Although Justice Stevens found the grounds adequate, he did not explicitly state

whether the state ground was independent he noted that four options are available to the Court to decide this question. The Court can ask the state court what it meant, it can attempt to decide what the state law is, or it can use one of two presumptions. First, it can presume that adequate state grounds are independent unless it clearly appears otherwise. Or, it can presume (as the Court did in this case) that the state grounds are not independent unless it clearly appears otherwise.[81]

Justice Stevens found the first two options defensible but could not endorse the Court's selection of the second presumption (for jurisdiction) when precedent supported using the first presumption against jurisdiction.[82] In his view, the presumption favoring the Court's exercise of its plenary powers would be inconsistent with avoidance of rendering advisory opinions and respect for state courts. Further, in his view, all the members of the Court would agree that scarce federal judicial resources must be carefully managed.[83] An expansive attitude towards jurisdiction, therefore, did not make good sense.[84]

Justice Stevens also commented on what he envisioned as the narrow role of the Supreme Court in the state-federal judicial scheme. Just as American courts have no cause to intervene in Finnish judicial matters where no American has been unfairly tried or

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that they were also independent. The focus of his dissent was not so much on this case as on the Court's decision to assume the absence of such grounds.

81 *Id*; *see also*, Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L REV. 737, 759 (1976)(the author suggests that when the grounds for the state court's decision are mixed, the Court could hold that no independent state grounds exist); Bice, Anderson *and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 760 (1972)(the author proposes that the Court should always review ambiguous state decisions).

82 Justice Stevens relied on Lynch v. New York, 293 U.S. 52 (1934). However, the gravamen in *Lynch* was the petitioner's failure to establish that the state decision rested on a substantial federal question. The state decision merely cited the fourteenth amendment, and the grounds of the state court's decision were unclear.

83 103 S. Ct. at 3490. Justice Stevens' comments touch the heart of a practical problem which concerns the Court: an ever-increasing docket. Most of the justices have publicly expressed concern about that problem, and some have offered proposals for change. *See, e.g.*, N.Y. Times, Feb. 7, 1983, at Al, col. 5. (Chief Justice Burger recommends special appellate court to address certain cases from federal circuit courts); *id*., Nov. 19, 1983, at Bl, col. 1.; *id*., Aug. 15, 1982, at E9, col. 2.

84 Justice Stevens may have overestimated the ultimate effect of the new rule on the size of the docket. Arguably, the rule does not actually expand the Court's jurisdiction, but is designed to assist the Court in dealing with future ambiguous state decisions. If the state courts respond to the Supreme Court's prodding by clarifying whether they are relying on state grounds, fewer cases may find their way into the Court. *See* text accompanying notes 210-14 *infra*.

convicted,[85] the Supreme Court has no cause to intervene in cases in which no federal right has been denied. In reviewing state court opinions, the primary role of the Court is to ensure that persons seeking vindication of *federal* rights[86] have been fairly heard.[87]

Justice Stevens also did not agree that the Court's new rule is needed to ensure uniformity in federal law.[88] That same need is present, he pointed out, when the state court's decision clearly rests on an independent and adequate state ground. Yet the Court has declined to intervene no matter how egregious that state court's reasoning.[89]

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85 Justice Stevens expressed bewilderment that the majority must stretch its jurisdiction and reverse the Michigan Supreme Court to show respect for it. Again referring to Finnish courts, he questioned whether the Court would show respect for Finland by presupposing to tell it how to interpret American law. 103 S. Ct. at 3490 (Stevens, J., dissenting).

86 *Id.* Justice Stevens found support for this narrow view in earlier decisions that refer to the Court's role in protecting federal rights. *See* Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931); Union Pac. R.R. Co. v. Public Service Comm'n, 248 U.S. 67, 70 (1918). He cites no recent persuasive authority, however, for the proposition that *vindication* of federal rights is the *sole* purpose of Supreme Court review.

Before 1914, Justice Stevens' view was reflected in the Court's statutory authority to review state decisions. The Judiciary Act of 1789, Ch. 20, § 25, 1 Stat. 83 (1789), limited Supreme Court review of state decisions to those cases in which a federal right had been *denied*. However, a New York case, Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 431 (1911), expanding the federal due process clause, prompted congressional action. *See generally* Dodd, *The United States Supreme Court as the Final Interpreter of the Federal Constitution*, 6 ILL. L. REV. 289 (1911). In 1914, Supreme Court review was extended to include state cases *sustaining* a federal claim. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 188-98 (1928). The amendment is now reflected in 28 U.S.C. § 1257(3)(1976). *See* note 8 *supra*.

87 Justice Stevens noted that recently the Court's docket has swollen with requests by state officials to review state court decisions that have vindicated individual rights. In his estimation, this is a misallocation of resources. He repeated that concern recently in Florida v. Meyers, 104 S. Ct. 1852, 1854 (1984) (per curiam) (Stevens, J., dissenting), where the Court summarily reversed a Florida state court opinion. As Justice O'Connor pointed out in the majority opinion in *Michigan v. Long*, the sheer number of state criminal actions would account for an increased number of state cases addressing federal law and thus potentially requiring Supreme Court review. 103 S. Ct. at 3477 n.8.

88 *Id.* at 3490 (Stevens, J., dissenting).

89 *Id.* at 3492. One of the underlying themes of Justice Stevens' dissent is his concern about how the Supreme Court, representing one sovereign, deals with state courts, representing other sovereigns. Few would quarrel with Justice Stevens' call for restraint in Finnish affairs, but under the Constitution the state courts are "sovereign" only insofar as they apply their own law. When they interpret federal law, the Constitutional and statutory framework permits Supreme Court review.

Abandoning such review powers and abandoning uniformity in federal law, as Justice Stevens suggests, would render the Supreme Court an ineffective constitutional organ. *See* notes 119-30 *infra* and accompanying text.

B. *Measuring the* Michigan v. Long *Rule Against Principles of Federalism*

The Court's decision in *Michigan v. Long* to adjust its internal controls over assessing whether nonfederal grounds support a state court's judgment will undoubtedly stir debate and raise concerns over the potential intrusiveness of the new rule. Whether future dispositions of state cases will tell us much about how the rule is actually working inside the Court remains to be seen.[90] There is nonetheless the very real and present problem of how the new rule will be perceived, measured, and applied by counsel and the state courts. This section briefly analyzes the rule against the standards that the Court itself has relied upon in the past for declining to review certain state court decisions: the respect for state courts and a desire to avoid advisory opinions.[91]

1. Respect for State Courts

One of the principle reasons for the Court's independent and adequate state ground rule is its respect for state courts. The Court, especially the Burger Court, is sensitive to the respective roles of the federal and state judicial systems and does not wish to intrude into the affairs of state courts.[92] However, the manner in which the Court shows that respect, and what the Court considers to be intrusive, remain volatile questions.

One's definition of "respect" and "intrusiveness" in any particular case generally reflects one's personal opinion of whether the Court has rendered an acceptable decision. For instance, some would consider the Supreme Court to be disrespectful and unduly intrusive in state court affairs if it drastically broadened its reading of federal individual rights and reversed state court decisions which favored a narrower view.[93] In defining "respect" and "intrusiveness," the Court must, therefore, find a middle ground. The question that has arisen now is whether *Michigan v. Long*'s "assumption" rule best ar-

90 The caveat footnote in Justice O'Connor's majority opinion, *see* note 64 *supra*, creates the real possibility that, in an ambiguous state decision, the Court will have examined state law rather than relying on the new assumption. In that instance a specific statement from the Court that it did so would be desirable.

91 *See* notes 23-26 *supra* and accompanying text.

92 *See, e.g.*, Younger v. Harris, 401 U.S. 37, 41 (1971). *See generally* L. TRIBE, *supra* note 10, at 152-56.

93 That was certainly the view following the Warren Court's "incorporation" cases. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Sheran, *supra* note 16, at 791.

ticulates that ground. One of the dangers in answering this question is to assume that because the Burger Court adopted the "assumption" rule, it is simply another veiled device to whittle away at individual rights. If one accepts that premise, then all the present Court's salutary language concerning respect for state courts is hollow.

The better and more objective approach is to recognize that *Michigan v. Long* is important for separate and distinct reasons: first, because of what it says about the relationship between the Supreme Court and the state courts, and second, from a criminal procedure perspective because of its expansion of *Terry v. Ohio*.[94] While each of these facets of the case effects the other, the two elements should not be mixed. The paradox is that while state courts and commentators may well shudder that the Court has narrowed fourth amendment protections, the Court has again implicitly reminded the state courts that they are free to adopt more protective standards; by clearly relying on independent and adequate state grounds, they may virtually immunize their decisions from Supreme Court review. The Court has clearly articulated that, when applying state law, state courts are the final arbiters of cases, as long as they do not apply that state law in such a way as to infringe upon federal constitutional rights.[95] Yet the Court's "respect" for state autonomy is not absolute. Some "intrusion" into that autonomy is permitted when federal law is at stake.[96] In assessing *Michigan v. Long*, therefore, it is helpful to balance the degree of intrusion into state autonomy, the desire for uniformity in application of federal law, and the need to decide as a jurisdictional matter between those competing interests.

a. *Scope of the Rule: Minimal Intrusion*

The classic example of a nonreviewable state court decision arises when the state court relied exclusively upon specific state constitutional provisions to strike down a state statute.[97] The new rule should not change that result. Nor should the rule apply where the

94 392 U.S. 1 (1968).

95 *See, e.g.*, Sibron v. New York, 392 U.S. 40, 61 (1968) (state may not authorize police conduct which "trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct").

96 Professor Tribe points out that when deciding whether to exercise jurisdiction over state decisions, the Court decides "whether state autonomy threatens federal interests to such an extent that uniformity must prevail." L. TRIBE, *supra* note 10, at 122. This analysis, according to Tribe, occurs when *both* federal and state interests are implicated, i.e. when the state law is a "hybrid". *Id.*

97 People v. Anderson, 6 Cal. 3d 628, 493 P.2d 380, 100 Cal. Rptr. 152, *cert. denied*, 406

state court relies exclusively on federal grounds without referring at all to state law.[98] In each of these examples the Court is presented with a bright line; there is therefore no need to struggle with deductive devices.

The more difficult case arises when the state court decision could be fairly interpreted to rest on both federal and state grounds. In the past, the Court in those cases resorted to one of the previously discussed options for determining jurisdiction.[99] Now the rule in *Michigan v. Long* will apply in those types of cases.[100] However, the rule is in fact narrower than it first appears: it is restricted to those cases where there is clearly some room for disagreement on whether independent and adequate state grounds are present. Even then the Court may call for clarification from the state court.[101]

Given the relatively limited scope of the rule, and measured against the possible options of either interpreting state law or asking the state court to clarify its opinion, the degree of intrusion into the affairs of a state court should be *de minimis*.[102] Indeed, a good argument can be made that the rule is not at all intrusive. It certainly cannot be any more offensive than having the Supreme Court ultimately disagree with a state court and reverse its decision. In *Michigan v. Long*, the Court has asked nothing more than that the state court, in the first instance, be as clear as reasonably possible in stating the grounds for its decision.

Assuming that the state court declines, for whatever reason,[103] to draw clear lines between federal and nonfederal grounds in its decision, the Court will assume that the state court felt bound by federal law and thus rested its judgment primarily on federal grounds.[104] This approach is a reasonable and practical compromise. Granted, use of this reasoning might be intrusive in the sense that it may be an

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U.S. 958 (1972)(declaring capital punishment in California unconstitutional under the state constitution).

98 *See, e.g.*, Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 375-76 (1968).

99 *See* notes 40-48 *supra* and accompanying text.

100 The *Michigan v. Long* rule is specifically designed for use in those "state court decision[s which] fairly appear[] 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." 103 S. Ct. at 3476.

101 *Id.* at 3476 n.6.

102 *See* Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on The Law and The Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1056 (1977) (the major virtue of direct review is its "marginal intrusion" upon state authority).

103 The reasons will obviously vary. The state court, for example, may be walking a local political tightrope or it may even think that it has clearly stated the grounds for its decision.

104 103 S. Ct. at 3478.

incorrect assumption and therefore cause an incorrect interpretation of the state court's reasoning. But to assume instead that the state court relied on state grounds may be equally incorrect and, although more deferential to the state court's autonomy, that reasoning could result in unnecessarily insulating a state court's opinion.[105] In summary, even assuming that there is some intrusion on the state court's autonomy, it is a minimal and necessary incident of doing business in a federalist judicial system.

b. *Presumption, Assumptions, and Stretching Jurisdiction*

In measuring the new rule, it is also important to note that *Michigan v. Long* does not expand the Court's jurisdiction over state court judgments. At most, the Court now merely assumes that one jurisdictional prerequisite—nonfederal grounds—no longer faces petitioners in a narrow class of cases.[106]

The Court's self-imposed, nonfederal-ground rule is not the Court's only jurisdictional hurdle. Should counsel successfully leap this first hurdle, there are other equally imposing ones to surmount. For example, counsel must demonstrate that the decision below contains a substantial federal question,[107] that it is final,[108] and that it is of the highest state court.[109] There are then other justiciability hurdles such as standing,[110] ripeness, and mootness.[111] Even then the Court may impose other less remarkable, self-imposed hurdles; for example, is there a conflict between the state's decision and other federal or state decisions?[112]

The point is to emphasize that *Michigan v. Long* does not *presume* jurisdiction.[113] Nor should it be viewed as an attempt to stretch jurisdiction. The Court would hardly have needed a new rule to do that. It could have simply concluded, *sub silentio*, that a state court's decision had not rested on nonfederal grounds.

105 *Id.* at 3476; *see also* Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

106 *See* notes 97-101 *supra* and accompanying text.

107 *See* 28 U.S.C. § 1257 (1976); R. STERN & E. GRESSMAN, *supra* note 9, at 208-30.

108 28 U.S.C. § 1257 (1976).

109 *Id.*

110 *See generally* L. TRIBE, *supra* note 10, at 79-89.

111 *Id.* at 62-68.

112 For a thorough discussion of this question and of other factors in deciding whether to grant plenary review, see R. STERN & E. GRESSMAN, *supra* note 9, at 254-336.

113 The text of the majority opinion in *Michigan v. Long* used the term "assumption." 103 S. Ct. at 3476. In a footnote, however, the Court recognized that it uses certain "presumptions" in deciding jurisdictional issues. *Id.* at 3477 n.8. It is Justice Stevens' dissent which includes repeated references to the new "presumption". *See id.* at 3489 (Stevens, J., dissenting).

In his dissent, Justice Stevens expresses concern for the Court's increasing tendency to accept requests from state prosecutors to review unfavorable state court decisions.[114] Does the rule in *Michigan v. Long* in fact signal an open-door policy to state prosecutors? Not necessarily. The Court was hearing prosecutor appeals long before it decided *Michigan v. Long*. Even assuming the Court is more inclined to hear prosecutor appeals, it did not need the new rule to support its decision to do so.[115]

Although the rule tends to favor petitioners and appellants, in theory the rule does not discriminate between prosecutors and defendants. When either party appeals an adverse state court decision, it must leap the nonfederal ground hurdle. The rule appears unfairly one-sided now because a more conservative Court is facing several activist state courts which have tended to interpret federal constitutional rights more broadly than a majority of the Supreme Court. Ironically, however, the rule may ultimately reduce successful state prosecutor appeals. By simply resting their expansive rulings for individual rights on state grounds, state courts can use the nonfederal-ground rule to reduce state prosecutor appeals.[116] Finally, it seems unlikely that the Court will disregard its heavy docket problems[117] to fling its doors open to state prosecutors.[118]

c. *The Need for Uniformity in Application of State Law*

The majority opinion in *Michigan v. Long* only briefly mentioned the need for uniformity in federal law as justification for reviewing

114 *Id.* at 3491 (Stevens, J., dissenting).

115 A review of U.S. Law Week for the 1983 Term through Jan. 1984 indicates that the states filed 25 cases, 19 of which were criminal. Review was granted in 3 criminal cases, Ohio v. Johnson, 104 S. Ct. 994 (1984)(double jeopardy); Arizona v. Rumsey, 104 S. Ct. 697 (1984)(capital sentencing); California v. Trombetta, 104 S. Ct. 696 (1984)(DWI breathalyzers), and 1 civil case, New Jersey v. T.L.O., 104 S. Ct. 480 (1984)(use of drug detection dogs in schools).

During the same time period, state defendants filed 74 direct appeals. As of Jan. 31, 1984, the Court had granted review in 3 cases: Spaziano v. Flordia, 104 S. Ct. 697 (1984)(death penalty); Waller v. Georgia, 104 S. Ct. 390 (1983)(search and seizure); Cole v. Georgia, 104 S. Ct. 390 (1983)(*Waller* and *Cole* were consolidated by the Court).

116 *See* notes 210-14 *infra* and accompanying text.

117 The *Michigan v. Long* rule is grounded as much on practical considerations as any concern for maintaining federalism. The task of deciding which 200 of the approximately 4,000 cases filed annually will be granted plenary review is obviously time consuming. The problem is compounded when a state court decision, which may be a good vehicle for resolving a major constitutional issue, is ambiguous as to whether the state grounds are independent and adequate.

118 *See* note 115 *supra*; *cf.* Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HAST. CONST. L.Q. 819 (1984).

state court decisions.[119] However, absent a need for uniformity, the underpinnings for the rule in *Michigan v. Long* fall. As the Court noted in *Herb v. Pitcairn*,[120] "[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."[121] That proposition, supported by the supremacy clause,[122] is not only beyond debate, but is also a common-sense rule. 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.[123]

Critics of the nonfederal-ground rule may argue that relying on the uniformity argument to rule in favor of state prosecutors does not advance the cause of federalism. But it does. The supremacy clause checks threats to federal interests, not just threats to a defendant's federal rights. If in ruling against a state prosecutor the state court has relied on federal grounds, it should not be able to insulate its erroneous reading of the Constitution by simply saying that its action benefitted the state defendant.[124]

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119 103 S. Ct. at 3475. In sharp contrast, Justice Stevens' dissent minimized the need for such uniformity and further advocated jurisdictional abstention unless the state court has denied a federal right. *Id.* at 3491.

120 324 U.S. 117 (1945).

121 *Id.* at 125-26.

122 U.S. CONST. art. VI.

123 See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), where in addressing the motives for exercising appellate review over state court decisions, the Court stated:

> 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. [original emphasis].

Id. at 347-48.

124 Article III of the Constitution does not limit Supreme Court review to those cases where a constitutional right has been denied, nor does 28 U.S.C. §1257 draw such lines, *see* note 7 *supra*. There may be practical concerns for narrowing Supreme Court jurisdiction, as Justice Stevens suggests in his dissent, 103 S. Ct. at 3491, but the present constitutional and statutory framework for appellate review by the Court does not support the narrow view he suggests.

Most state courts agree that uniformity in federal law is desirable and worthy of protection.[125] In the area of federal criminal law the argument for uniformity is particularly compelling because of the national nature of law enforcement and prosecution; even then there is often disparity between the federal circuits.[126]

This is not to say that state courts are bound to remain in lockstep with the Supreme Court in applying more protective state law. Although perhaps desirable, there is no constitutional requirement that state and federal law be uniform. What is required is that the state courts maintain the uniform minimum federal protections drawn by the Supreme Court. If they should choose to expand federal protections and thus waver from the uniform federal standard, they risk plenary review and reversal.[127] Although the state courts are often encouraged to experiment,[128] they must also realize that experiments are sometimes unsuccessful. For many activist state courts that is an acceptable risk; it is always possible that a majority of the Court will agree with them and expand certain federal rights. But federalism does not guarantee that the Supreme Court will defer

125 A resolution unanimously passed by the Conference of Chief Justices in 1982 addressed the issue of whether state courts should be the final arbiters of controversial issues such as abortion, school busing, and prayer in schools. In this resolution the Conference noted that depriving the Supreme Court of jurisdiction to finally review those questions would be undesirable. One of the Chief Justice's underlying concerns in passing this resolution was that, without Supreme Court review, federal constitutional rights would not be uniformly applied. The resolution stated in part:

> C. State court litigation constantly presents new situations testing the boundaries of federal constitutional rights. Without the unifying function of United States Supreme Court review, there inevitably will be divergence in state court decisions, and thus the United Stated Constitution could mean something different in each of the fifty states;
>
> D. Confusion will exist as to whether and how federal acts will be enforced in state courts and, if enforced, how states may properly act against federal officers . . . .

Resolution I—Resolution Relating to Proposed Legislation to Restrict the Jurisdiction of the Federal Courts (Jan. 30, 1982 meeting of the Conference of Chief Justices, Williamsburg, Virginia), *reprinted in* 128 CONG. REC. S2242 (daily ed. Mar. 17, 1982). In Gressman & Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495 (1983) the authors conclude that the resolution indicates that "state courts want no part in any such experiment in neo-federalism." *Id.* at 507.

126 Conflicting decisions between the circuit courts of appeals is one of several factors the Court considers in deciding whether to grant plenary review. *See* SUP. CT. R. 17.1.

127 Oregon v. Hass, 420 U.S. 714, 719 (1975).

128 The states are often referred to as independent laboratories or experimenters. *See* McCray v. New York, 103 S. Ct. 2438, 2439 (1983)(Stevens, J., opinion respecting the denial of cert.)(permit states to experiment with peremptory challenges); 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)(novel social and economic experiments); *see also* Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976).

to state courts. Nor does it bar the Court from narrowing or redefining the "federal line" when a state decision presents it with the opportunity to do so. As Justice O'Conner pointed out in *Michigan v. Long*, the vast majority of criminal cases (and therefore the most fertile ground for development of federal criminal law) comes from the state courts.[129] Naturally, then, the chance of a federal constitutional issue being decided through a state court decision is high.[130]

2. The Danger of Advisory Opinions

Another justification for the Court's nonfederal-ground rule is that it will decrease the possibility of rendering advisory opinions. However, application of the nonfederal-ground rule may sometimes cause the Court to violate its rule against rendering advisory opinion.[131] In a jurisdictional sense, an ambiguous state court judgment may not present an adequate "case or controversy" for review under article III.[132] Also, assuming the Court reversed an "ambiguous" state case on federal grounds, the state court on remand may ignore the Supreme Court's opinion by explaining that its earlier ambiguous judgment actually rested on nonreviewable state grounds.[133] The "advisory opinion" problem then is as much a practical problem as a theoretical one.

In *Michigan v. Long*, the Court recognized that the state courts can in the first instance help the Supreme Court avoid rendering non-binding advisory opinions by being as clear as possible in stating the basis for their judgments. Where the grounds for a state judgment are clear, the danger of giving an advisory opinion is virtually absent.[134] But, where the state judgment is ambiguous, the Court must take some calculated risks; in doing so it could possibly render an advisory opinion.

Instead of adopting the nonfederal-ground rule, the Court in

129 103 S. Ct. at 3477, n.8.

130 *Cf.* Brennan, *State Court Decisions and the Supreme Court*, 31 PA. B.A.Q. 393, 398 (1960)("[a] federal question emerges from the grist of state courts with greatest rarity.").

131 The Court's rule of not rendering advisory opinions is primarily self-imposed. Michigan v. Long, 103 S. Ct. 3469, 3476, 3477 (1983); Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

132 *Cf.* Fay v. Noia, 372 U.S. 391, 430 n.40 (1963) (whether the nonfederal-ground rule is constitutionally required is not crucial because the statutory provision, § 1257, limits review to *judgments or decrees* of state court).

133 *See, e.g.*, State v. Kennedy, 666 P.2d 1316 (Or. 1983), discussed in notes 175-79 *infra* and accompanying text.

134 If the state judgment clearly rests on federal grounds, the Court may grant review and address the federal law; presumably the lower court will find it more difficult to later backpeddle into state grounds. Where the state judgment clearly rests on state grounds, the Court will decline review.

Long could have assumed that the ambiguous decision rests on independent and adequate state grounds and decline review.[135] That would clearly be more deferential to the state courts but would also needlessly insulate expansive state decisions from assessment under federal constitutional standards.[136]

To assume, as the Court now says it will, that in certain situations the state court felt compelled to rely on federal law does create some risk of rendering an advisory opinion. On balance, the risk is acceptable. The state court may indeed later explain away its supposed reliance on federal law.[137] But that possibility seems slight

135 Indeed, this was Justice Steven's position. 103 S. Ct. at 3489 (Stevens, J., dissenting).

136 See Minnesota v. National Tea Co., 309 U.S. 551 (1940), where the Court said:

> 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 ascertain 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 encroach 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.

Id. at 557.

137 For example, In State v. Chrisman, 676 P.2d 449 (Wash. 1984), the Washington Supreme Court did an about face on its first decision in which it relied on federal grounds to reject the prosecution's "plain view" argument. On plenary review, the Supreme Court in Washington v. Chrisman, 455 U.S. 1 (1982), reversed and remanded, noting that the Washington Supreme Court's novel reading of the fourth amendment was incorrect. *Id.* at 16. On remand the Washington Supreme Court adhered to its earlier decision but this time it based its reasoning "solely and exclusively on the [state] constitution." 676 P.2d at 421. The court acknowledged the Supreme Court's authority to act as final arbiter of federal constitutional law, but it also recognized that a "plain statement of independent state grounds precludes federal court review." *Id.* Turning to article 1, § 7 of the state constitution and other state cases, the Washington court stood by its original decision; in that decision, however, the Washington court had primarily relied on federal law. In reviewing *Chrisman* the Supreme Court had noted that the Washington court had primarily relied on federal law and therefore rejected the argument that there were independent and adequate state grounds precluding review. 455 U.S. at 5 n.2. Judge Dimmick dissented from the Washington court's second opinion in *Chrisman*. He argued that clear rules are not assured when "we waffle between state and federal constitutions." 676 P.2d at 425 (Dimmick J., dissenting). This case thus demonstrates the manner in which a state court may reach the same conclusion by relying solely on state law and thus have the last say on the matter. *See also* State v. Kennedy, 666 P.2d 1316 (Or. 1983); notes 175-79 *infra* and accompanying text.

when the state judgment appears to rest primarily on federal law and any possible state ground is not clearly stated on the face of the opinion.[138] That is the sort of case to which *Michigan v. Long* applies.

It is important to note again that the Court implicitly recognizes that there are endless combinations of federal-state grounds[139] and that ambiguous state decisions will no doubt continue. Each state case presented to the Court for plenary review offers a new opportunity to balance federal and state interests and offers new risks of rendering advisory opinions. The Court is always free to opt out of plenary review if it finds the risks unacceptable.

Even where the Court opts out of plenary review, one or more Justices could possibly gratuitously comment on the merits of the case in a concurring or dissenting opinion. That was the situation in *Colorado v. Nunez*.[140] The Colorado Supreme Court held that the prosecution could be required to disclose to the defense an informant's identity for assessing the validity of a search warrant.[141] The Supreme Court granted certiorari,[142] but after hearing oral argument it dismissed the case as improvidently granted; the state decision rested on independent and adequate state grounds.[143] Concurring in the per curiam dismissal, Justice White, joined by the Chief Justice and Justice O'Connor, emphasized that "neither the Federal Constitution nor any decision of [the] Court requires the result reached by the Colorado Supreme Court."[144] Justice Stevens also concurred but

138 *See* note 133 *supra.*

139 *Michigan v. Long* does not explicitly address what sort of "model" the state courts may or will use when they decide cases. *Cf.* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984) in which the author suggests that the O'Connor-Stevens debate represents a debate over the "interstitial" model and the "classical" model—both terms being used to describe how states may interpret their constitutions. The models are analyzed in *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470 (2d ed. 1972).

140 104 S. Ct. 1257 (1984).

141 People v. Nunez, 658 P.2d 879 (Colo. 1983). The Colorado Supreme Court's opinion cites only several state decisions, no federal authority; on its face then the state decision rested on state grounds.

142 104 S. Ct. 65 (1983). Certiorari was granted on Oct. 3, 1983, well after the Court's decision in *Michigan v. Long* (July 6, 1983). Assuming that the case somehow slipped through a jurisdictional crack, the respondent apparently later apprised the Court that "jurisdictional" problems existed. His motion to dismiss the case for want of jurisdiction was denied, however, in Nov. 1983. 104 S. Ct. 478 (1983). Remarkably, Justice Stevens, who usually criticizes the Court for granting review in cases of this type, said nothing about the Court's initial decision to hear it and its later denial of the motion to dismiss.

143 104 S. Ct. 1257 (1984).

144 *Id.* at 1257.

expressed concern over Justice White's "advisory opinion," noting that Justice White's remark was entirely gratuitous and evidenced the Court's emerging tendency to enlarge its involvement in state litigation.[145]

From a purely time-management viewpoint, Justice Stevens is correct. The Court must be stingy with its resources. What is more puzzling, however, is *why* Justice White felt it important to give what in effect is an advisory opinion. Was it to light the way for other state and federal courts who might misread the Colorado decision as a "blessed" expansion of federal law? Or was it, as Justice Stevens says, an attempt to enlarge the Court's "involvement" in state court litigation? The first explanation seems more plausible. Justice White's "advisory opinion" does not tell the Colorado court *how* to decide future cases on this same issue. It does, however, telegraph to all courts how three of the nine Justices might rule on a similar case grounded on federal, rather than state, law.

The Court recently addressed the issue of advisory opinions in *Florida v. Meyers*.[146] In that case the intermediate Florida appellate court reversed a criminal conviction on grounds that the trial court had erred in admitting contraband seized in violation of the fourth amendment.[147] The state court also noted that because the case was being remanded for a new trial, it would briefly mention another appellate point—the fact that under state law the respondent was unduly restricted in cross-examining a witness.[148] In a lengthy footnote the Court first rejected the argument that the state court decision rested on an independent and adequate state ground; citing *Michigan v. Long*, the Court noted that the state court's reference to the state law issue was "hardly a clear indication" that the court's decision to reverse rested on an independent and adequate state ground.[149] The Court continued, however, by noting that even if the state ground was independent, it had the power to review the fourth

145 Justice Stevens also remarked that:

> This tendency feeds on itself, for it can only encourage litigants—particularly institutional litigants—to file even more petitions for certiorari in the hope of obtaining, if not review and reversal, at least an opinion by a number of Supreme Court Justices in support of their position. In light of the increasing flood of certiorari petitions, today's advisory opinion provides further support for concluding that this situation "will very likely progressively worsen."

Id. at 1259-60 (Stevens, J., concurring) (footnote omitted).

146 104 S. Ct. 1852 (1984) (per curiam).

147 Meyers v. State, 432 So. 2d 97 (Fla. Dist. Ct. App. 1983).

148 *Id.* at 99.

149 104 S. Ct. at 1852 n.*.

amendment issue.[150] Citing *Herb v. Pitcairn*,[151] the Court stated that in this case there was no possibility that its opinion would be merely advisory.[152] Regardless of how the state appellate court rules, said the Court, the disposition of the constitutional issue is critical to the new trial. Thus, there was no jurisdictional reason to decline review.[153]

The danger of rendering advisory opinions exists in any case, whether the Court has granted plenary review or not. But the types of danger are different. In a case where the Court assumes the absence of state grounds and then decides a question of federal law, the danger is that, on remand, the state court will sidestep the Court's decision and render it meaningless.[154] When, as in *Nunez*, the Court decides not to reach the merits but a Justice nonetheless offers an advisory opinion on the merits, the "danger" lies in lower courts' reliance on that opinion[155]

Although the new rule in *Michigan v. Long* presents some risk of rendering advisory opinions, that danger always exists; it is, therefore, to be distinguished from the danger involved in including individual, gratuitous opinions in denials of plenary review.

III. Response From the State Courts in Criminal Law Decisions

A. *Recent Returns*

The Supreme Court has clearly given a judicial cue to state courts—they have a great deal to say about which cases clear the nonfederal-ground jurisdictional hurdle.[156] Likewise, the Court has

150 *Id.*

151 324 U.S. 117, 126 (1945); *see* notes 23 and 24 *supra* accompanying text.

152 104 S. Ct. at 1853 n.*.

153 In reaching this conclusion the Court correctly assumed that the two grounds, the fourth amendment ground and the state law cross-examination ground, were independent of each other. But the Court may have incorrectly assumed that its resolution of the fourth amendment issue was critical to a new trial. Arguably, the Florida state court on remand could ignore the Supreme Court's fourth amendment analysis and instead rest its reversal on more protective state search and seizure law. Would that not render the Supreme Court's decision advisory?

154 *See* notes 133-37 *supra* and accompanying text.

155 For example, until the Court fully addresses the issue raised in *Nunez*, lower courts may rely on Justice White's concurring opinion as though he spoke for a majority. Rather than being ignored, it is likely to be cited as authority.

156 *Cf.* Welsh, *supra* note 139, at 1118 (status of state judgment is entirely in the hands of the Justices). Whether the state electorate will graciously receive such expansive rulings is another matter, however. *See, e.g.*, Crawford v. Los Angeles Bd. of Educ., 102 S. Ct. 3211 (1982) (California voters amended the state's constitution to bring state courts in line with narrower federal court interpretations of the equal protection clause on school busing).

reminded the state courts that while they may provide expansive state-ground rulings, attempts to unduly expand federal law may be curtailed.

This course is understandably frustrating for those who would prefer to see state courts free themselves from what is now a more conservative Court.[157] On the other hand, those of a more conservative persuasion are concerned that activist state courts may further protect state criminal defendants by relying on state grounds for their rulings.[158] Unfortunately, the critical gaze is sometimes turned from the state courts to the Supreme Court, especially by those who are frustrated by state courts that are content to follow federal law rather than forge or revive reliance on state law. This criticism generally takes the form of challenging the present Court's right to stifle any state court initiative.[159] While a slim majority of the present Court disfavors increasing federal constitutional safeguards for criminal defendants, one cannot ignore the repeated reminders by both conservative and liberal members of the Court that state courts are free to adopt increased safeguards based upon independent state law.[160] Whether the state courts or legislatures accept that challenge depends upon them.

Since *Michigan v. Long* was decided, several state courts have responded to the call for more protective criminal law rulings based on state law. Others have declared that federal protections are broad enough. Although the number of cases noted here are few, they indicate the broader response that is yet to come as state appellate courts continue to struggle with decisions in criminal procedure.[161]

A number of state courts have recently opted to provide more

157 *See, e.g.*, Welsh, *supra* note 118.

158 *See* Florida v. Casal, 103 S. Ct. 3100 (1983) (per curiam) (Burger, C.J., concurring).

159 State v. Jackson, 672 P.2d 255, 261-65 (Mont. 1983) (Shea, J., dissenting); *see also* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978)(author suggests the Supreme Court should not review expansive state court decisions).

160 Michigan v. Long, 103 S. Ct. 3469, 3476 (1983) (O'Connor, J.); Florida v. Casal, 103 S. Ct. 3100 (1983) (per curiam) (Burger, C.J., concurring); Michigan v. Mosley, 423 U.S. 96, 120 (1975)(Brennan, J., concurring); Oregon v. Hass, 420 U.S. 714, 726 (1975)(Marshall, J., dissenting).

161 Scores of state court decisions reflect an independent and more protective state path in all areas of the law. The focus here is narrower, however. It is those state criminal law decisions following *Michigan v. Long* that might show how that decision will be received. For recent commentaries addressing expansive rulings see, Welsh, *supra* note 149; Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221 (1983); Comment, *State Constitutional Rights of Free Speech on Private Property: The Liberal Loophole*, 18 GONZ. L. REV. 81 (1983); *see also* note 1 *supra*.

protective search and seizure rulings through their state law. In *State v. Ball*,[162] the New Hampshire Supreme Court relied upon its state's constitution to interpret the plain view exception more narrowly than the Supreme Court did in *Texas v. Brown*.[163] According to the state court, the Supreme Court would permit a warrantless seizure of a "suspicious"[164] item.[165] The state court relied on the state constitution's ban on unreasonable searches and seizures, on case law,[166] and on the Supreme Court's plurality opinion in *Coolidge v. New Hampshire*[167] in holding that only probable cause would support the seizure of an item in plain view. The court did not reach the federal issue.[168]

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162 471 A.2d 347 (N.H. 1983).

163 103 S. Ct. 1535 (1983).

164 The state court may have overstated the Supreme Court's decision in *Brown*. In restating the federal plain view rule, the Supreme Court did state that officers may seize "suspicious" objects. *Brown*, 103 S. Ct. at 1541. But the test applied by the *Brown* plurality was probable cause to believe that the items seized from the defendant were associated with criminal activity. *Id.* at 1542.

165 In laying the framework for its departure from *Brown*, the court stated:

> While the role of the Federal Constitution is to provide the *minimum* level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution. . . . The Supreme Court has recognized this authority and has stated that its holdings "[do] not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." *Cooper v. California*. . . .
>
> Even if it appears that the Federal Constitution is more protective than the State Constitution, the right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees. This is because any decision we reach based upon *federal* law is subject to review by the United States Supreme Court, whereas we have unreviewable authority to reach a decision based on articulated adequate and independent *State* grounds. *Michigan v. Long*, . . . Therefore, we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.

471 A.2d at 350-51 (citations omitted).

166 State v. Beede, 119 N.H. 620, 626, 406 A.2d 125, 130 (1979), *cert. denied*, 445 U.S. 967 (1980); State v. Theodosopoulos, 119 N.H. 573, 578, 409 A.2d 1134, 1137 (1979), *cert. denied*, 446 U.S. 983 (1980).

167 403 U.S. 443 (1971).

168 The idea of focusing first on the state issue, which may dispose of the question, is a sound and oft-recommended practice. P. Galie & L. Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273 (1978)(authors urge Supreme Court to adopt rule requiring state courts to decide state issue first); Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Carson, *"Last Things Last": A Methodological Approach to Legal Arguments in State Courts*, 19 WILLAMETTE L. J. 641 (1983). Chief Justice Burger urged using this procedure in the Year-End Report of the Judiciary, 18 (1981). Noting that maintaining the federalism balance is a two-way street, Justice Stevens criticized the state court in Massachusetts v. Upton, 104 S. Ct.

The Washington Supreme Court also rendered an expansive ruling in *Ringer v. State*[169] where it considered two consolidated cases involving warrantless searches of automobiles.[170] The court noted that under federal law each search could be valid; one under *United States v. Ross*,[171] which permits probable cause warrantless searches of vehicles; the other under *New York v. Belton*,[172] which permits warrantless searches incident to arrest. However, rather than evaluating the searches on federal law standards, the court moved to an analysis of the state constitution and state case law.[173] The court rejected *Ross* and concluded that state law only permitted warrantless vehicle searches where exigent circumstances are present.[174]

In several other cases, the state courts have had an opportunity to reexamine their earlier decisions following a remand by the Supreme Court. In each case the question whether there was an independent and adequate state ground was raised at the Supreme Court level.

The Oregon Supreme Court's opinion on remand in *State v. Kennedy*[175] provides a good discussion of the independent path which the state courts may choose to follow.[176] The court's decision, which was handed down the same date as *Michigan v. Long*, rested primarily on

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2085, 2090 (1984), for not addressing first the question of whether the state constitution was applicable. It is important, he said, that state courts not "unnecessarily invite" Supreme Court review of state court decisions. *Id.*

169 674 P.2d 1240 (Wash. 1983).

170 In each case the defendant was properly arrested, handcuffed, and placed in a patrol car. Officers then searched the vehicle and in each case found contraband. In both cases officers had learned from others that probable cause existed to arrest the defendants; an outstanding warrant existed for defendant Ringer, and defendant Corcovan was linked to boat theft.

171 456 U.S. 798 (1982).

172 453 U.S. 454 (1981).

173 As for the search incident to an arrest, the Court first traced the development of the federal search-incident-to-arrest exception to the warrant requirement. The Washington Court noted that, until the Supreme Court decided *New York v. Belton* in 1981, it (the Washington Court) had neglected its own state constitution, focusing instead on the federal constitution. In *Ringer* the Washington court returned to the protections of its own state constitution and overruled any other state cases that were inconsistent with its decision in *Ringer*. 674 P.2d at 1247.

For another example of reliance on state law and rejection of the *Belton* rule, see People v. Gokey, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983).

174 The court in *Ringer* concluded that no exigent circumstances were present. 674 P.2d at 1249.

175 666 P.2d 1316 (Or. 1983).

176 When this case was before the Supreme Court on plenary review, the Court expressed concern that independent and adequate state grounds might have supported the state court's opinion. 456 U.S. at 671 (opinion of the court) and 681 (Stevens, J., concurring, joined by Brennan, Marshall, and Blackmun, JJ.). Nonetheless, it addressed the double jeopardy issues,

Oregon law and interpreted the state's double-jeopardy protections more broadly than the fifth amendment provision as applied by the Supreme Court in its review of the case.[177] In resting its decision on state law, the Oregon Supreme Court noted that, while the Oregon courts often refer to federal decisions in deciding issues which have been previously undecided under state law, the Oregon Supreme Court cites federal opinions only because it finds them persuasive and not because it considers itself bound to do so under federal doctrines.[178]

By relying on state grounds, the Oregon Supreme Court arguably rendered the Supreme Court's decision "advisory," although there can be no doubt that what the court said about fifth amendment double jeopardy issues will aid lower federal and state courts looking for guidance on federal law on the issue.[179]

Another case in which the Supreme Court recognized the possibility that an independent and adequate state ground existed for a state court's decision is *State v. Jackson*.[180] The issue raised in that case was the extent of fifth amendment protection for motorists who refused to submit to breathalizer sobriety tests.[181] When the Supreme Court resolved the same issue in *South Dakota v. Neville*,[182] it vacated and remanded *Jackson* to the Montana Supreme Court for consideration of whether the Montana court's earlier decision[183] (ruling against admission of evidence that the motorist refused the test) rested on federal or state grounds, or both, and, if it was based on federal grounds, to reconsider the case in light of *Neville*.[184]

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reversed, and remanded the case to the Oregon courts for further proceedings. 456 U.S. at 679.

177 Oregon v. Kennedy, 456 U.S. 667 (1982). The federal double jeopardy rule in *Kennedy* was also rejected by the Arizona Supreme Court in Pool v. Superior Court, 677 P.2d 261 (Ariz. 1984).

178 State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983). Continuing, the court noted that often a defendant would raise only a federal claim. The court pointed out that exclusive reliances on federal claims might foreclose any potential state law claims in the future. Further, where counsel merely cited Oregon law, the court may ask counsel to either explain or abandon the state issue. *Id.*

179 *See* P. Galie & L. Galie, *supra* note 168, at 286 n.75. (The authors suggest that in such circumstances, the Supreme Court's opinion is advisory in retrospect *only* if the state court negates the Court's opinion.); *see also* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 765 (1972)(considers potential impact in other cases).

180 672 P.2d 255 (Mont. 1983).

181 *Id.*

182 103 S. Ct. 916 (1983).

183 195 Mont. 185, 637 P.2d 1 (1981), *vacated*, 103 S. Ct. 1418 (1983).

184 103 S. Ct. 1418 (1983). Justice Stevens dissented, quoting those portions of the state

On remand, a newly-constituted Montana Supreme Court[185] noted the *Michigan v. Long* "assumption," recognized that the majority's first opinion in *Jackson* had cited pertinent provisions from the Montana Constitution, and reviewed the various state cases it had relied on in that opinion. It then concluded that the (first) *Jackson* opinion had been based primarily on the federal constitution and Supreme Court decisions.[186] The Montana court therefore reconsidered its earlier decision and modified it according to the holding in *South Dakota v. Neville*.[187]

Two Montana justices, however, filed sharp dissents.[188] Both echoed the theme of the arrogance and intrusiveness of the Supreme Court in this case.[189] Justice Shea, the author of the first *Jackson* opinion, admitted that he had been mistaken in that decision because he "did not recognize the extent to which the United States Supreme Court stood ready to intrude on the judicial affairs of this state in interpreting our own constitution."[190] Justice Shea noted:

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court decision which in his view demonstrated an independent and adequate state ground. *Id.* at 1418-19 (Stevens, J., dissenting).

185 Between the first and second *Jackson* opinions, following remand by the Court, Justice Daly, one of the justices in the majority on the first decision, was replaced by Justice Gulbrandson. He joined three dissenters on the first case to form a new majority. 672 P.2d at 255, 260. Further, Justice Morrison, who had concurred with the majority in the first *Jackson* decision, offered a special opinion concurring in the result; he stated that in the first decision he was not concerned about independent state grounds. *Id.* at 260. Although he disagreed with the Supreme Court's interpretation of the fifth amendment, he felt bound to follow it because the United States and state constitutional provisions are identical.

186 672 P.2d at 258.

187 *Id.* at 259. Using the Supreme Court's model in *South Dakota v. Neville* as a template, the court reconsidered its earlier decision and agreed that under federal law the evidence of refusal to take the sobriety test was admissible. *Id.* at 258-59.

188 Both of these justices had been in the majority in the court's first decision in *Jackson*.

189 Justice Sheehy stated:

> Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.

672 P.2d at 260 (Sheehy, J., dissenting). There is no need to "knuckle under" to the Supreme Court. The states have the right to establish independent state grounds. The dissent's complaint misses the mark because the Court in this case had not told the Montana court what law to apply. It simply asked the court to clarify what law it had applied in its first decision. *Id.* at 256. The Oregon Supreme Court's "respectful" disagreement with the Supreme Court in State v. Kennedy, 666 P.2d 1316 (Or. 1983). A state court or judge urging adoption of an independent ground need not be disrespectful in the process.

190 672 P.2d at 262. Justice Shea further pointed to Chief Justice Burger's concurring opinion in *Florida v. Casal*, 103 S. Ct. 3100 (1983), as representing the kind of philosophy which he felt led to the remand in this case. In *Casal*, the Chief Justice had reminded the citizens of Florida that the nonfederal ground which had required suppression of large quan-

> I suggest that the provisions of our own constitution do have meaning independent of the interpretations given to the United States Constitution, and that so long as we do not deny rights guaranteed by the United States Constitution, we can and should, where the situation arises, interpret our own constitution to give more rights than those granted by the United States Constituiton. But the majority has abdicated that responsibility by holding that provisions of our constitution "substantially indentical" (whatever that means) with provisions of the United States Constitution can get their meaning only from the United States Supreme Court. It seems the majority has adopted the philosophy suggested by Chief Justice Burger in *Florida v. Casal*, and would permit the United States Supreme Court to tell us what our state constitution means.[191]

Both of the dissents in *Jackson*, however, unfairly vented their frustration at the Supreme Court instead of at the apparent cause of the Montana court's changed position—a change in composition of that court.[192] The Supreme Court had simply asked the Montana court to clarify the basis of its first decision.[193] To say that the request amounted to an edict from the Supreme Court as to how to read state law is a leap in logic. As noted in an earlier section, "respect" is a question of degree.[194] What to some is a respectful request for clarification is to others a personal and arrogant insult.[195]

In *Brown v. State*,[196] the Texas Court of Criminal Appeals reconsidered a case which the Supreme Court had reversed and remanded on the issue of plain-view seizures.[197] The Court did not ask the Texas court to clarify its decision,[198] but on remand defense counsel raised the question of whether the court had relied on Texas law in its first decision, and if not, whether the Texas Constitution would nonetheless provide an independent basis for that decision. The Texas court, in a plurality opinion, noted that its first decision rested squarely on the fourth amendment.[199] The court also declined to read the Texas Constitution as being more protective than its federal

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tities of marijuana could be changed through the legislative process. *Id.* at 3101-02 (Burger, C.J., concurring).

191 672 P.2d at 264-65 (Shea, J., dissenting).

192 *See* note 185 *supra*.

193 *See* notes 180-84 *supra* and accompanying text.

194 *See* notes 92-96 *supra* and accompanying text.

195 *See, e.g.*, State v. Chrisman, 676 P.2d 419 (Wash. 1984), discussed in note 137 *supra*.

196 657 S.W.2d 797 (Tex. Crim. App. 1983)(en banc).

197 Texas v. Brown, 103 S. Ct. 1535 (1983).

198 The Court nonetheless briefly addressed the issue in rejecting the defendant's argument that the Texas court had relied on state grounds. 103 S. Ct. at 1537-38 n.1.

199 657 S.W.2d at 798.

counterpart. Although noting that under the state provision earlier cases indicated that the defendant might have been entitled to greater protection, the court reiterated its decision to interpret the state constitution in harmony with the Supreme Court opinions.[200]

The plurality's allegiance to the Supreme Court, however, failed to gain full-fledged support from other judges. Both concurring and dissenting opinions voiced concern about judicial abdication.[201]

What these cases evidence is the true independence of the state courts to decide whether to follow federal precedent or, if necessary, forge state law. The states' responses have obviously been mixed. Moreover, those state courts choosing to take an independent course will not always find the path well-marked or smooth.

B. *Role of the Courts and Counsel In the "New Federalism"*

Just how state courts go about establishing more expansive state law and meeting the *Michigan v. Long* plain statement rule will obviously vary from court to court. In some instances, a specific constitutional or statutory provision will provide a worthy vehicle for state courts' reliance on nonfederal grounds for their decisions.[202] In the absence of such provisions, the state court may revive earlier, dormant state cases for a more expansive reading, as the Washington Supreme Court did in *Ringer v. State*.[203] Where there is no state precedent to rely on, the state court may forge new state law, perhaps relying in part on more expansive lower federal court rulings, or dissenting opinions from the Supreme Court, or upon the state court's supervisory powers.[204] Throughout this process, the state court must be careful to specifically delineate both the authority it is relying upon and the reasons for its reliance. If federal authorities are used as a basis for developing independent state grounds, it is especially important that the state court make it clear that it finds those au-

200 The Texas Court stated that it would follow that "path until such time as we are statutorily or constitutionally mandated to do otherwise." *Id.* at 799.

201 Judge Teague's dissent was particularly sharp:

> 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 part of the independent appellate judiciary of the State of Texas.

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

202 See Howard, *supra* note 1, at 934-940, for a number of sound suggestions for state courts on where to look for independent state law.

203 *See* notes 169-74 *supra* and accompanying text.

204 *See* Howard, *supra* note 1, at 934-940.

thorities to be persuasive guidance but that the federal law does not compel the decision it is reaching.[205] Ambiguous decisions may well trigger application of the *Michigan v. Long* "assumption." In short, for those state courts choosing an expansive, independent, and adequate state path, it is important that others reading the court's decision see the path clearly.

It is also important to recognize that the state courts do not stand alone in choosing whether to base their decision on federal or state grounds. Counsel can, and should, be conscious of the possibility of developing adequate state grounds. In many cases it is easier for both counsel and judges simply to rely on the Supreme Court's decisions, especially where there is little state law on the issue.[206] It is obviously more difficult to break or reopen a different trail. Again, however, that task is not mandated by the Supreme Court; at most the Court encourages states to do that. Just how counsel frame and brief their respective positions will depend largely on the climate in the state courts. Defense counsel, for example, in a criminal proceeding should in most cases raise both federal and state grounds; a sympathetic state court may provide an expansive state-ground ruling and reject the federal ground. But the necessary groundwork for possible collateral relief in a federal court will have been laid.[207]

Some tactical choices remain even after the highest state court has acted. If time permits, counsel should consider a request for rehearing or modification to clear up any ambiguous decisions which do not clearly delineate between state and federal grounds.[208] For

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205 Although state courts may be well advised to make such plain statements in each case, a one-time statement may be sufficient to cover future cases. *See, e.g.*, State v. Kennedy, 295 Or. 260, 265, 666 P.2d 1316, 1321 (1983), discussed at note 178 *supra* and accompanying text. The Oregon Court apparently relied upon the one-time claim it made in Kennedy in two subsequent decisions. *See* State v. Sparklin, 296 Or. 85, 672 P.2d 1182 (1983)(court addressed both state and federal provisions on rights to counsel at interrogations and found no denial of rights); State v. Mains, 295 Or. 640, 669 P.2d 1112 (1983)(court established state law requirement for warning a defendant about to undergo psychiatric questioning).

206 *See* State v. Kennedy, 666 P.2d 1316, 1320 (Or. 1983), where the court recognizes that "time for original analysis is scarce, particularly in the ordinary criminal case and particularly at the trial level."

207 *See* O'Connor, *supra* note 2, at 802.

208 In *State v. Kennedy*, the court noted problems associated with reviewing a lower state court opinion which relies only on federal grounds although state grounds were argued. The Oregon Supreme Court stated:

> [The] practice of deciding federal claims without attention to possibly decisive state issues can create an untenable position for this state's system of discretionary Supreme Court review. It can also waste a good deal of time and effort of several courts and counsel and needlessly spur pronouncements by the United States Supreme Court on constitutional issues of national importance in a case to whose

instance, a defense counsel who has benefitted from a protective state-ground decision by the state court should ensure that there can be no mistake that the state court clearly relied on an independent and adequate state ground, thus effectively precluding further review by the Supreme Court,[209] as long as the insulation from review is not artificial.

C. *Good Faith Insulation of State Court Decisions*

Simply citing state grounds is not an absolute bar to Supreme Court review. In *Michigan v. Long*, the Court recognized this, stating that it would not review a state decision if it clearly and expressly stated that it was alternatively based both on federal grounds and on "bona fide separate, adequate, and independent [state] grounds."[210] Thus, the Court has clearly signaled that in all cases coming before it, it will remain as it always has, ultimately responsible for determining whether it has jurisdiction.[211] Measuring for "bona fide" nonfederal grounds is difficult but not unworkable. The Court will be particularly sensitive to attempts by state courts to insulate review and resolution of federal questions.[212] For example, state procedural rules which serve as the nonfederal grounds and have prevented resolution of a federal issue will be evaluated based on their legitimate state interest.[213] When it is not clear from the state decision just how

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> decision these may be irrelevant. In effect, when this court might reach the same result under the Oregon law that a lower court reaches by citing federal precedents, we would have to allow review at the instance of a losing party objecting only to the federal holding, while the successful party who might prefer a decision on state grounds has no reason to petition us for review. Surely a practice that requires a winning party to seek review solely in order to shift a favorable judgment from federal to state grounds is wholly unreasonable, apart from its logical flaws.

295 Or. 260, 263, 666 P.2d 1316, 1319 [footnote omitted]. In a footnote the court observed that the same problem can occur when a trial court has relied on federal grounds and the intermediate appellate court affirms without opinion. *Id.* at 263 n.4, 666 P.2d at 1319 n.4.

209 *See, e.g.*, Michigan v. Long, 103 S. Ct. 3469, 3476 (1983).

210 *Id.*

211 *Id.* That is not to say, however, that state courts do not have anything to say about whether a case will be reviewed. It does mean that the Supreme Court will determine whether the state clearly stated independent and adequate state grounds which preclude review.

212 State court "evasion" of Supreme Court decisions has been the subject of a number of commentaries. *See, e.g.*, Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972); Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY L.J. 729 (1976); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954).

213 *See* Henry v. Mississippi, 379 U.S. 443 (1965).

firm the state grounds are, the Court may properly probe deeper and fall back into one of its earlier options of either asking the state court for further clarification or examining the applicable state law to determine whether it should assume jurisdiction.[214]

IV. Impact of the *Michigan v. Long* Rule on State Criminal Defendants

The Court's new rule appears to open the doors for state prosecutors who will succeed in convincing the Court to further whittle away at the rights of state criminal defendants.[215] As noted in an earlier portion of this article, the new rule is not likely to change the Court's underlying criteria for deciding which cases to hear; the portion of the Court's expansion of *Terry* protective searches in *Long* should not be confused with the Court's statements about dealing with ambiguous state court decisions. Further, while the two Justices most often associated with protecting criminal defendants' rights, Justices Brennan and Marshall, dissented on the merits, they did not explicitly object to the new rule.[216] Had they perceived the rule as a danger to state criminal defendants, it seems safe to assume that they would have expressly voiced their concern. Even Justice Stevens' dissent focused primarily on the Court's "intrusion" into state autonomy.

The perceptions that the *Long* rule will provide the vehicle for further erosion of criminal defendants' rights is no doubt fueled in part because Justice O'Connor, perceived as a conservative, authored the opinion adopting the rule; but Justice O'Connor is also a former state appellate judge who has long urged state courts to recognize their valuable role as independent arbiters of state law. That, it would seem, says much about whether the Court itself really sees the *Michigan v. Long* rule as a sign of respect for state courts.[217]

The *Long* rule does not signal a change in the proposition that state courts may provide *more* protections for state criminal defendants than those provided in the federal Constitution. It does remind the states, however, that they may not expand *federal* rights;[218] when they act like federal courts they will be reviewed as a federal court.

214 *See* note 64 *supra* and accompanying text.

215 *See* Justice Stevens' dissent, 103 S. Ct. at 3489.

216 *See* notes 73-78 *supra* and accompanying text.

217 One of the ironies in the area of the Supreme Court review of state court criminal law decisions is that justices who may wish to hold the line on federal rights are also advocates of state autonomy. The two views are not inconsistent.

218 Oregon v. Hass, 420 U.S. 714, 719 (1975).

But, it does not follow that the defendants' federal rights will always be *reduced*.

Ironically, as a result of the *Long* rule, the state courts that heretofore were reversed on federal grounds may now expand state criminal defendants' rights on state grounds with little fear of reversal, as long as they are clear and fair about it. What happens to state criminal defendants is still determined to a great extent by the way in which the state court treats their arguments and by the grounds on which the state court rests its decision.

Conclusion

Our federalist judicial system presents a delicate balance and requires an ever-steady hand in weighing state autonomy and potential Supreme Court review. Tipping the balance toward respecting state autonomy is less intrusive, but potentially casts state courts as final arbiters of federal law. On the other hand, tipping the balance toward the Supreme Court as final arbiter of federal law can threaten to intrude on state autonomy. "Intrusion" in a federalist scheme, however, is a two-way street. When the Supreme Court reviews state court decisions potentially grounded on state law, it is arguably intruding into a state court's autonomy. When a state court decides federal issues in an expansive manner, it is potentially intruding into the province of the Supreme Court and other federal courts.

That potential tensions exist between federal and state courts is clear. It is also clear that a workable and practical balance is needed. That balance emerges from *Michigan v. Long*. The Court's new option for handling ambiguous state decisions which might rest on an independent and adequate state ground is a reasonable rule. The *Long* rule may cause some perceived "intrusion into the state autonomy," but that possibility existed even under pre-*Michigan v. Long* practices. Considering the limited scope of the rule, the problems it was designed to remedy, the compelling need for uniformity in federal law, and the minimal risks of rendering advisory opinions, the rule makes good sense.

The new rule is not a panacea. It will not likely change anyone's views about the role or posture of the Supreme Court. Its detractors may well view it as another artificial attempt to impose federal law on state courts. Staunch supporters of the Court will continue to swear allegiance to it. Nonetheless, regardless of one's ideological stance, there should be no doubt that the Court has given a

practical and unmistakable signal to state courts: To avoid risks of unnecessary plenary review, be as clear as possible in stating the grounds for your judgments.

To date, the responses from the state courts have been mixed. Whatever the response, state courts should remember that the Court is not mandating how they decide state law questions, as long as they do not infringe on federal rights. Rather, the Court has simply indicated how it will react to ambiguous state court decisions. How state courts react is their affair.