Thirty Years Too *Long*: Why the *Michigan v. Long* Presumption Should Be Rejected, and What Can Be Done To Replace It

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I. INTRODUCTION: THE CASE AGAINST *LONG*

When *Michigan v. Long*[1] celebrated its thirtieth birthday in 2013, the occasion warranted little celebration. Over the course of the three decades since the United States Supreme Court established the presumption that federal law controls in state high court cases involving a mix of federal- and state-law grounds for decision, thus giving the Court jurisdiction to review the state high courts' decisions,[2] the *Long* framework has proven to be controversial at best, and unwieldy and ineffectual at worst. This article argues that the *Long* presumption should be rejected.

Several lines of reasoning support this conclusion. First, the vast majority of the long history of the Court's approach to reviewing the decisions of state high courts has been marked by deference to those courts; its current aggressive approach to reviewing the decisions of state high courts is a relatively recent development. Second, the Court itself has demonstrated some reservations as to the wisdom of *Long*. Members of the Court have, at times, expressed their doubts directly, as in the well-reasoned dissents of Justices John Paul Stevens and Ruth Bader Ginsburg.[3] The Court has also impliedly evinced a distrust of the *Long* presumption on a particularly consequential and high-profile occasion. In the first[4] of the series

1. 463 U.S. 1032 (1983).

2. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court revolutionized its approach to evaluating whether it had jurisdiction to review ambiguously grounded state high court cases by setting forth the following presumption:

> [I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Id. at 1042 (internal citation omitted). The rationale underlying the holdings of *Long* will be discussed in much greater detail in Part II.C, *infra*.

3. *See, e.g.*, Florida v. Powell, 559 U.S. 50, 64–76 (2010) (Stevens, J., dissenting); Arizona v. Evans, 514 U.S. 1, 23–34 (1995) (Ginsburg, J., dissenting); Delaware v. Van Arsdall, 475 U.S. 673, 689–708 (1986) (Stevens, J., dissenting).

4. Bush v. Palm Beach Cnty. Canvassing Bd. (*Bush I*), 531 U.S. 70 (2000) (per curiam).

of cases leading up to its *Bush v. Gore*[5] decision, which could arguably have determined the outcome of the 2000 presidential election, the Court quietly departed from the *Long* presumption, instead resuscitating an earlier approach to ambiguously grounded cases and remanding the case to the Florida Supreme Court for clarification as to the basis for its decision. Given the critical importance of the situation, the Court's decision not to rely on *Long* under the circumstances can be viewed as a symbolic "vote of no confidence."

Not surprisingly, the state high courts whose decisions are presumed to be subject to U.S. Supreme Court review have been more forthright in expressing their distaste for *Long*. The tendency of *Long* to either dampen or neutralize entirely the benefits of the "adequate and independent state grounds doctrine"—fostering comity, keeping the courts operating within their proper jurisdictional bases, and promoting judicial efficiency—explains why this is so.

Long creates comity problems because it gives the U.S. Supreme Court the opportunity to critique and second-guess state high courts' decisions. It has even been speculated from time to time that the very act of granting certiorari, vacating a state court's decision without opinion, and remanding the case is an implicit signal on the part of the U.S. Supreme Court that it did not like the direction in which the state court had taken the case, and that the state court ought to reverse itself on remand. This, of course, is not the Court's proper role.

Instead of preventing problems like these, *Long*'s "plain statement" rule, which requires state courts to explicitly state that their decisions rest upon adequate and independent state grounds if they wish to avoid Supreme Court review,[6] has exacerbated the resentment that state courts have at times expressed in reaction to a vacatur or reversal. Some state courts have adopted sarcastic or hostile tones in their "plain statements," and the New Hampshire Supreme Court even attempted to issue a "blanket disclaimer" intended to shield its ambiguously grounded cases from Supreme Court review in perpetuity, whether they include a thorough, good-faith state-law analysis or not.[7] This hostility and passive aggression is not limited to the "plain statement" rule, however. State high courts have on multiple occasions expressed anger or dissatisfaction at what they perceive as the Court's incursion into their territory. If this type of enmity continues to build, and if state high

5. 531 U.S. 98 (2000) (per curiam).
6. *Long*, 463 U.S. at 1043–44.
7. State v. Ball, 471 A.2d 347, 352 (N.H. 1983).

courts protect their sovereignty and take stands on principle by refusing to follow the U.S. Supreme Court's instructions on remand, the latter Court's authority could be undermined and its standing in the American system of government permanently compromised. After all, "the Supreme Court has no army or police force with which to enforce its decisions."[8] It is, therefore, only as good as its word.

Even more troubling than these comity problems are the jurisdictional implications of *Long*. The state courts whose state constitutional decisions the U.S. Supreme Court reviews almost invariably reach the exact same decision on remand, rendering the Court's decisions in such cases advisory in the sense that they had no effect on the ultimate outcome of the case. A twenty-year retrospective study conducted in 2003 revealed that in more than half of the cases reviewed pursuant to *Long*, the state high court either reached the same result on remand or reached the same result as the U.S. Supreme Court by coincidence.[9] A 2013 study conducted for the purposes of this article revealed that the jurisdictional effects of *Long* were even more pronounced at the thirty-year mark than they were a decade ago. The state courts reached the same result on remand with respect to at least some issues—thus rendering the U.S. Supreme Court's opinions advisory to some degree—in seven of eleven cases.[10] In fact, the only cases in which the outcomes *were* affected were cases in which the state court interpreted the state's constitution in accordance with the U.S. Supreme Court's interpretation of the federal Constitution—cases the Court *should* have jurisdiction to review due to the close link to federal law.[11]

The issuance of advisory opinions also frustrates the third benefit of the adequate and independent state grounds doctrine, judicial economy. For example, assuming each of the seven advisory opinions discussed above required the U.S. Supreme Court and the state high court on remand to spend one month each deciding the case and generating an opinion, fourteen months' worth of man-hours and other resources—well over a year—were allocated toward cases that never should have been reviewed or remanded in the first place.

Again, *Long*'s plain statement rule has done nothing to remedy these problems. The state courts frequently ignore the requirement

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8. ROBERT GARNER, PETER FERDINAND, & STEPHANIE LAWSON, INTRODUCTION TO POLITICS 49 Box 2.1 (2012).

9. Matthew G. Simon, Note, *Revisiting* Michigan v. Long *after Twenty Years*, 66 ALB. L. REV. 969, 982–84 (2003).

10. *See infra* Part III.A.2.b.i.

11. *See infra* Part III.A.2.b.i.

entirely, forget about it, or bury it in a footnote of a long and complex opinion. In other cases, it is so difficult to determine whether a particular phrase in the state court's opinion constitutes the requisite "plain statement" for the purposes of *Long* that it is doubtful whether it is sufficiently "plain" at all. Even worse is the possibility, realized in one recent case,[12] that the U.S. Supreme Court will recognize the plain statement, but reject it and review the case anyway.

These unintended consequences of *Long* thus frustrate its stated goals by increasing inefficiency in the court system, endangering comity between the federal and state courts, and stretching the jurisdiction of the Court dangerously close to its bounds. In order to resolve these issues or, better yet, avoid them entirely, it is time for the Court to abandon *Long*. Instead, it should err on the side of caution and presume that it lacks jurisdiction to review the decision of a state court of last resort that relies on a mixture of state and federal law grounds. The Court should return to its earliest approach to such cases:[13] where it is unclear whether a state high court case was decided on state or federal constitutional grounds, the Court should presume that the case was decided on *state* grounds and decline to hear the case for lack of jurisdiction.

This does not mean, however, that the Court must return to the laissez-faire approach that allowed state courts' erroneous interpretations of federal law to remain uncorrected and ultimately led it to adopt the *Long* presumption. In order to prevent this and preserve the uniformity of the body of federal jurisprudence for which it has the ultimate responsibility, the Court should include a disclaimer in its denial of certiorari that states that it lacks jurisdiction based upon the adequate and independent state grounds doctrine, and that the state high court's opinion is not precedential to the extent that its decision rests upon federal law.[14] This disclaimer intends no disrespect toward the state courts and makes no new law. Rather, it simply reminds practitioners who encounter that state high court decision of a principle of federalism that is beyond dispute: the state high courts are the ultimate arbiters of state law, while the United States Supreme Court has the ultimate authority to interpret federal law.

In order to ensure the success of this effort, state high courts should adopt "modern federalism," proposed for the first time in this

12. Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 502 (2012) (per curiam).

13. *See, e.g.*, Thomas v. Bd. of Trustees of Ohio State Univ., 195 U.S. 207 (1904); Minnesota v. N. Sec. Co., 194 U.S. 48 (1904); King Bridge Co. v. Otoe Cnty., 120 U.S. 225 (1887).

14. *See infra* Part III.B.1.b.

article, as their preferred approach to the state constitutional decision-making process. Modern federalism requires state high courts to make the effort, to the extent that their schedules and resources allow, to conduct an independent state constitutional analysis in good faith *before* analyzing any federal issues that might be necessary to resolve the case. The state high courts should also keep their state and federal analyses separate, preferably by placing each in its own respective portion of the opinion. In order to promote long-term compliance, the state high court should propose and strongly encourage litigants to use a standardized analytical framework[15] that mirrors the court's order of analysis. Litigants should follow this framework as they brief state constitutional issues, which would in turn help to keep the state and federal issues distinct and conserve time and judicial resources by supplying the court with the "raw materials" it needs to produce a thorough state constitutional analysis.

II. THE ROAD TO *LONG*

A. Early Cases

1. The Origins of Supreme Court Review of State High Court Cases

In order to understand the significance of *Michigan v. Long*—and to properly comprehend how far the United States Supreme Court has strayed from its previous approaches to reviewing the decisions of state courts of last resort—it is necessary to place *Long* into proper historical context. It is helpful to begin, as it is often said, at the very beginning, with the seminal decision that serves as the source of much of the United State Supreme Court's power. In *Marbury v. Madison*,[16] the Court interpreted Article III of the United States Constitution as establishing the power of judicial review, that is, the courts' authority to invalidate acts of Congress by declaring them unconstitutional.[17]

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15. For example, the Pennsylvania Supreme Court's framework for state constitutional analysis was announced in *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991). *Edmunds* will be discussed in greater detail *infra* Part III.B.2.b.ii.

16. 5 U.S. 137 (1803).

17. *See id.* at 173–80. Specifically, Chief Justice Marshall wrote in an oft-quoted passage:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the con-

While *Marbury* established judicial review in a general sense, the contours of the courts' authority would be delineated over the course of the next two decades.[18] In 1816, *Martin v. Hunter's Lessee*[19] marked the Court's first opportunity to explore the boundaries of the United States Supreme Court's relationship to its state counterparts. The facts of *Martin* involved a dispute over a tract of land in Virginia called the Northern Neck, which an English nobleman, Lord Thomas Fairfax, purportedly devised in his will to a nephew, British citizen Denny Fairfax, before the Revolutionary War.[20] After the Revolution, the Commonwealth of Virginia commenced an action in ejectment to confiscate the land from Denny Fairfax pursuant to legislation it had enacted during the war that allowed it to confiscate property owned by Loyalists.[21]

The Virginia Supreme Court initially upheld the confiscation on the grounds that the Peace Treaty between the United States and England did not control the outcome of the dispute over the Northern Neck.[22] The United States Supreme Court reversed, holding that the treaty did, in fact, apply, and remanded the case to the Virginia Supreme Court.[23] On remand, the Virginia Supreme Court reaffirmed its original decision, reasoning that the United States Supreme Court lacked jurisdiction to review the decisions of state high courts.[24] On appeal to the United States Supreme Court, the

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> stitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.

Id. at 177. The importance of judicial review cannot be overstated. "The Supreme Court is often said to be the most powerful arm of the American political system because of its established right (of judicial review) to declare actions of the executive and legislative branches as unconstitutional." GARNER ET AL., *supra* note 8, at 49 Box 2.1.

18. The debate over the breadth of Article III began much earlier, however, dating back to the founding of the nation. George Mason, for example, feared that "the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States." George Mason, 3 ELLIOT, Debs. at 475. Addressing the Virginia ratifying convention in 1788, Mason cautioned that there was no "limitation whatever with respect to the nature or jurisdiction of [the federal] courts." George Mason, Speech at the Virginia Ratifying Convention (June 19, 1788). The Federalists, including John Jay, Alexander Hamilton, and James Madison, responded to the fears of Mason and his anti-Federalist brethren by assuring them that "the action of the State courts could [not] be revised by the judiciary department, except on questions purely Federal." Murdock v. City of Memphis, 87 U.S. 590, 609 (1874).

19. 14 U.S. 304 (1816).

20. *Id.* at 307–09, 311.

21. *Id.* at 309–12.

22. Hunter v. Fairfax's Devisee, 15 Va. 218, 238 (1810), *rev'd sub nom.* Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603 (1812).

23. *Fairfax's Devisee*, 11 U.S. at 605–08.

24. Hunter v. Martin, 18 Va. 1, 58–59 (1815), *rev'd sub nom.* Martin v. Hunter's Lessee, 14 U.S. 304 (1816). The Supreme Court of Virginia explained:

Court again reversed the decision of the Virginia Supreme Court.[25] In an opinion authored by Justice Story, the Court held that the United States Supreme Court's appellate jurisdiction extended to cases originating in state courts.[26] In establishing judicial review by the United States Supreme Court over state court decisions, the Court made clear that the fundamental assumption underlying the new American system of government—that the federal system requires the states to cede some degree of their autonomy to the federal government—extended to the judiciary.[27] In a particularly elegant passage, Justice Story wrote:

> Such is the language of the article creating and defining the judicial power of the United States [Article III]. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.[28]

The United States Supreme Court thus declared its own supremacy over its state counterparts with respect to matters of federal constitutional interpretation.[29]

> The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States, does not extend to this court, under a sound construction of the constitution of the United States;—that so much of the 25th section of the act of congress, to establish the judicial courts of the United States [commonly known as the Judiciary Act of 1789], as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court; and that obedience to its mandate be declined by this court.

Id.

25. *Martin*, 14 U.S. at 362. The Court ultimately held the confiscation of the Northern Neck property impermissible and ruled that aliens (here, Denny Fairfax) were permitted to inherit land in Virginia. *Id.*

26. *Id.* at 342 (opinion of the Court, per Story, J.) ("It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals . . . .").

27. *Id.* at 343 ("It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives.").

28. *Id.* at 328.

29. To be precise, *Martin v. Hunter's Lessee* established United States Supreme Court review over state high courts' decisions with respect to federal law in *civil* matters. Five years later in *Cohens v. Virginia*, 19 U.S. 264 (1821), the Court held that state courts' *criminal* law decisions involving federal law are reviewable by the federal courts.

2. The Presumption against Reviewing State Decisions

Even though the Court established its authority to review the decisions of state high courts early in the nation's history, it exercised that power with great restraint for more than a century afterward. In a general sense, the Court advocated that the federal courts exercise their limited jurisdiction sparingly.[30] In the 1887 case of *King Iron Bridge & Manufacturing Co. v. Otoe County*,[31] for example, the Court recognized the presumption that a federal court lacks jurisdiction over a state court's decision unless "the contrary appears affirmatively from the record."[32] For this proposition the Court cited *Mansfield, C. & L. M. Railway v. Swan*,[33] which explained:

> [T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.[34]

King Iron Bridge and *Mansfield* were neither the first nor the last cases of their kind. In many other instances, the Court's default presumption was to assume, in cases where the basis for its jurisdiction was not apparent, that it lacked jurisdiction over the matter.[35]

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30. For a discussion of the jurisdictional limitations of the federal courts that spring from the text and interpretation of Article III of the U.S. Constitution, see *infra* Part III.A.1.

31. 120 U.S. 225 (1887).

32. *Id.* at 226.

33. 111 U.S. 379 (1884).

34. *Id.* at 382.

35. *See, e.g.*, Thomas v. Bd. of Trustees of Ohio State Univ., 195 U.S. 207, 218 (1904) ("The presumption is that a cause is without the jurisdiction of a circuit court of the United States unless the contrary affirmatively and distinctly appears."); Minnesota v. N. Sec. Co., 194 U.S. 48, 62–63 (1904) (requiring an affirmative showing of jurisdiction); Bors v. Preston, 111 U.S. 252, 255 (1884) ("[B]ecause the courts of the Union, being courts of limited jurisdiction, the presumtion, [sic] in every stage of the cause, is that it is without their jurisdiction, unless the contrary appears from the record."); Grace v. Am. Cent. Ins. Co., 109 U.S. 278, 283 (1883) ("As the jurisdiction of the circuit court is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."); Robertson v. Cease, 97 U.S. 646, 649 (1878) (explaining that "the presumption now . . . is[] that a cause is without [the Circuit Court's] jurisdiction unless the contrary affirmatively appears").

B. U.S. Supreme Court Review of State High Court Cases: A Delicate Balance

1. The "Adequate and Independent State Grounds" Doctrine

Despite this apparently well-settled presumption against assuming jurisdiction, a recurring problem arose in many cases in which federal courts were called upon to review the decisions of state courts. Because by their very natures these cases often involved a mix of federal law and state law, the "affirmative" basis of jurisdiction the Court required in cases such as *King Iron Bridge* and *Mansfield* was often difficult to pinpoint. In order to determine whether they had jurisdiction to review state cases, federal courts first had to decide a threshold question: whether the state courts' decisions relied on federal law, state law, or both.

The United States Supreme Court attempted to resolve this issue in *Murdock v. City of Memphis*,[36] which set forth a list of requirements that had to be satisfied before it could review the decision of a state high court and provided a framework for reviewing state issues once jurisdiction was established.[37] The *Murdock* Court, recognizing that the decisions of state courts rest at various times on federal, state, or an ambiguous combination of grounds,[38] produced no less than seven holdings to guide the Supreme Court's approach to these cases.[39] The first three established prerequisites that a case must meet if the Court is to take jurisdiction.[40] First, for the state court decision to be reviewable, it had to involve a federal question.[41] Second, the state court had to have decided that federal issue.[42] Third, the petitioner must have presented an actual grievance.[43] Fourth, if those three prerequisites were met, the Court had jurisdiction.[44]

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36. 87 U.S. 590 (1874).
37. *Id.* at 593, 635–36.
38. *See id.* at 634 ("It often has occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case. Or it may be, that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment. It may also be found that notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.").
39. *Id.* at 635–36.
40. *See id.*
41. *Id.*
42. *Id.* at 636.
43. *Id.*
44. *Id.*

Once jurisdiction was established, *Murdock*'s remaining holdings provided a procedure for *how* the Court was required to review the state court's decision.[45] The fifth mandated that if the decision of the state court was correct, the United States Supreme Court was required to affirm it.[46] It was the final two holdings, however, that would give *Murdock* its landmark status. In the sixth, the Court made clear that, where the decision of the state high court rested on a mix of state and federal grounds for decision, the Supreme Court had to look for a state-law issue that would be sufficient in and of itself to dispose of the case.[47] Seventh, if federal law formed the predominant basis for the state high court's decision, the United States Supreme Court possessed jurisdiction to review it.[48]

With its sixth holding, the *Murdock* Court ushered in the era of the "adequate and independent state grounds" doctrine.[49] Ken Gormley, now Dean of the Duquesne University School of Law, explains that, "[b]oiled down to its simplest form, the adequate and independent state grounds doctrine simply dictates 'when and how' the United States Supreme Court can review decisions of the highest state courts."[50] The essence of the doctrine lies in the *Murdock* Court's then-novel pronouncement that it would decline to review a state high court's judgment when the state-law issue "is sufficiently broad to maintain the judgment of that court"—that is, when the judgment rests upon state grounds that are both adequate and independent.[51] The term "adequate" referred to the ability of the decision "to stand on its own four legs—the state ground standing by itself had to be sufficient to sustain the decision."[52] "Independent" in this context "meant that the state ground in question had to possess a life of its own" and did not depend on federal law.[53] At its heart, the significance of the adequate and independent state grounds doctrine is this: "The power to review decisions is ultimately the power to overturn those decisions."[54] With respect to state high courts' state-law pronouncements, particularly in the state constitutional law context, the adequate and independent

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *See* Ken Gormley, *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 OR. L. REV. 689, 699 (1988) [hereinafter Gormley, *Primer*].
50. *Id.*
51. *See Murdock*, 87 U.S. at 636.
52. Gormley, *Primer*, *supra* note 49, at 699.
53. *Id.*
54. *Id.*

state grounds doctrine can effectively shield state high court decisions grounded in state law from review by the federal courts, "thus allowing [their state constitutional decisions] to exist in separate pockets without the intrusion of the U.S. Supreme Court."[55]

Dean Gormley has identified three advantages of the doctrine.[56] First, it encourages judicial economy by preventing the "improvident use of the U.S. Supreme Court's precious resources," which would be wasted by reviewing state high court decisions that are already sufficiently supported by state law.[57] Second, for the Justices of the U.S. Supreme Court to defer to their state counterparts on matters of state law and policy over which the latter have authority and expertise encourages comity, the mutual respect and goodwill that the sovereign state and federal courts owe one another.[58] Third, and most importantly, the adequate and independent state grounds doctrine "serves the paramount purpose of ensuring that the U.S. Supreme Court does not overstep its own sensitive bounds of jurisdiction."[59] Article III, Section 2 of the U.S. Constitution[60] forbids the Court from issuing advisory opinions that do not affect the outcome of a case.[61] If the Court was to review a state high court decision supported by adequate and independent state

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55. *Id. Murdock*'s sixth holding stands for the proposition that a state high court decision supported by adequate and independent state grounds must be affirmed, even if the court decided an accompanying federal issue incorrectly. *Murdock*, 87 U.S. at 636 (holding that an adequate and independent state ground will suffice to support a state high court decision "notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."); *see also* text accompanying *supra* note 47.

56. Gormley, *Primer*, *supra* note 49, at 699–700. Dean Gormley has described the reasoning underlying *Murdock* as "sensible." *Id.*

57. *Id.* at 699 & n.30.

58. *Id.* at 699 & n.31.

59. *Id.* at 699–700.

60. Article III, Section 2 of the U.S. Constitution provides:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

61. *See* Gormley, *Primer*, *supra* note 49, at 700. The Court itself is well aware that the "'judicial Power' is one to render dispositive judgments," not advisory opinions. Camreta v. Greene, 131 S. Ct. 2020, 2037–38 (2011) (Kennedy, J., dissenting) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995)). This limitation is grounded in Article III's Case or Controversy requirement. *See id.* at 2028 (majority opinion) ("Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of 'Cases' or 'Controversies.'"); *see also supra* note 60.

grounds for the purpose of re-examining it under federal law, its opinion would be purely academic—and thus outside the bounds of the Court's jurisdiction as conferred by Article III, Section 2.[62] Beginning with *Murdock*, the United States Supreme Court thus declined to review state cases resting upon adequate and independent state grounds in order to maintain and respect the "partitioning of power between the state and federal judicial systems and . . . the limitations of [its] own jurisdiction."[63]

For the first fifty years after the Court instituted the adequate and independent state grounds doctrine in *Murdock*, it adopted a very deferential approach to reviewing the decisions of state courts. Consistent with its prevailing approach to jurisdiction generally,[64] the United States Supreme Court declined to review state high court decisions that rested upon an inextricable mix of state and federal law grounds.[65] In the 1934 case of *Lynch v. People of New York* ex rel. *Pierson*,[66] Chief Justice Hughes explained the Court's inclination against assuming jurisdiction in ambiguously grounded cases:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . . . 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.[67]

According to Dean Gormley, in ambiguously grounded cases "[w]here the highest state courts issued opinions which jumbled together citations to federal and state law, the U.S. Supreme Court

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62. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994) (explaining that a "federal court [may not] decide the merits of a legal question not posed in an Article III case or controversy").

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

64. *See supra* Part II.A.2.

65. *See* Gormley, *Primer*, *supra* note 49, at 700.

66. 293 U.S. 52 (1934).

67. *Id.* at 54–55.

essentially *presumed* they rested upon some adequate, independent state ground, and declined to interfere."[68]

That presumption was not infallible, however. The major drawback to such a "laissez-faire" approach was that, in the name of affording state courts the maximum amount of deference to shape their own laws, it had the potential to allow erroneous state interpretations of federal law to persist. The Court has acknowledged that its "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights";[69] if the Court chooses not to exercise that power, it follows that any such incorrect state court judgments will remain uncorrected.

2. The Court Finds a "Middle Ground" in the Decisions of the Mid-Twentieth Century

As the mid-twentieth century neared, the general trend of deference toward state courts began to wane.[70] In the 1940s and 1950s, a new trend emerged: when the Supreme Court confronted a state high court case that was ambiguously grounded in a mixture of state and federal law, the Court began to seek clarification from the state court as to the precise grounds upon which its decision rested.[71] The Court employed two different means of clarification, each introduced in a seminal case.

The first of these cases was *Minnesota v. National Tea Co.*,[72] in which the U.S. Supreme Court was asked to review a Minnesota Supreme Court decision striking down a controversial progressive chain store tax, which taxed stores earning greater sales revenues at higher rates.[73] The Minnesota Supreme Court's opinion referred to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article 9, section 1 of the Minnesota Constitution[74] and included a general discussion of the Minnesota Constitution and three Minnesota cases, a discussion of several federal cases, and, finally, a discussion of state cases citing federal law.[75] The Minnesota Supreme Court concluded by stating:

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68. *See* Gormley, *Primer*, *supra* note 49, at 700 (emphasis added).
69. *Herb*, 324 U.S. at 125–26.
70. Gormley, *Primer*, *supra* note 49, at 700.
71. *Id.*
72. 309 U.S. 551 (1940).
73. *Id.* at 550–52.
74. Article 9, section 1 (currently article 10, section 1), a uniformity clause, provides that "[t]axes shall be uniform upon the same class of subjects . . . ." MINN. CONST. art. 10, § 1.
75. Nat'l Tea Co. v. State, 286 N.W. 360 (Minn. 1939), *vacated sub nom.* Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940).

> We think the five [federal] cases to which we have referred have so definitely and finally disposed of the legal problem presented as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. These being the only cases to which our attention has been called directly deciding the question presented, we are of opinion that we should follow them and that *it is our duty so to do*.[76]

The United States Supreme Court acknowledged that in cases where "there is considerable uncertainty as to the precise grounds for the decision," it was free to decline to pass upon the federal issues involved in the case, but it did not automatically do so.[77] Instead, the Court balanced its authority to correct errors of law and to dispose of cases in a just fashion with the "fundamental" need to leave state courts "free and unfettered by us in interpreting their state constitutions."[78] The Court ultimately held that, because "[i]ntelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases," the best course of action where the grounds for the decision of the state high court were unclear was to vacate the state high court's decision and remand the case to that court for clarification as to whether the state court had decided the case on adequate and independent state grounds.[79] Remanding cases in order to give state courts an opportunity to clarify ambiguous grounds

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76. *Nat'l Tea*, 309 U.S. at 554 (emphasis added) (citing Nat'l Tea Co. v. State, 286 N.W. 360, 364 (Minn. 1939)).

77. *Id.* at 555.

78. *Id.* at 555, 557.

79. *Id.* at 557–58. Not surprisingly, on remand, the Minnesota Supreme Court clarified that its prior decision did, in fact, rest upon adequate state grounds, and it reinstated its former opinion in the case. Nat'l Tea Co. v. State, 294 N.W. 230, 231 (Minn. 1940) (per curiam) ("Having so re-examined them we conclude that our prior decision was right. There is no need of further discussion of the problems presented for the former opinion adequately covers the ground."). The Minnesota Supreme Court praised the U.S. Supreme Court's three dissenters in the case for correctly recognizing that its decision rested upon adequate and independent state grounds. *Id.* at 230.

thus became the Court's first "middle ground" approach to the Supreme Court's jurisdiction over state high court cases[80] as the "adequate and independent state grounds doctrine budged towards the center in the middle of the last century."[81]

The United States Supreme Court instituted the second "middle ground" approach in *Herb v. Pitcairn*,[82] which continued the trend in the 1940s and 1950s of seeking clarification from the state high court, this time by certifying a question. In *Herb*, the United States Supreme Court was asked to decide whether the Illinois Supreme Court erred in affirming the dismissal of a railroad switchman's tort claim under the Federal Employers' Liability Act.[83] The Illinois Supreme Court's opinion included both federal and state precedent dealing with the procedural issue.[84] Cognizant of the state high court's ambiguous grounds for decision, the U.S. Supreme Court proceeded with caution, explaining that "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."[85] The Court ultimately concluded that the best solution to the problem was to hold the case in abeyance and certify the question whether the judgment rested on state or federal grounds to the Illinois Supreme Court:

> But because we will not proceed with a review while our jurisdiction is conjectural it does not follow that we should not take steps to protect our jurisdiction when we are given reasonable grounds to believe it exists. We think the simplest procedure

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80. The "middle ground" role played by the remand-for-clarification approach was consciously designed to function as such. The *National Tea* Court explained its goal of striking a balance as follows:

> [N]o other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

309 U.S. at 557.

81. *See* Gormley, *Primer*, *supra* note 49, at 700.

82. 324 U.S. 117 (1945).

83. *Id.* at 118–19.

84. *Id.* at 123–24.

85. *Id.* at 125–26.

> to do so, where the record is deficient, is to hold the case pending application to the state court for clarification or amendment.[86]

In this way, *Herb* introduced the option of staying ambiguously grounded state high court cases and certifying a question to the state high court in order to clarify whether its decision rested upon state or federal grounds.

Like the Supreme Court's earliest presumption, that it lacked jurisdiction unless it had an affirmative basis for review, the Supreme Court's two "middle ground" approaches—remanding for clarification and certifying a question—were imperfect.[87] In fact, these approaches introduced an entirely new set of problems. When the U.S. Supreme Court vacates the decision of the state high court[88] and remands the case to that court for clarification of its grounds for decision, a lengthy delay is inevitable and the state court's workload is doubled, as is its consumption of scarce resources in the form of man-hours and money.[89] Similarly, the state court's workload is increased when it is confronted with a certified question asking it to clarify its grounds for decision. Having to stay the case and wait for the state high court to answer the question[90] is also likely to waste another of the courts' most precious resources—time.[91]

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86. *Id.* at 128. Specifically, the Court directed counsel for the petitioners to apply for certification of the question to the Illinois Supreme Court.

87. Recall that the Supreme Court's presumption that it lacked jurisdiction over state high court cases involving an amalgam of federal and state law carried with it the potential for erroneous federal precedent created by state high courts to stand—and that other courts, practitioners, and citizens might rely on it. *See supra* note 69 and accompanying text.

88. Vacatur "strips the decision below of its binding effect . . . and clears the path for future relitigation." Camreta v. Greene, 131 S. Ct. 2020, 2035 (2011) (internal quotation marks and citations omitted).

89. *See* Michigan v. Long, 463 U.S. 1032, 1039–40 (1983) ("Vacation and continuance for clarification have also been unsatisfactory both because of the delay and decrease in efficiency of judicial administration . . . .").

90. This analysis assumes that the state high court will answer the certified question. The possibility of the state court declining to do so raises some very serious comity issues. *See supra* note 58 and accompanying text. For a detailed discussion of comity between the federal and state courts in the context of U.S. Supreme Court review of state high court decisions, see *infra* Part III.A.2.a.

91. Dixon v. Duffy, 344 U.S. 143 (1952), provides an interesting case study. The United States Supreme Court continued the case on two separate occasions without success, as the California Supreme Court was apparently unable to provide clarification. The U.S. Supreme Court ultimately vacated and remanded the case. *Long*, 463 U.S. at 1040 n.5.

C. The Long *Presumption*

In the 1970s and 1980s, the United States Supreme Court became increasingly more aggressive in its approach to reviewing ambiguously grounded state high court cases.[92] This aggressiveness manifested itself in the form of "the Court's willingness to examine state law in order to determine for itself whether an independent and adequate state ground exists to support a state judgment below."[93] In a 1975 dissenting opinion, Justice Thurgood Marshall expressed reservations about the Court's "increasingly common practice" of reviewing certain state court decisions.[94] Justice Marshall wrote, "In my view, we have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion."[95]

This trend toward aggressive review reached its apex in 1983's *Michigan v. Long*,[96] in which the United States Supreme Court turned its original presumption against deciding ambiguously grounded state high court cases on its head.[97] Instead, the Court established in *Long* the presumption that, in absence of a plain statement to the contrary, a state court of last resort citing federal law relied upon *federal* grounds in reaching its decision—thus opening up the possibility of U.S. Supreme Court review.[98]

The groundwork for the new presumption was unwittingly laid in *People v. Long*,[99] where the Michigan Supreme Court limited the reach of the *Terry v. Ohio*[100] doctrine by holding that the search of the passenger compartment of an automobile during an otherwise lawful investigatory stop was unconstitutional.[101] In its opinion,

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92. Glen S. Goodnough, *The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution*, 38 ME. L. REV. 491, 512 (1986); *see* Gormley, *Primer*, *supra* note 49, at 701. Dean Gormley suggests that this trend was a reaction to "the onslaught of state constitutional decision making that presented itself in the 1970s and 1980s." *Id.*

93. Goodnough, *supra* note 92, at 512 n.56. Glen Goodnough believes that "it is the perceived lack of state law independence that heightens the Supreme Court's interest in review." *Id.*

94. Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting) (criticizing the U.S. Supreme Court's review of "state-court decisions upholding constitutional claims in criminal cases").

95. *Id.*

96. 463 U.S. 1032 (1983).

97. Gormley, *Primer*, *supra* note 49, at 701 n.36 ("The U.S. Supreme Court departed from its past presumption of laissez faire toward the states . . . .").

98. Michigan v. Long, 463 U.S. 1032, 1043–44 (1983).

99. 320 N.W.2d 866 (Mich. 1982), *rev'd sub nom*. Michigan v. Long, 463 U.S. 1032 (1983).

100. 392 U.S. 1 (1968) (permitting under the Fourth Amendment a warrantless limited protective search of the person of the detainee during an investigatory stop).

101. *Long*, 320 N.W.2d at 870.

the Michigan Supreme Court made only a brief mention of the U.S. and Michigan Constitutions in reaching its conclusion: "We hold . . . that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution."[102]

The United States Supreme Court reversed and remanded, holding that the search of the passenger compartment was reasonable under the Fourth Amendment as interpreted in *Terry*.[103] The Court's more significant holding, however, came in response to the jurisdictional issue.[104] Long, the criminal defendant, argued that the Court lacked jurisdiction to review the case because decision of the Michigan Supreme Court rested upon an adequate and independent state ground: article 1, section 11 of the Michigan Constitution.[105] Taking notice of the fact that the Michigan Supreme Court had mentioned the Michigan Constitution only twice in its opinion—with one of those couched in a footnote[106]—the Court reviewed its own recent precedent on the issue of its jurisdiction to review ambiguously grounded state high court decisions through a lens markedly different than the one it employed in its earlier cases.[107] The Court cited, for example, *Beecher v. Alabama*[108] for the proposition that it "may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied," and discussed *Oregon v. Kennedy*,[109] in which the Court "rejected an invitation to remand to the state court for clarification even when the decision rested in part on a case from the state court, because

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102. *Id.*; *see also id.* at 869 n.4. In the textual discussion of the passenger compartment search in the opinion, the only cases the Michigan Supreme Court cited were *Terry* and *Wong Sun v. United States*, 371 U.S. 471 (1963). The Court relegated its citations to five other U.S. Supreme Court cases, a decision of the U.S. Court of Appeals for the Fifth Circuit, and a Michigan Supreme Court case to the footnotes.

103. *Long*, 463 U.S. at 1035.

104. "The jurisprudential questions presented in this case are far more important than the question whether the Michigan police officer's search of respondent's car violated the Fourth Amendment." *Id.* at 1065 (Stevens, J., dissenting).

105. *Id.* at 1037 (majority opinion).

106. *Id.* at 1037 & n.3.

107. *Id.* at 1038–39. In its more recent cases, the Court has adopted a practice of reviewing state law on its own in order to determine whether state or federal law provided the basis for state high courts' decisions, *id.* at 1039, thus affording little deference to those courts. In contrast, the Court's earlier practices—dismissing the case outright, remanding, or certifying a question, *id.*—all involved a higher degree of deference to the state high courts.

108. 389 U.S. 35 (1967) (per curiam).

109. 456 U.S. 667 (1982).

[it] determined that the state case itself rested upon federal grounds."[110]

Writing for the Court, Justice O'Connor discussed the shortcomings of—and ultimately rejected—the U.S. Supreme Court's previous approaches to its own jurisdiction to review state high court cases where it is unclear whether the court's decision rests upon state or federal grounds.[111] For the Court to conduct its own examination of state law was unsatisfactory because of the Court's limited expertise in the area, as well as the equally limited discussion of state issues that the litigants often present.[112] Vacating and remanding or continuing cases in order to obtain clarification were likely to cause delays and burden the state courts, and dismissing cases for lack of jurisdiction had the potential to compromise the uniformity of federal law by allowing erroneous interpretations to persist.[113]

In order to avoid these pitfalls and "achieve the consistency that is necessary" in the Court's approach to the review of ambiguously grounded state high court cases, the *Long* Court set forth a method intended to respect the autonomy of state courts of last resort and prevent the issuance of advisory opinions:[114]

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that *the state court decided the case the way it did because it believed that federal law required it to do so*.[115]

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110. *Long*, 463 U.S. at 1039. The *Long* Court also quoted a line from *Kennedy* in which the Court explained that "[e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits." *Id.* at 1039 (citing *Kennedy*, 456 U.S. at 671).

111. *Id.* at 1039–40. Justice O'Connor explained:

> This *ad hoc* method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal–state relations are involved. Moreover, none of the various methods of disposition that we have employed thus far recommends itself as the preferred method that we should apply to the exclusion of others, and we therefore determine that it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the consistency that is necessary.

Id. at 1039.

112. *Id.*

113. *Id.* at 1039–40.

114. *Id.* at 1040.

115. *Id.* at 1040–41 (emphasis added).

The Court thus created the presumption that ambiguously grounded state high court decisions rest upon federal law:

> [I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, . . . we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.[116]

Recognizing that these ambiguously grounded opinions often include citations to both state and federal precedent, Justice O'Connor also included guidance as to the role state high courts would be expected to play in order to avoid confusion as to the basis for their opinions:

> 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.[117]

Later in the opinion, Justice O'Connor added another component to this "plain statement" rule by describing it as a "'plain statement' that a decision rests upon adequate and independent state grounds."[118]

In its pursuit of "doctrinal consistency" with respect to the United States Supreme Court's jurisdiction to review the ambiguously grounded decisions of state high courts,[119] the *Long* Court thus set in motion a sea change marked by two novel rules. First, the presumption: where it is unclear whether the state high court decision rests on federal- or state-law grounds, the U.S. Supreme Court will presume that the case relies on federal precedent in absence of a plain statement to the contrary. Second, the "plain statement" rule: in order to avoid U.S. Supreme Court review, state courts of last resort wishing to base their decisions upon independent state grounds must expressly state that those grounds are adequate and independent; if the state court cites federal precedent as persuasive

116. *Id.* at 1042 (internal citations omitted).
117. *Id.* at 1041 (emphasis added).
118. *Id.* at 1042.
119. *Id.* at 1039.

authority, it should clearly state as much. Given that the net effect of the presumption of jurisdiction and the plain statement rule is to essentially place a finger on the scale in favor of U.S. Supreme Court review, it is perhaps not surprising that a byproduct of *Long* has been "expansionist post-*Michigan v. Long* jurisprudence"[120] on the part of the Court.

III. THE FAILURE OF *LONG*

A. The Problem: The Failings of the Long *Presumption*

It is somewhat ironic that the *Long* Court "openly admit[ted] that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue,"[121] as the *Long* presumption has proven to be anything but "satisfying and consistent." Given the volume and hostility level of the criticism on the subject from courts and commentators alike, it is clear that this "vexing issue" remains unresolved.

1. The United States Supreme Court Itself Has Questioned the Wisdom of Long

a. The Dissents

In the years following the inception of the *Long* presumption, an onslaught of scholarly commentary questioned, dissected, and criticized the case's jurisprudential impact and the negative side effects it portended for U.S. Supreme Court-state high court relations.[122]

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120. Washington v. Recuenco, 548 U.S. 212, 223 (2006) (Stevens, J., dissenting).

121. *Long*, 463 U.S. at 1038.

122. *See* Goodnough, *supra* note 92, at 513 n.58 (listing the following scholarly critiques of *Long*: Ronald K. L. Collins, *Plain Statements: The Supreme Court's New Requirements*, 70 A.B.A. 92 (1984); *Independent and Adequate State Grounds: The* Long *and the Short of It*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 211 (Bradley D. McGraw ed., 1984); Timothy P. O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363 (1984); David A. Schlueter, *Federalism and Supreme Court Review of Expansive State Court Decisions: A Response to Unfortunate Impressions*, 11 HASTINGS CONST. L.Q., 523 (1984); David A. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges,* 59 NOTRE DAME L. REV. 1079 (1984); Note, *Developing a State Jurisprudence under* Michigan v. Long, *103 S. Ct. 3469 (1983)*, 12 AM. J. CRIM. L. 99 (1984); Comment, *Emerging Jurisdictional Doctrines of the Burger Court: A Doctrine of Convenience*, 59 ST. JOHN'S L. REV. 316 (1985); Note, *Michigan v. Long: A New Jurisdiction and a New Frisk*, 30 LOY. L. REV. 198 (1984); Comment, Michigan v. Long*: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081 (1984); Comment, Michigan v. Long: *The Supreme Court Establishes Presumptive Jurisdiction over State Court Cases*, 20

In reality, however, the criticism of the presumption began immediately—with Justice Stevens' dissent in *Long*. Justice Stevens pointed out that, rather than presuming federal law controlled the outcome of an ambiguously grounded state high court case in the absence of an express statement to the contrary, the Court's own precedent supported the opposite presumption.[123] If the majority was to reject the two "middle ground" approaches, stare decisis thus compelled a return to the Court's longstanding tradition of declining to re-decide state high court cases.[124]

In Justice Stevens' view, the circumstances of *Long* should not have led the Court to second-guess its traditional approach.[125] The Michigan Supreme Court had *upheld* an exercise of rights by a Michigan citizen; it had not permitted Michigan authorities to deprive him of his rights.[126] Because the Michigan court had simply added protections beyond the federal minimum, "the final outcome of the state processes offended no federal interest whatever."[127] Justice Stevens "believe[d] that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[128]

Justice Stevens offered several other reasons why the Court should resist the temptation to review the opinions of state high courts. He questioned the wisdom of the majority's stated purpose in instituting the presumption in favor of redeciding state high court cases on federal grounds, warning that "the 'need for uniformity in federal law' is truly an ungovernable engine."[129] Despite the risk of erroneous state high court interpretations of federal law, the United States Supreme Court had "never claimed jurisdiction to correct such errors, no matter how egregious they may be, and no

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NEW ENG. L. REV. 123 (1985); Note, *State Law Independence and the Adequate and Independent State Grounds Doctrine after* Michigan v. Long, 62 WASH. U. L. REV. 547 (1984); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 224 (1983)).

123. *Long*, 463 U.S. at 1066–67 (Stevens, J., dissenting) (citing Durley v. Mayo, 351 U.S. 277, 284 (1956); Stembridge v. Georgia, 343 U.S. 541, 546 (1952); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54–55 (1934)); *see also* Cuyahoga River Power Co. v. N. Realty Co., 244 U.S. 300, 302, 304 (1917); Consol. Tpk. Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 599 (1913); Allen v. Arguimbau, 198 U.S. 149, 154–55 (1905); Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U.S. 293, 295, 297 (1891); Johnson v. Risk, 137 U.S. 300, 306–07 (1890).

124. *Long*, 463 U.S. at 1067 (Stevens, J., dissenting).

125. *Id.*

126. *Id.* at 1067–68.

127. *Id.* at 1068.

128. *Id.*

129. *Id.* at 1070 (quoting majority opinion).

matter how much they may thwart the desires of the state electorate."[130] To do so would be to run afoul of the prohibition on rendering advisory opinions and risk disrespecting the authority of the highest courts of the sovereign states.[131] "I am thoroughly baffled," Justice Stevens wrote, "by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show '[r]espect for the independence of state courts.'"[132]

Throughout the decades after the United States Supreme Court issued its decision in *Long*, Justice Stevens continued to raise incisive attacks on the *Long* presumption in subsequent concurring opinions and dissents. One of the most notable was his dissent in the 1986 case of *Delaware v. Van Arsdall*.[133] In *Van Arsdall*, the majority agreed with the Delaware Supreme Court that the criminal defendant's Sixth Amendment Confrontation Clause rights had been violated at trial, but held that the state high court should have applied a harmless-error analysis instead of concluding that the Confrontation Clause violation automatically necessitated a new trial.[134] The U.S. Supreme Court vacated the Delaware Supreme Court's judgment accordingly and remanded the case.[135]

In his dissent, Justice Stevens echoed the sentiments he first expounded in his dissenting opinion in *Long*. He reminded the majority of the Court's historical reluctance to reevaluate state high court decisions resting upon a mix of federal and state grounds and criticized it for taking what he perceived to be an unusually aggressive approach toward deciding constitutional questions where the need to do so was either questionable or absent.[136] Justice Stevens cautioned the Court that the *Long* presumption in favor of deciding ambiguously grounded state high court cases placed it at risk of exceeding the boundaries of its jurisdiction and disturbing the "mutual trust" between the United States Supreme Court and the sov-

130. *Id.* at 1071.
131. *Id.* at 1071–72.
132. *Id.* at 1072 (quoting majority opinion).
133. 475 U.S. 673, 689–708 (1986) (Stevens, J., dissenting).
134. *Id.* at 674 (majority opinion).
135. *Id.* at 684.
136. *See id.* at 690–94 (Stevens, J., dissenting). Justice Stevens explained that the United States Supreme Court's status conferred upon it "a special obligation to make sure that our conclusions concerning our own jurisdiction rest on a firm and legitimate foundation." *Id.* at 692. He thus urged the Court exercise caution: "When the state-court decision to be reviewed is ambiguous, and it is not even clear that the judgment rests on a federal ground, the basis for exercising jurisdiction is even less tenable." *Id.* at 698.

ereign state high courts that is critical to the operation of the federal system.[137] He warned that, rather than settling the issue of the proper treatment of ambiguously grounded cases, "the Court's [current] approach does nothing to minimize, and indeed multiplies, future occasions on which state courts may be called upon to clarify whether their judgments were in fact based on state law."[138] In this respect, Justice Stevens' prediction seems to have been accurate: he had occasion to reiterate the same criticisms of the *Long* presumption that he raised in his *Long* and *Van Arsdall* dissents—and add new ones—on many other occasions.[139]

Justice Stevens was not the only member of the Court to express reservations about the *Long* presumption. Dissenting in *Arizona v. Evans*,[140] Justice Ginsburg recognized that "[h]istorically, state laws were the source, and state courts the arbiters, of individual rights."[141] She expressed concern that the *Long* presumption "impedes the States' ability to serve as laboratories for testing solutions

137. *See id.* at 694–701.

138. *Id.* at 701.

139. *See, e.g.*, Florida v. Rigterink, 559 U.S. 965 (2010) (granting certiorari, vacating judgment, and remanding for reconsideration in light of Florida v. Powell, 559 U.S. 50 (2010)) (Stevens, J., dissenting) ("Because the independence of the state-law ground is clear from the face of the opinion, we do not have power to vacate the judgment of the Florida Supreme Court." (internal quotation marks and citations omitted)); Washington v. Recuenco, 548 U.S. 212, 223 (2006) (Stevens, J., dissenting) ("[T]his is a case in which the Court has granted review in order to make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution."); Kansas v. Marsh, 548 U.S. 163, 203 (2006) (Stevens, J., dissenting) ("I continue to hope that a future Court will recognize the error of this allocation of resources and return to our older and better practice of restraint." (internal quotation marks and citations omitted)); Brigham City, Utah v. Stuart, 547 U.S. 398, 409 (2006) (Stevens, J., concurring) ("I continue to believe 'that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government." (citing Michigan v. Long, 463 U.S. 1032, 1067 (1983) (Stevens, J., dissenting))); California v. Ramos, 463 U.S. 992, 1031 (1983) (Stevens, J., dissenting) ("Why, I ask with all due respect, did not the Justices who voted to grant certiorari in this case allow the wisdom of state judges to prevail in California, especially when they have taken a position consistent with those of state judges in Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming?").

140. 514 U.S. 1 (1995). Justice Stevens joined Justice Ginsburg's dissent, which he called "an important opinion." *Id.* at 18.

141. *Id.* at 30 (Ginsburg, J., dissenting) (citing Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382 (1980)).

to novel legal problems"[142] and recommended that it be overruled.[143] In its place, Justice Ginsburg advocated for the opposite presumption: absent a plain statement to the contrary, the Court should presume that it lacks jurisdiction and dismiss the writ of certiorari.[144] In this way, she reasoned, state courts of last resort would be free to experiment without fear of federal review.[145] Even before *Long*, Justice Marshall also disagreed that the correct way to resolve the problem of ambiguously grounded state high court cases was to assume the Court had jurisdiction. "In my view," he wrote, "we have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion."[146]

It should not come as a surprise that the *Long* presumption faced opposition from members of the Court itself. The United States Supreme Court was aware of the jurisdictional conundrum that *Long* poses well over a century before that decision was issued: namely, presuming federal grounds where they may not lie increases the risk of issuing advisory opinions.[147] When state high court cases rest upon adequate and independent state grounds, U.S. Supreme Court review cannot change the outcome and thus can play no more than an academic role—a set of circumstances proscribed by Article III.[148] "This point," Justice Kennedy recently wrote, "has been repeated with force and clarity."[149]

Adherence to it becomes complicated, however, in cases where it is unclear whether the state high court's grounds for decision are rooted in state or federal law. This is because, as Justice Jackson

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142. For the "laboratories" analogy, Justice Ginsburg cited Justice Brandeis' famous dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932): "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *Id.* at 311 (Brandeis, J., dissenting).

143. *Evans*, 514 U.S. at 24 (Ginsburg, J., dissenting).

144. *Id.* at 24, 26.

145. *See id.* at 30–31.

146. Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting).

147. *See, e.g.*, Camreta v. Greene, 131 S. Ct. 2020, 2037–38 (2011) (Kennedy, J., dissenting).

148. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

149. *Camreta*, 131 S. Ct. at 2037–38 (Kennedy, J., dissenting) (citing Michigan v. Long, 463 U.S. 1032, 1041–42 (1983) and Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945)); *see also Coleman*, 501 U.S. at 729 ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory."); *Herb*, 324 U.S. at 128 ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

explained in *Herb v. Pitcairn*, the Court "cannot . . . 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."[150] Despite its goal of resolving the "vexing issue" of ambiguous grounds,[151] one of *Long*'s problems is that the Court has yet to define the extent to which a state high court can rely on federal precedent before the decision becomes one of *federal* law, thus bringing it within the U.S. Supreme Court's purview.[152] It is, therefore, quite understandable that some members of the Court have balked at the degree of risk of transgressing its jurisdictional limits that the *Long* presumption entails.

b. The Bush v. Gore *Controversy: A Vote of No Confidence in* Long

Perhaps the most persuasive evidence that the Court itself lacks confidence in *Long* is the fact that the Court departed from the presumption in a particularly high-stakes situation: the controversy surrounding the 2000 presidential election. The outcome of the election hinged upon which candidate, Texas Governor George W. Bush or Vice President Al Gore, would win Florida's electoral votes.[153] These twenty-five contested votes would give Bush a total of 271—one more than the 270 he needed to win the Electoral College and the election.[154] Bush's initial margin of victory in Florida was so narrow as to trigger an automatic recount under the state's election laws, after which he remained the apparent winner, albeit by a smaller margin of victory.[155] Gore contested this result, seeking a manual recount of the ballots cast in four Florida counties.[156]

The Florida Supreme Court held that such a recount was permissible under state election law, set a deadline for counties to amend their ballot counts, and directed the Florida Secretary of State to accept manual counts submitted before that deadline.[157] When Bush petitioned the U.S. Supreme Court for certiorari, the Court

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150. *Herb*, 324 U.S. at 127.
151. *Long*, 463 U.S. at 1038.
152. Goodnough, *supra* note 92, at 516.
153. Barry C. Burden, *Minor Parties in the 2000 Presidential Election*, *in* MODELS OF VOTING IN PRESIDENTIAL ELECTIONS: THE 2000 U.S. ELECTION 206, 219 (Herbert F. Weisberg & Clyde Wilcox eds., 2003).
154. *See* KENNETH DAUTRICH & DAVID A. YALOF, AMERICAN GOVERNMENT: HISTORICAL, POPULAR AND GLOBAL PERSPECTIVES 462 (2d ed. 2011).
155. Bush v. Palm Beach Cnty. Canvassing Bd. (*Bush I*), 531 U.S. 70, 73–74 (2000) (per curiam).
156. *Id.* at 74.
157. *Id.* at 75–76; *see also* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000).

granted the petition in part and agreed to consider: (1) whether the Florida Supreme Court had violated either the Due Process Clause or 3 U.S.C. § 5[158] by altering Florida's procedure for appointing its electors after the election, and (2) whether that court's actions had infringed upon Congress' Article II power to promulgate procedures for the selection of electors.[159]

The United States Supreme Court began its analysis by noting that the process of selecting presidential electors is governed by an interplay between state law and Article II of the United States Constitution.[160] However, the Court realized that the Florida Supreme Court's opinion did not make clear to what extent the Florida Constitution, consistent with Article II, "circumscribe[d] the legislature's power," and the opinion did not specifically discuss 3 U.S.C. § 5 at all.[161] The Court thus determined that, in view of the questions presented, the Florida Supreme Court's opinion left "considerable uncertainty as to the precise grounds for the decision."[162] Under these circumstances, in which the United States Supreme Court found itself reviewing an ambiguously grounded state high court decision, the *Michigan v. Long* presumption should have applied. As Justice Ginsburg succinctly explained in her *Evans* dissent, "If it is unclear whether a state court's decision rests on state or federal law, *Long* dictates the assumption that the state court relied on federal law."[163] The *Bush I* Court confronted precisely that situation. Under *Long*, therefore, the United States Supreme Court

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158. 3 U.S.C. § 5, entitled "Determination of controversy as to the appointment of electors," provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Id.

159. *Bush I*, 531 U.S. at 73. The Article II provision at issue in *Bush I* provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, § 1, cl. 2.

160. *See Bush I*, 531 U.S. at 76.

161. *Id.* at 77–78 (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

162. *Id.* at 78 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 555 (1940)).

163. Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

should have presumed federal law controlled and proceeded to evaluate the merits of the case.

Despite *Long*'s applicability, however, the *Bush I* Court did *not* presume that it had jurisdiction. Instead, it cited *National Tea* for the proposition that its "considerable" uncertainty as to the Florida Supreme Court's precise grounds for decision was "sufficient reason . . . to decline at this time to review the federal questions asserted to be present."[164] The Court did not merely borrow language from *National Tea* for merely stylistic purposes; rather, the case supplied the crux of the rationale supporting the Court's conclusion:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.[165]

In accordance with *National Tea*, which had apparently been overruled by *Long* seventeen years earlier,[166] the *Bush I* Court vacated the decision of the Florida Supreme Court and remanded the case for clarification.[167]

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164. *Bush I*, 531 U.S. at 78 (citing *Nat'l Tea*, 309 U.S. at 555).

165. *Id.* (quoting *Nat'l Tea*, 309 U.S. at 557).

166. In his *Long* dissent, Justice Stevens recognized the overruling of *National Tea*. *See* Michigan v. Long, 463 U.S. 1032, 1071 n.4 (1983) (Stevens, J., dissenting).

167. *Bush I*, 531 U.S. at 78; *see also Nat'l Tea*, 309 U.S. at 556 (adopting as the proper approach to ambiguously grounded state high court cases the practice of "vacat[ing] the judgment and . . . remand[ing] the cause for further proceedings, so that the federal question might be dissected out or the state and federal questions clearly separated.").
Interestingly, the Florida Supreme Court did not attempt to insulate itself from further U.S. Supreme Court review by invoking the adequate and independent state grounds doctrine on remand. *See* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000). Professor Althouse has explored the thought process motivating the United States Supreme Court's decision to incur this risk by remanding *Bush I*:

> Why did the United States Supreme Court, by vacating and remanding the case, offer the Florida Supreme Court the opportunity to insulate itself from further review? It seemed all too easy for the Florida Supreme Court to embed the values it had previously derived from the state's constitution in a discussion of the intent of the legislature. If the United States Supreme Court at that point thought the Florida Supreme Court had strategically tried to insulate itself with a false assertion about state law, it would be quite hard to find a way to state a ground for reversal. A straightforward "We don't believe you" would fall short of the conventions of craftsmanship and comity.

Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush–Gore Litigation*, 61 MD. L. REV. 508, 521–22 (2002) [hereinafter Althouse, *Authoritative Lawsaying Power*]; *see also* Ann Althouse, Bush v. Gore*'s Place in the Rehnquist Court's Federalism Oeuvre in* THE FINAL

This course of action in a high-profile case of critical importance stands as powerful evidence of the United States Supreme Court's discomfort with the *Long* presumption when the stakes are high. With the nation hanging upon its every word, the Court departed from *Long* and instead chose to rely upon a then-sixty-year-old case that it resurrected for the occasion—a subtle, symbolic vote of no confidence in the *Long* presumption.[168]

2. State High Courts Have Evidenced Distaste for Long*, thus Frustrating the "Adequate and Independent State Grounds" Doctrine*

A review of the post-*Long* state high court case law on the issue of U.S. Supreme Court review of state high court decisions reveals that the state high courts' attitude toward the *Long* presumption is less subtle than that of their federal counterpart. The state high courts have shown a general distaste for *Long*'s tendency to invite U.S. Supreme Court intervention, especially with respect to state constitutional decisions where the state high court adds (or attempts to add) additional protections above the federal minimum. The state high courts have reacted to U.S. Supreme Court review of these decisions in a variety of negative ways, ranging from begrudging acceptance to sarcasm to outright hostility. More problematic is the fact that over the course of the thirty-plus years since the inception of the *Long* presumption, the state high courts whose decisions are vacated and remanded almost invariably reinstate their original decisions on remand. This practice squanders the courts' precious resources and renders the U.S. Supreme Court's opinions

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ARBITER: THE CONSEQUENCES OF *BUSH V. GORE* FOR LAW AND POLITICS 133, 138 (Christopher P. Banks, David B. Cohen, & John C. Green, eds., 2005) [hereinafter Althouse, Bush v. Gore*'s Place*] (discussing the pragmatic considerations likely to have motivated the Court's decision).

On the case's third trip to the United States Supreme Court, Jack M. Balkin, Bush v. Gore *and the Boundary between Law and Politics*, 110 YALE L.J. 1407, 1410 (2001), the legal issues surrounding the Florida recount were finally—if, in the view of many, unsatisfyingly—resolved in *Bush v. Gore* (*Bush II*), 531 U.S. 98 (2000) (per curiam). In a 5–4 per curiam decision, the Supreme Court halted the recount, holding that no remedy that Florida could devise would satisfy the time limit under 3 U.S.C. § 5 in accordance with "minimal constitutional standards." *Bush II*, 531 U.S. at 110. The Court's decision paved the way for the Florida Secretary of State's certification of George W. Bush as the winner of the state's electoral votes to stand.

168. Given the symbolic significance of the Court's departure from *Long*, it is surprising that this aspect of the 2000 election cases has received so little attention. In fact, the author's research revealed only two scholars who have explored this specific issue: Professors Althouse and Solimine. *See, e.g.*, Althouse, Bush v. Gore*'s Place*, *supra* note 167, at 138; Althouse, *Authoritative Lawsaying Power*, *supra* note 167, at 521–22; Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 347 (2002).

advisory. Because the *Long* presumption prevents the benefits of the adequate and independent state grounds doctrine—judicial economy, comity, and jurisdiction[169]—from being realized, the state courts' dissatisfaction with *Long* is hardly surprising.

a. Comity

What *is* perhaps surprising in hindsight is that fostering comity was one of the stated objectives of the *Long* Court, which had hoped to curtail the practice of issuing advisory opinions questioning the decisions of state high courts: "By refraining from deciding cases that rest on an adequate and independent state ground, federal courts *show proper respect for state courts* . . . ."[170] In practice, however, the *Long* presumption in favor of U.S. Supreme Court review risks harming the state and federal courts' mutual respect for one another. As one scholar points out, "The result of the Supreme Court's heightened scrutiny of the bases of state court decisions is increased tension between state supreme courts and the United States Supreme Court."[171] Justice Stevens warned of this very problem in his *Van Arsdall* dissent, cautioning the majority that "the Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts and will, I fear, be a recurrent source of friction between the federal and state judiciaries."[172]

i. Permits the U.S. Supreme Court To Critique State High Courts' Opinions

The *Long* presumption effectively grants the United States Supreme Court license to criticize and second-guess the decisions and opinion-writing choices of the state high courts. Chief Justice Rehnquist criticized the majority for falling prey to this temptation in his dissent in *Bunkley v. Florida*,[173] which did not deal specifically with a state constitutional issue but illustrates the phenomenon nonetheless. Chief Justice Rehnquist took the majority to task for "critici[zing] . . . the state court for failing to anticipate [the U.S. Supreme Court's] holding," "criticiz[ing] the Florida Supreme Court for its workmanship in the decision under review," and "repri-

169. Gormley, *Primer*, *supra* note 49, at 699–700.
170. Michigan v. Long, 463 U.S. 1032, 1040 (1983) (emphasis added).
171. Goodnough, *supra* note 92, at 514.
172. Delaware v. Van Arsdall, 475 U.S. 673, 691 (1986) (Stevens, J., dissenting).
173. 538 U.S. 835 (2003).

mand[ing] the Florida court for failing to reach its holding in a sufficiently clear manner."[174] Ironically, the Chief Justice levied his attacks in defense of the very presumption that gave the majority the opportunity to criticize and reprimand the Florida Supreme Court in the first place: "This rebuke to the state court violates the well-established rule that this Court will not 'require state courts to reconsider cases to clarify the grounds of their decisions.'"[175]

Youngblood v. West Virginia[176] provides a helpful example of the comity issues raised when the Court elects to err on the side of taking jurisdiction over a state high court decision. In granting certiorari, vacating the West Virginia Supreme Court's decision, and remanding the case, the Court offered the following reason: "If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the . . . issue."[177] In his dissent, Justice Scalia seized the opportunity to draw the Court's attention to the dangers of aggressive grants of certiorari in such instances. The majority, Justice Scalia argued, "purports to *conscript the judges* of the Supreme Court of Appeals of West Virginia to write what is essentially an *amicus* brief on the merits of an issue they have already decided, in order to facilitate our *possible* review of the merits at some later time."[178] Calling the majority's "tutelary remand, as to a schoolboy made to do his homework again," unjustified, Justice Scalia reminded the majority that the state high courts are sovereign entities and "not, as we treat them today, the creatures and agents of this body."[179] For the United States Supreme Court to assert authority in this manner—by critiquing and reprimanding a state high court—is antithetical to the mutual respect among sovereign bodies that is the essence of comity.

ii. Pressures State High Courts To Change Their Minds on Remand

Another unwelcome side effect of *Long* that could further compromise the mutual respect between the state high courts and the U.S.

174. *Id.* at 844 & n.2 (Rehnquist, C.J., dissenting).
175. *Id.* at 844 n.2 (citing *Long*, 463 U.S. at 1040).
176. 547 U.S. 867 (2006) (per curiam). Even though *Youngblood* was a non-*Long* case in which the U.S. Supreme Court's jurisdiction was not at issue, it is nonetheless illustrative of the ways in which comity can be harmed when the Court's grants of certiorari in state high court cases rest on shaky foundations.
177. *Id.* at 870.
178. *Id.* at 872 (Scalia, J., dissenting) (first emphasis added).
179. *Id.* at 873–74 (internal quotation marks and citations to a previous Scalia dissent omitted).

Supreme Court—and disturb the delicate balance of federalism—is the potential for the state high courts to feel pressured into second-guessing their own conclusions with respect to issues of state law in response to the Court's purportedly neutral grants of certiorari. This aspect of the *Long* presumption's negative impact on comity is particularly insidious, as it appears that by merely granting certiorari and assuming jurisdiction to review a state high court decision, the United States Supreme Court can silently influence its state counterparts to change their minds on remand. Justice Stevens was among the first to anticipate this possibility, writing in his *Long* dissent, "Less obvious is the impact on mutual trust when the state court on remand—perhaps out of misplaced sense of duty—confines its state constitution to the boundaries marked by this Court for the Federal Constitution."[180]

Justice Scalia also attacked the grant of certiorari in *Youngblood*, where the majority granted certiorari, vacated, and remanded because "*it would be better* to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the . . . issue,"[181] on the grounds that the Court's stated reasons for granting certiorari were pretextual. Justice Scalia offered what he suspected to be the majority's actual motive: to "induce [the West Virginia Supreme Court] to change its mind on remand, sparing us the trouble of correcting the suspected error."[182] Rather colorfully likening the Court's means to this end to the actions of a "mob enforcer [who] might suggest that it would be 'better' to make protection payments,"[183] Justice Scalia concluded that, "[a]t worst, [the Court's decision] is an implied threat to the lower court, not backed by a judgment of our own, that it had 'better' reconsider its holding."[184]

Justice Scalia's observation that "[t]hose whose judgments we review have sometimes viewed even our legitimate, intervening-event [granting-vacating-remanding] orders as polite directives that they reverse themselves"[185] seems to have merit. This is especially problematic in cases where state high courts feel pressured to change their minds about adding additional rights above the federal minimum established by the United States Supreme Court when cases are returned to them on remand pursuant to *Long*. In *State v. Badger*,[186] for example, the Vermont Supreme Court warned

180. Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting).
181. *Youngblood*, 547 U.S. at 870 (majority opinion) (emphasis added).
182. *Id.* at 873 (Scalia, J., dissenting).
183. *Id.*
184. *Id.* at 875.
185. *Id.* at 873.
186. 450 A.2d 336 (Vt. 1982).

against conducting an independent analysis on remand from the United States Supreme Court in the name of avoiding the "potential for great friction between the state and federal judiciaries, and concomitant damage to the authority, efficiency, and finality of the United States Supreme Court."[187] In *State v. Jackson*,[188] a Montana Supreme Court Justice advocated for precisely the opposite course of action. Believing that the U.S. Supreme Court's vacatur and remand of one of his court's constitutional decisions under *Long* "command[ed] us in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits proscribed by the federal decisions," Justice Sheehy urged his colleagues to "show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution."[189] Whether the state chooses to acquiesce to the perceived dictates of the U.S. Supreme Court (as in Vermont) or resist them (as in Montana) is ultimately irrelevant to analysis of *Long*'s effect on comity; the mere fact that the state high court judges felt pressured by the U.S. Supreme Court in both cases to act or refrain from acting is evidence enough.

iii. The Plain Statement Rule Fails To Address Long*'s Comity Implications*

Long's plain statement rule, which was intended help the Court avoid such improvident grants of certiorari, has done nothing to ameliorate the comity problems that Chief Justice Rehnquist and Justice Scalia identified. It could even be argued that for the United States Supreme Court to dictate to the state high courts that they must follow such a formal requirement in order to avoid review can be considered demeaning toward the high courts of sovereign states. Worse still, the plain statement rule at times seems to present state high courts who feel their autonomy has been compromised with an opportunity to engage in a form of "self-help" in an effort to vindicate and protect their decisions.

Some state high courts have utilized the plain statement as an opportunity to reassert their sovereignty. On remand from the U.S. Supreme Court in *State v. Knapp*,[190] for example, the Wisconsin Supreme Court obeyed the plain statement rule, making clear that its

187. *Id.* at 347; *see also* West v. Thomson Newspapers, 872 P.2d 999, 1020 (Utah 1994) (citing *Badger* as an example of the comity problems that result from the *Long* presumption).
188. 672 P.2d 255 (Mont. 1983).
189. *Id.* at 260 (Sheehy, J., dissenting).
190. 700 N.W.2d 899 (Wis. 2005).

"decision rests on bona fide separate, adequate, and independent state grounds" and citing *Long*.[191] But the Court did not stop there. "Further," the opinion continued, "*we reinstate all portions of our decision* in *State v. Knapp* [the decision the U.S. Supreme Court vacated] . . . not implicated by the Supreme Court's order vacating our decision in light of *United States v. Patane*."[192] The New Hampshire Supreme Court went even further in *State v. Ball*,[193] where it attempted to declare the plain statement requirement satisfied in *all* future cases.[194]

Other state high courts have attempted to use the plain statement as a means by which to insulate their decisions from U.S. Supreme Court review. In *Immuno AG. v. Moor-Jankowski*,[195] the New York Court of Appeals announced its decision by declaring, "For the reasons stated below, we adhere to our determination [in the previous decision] . . . , premising our decision on independent State constitutional grounds as well as the Federal review directed by the Supreme Court."[196] In this manner, the Court of Appeals used the plain statement to make perfectly clear, should a petition for certiorari be filed with the U.S. Supreme Court, that it had (1) provided the requisite plain statement, and (2) incorporated the Court's analysis into its decision, thus rendering any further review by the Court unnecessary and redundant. On a more subtle level, the New York Court of Appeals also implied that such review by the Court would be unwelcome.[197]

Even more troubling from a comity standpoint are cases in which a state high court *does* obey the plain statement rule by expressly proclaiming that its opinion is based upon adequate and independent state grounds, only to see the U.S. Supreme Court question and ultimately *reject* the plain statement. In *Howard v. Nitro-Lift Technologies, L.L.C.*,[198] the Oklahoma Supreme Court included a statement that its "determinations rest squarely within Oklahoma law[,]

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191. *Id.* at 901 n.3 (citing Michigan v. Long, 463 U.S. 1032, 1040 (1983)).

192. *Id.* (emphasis added) (citations omitted).

193. 471 A.2d 347 (N.H. 1983).

194. *Id.* ("We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions."). In *Arizona v. Evans*, Justice Ginsburg expressed doubt that New Hampshire's "blanket disclaimer" would be effective. *See* 514 U.S. 1, 31 (1995) (Ginsburg, J., dissenting).

195. 567 N.E.2d 1270 (N.Y. 1991).

196. *Id.* at 1272.

197. In his concurring opinion, Judge Simons accused the majority of basing its holding on the U.S. Constitution, but nonetheless conducting a state constitutional analysis in order to ward off U.S. Supreme Court review. *Id.* at 1283 (Simons, J., concurring).

198. 273 P.3d 20, 23 (Okla. 2011), *cert. granted, judgment vacated sub nom.* Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam). *Nitro-Lift Technologies* did not

which provides bona fide, separate, adequate, and independent grounds for our decision."[199] Notwithstanding this plain statement, the United States Supreme Court granted certiorari, vacated the decision, and remanded the case.[200] Explaining that the Oklahoma Supreme Court's incorrect application of the Federal Arbitration Act necessitated vacatur, the U.S. Supreme Court concluded that the Oklahoma court's plain statement of state grounds was, in fact, "not so," as its state analysis was not truly independent of its conclusions with respect to federal law.[201] The Court directed a rebuke toward the Oklahoma court as it explained its basis for taking jurisdiction:

> The Oklahoma Supreme Court acknowledged the [United States Supreme Court] cases on which Nitro-Lift relied, as well as their relevant holdings, but chose to discount these controlling decisions. Its conclusion that, despite this Court's jurisprudence, the underlying contract's validity is purely a matter of state law for state-court determination is all the more reason for this Court to assert jurisdiction.[202]

If the U.S. Supreme Court begins to make a habit of routinely questioning and rejecting the state high courts' plain statements of adequate and independent state grounds, those courts will have even less of an incentive to comply with the plain statement rule in the future.

iv. The State High Courts' Hostile Reactions to Long

It would have been interesting to see the Oklahoma Supreme Court's reaction to the U.S. Supreme Court's rejection of its plain statement as pretextual if *Nitro-Lift* had come before it once again on remand.[203] In some state high court cases that were reviewed and remanded by the U.S. Supreme Court pursuant to *Long*, state

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implicate the Oklahoma Constitution, but nonetheless makes a valuable contribution as a recent example of this extreme circumstance.

199. *Id.* at 23 (citing Michigan v. Long, 463 U.S. 1032 (1983)).

200. *Nitro-Lift Techs.*, 133 S. Ct. at 504.

201. *Id.* at 502.

202. *Id.* at 503. In her analysis of *Bush v. Gore* and its predecessors, Professor Althouse conjectured that, if the Florida Supreme Court had included a plain statement after the U.S. Supreme Court remanded *Bush I*, "it would be quite hard to find a way to state a ground for reversal" the next time the Court encountered the case. Althouse, Bush v. Gore*'s Place*, *supra* note 167, at 522. *Nitro-Lift Technologies*, however, suggests otherwise; the Court expressed no reservations about rejecting the Oklahoma Supreme Court's plain statement.

203. As of June 17, 2015, the author could locate no such decision.

high courts that did not welcome having to re-decide their own cases have expressed sentiments ranging from defeat to frustration to outright hostility toward the U.S. Supreme Court. In these cases, Justice Stevens' fear that "the Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts . . . will . . . be a recurrent source of friction between the federal and state judiciaries"[204] has indeed proven legitimate.

The "friction" Justice Stevens warned of jumps from the pages of these opinions. In some, the state high court's tone is sarcastic, as was the New York Court of Appeals' in *Immuno AG.*: "One year ago, *applying what appeared to be settled law*, we affirmed the dismissal of plaintiff's libel action . . . . [T]he United States Supreme Court granted certiorari, vacated our judgment, and remanded the case . . . ."[205] In other cases, state high court judges have reacted angrily toward the U.S. Supreme Court's vacatur or reversal of their decisions. Perhaps the most memorable and noteworthy of these was Montana Supreme Court Justice Sheehy's blistering dissent in *State v. Jackson*, [206] a 1983 case that followed closely on the heels of *Long*. Joined by the colleague who authored the original opinion that was vacated as a result of the United States Supreme Court's presumption that the decision did not rest on Montana Constitutional grounds, Justice Sheehy criticized the United States Supreme Court for curbing Montana's attempt to afford its citizens additional constitutional protections—and the majority of the Montana Supreme Court for "knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power."[207] Justice Sheehy did not mince words as he described "what [the *Long*] majority has done to Montana."[208] He expressed grave concerns about the federalism implications of *Long*:

> Now the United States Supreme Court has *interjected itself, commanding us* in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits proscribed by the federal decisions. Effectively, *the United States Supreme Court has intruded upon the rights of the judiciary of this sovereign state*.[209]

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204. Delaware v. Van Arsdall, 475 U.S. 673, 691 (1986) (Stevens, J., dissenting).

205. Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1271–72 (N.Y. 1991) (emphasis added) (adhering to prior judgment).

206. 672 P.2d 255 (Mont. 1983). Justice Stevens acknowledged Justice Sheehy's "rather bitter[]" tone in his *Van Arsdall* dissent. 475 U.S. at 699 (Stevens, J., dissenting).

207. *Jackson*, 672 P.2d at 260 (Sheehy, J., dissenting).

208. *Id.* at 261.

209. *Id.* (both emphases added).

"[T]he United States Supreme Court," he continued, "has no business contravening the final decisions of a state judiciary where no federal right guaranteed to all citizens has been offended."[210] In his conclusion, Justice Sheehy called for the Montana Supreme Court to solve this problem by refusing to abide by the U.S. Supreme Court's pronouncements.[211] This scenario, in which a state high court judge reacted "rather bitterly"[212] to what he perceived as the U.S. Supreme Court exceeding its jurisdictional boundaries, illustrates how illogical the *Long* Court's goal of respecting the state high courts[213] by presuming that their decisions are reviewable truly is. In fact, the presumption has produced exactly the opposite effects on federal-state comity.

v. Long*'s Potential To Undermine the U.S. Supreme Court's Authority*

Perhaps the most dangerous consequence of the *Long* presumption's negative effect on comity its potential to undermine the U.S. Supreme Court's authority in the event that the state courts refuse to respect and abide by its decisions. For example, suppose the Court grants certiorari, reviews and vacates or reverses the decision of a state high court, and remands the case to the state court for reconsideration in light of its opinion. Suppose, then, that the state high court refuses to follow the Court's direction and insists upon restoring its previous decision—the same one the U.S. Supreme Court vacated. In that event, would the U.S. Supreme Court grant certiorari, reverse or vacate, and remand the case a second time? Would the state high court eventually capitulate and comply with the Court's interpretation? In this hypothetical scenario, because the state high courts are sovereign and because the U.S. Supreme Court has no external mechanism through which to enforce

210. *Id.*

211. *Id.* at 260–61 (suggesting that, to remedy the situation, the Montana Supreme Court "could put the question to the United States Supreme Court four-square, that this State judiciary has the right to interpret its constitution in the light of federal decisions, and to go beyond the federal decisions in granting and preserving rights to its citizens under its state constitution").

212. Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting).

213. Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts . . . ha[s] been the cornerstone[] of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts . . . that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions."); *see also* Beard v. Kindler, 558 U.S. 53, 63 (2009) (Kennedy, J., concurring) ("By refraining from deciding cases that rest on an adequate and independent state ground, federal courts *show proper respect for state courts* . . . ." (emphasis added) (citing *Long*, 463 U.S. at 1040)).

its pronouncements,[214] it is theoretically possible that the case could bounce back and forth between these courts *ad infinitum*.

Unfortunately for the United States Supreme Court, this phenomenon is not relegated to the realm of the hypothetical; the issue occasionally arises—or at least seems appealing—in actual cases. Montana's Justice Sheehy, for example, explained in dissent that, had he been in the majority, he would "press the issue" and "put the question to the United States Supreme Court four-square"[215] by "insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution."[216] A five-to-one majority of the Pennsylvania Supreme Court did have occasion to reject the U.S. Supreme Court's analysis on remand in *Pap's A.M. v. City of Erie*.[217] Concluding that "there is nothing that requires, or even counsels us, to view this ordinance in the light adopted by the U.S. Supreme Court plurality," the Pennsylvania Supreme Court disregarded the U.S. Supreme Court's First Amendment analysis upholding a public indecency ordinance prohibiting nude dancing.[218] Instead, the Pennsylvania Supreme Court, consistent with its prior decision, again struck the statute down as a violation of the freedom of expression under article 1, section 7 of the Pennsylvania Constitution.[219]

In his *Van Arsdall* dissent, Justice Stevens predicted this very problem: the "friction" the *Long* presumption causes between the state high courts and the U.S. Supreme Court "threaten[s] to undermine the respect on which we must depend for the faithful and conscientious application of this Court's expositions of federal law."[220] If the Court's authority is undermined, it could find itself in a figurative "standoff" with its state counterparts as to the correct interpretation of the law, as its only enforcement mechanism is the respect those courts afford to its pronouncements. Should the sovereign state courts refuse to implement them, it would become

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214. GARNER, ET AL., *supra* note 8, at 49 Box 2.1 (emphasizing that "the Supreme Court has no army or police force with which to enforce its decisions").

215. *Jackson*, 672 P.2d at 261 (Sheehy, J., dissenting).

216. *Id.* at 260.

217. 812 A.2d 591 (2002).

218. *Id.* at 611. The Pennsylvania Supreme Court declined to adopt the U.S. Supreme Court's rationale because "[a]s a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question." *Id.*

219. *Id.* at 612–13. Unlike the U.S. Supreme Court, the Pennsylvania Supreme Court concluded that nude dancing was content-based expression that triggered a strict scrutiny analysis. *Id.* at 612.

220. Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting).

impossible for practitioners and citizens alike to know "what the law is"—the American judiciary's oldest and most important function.[221]

b. Jurisdiction

As severe as the comity problems *Long* creates are, the presumption's most troubling implications affect another benefit of the adequate and independent state grounds doctrine: jurisdiction. In fact, this is, "without question," the most important of the doctrine's benefits, as it ensures that the United States Supreme Court operates within the limits prescribed by Article III of the federal Constitution.[222] State high court decisions that rest upon adequate and independent state grounds are outside this sphere and thus fall within the exclusive jurisdictional territory of the state high courts. Respect for the jurisdictional boundary between the U.S. Supreme Court and its state counterparts and the division of power that it creates is thus essential to the proper functioning of the federal system.

i. In the Majority of Cases Remanded under Long*, State High Courts Reach the Same Result*

Under Article III of the U.S. Constitution, the United States Supreme Court is empowered to "correct judgments, not revise opinions," or, to state it another way, "to render dispositive judgments, not advisory opinions."[223] As Justice Jackson made clear in *Herb v. Pitcairn*, the Court issues impermissible advisory opinions when it reviews state high court cases under circumstances in which "the same judgment would be rendered by the state court after we corrected its views of federal laws."[224] The most serious problem plaguing *Long* is that, when the U.S. Supreme Court presumes it has jurisdiction to review a state high court case, reverses or vacates the state court's decision, and remands the case, the state court more often than not reaches the same decision on remand—precisely the scenario Justice Jackson warned against.[225]

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221. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say *what the law is*." (emphasis added)).

222. Gormley, *Primer*, *supra* note 49, at 700.

223. Camreta v. Greene, 131 S. Ct. 2020, 2037–38 (2011) (Kennedy, J., dissenting) (internal citations omitted).

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

225. Even before *Long*, state high courts showed an aversion to changing their minds in response to U.S. Supreme Court review, often reaching the same conclusion on remand. *See,*

As part of a retrospective commemorating the twentieth anniversary of *Long* in 2003, Matthew G. Simon conducted a survey of post-*Long* cases that included a mix of state and federal constitutional grounds, identifying seventeen that were reviewed by the United States Supreme Court pursuant to the *Long* presumption and re-decided on remand by the state high courts.[226] The state high courts followed the U.S. Supreme Court in eight.[227] In five of the seventeen cases, however, the state courts reached a result on remand that was inconsistent with that of the United States Supreme Court; these courts either clarified their state analyses or openly criticized the Court for exercising its jurisdiction under *Long*.[228] In the remaining four, the state high courts performed state-law analyses but happened to reach the same result as the U.S. Supreme Court despite applying a different rationale.[229] Taking the latter two groups together, in more than half of the post-*Long* cases decided between 1983 and 2003, the United States Supreme Court either violated the adequate and independent state grounds doctrine outright and issued advisory opinions by reviewing cases resting upon state grounds, or ran the risk of producing advisory opinions but escaped without incident when the state high courts reached the same result as the Court by coincidence.[230] As to *Long*'s efficacy, Simon determined that the presumption "has not produced a bright-line conclusion."[231]

The cases in which the United States Supreme Court has exercised jurisdiction under the *Long* presumption and vacated or reversed the decision of a state high court in the decade since Simon's study left off on January 1, 2003 demonstrate that little has changed in the intervening decade. For the purposes of this article, the author conducted a study similar to Simon's that sought cases satisfying five criteria. The decisions included in the final analysis were required to: (1) have been decided by the U.S. Supreme Court between January 1, 2003 and November 1, 2013; (2) include an original opinion by a state court of last resort that was ambiguously grounded in both state and federal law; (3) have been reversed or

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e.g., State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976) (affirming original decision under state constitution).

226. Simon, *supra* note 9, at 977–78. The study included cases decided between July 6, 1983 (the day *Michigan v. Long* came down) and January 1, 2003.

227. *Id.* at 980–81 (discussing Meyers v. State, 457 So. 2d 495 (Fla. Dist. Ct. App. 1984)).

228. *Id.* at 981–83 (discussing, inter alia, People v. P.J. Video, Inc., 501 N.E.2d 556 (N.Y. 1986) (expressing polite disagreement with U.S. Supreme Court) and Commonwealth v. Labron, 690 A.2d 228 (Pa. 1997) (openly criticizing U.S. Supreme Court)).

229. *Id.* at 983–84 (citing, inter alia, State v. Robinette, 685 N.E.2d 762 (Ohio 1997)).

230. *See id.* at 982–84.

231. *Id.* at 971.

vacated by the U.S. Supreme Court (either citing *Long* expressly or impliedly exercising jurisdiction based on the presumption that federal law controlled); (4) have been reconsidered by the state high court in light of the U.S. Supreme Court's opinion or order granting certiorari; and (5) involve, to some degree, a constitutional issue.[232] An exhaustive search revealed eleven cases in the last decade that meet these criteria,[233] and a closer look shows that, despite the *Long* Court's hope that its presumption would settle the issue, the question whether the United States Supreme Court has jurisdiction to review state high court decisions that involve both state and federal law persists.

On remand, the state high courts reached the same result as in their original decisions on at least some of the issues[234] in seven of the eleven cases.[235] Three of these are particularly instructive. In the 2004 case of *Racing Association of Central Iowa v. Fitzgerald*,[236] the Iowa Supreme Court originally held that a statute that taxed racetracks' gambling revenues at nearly twice the rate imposed on riverboat gambling violated the Equal Protection Clause of the U.S. Constitution and the equality provision of article I, section 6 of the Iowa Constitution.[237] After the U.S. Supreme Court reversed, holding that the statute satisfied the Equal Protection Clause, the Iowa Supreme Court found "no basis to change [its] earlier opinion that

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232. This analysis excludes cases involving the recurring issue of whether, pursuant to the adequate and independent state grounds doctrine, a state procedural bar can prevent U.S. Supreme Court review of habeas corpus denials.

233. Rigterink v. State, 66 So. 3d 866 (Fla. 2011); State v. Powell, 66 So. 3d 905 (Fla. 2011) (per curiam); Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004); State v. Marsh, 144 P.3d 48 (Kan. 2006) (per curiam); King v. State, 76 A.3d 1035 (Md. 2013); Williams v. Philip Morris Inc., 176 P.3d 1255 (Or. 2008); Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2009); Brigham City v. Stuart, 122 P.3d 506 (Utah 2005); State v. Brillon, 995 A.2d 557 (Vt. 2010); State v. Recuenco, 180 P.3d 1276 (Wash. 2008) (en banc); State v. Knapp, 700 N.W.2d 899 (Wis. 2005). *Herron v. Century BMW*'s constitutional issue was more tangential than those of the other cases listed; it involved preemption rather than the interpretation of constitutional provisions. 719 S.E.2d at 641.

234. *State v. Marsh* followed the U.S. Supreme Court on two issues and restored its original decision on two others. 144 P.3d at 48. *Herron v. Century BMW* was also ultimately decided on procedural rather than substantive grounds. 719 S.E.2d at 641.

235. *Fitzgerald*, 675 N.W.2d 1; *Marsh*, 144 P.3d 48; *Williams*, 176 P.3d at 1256–57 (adhering to its original decision on other state law grounds after the U.S. Supreme Court vacated on the grounds that due process required limitations on the imposition of punitive damages by the jury); *Herron*, 719 S.E.2d 640; *Brillon*, 995 A.2d at 561, 569–70 (expressing a willingness to consider reexamining the case on state constitutional grounds but, due to the inadequacy of the requested briefing on the issue and the fact that the criminal defendant did not raise the issue in the original case, ultimately restoring its decision on other grounds over the objections of a dissenting justice who advocated for conducting a state constitutional analysis); *Recuenco*, 180 P.3d 1276; *Knapp*, 700 N.W.2d 899.

236. 675 N.W.2d 1 (Iowa 2004).

237. *Id.* at 3.

the differential tax violates article I, section 6 of the Iowa Constitution."[238]

In 2005's *State v. Knapp*,[239] the Wisconsin Supreme Court confronted on remand the issue of whether the fruit of the poisonous tree doctrine applied to derivative physical evidence obtained as a result of a *Miranda* violation. The U.S. Supreme Court vacated the Wisconsin Supreme Court's original opinion suppressing the evidence in light of its own decision in *United States v. Patane*,[240] which held that the doctrine did not extend to voluntary statements made in the absence of a *Miranda* warning.[241] On remand, the Wisconsin Supreme Court conducted a thorough analysis of the history and policy underlying article I, section 8 of the Wisconsin Constitution as well as federal and state case law and again ruled the contested evidence inadmissible.[242] In a concurring opinion joined by the Chief Justice and two other justices, Justice Crooks emphasized that the majority's holding reinforced Wisconsin's willingness to afford additional protections above the federal constitutional minimum in accordance with the "new federalism" movement.[243]

In *Washington v. Recuenco* (*Recuenco I*),[244] the United States Supreme Court reversed the original decision of the Washington Supreme Court and held that a *Blakely*[245] error, in which a sentencing factor is not submitted to the jury in violation of the Sixth Amendment as interpreted in *Apprendi v. New Jersey*,[246] could be subject

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238. *Id.* The Iowa Supreme Court emphasized that it was conducting an independent state constitutional analysis:

> Based on our prior precedents and the sovereign nature of our state and its constitution, our court has an obligation to evaluate independently the validity—under the *Iowa* Constitution—of the differential tax rates imposed on excursion boats and racetracks. When we independently consider this issue, we arrive at a conclusion different from that reached by the Supreme Court under the *federal* constitution.

Id. at 7 (emphasis in original).

239. 700 N.W.2d 899 (Wis. 2005).

240. 542 U.S. 630 (2004) (plurality decision).

241. *Knapp*, 700 N.W.2d at 901.

242. *Id.* at 912–18, 921. The Court declined the State's request that it interpret article I, section 8 in lock-step with the Fifth Amendment. *Id.* at 914.

243. *Id.* at 922–24 (Crooks, J., concurring). The new judicial federalism movement, which began in the 1970s and of which Justice Brennan of the United States Supreme Court was a leader, espoused the view that the states are free to safeguard their citizens' liberties above and beyond the minimum protections required by the United States Constitution. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

244. 548 U.S. 212 (2006).

245. Blakely v. Washington, 542 U.S. 296 (2004).

246. 530 U.S. 466 (2000). In *Recuenco*, the *Blakely* error occurred when the criminal defendant was sentenced with a firearm enhancement when an assault with a deadly weapon enhancement should have been applied. State v. Recuenco (*Recuenco II*), 180 P.3d 1276, 1286 (Wash. 2008) (en banc) (Fairhurst, J., dissenting).

to harmless error analysis.[247] On remand in 2008, the Washington Supreme Court accepted dissenting Justice Stevens' invitation[248] to reinstate its judgment.[249] The Court held that because article I, section 21 of the Washington Constitution "provide[d] greater protection for jury trials than the federal constitution," harmless error did not apply under the circumstances of the case.[250]

In four cases, two of which were decided in tandem,[251] state high courts whose decisions were reversed or vacated and reviewed by the U.S. Supreme Court followed the Court on remand.[252] A closer examination of these cases, however, reveals that these state high courts did not simply abandon their state constitutional analyses and blindly follow the Court for the sake of the "important need for uniformity in federal law."[253] These cases demonstrate that in the last decade, state high courts only reversed their prior decisions where the court's interpretation of its own constitution was closely linked to the interpretation of the federal constitution—an area in which the United States Supreme Court is the ultimate authority.[254] Unlike the cases in which the state high courts reached the

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247. *See Recuenco I*, 548 U.S. at 221–22.

248. *Id.* at 223 (Stevens, J., dissenting).

249. *Recuenco II*, 180 P.3d at 1283.

250. *Id.* at 1282 (citations omitted).

251. *Rigterink v. State*, 66 So. 3d 866 (Fla. 2011), was decided the same day as *State v. Powell*, 66 So. 3d 905 (Fla. 2011) (per curiam), and relied upon *Powell*'s rationale.

252. *Rigterink*, 66 So. 3d 866; *Powell*, 66 So. 3d 905; King v. State, 76 A.3d 1035 (Md. 2013); Brigham City v. Stuart, 122 P.3d 506 (Utah 2005).

253. Michigan v. Long, 463 U.S. 1032, 1040 (1983).

254. In *Rigterink v. State* and *State v. Powell*, which were decided on the same day, the Florida Supreme Court adopted the United States Supreme Court's analysis of a *Miranda* issue because it determined that the requirements of article I, section 9 of the Florida Constitution align with those of the Fifth Amendment as interpreted by the U.S. Supreme Court. *See Rigterink*, 66 So. 3d at 904 ("[T]his Court has *generally* followed federal Fifth Amendment precedent in interpreting article I, section 9 of the Florida Constitution" (emphasis in original) (internal quotation marks omitted)); *Powell*, 66 So. 3d at 907, 910 (explaining that "similar warnings [to those required by the Fifth Amendment] are required by the self-incrimination clause of article I, section 9 of the Florida Constitution" and that its conclusions with respect to the *Miranda* right of a defendant to the presence of counsel during questioning "were no different than those set forth in prior holdings of the United States Supreme Court" (internal quotation marks omitted)).

In *Maryland v. King*, 133 S. Ct. 1958 (2013), the United States Supreme Court reversed the Maryland Supreme Court's holding that law enforcement's collection of DNA from those arrested for certain enumerated offenses violated the Fourth Amendment. On remand in *King v. State* (*King II*), 76 A.3d 1035 (Md. 2013), the Maryland Supreme Court reached the same result as the U.S. Supreme Court, concluding that because it interpreted article I, section 26 of the Maryland Constitution *in pari materia* with the latter Court's construction of the Fourth Amendment, the DNA collection did not violate article I, section 26. *Id.* at 1042.

The state courts' decision to change course on remand in these cases can be juxtaposed against the result in the "hybrid" case of *State v. Marsh* (*Marsh II*), 144 P.3d 48 (Kan. 2006) (per curiam), in which the Kansas Supreme Court vacated its original decision that Kansas' death penalty statute was prima facie unconstitutional in response to the U.S. Supreme

same conclusion on remand, these cases, with their disproportionate reliance on federal constitutional precedent, seem to invite U.S. Supreme Court review.

In any event, the jurisdictional problems that the *Long* presumption created in 1983 have persisted throughout the last decade. Seventy years ago, the *Herb v. Pitcairn* Court restated what was a long-held jurisdictional principle even then: "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."[255] Despite the all but indisputable status of this rule, the United States Supreme Court broke it seven times between January 2003 and November 2013 in cases where it assumed jurisdiction under *Long* to review state high court decisions, but the state high court rendered the same judgment on remand.[256] These cases demonstrate that *Long*'s most notorious contribution—the presumption that the United States Supreme Court has jurisdiction to review state high court decisions that rest on ambiguous grounds—has, at best, failed to put the issue of how best to approach ambiguously grounded state high court cases to rest. At worst, its tendency to lead the Court to stretch its jurisdictional boundaries into impermissible territory has *exacerbated* the debate by lending credence to the arguments of *Long*'s opponents; as Justice Ginsburg predicted, "[t]he presumption is an imperfect barometer of state courts' intent."[257] What is clear after three decades is that the presumption that the U.S. Supreme Court has jurisdiction

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Court's reversal on the Eighth and Fourteenth Amendment issues. *Id.* at 48. The U.S. Supreme Court observed over Justice Stevens' dissent that the Kansas Supreme Court's original analysis centered around one of its own cases but relied heavily upon federal constitutional law. Kansas v. Marsh, 548 U.S. 163, 169 (2006). On remand, however, despite its apparent acceptance of the U.S. Supreme Court's rationale, the Kansas Supreme Court reaffirmed its original opinion on the other issues, ultimately reaching the same outcome and ordering a new trial on state-law grounds. *Marsh II*, 144 P.3d at 48.

255. Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

256. Irrespective of the outcome, the number of cases alone in which the Court's jurisdiction to review the state high court's decision was either expressly at issue or questionable shows that *Long* has not settled matters. It would have been reasonable to expect the number of such cases to drop off over time as state courts (1) adjusted to the new requirements of *Long*, such as the plain statement rule, and conformed their opinions accordingly; (2) moved their focus away from state constitutional law as the "onslaught of state constitutional decision making that presented itself in the 1970s and 1980s" began to ebb, *see* Gormley, *Primer*, *supra* note 49, at 701; and (3) became more ideologically conservative, bringing state constitutional law into line with the United States Supreme Court's jurisprudence. In fact, the number of such cases has not waned. Simon's 2003 retrospective compiled seventeen cases where the Court reexamined state courts' ambiguously grounded decisions in the twenty years after *Long*—an average of 8.5 per cases per decade. *See supra* note 226 and accompanying text. The author of this article uncovered *eleven* cases in the subsequent decade. *See supra* note 233 (listing cases).

257. Arizona v. Evans, 514 U.S. 1, 31 (1995) (Ginsburg, J., dissenting).

in absence of a plain statement to the contrary has not achieved the *Long* Court's primary objective of selecting a jurisdictional approach that ensures the "doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[258]

ii. The Plain Statement Rule Has Proven Ineffective

The plain statement rule itself—the second component of *Long*'s legacy—suffers from similar maladies. Despite Justice O'Connor's implied assurances as to the clarity and simplicity[259] of the requirement that the state high court include a "plain statement that a decision rests upon adequate and independent state grounds,"[260] the rule has proven simpler to abide by in theory than in practice. At times, the state high courts have simply ignored the plain statement rule,[261] perhaps because, as Justice Ginsburg conjectured in her *Evans* dissent, "[a]lthough it is easy enough for a state court to say the requisite magic words, the court may not recognize that its opinion triggers *Long*'s plain statement requirement."[262] Even in the opinions that seem to comply most literally with the *Long*

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258. *Long*, 463 U.S. at 1039.

259. For example, Justice O'Connor wrote that a state high court citing federal cases as persuasive authority "*need only* make clear by a plain statement in its judgment or opinion." *Id.* at 1041 (emphasis added).

260. *Id.* at 1042 (internal quotation marks omitted).

261. *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 748 (Ill. 2013), is a recent example of an ambiguously grounded case. In *Hope Clinic*, the Illinois Supreme Court was asked to resolve a challenge to an Illinois statute limiting abortion rights for teenagers. *Id.* at 748–49. After citing article I, section 2 of the Illinois Constitution and explaining that the state constitution can offer additional protections beyond the federal floor, the Court began its analysis of the plaintiffs' equal protection and due process claims by citing Illinois cases. *Id.* at 765–66. The Court then abandoned this state-centered line of reasoning and cited eleven U.S. Supreme Court cases as it announced and explained its decision upholding the statute. *Id.* at 766–68 ("Finally, we find no state grounds for disregarding federal precedent when interpreting our state constitution's due process and equal protection clauses."). Had the rights claimant prevailed on state grounds, however, this mélange of citations to state and federal law would have necessitated a "plain statement" under *Long*.

262. Arizona v. Evans, 514 U.S. 1, 31 (1995) (Ginsburg, J., dissenting). Justice Ginsburg explained:

> Application of *Long*'s presumption depends on a whole series of "soft" requirements: the state decision must "fairly appear" to rest "primarily" on federal law or be "interwoven" with federal law, and the independence of the state ground must be "not clear" from the face of the state opinion. These are not self-applying concepts.

Id. at 31 (quoting PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 552 (3d ed. 1988) [hereinafter HART AND WECHSLER]).

Court's dictate, the plain statement feels like an afterthought intended to ward off U.S. Supreme Court review.[263]

In other cases, it is unclear whether the state court's references to independent state grounds (if, in fact, that is what they were) complied with the requirement or not, raising questions as to whether such statements are sufficiently "plain."[264] Even when stated more clearly, state high courts sometimes bury the purported plain statement in a footnote.[265] Placing the requisite statement in the text does not necessarily remedy the problem, however. In many instances, courts still run the risk of the statement getting lost in the body of a bulky constitutional analysis or being mistaken for a stylistic flourish.[266] In the most extreme example of questionable compliance with *Long*'s plain statement rule, the New Hampshire Supreme Court attempted to issue a "blanket disclaimer" in the hope of dispatching with the plain statement rule in perpetuity: "We hereby make clear that when this court cites federal or other

263. *See, e.g.*, State *ex rel.* Dep't of Envtl. Quality v. BNSF Ry. Co., 246 P.3d 1037, 1044 (Mont. 2010) ("For the reasons set forth below, we affirm the District Court on adequate and independent state grounds.").

264. *See, e.g.*, State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010) (explaining that "while United States Supreme Court cases are entitled to respectful consideration, *we will engage in independent analysis* of the content of our state search and seizure provisions" (emphasis added)); State v. Chenoweth, 158 P.3d 595, 600 (Wash. 2007) (en banc) ("[A]rticle I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. . . . Thus . . . this court should undertake an independent state constitutional analysis." (emphasis added) (footnotes and citations omitted)). Even though these courts reference their state constitutions or processes of state constitutional interpretation as "independent" of their federal counterparts—as the Iowa Supreme Court did fourteen times in *Ochoa*—it is unclear whether these references would satisfy the plain statement rule.

265. *See, e.g.*, City of Midwest City v. House of Realty, Inc., 198 P.3d 886, 901 n.55 (Okla. 2008) (tacking on in the fifty-fifth—and final—footnote the statement that "[o]ur holdings in the consolidated appeals are based on Oklahoma law constituting separate, adequate, and independent state grounds for our decision." (citing Michigan v. Long, 463 U.S. 1032 (1983))); Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery, 136 P.3d 639, 651 n.19 (Okla. 2006) (placing in a footnote the statement that its "holding in the instant cases concerns state constitutional questions based on Oklahoma law, which constitutes 'separate, adequate, and independent [state] grounds' for our decision" (quoting *Long*, 463 U.S. at 1041)); State v. Feaster, 877 A.2d 229, 245 n.12 (N.J. 2005) ("We need not reach the federal question, *having decided this case on an independent state ground*." (emphasis added)).

266. For example, the New Jersey Supreme Court often places these statements—assuming they are sufficiently plain to constitute attempts to comply with the *Long* requirement at all—in nondescript clauses or textual sentences. *See, e.g.*, State v. Hess, 23 A.3d 373, 394 (N.J. 2011) ("Article I, paragraph 10 of the New Jersey Constitution . . . and our state-court decisional law *provide an independent state ground* for our decision." (emphasis added) (internal citations omitted)); State v. Branch, 865 A.2d 673, 682 (N.J. 2005) ("Because we resolve the issue on independent state grounds, we do not need to decide the constitutional challenge . . . ."); State v. Fuller, 862 A.2d 1130, 1141 (N.J. 2004) ("We now highlight those differences and lay the foundation for our decision in this case. . . . [W]e use federal [and] other state court opinions . . . for the purpose of guidance, not as compelling the *result we reach on independent state grounds*." (first alteration and emphasis added) (internal quotation marks omitted)).

State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions."[267] No matter how creative the state high courts' attempts to satisfy the plain statement rule have been, the rule has not, as Justice O'Connor hoped, helped to achieve *Long*'s stated goal of avoiding the need to "place significant burdens on state courts to demonstrate the presence or absence of our jurisdiction."[268] In practice, the Court's good intentions "ring hollow: *Long* simply puts the burden of clarification on the state court in advance."[269]

c. Judicial Economy

Because, as has been demonstrated, the states often do not successfully shoulder the burden of making their grounds for decision clear, the resultant need for the U.S. Supreme Court—and, almost invariably, the state high courts on remand[270]—to re-decide cases under *Long* wastes the courts' valuable time and resources and thus frustrates judicial economy, the third benefit of the adequate and independent state grounds doctrine. When the U.S. Supreme Court grants certiorari and reviews a state high court decision, then remands the case to the state court, two additional rounds of decisions are necessary. In effect, the state high court's workload with respect to a given case is doubled, and additional work is created for the U.S. Supreme Court, which is already deluged with over 10,000 petitions for certiorari per year.[271] When the state high court decides the case the same way on remand, these extra resources are effectively wasted, and this inefficiency has not gone unnoticed. In his long line of dissents and concurrences advocating for judicial restraint when the U.S. Supreme Court confronted petitions for certiorari in ambiguously grounded cases on appeal from state courts

267. State v. Ball, 471 A.2d 347, 352 (N.H. 1983); *see also* Arizona v. Evans, 514 U.S. 1, 31 (1995) (Ginsburg, J., dissenting) (doubting the legitimacy of the New Hampshire Supreme Court's "blanket disclaimer").

268. *Long*, 463 U.S. at 1040.

269. HART AND WECHSLER, *supra* note 262, at 553.

270. In the cases the author researched, when the U.S. Supreme Court assumed jurisdiction over a state high court case, the Court almost always either vacated or reversed the decision and remanded it to the state court.

271. *Frequently Asked Questions*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/faq.aspx#faqgi9 (last visited May 31, 2015).

of last resort, Justice Stevens was cognizant of the reality that neither the state courts nor the Supreme Court have the benefit of unlimited resources and would be wise to allocate them elsewhere.[272]

State high courts have also acknowledged that, rather than promoting finality by simply letting their original decisions stand, the *Long* presumption shifts the responsibility for deciding cases back onto the state high courts, whose resources are also limited. The Utah Supreme Court, for example, explained that "time and expense [can be] saved by avoiding multiple trips through state and federal appellate courts."[273] As an example, Chief Justice Durham, writing for the Court, pointed to the *Immuno AG.* case, in which the New York Court of Appeals wrote, "In view of the costly, sizable record already amassed, including hundreds of pages of briefs, no purpose is served by compelling *these* parties, on *this* record and *these* briefs, to consider another trip to Washington . . . ."[274]

The resources wasted by needlessly re-deciding cases at the U.S. Supreme Court and state high court levels are not merely theoretical. The author's November 2013 search for state high court decisions on remand from the U.S. Supreme Court where the Court apparently decided the case in accordance with the *Long* presumption revealed eleven such cases since 2003.[275] If each opinion produced in these cases beyond the state high court's original decision required an average of two extra months to produce, one for the U.S. Supreme Court and one for the state high court on remand, the number of additional months spent by the two courts combined totals twenty-two—nearly two years. The outcomes of most of these cases remained unchanged on remand, meaning that the courts expended the majority of these extra resources in the name of reaching the exact same result. Even worse, these resources were imprudently allocated in the name of rendering advisory opinions the

272. *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 203 (2006) (Stevens, J., dissenting) ("Although in recent years the trend has been otherwise, I continue to hope 'that a future Court will recognize the error of this allocation of resources . . . and return to our older and better practice of restraint.'" (citing *Long*, 463 U.S. at 1070 (Stevens, J., dissenting))); California v. Ramos, 463 U.S. 992, 1029 (1983) (Stevens, J., dissenting) ("We granted certiorari only because at least four Members of the Court determined—as a matter of discretion—that review . . . would represent a wise use of the Court's scarce resources."). This theory also formed underlying theme of Justice Stevens' concurring opinion in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 407–09 (2006) (Stevens, J., concurring), which he called "an odd flyspeck of a case." *Id.* at 407. Because the case, which had been pending for six years, involved "minor offenses" carrying maximum penalties of just ninety days to six months in jail, Justice Stevens could "see no reason for this Court to cause the Utah courts to redecide the question as a matter of state law." *Id.* at 407, 409.

273. West v. Thomson Newspapers, 872 P.2d 999, 1005 n.6 (Utah 1994).

274. *Id.* (quoting Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1278–79 (N.Y. 1991)).

275. *See supra* notes 232–233 and accompanying text.

Court was not permitted to deliver in the first place. Ultimately, this constitutes a waste of the courts' valuable time and resources, which could have been better spent on other tasks.[276]

Ten years ago, Matthew Simon analyzed the post-*Long* body of case law and reached some disheartening conclusions. *Long*, with its presumption and plain statement rule, did not significantly reduce the number of advisory opinions and did not always effectively demonstrate respect for the state courts' independence. Many state courts did not comply with the plain statement rule, and, perhaps most importantly, "[t]he Court continues to take cases that it should not."[277] "[I]f state courts continue to fail to abide by *Long*," Simon theorized, "then the case has not 'achieve[d] the consistency that is necessary' [and] that the Supreme Court had sought."[278]

The cases of the last decade continue to serve as examples of *Long*'s ineffectiveness. With the plain statement required by the U.S. Supreme Court often ignored, hidden, or used as a sort of disclaimer by state courts hoping to shield their decisions from review, the Court continues to presume—often incorrectly—that it has jurisdiction over state high court decisions involving a mix of state and federal grounds. Furthermore, where the state high courts' grounds for decision are truly ambiguous—that is, not relying almost exclusively upon federal law—these courts invariably reinstitute on remand the decisions that the U.S. Supreme Court vacated or reversed in order to assume jurisdiction pursuant to *Long*. The net result is that, in addition to endangering comity and wasting resources, *Long* too often leads the Court to render advisory opinions. The thirty-plus years since the Court instituted the *Long* presumption have done nothing to remedy these "vexing issue[s]."[279] Rather, *Long* has only replaced the threat of inconsistency in federal law with another set of problems: damaged comity, squandered

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276. Efficient resource management is even more critical in today's challenging economic conditions, which the state and federal courts have struggled to navigate. *See* Lita Epstein, *Courts in Crisis: Recession Drives Caseloads Up, Budgets Down*, DAILYFINANCE (Dec. 28, 2009, 9:33 AM), http://www.dailyfinance.com/2009/12/28/courts-in-crisis-recession-drives-caseloads-up-budgets-down/; Amanda Robert, *California Courts Continue Cuts, Closures*, LEGAL NEWSLINE (June 17, 2013, 1:05 PM), http://legalnewsline.com/issues/tort-reform/242312-california-courts-continue-cuts-closures; Jennifer Smith, *Federal Courts 'Crisis' Seen Due to Cuts*, WALL ST. J. (Sept. 5, 2013, 9:39 PM), http://online.wsj.com/news/articles/SB10001424127887324123004579057520168095380; Richard Wolf, *Federal Courts Can't Pay Court-Appointed Lawyers*, USA TODAY (Sept. 17, 2013, 3:28 PM), http://www.usatoday.com/story/news/politics/2013/09/17/federal-courts-budget-cuts-lawyers/2827843/.

277. Simon, *supra* note 9, at 988.

278. *Id.* (quoting Michigan v. Long, 463 U.S. 1032, 1039 (1983)).

279. *Long*, 463 U.S. at 1038.

judicial resources, and, most importantly, stretching the Court's jurisdiction beyond its bounds and into the verboten territory of the advisory opinion. "I am confident that a future Court will recognize the error of this allocation of resources," Justice Stevens wrote in his *Long* dissent.[280] "When that day comes, I think it likely that the Court will also reconsider the propriety of today's expansion of our jurisdiction."[281] After an unsuccessful trial period spanning three decades, the day Justice Stevens hoped for is long overdue.

B. The Solution: Abandon the Long *Presumption in Favor of the "Modern Federalism" Approach*

As this article demonstrates, *Long*'s failings lead to one inevitable conclusion: the Court must abandon the *Long* presumption and its accompanying plain statement rule. Implementing this solution to the *Long* problem, however, is not as simple as merely overruling the decision. With what approach to ambiguously grounded cases should the United States Supreme Court replace *Long*? If the Court adopts any of its previous approaches, how will it address that approach's shortcomings?

Once the Court overturns *Long*, it should return to its earliest historical approach and instead presume that, where the state high court's grounds for decision are unclear, the decision rests upon adequate and independent state grounds. It should, therefore, presume that it has no jurisdiction to review the case and decline to grant certiorari, thus ensuring that it errs on the proper side of its jurisdictional limits. The Court's return to this approach does not mean, however, that it must also return to the problems that led it to abandon the presumption in favor of adequate and independent state grounds: namely, that state courts' erroneous interpretations of federal law are allowed to persist, compromising the uniformity of the U.S. Supreme Court's own federal jurisprudence. In order to mitigate this problem, the Court could include a simple disclaimer in its denials of certiorari on the basis of adequate and independent state grounds to indicate that the state court's opinion lacks precedential value to the extent that it relies upon federal law. This "adequate and independent state grounds disclaimer" makes no new law; to the contrary, it is consistent with some of the nation's oldest federalism principles.

The state high courts can reinforce this effort—and help to ensure that their state constitutional decisions are properly protected from

280. *Id.* at 1070 (Stevens, J., dissenting).
281. *Id.*

U.S. Supreme Court review—by adopting the "modern federalism" approach to the analysis of state constitutional issues. Under modern federalism, a state high court should make a reasonable, good-faith effort, as its docket and resources permit, to conduct a thorough independent state constitutional analysis *before* moving on to issues of federal law, which should only be analyzed when necessary to resolve the case. If a federal law analysis is necessary, the court should locate it in a separate section of the opinion in order to ensure that the state and federal grounds for decision are clear and unambiguous. In order to promote the state high court's long-term compliance with the modern federalism approach, it should strongly encourage litigants to compose and structure their briefs accordingly. By shifting the responsibility for framing and thoroughly researching these issues onto the litigants, a state high court can reap the benefits of modern federalism without imposing an unreasonable—and ultimately unmanageable—workload upon itself.

Working in concert, these two proposed solutions, the U.S. Supreme Court's adequate and independent state grounds disclaimer and the state high courts' litigant-assisted modern federalism approach, will not only fill the post-*Long* void. Beyond remedying the problems presented by *Long*, they will actually *enhance* the workings of the federal system by fostering a mutually respectful and symbiotic balance between the United States Supreme Court and its state counterparts.

1. The U.S. Supreme Court's Role: Overturn Long

The first step that must be taken in order to avoid the problems *Long* has caused and maximize the benefits that the adequate and independent state grounds doctrine offers is that the United States Supreme Court must abandon *Long*. Stare decisis, while generally important to the stability of and respect for the Court's pronouncements, does not require the Court to slavishly follow its prior decisions when they are no longer viable. As Justice Kennedy explained in *Lawrence v. Texas*,[282] "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command."[283] Instead, stare decisis "is a principle of policy and not a mechanical formula of adherence to the latest decision."[284] The Court has

282. 539 U.S. 558, 577 (2003).
283. *Id.*
284. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

acknowledged that, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"[285] Such is the case here. *Long* has not accomplished its stated goals and, at the same time, it has created a host of unanticipated and unwelcome side effects.

a. Presume State High Court Cases Rest upon Adequate and Independent State Grounds

Once *Long* has been overruled, the United States Supreme Court should return to its earliest precedent on the issue and adopt the opposite presumption: in cases where the state high court decision it is asked to review is ambiguously grounded, the Court should presume that it *lacks* jurisdiction. Justices Stevens and Ginsburg have advocated for this approach on various occasions. Justice Stevens expressed a desire for a "return to [the Court's] older and better practice of restraint" on multiple occasions over the course of more than a quarter-century.[286] In her dissent in *Evans*, Justice Ginsburg also argued in favor of judicial restraint when confronted with this type of jurisdictional issue, writing, "I would *apply the opposite presumption* and assume that Arizona's Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion."[287] In order to implement this new presumption, the United States Supreme Court should not grant certiorari in ambiguously grounded state high court cases, as Justice Stevens repeatedly recommended.[288]

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285. *Id.* at 827 (citing Smith v. Allwright, 321 U.S. 649, 665 (1944)). The Court's prerogative to depart from the doctrine of stare decisis extends to this issue. In *Long*, Justice Stevens agreed with the majority that the Court is "free to consider as a fresh proposition whether we may take presumptive jurisdiction over the decisions of sovereign states." 463 U.S. at 1067 (Stevens, J., dissenting).

286. *See* Kansas v. Marsh, 548 U.S. 163, 203 (2006) (Stevens, J., dissenting); Brigham City, Utah v. Stuart, 547 U.S. 398, 409 (2006) (Stevens, J., concurring) ("I continue to believe that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government." (internal quotation marks omitted)); *Long*, 463 U.S. at 1067 (Stevens, J., dissenting) ("[A] policy of judicial restraint . . . enables this Court to make its most effective contribution to our federal system of government.").

287. Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting) (emphasis added).

288. *See, e.g.*, Florida v. Rigterink, 559 U.S. 965 (2010) (granting certiorari, vacating judgment, and remanding for reconsideration in light of *Florida v. Powell*, 559 U.S. 50 (2010)) (Stevens, J., dissenting) ("Because the independence of the state-law ground is 'clear from the face of the opinion,' . . . we do not have power to vacate the judgment of the Florida Supreme Court." (citation to *Long* omitted)); Washington v. Recuenco, 548 U.S. 212, 223 (2006) (Stevens, J., dissenting) ("[T]here was surely no need to reach out to decide this case."); *Brigham City*, 547 U.S. at 409 (2006) (Stevens, J., concurring) ("[W]hile I join the Court's

The primary failing of the *Long* presumption is that it "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."[289] The United States Supreme Court can avoid this scenario and instead err on the side of safety by presuming that an ambiguously grounded state high court decision rests upon adequate and independent state grounds and declining to grant certiorari in cases where its opinion is likely to be advisory.[290]

It follows that the Court should also abandon *Long*'s plain statement rule, which has largely proven ineffective. Some states ignore it entirely, whether out of a lack of awareness of the United States Supreme Court's requirement or the level of detail needed to satisfy it, or, more problematically, in defiance of the Court's pronouncement.[291] Still others, such as New Hampshire, have used it as an opportunity to reassert their sovereignty in the face of a direct dictate from the U.S. Supreme Court.[292] In her *Evans* dissent, Justice Ginsburg advocated for a presumption in favor of adequate and independent state grounds but added an additional requirement: "I would presume, *absent a plain statement to the contrary*, that a state court's decision of the kind here at issue rests on an independent state-law ground."[293] It is not necessary, however, to insist on the inclusion of such a "plain statement." For one sovereign court to impose detailed requirements as to the form, content, and style of the written opinions of another exceeds the bounds of the former's authority and infringes upon the latter's.[294] Thus, the less formalistic approach offered by Justice Sheehy of the Montana Supreme Court, namely, that "adequate state grounds for [the state court's]

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opinion, I remain persuaded that my vote to deny the State's petition for certiorari was correct."); California v. Ramos, 463 U.S. 992, 1031 (1983) ("I repeat, no rule of law commanded the Court to grant certiorari.").

289. Delaware v. Van Arsdall, 475 U.S. 673, 698–99 (1986) (Stevens, J., dissenting).

290. Another benefit is that this approach forecloses the possibility that states will attempt to engage in self-help on remand. After proposing the solution the author suggests, Montana's Justice Sheehy wrote, "We should at least attempt to force the United States Supreme Court to come to that proper stance." State v. Jackson, 672 P.2d 255, 261 (Mont. 1983) (Sheehy, J., dissenting). For the Court to adopt the "proper stance" of its own volition would alleviate the need for the states to take matters into their own hands.

291. *See supra* Parts III.A.2.a.iii (discussing the plain statement rule's inability to remedy *Long*'s comity problems) and III.A.2.b.ii (discussing the plain statement rule's compliance issues).

292. *See* State v. Ball, 471 A.2d 347, 352 (N.H. 1983) (issuing a blanket disclaimer that all of its future decisions on issues of state law that cite both federal and state grounds rest upon adequate and independent state grounds).

293. Arizona v. Evans, 514 U.S. 1, 26 (1995) (Ginsburg, J., dissenting) (emphasis added).

294. This assumption pervades the discussions of the *Long* "plain statement" rule in Part III.A *supra*.

decision are independent of federal grounds *unless it clearly appears from the state's opinion otherwise*,"[295] is preferable.

b. Include a Disclaimer in Denials of Certiorari on Adequate and Independent State Grounds

This does not mean, however, that the United States Supreme Court must reinstitute the same laissez-faire approach that led it to abandon the presumption against reviewing state high court decisions in the first place. After all, the threat of allowing state courts' erroneous interpretations of federal law to infect the federal *corpus juris* is the most troubling drawback of the presumption against review.[296] In *Herb v. Pitcairn*, Justice Jackson aptly acknowledged that the U.S. Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."[297]

Importantly, however, this observation does not automatically compel the Court to exercise its "power . . . to correct wrong judgments" on the part of the state courts.[298] Instead, where a petition for certiorari requests review of a state high court decision that contains both adequate and independent state grounds *and* federal grounds, the United States Supreme Court should deny the petition—*subject to the disclaimer that the state court's analysis with respect to federal law is not precedential*. The Court need not tailor this caveat to the individual case at hand; rather, it need only include the following verbiage in its order denying certiorari:

> Petition for writ of certiorari to the [state high court] denied on the basis of adequate and independent state grounds. The decision of the [state high court] is not precedential to the extent that it is based upon grounds of federal law.

This "adequate and independent state grounds" disclaimer creates no new law. It merely makes clear the practical effects of the state of the law as it has stood since the nineteenth century: state

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295. *Jackson*, 672 P.2d at 261 (Sheehy, J., dissenting) (emphasis added).

296. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) (cautioning 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." (emphasis in original)).

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

298. *Id.* at 126.

high court decisions with respect to issues of federal law are reviewable by the Court,[299] while state high court decisions based upon adequate and independent state grounds are not.[300]

The disclaimer is in no way intended to signal disapproval of the state high court's opinion on the part of the United States Supreme Court. Like the United States Supreme Court's other denials of certiorari, which indicate only that the customary four justices did not vote to hear the case,[301] the disclaimer means absolutely nothing with respect to the merits of the state high court's decision. The United States Supreme Court has "often stated" that its "denial of a writ of certiorari imports no expression of opinion upon the merits of the case," and this principle applies equally to any accompanying opinions.[302] The same is true of a single sentence reminding practitioners of a jurisdictional principle that has been undisputed for nearly two centuries.[303]

For the adequate and independent state grounds disclaimer to be truly effective in practice, however, it must attract the notice—and earn the trust—of legal practitioners and courts. While it is common knowledge that "denial of certiorari is not the equivalent of an affirmance,"[304] the United States Supreme Court has acknowledged the reality that, "[a]lthough denial of certiorari is not to be taken as expression of opinion in any case, it would be idle to claim that it has no actual or reasonable influence upon the practical judgment of lawyers . . . ."[305] For this reason, the effects of the Court's denial of certiorari on the basis of adequate and independent state grounds, i.e., that the state high court's opinion lacks precedential value with respect to federal law, must be obvious to lawyers and courts in order to ensure that they conduct their respective briefing and opinion writing accordingly.

Because of the prevalence of large legal databases such as Westlaw, LexisNexis, and Bloomberg Law, they are the logical place to start. As is commonly done for unreported opinions, which

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299. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 342 (1816).

300. *See* Murdock v. City of Memphis, 87 U.S. 590, 636 (1874).

301. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 215 (9th ed. 2011).

302. Teague v. Lane, 489 U.S. 288, 296 (1989) (quoting United States v. Carver, 260 U.S. 482, 490 (1923) (Holmes, J.)) (internal quotation marks omitted).

303. *See Martin*, 14 U.S. at 342.

304. Kemp v. Day & Zimmerman, Inc., 33 N.W.2d 569, 589 (Iowa 1948).

305. Sunal v. Large, 332 U.S. 174, 192 (1947) (observing that lawyers can be expected to look to a denial of certiorari as an indication of whether litigants should petition the U.S. Supreme Court for certiorari in similar cases in the future).

also implicate a case's precedential value,[306] when a user opens the document containing the state high court decision that the United States Supreme Court has declined to review on the basis of adequate and independent state grounds, the top of the page should feature the following text:

> This decision is not precedential to the extent that it relies upon grounds of federal law. See [citation to order of United States Supreme Court denying certiorari].

Unlike the distinction between unpublished and published cases in terms of precedential value, which is usually a matter internal to a court or, at the very least, within a state's court system,[307] denials of certiorari based on adequate and independent state grounds span two sovereign court systems, often take a period of several years to develop, and raise important federalism issues that imperil the courts' jurisdictional bounds, comity, and efficiency.

For this reason, a denial of certiorari under these circumstances should be specifically flagged in the legal database's citator. Assigning the state high court case an orange flag would be particularly apt, as the state high court decision that the United States Supreme Court declined to review has research implications in common with cases to which the legal databases currently assign "yellow flags" and "red flags." A case in which certiorari is denied on the basis of adequate and independent state grounds is, to some degree, both: it is "yellow" in the sense that the user must proceed with caution, as a portion of the opinion *might* lack precedential

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306. *See, e.g.*, Chester v. Comm'r of Pa. Dep't of Corr., 598 F. App'x 94 (3d Cir. 2015) (unpublished). Lexis Advance places the following text underneath the case caption:

> **Notice:** NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT. PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Id.

While the Federal Rules of Appellate Procedure provide that the federal courts "may not prohibit or restrict" litigants from citing unpublished opinions, FED. R. APP. P. 32.1(a), in some states, whether a case is published determines whether it can be cited at all. *See, e.g.*, 210 PA. CODE § 65.37 (2012) ("An unpublished memorandum decision shall [generally] not be relied upon or cited by a Court or a party in any other action or proceeding . . . ."); *see also* Boring v. Erie Ins. Grp., 641 A.2d 1189, 1191 (1994) (reversing trial court on the grounds that the lone decision upon which it relied was "an unreported memorandum decision of this Court and as such has no precedential value" (citing Pa. Super. Ct. I.O.P. 444 B)). Designation of a case as published versus unpublished can also affect a court's decision to cite to it. *See, e.g.*, 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority.").

307. *See supra* note 306.

value, and "red" in that, to the extent the court *does* in fact analyze federal law, those portions *must* be treated as non-precedential.

It is important to note that the use of this disclaimer and its accompanying citator flag is appropriate only where the United States Supreme Court declines review of state high court decisions on the basis of *adequate and independent* state grounds. A mere fleeting reference to state grounds in the state high court's opinion will not do. In the case that ultimately led to *Michigan v. Long*, for example, the Michigan Supreme Court mentioned its state constitution only three times in its opinion, with two of those references in footnotes and the other in its holding "that the deputies' search of the [defendant's] vehicle was proscribed by the Fourth Amendment to the United States Constitution and art[.] 1, § 11 of the Michigan Constitution."[308] The only other reference to state law was a citation to a state case in the final footnote.[309] Under these circumstances, the United States Supreme Court's decision to presume that the Michigan Supreme Court's decision rested upon federal grounds was not unreasonable. As Dean Gormley explains, "Only certain pronouncements by the state courts under their own constitutions will be 'shielded' from federal review, thus allowing them to exist in separate pockets without the intrusion of the U.S. Supreme Court."[310] If the state high court fails to make a good-faith effort to demonstrate that its decision rests upon adequate and independent state grounds by conducting a thorough analysis of the state issue, it cannot expect to "shield" its decision from Supreme Court review by simply referencing its state constitution, statutes, and case law in passing.

Nor is the disclaimer meant as an affront to the competence of the state courts or as a diminishment of their position in the federal system. State high courts are the ultimate arbiters of *state* law, whereas the United States Supreme Court is the ultimate arbiter of *federal* law. In the event that a state high court's decisions wade into federal territory, it is no insult to that court for the United States Supreme Court to remind practitioners that the state court's opinion as to federal law lacks precedential value. Just as the presumption that ambiguously grounded decisions rest upon state grounds prevents the U.S. Supreme Court from encroaching upon the state high courts' jurisdiction with respect to state law, the state high courts must also respect their federal counterpart's jurisdiction with respect to federal law.

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308. People v. Long, 320 N.W.2d 866, 869 n.4, 870 & n.8 (Mich. 1982).
309. *Id.* at 870 n.8.
310. Gormley, *Primer*, *supra* note 49, at 699.

2. The State High Courts' Role: Adopt the "Modern Federalism" Approach

Under the modern federalism approach, the state courts are not required to simply stand aside while the United States Supreme Court unilaterally determines whether their decisions contain adequate and independent state grounds sufficient to render its review improper. To the contrary, the effective resolution of the issues *Long* attempted to address will not just require action on the part of the U.S. Supreme Court. The state high courts will also need to take a proactive role in reinforcing their own sovereignty once *Long* is jettisoned. *Long*'s rejection of the presumption that ambiguously grounded state high court decisions rest on adequate and independent state grounds was rooted in the fear that errors committed by the state courts in their interpretations of federal law would go uncorrected, thus frustrating the "important need for uniformity in federal law."[311] The state courts, however, are better positioned than the U.S. Supreme Court to solve this problem, because they have the ability to *prevent* their opinions that rest upon adequate and independent state grounds from *becoming* ambiguously grounded—and thus potentially vulnerable to U.S. Supreme Court review—in the first place.

The states can help to accomplish the *Long* Court's stated goal of uniformity in federal law by adopting the "modern federalism" analysis proposed in this article as their preferred analytical approach to cases requiring an examination of state and federal constitutional precedent. In addition to the abandonment of *Long*, modern federalism requires the state courts to take appropriate steps to protect their state constitutional decisions from federal review. In a perfect world, the primacy principle, in which a state high court reaches the federal issue *only* in the event that a rights claimant does not prevail under the state's statutory law and constitution (which are examined first and second, respectively), would be the ideal means by which to ensure that state high courts' decisions tread into federal-law territory only when necessary. In practice, however, the benefits of primacy have proven to be elusive.

The modern federalism approach addresses the primacy principle's shortcomings by enlisting the help of the litigants themselves. Modern federalism requires state high courts to do two things: (1) make a good-faith effort to conduct an independent state constitutional analysis *prior* to addressing federal constitutional issues, and

311. Michigan v. Long, 463 U.S. 1032, 1040 (1983).

(2) strongly encourage litigants to analyze state constitutional issues in their briefing in order to furnish the court with the "raw materials" necessary to perform its own analysis. In this way, the litigants are incentivized to assist the state high court's effort to analyze issues in the proper order where practical and, more importantly, to keep their state and federal analyses separate and the bases for their decisions clear. By pooling their efforts in this symbiotic manner, litigants and courts can realize the true benefits of modern federalism: a practical, efficient, and sustainable solution by which state courts can help the U.S. Supreme Court maintain the delicate balance of judicial power in the federal system while building, over time, their own independent bodies of state constitutional law.

a. The Theoretical Ideal: The Primacy Principle

Scholars have previously identified four major approaches to state constitutional interpretation by state courts: interstitial, dual sovereignty, lockstep, and primacy.[312] Under the interstitial approach, a court presumes federal law controls, and state constitutional issues are only reached if federal law is insufficient to resolve the case.[313] The dual sovereignty approach requires a court to analyze both state and federal grounds even where the federal grounds are sufficient to resolve the case.[314] Under the lockstep approach, the state's interpretation of its own constitution is directly linked to the United States Supreme Court's interpretation of the U.S. Constitution.[315] Under the primacy approach, "a state court looks first to state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive."[316]

Justice Linde of the Oregon Supreme Court, a leading advocate of the primacy approach to state constitutional interpretation,[317]

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312. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES ¶ 1.04 (1st ed.1993).

313. *See id.* ¶ 1.06[3].

314. *See id.* ¶ 1.04[4].

315. *See id.* ¶ 1.06[2].

316. West. v. Thomson Newspapers, 872 P.2d 999, 1005–06 (Utah 1994) (quoting Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, UTAH B.J., Nov. 1989, at 26).

317. Shirley S. Abrahamson & Michael E. Ahrens, *The Legacy of Hans Linde in the Statutory and Administrative Age*, 43 WILLAMETTE L. REV. 175, 175 (2007) ("Hans Linde has been the poster child for state courts to interpret their laws independently of the U.S. Supreme Court's interpretation of parallel provisions in the federal Constitution, while still adhering to the doctrine of federal supremacy.").

summarized its mechanics in his argument that "[t]he proper sequence is to analyze the state's law, including its constitutional law, *before* reaching a federal constitutional claim."[318] In conducting a primacy analysis, a state court first analyzes state *statutory* law; if the state action facing a constitutional challenge is unlawful, the analysis ends there, without reaching the constitutional claims.[319] If the second step is necessary, the court proceeds to an analysis of *state* constitutional claims. Justice Linde explained that this is "because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."[320] If the challenged action violates the state constitution, the analysis ends; there is no need to analyze the claim under the federal Constitution, because state constitutions must provide their citizens' liberties at least as much protection as the U.S. Constitution.[321] If the state constitution does not prohibit the challenged action, however, the third step—an analysis of the claim under the *federal* Constitution—becomes necessary because "if the state constitution affords lesser protection than the U.S. Constitution, the Supremacy Clause of the U.S. Constitution prevents enforcement of the lesser state level of constitutional protection and requires application of the federal standard."[322]

In cases involving a mix of federal and state constitutional grounds, the primacy principle theoretically provides the most foolproof approach by which to further minimize the risks of confusion on the part of the United States Supreme Court and, more importantly, erroneous interpretations of federal law by the state high courts. This approach also helps to ensure that the state courts of

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318. Sterling v. Cupp, 625 P.2d 123, 126 (1981) (en banc) (emphasis added).

319. John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1038 (1993) (citing State v. Bridewell, 759 P.2d 1054, 1059 (Or. 1988)).

320. *Sterling*, 625 P.2d at 126.

321. Stewart G. 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). Justice Pollock, formerly of the New Jersey Supreme Court, explained that the United States Constitution's Bill of Rights "establish[es] a foundation for the protection of human liberty. A state may not undermine that foundation, but its constitution may build additional protections above the federal floor." *Id.*

322. Shaw, *supra* note 319, at 1026. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

last resort remain the ultimate arbiters of state constitutional issues, thus keeping the sovereign state high courts operating within the bounds of their respective areas of expertise.[323] Justice Marshall emphasized the importance of leaving state issues to the state high courts several years before *Long*, writing in his dissent in the 1975 case of *Oregon v. Hass*:[324]

> [I]t seems much the *better policy to permit the state court the freedom to strike its own balance between individual rights and police practices*, at least where the state court's ruling violates no constitutional prohibitions. It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum.[325]

Because the primacy principle's order of analysis requires that "a state supreme court address[] state constitutional issues *before* moving to issues under the Federal Constitution,"[326] it is the ideal approach by which to effectuate Justice Marshall's "better policy."

Unfortunately for the primacy principle and its esteemed advocates, however, the "ideal" nature of the primacy principle has also been its downfall. Despite its great promise, the primacy approach has proven too unwieldy, cumbersome, and time-consuming in practice to use on a consistent basis. Not surprisingly, the major hurdle preventing the widespread and consistent application of the primacy principle among state high courts has been compliance. The Utah Supreme Court provides an interesting case study. In the 1994 case of *West v. Thomson Newspapers*,[327] in which then-Justice Durham, a primacy advocate, wrote for the majority, the Court acknowledged that it had been criticized for apparently lacking a consistent approach in its constitutional decisions.[328] In response, the Court instituted the primacy principle in *West* but seemed to

323. Justice Stevens lamented what he believed to be his Court's transgression of this boundary in *California v. Ramos*, decided the same day as *Long*, when he queried in dissent, "Why, I ask with all due respect, did not the Justices who voted to grant certiorari in this case allow the wisdom of state judges to prevail in California . . . ?" 463 U.S. 992, 1031 (1983) (Stevens, J., dissenting).

324. 420 U.S. 714 (1975).

325. *Id.* at 728 (Marshall, J., dissenting) (emphasis added).

326. State v. Baldon, 829 N.W.2d 785, 821 (Iowa 2013) (emphasis added).

327. 872 P.2d 999 (Utah 1994).

328. *Id.* at 1004–05.

leave the door open to limiting its reach to the context of that particular case.[329] The Utah Supreme Court followed the primacy approach intermittently for over a decade,[330] but has departed from it in recent years.[331] Former Chief Justice Durham, however, has continued to lobby for its consistent use.[332]

Even the Oregon Supreme Court, which took the lead in adopting the primacy approach in Justice Linde's majority opinion in the 1981 case of *Sterling v. Cupp*,[333] has had difficulty adhering to the principle.[334] A study conducted by scholar John Shaw in the early 1990s showed that Oregon's Supreme Court applied its pure primacy approach far less faithfully than it purported to.[335] In fact, Shaw's analysis revealed that "[t]he frequency of primacy practice varies in all dimensions; no pattern in the application of the primary approach appears according to constitutional issue or Oregon justice."[336] Shaw concluded that state constitutionalism in itself was not the cause of non-compliance with the primacy principle; rather, "constitutional practice, electoral pressures and judicial disinterest in certain issues" were to blame.[337]

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329. *Id.* at 1006 ("In the present context, we are persuaded that the primacy model is the best method *to address the interests at stake*.") (emphasis added).

330. *See, e.g.*, State v. Tiedemann, 162 P.3d 1106, 1113 (Utah 2007) ("[I]t is part of the inherent logic of federalism that state law be interpreted independently and *prior to* consideration of federal questions." (emphasis in original)); Jeffs v. Stubbs, 970 P.2d 1234, 1248 (Utah 1998) ("[W]hen a party asserts claims under both the Utah and federal Constitutions, this court ordinarily first determines the issue under the Utah Constitution and only resorts to the federal Constitution if the state constitution is not dispositive.").

331. *See* State v. Ott, 247 P.3d 344, 357 (Utah 2010); State v. Briggs, 199 P.3d 935 (Utah 2008).

332. *See, e.g.*, *Ott*, 247 P.3d at 357 (Durham, C.J., concurring) ("Structurally, I believe this court should determine first whether state law has been complied with before addressing claims that the federal Constitution has been violated."); *Briggs*, 199 P.3d at 948–49 (Durham, C.J., concurring) ("I concur in the result of the majority opinion, and have no quarrel with its analysis of the federal due process question. I believe, however, that in addressing the federal constitutional challenge before the state constitutional challenge, the opinion overlooks the proper order of analysis."). Chief Justice Durham also took to the scholarly literature to advocate for more widespread acceptance of the primacy principle. *See, e.g.*, Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, UTAH B.J., Nov. 1989, at 25–26; *see generally* Sinéad McLoughlin, *Choosing a "Primacy" Approach: Chief Justice Christine M. Durham Advocating States Rights in Our Federalist System*, 65 ALB. L. REV. 1161 (2002).

333. 625 P.2d 123 (Or. 1981) (en banc).

334. Shaw, *supra* note 319, at 1048–49 ("This study demonstrates that even one of the leading New Federalist jurisdictions can fail to live up to the expectations created by New Federalism.").

335. *Id.* at 1043–48.

336. *Id.* at 1043.

337. *Id.* at 1021. Utah and Oregon are not alone. In fact, Dean Gormley has come to a rather disheartening conclusion: "The blunt truth is that virtually no state court has been able to adhere to a single state constitutional methodology, once announced." Ken Gormley, *The Pennsylvania Constitution after* Edmunds, 3 WIDENER J. PUB. L. 55, 73 (1993) [hereinafter Gormley, *The Pennsylvania Constitution*].

Shaw's "electoral pressures" argument is a sensible one, as state judges, unlike their federal counterparts, are generally elected and do not enjoy the security of lifetime appointments. Rather, as Dean Gormley points out, because state judges must "play musical chairs on a regular basis," their courts' "state constitutional approaches and philosophies are bound to be juggled" as well, "leading to a built-in inability to maintain consistency."[338] "Constitutional practice" and "judicial disinterest" are also logical causes of state high courts' noncompliance with the primacy principle,[339] and the latter logically flows from the former. Litigants often fail to adequately brief state constitutional issues. For example, Justice Linde chastised the petitioner in a 1980 Oregon Supreme Court case for failing to identify the specific constitutional provision he was invoking, as well as the vagueness of his assertion that the statute in question was "constitutionally impermissible" under the unnamed provision.[340] Similarly, in a 2010 case before the Vermont Supreme Court on remand from the U.S. Supreme Court, the Vermont Supreme Court initially requested briefing on the state constitutional issues involved; however, it ultimately deemed those issues waived due to the inadequacy of the briefs it received, coupled with the fact that the parties had not raised those issues in prior proceedings.[341]

b. "Modern Federalism": A Workable Solution

Given the inadequate information with which state high court judges are furnished in instances such as these, it is no wonder that they have displayed "disinterest" in state constitutional issues.[342] State high courts, with their crowded dockets and busy argument schedules, can hardly be expected to greet the prospect of conducting a state constitutional analysis with enthusiasm when litigants fail to frame the issues properly or provide the case law and historical background information necessary to guide the courts' research. This is especially true given that "a complete body of state constitutional jurisprudence [is not] created overnight, by one generation of Justices and law clerks, when that niche of case law and history has languished for two centuries."[343]

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338. Gormley, *The Pennsylvania Constitution*, *supra* note 337, at 73.
339. Shaw, *supra* note 319, at 1021.
340. Megdal v. Or. State Bd. of Dental Exam'rs, 605 P.2d 273, 274–75 (Or. 1980).
341. State v. Brillon, 995 A.2d 557, 561, 569–70 (Vt. 2010).
342. *See* Shaw, *supra* note 319, at 1021.
343. Gormley, *The Pennsylvania Constitution*, *supra* note 337, at 75.

Unlike the primacy principle in its pure form, the modern federalism approach accounts for this reality. Due to the dearth of existing state constitutional case law and the demands of their dockets, state high courts cannot realistically be expected to conduct a thorough analysis of every state constitutional issue a case may present—especially when the litigants themselves fail to raise them. Nor are all state constitutional issues that could be raised equally deserving of the state high courts' time and resources. For example, Dean Gormley has termed the Pennsylvania Supreme Court's approach to state constitutional cases "selective primacy" because that court only conducts a thorough state constitutional analysis "when an issue grabs its attention and sets off a bell that says 'this issue should be permanently boxed in under the state constitution.'"[344]

Modern federalism incorporates the same sense of pragmatism. Assuming the United States Supreme Court abandons *Long* in favor of a return to the presumption that ambiguously grounded state high court decisions are based upon adequate and independent state grounds, the primacy approach offers a valuable advantage: mitigating that presumption's tendency to allow state high courts' erroneous interpretations of federal law to persist. That benefit can be realized, however, without conducting a thorough analysis of *every* single state constitutional issue a case presents. Under the modern federalism approach, two important facets of the primacy principle should be retained: (1) the order in which the state and federal analyses are conducted, and (2) the fact that the two analyses are kept separate in the court's opinion. Where state constitutional materials are not available, the court's time and resources are limited, and/or the state happens to follow a lockstep approach toward a particular provision of its own constitution, the burdens of conducting a detailed analysis under the state's constitution might outweigh the benefits.

Under the modern federalism approach, the court *should*, however, make a reasonable attempt to conduct a reasonably thorough state constitutional analysis in good faith whenever practicable. That is, it should not merely insert references to its state constitution and case law into an otherwise predominantly federal analysis as an afterthought—or in a deliberate attempt to insulate its decision from U.S. Supreme

344. *Id.*; *see also* Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decision*, 47 DUQ. L. REV. 503, 523 (2009) (describing Pennsylvania Supreme Court's approach).

Court review. It should instead conduct an independent state-law analysis *before* moving on to any federal constitutional analysis, and it should attempt as far as possible to refrain from conducting *any* federal analysis at all where the rights claimant prevails under the state constitution. Where a federal analysis *is* necessary, it is critical that, at the very least, the state and federal analyses occupy distinct and separate sections in the court's opinion. At the same time, modern federalism calls for state high courts to promote the success of their efforts by strongly encouraging litigants to abide by these principles in their own briefing, so that the issues are framed properly, the court is supplied with the materials it needs to jump-start and direct its research, and the presentation of the arguments and supporting law mirrors—and, to some extent, guides—the proper organizational structure of the finished opinion.

i. Order of Analysis: State Issues First, Where Practicable

The recommended order of analysis under the modern federalism approach—as inspired by the primacy principle, state issues first, then, if necessary, federal issues—dramatically reduces the chances of the state high courts muddying the waters with respect to *federal* constitutional interpretation. This, in turn, reduces the temptation for the U.S. Supreme Court to stretch the boundaries of its jurisdiction in order to correct questionable interpretations of the United States Constitution on the part of the state courts. Justice Scalia, writing separately in defense of the Court's grant of certiorari in a Kansas case involving issues of both state and federal law, explained that the Court is motivated in such cases by its "solemn responsibility . . . to ensure that when courts speak in the name of the Federal Constitution, they disregard none of its guarantees . . . ."[345] If the state high courts are able to dispose of constitutional cases on state grounds before they even need to *consider* federal constitutional issues, the United States Supreme Court would be relieved of much of the pressure to act as the guarantor of the accuracy of the state courts' constitutional interpretations.[346] In this

345. Kansas v. Marsh, 548 U.S. 163, 185 (2006) (Scalia, J., concurring) (responding to Justice Stevens' dissent criticizing majority for granting certiorari and reviewing state high court case that was, in Justice Stevens' opinion, supported by adequate and independent state grounds).

346. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM 70 (1989) [hereinafter ADVISORY COMM'N].

way, the primacy principle's "desirable feature of avoiding unnecessary federal constitutional adjudications,"[347] as incorporated into the more flexible and realistic modern federalism approach, helps to preserve the boundaries of the U.S. Supreme Court's jurisdiction.

The modern federalism approach also accomplishes this by keeping the state and federal analyses separate, which ensures that the basis for the state high court's decision is clear in the event that the losing litigant petitions the U.S. Supreme Court for certiorari. Modern federalism's strong recommendation that courts choosing to conduct state constitutional analyses do so first gives the state issues a clear place in the court's opinion—literally as well as figuratively, as the state analysis should be placed in a separate section. If the state analysis does not grant the claimant the rights he or she seeks, the federal constitutional analysis is *then* conducted—again, in a separate section. Keeping the state and federal analyses separated in this manner helps to keep the bases of the state high court's decision clear—and any adequate and independent state grounds thus clearly in view—in the event that a litigant seeks U.S. Supreme Court review.

The order in which state and federal constitutional issues are decided under the modern federalism approach also promotes the conservation of valuable judicial resources by ensuring that they are expended as prudently and efficiently as possible. Like the primacy approach, modern federalism promotes finality by ensuring that, to the extent possible, cases are decided on non-federal grounds—and, therefore, without the possibility of review by the United States Supreme Court—the first time the state high court hears them.[348] Ensuring that the state courts try their best to focus upon the adjudication of state issues prevents them from wasting their resources adjudicating federal constitutional issues that are not necessary to resolve the case, reduces the size of the U.S. Supreme Court's bloated docket,[349] and forecloses the possibility of the state courts having to decide the same cases a second time.[350] Litigants as well

347. State v. Baldon, 829 N.W.2d 785, 821 (Iowa 2013).

348. Shaw, *supra* note 319, at 1027 (discussing the economy benefits of the primacy approach).

349. ADVISORY COMM'N, *supra* note 346, at 70.

350. *See supra* text accompanying notes 275–276 (calculating a rough estimate of two years spent by U.S. Supreme Court and state high courts on remand rendering decisions that would have been unnecessary if the state high court's judgment had been permitted to stand on independent state grounds).

as courts are likewise spared the need to expend valuable time and resources obtaining a final judgment.[351]

ii. Encourage State Constitutional Analysis in Litigants' Briefing

State courts wishing to implement the modern federalism approach can solve these problems by directing litigants to analyze state constitutional issues in their briefing. Because modern federalism favors an initial analysis of the state constitutional issues when feasible, it rests upon the foundational assumption that the parties will have also analyzed the state constitutional issues. After all, the court will require information upon which to base its own analysis; the more of its limited time and resources the court will be required to devote to this task in the absence of proper briefing, the less likely the analysis is to be conducted. The Utah Supreme Court lamented this problem in *Brigham City v. Stuart* (*Brigham City I*), which was eventually reversed and remanded when the United States Supreme Court asserted jurisdiction in absence of obvious state grounds for decision.[352] The Utah Supreme Court explained:

> Because we are resolute in our refusal to take up constitutional issues which have not been properly preserved, framed and briefed, we are once again foreclosed from undertaking a principled exploration of the interplay between federal and state protections of individual rights without the collaboration of the parties to an appeal. This collaborative effort should be renewed.[353]

Instead of expecting courts to assume these burdens on their own—a proposition that is unlikely to be effective—the courts should instead impose an *external* obligation to research and argue state constitutional issues onto the litigants, whose briefs would then guide the courts' analysis of the issues as well as the overall structure of the opinion. This, in turn, would promote the courts' ability to maintain the consistency in their approach to research,

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351. Shaw, *supra* note 319, at 1027; *see also, e.g.*, Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1278–79 (N.Y. 1991) ("In view of the costly, sizable record already amassed, including hundreds of pages of briefs, no purpose is served by compelling *these* parties, on *this* record and *these* briefs, to consider another trip to Washington . . . .").

352. *See* Brigham City, Utah v. Stuart, 547 U.S. 398, 408–09 (2006) (Stevens, J., concurring).

353. Brigham City v. Stuart, 122 P.3d 506, 510–11 (Utah 2005), *rev'd and remanded sub nom*. Brigham City, Utah v. Stuart, 547 U.S. 398 (2006).

legal analysis, and opinion writing that the successful and continued adoption of modern federalism requires.

The recommended framework under modern federalism is a simple one. A litigant's state constitutional analysis: (1) should be conducted *first*, before its federal-law analysis; (2) should be set off in a separate section in the brief; and (3) should provide the information the court deems necessary to conduct its own thorough state constitutional analysis. As to the third factor, the court should specify in a precedential opinion the substantive information it requires in order to formulate such an analysis. For example, it might request (a) the text of the provision at issue, (b) citations to its own case law interpreting the provision, (c) persuasive authority from other states interpreting similar provisions, and (d) any historical background information and policy considerations that it should consider in order to ensure that its analysis blends seamlessly into its existing body of jurisprudence and is consistent with the values and policy of the state.[354]

State high courts have taken similar steps to guide litigants' briefing before. The Pennsylvania Supreme Court, for example, acknowledged the importance of the litigants' briefing as the starting point of the courts' constitutional analysis in *Commonwealth v. Edmunds*,[355] where the court, reiterating that "it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution," set forth a protocol for briefing and arguing state constitutional issues.[356] The court declared that "the following four factors are to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania constitution": the constitutional text, the provision's history, other states' case law on the topic, and policy considerations that take state and local implications into account.[357] Judge Thomas Hardiman of the United States Court of Appeals for the Third Circuit has observed that "it is already clear that *Edmunds* profoundly affected Pennsylvania jurisprudence by establishing a framework for lawyers and courts to demonstrate that they have engaged in a state constitutional analysis."[358]

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354. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 894–95 (Pa. 1991) (setting forth similar factors).

355. 586 A.2d 887 (Pa. 1991).

356. *Id.* at 894–95.

357. *Id.* The Pennsylvania Supreme Court enumerated the *Edmunds* factors as a direct response to *Michigan v. Long*'s plain statement rule. *Id.* at 895; *see also* Commonwealth v. Russo, 934 A.2d 1199, 1208 n.11 (Pa. 2007) (recognizing *Long* as the *Edmunds* Court's motivation).

358. Hardiman, *supra* note 344, at 523.

Other state high courts should follow the Pennsylvania Supreme Court's example and institute a protocol like the one recommended above in order to direct litigants to set forth their analyses of state statutory and constitutional claims *before*—and *separate from*—their analyses of federal constitutional claims in their briefs, as well as to provide the information the court needs to conduct its own analysis. Requesting that the litigants brief their claims in accordance with the modern federalism approach is likely to increase the state high courts' eventual compliance with it, as there is a greater incentive for litigants to follow such a procedure than the courts themselves. The *Edmunds* protocol, for example, plays an important role as an external motivating force in that it "*strongly encourages* that the litigants provide the Court with the appropriate information to reach a reasoned decision on an independent claim under the Pennsylvania Constitution."[359]

By conducting an organized, thorough, and, therefore, more persuasive analysis of their state constitutional arguments, as well as demonstrating good faith toward the court by complying with the stated framework and providing the materials the court needs to begin its research, litigants put themselves in a better position to win the case. Following the court's direction gives the court a favorable impression of the litigant and, conversely and more importantly, *avoids* giving the court an *un*favorable impression. It also serves as a mechanism by which litigants can highlight state-law arguments that favor their claims, particularly in situations where the corresponding federal precedent is unfavorable. There will, of course, be litigants who will forgo this opportunity to conduct a proper state constitutional analysis in accordance with the court's stated framework, perhaps due to their discomfort with state constitutional law or in the hope of saving time and resources. Because the use of the framework is "strongly encouraged," the subtext under these circumstances is clear: litigants who deviate from the court's preferred format may not be maximizing their chances of winning.[360] This is, perhaps, an even more powerful incentive for litigants to follow the recommended procedure.

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359. *Russo*, 934 A.2d at 1218 (Baldwin, J., dissenting) (emphasis added).

360. The Pennsylvania Supreme Court did not feel compelled to impose waiver as a consequence of failure to brief in accordance with *Edmunds*; however, it did "reaffirm [*Edmunds*'] importance and encourage its use." Commonwealth v. White, 669 A.2d 896, 899 (Pa. 1995). Interestingly, then-Chief Judge Durham, a proponent of new federalism, implied that a fear of a hard-line waiver rule that would unfairly penalize litigants led her to reject the notion that a briefing procedure like the *Edmunds* framework should be adopted in Utah. *See* State v. Tiedemann, 162 P.3d 1106, 1115 n.6 (Utah 2007).

This is not to say, however, that litigants should be *coerced* into adhering to the court's preferred format. Constitutional arguments should not be deemed waived merely because they do not follow the prescribed order or discuss all of the topics enumerated in *Edmunds*. Like Pennsylvania's reasonable, moderate approach to the *Edmunds* framework, which serves as a "rule for litigants to follow and a guidepost for courts in interpreting state constitutional provisions,"[361] the framework proposed under modern federalism need not be feared as overly draconian toward litigants or too demanding on the limited resources of courts. As the Pennsylvania Supreme Court has made clear in its subsequent treatment of *Edmunds*, waiver of state constitutional issues where litigants fail to brief them properly is an overly harsh—and therefore inappropriate—penalty.[362] Nor are the courts automatically burdened in the event that litigants fail to adhere to the framework. Because *Edmunds* was directed "to *litigants*, not to courts," a court can decline to perform its analysis in accordance with the framework when it lacks the "raw materials" to do so due to inadequate briefing.[363]

Even on occasions where litigants fail to follow this structure, state high courts should make the effort to follow the modern federalism approach of their own accord. Although the task of rigorously adhering to a prescribed analytical framework can be a difficult one, as the Pennsylvania Supreme Court has acknowledged,[364] that court has demonstrated that it is *possible*.[365] Not only is such an approach possible, it is *desirable*, given the additional benefits the state high courts stand to reap by adopting modern federalism

361. Hardiman, *supra* note 344, at 519.

362. *See White*, 669 A.2d at 899 (defendant did not waive a constitutional claim that was raised but not briefed in accordance with *Edmunds*).

363. Hardiman, *supra* note 344, at 518–19 (emphasis in original).

364. The Pennsylvania Supreme Court has admitted to some inconsistency in conforming its own analyses of Pennsylvania Constitutional issues to the structure set forth in *Edmunds*. *See Russo*, 934 A.2d at 1208 n.11. In *Russo*, dissenting Justice Baldwin argued that the majority was criticizing itself too harshly. *See id.* at 1218 (Baldwin, J., dissenting) ("If, by 'ignored the *Edmunds* paradigm,' the Majority means to say that there was no explicit analysis of each of the *Edmunds* factors, that is correct; however, if the Majority means that the Court failed to conduct an appropriate analysis of the history and state-specific reasons for a decision departing from federal standards, as they believe is required by *Edmunds*, that assumption is incorrect.").

365. *See id.* at 1208 n.11 (majority opinion) (noting, despite the Court's occasional inconsistency in its application of the *Edmunds* framework, "there also are numerous, careful state constitutional decisions where this Court has engaged in the responsible, searching inquiry *Edmunds* outlined."); *see also, e.g.*, Commonwealth v. Cleckley, 738 A.2d 427, 430 (Pa. 1999) (applying *Edmunds* in assessing the validity under the Pennsylvania Constitution of the criminal defendant's consent to a search); Commonwealth v. Williams, 692 A.2d 1031, 1038 (Pa. 1997) (applying *Edmunds* to determine the constitutional validity of the search of a parolee).

as their approach to constitutional analysis. The modern federalism approach empowers state courts to safeguard their authority to decide state-law issues[366] and to build the body of state constitutional precedent that forms the adequate and independent state grounds for decision that ultimately shield the state courts' decisions from being reviewed—and possibly overturned—by the United States Supreme Court.[367]

The U.S. Supreme Court also stands to benefit from the states' adoption of modern federalism, which mitigates the problems that arose in the past when the Court adopted a "hands-off" approach, presuming a lack of jurisdiction and declining to review state high court cases. Because the modern federalism approach discourages state high courts from conducting any federal analysis at all if the state analysis is sufficient to decide the case, the state courts can be expected to wade into federal territory less frequently. Opinions constructed in accordance with modern federalism keep the state and federal constitutional analyses separate from one another, clarifying the respective bodies of law and minimizing confusion on the part of the U.S. Supreme Court as to the grounds upon which the decision rests in the event that review is sought. The modern federalism approach also minimizes any temptation on the Court's part to exceed its jurisdiction—and helps it to avoid being criticized for its exercise thereof.[368]

In these ways, the modern federalism approach helps to preserve comity and promote the overall health of the federal system. It helps the state and federal judges to save face, as the number of opportunities for the U.S. Supreme Court to critique the state courts' application of federal law or admonish them for failing to

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366. *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984) ("My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.").

367. *See* State v. Briggs, 199 P.3d 935, 948–49 (Utah 2008) (Durham, C.J., concurring). Then-Chief Justice Durham implored her colleagues on the Utah Supreme Court to conduct their own state law analysis when necessary to adhere to the primacy approach (from which modern federalism's order of analysis derives its inspiration):

> The failure to undertake independent state analysis in cases where state law is argued contributes to a paucity of precedent and the absence of an independent and adequate state ground for our holding. This result is occasionally thrust upon us by parties who fail to raise state constitutional questions, but I think it is unfortunate when we embrace it ourselves.

Id. at 949 (internal citations omitted).

368. It is still appropriate for the U.S. Supreme Court to take jurisdiction where the state high court's purported "state constitutional analysis" consists of a mere fleeting reference, or where the state court's opinion is tied directly to the Court's interpretation of the federal constitution (for example, if the state employs the lockstep approach).

make the grounds for their decisions sufficiently clear is greatly reduced. Relatedly and even more importantly, the modern federalism approach maintains the proper balance between federal and state authority that forms the very foundation of the American system of government. The Iowa Supreme Court has pointed out that increased emphasis on independent state constitutional law, which modern federalism encourages, promotes "a constitutional dialogue between state and federal courts" as they conduct parallel constitutional analyses.[369] This, the Court reassures us, is "highly desirable and should cause celebration, not handwringing," as this type of dialogue "demonstrate[s] that the system of dual sovereignty is now functioning more closely to the federalist ideal."[370] In this way, modern federalism helps to ensure that the structure the Founding Fathers envisioned continues to flourish. In the words of James Madison:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[371]

The modern federalism approach—coupled with judicial restraint toward state high court opinions on the part of the United States Supreme Court—optimizes the sovereign courts' ability to do just that.

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369. State v. Baldon, 829 N.W.2d 785, 818 (Iowa 2013) (citing JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 100 (2005)). The Iowa Supreme Court also endorsed the benefits of the increased attention to state constitutional interpretation that Professor Gardner identified:

> [S]tate court rejection of United States Supreme Court decisions under state constitutions can ultimately influence opinion on the correctness of the Supreme Court decision, contribute to a state-level nationwide consensus, sometimes considered by the United States Supreme Court, provide a check on national power by prohibiting state and local governments from exercising power granted to them under the United States Constitution, and curb harm to civil liberties brought about by narrow United States Supreme Court rulings.

Id. (citing James A. Gardner, *State Constitutional Rights as Resistance to National Power,* 91 GEO. L.J. 1003, 1032–54 (2003)).

370. *Id.* at 820.

371. THE FEDERALIST NO. 51 (James Madison).

IV. CONCLUSION

The *Michigan v. Long* presumption has proven problematic throughout its thirty-plus-year existence. Even if one is to assume *arguendo* that *Long* has effectuated its stated purpose of promoting the uniformity of federal law, more than thirty years of subsequent jurisprudence have made clear that the Court's pursuit of uniformity has come at a cost. *Long*'s presumption of federal grounds for decision in state high court cases involving a mix of state and federal grounds has placed the adequate and independent state grounds doctrine in jeopardy by thwarting its most valuable benefits: comity, jurisdiction, and judicial economy. This state of affairs disrespects the state courts' sovereignty, wastes the time and resources of the courts and litigants, and turns the U.S. Supreme Court's opinions into mere academic exercises. These failings lead to one inexorable conclusion: it is time for the Court to abandon *Long*.

Instead, the United States Supreme Court should return to its earliest approach to ambiguously grounded cases and presume that the decision rests on *state* grounds. This presumption is more efficient because declining review prevents both the U.S. Supreme Court and the state court from having to re-decide the case. It offers the additional benefit of promoting comity between the state high courts and the U.S. Supreme Court—also promoting, in turn, the healthy functioning of the federal system and safeguarding the authority of the pronouncements of the United States Supreme Court. This approach is consistent with the Court's historical approach to its own jurisdiction and reinforces its role vis-à-vis its sovereign state counterparts by respecting the bounds set by the U.S. Constitution.

The abandonment of *Long* need not mark a return to laissez-faire treatment of state high court cases, which increases the risk of eroding the uniformity of federal law if state high courts' errant federal analyses remain unreviewed and uncorrected. In order to mitigate this possibility in the post-*Long* era, the U.S. Supreme Court should insert a disclaimer into its denials of certiorari stating that the state high court's decision rested on adequate and independent state grounds and thus carries no precedential value with respect to any federal constitutional analysis contained therein. Far from serving as a rebuke to the state courts, the disclaimer simply reminds litigants or courts relying on the case of a traditional federalism con-

cept: the state high courts are the ultimate arbiters of their respective *state* laws, while the U.S. Supreme Court has ultimate authority over the interpretation of *federal* law.

The state high courts can buttress the U.S. Supreme Court's effort by incorporating the modern federalism approach into their state constitutional jurisprudence. Modern federalism encourages state high courts to make a reasonable, good-faith effort to conduct a thorough, independent state constitutional analysis before moving on to any federal analysis; performing a federal analysis only where the rights claimant is not entitled to additional protection under state law; and locating the state and federal bases for their decisions in separate sections in their opinions. By making diligent efforts to separate their state and federal grounds for decision, the state high courts can prevent cases from being deemed "ambiguously grounded" in the first place and thus and reduce the likelihood of the U.S. Supreme Court stretching its own jurisdiction into impermissible territory. Resolving the state constitutional issues first also contributes to the development of a solid body of state constitutional precedent while discouraging state courts from engaging in unnecessary forays into federal law—in turn removing any temptation for the U.S. Supreme Court to involve itself and allowing state law to continue to evolve independent of Supreme Court review.

In order to fully realize these benefits, the state high courts should devise a framework based on the modern federalism approach and strongly encourage litigants to follow it in their briefing. This incentivizes litigants to adequately raise, argue, and support the relevant constitutional issues and provides courts with the structure and "raw materials" necessary to guide and streamline their opinion-writing processes. For a state high court to formally adopt such a modern federalism framework and encourage litigants to follow it ensures that the approach continues in perpetuity as the state's citizens elect new judges to the bench.

Taken together, the abandonment of *Long* and its replacement with the presumption of adequate and independent state grounds and an accompanying disclaimer, complemented by the states' adoption of the modern federalism approach, respect both the sovereignty of the states and the supremacy of federal law. These proposed solutions to the *Long* problem are, therefore, well-suited to effectuate Justice Stevens' deeply held and often-repeated belief "that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make

its most effective contribution to our federal system of government."[372]

372. Michigan v. Long, 463 U.S. 1032, 1067 (1983) (Stevens, J., dissenting); *see also* Brigham City, Utah v. Stuart, 547 U.S. 398, 409 (2006) (Stevens, J., concurring) (quoting the Justice's own dissent in *Long*).