University of Miami Law Review

Volume 42
Number 1 *Symposium: Excluded Voices: Realities in Law and Law Reform*

Article 9

9-1-1987

Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds

Patricia Fahlbusch

Daniel Gonzalez

CASE COMMENT

Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds

I. INTRODUCTION

This Note traces the effect of *Michigan v. Long*[1] on the development of state constitutional protections in criminal cases and the shift in the balance between federal and state protection in such cases. In *Long*, the Supreme Court of the United States held that when a state court based its decision on both state and federal law and it was unclear whether the decision rested on state or federal grounds, the Court would assume it rested on federal law.[2] The Court, therefore, would have jurisdiction to review the decision if it wished to do so. The Supreme Court, however, allowed the state courts to escape such review if they clearly stated that their decisions were based on "bona fide separate, adequate, and independent [state] grounds."[3] The Court's stated intent was to allow state courts to "develop state jurisprudence unimpeded by federal interference."[4] In practice, however, many state courts have continued to rely on federal law and principles

1. 463 U.S. 1032 (1983).
2. *Id.* at 1040-41.
3. *Id.* at 1041.
4. *Id.*

and have only included in their opinions a one sentence disclaimer stating that their decisions rest on independent and adequate state grounds.[5] This one sentence disclaimer is the "rubber stamp" that some state courts have used to escape the Court's review while avoiding the necessity of truly developing state constitutional law.

This introduction is the first of five sections contained in this Note. Section II discusses the Supreme Court's inconsistent treatment of cases involving mixed state and federal constitutional issues prior to *Long*. In addition, it analyzes the *Long* decision itself. Section III examines those Supreme Court cases subsequent to *Long* in which the state courts did not include the rubber stamp and the Court, after accepting review, overruled the state court's expansion of individual rights. Further, this section analyzes these cases on remand to investigate whether the state courts reinstated their original decisions by explicitly applying their state constitutions or whether they simply deferred to the Supreme Court. Sections II and III also discuss the inability of the *Long* approach to achieve the goals the Court set out at both the state and federal levels: First, "to provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference;"[6] and second, to "preserve the integrity of state law."[7] Section IV discusses the continuing reluctance of some state courts to apply their state constitutional principles as the primary grounds for their decisions. This section also explores the range of approaches that state courts continue to use in cases raising both state and federal constitutional issues.

Section V concludes that the Court's approach in *Long* has failed thus far to respond to the concerns expressed by the majority of the Supreme Court in that case. Ambiguity continues as to the appropriate standard for Supreme Court review of state court opinions that contain some combination of federal and state law. As a result, the Court's review continues to be too broad under the *Long* approach in cases in which decisions that rely on state grounds are reinstated by the state courts on remand, and too narrow when state courts' decisions with the rubber stamp successfully evade Supreme Court review.[8] This Note hypothesizes that the *Long* doctrine could result in a shift of ultimate authority[9] over the interpretation of the federal Constitution to the state courts because of their ability to rubber

5. *See infra* Section IV.

6. Michigan v. Long, 463 U.S. at 1041.

7. *Id.*

8. *See infra* Section V.

9. *See infra* notes 258-59 and accompanying text.

stamp their decisions.[10] It recognizes that the validity of this hypothesis depends on the continuing application of the *Long* approach by the Supreme Court. It also recognizes that the Court is free to modify or overturn the current method by which it reviews state court decisions.

II. THE SUPREME COURT'S GOALS IN *Michigan v. Long*

A. *Historical Perspective*

Long can best be viewed as a part of the Supreme Court's changing perception of its role in shaping basic constitutional rights. In the 1950's and 1960's, the Warren Court expanded the constitutional protection of individual rights in the context of criminal cases.[11] The 1970's saw a transition to a more conservative philosophy under Chief Justice Warren Burger.[12] Some argue that the Burger Court's intent was "to reverse the trend of the past decade and to constrict rather than expand the rights of the accused."[13] This change in direction is said to have brought about "a new period of federalism in criminal procedure in which the state-based rights of criminal defendants will assume increasing significance as federal-based rights play an ever-diminishing role."[14]

Many scholars interpret the decisions of the Burger Court as

---

10. *See infra* Section IV.

11. Wilkes, *The New Federalism in Criminal Procedures: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). Professor Wilkes refers to this period of expansion as the "criminal procedure revolution," and claims that it occurred in two parts: "First, through a process of 'selective incorporation,' provisions of the Bill of Rights were held applicable to the states through the due process clause of the fourteenth amendment. . . . Second, liberal interpretations of the Bill of Rights greatly expanded the scope of federal constitutional protections." *Id.* at 422 (citing Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Klopfer v. North Carolina, 386 U.S. 213 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Robinson v. California, 370 U.S. 660 (1962); Mapp v. Ohio, 367 U.S. 643 (1961)).

12. Wilkes, *supra* note 11, at 423.

13. *Id.* Professor Wilkes claims that even "[i]n cases where an accused's rights were plainly violated," the Burger Court has upheld convictions "by generous construction of the harmless error doctrine." *Id.* at 423-24 (citing Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972)). *But see* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983) (arguing that the Burger Court has not limited rights extended during the Warren era).

14. Wilkes, *supra* note 11, at 426; *see also* Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986). The following tables compiled by Professors Collins and Galie demonstrate statistically just how much the Supreme Court's review practices have changed during the past two decades. During the 1965-1966 term, the states' certiorari success rate was only slightly better than that of individual claimants. In contrast, the 1984-1985 term shows a great increase in the rate of state petitions granted review over that of individuals' petitions:

reflecting an intent to constrict, or at least prevent further expansion of, federal constitutional protections of defendants in criminal cases. Rights above the federal floor will exist, if at all, only through state constitutional protections.[15] Given this intent, the logical inference must be that the Burger Court did not expect state courts to extend state constitutional rights beyond the new federal levels being set by the Court.[16] To accomplish its objectives, however, the Supreme Court has had to exercise its jurisdiction to review cases in which state courts have granted more extensive individual rights than the Court was willing to accept, instead of only accepting those cases in which the defendants complained of a denial of their federal constitutional rights.[17] The difficulty for the Court in deciding whether to review a case arose in cases in which the state courts responded to this expanded review by using a blend of federal and state law in their

TABLE 1
CERTIORARI DOCKET ACTIONS, 1984-1985

	Number of Petitions		
	Total	Granted	Granted (%)
Petitions filed by individual claimants			
Paid Docket	249	3	1.2
5000 Docket	591	9	1.5
Petitions filed by State Officials	58	11	19.0

TABLE 2
CERTIORARI DOCKET ACTIONS, 1965-1966

	Number of Petitions		
	Total	Granted	Granted (%)
Petitions filed by individual rights claimants			
Paid Docket	206	28	13.6
Petitions filed by State Officials	6	1	16.6

Id. at 342-43.

15. Wilkes, *supra* note 11, at 425-26; *see also* Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980 (1985) (state constitutions may build additional protections above the federal floor).

16. A state court might be reluctant to extend state constitutional rights for many reasons. Elected or appointed state judges, for example, may be reluctant to extend rights in a controversial area; or, a state court that extends rights under its state constitution might be held accountable for the extension, thereby becoming a target of conservative criticism.

17. *See supra* note 14. Although this Note's analysis is limited to criminal cases, the situation of mixed federal and state law may appear outside the criminal context. It is interesting, although beyond the scope of this Note, that the Court's presumption of the grounds that civil cases with mixed state and federal grounds rest on, has been almost exactly opposite to that established by the Court in *Long*.

decisions. Prior to *Long*, the Supreme Court traditionally had denied review in cases in which there was an "adequate state ground," even if intermixed with federal law.[18] The Court, in addition, would not review cases that gave *greater* federal constitutional protection to defendants.[19] This pattern changed with *Long*. The state courts could now extend state constitutional rights, but unless the state decisions rested on "adequate and independent" state grounds, they were subject to review by the Supreme Court.[20]

Prior to *Long*, the Court resorted to four approaches to reviewing state court decisions that relied on a mixture of state and federal grounds in determining the rights of an accused. In some instances, it dismissed the case if the grounds for the decision were at all unclear.[21] In other instances, the Court vacated the judgment and remanded the case for a determination of the grounds upon which the decision rested.[22] In yet other instances, it would stay the case pending the state court's clarification of the basis of its decision.[23] Finally, in

---

18. It is not clear whether the traditional limitation on Supreme Court review was a self-imposed prudential restraint or a true jurisdictional one. On rare occasions the Supreme Court has taken the latter view:

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

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

19. *See supra* note 14.

20. *See infra* notes 28-30 and accompanying text.

21. Michigan v. Long, 463 U.S. at 1038 (citing Lynch v. New York, 293 U.S. 52 (1934)). The Court recognized in *Lynch* that the state decision could rest on federal grounds but stated that the federal question must have been necessary and must have been actually decided by the state court in order for it to accept review. 293 U.S. at 54. The Court added that although it could surmise that the decision was based on federal law, "jurisdiction cannot be founded on surmise." *Id.*

22. Michigan v. Long, 463 U.S. at 1038-39 (citing Minnesota v. National Tea Co., 309 U.S. 551 (1940)). In *National Tea*, the Supreme Court of the United States reviewed a case in which the Supreme Court of Minnesota had analyzed its state constitution in general terms, but had been specific in analyzing the federal constitution. 309 U.S. at 553. The Court stated that if there was uncertainty as to a state court's grounds, it would require a clarification by the state court to determine if the Court had jurisdiction. *Id.* at 557. The proper procedure, the Court said, is for the case to be vacated and remanded for the state court to determine its constitutional grounds more precisely. *Id.* at 556. This procedure was followed in the case of California v. Krivda, 409 U.S. 33 (1972), in which the Court vacated the state court judgment and remanded the case because it was unable to determine the basis of the state court's decision.

23. Michigan v. Long, 463 U.S. at 1039 (citing Herb v. Pitcairn, 324 U.S. 117 (1945)).

some instances, the Court itself examined state law to determine if federal law was used as a guide or as the basis for the state court's decision.[24] Because the Court relied on any one of these four approaches, its review of cases occurred on an ad hoc basis. Consequently, prior to *Long*, the state courts lacked the power to express opinions incorporating an analysis of federal law in a manner that assured prevention of Supreme Court review. Instead, whenever a state court used federal law, its opinion could be reviewed, even when it used the federal cases only as persuasive, and not controlling, authority.

B. *Michigan v. Long*

Long involved the warrantless search of an automobile. Police officers stopped the defendant for erratic driving, and conducted a warrantless search of the vehicle after observing a large hunting knife on the floor on the driver's side. One of the officers noticed what later proved to be a pouch of marijuana protruding from under the armrest in the front seat. The trial court denied the defendant's motion to suppress the evidence, and the Court of Appeals of Michigan affirmed.[25] The Supreme Court of Michigan, however, reversed the decision of the Court of Appeals and held that the search violated the fourth amendment of the Constitution of the United States as well as article 1, section 11 of the Constitution of Michigan.[26] On certiorari, the Supreme Court of the United States held:

> [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 Court in *Herb* was concerned that if the state court reinstated its earlier decision after the Supreme Court corrected the state court's view of federal law, it would constitute an advisory opinion by the Supreme Court. *Id.* at 126. To avoid advisory opinions, the Court said that it should withhold its decision until the state court clarifies or amends the ground on which its decision rests. *Id.* at 128. This approach avoids the problem of advisory opinions and is consistent with the respect due state supreme courts. *Id.*

24. Michigan v. Long, 463 U.S. at 1039 (citing Texas v. Brown, 460 U.S. 730, 732-33 n.1 (1983)); Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982)). In *Kennedy*, the Court held that while the state and federal grounds were mixed in the state court decision, "the fact that the state court relied to the *extent* it did on federal grounds requires [the Court] to reach the merits." 456 U.S. at 671 (emphasis added).

Justice Stevens recognized these four approaches and argued that if these approaches were rejected, then the Court would be left with two alternatives: one in favor of accepting review and one against accepting review. Justice Stevens prefers the historical precedent of refusing review. Michigan v. Long, 463 U.S. at 1066 (Stevens, J., dissenting).

25. People v. Long, 94 Mich. App. 338, 288 N.W.2d 629 (Ct. App. 1979).

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

> 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.[27]

The Court's holding created a presumption that such "blended" state court opinions were grounded in federal law absent a clear statement that state law controlled and federal law was used only for guidance.[28] This presumption places a burden on defendants to raise adequate and independent state constitutional grounds if they wish to avoid Supreme Court review in order to argue for broader rights than those currently provided by the federal Constitution.[29] Defendants, however, cannot control whether a state court bases its decision on state law or federal law, or some combination of the two. It is not the defendant but the state court that must use the plain statement. The state court has the burden of convincing the Supreme Court that state law has controlled its decision if it wishes to avoid review of the decision by the Court. Therefore, although the defendant has the burden of initially raising adequate and independent state grounds, only the state court can control whether its decision will be reviewable.[30]

In practice, this requirement has not placed an extensive burden on the state courts. The Supreme Court intended that the state courts rely on their own state law and develop it further instead of relying solely on federal law. If the state court wishes to extend constitutional protections, it should do so under its own state constitution and accept responsibility for that extension. Instead, state courts still use federal law as the basis for their decisions but protect these decisions from review by use of the rubber stamp.[31]

Speaking for the majority in *Long*, Justice O'Connor expressed discontent with the "ad hoc method of dealing with cases that involve possible adequate and independent state grounds."[32] She argued that state courts were requiring the Court to interpret state law with which it was generally unfamiliar.[33] The alternatives of vacation or continu-

27. Michigan v. Long, 463 U.S. at 1040-41.
28. Pollock, *supra* note 15, at 981.
29. *Id.*
30. *Id.* (footnote omitted).
31. *See infra* Section IV.
32. Michigan v. Long, 463 U.S. at 1039.
33. *Id.*

ance for clarification created delay and inefficiency in judicial administration.[34]

The majority in *Long* hoped that its new approach would resolve three major concerns: First, limiting the need for interpreting state law;[35] second, avoiding the rendition of advisory opinions;[36] and third, conserving scarce judicial resources.[37] Moreover, the stated goal of the Court in *Long* was to provide "state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet . . . preserve the integrity of federal law."[38]

This stated goal, however, could be viewed as serving a second goal not explicitly articulated by the Court. By requiring the state court to identify affirmatively an opinion as resting on independent and adequate state grounds, the Court was implicitly presuming the right to review all cases not so identified. There would thus be a substantial impact on the development of corresponding state constitutional rights: either the state courts would assume ultimate responsibility and accountability for extending those rights or they would expose themselves to the possibility of Supreme Court review.[39] This choice, in turn, could have a stifling effect on state constitutional protections in those states where the state court was unable or unwilling to develop completely distinct state constitutional principles. Ultimately the Supreme Court could control both the "floor" and the "ceiling" of constitutional rights.

There is a tension between these two goals. If the underlying purpose of the *Long* approach was to allow the Court greater review and thus more control over constitutional protections, then it was undercutting its ability to achieve this goal by encouraging state courts to develop state constitutional law. In practice, however, the *Long* approach has not resulted in state courts developing state jurisprudence, but it has, at least in the short run, resulted in the Supreme Court reviewing a larger number of criminal cases and, correspond-

34. *Id.* at 1039-40.

35. *Id.*

36. *Id.* at 1040. Advisory opinion in this context is not meant to indicate the absence of a live controversy between adverse parties. Rather, as Justice O'Connor stated, it is the rendering of an opinion by the Supreme Court that will not have any practical effect, because even if the Supreme Court finds that the state court decision exceeded federal constitutional limits, the state court's decision can be sustained by the state court's claim that the controversy was settled under state law. *Id.* at 1042. *See also supra* notes 10, 18 & 23 and accompanying text.

37. *Id.* at 1042.

38. *Id.* at 1041.

39. *See, e.g.*, Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

ingly, exerting more control over these constitutional protections. This increase will almost certainly be offset by the use of the rubber stamp by those state courts that want to avoid Supreme Court review.

Justice Stevens, in a vigorous dissent, argued against the Court's presumption favoring its jurisdiction and urged judicial restraint.[40] He argued that if the Court's earlier approaches were not viable,[41] then both stare decisis and policy concerns dictated a return to the presumption that state law grounds are independent unless it clearly appears otherwise.[42] Apart from deference to state courts and the avoidance of advisory opinions, Justice Stevens' major concern was that the scarce federal judicial resources be utilized effectively.[43] Justice Stevens stated that the Court should allow "other decisional bodies to have the last word in legal interpretation until it is truly necessary for [the] . . . Court to intervene."[44]

According to Justice Stevens, *Long* did not involve any deprivation of the rights secured by the Constitution of the United States or by federal statutes, and thus did not require intervention by the Supreme Court.[45] He analogized the situation to an American citizen arrested in a foreign country who was granted greater rights than the federal Constitution provides, and claimed that the United States would not intervene in such a case.[46] Justice Stevens concluded that the State of Michigan, acting within its authority, had decided to set the defendant in *Long* free, according to its state processes and without offending any federal interest.[47] The fact that Michigan provided greater protection to one of its citizens than some other state might provide, or that the Supreme Court requires nationally, was of no concern to the Court.[48] The federal Constitution establishes only the floor of individual rights and each of the states establishes its own

40. 463 U.S. at 1065-72 (Stevens, J., dissenting).

41. The alternatives Justice Stevens refers to are, first, asking the state court directly, and second, examining state law to determine the grounds for the decision. *Id.* at 1066. While Justice Stevens finds these alternatives to be unattractive, he does not accept the *Long* solution in their stead. *Id.*

42. *Id.* (citing Lynch v. New York, 293 U.S. 52 (1934)). The Court in *Lynch* held:

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

293 U.S. at 54-55.

43. Michigan v. Long, 463 U.S. at 1067 (Stevens, J., dissenting).

44. *Id.*

45. *Id.* at 1067-68.

46. *Id.* at 1068.

47. *Id.*

48. *Id.*

ceiling at a height that may differ from that established by other states.[49] Justice Stevens therefore viewed the majority's decision in *Long* as establishing the Supreme Court as the ultimate magistrate to which states will turn when their courts have expanded rights in favor of their citizens.[50]

Justice Stevens also criticized the majority's justification for its expansive approach—the need to create uniformity in the interpretation and application of federal constitutional law.[51] He pointed out that the need for uniformity in the substantive application of federal law is no less present when clearly independent and adequate state grounds exist than when the state decision rests solely on federal grounds.[52] The federal system, however, provides for diversity. Therefore, as long as the federal system of government recognizes the states' sovereignty and their ability to give their citizenry greater individual rights than the floor provided by the Constitution of the United States, differences between the standards set by the states' constitutions and those set by the federal Constitution cannot be eradicated. Further, Justice Stevens emphasized the Court's limited jurisdiction even in cases in which a state court incorrectly interprets federal law:

> [W]e have never claimed jurisdiction to correct such errors, no matter how egregious they may be, and no matter how much they may thwart the desires of the state electorate. We do not sit to expound our understanding of the Constitution to interested listeners in the legal community; we sit to resolve disputes. If it is not apparent that our views would affect the outcome of a particular case, we cannot presume to interfere.[53]

Thus Justice Stevens' position suggests that the Court's presumption in favor of its jurisdiction could lead to more rather than fewer advisory opinions. The immediate practical consequences of *Long* have proved this expectation to have been only partially correct. Although the *Long* approach has not prevented advisory opinions, it has given state courts the power to avoid Supreme Court review by incorporating the rubber stamp into their decisions.[54]

III. SUBSEQUENT SUPREME COURT CASES

The ten criminal cases discussed in this section illustrate the conflicts and inefficiencies remaining after *Long*. The majority in *Long*

49. Pollock, *supra* note 15, at 980.
50. Michigan v. Long, 463 U.S. at 1070 (Stevens, J., dissenting).
51. *Id.*
52. *Id.* at 1071.
53. *Id.*
54. *See infra* Section IV.

raised and addressed three major concerns: First, alleviating the need for the Supreme Court to examine and interpret state law; second, avoiding advisory opinions; and third, conserving scarce judicial resources.[55] Justice Stevens, in his dissent, added a fourth: allowing the states to "percolate" issues.[56]

The key to this debate centers on two different perceptions of the Court's role in reviewing state decisions that involve federal rights. Justice Stevens stated that "in reviewing the decisions of state courts, the primary role of . . . [the Supreme] Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[57] The majority, on the other hand, adopted the position that unless "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds," the need to "preserve the integrity of federal law" may require that the Court review the decision.[58] This latter standard calls for Supreme Court review of any deviation by a state court from federal norms and not just when the petitioner has been denied a fair hearing in the vindication of federal rights. The Court's concerns, however, are not promoted by the *Long* approach, as the following analysis demonstrates.

A. *Examination of Subsequent Cases*

1. EXAMINATION OF STATE LAW

The first concern articulated in *Long* was that of alleviating the need for the Court to examine state law because the Court is generally unfamiliar with state law and it is therefore time consuming for the Court to have to educate itself on such law.[59] Additionally, there is always the possibility that the Court might misinterpret state law. The presumption in favor of review in cases of mixed federal and state law was supposed to accomplish this goal, because the Court could treat the state court decision as resting on federal law, thereby obviating the need to delve into state law. The following cases, however, show that the Court has not always achieved this result, and that it has examined state law, especially when it has suspected that the state cases used to support the state court decision have themselves rested on federal grounds.

---

55. *See supra* notes 35-38 and accompanying text.

56. *See infra* notes 160-61 and accompanying text.

57. 463 U.S. at 1068 (Stevens, J., dissenting).

58. *Id.* at 1041.

59. *See supra* note 30 and accompanying text.

Oliver v. United States[60] involved two state cases consolidated on certiorari: *United States v. Oliver*[61] and *Maine v. Thornton*.[62] Both cases involved warrantless searches of fields located some distance from the petitioners' residences but upon which were posted "no trespassing" signs. In each case, the trial court suppressed the evidence. In *United States v. Oliver*, the United States Court of Appeals for the Sixth Circuit reversed the federal district court's suppression of the evidence.[63] In *State v. Thornton*, the Supreme Judicial Court of Maine ruled the other way and affirmed the trial court's decision, holding that the search violated the fourth amendment of the Constitution of the United States.[64] The Supreme Court of the United States rejected the contention that the decision in *Thornton* rested on adequate and independent state grounds, because it found that the Supreme Judicial Court of Maine had referred only to the fourth amendment of the federal Constitution, and that the state cases cited by that court "construed the Federal Constitution."[65] These cases thus were still fourth amendment cases and were not based on the state constitution. The Court's decision in *Oliver*, therefore, suggests that it is not enough for a state to cite state cases; the cited cases must themselves rest on adequate and independent state grounds and not on federal law.

A more complex case is *New York v. Quarles*,[66] in which an alleged rapist was apprehended in a supermarket after the victim had informed the police both of his whereabouts and that he was armed. When the police frisked the suspect upon his arrest, he was wearing an empty shoulder holster. The officer asked him where the gun was and the suspect nodded toward some empty cartons. The officer retrieved the gun and then read the suspect his preinterrogation warnings. The suspect waived his right to silence and admitted that the gun was his. The trial court excluded the defendant's initial statement and the gun because he had not first been given the preinterrogation warnings. His subsequent statement was also excluded as having been "fruit of the poisonous tree,"[67] i.e., evidence that was excluded for having been derived from information obtained in a prior illegal

60. 466 U.S. 170 (1984).

61. 686 F.2d 356 (6th Cir. 1982), *cert. granted*, 459 U.S. 1168 (1983), *aff'd*, 466 U.S. 170 (1984).

62. 453 A.2d 489 (Me. 1982), *cert. granted*, 460 U.S. 1068 (1983), *rev'd*, 466 U.S. 170 (1984).

63. 686 F.2d at 361.

64. 453 A.2d at 489.

65. 466 U.S. at 175 n.5.

66. 467 U.S. 649 (1984).

67. *Id.* at 665.

search. The Supreme Court found that the state court had relied on *Miranda v. Arizona*[68] and not expressly on state law, and therefore concluded that it had jurisdiction to review the state court decision.[69] In the case below, the Court of Appeals of New York did not actually cite *Miranda* or any federal law.[70] The majority cited New York cases to rebut the dissenting judge's argument that the defendant had not been subjected to "custodial interrogation," which was based on *Miranda* and other federal cases.[71] Only the dissent cited *Miranda* and used federal cases.[72]

Therefore, the Supreme Court's argument that the Court of Appeals of New York did not cite state cases and relied on *Miranda* is wrong, unless the Supreme Court studied the state cases and determined that they relied on federal law.[73] If the Court did conduct such a study, however, it would defeat *Long*'s goal of freeing the Supreme Court from the need of examining state law. As it appears from *Quarles*, in cases where the state court has not included the rubber stamp in its decision, the Supreme Court is forced to examine state law to decide whether this law is independent of federal law. State court precedents used to support a state court's decision in any given case would themselves have to be based on independent and adequate state grounds. The Court, therefore, is not relieved of the task of examining state law. In addition, the Court faces the problem of how far back to trace those independent and adequate state grounds. The question then is whether a state court decision can become rooted in state law if it has some underlying basis in federal law. Much of state constitutional and other law at some point relies on, or refers to, federal law.[74] Thus, the Court's desire to avoid examining state law is not often likely to be realized in practice. Furthermore, the Court's requirements place the state courts in the unenviable position of trying to develop state constitutional principles without relying on similar, deeply rooted federal principles.

---

68. 384 U.S. 436 (1966).

69. New York v. Quarles, 467 U.S. at 665.

70. People v. Quarles, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982).

71. *Id.* at 666-67, 444 N.E.2d at 985-86, 458 N.Y.S.2d at 522.

72. *Id.* at 667-71, 444 N.E.2d at 986-88, 458 N.Y.S.2d at 522-24 (citing *Miranda*, 384 U.S. at 471).

73. The Court of Appeals of New York did not address any state constitutional issues on remand, but simply remanded the case to the trial court for a determination of the voluntariness of defendant's admissions. People v. Quarles, 63 N.Y.2d 923, 473 N.E.2d 30, 483 N.Y.S.2d 678 (1984).

74. *See, e.g.*, Brennan, *supra* note 39.

2. ADVISORY OPINIONS

The entire Court is concerned with avoiding advisory opinions.[75] Advisory opinions waste judicial resources and breed disrespect for the ability of state courts to address important issues. If the Supreme Court reviews federal issues in a case because it believes that the state court has based its decision on federal law, it has necessarily issued an advisory opinion if the state court on remand reinstates its original decision on state law grounds. At that point, the Supreme Court's opinion has no substantive impact. The federal issue did not have to be reached, and does not have any practical effect. The presumption that the state court decision was based on federal grounds increases the chance that the Court's decision will turn out to be an advisory opinion because the presumption may have been incorrect. In practice, however, there has not been a flood of advisory opinions.[76]

A case which did result in an advisory opinion was *Florida v. Meyers*.[77] *Meyers* involved the warrantless search of a defendant's car incident to his arrest for sexual battery.[78] The police seized several items as evidence. Another officer, again without a warrant, searched the car approximately eight hours later and found additional evidence.[79] The trial court refused to suppress the evidence seized during the second search.[80] The Fourth District Court of Appeal of Florida reversed the defendant's conviction and remanded, holding that although the initial search of the car was valid, the second warrantless search was not.[81] The Supreme Court of the United States granted certiorari after the Supreme Court of Florida denied the state's petition for discretionary review.[82]

The Fourth District Court of Appeal of Florida based its reversal of the defendant's conviction in *Meyers* on two grounds: First, that the warrantless search of the automobile violated the defendant's rights under the fourth amendment; and second, that the defendant's counsel should have been able to cross-examine the victim regarding her activities for the six hours prior to the crime.[83] The State of Florida, as appellant, did not contest the reversal on the second ground.[84]

---

75. *See supra* note 36 and accompanying text.
76. *See supra* note 54 and accompanying text.
77. 466 U.S. 380 (1984).
78. Meyers v. State, 432 So. 2d 97 (Fla. 4th DCA 1983).
79. *Id.* at 98.
80. *Id.*
81. *Id.* at 99.
82. Florida v. Meyers, 466 U.S. at 381.
83. Meyers v. State, 432 So. 2d at 99.
84. Florida v. Meyers, 466 U.S. at 381.

The Supreme Court of the United States held that it had the power to review the fourth amendment issue in the case because the Florida appellate court did not clearly declare that the state ground was the *basis* for its decision.[85] The Court said that there was no danger of issuing an advisory opinion, and that even if the state court ordered a new trial on remand, the fourth amendment issue would still need to be resolved.[86] The clear implication of *Meyers* is, therefore, that if a case involves important federal constitutional questions, the Court might take the case for review, and rule upon these questions even if the state court on remand may decide the case on state law grounds. This approach flies in the face of the Court's expressed desire to avoid giving advisory opinions.[87] In this particular case, on remand, the Florida appellate court adopted without comment the Supreme Court decision that the warrantless search was proper.[88]

Another advisory opinion resulted in *New York v. Class.*[89] *People v. Class*,[90] the case below, used both federal and state cases and held that police officers had violated both the federal Constitution and the Constitution of New York.[91] *Class* involved the warrantless search of an automobile. Two police officers had stopped the defendant for exceeding the speed limit, and for having a cracked windshield. One of the officers, in attempting to find the vehicle's identification number, reached into the car and moved some papers that were obscuring the area of the dashboard where the number was located. The officer seized a gun protruding from underneath the driver's seat. The defendant was arrested for the criminal possession of a weapon, and after the trial court refused to suppress the gun as evidence, he pleaded guilty and was convicted.[92] The Supreme Court of New York, Appellate Division affirmed.[93] The Court of Appeals of New York reversed, holding that both the fourth amendment of the federal Constitution and article I, section 12 of the Constitution of New York prohibited the search.[94]

---

85. *Id.* at 381-82.

86. *Id.* at 382. The Court stated that the decision regarding admissibility of the evidence would affect the trial court regardless of how the Florida appellate court ruled on remand, because the admissibility of "critical evidence" at the new trial would still require a resolution of the fourth amendment issue. *Id.*

87. *See supra* note 23 and accompanying text. This is the exact type of decision that the Court attempted to avoid in Herb v. Pitcairn, 324 U.S. 117 (1945).

88. Meyers v. State, 457 So. 2d 495 (Fla. 4th DCA 1984).

89. 106 S. Ct. 960 (1986).

90. 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984).

91. *Id.* at 493, 472 N.E.2d at 1010, 483 N.Y.S.2d at 182.

92. *Id.* at 494, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

93. *Id.* at 494, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

94. *Id.* at 497, 472 N.E.2d at 1013, 483 N.Y.S.2d at 185.

The Supreme Court of the United States, in *New York v. Class*,[95] held that there was no adequate and independent state ground for the state court's decision because it only cited the state constitution once, and that was in conjunction with the federal Constitution.[96] Because the opinion made use of both federal and state cases, the Court found that it "lack[ed] the requisite 'plain statement' that it rest[ed] on state grounds."[97] The Court thus required that when both federal and state cases are used, there must be a "plain statement" that the decision rests on state grounds. Further, the Court found that because New York has a general rule of not reaching a constitutional issue if statutory construction can resolve the case,[98] the fact that both statutory and constitutional grounds were discussed in the Court of Appeals decision indicated that the statutory issue could not have resolved the case. State law could not, therefore, have been an independent and adequate ground for deciding this case.[99]

The statute in question in *Class* authorizes a police officer to demand information necessary to identify a vehicle.[100] The Court of Appeals of New York held that the statute did not justify the officer's intrusion into the car, and that the officer should only have demanded that the vehicle number be uncovered, allowing the defendant to move the papers.[101] Regardless of the Court's reasoning on New York's policy of reaching constitutional issues, it does seem that the interpretation of the state statute provided an "adequate and independent" state ground within the meaning of *Long*, because the Court of Appeals of New York had found that when the statute did not justify the officer's entry into the vehicle, the nonconsensual entry had violated the state constitution.[102]

On remand, the Court of Appeals of New York reinstated its earlier judgment and held that it had previously found a violation of the state constitution: "[w]here, as here, we have already held that the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds unless respondent demonstrates that there are extraordinary or compelling circumstances. That showing has not been made."[103] This position

95. 106 S. Ct. 960 (1986).
96. *Id.* at 964.
97. *Id.*
98. *Id.*
99. *Id.*
100. People v. Class, 63 N.Y.2d at 496, 472 N.E.2d at 1012, 483 N.Y.S.2d at 185.
101. *Id.* at 497, 472 N.E.2d at 1013, 483 N.Y.S.2d at 185.
102. *Id.* at 493, 472 N.E.2d at 1010, 483 N.Y.S.2d at 182.
103. People v. Class, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986).

suggests that New York courts have concluded that reference to the state constitution should be sufficient to sustain a state court's holding, even when the decision also mentions the federal Constitution.

As seen from the discussion of *Meyers* and *Class*, the Court requires the use of a plain statement that a state court's decision rests on adequate and independent state grounds for that decision to be beyond review by the Court. The Court, however, goes one step further when there is no plain statement, and dissects the decision to examine whether state grounds that *could* have supported the decision are sufficiently adequate to do so. This approach causes two problems: First, it does not alleviate the need to examine state law; and second, the Court risks interpreting the state decision incorrectly, as it did in *Class*.

The Supreme Court granted certiorari in *New York v. P.J. Video*[104] on similar grounds: that the Court of Appeals of New York only cited the New York constitution once and also mentioned the first and fourth amendments to the federal Constitution.[105] The respondents in the case had been charged with violating the New York obscenity statute after an investigator had viewed video-cassette movies rented from the respondents' store by a member of the sheriff's department. The investigator executed affidavits summarizing the movies and a warrant was issued on the basis of these affidavits. The trial court granted the respondent's motion to suppress the seized films. The Erie County Court affirmed the decision of the trial court.[106] The Court of Appeals of New York, in its review of the Erie County Court's decision, only cited the state constitution once,[107] generally cited the Constitution of the United States once,[108] and mentioned the first and fourth amendments specifically one other time.[109] The dissent in the Court of Appeals of New York opinion, on the other hand, argued that the New York statute was passed with the purpose of incorporating the federal standard of obscenity.[110] It also cited *Long* for the proposition that the majority opinion did not rest upon adequate and independent state grounds because "application of the statute necessarily entails interpretation of the Federal guidelines"

104. 106 S. Ct. 1610 (1986).

105. *Id.* at 1613 n.4.

106. People v. P.J. Video, 65 N.Y.2d 566, 576, 483 N.E.2d 1120, 1127, 493 N.Y.S.2d 988, 995 (1985).

107. *Id.* at 569, 483 N.E.2d at 1122, 493 N.Y.S.2d at 990.

108. *Id.*

109. *Id.* at 569, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.

110. *Id.* at 577, 483 N.E.2d at 1128, 493 N.Y.S.2d at 996.

because it incorporates the federal standard.[111] The Supreme Court of the United States rested its decision to review the case on the dissent's argument that the statute incorporated the federal standard of obscenity.[112]

The Court of Appeals of New York on remand addressed the question of whether its own state constitution afforded greater protection from unlawful seizure, and determined that it did.[113] The court explicitly stated that although the histories of the fourth amendment to the federal Constitution and article I, section 12 of the New York Constitution supported uniformity in interpretation, the state had adopted independent standards and had rejected good faith exceptions to the warrant requirement.[114] The Court of Appeals of New York reinstated its original judgment and held that there was an insufficient showing of probable cause to have justified issuing the warrant.[115] Again, the subsequent action of a state court rendered a Supreme Court decision advisory.

A state court will not always, however, reinstate its original opinion and thus render the Supreme Court's decision advisory.[116] In some cases, courts will defer to the Supreme Court's ruling, as in *Ohio v. Johnson*.[117] *Johnson* concerned a double jeopardy claim, the defendant having been indicted on one count each of murder, involuntary manslaughter, aggravated robbery and grand theft. At the arraignment hearing, an Ohio trial judge accepted his guilty pleas to involuntary manslaughter and grand theft and granted the defendant's motion to dismiss the remaining charges, to which the defendant had pleaded not guilty.[118] The Court of Appeals of Ohio affirmed the trial court's decision.[119] On appeal by the State of Ohio, the Supreme Court of Ohio affirmed the trial court's decision and held that prosecution for murder and aggravated robbery was barred by the double jeopardy provisions of the federal and state constitutions.[120] The Supreme Court of the United States granted certiorari and held that

111. *Id.*

112. New York v. P.J. Video, 106 S. Ct. at 1614.

113. People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 107 S. Ct. 1301 (1987).

114. *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 913.

115. *Id.* at 309, 501 N.E.2d at 564, 508 N.Y.S.2d at 916.

116. As discussed earlier, in Meyers v. State, 457 So. 2d 495 (Fla. 4th DCA 1984), the Florida court simply adopted the Supreme Court's decision without comment. *See supra* note 88 and accompanying text.

117. 467 U.S. 493 (1984).

118. State v. Johnson, 6 Ohio St. 3d 420, 420, 453 N.E.2d 595, 597 (1983).

119. *Id.*

120. *Id.*

the Supreme Court of Ohio had not articulated an independent state ground for its decision.[121] The fact that the Supreme Court of Ohio had cited federal cases indicated to the Court that the decision rested on federal law:

> Although the court's reference to double jeopardy might arguably be to the Ohio version, . . . the failure to indicate clearly that the state double jeopardy protection was being invoked, when coupled with the references in the opinion to our decisions in *North Carolina v. Pierce* and *Ashe v. Swenson*, convinces us that the Ohio Supreme Court based its decision on its interpretation of the Double Jeopardy Clause of the Fifth Amendment as applied to the States by the Fourteenth Amendment.[122]

Justice Stevens dissented and concluded that the decision below did rest on adequate and independent state grounds, and that the "Court's cavalier disregard for the state-law basis for this aspect of the judgment of the Supreme Court of Ohio is totally unprecedented."[123] The Ohio Court of Appeals, however, on remand, adopted the Supreme Court's ruling.[124]

In summary, although there has not been the flood of advisory opinions that Justice Stevens feared, there have nonetheless been some cases in which a state court has reinstated its original decision on state law grounds after the Supreme Court decided the issue on federal grounds. This outcome rendered the Court's decisions in these cases advisory. The Court, therefore, has not met its goal of eliminating such advisory opinions.

3. SCARCE JUDICIAL RESOURCES

An issue closely related to the Court's concern with issuing advisory opinions is the need to conserve judicial resources.[125] The concern is that even if a Supreme Court opinion is not advisory when pronounced, when a state court reinstates its original decision on state law grounds, the Supreme Court decision might have no practical effect and therefore be an unwise use of the Court's resources. Additionally, even if the state court decisions *do* rest on federal grounds, Justice Stevens argues that there is still no need to review the cases as long as some state basis is present and as long as the state does not drop below the federal floor of individual rights.[126] To conserve judi-

121. Ohio v. Johnson, 467 U.S. at 497 n.7.
122. *Id.* (citations omitted).
123. *Id.* at 503 (Stevens, J., dissenting).
124. State v. Johnson, No. 11-027, slip op. (Ohio Ct. App. Dec. 20, 1985).
125. *See supra* note 44 and accompanying text.
126. *See infra* notes 142-46 and accompanying text.

cial resources, and to avoid the possible consequence of fostering disrespect for state court decisions, Justice Stevens proposes that the Court should only interfere to vindicate federal rights.[127]

California v. Ramos[128] was among the first cases to apply *Long* explicitly. The defendant had been sentenced to death following his conviction for the murder of one employee and the attempted murder of another during the robbery of a fast-food restaurant. The decision of the Supreme Court of California considered the constitutionality of a California statute that required the jury sitting for the penalty phase of a bifurcated capital trial to be instructed regarding the Governor's power to commute a sentence of life imprisonment without possibility of parole to a sentence that includes the possibility of parole.[129] The trial court gave the instruction as required and the jury sentenced the defendant to death.[130] The Supreme Court of California, on direct appeal, reversed the trial court and held that the statute violated the defendant's due process rights under the fourteenth amendment.[131] The court declined, however, to decide whether the California constitution was also violated.[132]

The Supreme Court of the United States reversed the Supreme Court of California, holding that although it was possible that the California constitution was also violated, the Supreme Court of California rested its decision solely on the federal Constitution.[133] The Court, however, pointed out that "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."[134] On remand, the Supreme Court of California proceeded to determine the statute's validity under the state constitution and decided to afford greater protection by holding that the jury instruction violated the state constitution.[135]

Although the Supreme Court of California had failed to base its original decision on state law, Justice Stevens argued in his dissent that the Court still should not have granted certiorari.[136] He did not

127. *See infra* notes 155-56 and accompanying text.

128. 463 U.S. 992 (1983).

129. People v. Ramos, 30 Cal. 3d 553, 562, 639 P.2d 908, 912, 180 Cal. Rptr. 266, 270 (1982).

130. *Id.*

131. *Id.* at 600, 639 P.2d at 936, 180 Cal. Rptr. at 294.

132. *Id.*

133. California v. Ramos, 463 U.S. at 997.

134. *Id.* at 1014.

135. People v. Ramos, 37 Cal. 3d 136, 143, 689 P.2d 430, 432, 207 Cal. Rptr. 800, 802 (1983). The Supreme Court of California stated that the instruction was misleading and invited the jury to consider speculative matters, and thus violated the defendant's due process rights. *Id.* at 154, 689 P.2d at 440, 207 Cal. Rptr. at 810.

136. California v. Ramos, 463 U.S. at 1029 (Stevens, J., dissenting).

think that the case had enough of a national impact to justify using the Court's scarce judicial resources.[137]

> Even if one were to agree with the Court's conclusion that the instruction does not violate the defendant's procedural rights, it would nevertheless be fair to ask what harm would have been done to the administration of justice by state courts if the California court had been left undisturbed in its determination.[138]

Justice Stevens argued, without further explanation, that "nothing more than an interest in facilitating the imposition of the death penalty in California justified" the majority's grant of review.[139] And, although the position taken by the Supreme Court of California was consistent with that adopted by many other states, no other state would have been bound by the California precedent because the jury instruction at issue was based on California state law.[140]

As the *Ramos* case indicates, redundancy and waste of judicial resources can result when a state court decides an issue first on federal constitutional grounds and, when reversed by the Supreme Court, reinstates its original decision on the basis of state law. Under the majority's analysis in *Long*, a state court can prevent a dissipation of the Court's judicial resources by deciding the issue first under state law when it is possible to do so. Because there is no way to impose such a responsibility on the state courts, the Supreme Court should exercise its discretion and not grant review of cases in which the extension of federally protected rights is minor or will not have a broad impact. The alternative carries the risk that the state court may simply reinstate its original decision on state law grounds. Although the state court did ultimately undertake a deeper analysis of state law on remand in *Ramos*, there is no guarantee that such scrutiny will ensue, and the Court's review of such cases may result in unnecessary review at the Supreme Court level combined with a lack of a more complete analysis at the state level.

Justice Stevens was particularly concerned about the Court's use of scarce judicial resources and discussed this concern in *Florida v. Meyers*:[141]

> [I]f we take it upon ourselves to review and correct every incorrect disposition of a federal question by every intermediate state appellate court, we will soon become so busy that we will either be unable to discharge our primary responsibilities effectively, or else

137. *Id.* at 1029-30.
138. *Id.* at 1030.
139. *Id.* at 1031.
140. *Id.*
141. 466 U.S. 380 (1984).

> be forced to make still another adjustment in the size of our staff in order to process cases effectively. We should focus our attention on methods of using our scarce resources wisely rather than laying another course of bricks in the building of a federal judicial bureaucracy.[142]

Further, Justice Stevens argued that the central purpose of the federal Constitution is to vindicate federal rights.[143] He viewed the majority, on the other hand, as being more concerned with imposing its will and "less interested in its role as a protector of the individual's constitutional rights."[144] Justice Stevens pointed to nineteen cases decided by summary disposition in the 1981 term in which the prosecution obtained reversals of decisions upholding constitutional rights.[145] In contrast, he noted that during the past two and one-half terms the Court had not "employ[ed] its discretionary power of summary disposition in order to uphold a claim of constitutional right."[146] Thus, in addition to his concern regarding the unwise use of the Court's resources, Justice Stevens is also concerned that the Court is exercising its review power in order to constrain constitutional protections rather than to vindicate them.

State courts can do much to conserve judicial resources, and the primary responsibility of preventing unnecessary review of state cases by the Court rests upon the state courts. This point is illustrated by *Massachusetts v. Upton*,[147] a case in which the Supreme Judicial Court of Massachusetts based its decision on the fourth amendment. *Upton* concerned the search of a motor home pursuant to a search warrant. The police had received a tip from the defendant's ex-girlfriend that stolen items were hidden in the motor home and on this basis had

---

142. *Id.* at 385 (Stevens, J., dissenting).

143. *Id.*

144. *Id.* at 386. Justice Stevens' view of the majority's concern supports the contention that the Burger Court attempted to limit the federal constitutional rights that had been broadened by the Warren Court. *See supra* note 16 and accompanying text.

145. *Id.* at 386 n.3. Justice Stevens cited the following cases: Rushen v. Spain, 464 U.S. 114 (1983) (per curiam); Wainwright v. Goode, 464 U.S. 78 (1983) (per curiam); California v. Beheler, 463 U.S. 1121 (1983) (per curiam); Illinois v. Batchelder, 463 U.S. 1112 (1983) (per curiam); Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam); Cardwell v. Taylor, 461 U.S. 571 (1983) (per curiam); Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam); Anderson v. Harless, 459 U.S. 4 (1982) (per curiam); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (per curiam); Michigan v. Thomas, 458 U.S. 259 (1982) (per curiam); Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam); Sumner v. Mata, 455 U.S. 591 (1982) (per curiam); Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam); Harris v. Rivera, 454 U.S. 339 (1981) (per curiam); Leeke v. Timmerman, 454 U.S. 83 (1981) (per curiam); Jago v. Van Curen, 454 U.S. 14 (1981) (per curiam); Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam).

146. Florida v. Meyers, 466 U.S. at 386.

147. 466 U.S. 727 (1983).

obtained the warrant. The trial court allowed the items to be received into evidence.[148] The Supreme Judicial Court of Massachusetts reversed the trial court's order and held that the issuance of the warrant violated the fourth amendment because there was an insufficient showing of probable cause.[149] On certiorari to the Supreme Court of the United States, Justice Stevens pointed out that deciding the case on fourth amendment grounds without analyzing it under state law increased the burden on both the state courts and the Supreme Court.[150] On remand to the Supreme Judicial Court of Massachusetts, the state court would have to "review the probable-cause issue once again and decide whether or not a violation of the state constitutional protection against unreasonable searches and seizures ha[d] occurred."[151] If the state court decided that the state constitution *was* violated, the Supreme Court opinion would be redundant. If the state constitution was not violated, the issue still could have been resolved at the state level by the state courts expressly undertaking an analysis of state law.[152]

Justice Stevens rightly believes that it is important that the state courts "do not unnecessarily invite th[e] Court to undertake review of state-court judgments."[153] State constitutional protections are "disparaged" when state courts "refuse[] to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States."[154] Reiterating that a state may offer greater constitutional protections to its citizens than those afforded by the federal Constitution,[155] Justice Stevens went further and asserted that such an extension of rights is a duty of the state courts: "The States in our federal system . . . remain the primary guardian of the liberty of the people. The Massachusetts court, I believe, ignored this fundamental premise of our constitutional system of government. In doing so, it made an ill-advised entry into the federal domain."[156] Thus, although asserting that the Supreme Court should exercise its discretion to decline to review cases in which the state courts grant broader individual protections than provided by the federal Constitution, Justice Stevens places primary responsibility for avoiding Supreme Court review upon the state courts.

148. *Id.* at 729.
149. *Id.* at 730.
150. Commonwealth v. Upton, 390 Mass. 562, 458 N.E.2d 717 (1983).
151. Massachusetts v. Upton, 466 U.S. at 735 (Stevens, J., dissenting).
152. *Id.* at 735-36.
153. *Id.* at 737.
154. *Id.* at 738.
155. *Id.*
156. *Id.* at 739.

The Supreme Judicial Court of Massachusetts took Justice Stevens' advice on remand and held that a state statutory exclusionary rule applied to evidence that was seized without a showing of probable cause.[157] The court also held that the Constitution of Massachusetts requires a stricter test to determine probable cause than the federal Constitution does,[158] thereby "providing more substantive protection to criminal defendants than does the fourth amendment in the determination of probable cause."[159]

It is clear that the Massachusetts court's initial failure to use a state ground in *Upton* resulted in the delivery of an unnecessary opinion by the Supreme Court of the United States. Had the Massachusetts Supreme Judicial Court held at first, as it did on remand, that its constitution had been violated, the federal issue need never have been reached, and the judicial resources expended in review by the Court, and on remand at the state level, could have been conserved.

Cases such as *Upton* justify Justice Stevens' concern that the Supreme Court is accepting unnecessary review of state cases that grant greater constitutional protections than would be available under the federal Constitution. Such cases strengthen his argument that the Court is wasting precious judicial resources by undertaking review. This position, however, does not answer the argument that an underlying purpose of the *Long* approach might have been to allow the Court to accept review of criminal cases in which state courts have extended constitutional protections, in order to constrain or reduce the expansion of these rights. If that premise is accepted as a valid one, it is no longer a waste of judicial resources to accept cases in which a defendant is granted greater constitutional protections, because the Court may narrow at least the federal basis for the rights at issue.

4. THE PERCOLATION OF ISSUES

The majority's opinions in the cases discussed above have not dealt directly with "percolation" of issues.[160] Percolation allows the Supreme Court to address issues with the assurance that these issues have been adequately explored and debated over time in state courts and lower federal courts. Percolation also shows the Supreme Court's confidence in, and respect for, the ability of the lower courts and state courts to debate and refine important issues of law. This considera-

157. Commonwealth v. Upton, 394 Mass. 363, 364, 476 N.E.2d 548, 550 (1985).
158. *Id.*
159. *Id.* at 373, 476 N.E.2d at 556.
160. *See supra* notes 35-37, 55 & 56 and accompanying text.

tion ties in directly with the prudential concern of conserving scarce judicial resources. By accepting review of cases that have not been exhaustively debated and digested over a period of time, the Court may be reaching issues that may not necessarily be ready, or appropriate, for the Court's consideration.[161]

In *People v. Carney*,[162] the Supreme Court of California discussed the state constitution's provision against unlawful search and seizure, and, citing both state and federal cases, found that its protection was similar to that provided by the fourth amendment. *Carney* involved the warrantless search of a motor home by agents of the Drug Enforcement Agency. The Supreme Court of California found that the motor vehicle exception to the warrant requirement of the fourth amendment did not apply.[163] The Supreme Court of the United States granted review and reversed the decision of the Supreme Court of California in *California v. Carney*,[164] finding that the case below rested on federal grounds.[165]

Justice Stevens dissented, stating that "[p]remature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles."[166] He stated that the Court's recent trend in accepting petitions for certiorari displayed a lack of confidence in the state courts' ability to interpret the fourth amendment.[167] The Court's willingness to accept such petitions had, in turn, "emboldened state legal officers to file petitions for certiorari from state court suppression orders that are explicitly based on independent state grounds."[168] Additionally, he accused the Court of promoting itself as the "High Magistrate for every warrantless search and seizure" and burdening "the [Court's] argument docket with cases presenting fact-bound errors of minimal significance."[169] Justice Ste-

161. While Justice Stevens calls this issue a "percolation" issue, it shares similarities with "ripeness" analysis.

162. 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983).

163. *Id.* at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507.

164. 471 U.S. 386 (1985).

165. *Id.* at 389 n.1.

166. *Id.* at 399 (Stevens, J., dissenting). Justice Stevens pointed out that the Court had no prior cases dealing with "hybrids" such as motor homes and thus could not fully contemplate all the future complexities such cases could raise. *Id.*

167. *Id.* at 396 (Stevens, J., dissenting).

168. *Id.* at 396 n.4. As authority for this proposition, Justice Stevens cited Jamison v. State, 455 So. 2d 1112 (Fla. 4th DCA 1984), *cert. denied*, 469 U.S. 1127 (1985); Ex parte Gannaway, 448 So. 2d 413 (Ala. 1984), *cert. denied*, 469 U.S. 1207 (1985); State v. Burkholder, 12 Ohio St. 3d 205, 466 N.E.2d 176, *cert. denied*, 469 U.S. 1062 (1984); People v. Corr, 682 P.2d 20 (Colo.), *cert. denied*, 469 U.S. 855 (1984); State v. von Bulow, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984).

169. 471 U.S. at 396 (Stevens, J., dissenting).

vens pointed out that by accepting review, the Court was giving national effect to a case of local significance: "If the Court had merely allowed the decision below to stand, it would have only governed searches of those vehicles in a single State. The breadth of this Court's mandate counsels greater patience before we offer our binding judgment on the meaning of the Constitution."[170] Justice Stevens' concern is that resolving the issue in the "vacuum of the first case raising the issue" does not allow an issue to be sufficiently percolated.[171]

Justice Stevens has argued that disagreement among the lower courts percolates an issue by allowing time for "exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."[172] Even when the Court *could* accept review, therefore, it *should not* unless the issue has been well litigated in the lower courts.

Delaware v. Van Arsdall[173] is not, strictly speaking, a percolation case. It does, however, encompass many of the same concerns, especially those concerning the respect owed to a state court. Justice Stevens argued that the issues involved in *Van Arsdall* were issues that the state should be allowed to resolve as a matter of deciding whether or not to extend the protections of its state constitution.[174] The issue, according to Justice Stevens, was not of significant national impact to merit the attention of the Supreme Court of the United States.

Van Arsdall concerned a Delaware trial court's refusal to allow

---

170. *Id.* at 399. Justice Stevens quoted from a study on the Supreme Court:

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

Id. (quoting Estreicher & Sexton, *New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibility: An Empirical Study*, 59 N.Y.U. L. REV. 677, 738-39 (1984)). The same concerns are the subject of an article written by a retired chief justice of the Supreme Court of Pennsylvania. *See* Roberts, *The Adequate and Independent State Ground: Some Practical Considerations*, IJA REP. Winter 1985, at 1-2.

171. California v. Carney, 471 U.S. at 399 (Stevens, J., dissenting).

172. *Id.* at 400 n.11 (citing Estreicher & Sexton, *supra* note 170, at 716).

173. 106 S. Ct. 1431 (1986).

174. *Id.* at 1450 (Stevens, J., dissenting).

defense counsel to cross-examine a prosecution witness about an agreement the latter had made with the prosecutor. The witness had agreed to speak with the prosecutor about the murder of which the defendant was accused and of which the witness had information, in exchange for the dismissal of an unrelated criminal charge against the witness. The Supreme Court of Delaware reversed, holding that the trial court improperly restricted defense counsel's attempt to show bias on the part of the witness, and that such a restriction violated the confrontation clause of the federal Constitution.[175] The Supreme Court of the United States stated that it granted review because the decision below had applied both federal and state cases and did not contain a plain statement that the decision rested on state grounds.[176] Further, the state decision did not cite a "state prophylactic rule designed to insure protection for a federal constitutional right," and thus it rested on federal law.[177] The case was remanded to the Supreme Court of Delaware to enable it to apply the "harmless error" rule to the trial court's improper denial of the defendant's opportunity to impeach a witness for bias.[178]

On remand, the Supreme Court of Delaware focused "solely on the defendant's rights under the Delaware constitution and other state law."[179] It added that although it had cited significant rulings of federal courts in its original opinion, it did not base its decision on federal law.[180] The court also said that it did "not choose to set forth at this time a rule of procedure requiring a particular sequence of analysis with respect to issues arguably controlled by the State or Federal constitutions."[181] The Supreme Court of Delaware, therefore, not only declined the Supreme Court's invitation to apply the harmless-error rule, but also ignored the Court's implied demand that it develop a state prophylactic rule.

Justice Stevens dissented, arguing that the case involved the state's remedy for a federal constitutional violation and that the Court should not presume jurisdiction to review a state remedy because state courts "have traditionally enjoyed broad discretion to fashion remedies" once a constitutional violation has been proved.[182] In Justice

175. *Id.* at 1434.
176. *Id.* at 1435 n.3.
177. *Id.*
178. *Id.* at 1434.
179. Van Arsdall v. State, No. 346, 1982, at 2 (Del. Sup. Ct. April 20, 1987).
180. *Id.* at 7.
181. *Id.*
182. 106 S. Ct. at 1441 (Stevens, J., dissenting). Justice Stevens added that "federal law does not *require* a state appellate court to make a harmless-error determination; it merely *permits* the state court to do so in appropriate cases." *Id.* at 1442 n.3.

Stevens' opinion, "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."[183] Justice Stevens reiterated that federal courts are courts of limited jurisdiction, and that the Supreme Court should not reach a constitutional issue if there is another basis for its decision.[184] Although Justice Stevens acknowledged that the Court follows these tenets in reviewing federal cases, he did not believe it treated state courts with similar respect:

> [T]he Court has taken a different stance when it is asked to review cases coming to us from state courts. Although "[w]e cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment," *Herb v. Pitcairn*, . . . the jurisdictional precepts that serve us so well in reviewing judgments rendered in federal court merit observance in review of state court judgments too. Abjuring the federal analogy, the Court unwisely marks for special scrutiny the decisions of courts to which I believe it owes special respect.[185]

Justice Stevens was concerned that the Court's expansion of its "review of state remedies that over-compensate for violations of federal constitutional rights"[186] would lead to judicial waste, advisory opinions and friction between the state and federal judiciaries:

> The presumption applied today allocates the risk of error in favor of the Court's power of review; as a result, over the long run the Court will inevitably review judgments that in fact rest on adequate and independent state grounds. Even if the Court is unconcerned by the waste inherent in review of such cases, even if it is unmoved by the incongruity between the wholly precatory nature of our pronouncements on such occasions and . . . [Article] III's prohibition of advisory opinions, it should be concerned by the inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for the faithful and conscientious application of this Court's expositions of federal law.[187]

Justice Stevens concluded that the interests of the independent role of state constitutions and state courts can only be protected if both the state courts and the Supreme Court respect "[t]he emerging

183. *Id.* at 1442.
184. *Id.*
185. *Id.* at 1443 (citation omitted).
186. *Id.* at 1444.
187. *Id.* at 1446 (Stevens, J., dissenting).

preference for state [constitutional] bases of decision in lieu of federal ones . . . ."[188] Thus, Justice Stevens' concern is not only with judicial efficiency and advisory opinions, but also with the respect owed to state courts by the federal courts. Although this concern was shared by the majority in *Long*, it does not appear to have been put into practice by the Court.[189]

B. *The Impact of* Michigan v. Long

The majority in *Long* stated that its decision would free states to develop their own state constitutional law.[190] This result, however, has not yet been achieved in the majority of the cases. On remand by the Supreme Court of the United States, some state courts agreed that they were citing federal law. Such courts did not attempt to develop their own state law.[191] Others followed the Supreme Court without comment.[192] Only a few state courts have truly developed state constitutional precedents that are detached from the federal realm.[193]

Despite the continuing dependence of many state courts on federal guidance, Justice Stevens consistently has argued against review in each of the cases in which the Court granted review expressly on *Long*'s authority. His concern that the state courts on remand would render the Supreme Court's decisions advisory has in fact been realized in some cases.[194] In addition, some of the state court decisions on remand show that these courts may have perceived the Court's acceptance of review as showing a lack of respect and confidence in the state courts.[195] Finally, Justice Stevens' concern that the Supreme Court's scarce resources would be wasted has come to be realized, as

188. *Id.* at 1449 (Stevens, J., dissenting).

189. Michigan v. Long, 463 U.S. at 1040.

190. *Id.* at 1041.

191. *See, e.g.*, People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982); State v. Thornton, 485 A.2d 952 (Me. 1984); People v. Quarles, 63 N.Y.2d 923, 473 N.E.2d 30, 483 N.Y.S.2d 678 (1984).

192. *See, e.g.*, Meyers v. State, 457 So. 2d 495 (Fla. 1984).

193. *See, e.g.*, Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985); People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986); People v. P.J. Video, 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985). It is interesting to note, however, that in People v. Quarles, 63 N.Y.2d 923, 473 N.E.2d 30, 483 N.Y.S.2d 678 (1984), the New York court did not attempt to develop its state law. *See supra* note 191 and accompanying text. New York may thus be moving to a greater reliance on its state constitution, although it is probably still too early to say so with confidence.

194. Advisory opinions were entered in three of the cases discussed in this Note, in which the state court reinstated its original judgment. *See supra* note 193.

195. This perception is also possible in cases in which the courts simply accepted the Supreme Court's decision without comment. Because the courts did not write an opinion, one cannot tell if they based their decisions on federal law or were simply deferring to the Supreme Court. *See supra* note 191 and accompanying text.

seen from the reinstated judgments.[196]

On the other hand, the flood of advisory opinions that Justice Stevens anticipated from *Long* has not materialized. In the ten cases discussed above, the Supreme Court expressly cited *Long* in support of its presumption that the state court's decision rested on federal grounds. *Long* has also often been used by state courts, however, as a rubber stamp to *avoid* Supreme Court review.[197] Therefore, although some of Justice Stevens' concerns have come to be realized, this analysis also shows that the state courts can manipulate the *Long* approach and bend it to their own advantage. The *Long* approach allows state courts to decide state constitutional issues unimpeded by federal review.[198] Yet it only requires the state court to say explicitly that it is deciding a case on independent and adequate state grounds. The stage may thus have been set for a transition from a federally dominated era of constitutional protections to one in which the state courts play a more prominent role.

IV. STATE REACTION TO *Michigan v. Long*

Traditionally state courts have adopted one of three practical methods of analyzing constitutional claims. The first approach has been called the "dual reliance" method,[199] under which the state court analyzes the case in terms of both federal and state constitutional claims.[200] The second method is what some commentators

196. *See supra* note 186.

197. *See infra* Section IV.

198. Michigan v. Long, 463 U.S. at 1041.

199. *See* Pollock, *supra* note 15, at 983.

200. Some writers have emphasized that dual reliance may easily be abused by state courts that rely on both constitutions in effect to shield their decisions from review. *See* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996-97 (1979).

Of the seventeen states surveyed in this Note, none seemed to have demonstrated a pure dual reliance approach. Although most of the states had dealt with both the state and federal constitutions to varying degrees, all of them emphasized one constitution over the other in their analyses. To the extent that the dual reliance method has been abandoned, the *Long* approach does serve the majority's concern for judicial efficiency. *See* Michigan v. Long, 463 U.S. at 1041. It is certain that the application of the rubber stamp to a state opinion subordinates the federal Constitution and forces a court at least in form to appear to be deciding the case based on its state constitution. At one time or another, all of the state courts surveyed in this study placed in their opinions the declaration that their decisions rested on bona fide, separate, adequate and independent state grounds. And in all cases the Supreme Court denied review. *See* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1171 (1985). But was it the intention of *Long* to require merely a one sentence disclaimer? Or was the Supreme Court expecting that the *Long* approach would encourage states to present an analysis of their decision that rested on state concerns and principles? As we have seen in the states applying the interstitial approach and as we will see in the states applying the primacy approach, most

refer to as the "supplemental" or "interstitial" approach.[201] Under this approach, the state court will look at federal constitutional law first and will only look at state constitutional law if it finds that the floor provided by the federal Constitution was not violated. Finally there is the "primacy" approach,[202] under which the state court will look at its own constitutional law first. If this law provides protection to the individual, the court will not consider the federal Constitution.

A state court's application of one of these approaches as opposed to the others will affect the degree of analysis it gives to state constitutional law. The interstitial model always places state constitutional law as a secondary source. Although it may be sensible and efficient for a state to apply federal law when this law clearly provides decisional principles, to do so on a systematic basis results in state courts forcing federal principles to fit every situation and a consequent neglect of available state principles. On the other hand, the application of the primacy model requires state courts to look to state principles first, thus increasing the chances that the court will undertake a truly adequate analysis of state principles. This approach in turn diminishes the likelihood of Supreme Court review and thereby achieves the stated goals of *Long*. Professor Pollock has noted that: "This model avoids entanglement with federal law and also avoids United States Supreme Court review because of the failure to state an adequate and independent state ground."[203] As this Note discusses, however, there has been less than unanimous adoption of the primacy approach.[204] Even if the primacy approach has been adopted, the state supreme court can still reach its decision without taking meaningful steps toward developing state constitutional law. Although this section discusses the failure of *Long* to achieve its goal with respect to state constitutional independence, it is not intended as an endorsement of that goal. We wish only to emphasize at this point the inabil-

states are not truly applying principled analysis to their state constitutional decisions. *See, e.g.*, People v. Corr, 682 P.2d 20 (Colo.), *cert. denied*, 469 U.S. 855 (1984); State v. Fleming, 198 Conn. 255, 502 A.2d 886, *cert. denied*, 106 S. Ct. 1797 (1986); State v. Couture, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 469 U.S. 1192 (1985); Cannaday v. State, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 469 U.S. 1221 (1985).

201. Pollock, *supra* note 15, at 984; Abrahamson, *supra* note 200, at 1171.

202. Pollock, *supra* note 15, at 983.

203. *Id.*

204. Undoubtedly, in cases in which federal law is reasonably clear, the state court can rely on it regardless of the approach taken. This discussion focuses on the analytical approach taken by a state court and not the ultimate decision that it may reach in a given case. The adoption of the primacy model does not mean that there must be a complete abandonment of federal principles. As discussed below, however, a controlled primacy approach may better serve both state constitutional development and the continuing application of federal principles when appropriate. *See infra* notes 236-50 and accompanying text.

ity of a rubber stamp requirement to encourage states uniformly to apply a single mode of analysis.

A. *The Supplemental Approach*

If the three approaches to analyzing constitutional claims are placed on a continuum of state constitutional activism, the supplemental or interstitial approach would be at the lowest level of state activism, the primacy approach would be at the highest level and the dual reliance approach would fall somewhere in between. Of the seventeen states surveyed in this Note that applied the rubber stamp to their opinions, most still cling to an almost complete reliance on federal law.[205]

New Jersey recently used what in substance was an interstitial method in reversing a conviction because of a violation of the fifth amendment privilege against self-incrimination.[206] This case involved a failure by FBI agents to readminister *Miranda* warnings before reinterrogating a defendant who had previously invoked his right to remain silent.[207] The Supreme Court of New Jersey spent the first seventeen pages of its opinion interpreting the fifth amendment and making predictions of how the Supreme Court of the United States would rule on the issue.[208] The Supreme Court of New Jersey said it "sought to follow [the Supreme Court] faithfully, not to write new law."[209]

---

205. The cases from the seventeen states analyzed in this Note were obtained by identifying all state court opinions that refer to Michigan v. Long, 463 U.S. 1032 (1984). The following cases were decided in jurisdictions that apply the interstitial model: Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Jones, 706 P.2d 317 (Alaska 1985); People v. Hill, 37 Cal. 3d 491, 691 P.2d 989, 209 Cal. Rptr. 323 (1984); Oldham v. State, 179 Ga. App. 730, 347 S.E.2d 698 (Ct. App. 1986); Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (Ct. App. 1983); State v. Otiz, 67 Haw. 181, 683 P.2d 822 (1984); People v. Tisler, 103 Ill. 2d 226, 469 N.E.2d 147 (1984); People v. Chapman, 392 Mich. 691, 222 N.W.2d 749 (1986); Stringer v. State, 491 So. 2d 837 (Miss. 1986); Cannaday v. State, 455 So. 2d 713 (Miss. 1984); State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986); Commonwealth v. Tarbert, 348 Pa. Super. 306, 502 A.2d 221 (Super. Ct. 1985).

The following cases were decided in jurisdictions that apply the primacy model: State v. Ault, 150 Ariz. 459, 724 P.2d 545 (1986); Large v. Superior Court, 148 Ariz. 229, 714 P.2d 399 (1986); State v. Fleming, 198 Conn. 255, 502 A.2d 886 (1986); State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985); State v. Couture, 194 Conn. 530, 482 A.2d 300 (1984); People v. Corr, 682 P.2d 20 (Colo. 1984); State v. Flick, 495 A.2d 339 (Me. 1985); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983); State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983); State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985); State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986).

206. State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986).

207. *Id.* at 255, 511 A.2d at 83.

208. *Id.* at 284, 511 A.2d at 97.

209. *Id.*

The Supreme Court of New Jersey said that it was only the absence of a Supreme Court decision squarely on point that "compelled" it by principles of sound jurisprudence to look to state law.[210] There was no ardent desire expressed by the court to develop its own constitution but only a fear of Supreme Court review: "Failure to set forth clearly the independent state-law basis for a decision in a case in which federal constitutional law is also involved can lead to needless review in the United States Supreme Court, and could in fact require, in some cases, subsequent redundant proceedings in our own courts."[211] The New Jersey court did no more than base its decision *alternatively* "on bona fide separate, adequate, and independent grounds," followed by a one paragraph endorsement of the privilege against self-incrimination in New Jersey.[212] This minimal analysis could hardly be characterized as an in-depth development of state constitutional law.[213]

Illinois courts read that state's constitution even more narrowly to require parallel interpretations if parallel language exists in the federal Constitution and the Illinois Constitution. In *People v. Tisler*,[214] the defendant claimed that the police lacked probable cause to make a warrantless arrest and that, therefore, the trial court should have excluded the drugs seized during the search of the defendant incident to his arrest.[215] The Supreme Court of Illinois applied a strict interstitial approach to find that the evidence used against the defendant did not violate either the fourth amendment to the federal Constitution or article 1, section 6 of its state constitution.[216] The court discussed extensively how the delegates, in drafting section 6 of the state Bill of Rights, did not intend to confer rights and protections beyond those given under the fourth amendment.[217] Justice Clark, in his concurrence, agreed with the ultimate result but did not believe there needed to be a complete surrender of the state constitution to the interpretation by the Supreme Court.[218] The Justice directed his concerns not at the case at hand, but at possible future ramifications: "Although the majority's reasoning may seem harmless today, it would preclude this court from protecting the individual liberties of Illinois citizens

210. *Id.*
211. *Id.* at 285-86, 511 A.2d at 97-98.
212. *Id.* at 256, 511 A.2d at 84.
213. For purposes of analysis the states have been broadly categorized under one of the two approaches based on a limited sample. *See supra* note 205.
214. 103 Ill. 2d 226, 469 N.E.2d 147 (1984).
215. *Id.* at 243, 469 N.E.2d at 152.
216. *Id.*
217. *Id.* at 241-42, 469 N.E.2d at 155-56.
218. *Id.* at 258, 469 N.E.2d at 163.

should such protection become essential in the future."[219] Because this restriction is self-imposed, the Illinois court theoretically would be able to free itself from this limitation in the future.

State courts may follow the supplemental model because, by subordinating their constitutions to the federal Constitution, they are serving the nation as a whole by not departing from federally established principles.[220] This argument is buttressed by the fact that an increasingly mobile population needs to rely on uniform principles. A state court interpreting only its own constitution, however, cannot assure that any other state will also interpret *its* constitution consistently and uniformly with the federal Constitution. The Supreme Court in *Long* makes clear that even if state courts were able to achieve uniformity, our system of federalism does not mandate uniformity of constitutional principles.[221] It is, therefore, neither feasible nor expected that state courts, through their state constitutions, will achieve national uniformity of constitutional principles.

Not even the push from the Supreme Court of the United States has swayed these state courts. For the states that follow the interstitial model, Justice O'Connor's rule in *Long*, that state courts shape their opinions so that they rest on independent and adequate state grounds, is no more than a formalistic requirement. The substance of the opinions has not changed and the majority of the state court opinions continue to demonstrate a reliance on federal precedent, and merely expand on what the Supreme Court already has said. The absence of substance means that we still have states that only echo the Supreme Court's voice. It is, therefore, improper to conclude that the void left by the Burger Court in the area of individual rights will naturally be filled by state courts under their own constitutions. The Supreme Court must realize that in many states the retreat in individual protections at the federal level will mean no additional protection above the floor. As far as these states are concerned, the Supreme Court is setting both the constitutional floor and ceiling.

B. *The Primacy Approach*

As a point of departure in discussing the primacy approach it should be noted that there are many different applications of this approach. Practical applications of this approach range from state courts delegating to counsel the responsibility for distinguishing the

219. *Id.* at 259, 469 N.E.2d at 164.

220. Pollock, *supra* note 15, at 986.

221. Michigan v. Long, 463 U.S. at 1041.

state constitutional issues from federal law issues,[222] to state courts assuming primary responsibility for all civil liberties.[223]

In following the primacy approach in *State v. Jewett*,[224] the Supreme Court of Vermont declined to address state constitutional questions because the issues were not adequately briefed by counsel. The court said that it was the duty of the attorneys to raise state constitutional issues at the trial level and then develop them on appeal.[225] The defendant had appealed his conviction on the ground that he was stopped and arrested in violation of his state constitutional rights.[226] Only after the attorneys had adequately identified state constitutional issues would the Supreme Court of Vermont address them. Nevertheless, the court emphasized that textual differences between the Vermont and the federal constitutions created the possibility that the two constitutions could be construed differently. According to the court, the "imaginative lawyer" bears the bulk of the burden for developing sound state constitutional law.[227]

Even among the states that have applied state constitutional principles, many have failed to enunciate their criteria for deciding when it is appropriate for state courts to apply state constitutions.[228] Thus, in *State v. Lowry*,[229] the Supreme Court of Oregon relied exclusively on its state law, and said that the court would not be tied to

---

222. State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985).

223. State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985).

224. 146 Vt. 221, 500 A.2d 233 (1985).

225. *Id.* at 229, 500 A.2d at 238.

226. *Id.*

227. *Id.*

228. *See, e.g.*, State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983). The court said that in order to ensure that a party that invokes the protection of the Constitution of New Hampshire will receive a final, nonreviewable decision it will look to state constitutional claims first. *Id.* at 231, 471 A.2d at 351. The court then cited several other cases in which it had previously departed from the pronouncements of the Supreme Court of the United States. *Id.* Nonetheless, the court said nothing more than it *can* and *has* previously departed from the Supreme Court's decisions, but gave no explanation of what compelled the court to do so in this particular case.

The Supreme Court of Connecticut avoided the dilemma of justifying its departure by viewing its state constitutional power as plenary:

> [I]n the area of fundamental civil liberties—which includes all protections of the declaration of rights contained in article first of the Connecticut Constitution—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter.

State v. Kimbro, 197 Conn. 219, 223 n.16, 496 A.2d 498, 506 n.16 (1985) (citing its own opinion in Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977)). Although this statement may be constitutionally dispositive, the claim that the court has the authority to deviate does not say when, in fact, it will deviate.

229. 295 Or. 337, 667 P.2d 996 (1983).

federal constitutional law in holding that the police had conducted an illegal search of the defendant upon his arrest.[230] Nowhere in the opinion did the court explain what factors, if any, had led to its departure from federal principles. Judge Jones' concurrence in that case expressed concern for what he viewed as a radical departure without principled reasoning from the decisions of the Supreme Court of the United States involving the same or similar constitutional provisions.[231] There is no question that the state supreme court has authority to interpret its state constitution.[232] But whether it should do so as against the federal Constitution in any given case is a question that involves balancing the state's interest or lack thereof in providing greater rights to its citizens against the additional complexity that will result in a dual constitutional system. As Judge Jones pointed out, "[the court] must be extremely cautious that . . . [its] decisions do not hopelessly confuse police, prosecutors, defense attorneys, judges and the public with search and seizure jurisprudence unique to Oregon which injects unnecessary complexities into the law."[233]

Although it is true that courts do not always divulge all of the factors considered in their analyses, carefully reasoned opinions are especially important when departing from federal principles, both because of the departure from current expectations and because of the expectations created for the future. What is required is predictability in the method by which the state courts determine what areas of the law carry such a level of state concern that departure from federal principles is likely. The need for predictable consequences, however, does not necessarily require a sacrifice of state constitutional independence.[234] It is the ad hoc manner in which the state courts depart from principles enunciated by the Supreme Court of the United States and not the act of departure itself that causes the confusion.[235]

Achieving predictability requires the use of what could be called

230. *Id.* at 343, 667 P.2d at 999. *See* State v. Owens, 302 Or. 196, 206 n.4, 729 P.2d 524, 530 n.4 (1986). The Supreme Court of Oregon subsequently distinguished *Lowry*, saying that in *Owens*, unlike *Lowry*, the officer had probable cause to believe the defendant was carrying a controlled substance, and that *Owens* thus did not concern a "search" or "seizure."

231. 295 Or. at 352, 667 P.2d at 1004.

232. Michigan v. Long, 463 U.S. at 1041.

233. State v. Lowry, 295 Or. at 352, 667 P.2d at 1005.

234. *See* People v. Corr, 682 P.2d 20 (Colo.), *cert. denied*, 469 U.S. 855 (1984). The dissent in *Corr* argued that "law enforcement officers are entitled to rely upon the decisions of our highest court, and should not have to anticipate that a federally guaranteed constitutional right will be given a broader interpretation under an all but identical provision in a state constitution." *Id.* at 33.

235. *See infra* note 237 and accompanying text.

a "controlled primacy" model instead of just a pure primacy model. The pure primacy model only requires the state court to begin with its own constitution, but requires no justification for choosing the state constitution over the federal Constitution. As a result, attorneys, lower courts, and the public are given no indication of what compels the state court to depart from federal principles, or what may compel it to do so in the future. The problem is compounded by the fact that state courts do not apply the same approach in every case. A controlled primacy approach overcomes these difficulties by requiring a two step methodology. First, the court determines through specified criteria whether the case at hand is a proper case for broadening rights provided by the federal Constitution. If the state concerns are such that departure is *necessary*, then the court proceeds to the second step of determining the *extent* of departure necessary, as is done in a pure primacy approach.

In *State v. Gunwall*,[236] the Supreme Court of Washington applied a controlled primacy approach to its telephone search and seizure provision, demonstrating how both state constitutional activism and predictability can be achieved simultaneously. The court expanded the accused's rights against illegal search and seizure by recognizing the need for predictable consequences in applying a primacy approach:

> Many of the courts now resorting to state constitutions rather than to analogous provisions of the United States Constitution simply announce that their decision is based on the state constitution but do not further explain it. The difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.[237]

To address these concerns, the Supreme Court of Washington set out six nonexclusive neutral criteria that courts are to apply in determining when it is appropriate to interpret the state constitution to give greater rights than those provided by the federal Constitution. The court first examined the text of the state constitution, using as a point of departure the view that the state constitution serves a different function from that of the federal Constitution.[238] Although the federal judiciary can act only to exercise the powers and rights granted in the Constitution of the United States, the state courts must serve as arbitrators between the states' plenary powers and the citi-

236. State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986).
237. *Id.* at 60, 720 P.2d at 811-12.
238. *Id.*

zens' individual rights.[239] The emphasis is on the subject matter at issue and whether it involves an area distinct from the scope of the federal Constitution. If the state court does find parallel provisions, and thus a common scope, the next step is to try to find significant differences in the texts of the two constitutions.[240] Finding material differences in the language, according to the Supreme Court of Washington, may justify a more expansive interpretation of the state constitution.[241] The court went on to say that even if there are no meaningful differences, other state constitutional provisions may suggest the view that the state constitution be interpreted differently from the federal Constitution.[242] This approach is markedly different from that of state courts that limit their analyses only to the parallel provisions.[243]

The Supreme Court of Washington next turned to state constitutional and common law history, recognizing that "[t]he history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law."[244] This history provided the court with a perspective in reading its own constitution. In addition, the court examined its preexisting state law to obtain a sense of the provision's legal context.[245] At first glance this endeavor may seem to be subjective and unpredictable, but if a state has a long history of strict protection in a certain area, then one would expect a state court to interpret its state constitution to further that protection. The Supreme Court of Washington, for example, noted that the state had a long history of strictly protecting telephone communications. The state's supreme court, therefore, would likely read its state constitution's search and seizure provision to prevent disclosure of long distance calls.[246]

Undertaking a broader analysis, the court addressed the structural and functional differences between the federal and state constitutions, finding that:

> [T]he United States Constitution is a *grant* of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states,

239. *Id.* at 66, 720 P.2d at 815.

240. *Id.* at 65, 720 P.2d at 814.

241. *Id.*

242. *Id.* at 67, 720 P.2d at 815.

243. *See* State v. Jackson, 672 P.2d 255, 260 (1983) (holding that if the language of the two constitutions is substantially the same, there is no basis for interpreting the state's provision more broadly than its federal counterpart).

244. State v. Gunwall, 106 Wash. 2d at 65-66, 720 P.2d at 814-15.

245. *Id.* at 66, 720 P.2d at 815.

246. *Id.* at 67-68, 720 P.2d at 815.

> whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law.[247]

The Supreme Court of Washington thus views its state constitution as requiring more aggressive protection of individual rights than does the federal Constitution.

Finally, the Supreme Court of Washington studied matters of particular state interest or of local concern. It balanced what it perceived as the weight of the state's concern, derived from the above criteria, against the disruption of national uniformity that its departure from the rule would cause. The court concluded from such an analysis that the "overwhelming state policy consideration" tipped the scales in favor of independent state analysis.[248] Having justified its use of separate and independent state grounds on the basis of the six-part test, the court went on to analyze its state constitution to determine the specific departure required.[249] The whole process took only two pages of the opinion to describe. The court laid a foundation which not only justified its use of broader state principles in this case, but also provided predictable consequences in future cases. The kind of reasoned and articulated analysis conducted by the Washington court may well have been what the Supreme Court intended state courts to undertake in response to *Long*.[250] But Washington's approach is the exception and not the rule.

The absence of more state opinions of this nature may be due both to the message of *Long* and the timidity of many state courts. The Court in *Long*, in essence, said that if the state court declared it was deciding a case on independent state grounds, the Court would take the state court's word for it.[251] Allowing the state courts simply to rubber stamp their decisions without any monitoring of the underlying substance of the opinions hardly gives them an incentive to develop their own state doctrines. The Supreme Court, however, is limited in its capacity to force state courts to undertake an exhaustive study of their own constitutions. At the same time, many state courts remain uneasy about developing the kind of analysis displayed by the Supreme Court of Washington.[252] Despite *Long*, many state courts cling to an interstitial approach and refuse to view their own constitu-

247. *Id.* at 66, 720 P.2d at 815.

248. *Id.* at 67, 720 P.2d at 815.

249. *Id.* at 67-68, 720 P.2d at 815-16.

250. Michigan v. Long, 463 U.S. at 1041.

251. *Id.*

252. State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986).

tions as the primary protectors of individual rights.[253] One can only speculate that their hesitation may be due to a reluctance to develop this kind of analysis. In any case, this is not something the Supreme Court can compel; it must be sought by each state. Eventually other states may follow Washington's example, but they will do so out of choice and not because of compulsion by the Supreme Court.

V. CONCLUSION

The preceding survey of cases decided after *Long*, at both the Supreme Court and state levels, exposes at least four aspects in which the *Long* approach has yet to respond to the problems it set out to solve. First, it has not lessened the Supreme Court's burden of reviewing state law.[254] Unless the rubber stamp is present, the Supreme Court must still explore the state court's opinion to determine if it is substantively based on state law grounds. Even in cases in which the state court cited state precedent, the Court has felt compelled to examine those cases to determine whether they expound state or federal law.

The second failure of the *Long* approach has been its inability to prevent the delivery of advisory opinions by the Supreme Court.[255] When state courts maintain their position on state law grounds after the Supreme Court has reversed on federal grounds, they take away any substantial effect that federal court review might have had. The only sure way to avoid this problem is to ensure that those state courts that are likely to revert to state grounds on remand rely expressly on state law grounds in their original opinion. As the use of the rubber stamp has demonstrated, the *Long* approach, which sought to encourage the state courts to rely on state grounds, has neither been practical nor successful. Third, the Supreme Court's inability to refrain from intervention has resulted in the waste of scarce judicial resources and a continuing disrespect for state decisions.[256] This situation is apparent in those cases in which the Supreme Court has reviewed a state court decision on federal grounds and forced the state court to justify its reinstatement of its original decision on state grounds. The fourth concern, presented by Justice Stevens, is that issues are not being percolated in the state courts before being reviewed by the Supreme Court.[257] The *Long* approach,

253. *See supra* notes 207-21 and accompanying text.
254. *See supra* notes 59-74 and accompanying text.
255. *See supra* notes 75-124 and accompanying text.
256. *See supra* notes 125-59 and accompanying text.
257. *See supra* notes 160-89 and accompanying text.

by encouraging Supreme Court review, discourages this type of percolation.

The *Long* approach has also failed to achieve its stated goal of encouraging state courts to develop state constitutional principles. The rubber stamp has not persuaded state courts to apply state law principles when they review a trial court's decision for the first time. The state courts that have chosen to follow the interstitial model of decision have not been deterred by the language in *Long*. They have continued to place federal analysis before state analysis and in many cases have failed to provide the latter. They simply state that they are deciding the case on independent and adequate state grounds. For states following the interstitial model, this is all that *Long* has required and it is all that it has achieved.

It is more difficult to determine whether the Court has achieved its hidden goal, if indeed it was a goal, of having more cases available for its review, thereby enabling it to constrain or reduce defendants' constitutional protections. It is apparent that the *Long* approach did, in the short run, result in more cases being reviewed. On the other hand, the use of the rubber stamp allows a state to escape this review if it wishes to do so. Therefore, even if the Court's hidden goal was to review more cases, as state courts become increasingly adept at using the rubber stamp, the likelihood of this goal being realized will be reduced.

Having found that the *Long* approach has thus far not accomplished what the Court intended it to achieve, the next question is whether the Court's goals established in *Long* are appropriate in the first place. Those opposed to *Long* will argue that as a practical consequence there is no problem to solve. The state courts' decisions, whether made on federal or state grounds, have no national binding effect. Within its own territorial jurisdiction each state court has the power to set the ceiling of individual rights. The fact that a state court rests its analysis on federal precedent and principles has no national consequence. To that state's citizen, who is the only one affected, the fact that the court sets the ceiling at a certain level means that the ceiling will be at that level regardless of whether the stated grounds are based on federal or state law. If a state wishing to raise the ceiling is unable to use federal law, it will use state law. Further, the *Long* approach allows a state court to continue to use federal law and yet, by the use of the rubber stamp, avoid Supreme Court review. Therefore, the state court is, in effect, choosing whether or not to allow review. This means that the Court has failed to achieve its goal of gaining control over the constitutional protection of defendants in

criminal cases, if, in fact, that is what the Court truly intended. The Supreme Court's struggle to insure independent state grounds, therefore, is a futile effort that will only result in more advisory opinions.

Additionally, if the Supreme Court attempts to enforce an "adequacy" prong along with the "independent" prong of the *Long* approach, the result will be an intrusion by the Supreme Court into the states' realm. Forcing the state courts to examine the means and motives of their actions too carefully, and only in the light of state law, might cause them to shy away from their independent function as final arbiters of state constitutional law. Federal law is a result of the percolation of ideas from all the states. Using federal precedent allows the states to draw upon this experience. It helps them both to clarify and justify their decisions. Requiring an "adequate" ground, as interpreted not by the state supreme courts who are the final interpreters of their own laws, but by the Supreme Court of the United States, is a tremendous intrusion into the states' constitutional sphere. The state courts would no longer be able to avoid Supreme Court review. If the states are inhibited in this way, the Supreme Court will be setting both the floor and the ceiling on individual rights. Further, the Supreme Court will be forcing the state courts to justify their decisions to it. The question then arises whether the Supreme Court can force this type of justification from the state courts or whether this would be an unconstitutional, or otherwise impermissible, intrusion into the realm of state prerogative. At the very least, this type of intrusion would support Justice Stevens' claim of disrespect for state courts.

As long as state courts have the ability to revert back to state law grounds, then whether they do revert has no practical consequence. This is not to say, however, that the state courts should not accept the responsibility of carefully analyzing their own constitutions; just that they cannot, and should not, be forced to do so by the Supreme Court of the United States.

On the other hand, proponents of *Long* argue that although state courts ultimately are able to raise the ceiling of rights enjoyed by individuals, two important reasons remain why the Supreme Court should constrain the state courts to their own state constitutional spheres. First, constitutional principles dictate that the Supreme Court is the sole and final arbiter of the Constitution of the United States.[258] The abdication by the Supreme Court of this role in matters concerning federal constitutional principles above the floor, in essence, allows a conflicting interpretation of the federal Constitution

258. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

at the state level. The states would be able to set federal constitutional law above the floor set by the Supreme Court. This result, in turn, could create fifty different interpretations of the gap left by the Supreme Court. The state courts would not be interpreting their own constitutions within their sovereign authority, but would instead be establishing federal principles within the federal sphere. Clearly, such a development, were it to occur, would not bind the Supreme Court to state interpretations of federal principles; nonetheless, as long as the Supreme Court chooses to honor the *Long* approach, the state courts will be able to shield their decisions from direct Supreme Court review. Nor does the states' ability to block Supreme Court review through a rubber stamp in the short run mean that the Supreme Court cannot ultimately establish federal principles. What can result, however, is that citizens in one state will have greater federal constitutional protection than those in another state. Some may therefore conclude that the state decisions will only have a marginal and temporary effect on federal principles. If this were true, the proper approach would be to go back to outright dismissal of the cases as merely verbiage by the state courts. Yet Justice O'Connor emphasized the need to review these cases by saying that "outright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion."[259] Thus, the Court in *Long* recognized the need for federal uniformity and the fragmenting effect that ignoring state decisions would have on federal principles.

Additionally, and more importantly for state constitutional development, proponents of the *Long* approach can argue that there is a real need for the Supreme Court to keep the state courts within their state constitutional boundaries. Only by requiring the state courts to show both independent *and* adequate grounds will the Court eliminate advisory opinions and force the state courts to account for their departures from federal principles. The Supreme Court has only applied the "independent grounds" prong of *Long*, while leaving the "adequacy" prong untested.[260] Allowing the state courts to apply federal law and just rubber stamp their opinions has avoided an open conflict between federal and state law principles. Were the adequacy prong to be activated, the state courts would then necessarily have to

259. Michigan v. Long, 463 U.S. at 1040.

260. Collins and Galie, *supra* note 14, at 340.

weigh their interest in providing greater rights against the lack of predictability and the haphazard manner in which they have been establishing state constitutional principles.[261] This analysis in turn would require state courts to exercise greater judicial responsibility. Justice Pollock expressed his concern this way: "State courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court."[262] The use of state constitutions should be principled and not simply results oriented if state courts are truly going to take responsibility for developing their own state constitutional jurisprudence.

In conclusion, this Note demonstrates that the *Long* doctrine has failed in its stated goal of encouraging state courts to develop state constitutional law. In addition, the concerns of the Supreme Court in alleviating the need to examine state law and in reducing the issuance of advisory opinons have not been resolved. This Note suggests two possible alternatives to the *Long* doctrine, and points out some of their potential consequences: First, that the Supreme Court require and enforce the "adequate" prong of the independent and adequate state grounds approach; and second, that the Supreme Court simply refuse to accept review in cases where the state courts have extended constitutional protections. This Note does not presume to know which alternative, if either, the Supreme Court will choose; it only points out the fact that the concerns addressed in *Long* have not been resolved, and if the Supreme Court does, in fact, wish to resolve these concerns, an approach different from that of *Long* must be chosen.

PATRICIA FAHLBUSCH
DANIEL GONZALEZ

261. The six criteria established by the Supreme Court of Washington presented truly "adequate" state grounds. State v. Gunwall, 106 Wash. 2d at 61-62, 720 P.2d at 812-13. An analysis of this kind would not require, as Justice O'Connor feared, the Supreme Court to undertake an extensive review of state law issues. The *Gunwall* opinion clearly and expressly indicates that it is alternatively based on bona fide separate, adequate, and independent grounds and does not require speculation about state law by the Supreme Court. The difference is in the substance. Although the other state courts say they are relying on independent and adequate grounds, Washington *proved* it did.

262. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983).