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Constitutional Law: Premature Federal Adjudication Through the Plain Statement Rule (Arizona v. Evans, 115 S. Ct. 1185 (1995))

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CASE COMMENTS

CONSTITUTIONAL LAW: PREMATURE FEDERAL ADJUDICATION THROUGH THE PLAIN STATEMENT RULE

Arizona v. Evans, 115 S. Ct. 1185 (1995)

*W. Craig Williams***

Respondent was stopped by police for a traffic violation, and a subsequent check with the patrol car's computer revealed an outstanding misdemeanor arrest warrant for Respondent.[1] While placing Respondent under arrest, the police officer noticed a marijuana cigarette in Respondent's hand, prompting a search of the vehicle that unveiled a small bag of marijuana.[2] When the police later discovered that the warrant for Respondent's arrest had been previously quashed, Respondent argued for suppression of the marijuana as the fruit of an unlawful arrest.[3] The trial court granted the motion to suppress, and the State appealed to the Court of Appeals of Arizona.[4] In reversing the trial court, the appellate court held that the exclusion of evidence was limited to instances of police-personnel

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** Captain, United States Marines, Judge Advocate General Corps; J.D., anticipated May 1997, University of Florida; B.A., 1987, Duke University. This comment is dedicated to my mother, Jane McEwen Clarke, who possesses all the personal qualities I hope to emulate. Among those are persistence and a fierce determination to accomplish the task at hand. I thank her for the sterling example that she provides and for a family life filled with unconditional love and devotion. I am also grateful for the tremendous editorial assistance of Jill Willis, Arthur Lewis, and Ava DeLorenzo.

1. Arizona v. Evans, 115 S. Ct. 1185, 1188 (1995).
2. *Id.*
3. *Id.*
4. State v. Evans, 836 P.2d 1024, 1025 (Ariz. Ct. App. 1992), *vacated*, 866 P.2d 869 (Ariz. 1994), *rev'd*, 115 S. Ct. 1185 (1995). Due to an administrative oversight of a judicial clerk, the police department was unaware of the quashed arrest warrant. *Id.* The county procedure for quashing a warrant was for a justice court clerk to call the "Sheriff's Office" to inform them of the quashed warrant, at which time the "Sheriff's Office" would remove the warrant from the computer. In the instant case, the clerk failed to make the phone call. *Id.*

negligence and did not extend to negligent record keeping by judicial clerks.[5] The court based its decision on federal as well as state interpretations of the exclusionary rule.[6]

The Supreme Court of Arizona reversed, relying less upon federal case law and more upon the need to have evidentiary law reflect advancements in automation of judicial record keeping.[7] After granting certiorari,[8] the U.S. Supreme Court reversed and, with respect to jurisdiction, HELD, that the case was within the purview of the Court because the Arizona Supreme Court did not base its decision upon adequate and independent state grounds, nor did it include a plain statement that its reference to federal law was only for persuasive purposes.[9]

When the U.S. Supreme Court reviews state court decisions, it generally reviews only questions of federal law and avoids state law questions.[10] The application of the federal Bill of Rights to the states via incorporation through the Fourteenth Amendment has meant that citizens can seek redressability through both state and federal constitutional provisions.[11] When a state court adjudicates a case on both federal and nonfederal grounds, the jurisdiction of the Supreme Court fails if the "non-federal ground is independent of the federal ground and [is] adequate to support the judgment."[12] The Court's refusal to decide controversies previously resolved on adequate and independent state grounds stems from a deference

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5. *Id.* at 1027.

6. *Id.* In addition to a substantial reliance on U.S. Supreme Court case law, the Arizona Court of Appeals interpreted a state exclusionary statute as "within the power of the legislature to enact and offends neither the state nor federal constitutions." *Id.* at 1028 (quoting State v. Coats, 797 P.2d 693, 697 (Ariz. Ct. App. 1990)).

7. *Evans*, 866 P.2d at 872.

8. Arizona v. Evans, 114 S. Ct. 2131 (1994).

9. *Evans*, 115 S. Ct. at 1190.

10. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626-33 (1874) (challenging Congress to expand the constitutional jurisdiction of the Court if the legislature wanted the Supreme Court to consider questions of state law). If Congress were to authorize review of state questions and make Supreme Court decisions of state law binding on the states through the supremacy clause, it would likely find such an extension of the Court's jurisdiction a violation of the Tenth Amendment. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24, at 163 (2d ed. 1988); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.13, at 90-91 (5th ed. 1995).

11. Ann Althouse, *How To Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1490 (1987); Felicia A. Rosenfeld, Note, *Fulfilling the Goals of* Michigan v. Long: *The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1041 (1988).

12. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); *accord* Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934) (finding the Court without jurisdiction where adequate and independent state grounds exist to sustain the judgment); Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931) (holding it "incumbent upon [the Court] . . . to ascertain for itself . . . whether the asserted nonfederal ground independently and adequately supports the judgment"); *Murdock*, 87 U.S. at 590 (one of the earliest expressions of the adequate and independent state grounds doctrine).

to state judicial independence in the federalist system and a reluctance to render advisory opinions.[13] For more than 100 years, the Court has struggled with the adequate and independent state grounds doctrine when state court opinions fail to articulate the basis for a holding.[14]

Herb v. Pitcairn[15] was an early pronouncement of how the Court handled cases that did not clearly state whether the decision was based on federal or nonfederal grounds. In *Herb*, a lower state court certified a federal question to the state supreme court.[16] The state supreme court decided the federal question, but the opinion was not clear as to whether the court had decided the question in the alternative or because of inadequate state law grounds.[17] In determining the justiciability of these vague cases, the U.S. Supreme Court adhered strictly to the principle that the federal question must have been essential to the disposition of the case, and where it was not clear, the Court avoided review of the decision.[18]

At that stage of federalism jurisprudence, the Court was unwilling to put the onus on state courts of ensuring that their opinions clearly distinguished the legal basis of the findings.[19] "Those courts may adjudicate both kinds of questions and because it is not necessary to their functions to make a sharp separation of the two their discussion is often interlaced."[20] The *Herb* Court found the appropriate remedy for disentangling the grounds was to simply ask the state courts for clarification.[21] Although this appeared to be a tremendous expenditure of judicial resources, the process of verifying whether or not the decision relied upon adequate and independent state grounds protected exclusive state jurisdiction.[22] In this era of state deference, the Supreme Court presumed it lacked jurisdiction unless the contrary was clearly established. It was the landmark decision of *Michigan v. Long*[23]

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13. Michigan v. Long, 463 U.S. 1032, 1040 (1983); *see also* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (finding the "power [of the Supreme Court under Article III] is to correct wrong judgments, not to revise opinions").

14. *Murdock*, 87 U.S. at 635 (defining the adequate and independent state grounds doctrine, leaving state supreme courts as the final arbiters of state law). *See generally* Richard W. Westling, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379 (1988).

15. *Herb*, 324 U.S. at 117.

16. *Id.* at 124.

17. *Id.* at 124-25.

18. *Id.* at 126; *see also Lynch*, 293 U.S. at 54 (stating that it must be clear from the opinion that the federal question was necessary to the outcome of the case, and although federal grounds may be inferred, an inference was not a sufficient basis for jurisdiction).

19. *Herb*, 324 U.S. at 127.

20. *Id.*

21. *Id.* at 127-28. The Court saw this solution as preferable to telling the state court what they intended, commensurate with the respect due the highest state courts. *Id.*

22. *Id.* at 128.

23. 463 U.S. 1032 (1983).

that reversed this presumption.

The *Long* case, like the instant case, involved protection of an accused from questionable searches and seizures.[24] The state supreme court twice referenced the state constitution, but for the remainder of the opinion cited federal law as germane to the holding.[25] The respondent argued that the state constitution afforded greater protection from searches and seizures than did federal constitutional provisions, and that the incorporation of state constitutional analysis into the opinion marked an adequate and independent state ground for the decision.[26]

In reviewing justiciability of the case, the Supreme Court recognized that a clear and consistent standard for distinguishing federal from nonfederal grounds never had been articulated.[27] The prior ad hoc approach to ascertaining jurisdiction prompted the Court, through Justice O'Connor, to promulgate the "plain statement rule."[28] This rule shifted the Court's presumption that a state court opinion was derivative of state law to a presumption that the decision was founded upon federal law, absent a plain statement from the state court that the mention of federal law was of only persuasive value.[29] Applying this test, the Court held that the state supreme

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24. People v. Long, 288 N.W.2d 629, 630-31 (Mich. Ct. App. 1979), *rev'd*, 320 N.W.2d 866 (Mich. 1982), *rev'd*, 463 U.S. 1032 (1983).

25. *Long*, 463 U.S. at 1037.

26. *Id.* at 1037-38.

27. *Id.* Prior to *Long*, the Court used several techniques to resolve basis ambiguity. In many cases the Court continued or vacated a case in order to resolve the basis for a state court decision. *Long*, 463 U.S. at 1038 (citing *Herb*, 324 U.S. at 117); *see also* California v. Krivda, 409 U.S. 33, 35 (1972) (vacating and remanding the case because the Court was unable to determine the basis for the state court judgment). Occasionally, the Court took upon itself the duty of examining state law to see if federal law was utilized merely for guidance or as a determinative basis. *Long*, 463 U.S. at 1039 (citing Texas v. Brown, 460 U.S. 730 (1983)); *see also* Patricia Fahlbusch & Daniel Gonzalez, Michigan v. Long: *The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 164 (1987); TRIBE, *supra* note 10, § 3-24.

28. *Long*, 463 U.S. at 1040-41.

> [W]hen, 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.

Id.

29. *Id. Cf.* Fahlbusch & Gonzalez, *supra* note 27, at 165 (noting that state courts have the burden of demonstrating that a decision was based on state law in order to avoid review by the Supreme Court).

court had relied primarily on federal case law, as the state court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did."[30]

By redefining the presumption as one based in federal law vice state law, the Court hoped to alleviate troublesome areas of old methods. The Court saw this approach as the best means of guaranteeing that state court decisions did not hinder review of federal questions, while preserving the opportunity for state judges to develop state jurisprudence without federal obstruction.[31] Other anticipated benefits of the presumption reversal included elimination of the need to interpret state law, conservation of judicial resources, and avoidance of advisory opinions.[32]

Justice Stevens, in his dissenting opinion, cautioned against altering the traditional presumption and encouraged judicial restraint in exercising jurisdiction.[33] Justice Stevens, justified deference to state sovereignty on the grounds that issues before the Court need to be sufficiently developed in the state courts before the Court can fashion an effective decision.[34] This concept, known as "percolating,"[35] gives the states ample opportunity to develop their own jurisprudence, free from federal interference, until it is necessary for the Court to intervene and resolve the issue in the interest of federal law uniformity.[36] Justice Stevens saw the *Long* presumption as a significant burden on state courts and forecasted a dramatic increase in the number of advisory opinions delivered by the Court.[37]

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30. *Long*, 463 U.S. at 1044 (quoting Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977)).

31. *Id.* at 1041.

> 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.

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

32. *Id.* at 1039; *see also* David A. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1090 (1984) (discussing the goals of the *Long* Court). Advisory opinions, as they are used in the context of this analysis, indicate the net result of a Supreme Court decision when a case is remanded for extending beyond federal constitutional boundaries, only to have the state supreme court sustain its original finding on state law grounds. The opinion of the Supreme Court thus becomes valueless and advisory in nature. Fahlbusch & Gonzalez, *supra* note 27, at 166 n.36; Westling, *supra* note 14, at 380-81 n.6.

33. *Long*, 463 U.S. at 1065-67 (Stevens, J., dissenting).

34. *Id.*

35. McCray v. New York, 461 U.S. 961, 961-63 (1983).

36. *Long*, 463 U.S. at 1065-67 (Stevens, J., dissenting); *see also* California v. Carney, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting) (asserting premature Supreme Court resolution of an issue does not allow sufficient time for percolation).

37. *Long*, 463 U.S. at 1067-68 (Stevens, J., dissenting) (arguing the Court should not concern itself with cases that seek to overprotect criminal defendants, as "the primary role of

Justice Stevens also argued that the role of the Court was to guarantee that citizens were not denied the minimum rights assured by the U.S. Constitution.[38] In *Long*, the state did not deny a citizen a federally guaranteed right, but actually provided greater constitutional protection than the Court would have required.[39] Justice Stevens argued that the Court's role was to establish the threshold of federal rights; thus, the Court should not concern itself with a state's willingness to further extend those rights.[40] In this way, the Court would set the floor of constitutional rights and the states would establish the ceiling.[41]

The instant case presented the Court with another state court opinion ambiguous as to the true basis of its holding.[42] The Court held that the test announced in *Long* should not be disturbed, and it therefore stood by the presumption that, absent a plain and clear statement of exclusive reliance upon state law, the case was based on federal law.[43] Applying the test to the instant case, the Court found that the state supreme court opinion referenced both Supreme Court case law and the Fourth Amendment for their precedential value, and that the state court opinion lacked the requisite plain statement to avoid review.[44] Upon these findings, the Court held that jurisdiction existed commensurate with the *Long* presumption.[45]

The Court in the instant case reiterated the reasoning behind the *Long* presumption, that is, the practice of vacating a state judgment for clarification seldom yielded the desired result and was an unnecessary expenditure of judicial resources.[46] The Court explained that the state court, after this decision, was still free to interpret state constitutional protection more expansively than the U.S. Constitution and to solve the problem of computerized law enforcement.[47] In fact, the Court found that the state was in a better position to serve as a test bed for novel legal solutions, once

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[the] Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.").

38. *Id.*

39. *Id.*

40. *Id.* at 1068-69.

41. *Id. But see* Fahlbusch & Gonzalez, *supra* note 27, at 200-01 (giving the states this latitude "could create fifty different interpretations of the gap" between the federal floor and the state ceiling and jeopardize the Court's role as final arbiters of the U.S. Constitution).

42. Arizona v. Evans, 115 S. Ct. 1185, 1189 (1995).

43. *Id.* at 1190.

44. *Id.* at 1190-91.

45. *Id.* at 1190.

46. *Id.* at 1189. The Court also recapped the goals of *Long*. The presumption obviated the practice of "'requiring state courts to clarify their decisions to the satisfaction of the Court'" and also would give state judges the opportunity to develop state law, while "'preserv[ing] the integrity of federal law.'" *Id.* (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)).

47. *Id.* at 1190.

relieved of its misinterpretation of federal law.[48] The Court maintained its assertion as the final arbiter of the U.S. Constitution and saw ambiguous state opinions as an erosion of that authority.[49]

As noted in the dissenting opinion of Justice Ginsburg, state courts have been the traditional arbiters of individual constitutional rights.[50] State courts continue to remain in the best position to protect individual rights from governmental intrusion.[51] It follows that as law enforcement administrative mechanisms evolve, state courts should be free to explore varying methods of ensuring that these processes do not infringe on personal liberties.[52] To better preserve the ability of states to function as laboratories for developing legal dilemmas, Justice Ginsburg would return to the presumption, followed by *Herb* and its progeny, that state court opinions are grounded in state law.[53]

Reluctance to render advisory opinions and respect for state court decisions have been justifications offered by the Court for preserving the adequate and independent state grounds doctrine.[54] The instant case, however, illustrates that these objectives are not being realized in the post-*Long* era. The Arizona Supreme Court found that the unlawful arrest, resulting from judicial clerical error, seriously impaired individual rights and thus, ordered suppression of the evidence at issue.[55] The court did not rely on a close analysis of Fourth Amendment precedent and, in fact, found the

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48. *Id.*

49. *Id.*

> [I]t is . . . 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.

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

50. *Id.* at 1201 (Ginsburg, J., dissenting) (citing Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381-82 (1980)) (explaining that the drafters of the federal Bill of Rights looked to existing state constitutions for guidance and many post-1789 state constitutions were modeled after pre-existing state constitutions instead of the federal Bill of Rights).

51. *Id.* (citing Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-18 (1978)).

52. *Id.* at 1201-03 (Ginsburg, J., dissenting).

53. *Id.*

54. *Long*, 463 U.S. at 1040; Herb v. Pitcairn, 324 U.S. 117, 125-27 (1945).

55. *Evans*, 115 S. Ct. at 1198 (Ginsburg, J., dissenting) (citing State v. Evans, 866 P.2d 869, 871 (1994) (seeing computerized record keeping as endangering individual liberties)). "It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows." *Evans*, 866 P.2d at 872.

most relevant Supreme Court case "not helpful."[56] Although the Arizona Supreme Court made it quite clear that federal law was not useful, the court failed to include a plain statement to that effect.[57] The instant case majority, nevertheless, invoked *Long* and presumed that the state decision relied on federal law.[58] For lack of a plain statement that the Arizona court rested squarely upon state law, the Supreme Court found jurisdiction.[59]

The Court resolved the suppression issue with federal precedent,[60] yet invited the state court to fashion, on state grounds, necessary solutions to computerization errors.[61] This invitation from the majority opens the door for state court reinstatement, rendering the Supreme Court's opinion advisory.[62] The *Long* presumption of a federal basis allows the Court to reach issues already resolved on solid state grounds and will, correspondingly, increase the propensity of the Court to give non-dispositive adjudications.[63] In Supreme Court cases reviewing ambiguous state decisions after *Long*, the frequency of advisory opinions has risen.[64] Such a result is

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56. *Evans*, 115 S. Ct. at 1198 (Ginsburg, J., dissenting) (citing *Evans*, 866 P.2d at 871).

57. *Id.* at 1198. Although it seems simple enough for a state court to rubber stamp an opinion with a basis disclaimer, many courts do not recognize the opinion triggers the *Long* requirement. *Id.* at 1201. Some states make wide use of disclaimers to preclude review under *Long*. *See, e.g.*, State v. Ball, 471 A.2d 347 (N.H. 1983) (making use of the rubber stamp). "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." *Ball*, 471 A.2d at 352. *See generally* Rosenfeld, *supra* note 11 (exploring the failure of the states to make use of the plain statement rubber stamp to avoid federal review).

58. *Evans*, 115 S. Ct. at 1190.

59. *Id.* One commentator has suggested that the Court is using the *Long* presumption to rein in expansion of constitutional rights by state courts. Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 344 (1989). The Court's protection of law enforcement interests is not matched by decisions concerning individual rights. *Id.* As a means of effecting its political goals, the Court is chipping away at substantive rights with a procedural device. *Id.*

60. *Evans*, 115 S. Ct. at 1194.

61. *Id.* at 1190.

62. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); *see also* Westling, *supra* note 14, at 380-81 (noting the increasing willingness of state courts to reinstate their judgments on remand).

63. *Evans*, 115 S. Ct. at 1202 (Ginsburg, J., dissenting) (citing Westling, *supra* note 14, at 389 & n.47); Michigan v. Long, 463 U.S. 1032, 1054 (1983) (Blackmun, J., concurring in part and in the judgment) (recognizing "an increased danger of advisory opinions"); *Long*, 463 U.S. at 1067 (Stevens, J., dissenting) (relying on a forecasted rise in advisory opinions as justification for opposing the plain statement rule).

64. *Evans*, 115 S. Ct. at 1202 (Ginsburg, J., dissenting). A study was conducted comparing the five-year period prior to the *Long* decision to a period five years subsequent. Westling, *supra* note 14, at 389-91 n.47. In the first period, 14.3% of the cases involving adequate and independent state grounds were rendered advisory by state courts, on remand. *Id.* In the period after *Long*, advisory opinions were handed down in 26.7% of the cases. *Id.* The rise correlates to the number of cases reviewed by the Court. *Id.* In the five years before *Long*, the Supreme Court reviewed 50% of the cases raising state grounds arguments. *Id.*

inconsistent with the goals announced in *Herb*.[65]

The majority in the instant case held that as final arbiters of the U.S. Constitution, the Court must address issues of federal law in vague state court opinions to ensure uniform application.[66] The possibility that these decisions may later become advisory is often justified as a necessary risk to that end.[67] But, where does such an opinion rank in the hierarchy of precedent? One possible constitutional interpretation is that a live controversy no longer exists before the Court, and thus, any resulting decision is of no precedential value.[68] Yet, a published Supreme Court opinion exists and is available as authority for lower courts.[69] Subsequent to the instant case, state courts, considering issues of unlawful arrests due to computer error, will have to weigh the Court's rendering on the issue, advisory or not.

Aside from the risk of advisory opinions, premature adjudications also cut short the opportunity for state courts to devise independent solutions.[70] Under this logic, the Supreme Court would review cases with the assurance that the issues have been sufficiently debated and explored in the state courts.[71] As Justice Ginsburg indicates, percolating an issue allows time for disagreement among the lower courts before the Supreme Court brings the process to a close with a nationally binding opinion.[72] Since state courts are the best arbiters of individual liberties, they should be extended the opportunity to serve as laboratories to develop suitable solutions to modern

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When the presumption reversed with *Long*, the Court reviewed 86.7% of the cases arguing independent nonfederal grounds in the next five years. *Id.*

65. *Herb*, 324 U.S. at 125-26.

66. *Evans*, 115 S. Ct at 1190 (citing Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

67. Schlueter, *supra* note 32, at 1102 (finding the risks of advisory opinions acceptable in order to preclude misinterpretation of federal law).

68. Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945) (holding federal courts are barred under Article III from deciding "abstract, hypothetical or contingent questions"); *see also* TRIBE, *supra* note 10, § 3-9.

69. One case illustrating this point is New York v. P.J. Video, Inc., 475 U.S. 868 (1986). On remand from the Supreme Court, the New York Court of Appeals reinstated its findings, based on state constitutional law. State v. P.J. Video, Inc., 501 N.E.2d 556, 563 (1986). Despite becoming advisory, the Supreme Court's opinion was cited as authority in two subsequent federal court cases: *In re* Grand Jury Subpoena: Subpoena Duces Tecum, 829 F.2d 1291, 1300 (4th Cir. 1987) and United States v. Espinosa, 827 F.2d 604, 610 (9th Cir. 1987).

70. *Evans*, 115 S. Ct. at 1198 (Ginsburg, J., dissenting). "'In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.'" *Id.* at 1198 n.1 (quoting McCray v. New York, 461 U.S. 961, 963 (1983)) (Stevens, J., respecting denial of petitions for writs of certiorari).

71. *Id.* at 1198; *see also* California v. Carney, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting) (arguing premature consideration of a novel issue stunts the natural growth and refinement of alternative solutions).

72. *Evans*, 115 S. Ct. at 1201-02 (Ginsburg, J., dissenting); *Carney*, 471 U.S. at 400 n.11 (Stevens, J., dissenting).

problems, prior to federal intervention.[73] Tolerance for percolation demonstrates the Court's respect for and confidence in the ability of the state courts to refine and resolve new and important issues of law.[74]

The instant case is an example of how the post-*Long* jurisdictional encroachment of the Court has not achieved the stated goals of avoiding advisory opinions and displaying respect for state court decisions. Advisory opinions violate Article III of the Constitution, and it does not strain the limits of reason to suggest that lending precedential value to an advisory opinion is also unconstitutional. There is no remedy in place for the Supreme Court to retract an adjudication on the merits. Furthermore, premature adjudication of an issue by the Supreme Court precludes cultivation of thoughtful analysis in the legal community. In order to guarantee that state courts do not rely on advisory opinions in developing state jurisprudence, a return to the pre-*Long* presumption is warranted. At worst, the Court's refusal of jurisdiction on a given issue will preserve for a particular state the power to extend individual liberties. Opportunities still abound for the Court to draw a definitive line, resolving misinterpretations of federal law and assuring uniformity.

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73. *Evans*, 115 S. Ct. at 1201-02 (Ginsburg, J., dissenting). Justice Stevens has accused the Court of promoting itself as the "High Magistrate for every warrantless search and seizure" and giving national effect to cases of only local significance. *Carney*, 471 U.S. at 396 (Stevens, J., dissenting). Addressing an issue "in the vacuum of the first case raising the question" circumvents the benefits of percolation. *Id.* at 399.

74. Delaware v. Van Arsdall, 475 U.S. 673, 691 (1986) (Stevens, J., dissenting) (finding the "Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts and will . . . be a recurrent source of friction between the federal and state judiciaries"); *see also* Fahlbusch & Gonzalez, *supra* note 27, at 182-86.