STATE LAW INDEPENDENCE AND THE ADEQUATE AND INDEPENDENT STATE GROUNDS DOCTRINE AFTER *MICHIGAN v. LONG*

A basic tenet of federalism is that state courts are the final arbiters of state law.[1] To avoid reviewing questions of state law, the Supreme Court limits its jurisdiction to cases in which a federal question is necessary to the state court's decision.[2] Thus the Court will not review state court decisions that purport to decide federal questions if, in the Court's view,[3] adequate and independent state law grounds support the judgment.[4]

The adequate and independent nonfederal grounds doctrine[5] promotes jurisdictional and constitutional restraint.[6] The Supreme Court has employed the rule to guard against advisory opinions,[7] to avoid premature or needless decision of constitutional issues,[8] and to foster

1. *See, e.g.*, C. WRIGHT, THE LAW OF THE FEDERAL COURTS § 107, at 747 (4th ed. 1983); Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 289 (1969).

2. *E.g.*, Berea College v. Kentucky, 211 U.S. 45 (1908); Eustis v. Bolles, 150 U.S. 361 (1893). In 1875 the Supreme Court established the rule that it does not have jurisdiction to review state court decisions interpreting state law. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). For a discussion of *Murdock*, see *infra* notes 38-42 and accompanying text.

3. The Supreme Court always has jurisdiction to decide whether a state court judgment rests on a nonfederal ground and whether that ground is adequate and independent. Wolfe v. North Carolina, 364 U.S. 177, 186 (1960); Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4021, at 675-76 (1977) [hereinafter cited as WRIGHT & MILLER].

4. R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 89, at 163 (R. Wolfson & P. Kurland 2d ed. 1951) (collecting cases stating the oft-cited rule); 16 WRIGHT & MILLER, *supra* note 3, § 4019, at 661-62 (same). *See also* C. WRIGHT, *supra* note 1, § 107, at 747-48 (summarizing various corollaries to the rule).

5. The rule is styled a number of ways. For the sake of readability, this Note interchangeably uses the terms "adequate and independent state grounds doctrine," "adequate and independent nonfederal grounds doctrine," and "nonfederal grounds doctrine."

6. *See generally* 16 WRIGHT & MILLER, *supra* note 3, § 4021 (discussing the rationale for the doctrine).

7. *See, e.g.*, Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965) (Court will decline jurisdiction when the possibility exists that on remand the state will reinstate its decision based on a state ground); Henry v. Mississippi, 379 U.S. 443, 446-67 (1965) (the nonfederal grounds doctrine avoids advisory opinions); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion").

8. *See* California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 98 (1981) (Stevens, J., dissenting) (linking a doubt as to jurisdiction because the state court may have rested its decision on adequate nonfederal grounds with the Court's "traditional practice of avoid-

judicial efficiency and economy.[9] More importantly, the adequate and independent state grounds doctrine protects state law from Supreme Court intrusion and defines the relationship of the Supreme Court to state law.[10]

When the Court declines review of a state court decision that clearly rests on state law,[11] the doctrine serves its basic policy goals and ensures against unwarranted Supreme Court revision of state law.[12] Complications arise in the application of the doctrine when state courts fail to indicate the degree to which they relied on federal law.[13] If the Court improperly finds jurisdiction, its review of a state court decision may infringe on the independence of state law[14] or result in an advisory opinion.[15] In large part, therefore, the history of the nonfederal

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ing the unnecessary and premature adjudication of constitutional questions"); Black v. Cutter Laboratories, 351 U.S. 292, 299-300 (1956) ("even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question"); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) (Court vacates and remands state court decision to ensure that existence of adequate and independent state ground does not render Court's decision a "needless dissertation[] on constitutional law").

9. *See* Department of Motor Vehicles v. Rios, 410 U.S. 425, 429 (1973) (Douglas, J., dissenting); Note, *The Untenable Non-federal Ground in the Supreme Court,* 74 HARV. L. REV. 1375, 1379-80 (1961).

10. *See, e.g.,* Fay v. Noia, 372 U.S. 391, 464 (1963) (Harlan, J., dissenting) (nonfederal grounds rule goes "to the heart of the division of judicial powers in a federal system"); Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (reason for rule "found in the partitioning of power between the state and federal judicial systems"); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) (rule "touches the division of authority between state courts and this Court and is of equal importance to each"). *See also* Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273, 282 (1978) (rule addresses "question . . . of power and where it lies in the federal system"); Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review,* 34 WASH. & LEE L. REV. 1043, 1056 (1977) (Supreme Court review should be limited to a "marginal intrusion upon state authority").

11. *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Berea College v. Kentucky, 211 U.S. 45, 53 (1908).

12. *See* Wechsler, *supra* note 10, at 1056; *supra* notes 6-10 and accompanying text; *infra* notes 38-42 and accompanying text.

13. *See infra* notes 48-69 and accompanying text.

14. Infringement can occur when the Court assumes jurisdiction after a state court reversed a conviction and appeared to rest its determination on both state and federal law. If the state court actually rested its decision on state law, and the Court reverses the judgment, the Court will have decided an issue of state law. *See* Michigan v. Long, 103 S. Ct. 3469, 3490 (Stevens, J., dissenting); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); 16 WRIGHT & MILLER, *supra* note 3, § 4021, at 679-81; *infra* notes 70-82 and accompanying text.

15. *See* Oregon v. Hass, 420 U.S. 714, 726, 727 (1975) (Marshall, J., dissenting) (urging Court to use "exacting standard" of jurisdiction to avoid advisory opinions); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965) (danger of advisory opinions should preclude

grounds doctrine recounts the various methods the Court has developed for determining when it may properly exercise its jurisdiction in ambiguous cases.[16]

Recent Supreme Court decisions culminating in *Michigan v. Long*[17] have changed the means by which the Court implements the adequate and independent state grounds doctrine.[18] In *Long*, the Court created a presumption that ambiguous state court decisions rest on federal law and thus are subject to Supreme Court review.[19] In *Long* and its precursors, the Court altered the balance between itself and state judiciaries,[20] redefined the independence of state law,[21] and precipitated potentially important changes in the jurisdictional interests protected by the nonfederal grounds doctrine.[22]

Part I of this Note examines the history of the nonfederal grounds doctrine and traces the development of the Court's various approaches to state court decisions exhibiting ambiguous grounds of decision.[23] Part II discusses the Court's recent treatment of the doctrine, the decision and holding in *Michigan v. Long*, and *Long*'s impact on the operation and rationale of the nonfederal grounds doctrine.[24] In part III, this Note considers and assesses possible state court responses to the *Long* rule.[25] Finally, in part IV, this Note concludes that the Court correctly modified the nonfederal grounds doctrine in *Long*. This Note also concludes that flexible Supreme Court administration of the *Long* rule, along with a conscientious state court response to the Supreme Court's challenge, will enhance federal-state court relations and con-

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Supreme Court jurisdiction unless state court decision rests solely on a federal ground). *See generally* 16 WRIGHT & MILLER, *supra* note 3, § 4021, at 688-93 (discussing advisory opinion rationale); Galie & Galie, *supra* note 10, at 286-87 n.75 (stressing importance of avoiding advisory opinions as reason for nonfederal ground doctrine). For a discussion of the relationship of the advisory opinion rationale to the nonfederal grounds doctrine, see *infra* notes 63-66 & 111-12 and accompanying text.

16. *See infra* notes 48-69 and accompanying text. *See generally* 16 WRIGHT & MILLER, *supra* note 3, § 4028 (discussing development of methods of ascertaining grounds of decision).

17. 103 S. Ct. 3469 (1983).

18. *See infra* notes 83-100 and accompanying text.

19. *See infra* notes 98-99 and accompanying text.

20. *See infra* notes 125-26 and accompanying text.

21. *See infra* notes 117-27 and accompanying text.

22. *See infra* notes 111-12 and accompanying text.

23. *See infra* notes 27-82 and accompanying text.

24. *See infra* notes 83-131 and accompanying text.

25. *See infra* notes 132-63 and accompanying text.

tribute to federal and state judicial efficiency.[26]

I. HISTORY AND DEVELOPMENT OF THE NONFEDERAL GROUNDS DOCTRINE

Because federal law is interstitial in nature, the role of state law is constantly evolving.[27] The scope of state authority contracts or expands whenever the Supreme Court redefines federal guarantees or Congress enacts legislation that changes the extent of federal preemption of state law.[28] Ultimately, therefore, the federal judiciary's interpretation of the scope of federal law governs the role of state law in the federal system.[29]

The adequate and independent state grounds doctrine operates in the murky area where federal law is not exclusively controlling.[30] State courts frequently can resolve issues on the basis of either federal or state law or both.[31] This freedom of choice complicates any definition of independence for purpose of the nonfederal grounds doctrine.[32]

Within the limits of due process[33] and the supremacy clause,[34] the states generally are free to use their own constitutions and laws to expand the individual freedoms granted by the federal constitution.[35] The adequate and independent state grounds doctrine protects this freedom to the extent that it prevents the Supreme Court from impos-

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26. *See infra* text accompanying notes 164-65.

27. P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 497-98 (1954).

28. *See* Hart, *supra* note 27, at 525-38 (discussing effect of changes in federal law on role of state law); *see also Developments in the Law—The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1334, 1337-40 (1982) (giving examples of federal judicial and legislative action and its effect on state law).

29. *See* 16 WRIGHT & MILLER, *supra* note 3, § 4021, at 675-76.

30. *Id.* at 676.

31. *Id.*

32. *See id.* § 4209, at 747-48; *cf.* THE FEDERALIST No. 82 (A. Hamilton) (discussing concurrent jurisdiction and state courts' ability to decide questions of state and federal law).

33. *See* U.S. CONST., amend. XIV, § 1.

34. U.S. CONST. art. VI, cl. 2.

35. *See* Johnson v. Louisiana, 406 U.S. 356, 375-77 (1972) (Powell, J., concurring in the judgment) (states should be free to experiment with "procedural alternatives" in criminal law); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

ing uniform federal law on the states.[36] The Court's evaluation of the independence of an asserted state ground largely determines the extent of this protection: the higher the standard the Court sets for finding independence, the smaller the field of state court authority.[37]

A. Early Cases

Since it decided *Murdock v. Memphis*[38] in 1875, the Supreme Court has declined to revise the judgments of state courts on state law.[39] In *Murdock*, the Court held that if a state court of last resort decides a federal question against a person claiming a federal right, the Court will review the federal question.[40] Under the *Murdock* rule, the Court would affirm the decision of the state court if it found that the state court had correctly decided the federal question.[41] If the Court found that the state court had incorrectly decided the federal issue, the Court would search for an adequate and independent state ground to support the judgment. If such a state ground existed, the Court would affirm;

36. *See, e.g.,* Cooper v. California, 386 U.S. 58, 62 (1967); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 489 (1965); *Developments in the Law, supra* note 28, at 1335.

37. For cases in which the Court has applied a stringent standard for judging the independence of state law, see Delaware v. Prouse, 440 U.S. 648 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). For a discussion of the Court's modern tendency to accord less deference to the independence of state law, see *infra* notes 78-82 and accompanying text. *See also Developments in the Law, supra* note 28, at 1340 (arguing that increased Supreme Court scrutiny of the independence of state court decisions dilutes nonfederal grounds doctrine); Address by Hon. Sandra D. O'Connor, The National Judicial College, Reno, Nev. (May 13, 1983), *quoted in* State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1323 n.10 (1983) (acknowledging modern tendency of Supreme Court to find no independent state ground).

38. 87 U.S. (20 Wall.) 590 (1875). The Court in *Murdock* addressed the question whether it had the power to review state court decisions in light of an 1867 amendment to the Judiciary Act of 1789. The 1789 Act explicitly confined the Court to review of questions involving the federal constitution or federal laws and treaties. The Judiciary Act of 1867 deleted this provision. For a comparison of the two statutory provisions, see HART & WECHSLER, *supra* note 27, at 439-40.

The state court had decided the case confronting the *Murdock* Court on both state and federal grounds. The state court rejected the plaintiff's claim to title to certain land both on the ground that the state statute of limitations had run and that an Act of Congress had intended to vest title unconditionally in the defendant. The plaintiff argued that the Supreme Court had the power to review both questions. Review of state court decisions of state law may be constitutional, *see* C. WRIGHT, *supra* note 1, at 746, and may have been intended by the framers of the Constitution, *see* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES chs. 23-26 (1953).

39. 16 WRIGHT & MILLER, *supra* note 3, § 4020, at 665; Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine,* 1965 SUP. CT. REV. 187, 188.

40. 87 U.S. at 635; *see* 16 WRIGHT & MILLER, *supra* note 3, § 4020, at 665.

41. 87 U.S. at 635; *see* 16 WRIGHT & MILLER, *supra* note 3, § 4020, at 665-66.

otherwise, it would reverse.[42]

In *Eustis v. Bolles*,[43] the Court abandoned its practice of initially reviewing a state court's disposition of federal issues.[44] Instead, in *Eustis*, the Court first ascertained whether the state court's decision rested on an adequate and independent nonfederal ground.[45] The Court found a sufficient basis for the decision under state law and accordingly dismissed the case as beyond its jurisdiction.[46] *Eustis* thus established the modern pattern of analysis.[47]

B. Methods of Disposition

Decisions since *Murdock* have focused on refining the Court's approach to state court rulings exhibiting ambiguous grounds of decision.[48] Case-law development has been haphazard,[49] however, because the Court has rarely explored the jurisdictional and federalism concerns underlying the doctrine.[50] Although principled grounds may exist for choosing one method of disposition over another,[51] the Court's

42. 87 U.S. at 635-36; *see* 16 WRIGHT & MILLER, *supra* note 3, § 4020, at 665-66.

43. 150 U.S. 361 (1893).

44. The Court approached this change in terms of the proper method for disposition of a case in which the federal issue was not dispositive. The Court noted that in earlier cases in which it had followed the *Murdock* approach, it had occasionally affirmed state court judgments, notwithstanding that it found an incorrectly decided federal issue. *Id.* at 370; *see supra* notes 41-42 and accompanying text.

45. 150 U.S. at 370.

46. *Id.*

47. 16 WRIGHT & MILLER, *supra* note 3, § 4020, at 666. Numerous cases illustrate this pattern. *See, e.g.*, Fox Film v. Muller, 296 U.S. 207 (1935); Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300 (1917); Allen v. Arquimbaw, 198 U.S. 149 (1905).

48. *E.g.*, Minnesota v. National Tea Co., 309 U.S. 551 (1940) (endorsing the vacating and remanding of ambiguous state decisions); International Steel & Iron Co. v. National Sur. Co., 297 U.S. 657 (1936) (granting continuance to allow parties to clarify basis for state court decision); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934) (explaining why dismissal proper when Court's jurisdiction is in doubt). *See generally* HART & WECHSLER, *supra* note 27, at 78-83 (discussion of various techniques); 16 WRIGHT & MILLER, *supra* note 3, § 4032 (reviewing the history of each method of disposition); Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 COLUM. L. REV. 822, 835-45 (1962) (in-depth examination of each method).

49. *See* Note, *supra* note 48, at 842-48 (criticizing the Court's lack of consistency).

50. *See id.* at 847-48. In *Herb v. Pitcairn*, 324 U.S. 117 (1945), the Court advanced several theoretical bases for the non-federal grounds doctrine. The Court, however, has rarely used these theories to guide its choice of one method of disposition over another. *See* HART & WECHSLER, *supra* note 27, at 482. For a discussion of *Herb*, see *infra* notes 61-66 and accompanying text.

51. *See* 16 WRIGHT & MILLER, *supra* note 3, § 4032, at 778-79. (suggesting that in deciding the proper approach to an ambiguous decision the Court should consider the efforts of the parties to establish the Court's jurisdiction, the likelihood that the state court rested its decision on federal

approach reflects primarily a desire for flexibility rather than doctrinal consistency.[52]

Until the mid-1930's dismissal remained the Court's principal method of disposing of state court decisions that clearly or possibly rested on an adequate and independent state ground.[53] The notion that the parties must prove jurisdiction underlies this approach. If the record did not affirmatively demonstrate grounds for jurisdiction, the parties had failed to satisfy their burden of proof and review was inappropriate.[54] Dismissal therefore involved a presumption that state court decisions exhibiting ambiguous grounds of decision rested on an adequate and independent state ground.[55]

In 1940, the Court began to vacate and remand state court judgments for clarification of the grounds of decision.[56] The Court adopted this approach in *Minnesota v. National Tea Co.*,[57] reasoning that forcing state courts to articulate the basis for their decisions minimized the possibility of Supreme Court intrusion into the province of state law and prevented the Court from indulging in "needless dissertations on constitutional law."[58] Vacating and remanding state court decisions also insured that "ambiguous or obscure adjudications" by state courts did not preclude review of federal issues.[59]

During this period, the Court began to grant continuances to allow the parties to seek a certificate from the state court evidencing the basis

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grounds, the possibility of undue delay, and the "ripeness" of the federal issue for present jurisdiction).

52. *See* Note, *supra* note 48, at 849 (ad hoc approach allows Court to avoid "thorny federal questions").

53. *Id.* at 835.

54. *See* Durley v. Mayo, 351 U.S. 277, 281 (1956); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 55 (1934); Johnson v. Risk, 137 U.S. 300, 307 (1890); Note, *supra* note 48, at 835-36.

55. *See* Michigan v. Long, 103 S. Ct. 3469, 3489 (1983) (Stevens, J., dissenting); Durley v. Mayo, 351 U.S. 277, 281 (1956); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 55 (1934); Johnson v. Risk, 137 U.S. 300, 307 (1890). The Court's disposition in Michigan v. Long, 103 S. Ct. 3469 (1983), creates the opposite presumption. *See infra* note 98 and accompanying text.

56. C. WRIGHT, *supra* note 1, at 752 & n.96. The Court has followed this approach on numerous occasions. *See, e.g.*, California v. Krivda, 409 U.S. 33 (1972) (per curiam); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Dixon v. Duffy, 344 U.S. 143 (1952); Minnesota v. National Tea Co., 309 U.S. 551 (1940). For a general discussion of this method, see Note, *supra* note 48, at 836-40.

57. 309 U.S. 551 (1940).

58. *Id.* at 557.

59. *Id. But cf.* Dixon v. Duffy, 344 U.S. 143, 147 (1952) (Jackson, J., dissenting) (questioning whether Court has power to vacate and remand when its jurisdiction is uncertain).

for its decision.[60] In *Herb v. Pitcairn*,[61] the Court strongly endorsed this approach, asserting that asking, rather than telling, state courts what they had held best served the interests of federalism.[62]

The *Herb* Court also considered the possibility that Supreme Court review of ambiguous state court decisions might result in advisory opinions.[63] The Court reasoned that if it presumed that a state court decision rested on a federal ground, the state court could reassert a state ground of decision on remand.[64] In that event, the Supreme Court's decision would not be dispositive of the parties' rights and would be merely advisory.[65] According to the *Herb* Court, the risk of advisory opinions supported seeking clarification of the state court's basis of decision.[66]

The Court's development of vacation and remand and continuance for clarification to resolve ambiguities in state decisions presupposed that the state court was the appropriate body to determine the basis for its own decision.[67] Nevertheless, the Court occasionally has under-

60. This technique originated in International Steel & Iron Co. v. National Sur. Co., 297 U.S. 657 (1936). *See* 16 WRIGHT & MILLER, *supra* note 3, § 4031, at 776-77; Note, *supra* note 48, at 840-41. The Court has employed this method of disposition on other occasions. *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528 (1963); Loftus v. Illinois, 334 U.S. 804 (1948).

61. 324 U.S. 117 (1945).

62. *Id.* at 127-28. Prior to *Herb*, the Court permitted parties to submit a certificate from the state court, stating that the decision rested on a federal question. *See, e.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 99 (1938); Whitney v. California, 274 U.S. 357, 361 (1927). The law of certificates is complex, involving, for example, what the certificate must say and who must sign it. *See* 16 WRIGHT & MILLER, *supra* note 3, § 4032, at 775-76; Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 HARV. L. REV. 111 (1949).

63. 324 U.S. at 126.

64. *Id.*

65. *Id. See also* Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting) (Court should carefully consider risk of advisory opinions when it reviews state decisions to correct state court interpretation of federal law); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965) (Court will not take jurisdiction when possibility exists that on remand the state court will reinstate its prior decision on a state ground basis); Fay v. Noia, 372 U.S. 391, 465 (1963) (Harlan, J., dissenting) (urging that risk of advisory opinions constitutes constitutional support for adequate and independent state grounds doctrine). For general discussions of the relationship between the advisory opinion doctrine and the nonfederal grounds doctrine, see 16 WRIGHT & MILLER, *supra* note 3, § 4021, at 688-93; *infra* notes 111-12 and accompanying text.

66. 324 U.S. at 126. Some states have statutes permitting certification of questions from federal courts to the state supreme court. Use of the certification technique by the Supreme Court accomplishes the same ends as vacation and remand or continuance for clarification. *See, e.g.*, Zant v. Stephens, 456 U.S. 410 (1982); Dresner v. City of Tallahassee, 375 U.S. 136 (1963).

67. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (Court should defer to state courts on questions of state law); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) (vacating and remanding ensures that responsibility for decision is "fairly placed").

taken to determine for itself whether a state court's decision rests on an adequate and independent state ground.[68] Although this practice began in 1917,[69] it has become increasingly prevalent within the last ten years.[70]

C. Modern Scrutiny

The Court usually considers two criteria in determining the independence of a state ground of decision.[71] First, the Court scrutinizes the state court's decision to determine whether the asserted state law ground is sufficiently interwoven with, and thus not independent of,[72] federal law. Alternatively, the Court examines the state court's reasoning to determine whether the state court's perception of federal law compelled its ruling.[73] If the Court makes either finding, it will assume

68. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 652-53 (1979) (Court examined state court decision and prior decisions of state supreme court to determine whether citation to state constitution indicated an adequate and independent state ground); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977) (examination of state court decision demonstrated that state court felt compelled by federal law to interpret state law as it did); Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917) (Court will examine state law ground of decision to determine if it is so interwoven with federal law as not to be independent); HART & WECHSLER, *supra* note 27, at 482.

69. *See* Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); 16 WRIGHT & MILLER, *supra* note 3, § 4029, at 748-49.

70. *See, e.g.*, Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Washington v. Chrisman, 455 U.S. 1, 5 n.2 (1982); Delaware v. Prouse, 440 U.S. 648, 652-53 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977).

Justice O'Connor recently made the following remarks:

> Recently, there has been a tendency for the Supreme Court to find no independent state ground and to assert its power to review if it appears that both federal and state constitutional provisions are cited by the state court, that the state cases generally follow the federal interpretation, and the state court does not clearly and expressly articulate its separate reliance on state grounds.

Address of Hon. Sandra D. O'Connor at The National Judicial College, Reno, Nev. (May 13, 1983).

71. *See infra* notes 72-73 and accompanying text. The Court occasionally considers other factors in determining the independence of state grounds of decision. *See, e.g.*, Konigsberg v. State Bar of Cal., 353 U.S. 252, 254-58 (1957) (Court examined the state court's opinion and held that no state ground for the California court's decision was independent of federal law).

72. The Court first employed this approach in Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917). *See also* Abie State Bank v. Weaver, 282 U.S. 765 (1931) (close connection between state procedural ground and federal law justifies Supreme Court review).

73. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); United Air Lines, Inc. v. Mahin, 410 U.S. 623, 630-31 (1973); Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1, 4 (1950). A leading commentary contends that Supreme Court review is entirely appropriate in this situation because the state court has not "properly understood [its] independence." 16 WRIGHT & MILLER, *supra* note 3, § 4029, at 751-52. Thus when a state court has acted

jurisdiction and review the state court decision.[74]

The Burger Court's increased scrutiny of state court decisions conserves time and judicial resources by eliminating the need for further state court consideration of its grounds of decision.[75] The Court's approach, however, presents several problems that obscure its advantages. The Court's level of scrutiny is likely to result in advisory opinions because the Supreme Court effectively presumes that a state court decision rests on federal law.[76] In addition, this approach intrudes upon the independence of state law because the Supreme Court determines what the state court held.[77]

The most significant problem is one of definition. Because the Warren Court expanded federal equal protection, due process, and criminal procedural guarantees, the seminal precedent in important areas of constitutional law consists of Supreme Court decisions.[78] Thus, state law has become increasingly interwoven with federal law, and, arguably, less independent as state courts have applied federal precedents to new fact situations. Even when a state court wishes to maintain the independence of its own constitution, the necessity of citation to federal precedent contributes to the ambiguity in the basis for a state court's judgment.[79]

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under perceived complusion of federal law, the proper course for the Court is to decide the federal issue and remand the case to the state court. *Id.*

74. *See Developments in the Law, supra* note 28, at 1341. *But see* Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965) (Court found that the state ground of decision was inextricably interwoven with federal law, but nevertheless refused to review).

75. *Cf.* Dixon v. Duffy, 344 U.S. 143 (1952) (Court heard argument and granted two continuances before vacating and remanding the state court's judgment because the state court denied it had the power to clarify a case in the Supreme Court).

76. The Court never admitted this presumption prior to its decision in Michigan v. Long, 103 S. Ct. 3469 (1983). *But cf.* South Dakota v. Neville, 103 S. Ct. 916, 925 (1983) (Stevens, J., dissenting) (arguing that Court's independent examination of state law ground invites presumption of state law dependency on federal law). For a discussion of the advisory opinion rationale, see *supra* notes 56-59 and accompanying text; *infra* notes 111-12 and accompanying text.

77. The intrusion results because the Supreme Court substitutes itself for the state court as the final arbiter of state law, implicitly claiming the right to interpret state law in the future. *See* 16 WRIGHT & MILLER, *supra* note 3, § 4021, at 679; *cf.* Project Report, *Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L. L. REV. 271, 314 (1973) (state law ground is independent whenever the state court declares that it is); *Developments in the Law, supra* note 28, at 1336 (adequate and independent state grounds rule concerned with assertion of independence by the state court).

78. *See Developments in the Law, supra* note 28, at 1336, 1350; *cf.* Johnson v. Louisiana, 406 U.S. 356, 375-77 (1972) (Powell, J., concurring in the judgment) (states should be free to experiment with "procedural alternatives" in criminal law).

79. *Developments in the Law, supra* note 28, at 1336. For a particularly graphic example of

In the Warren Court era, state courts that disagreed with Supreme Court expansion of constitutional guarantees often evaded the Court's decrees by using state procedural law to thwart implementation of federal rights.[80] In response, the Supreme Court restricted its definition of an adequate state ground.[81] Commentators have argued that state courts have attempted to evade the Burger Court's dilution of Warren era precedents by interpreting state constitutional guarantees more expansively than their federal counterparts.[82]

II. RECENT DEVELOPMENTS AND *MICHIGAN V. LONG*

Members of the Supreme Court have vigorously debated the proper function of the adequate and independent state grounds doctrine.[83] In

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the Supreme Court's use of this tendency to find jurisdiction, see Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982) (Court examined state decision cited by state court and found controlling federal precedent).

80. *See, e.g.*, Beatty, *State Court Evasion of the United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972). Professor Beatty cites Sullivan v. Little Hunting Park, Inc., 392 U.S. 657 (1968) as an example of the state court response. *Sullivan* involved the refusal by a nonprofit corporation that operated a community park to allow a member of the corporation to lease his share to a black. The Virginia Court of Appeals refused to hear the case because plaintiff's attorney had not complied with a state rule requiring written notice of appeal to opposing counsel of the filing papers involved in the appeal. The Supreme Court vacated the judgment and remanded to the state court to reconsider its decision in light of the Court's recent decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). On remand, the Virginia court adhered to its view that the plaintiff's procedural default barred consideration of his case. 209 Va. 279, 163 S.E.2d 588 (1968). The plaintiff took the case to the Supreme Court again, and the Court reversed on the merits, holding that the Virginia court had applied its procedural rule too stringently against the plaintiffs. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Beatty, *supra*, at 264-65. For a discussion of state court efforts to evade Supreme Court decisions in an earlier period, see Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954).

81. *See* Henry v. Mississippi, 379 U.S. 443 (1965) (state procedural grounds inadequate unless they serve a "legitimate state interests"); *see also* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965) (criticizing Court's setting of a lower standard for procedural as opposed to substantive grounds); Sandalow, *supra* note 38 (discussing impact of *Henry*).

82. *See, e.g.*, Falk, *The Supreme Court of California, 1971-1972—Forward: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976). *Cf.* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (Supreme Court Justice urging state supreme courts to provide greater protection of individual rights through expansive interpretations of state constitutional guarantees). For a collection of commentary on the modern state court tendency to give independent meanings to state constitutional provisions, see *Developments in the Law*, *supra* note 28, at 1328 n.20.

83. *See* Florida v. Casal, 103 S. Ct. 3100 (1983) (Burger, C.J., concurring in dismissal of

particular, Justices Marshall and Stevens have questioned whether recent applications of the doctrine preserve the independence of state law.[84] Their critique of the doctrine finds expression in a series of dissents culminating in Justice Stevens' dissent in *South Dakota v. Neville*.[85]

In *Neville*, Justice Marshall joined Justice Stevens in asserting that the adequate and independent state ground doctrine constitutes a rigid jurisdictional barrier.[86] Justice Stevens flatly stated that the Court lacks power to review state court decisions that rest on both the state and federal constitutions.[87] In the dissent's view, the risk of producing

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certiorari) (impliedly questioning whether state court should have power to accord criminal defendant greater rights than those prescribed by Supreme Court interpretations of fourth amendment); Orr v. Orr, 440 U.S. 268, 285 (1979) (Powell, J., dissenting) (Court should not decide federal issue when state law is unsettled and is possibly dispositive of the issue).

Members of the Supreme Court often have disagreed over whether particular cases present an adequate and independent state ground. *Compare, e.g.,* Montana v. Jackson, 103 S. Ct. 1418 (1983) (impliedly finding adequate and independent state ground) *and* Black v. Cutter Laboratories, 351 U.S. 292 (1956) (finding adequate nonfederal ground) *with* Montana v. Jackson, 103 S. Ct. 1418, 1418 (1983) (Stevens, J., dissenting) (Montana court decision clearly based on state law) *and* Black v. Cutter Laboratories, 351 U.S. 292, 300 (1956) (Douglas, J., dissenting) ("no doubt" as to lack of adequate nonfederal ground).

The Justices similarly have debated the proper method of disposition of state court decisions exhibiting ambiguous grounds of decision. *See, e.g.,* Department of Motor Vehicles v. Rios, 410 U.S. 425, 426 (1973) (per curiam) (vacating and remanding for clarification); *id.* at 427 (Douglas, J., dissenting) (characterizing vacation and remand as an "unhappy" practice); Dixon v. Duffy, 344 U.S. 143, 146 (1952) (vacating and remanding); *id.* at 147 (Jackson, J., dissenting) (Court should not assume jurisdiction when existence of federal ground of decision is in doubt); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) (vacating and remanding); *id.* at 558 (Hughes, C.J., dissenting) (dismissal is proper approach when federal jurisdiction is uncertain).

84. *See* South Dakota v. Neville, 103 S. Ct. 916, 924 (1983) (Stevens, J., dissenting); California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 95 (1981) (Stevens, J., dissenting); Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting).

85. 103 S. Ct. 916 (1983). *See infra* notes 86-89 and accompanying text (discussing Neville). *See also infra* note 89 (discussing Justice Stevens' dissent in California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 94 (1981), and Justice Marshall's dissent in Oregon v. Hass, 420 U.S. 714, 726 (1975)).

86. *Id.* at 926 (Stevens, J., dissenting).

87. *Id.* The Court in *Neville* addressed a South Dakota statute that permitted, at a driver's trial for driving while intoxicated, the introduction of evidence that the driver had refused to take a blood alcohol test. The South Dakota Supreme Court held that the introduction of this evidence violated the privilege against self-incrimination contained in both the fifth amendment to the federal constitution and article VI, section 9 of the South Dakota Constitution. State v. Neville, 312 N.W.2d 723, 726 (S.D. 1981).

The majority concluded that the South Dakota Supreme Court initially had held that the statute violated the fifth amendment, and then, without further analysis, had also found a violation of the state consitution. South Dakota v. Neville, 103 S. Ct. at 919 n.5. Justice Stevens thought it clear that the South Dakota Supreme Court's holding rested independently on the state constitution.

advisory opinions compels the Court to presume that state law is independent.[88] Justice Stevens reasoned that a contrary presumption would reduce state constitutions to a "mere shadow" of the federal constitution and engage the Court in "paternalistic" and "unsolicited" revision of state law.[89]

In *Michigan v. Long*,[90] the Court emphatically rejected these views. Substantively, *Long* addressed a challenge to a Michigan Supreme Court decision which held that "stop and frisk" searches of persons in

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Id. at 925 (Stevens, J., dissenting). He found the majority's jurisdictional holding particularly objectionable because of the South Dakota Supreme Court's declaration in State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976), *on remand from* 428 U.S. 364 (1976), that the state constitution has an "independent nature." South Dakota v. Neville, 103 S. Ct. at 926 (Stevens, J., dissenting).

88. South Dakota v. Neville, 103 S. Ct. at 925-26 (Stevens, J., dissenting).

89. *Id.* at 925 (Stevens, J., dissenting).

The Supreme Court of South Dakota reinstated its former decision on remand from the Supreme Court, holding that the South Dakota Constitution mandated its result. State v. Neville, 346 N.W.2d 425 (S.D. 1984). The South Dakota court reaffirmed its position in State v. Opperman, 247 N.W.2d 673 (S.D. 1976), that the South Dakota Constitution has an "independent nature." 346 N.W.2d at 427. *See supra* note 87 (discussing *Opperman*). Supreme Court recognition of the independence of the South Dakota Constitution remains unclear absent continual reassertions of independence by the South Dakota courts. *See infra* notes 143-46 and accompanying text.

Justices Stevens and Marshall also expressed their views of adequate and independent state grounds in California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 94 (1981) (Stevens, J., dissenting), and Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting). In *Hass*, the Supreme Court rejected respondent's argument that a decision of the Oregon Supreme Court rested on an independent state ground. *Id.* at 719-20. The Court reviewed the decision on the merits and reversed the state court's holding concerning the scope of the privilege against self-incrimination. *Id.* at 724. Justice Marshall dissented from the majority's finding that no sufficient state ground existed. *Id.* at 727-28 (Marshall, J., dissenting). He asserted that although the opinion of the Oregon court did not mention or cite state law, the decision nevertheless may have rested on a nonfederal ground. *Id.*

Justice Marshall also expressed concern about the Court's increasing tendency to review state court decisions that uphold claims of criminal defendants to certain procedural rights under the Constitution. *Id.* at 726 (Marshall, J., dissenting). He argued that the principal danger inherent in this practice is the risk of giving advisory opinions. *Id.* In addition, he asserted that Supreme Court review of state court decisions that enhance criminal procedural rights does not serve any federal interest. *Id.* at 728-29 (Marshall, J., dissenting). Justice Marshall proposed that the Supreme Court should concern itself with state court decisions reversing convictions only when federal law compelled the state court's ruling. *Id.* at 729 (Marshall, J., dissenting).

In *Cooper*, Justice Stevens objected to the majority's decision to review a state court decision that may have rested on state law. California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. at 95 (Stevens, J., dissenting). Justice Stevens reiterated Justice Marshall's argument that the risk of giving advisory opinions compels the Court to limit its review to state court decisions resting solely on federal law. *Id.* at 98 (Stevens, J., dissenting) (citing Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196 (1965)).

90. 103 S. Ct. 3469 (1983).

automobiles could not extend to the interior of the car.[91] The defendant attempted to prevent Supreme Court review by arguing that the decision rested on an independent state ground. He asserted that Michigan courts interpret the Michigan constitution's search and seizure provision more expansively than the Supreme Court interprets the fourth amendment.[92]

In responding to the defendant's contention, the Court reviewed its traditional methods of resolving ambiguous state court decisions and found deficiencies in each method.[93] First, it found that vacation and remand and continuance for clarification unduly delay the judicial process and burden the state courts.[94] Second, the Court stated that dismissal of state court decisions resting largely on federal precedent impedes the development of case law.[95] The Court reasoned that federalism interests require a more consistent approach to ambiguous state court decisions than the Court's previous "ad hoc" method of analysis.[96]

Seeking a solution to these problems, the majority concluded that recognition of state court independence and appreciation of the danger of advisory opinions required the Court to enunciate a clear rule.[97] The Court held that in reviewing state court cases exhibiting ambiguous grounds of decision, it would presume that the state court had rested its decision upon federal law.[98] To implement this presumption,

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91. *Id.* at 3473-74. Sheriff's deputies found Long's car in a ditch by the road in a rural area. When the deputies approached the car, Long met them at its rear. After repeated requests for identification from the deputies, Long began to walk toward the car. The deputies then patted down Long and looked into the car where they saw a large hunting knife. Upon further investigation of the interior of the automobile, the deputies discovered a pouch of marijuana. A search of the trunk followed, and the deputies found seventy-five pounds of marijuana. *Id.* For a definition of a "stop and frisk" search, see Terry v. Ohio, 392 U.S. 1 (1968).

92. 103 S. Ct. at 3474. The Michigan Supreme Court held that the search of the defendant's vehicle violated "the Fourth Amendment to the United States Constitution and art. I, § 11 of the Michigan Constitution." People v. Long, 413 Mich. 461, 469, 320 N.W.2d 866, 868 (1982).

93. 103 S. Ct. at 3475. For a discussion of the Court's various methods of disposing of ambiguous state court decisions, see *supra* notes 48-69 and accompanying text.

94. 103 S. Ct. at 3475.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 3476. Justice O'Connor, writing for the Court, phrased the presumption as follows:

> [W]hen . . . a state court decision fairly appears to rest primarily on 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 federal law required it to do so.

the majority formulated the "plain statement rule."[99] Under this requirement, a state court may preclude Supreme Court review only if it "clearly and expressly" indicates that its decision rests on a "bona fide separate, adequate, and independent" state ground.[100]

In the majority's view, this approach minimizes Supreme Court intrusion into state law while allowing for vindication of federal rights and uniformity of federal law.[101] In addition, according to the Court, the presumption that a state court decision does not contain an adequate and independent state ground alleviates the danger of advisory opinions.[102] Thus the Court emphasized clarity and uniformity in fashioning a jurisdictional standard.

Justice Stevens dissented,[103] arguing that history and policy com-

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Id. Cf. Address by Hon. Sandra D. O'Connor at The National Judicial College, Reno, Nev. (May 13, 1983), *supra* note 69 (using similar language to describe the Court's standard in evaluating the independence of state court decisions prior to *Long*).

99. *Id.* The Court's statement of the rule is as follows:

> 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.

Id.

100. *Id.* at 3476. The Court applied the rule to the Michigan Supreme Court's decision and assumed jurisdiction. The Court found that the Michigan court's two unadorned citations to the Michigan Constitution did not constitute a plain statement. *Id.* at 3477-78. In addition, the Court analyzed state law to determine whether Michigan courts interpreted the state constitution's search and seizure provision consistently with the Court's interpretations of the fourth amendment. *Id.* at 3478 n.10. Relying on Michigan precedent, the Court concluded that the procedural rights of arrested marijuana users under the Michigan constitution are identical to those mandated by the fourth amendment. *Id.* One commentator has argued that the Court overlooked or ignored Michigan precedent that would have dictated a different result. Collins, *Plain Statements: The Supreme Court's New Requirement,* 70 A.B.A. J. 92, 94 (Mar. 1984).

101. 103 S. Ct. at 3476.

102. *Id.* at 3475-77. The Court did not elaborate its consideration of the advisory opinion doctrine. Instead, it merely noted that the *Long* presumption did not "authorize" the rendering of advisory opinions, *id.* at 3476, and that it was not uncommon for the Court to employ jurisdictional presumptions. *Id.* at 3477 n.8.

103. *Id.* at 3489 (Stevens, J., dissenting). Justice Blackmun concurred on the merits, *see supra* note 91 and accompanying text, but declined to join the Court in "fashioning a new presumption of jurisdiction over cases coming here from state courts." 103 S. Ct. at 3483 (Blackmun, J., concurring in part and concurring in the judgment). Justices Brennan and Marshall agreed with the majority that the Court properly had jurisdiction because the Michigan courts had indicated that the state's search and seizure provision would be interpreted harmoniously with the Supreme Court's reading of the fourth amendment when searches and seizures of narcotics were involved.

pelled the Court to presume that ambiguous state court decisions rest on adequate and independent state grounds.[104] In Justice Stevens' view, federalism concerns, the risk of producing advisory opinions, and "sound management of scarce federal judicial resources" militated against the majority's presumption that ambiguous state court decisions rest on federal law.[105] He asserted that no compelling reason exists for the Court to review state court decisions that uphold a citizen's assertion of rights protected under both state and federal law.[106] According to Justice Stevens, the Court should concern itself solely with vindication of federal rights that state courts have refused to protect.[107] Justice Stevens concluded that the Court's desire for uniformity[108] simply did not warrant alteration of the nonfederal ground doctrine.[109]

Although the Court's holding in *Long* clarifies a murky area of federal jurisdiction, it also raises theoretical and practical problems for the nonfederal grounds doctrine.[110] By subjecting a larger number of state court decisions exhibiting ambiguous grounds of decision to Supreme Court review, the *Long* Court's presumption of jurisdiction may increase the risk of rendering advisory opinions.[111] Supreme Court review of a state court decision resting on both state and federal grounds leaves the state court free on remand to reinstate its judgment on the state ground. Supreme Court review of a federal issue in an ambiguous case therefore may not affect the outcome of the case.[112] If, however,

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Id. at 3483 n.1 (Brennan, J., with whom Marshall, J., joins dissenting); *see supra* note 100. Justices Brennan and Marshall dissented on the merits. 103 S. Ct. at 3483-89 (Brennan, J., dissenting).

104. 103 S. Ct. at 3489 (Stevens, J., dissenting).

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

106. *Id.* In Justice Stevens' view, a federal interest arises only when a state denies its citizens a federal right. The desire of a Michigan court to accord its citizens enhanced procedural rights should be of no more interest to the Court than, in Justice Stevens' analogy, the Republic of Finland's desire to "overprotect" its citizens. *Id.*

107. *Id.*

108. *See supra* note 95 and accompanying text.

109. 103 S. Ct. at 3491 (Stevens, J., dissenting). Justice Stevens asserted that "the 'need for uniformity in federal law' is truly an ungovernable engine. That same need is no less present when it is perfectly clear that a state ground is both independent and adequate." *Id.*

110. *See infra* notes 111-16 and accompanying text.

111. *See supra* note 102 and accompanying text (*Long* Court's inattention to advisory opinion doctrine). The concern that the Court's decision will not affect the outcome of the case historically has been one of the Court's principal reasons for declining jurisdiction of state court decisions exhibiting ambiguous grounds of decision. *See* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 198 (1965); Herb v. Pitcairn, 324 U.S. 117, 126 (1945); *supra* notes 63-66 and accompanying text.

112. Commentators have observed that the rationale underlying the advisory opinion doctrine

state courts respond to *Long* by plainly stating the grounds for their decisions, the *Long* rule will reduce the risk of advisory opinions. In this view, Supreme Court review of state court decisions resting on federal issues will preclude state courts from reinstating their decisions on remand.

The *Long* rule also detracts from the Court's ability to employ various methods to implement the nonfederal grounds doctrine.[113] Prior to *Long*, the Court used various approaches to sharpen ambiguous issues,[114] delay consideration, clarify the state court's ruling,[115] or avoid decision entirely.[116] *Long*'s rigid presumption may sacrifice this flexibility for clarity and uniformity.

Long's effect on the independence of state law is more difficult to gauge.[117] The "plain statement rule" imposes a high standard on state courts.[118] If a state court wishes to insulate its judgment from Supreme Court review, its decision must indicate "clearly and expressly that it is alternatively based on a bona fide separate, adequate, and independent state ground."[119] Each element of this standard presents a question of definition. For example, the Supreme Court might doubt the bona fides of a state court decision that concludes, after exclusively relying

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is inapplicable to the adequate and independent state grounds rule. *See* Bice, Anderson *and the Adequate State Ground,* 45 S. CAL. L. REV. 750, 765 (1972); Sandalow, *supra* note 38, at 203. These commentators note that the advisory opinion doctrine traditionally ensures that a court's decision rests on an adversary presentation of the issues and a concrete fact situation. These concerns are not present when the Court decides a federal issue that may not be dispositive of the parties' rights. Thus although the *Long* rule may not preclude the Court from rendering opinions that do not determine the outcome of the case, little chance exists that the *Long* presumption will result in the Court's delivering opinions on "sterilized and mutilated issues." *See* Frankfurter, *A Note on Advisory Opinions,* 37 HARV. L. REV. 1002, 1006 (1924).

113. *See supra* notes 48-69 and accompanying text.

114. *See, e.g.,* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 200-01 (1965) (Court sought clarification from state court in case involving statute imposing liability for support of indigent state mental patients on relatives because of "importance and widespread interest in the case"); HART & WECHSLER, *supra* note 27, at 482-83.

115. *See, e.g.,* Herb v. Pitcairn, 324 U.S. 117, 127-28 (1945) (Supreme Court should ask, rather than tell, a state court what it held).

116. *See, e.g.,* Black v. Cutter Laboratories, 351 U.S. 292 (1956) (Court dismissed California Supreme Court judgment which allowed discharge of an employee because she was a communist even though state decision seemed to rest solely on federal grounds); Note, *supra* note 48, at 844, 849.

117. The *Long* Court observed that its new approach would "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference." 103 S. Ct. at 3476.

118. *See supra* notes 98-99 and accompanying text.

119. 103 S. Ct. at 3476; *see supra* note 99 (quoting the *Long* Court's plain statement rule).

on federal precedents, that a challenged action violated the state constitution.[120]

Other problems are foreseeable in those states whose highest state court announces as a matter of policy that the state's constitution operates independently of federal law.[121] The Court did not indicate in *Long* whether it would accept broad state court assertions of independence.[122] The Court may insist that state courts reassert the independence of their constitutions in every decision interpreting overlapping questions of state and federal law.[123] Supreme Court review of a particular decision therefore may depend on the state court's mechanical reassertion of independent state grounds.[124]

Although the Supreme Court's implementation of the plain statement rule may result in an intrusion on the province of the state courts,[125] the *Long* holding also could encourage greater independence for state law.[126] *Long* places the responsibility for the assertion of state law independence directly upon state court judges and indirectly upon state legislatures and citizens. Under the *Long* rule, each state court is responsible for deciding whether its interpretations of important state constitutional provisions will diverge from interpretations of corresponding provisions of the federal constitution. After *Long*, a state court abdicates its responsibility to make this choice if it decides a

120. Prior to *Long* the Court probably would have assumed jurisdiction in such a case. *See, e.g.*, Oregon v. Kennedy, 456 U.S. 667, 671 (1982) (the Court, after reviewing an Oregon Court of Appeals decision that cited several Supreme Court cases and one state case, observed that the state case actually was based on federal precedent and therefore the possible state ground was not independent).

121. At least one state made such an announcement prior to *Long*, only to have its declaration ignored in the Supreme Court. *See supra* note 87 (discussing State v. Opperman, 247 N.W.2d 673 (S.D. 1976) and the Supreme Court's failure to take notice in South Dakota v. Neville, 103 S. Ct. 916 (1983)). Other state courts have made post-*Long* declarations of independence. *See, e.g.*, State v. Ball, 471 A.2d 347 (N.H. 1983); State v. Kennedy, 295 Or. 260, 271, 666 P.2d 1316, 1323 (1983).

122. The Court's language in *Long* speaks of the requirement that state court decisions, rather than state courts themselves, make a "plain statement" of the basis for decision. *See* 103 S. Ct. at 3476; *see also supra* text accompanying note 119.

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

124. *See* Collins, *supra* note 100, at 93 (arguing that the Supreme Court will require a "plain statement" in every state decision).

125. *See* Collins, *supra* note 100, at 92 (arguing that requirement of plain statement will increase Court's ability to upset state court decisions protecting individual rights).

126. *See, e.g.*, State v. Chrisman, 100 Wash.2d 814, 818, 676 P.2d 419, 422 (1984) (plain statement rule will "foster the development of state law free from federal interference"); *infra* notes 127-28 and accompanying text.

question of constitutional law on ambiguous grounds.[127]

State court reaction to *Long* also will determine the plain statement rule's contribution to judicial efficiency.[128] If problems in defining the elements of the rule do not impede the Court,[129] its application will simplify the Court's jurisdictional determinations. In addition, the plain statement rule should conserve judicial resources by eliminating time-consuming remands and continuances.[130] If, however, state courts choose to render decisions grounded in the federal constitution, the number of cases over which the Court potentially has jurisdiction will increase.[131]

III. THE STATE RESPONSE

A. Possible State Responses

Prior to *Michigan v. Long*, state courts could use the adequate and independent state grounds doctrine to insulate their decisions from political and judicial review.[132] In most instances, if the state court rested its decision on both state and federal law, the Supreme Court would decline review.[133] At the same time, the federal basis for the decisions discouraged state legislatures from acting to change state laws

127. *See, e.g.*, State v. Jackson, 672 P.2d 255, 264-65 (Mont. 1983) (Shea, J., dissenting) (ambiguous majority decision constitutes abdication of court's responsibility to maintain independence of state constitution); State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1323 (1983) (state courts should not abdicate their responsibility for maintaining independent state constitutional guarantees); Brown v. State, 657 S.W.2d 797, 806 (Tex. Crim. App. 1983) (Teague, J., dissenting) (blind adherence to Supreme Court interpretations is an abdication of the court's role as final arbiter of state law).

128. *See infra* notes 129-30 and accompanying text.

129. *See supra* notes 117-20 and accompanying text.

130. *See* Michigan v. Long, 103 S. Ct. at 3475 (discussing delay as a rationale for modifying nonfederal grounds doctrine).

131. The Court recently has exhibited a preference for reviewing state court decisions that accord defendants enhanced rights under the federal constitution. In 1982, for example, the Court granted four out of ten petitions in which the state sought review of a state court decision sustaining a defendant's claim. In the same year, the Court did not review any cases brought by a defendant claiming a state court denial of a constitutional right. Collins, *supra* note 100, at 92 (citing Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L. Q. 819 (1984)); *see also* Florida v. Meyers, 104 S. Ct. 1852, 1855 (1984) (Stevens, J., dissenting) (noting Court's tendency in criminal cases to grant prosecution's petition for certiorari and then to reverse summarily a lower court's reversal of a conviction).

132. *See* Bice, *supra* note 112, at 757.

133. *See, e.g.*, Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934). *But see, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (state court

that supported the decisions.[134] Thus the nonfederal grounds doctrine historically has encouraged state court independence and irresponsibility.

State courts now must make their decisions subject to review by state political authorities or by the Supreme Court.[135] Depending on the state court's response, a state's law will become either inextricably interwoven with federal law, or, beyond federal minimum guarantees, independently determined by the state's legislature and judiciary.[136] *Michigan v. Long* thus poses a challenge to the states.

States can respond to this challenge in essentially two ways. First, a state can require its courts, by constitutional amendment[137] or judicial fiat,[138] to harmonize their interpretations of the state constitution with

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decision resting on both state and federal law is subject to Supreme Court review because state court felt constrained to rule as it did by federal law).

134. *See* Bice, *supra* note 112, at 757. *But see* Falk, *supra* note 82, at 276 (arguing that Supreme Court review of state court decisions grounded in state and federal law would place undue political pressure on state courts if the Supreme Court reversed the federal law holding).

135. A decision on state grounds alone leaves the court's decision open to review by the state political process. *See infra* note 137. A decision on federal grounds or on ambiguous grounds now allows for Supreme Court review. Michigan v. Long, 103 S. Ct. 3469, 3476 (1983); *see supra* notes 98-99 and accompanying text.

136. *See infra* notes 150-54 and accompanying text.

137. *See, e.g.,* FLA. CONST. art. I, § 12 (amendment to search and seizure provision of Florida Constitution requires Florida courts to construe provision "in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court"); *see also* Florida v. Casal, 103 S. Ct. 3100, 3101-02 (1983) (Burger, C.J., concurring) (endorsing Florida constitutional amendment as a step toward guaranteeing "rational law enforcement"). In California, the electorate has passed a constitutional amendment of narrower scope but similar effect. In 1974, in response to the California Supreme Court's decision in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972), that capital punishment constituted cruel and unusual punishment under the California Constitution, the people of California added art. I, § 27 to the state constitution, overturning *Anderson. See.* CAL. CONST. art. I, § 27. *See generally* Collins, *Quarrels, Quotas and Darwinism: What's Happening in State Courts,* Nat'l L.J., Jan. 2, 1984, at 20, col. 4 & n.19.

Although these amendments seem to bring state law into accord with federal law, decisions grounded in these amendments may not raise federal questions. A Florida court decision, for example, based solely on the Florida search and seizure provision would not be reivewable by the Supreme Court if it did not restrict federally guaranteed rights. The remedy for such a state court misinterpretation of federal law would rest with the state's legislature, not with the Supreme Court. *Cf.* Bice, *supra* note 112, at 757; *supra* notes 132-33 and accompanying text.

138. *See, e.g.,* State v. Jackson, 672 P.2d 255, 258, 260 (Mont. 1983) (Montana constitutional privilege against self-incrimination affords no greater protection than fifth amendment privilege); Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (court interprets state constitution consistently with Supreme Court's interpretations of fourth amendment).

federal precedents.[139] States adopting this approach presume that certain state constitutional guarantees should not assume independent viability or significance.[140]

This presumption ignores the possibility that a state court interpretation of a state constitution might take local considerations into account.[141] Even if a state court decision clearly depended on such local factors, applying this harmonizing approach precludes a state decision from resting on an independent nonfederal ground and subjects the decision to federal review. Moreover, given the vast number of new fact patterns confronting a state court each year,[142] the feasibility of achieving complete accord with federal precedents by implementing this approach seems doubtful.

State courts can also respond to *Long* by declaring that state law is independent of federal law, either as a matter of general policy or in specific cases. The *Long* Court clearly contemplated the latter alternative.[143] This selective approach has the advantage of allowing a state

139. This approach is defensible on the ground that most state constitutional provisions derive from and are identical to those in the federal constitution. *See supra* notes 137 & 138.

140. *See* State v. Jackson, 672 P.2d 255, 260 (Mont. 1983) (finding no indication that the framers of the Montana constitution's privilege against self-incrimination intended it to be different from the fifth amendment privilege). *But see* People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972) (court found that the framers of California's constitutional prohibition against cruel *or* unusual punishment intended that the provision have a meaning separate from eighth amendment's prohibition against cruel *and* unusual punishment); State v. Ball, 471 A.2d 347 (N.H. 1983) (New Hampshire constitutional ban on unreasonable searches and seizures predates the fourth amendment to the federal constitution and thus does not necessarily accord the same protection); State v. Chrisman, 100 Wash. 2d 814, —, 676 P.2d 419, 422 (1984) (difference in wording of state search and seizure provision justifies difference in meaning).

141. *See Developments in the Law, supra* note 28, at 1360-61 & nn.144-48 (referring to local considerations as "state-specific" factors, and listing as examples distinctive state constitutional provisions, the state's history, established state precedents, and "distinctive attitudes of a state's citizenry"); *see also id.* at 1360 n.142 (noting commentators who emphasize the importance of these factors).

142. In 1982, for example, over twelve million criminal cases were filed in state courts. Michigan v. Long, 103 S. Ct. 3469, 3477 n.8 (1983) (citing 7 STATE COURT J. 18 (1983)).

143. *See id.* at 3476. The Court in *Long* referred to state court decisions rather than state courts themselves. For example, in its formulation of the plain statement rule, the Court declared that "state court decisions" must clearly indicate that they are based on state law. *Id. See supra* notes 119 & 123 and accompanying text.

State courts seem to be responding to *Long* by issuing "plain statements" of state law independence on a decision-by-decision basis. A number of state courts recently have included a simple footnote stating that the court's decision rested on an independent state ground. *See, e.g.,* State v. Ferrell, 191 Conn. 37, n.12, 463 A.2d 573, 578 n.12 (1983); State v. Bruzzese, 94 N.J. 210, 217 n.3,

court to determine when state policies or practices make it advisable to deviate from federal precedents.[144] In addition, a state court announcement of independence as a matter of general policy probably would not preclude Supreme Court review of ambiguous state court decisions.[145] Supreme Court acceptance of a general declaration of state law independence would subvert the plain statement rule because the Court would review decisions from states with a general policy of independence only if it found a plain statement that a decision rested on federal law.[146]

B. Michigan v. Long*: Federalism and Flexibility*

The Court's holding in *Michigan v. Long*[147] arguably intrudes on state court authority to offer criminal defendants greater procedural protection than the federal constitution mandates.[148] In addition, the Court's consideration of the relationship of the advisory opinion doctrine to the plain statement rule is seriously flawed.[149] Yet, flexible Court administration of the *Long* rule will serve the federalism and

463 A.2d 320, 324 n.3 (1983), *cert. denied,* 104 S. Ct. 1295 (1984); *In re* T.R. 465, 502 Pa. 165, 167 n.3, 465 A.2d 642, 643 n.3 (1983).

144. *See infra* note 161 and accompanying text (discussing the importance of state policies in formulating state guarantees that are independent of the federal constitution).

145. *See supra* notes 87 & 89 (discussing Supreme Court's refusal to accept general declaration by the South Dakota Supreme Court that the South Dakota Constitution has an "independent nature"). The Supreme Court of New Hampshire and the Supreme Court of Oregon have made similar general policy declarations. *See* State v. Ball, 471 A.2d 347, 352 (N.H. 1983); State v. Kennedy, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983).

146. As an alternative to a general declaration of independence, a state court could resolve all state law claims presented by the parties before considering any federal claims. Under this approach, however, state law would not be dispositive of the case. *See, e.g.,* State v. Ball, 471 A.2d 347 (N.H. 1983). This two-step approach is similar to a proposal Justice Marshall suggested in Oregon v. Hass, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting). Justice Marshall contended that the Court should not review a state court decision unless the state court has resolved all possible state law issues. *See* Galie & Galie, *supra* note 10 (discussing Justice Marshall's proposal); *supra* note 89 (discussing Justice Marshall's *Hass* dissent); *see also* Paschall v. Christie-Stewart Co., 414 U.S. 100 (1973) (per curiam) (Court vacated state court decision and remanded for consideration of state law issue that Court itself discovered and that might have been dispositive of the case); *cf.* Massachusetts v. Upton, 104 S. Ct. 2085, 2090-91 (1984) (Stevens, J., concurring in the judgment) (arguing that state supreme court should resolve the meaning of state constitutional provisions before it ventures into federal law).

147. 103 S. Ct. 3469 (1983); *see supra* notes 90-109 and accompanying text.

148. *Id.* at 3490 (Stevens, J., dissenting); *see also* Collins, *supra* note 100, at 92 (criticizing Court's intrusion as "lopsided federalism").

149. *See supra* notes 111-12 and accompanying text.

jurisdictional interests protected by the adequate and independent state grounds rule.

The *Long* rule furthers federalism interests in several distinct ways. First, it will delineate clearly the respective spheres of state and federal law. State law will become either independent of or congruent with federal law.[150] Second, the Court's holding in *Long* enhances the ability of state courts to experiment in the development of new principles of constitutional law.[151] State courts may perceive that state history and conditions compel an expansion of federal guarantees.[152] State judges who interpret state constitutions expansively will, however, be subject to possible restrictions imposed by the political process.[153] Third, the *Long* rule undermines Justice Stevens' argument that the Court should not concern itself with state court decisions that uphold assertions of federal rights.[154] Unambiguous state court declarations of the basis for their decisions will limit Supreme Court jurisdiction to review of decisions grounded in federal law. Although the Court can implement federal policies most effectively by reviewing decisions that deny federal rights, review of state court decisions that broaden federal constitutional rights does not intrude upon the independence of state law.

These federalism concerns dictate that the Supreme Court accept at face value state court "plain statements" that a decision independently rests on state law. If the Court regularly scrutinizes and rejects state court announcements that a decision rests on state law, the clarity and consistency the *Long* Court sought to achieve will remain unrealized.[155]

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150. *See supra* notes 125-27 and accompanying text.

151. *See supra* note 35 and accompanying text.

152. *See supra* note 140 and accompanying text (discussing State v. Ball, 471 A.2d 347 (N.H. 1983)).

153. For a discussion of the role of the political process in connection with the adequate and independent state grounds doctrine, see *supra* notes 132-34 and accompanying text and note 137.

State court judges also may hesitate to assert independence because of another aspect of the political process: the vote. Only three states provide their judges with the same kind of tenure and salary protection that federal judges enjoy. *See Developments in the Law, supra* note 30, at 1351-52 & n.92 (asserting that lack of state judge independence may make these judges more responsive to the popular will).

154. *See supra* notes 106-07 and accompanying text.

155. *But see* Colorado v. Nunez, 104 S. Ct. 1257 (1984). In *Nunez*, the Court dismissed a writ of certiorari after concluding that the Supreme Court of Colorado based its decision on an independent state ground. Justice White concurred in the dismissal, but expressed his opinion that federal law mandated the result reached by the Colorado court. *Id.* at 1257-59 (White, J., concurring in dismissal of certiorari). In a separate opinion, Justice Stevens characterized Justice White's

Similarly, the Court must not set too low the standard for finding a plain statement. If the Court finds plain statements and thus independent state grounds in every state court citation to state law, the opportunities for clarifying federal law will decrease, and the Court's role in the federal system will shrink. Pre-*Long* precedent indicates that this result is improbable.[156]

In addition, state court response to *Long* is vital to the *Long* rule's smooth operation and to the preservation of the federal-state balance fostered by the adequate and independent state grounds doctrine. The advantages of the *Long* rule will not materialize if state courts continue to hold in sweeping terms that challenged actions violate both the state and federal constitutions. The danger of advisory opinions will remain constant,[157] the burdens on judicial efficiency will continue,[158] and the respective spheres of state and federal law will remain undefined.[159]

Finally, the Supreme Court must apply the *Long* rule flexibly. The Court noted in *Long* that it may employ pre-*Long* methods of disposition[160] when "necessary and desirable."[161] The Court should not hesitate to seek clarification of ambiguous state court decisions when it will serve other jurisdictional policies.[162] Thus, for example, the Court could vacate and remand a state court decision when the parties have

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opinion as advisory and intrusive on state law. *Id.* at 1259 (Stevens, J., concurring in dismissal of certiorari). *See also* Florida v. Casal, 103 S. Ct. 3100 (1983) (Burger, C.J., concurring in dismissal of certiorari) (arguing that suppression of seized marijuana under the Florida Constitution not required by federal law or Supreme Court decisions); Collins, *Justice Stevens Becomes Advocate of States' Role in the High Courts,* Nat'l L.J., Aug. 27, 1984, at 20, col. 3 (Justice White's *Nunez* opinion a "classic example of an advisory opinion").

156. *See, e.g.,* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); *supra* notes 70-82 and accompanying text.

157. *See supra* notes 63-66 & 111-12 and accompanying text.

158. *See supra* notes 128-31 and accompanying text.

159. *See supra* notes 125-27 and accompanying text.

160. *See supra* notes 48-69 and accompanying text.

161. Michigan v. Long, 103 S. Ct. 3469, 3476 n.6 (1983).

162. In Capital Cities Media, Inc. v. Toole, 104 S. Ct. 2144 (1984) (per curiam), the Court indicated that it has not abandoned pre-*Long* methods of disposition. In *Toole,* the Court granted certiorari, vacated the judgment, and remanded the case to the state court for clarification. *Id.* The Court reviewed the case after the Supreme Court of Pennsylvania had denied, without opinion, a newspaper's request for a writ of prohibition against a judge who had barred the press from a criminal trial. The Court stated that it was unable to determine if the Pennsylvania Supreme Court had refused to address the federal question or had grounded its decision on state law. *See also* Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978) (Pennsylvania court denied petition for writ of mandamus; Court vacated and remanded for clarification).

failed to present clearly the issue to the state court.[163] This action would reduce frivolous attempts to obtain Supreme Court review. In addition, the Court could use dismissal to force state courts to adhere to the plain statement rule.[164] Denial of Supreme Court review could motivate state attorneys general who are unable to have their cases heard to pressure state courts for a clear statement of the grounds of decision.

IV. CONCLUSION

If the Supreme Court intended its decision in *Michigan v. Long* to clarify the adequate and independent state ground doctrine, then it has succeeded.[165] If the Court intended the *Long* presumption to extend Supreme Court review to a greater number of state court decisions or to enhance Supreme Court leadership in important areas of constitutional law, then the Court may not achieve its goal. The *Long* rule can aid the Court in achieving uniformity of federal law by simplifying identification of state court decisions that apply federal law. The Supreme Court's role as the definer of constitutional guarantees may diminish, however, if state courts elect to ensure the independence of their own constitutions.[166] An independent state court response to *Long* will restrict Supreme Court review of state court decisions and reduce the number of new fact situations in which the Court can articulate its views of constitutional law. Rather than uniformity, *Long* will achieve disparity between federal and state interpretations of similar constitutional provisions. To the extent that the rule of *Michigan v. Long* promotes federalism values, it prevents the Supreme Court from maintaining its leadership role in the definition of constitutional rights.

J. Douglas Wilson

163. *Cf. e.g.*, Lynch v. New York *ex rel.* Pierson, 293 U.S. 53, 55 (1934) (Court dismissed because parties failed to carry burden of affirmatively showing Court's jurisdiction).

164. *Cf.* Massachusetts v. Upton, 104 S. Ct. 2085, 2089 (1984) (Stevens, J., concurring in the judgment) (castigating state supreme court for failing to provide a plain statement and thus inviting Supreme Court review).

165. *See supra* notes 97 & 101 and accompanying text.

166. *See supra* notes 121-24 & 143-46 and accompanying text.