SPEECH

The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine

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> There is a story about the American philosopher Sidney Morganbesser, who is known among philosophers as quite a wit. Once, at a conference on the philosophy of language, the main speaker, reporting on a career of exhaustive research, declared that, while there are many languages in the world which sometimes employ a *double negative* to express a *positive*, there is no known grammatical construction in any language in which a *double positive* is used to express a *negative*.
>
> At this point, Morganbesser called dismissively from the back of the room "Yeah, yeah." — Anonymous

The "adequate and independent state grounds" doctrine is a double-negative that instead often winds up in the affirmative. As Professor Terrance Sandalow has written, "The rule is usually stated negatively: 'Where the decision of the state court is deemed to rest upon a non-federal ground which *independently and adequately* supports the state court judgment, the Supreme Court will *not* exercise jurisdiction to review notwithstanding the raising of federal questions upon the state court record or the decision of these questions by the state court.' "[1]

In short, if a state court decision rests on grounds that are not federal, and do not rely upon federal law to resolve the issue, then the

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1. Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 189 n.9 (quoting R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 163 (R. Wolfson & P. Kurland 2d ed. 1951)) (emphasis added).

United States Supreme Court will not review the ruling. At least, in theory.[2]

In practice, the double-negative of the "adequate and independent state grounds" test does not stop the Justices from saying "yes" to a case if they so desire.[3] This is not because the doctrine is wrong—in fact, it serves valid constitutional and prudential (that is, economic) ends. It is rather that, just as Justice Harlan said "one man's vulgarity is another man's lyric,"[4] so too one Justice's adequate state ground is another Justice's flimsy pretext—and one's independent state ground is another's muddling of federal precedent.

I. The Not-So-Independent State Ground

Prior to *Michigan v. Long*,[5] the presumption was that an asserted state ground was independent and that the United States Supreme Court would not review the state court's determination. *Michigan v. Long* reversed that presumption, declaring that the Supreme Court would review state court decisions which alluded to federal bases for decision, unless the state court made a "plain statement" that the determination of state law did not actually rest on federal law.[6]

A. State Court Responses to *Long*

The *Michigan v. Long* standard for assessing the "independence" of the state ground is unnecessarily constricted. To see why, let us consider the possible state court responses to such a federal doctrine.

2. The roots of the doctrine lie in Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1874); and Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871).

3. *See* Delaware v. Van Arsdall, 475 U.S. 673 (1986); Ohio v. Johnson, 467 U.S. 493 (1984); Florida v. Myers, 466 U.S. 380 (1984); Maine v. Thornton, 466 U.S. 170 (1984); California v. Ramos, 463 U.S. 992 (1983); Michigan v. Long, 463 U.S. 1032 (1983).

4. Cohen v. California, 403 U.S. 15, 25 (1971).

5. 463 U.S. 1032 (1983). In *Long*, the substantive issue before the Court was whether a search of an automobile interior was consistent with the Fourth Amendment under the "protective search" rationale of Terry v. Ohio, 392 U.S. 1 (1968). *See Long*, 463 U.S. at 1034-35, 1045-65. The Michigan Supreme Court had reversed Long's conviction for possession of marijuana found in a search of his automobile as violative of the *Terry* rationale, concluding "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." 413 Mich. 461, 472-73, 320 N.W.2d 866, 870 (1982) (*quoted in Long*, 463 U.S. at 1037 n.3).

6. *Long*, 463 U.S. at 1041.

1. Eschewal of Federal Grounds

The first way that state courts could respond to the challenge of *Michigan v. Long* would be to avoid the problem entirely by refusing to reach federal questions at all.[7] As one of our leading authorities on federal courts has noted, "[T]here can be no review [in the Supreme Court] if the state court has decided the case exclusively on some ground of state law, and has never reached a federal question present in the case."[8]

Now, of course, this is not possible in the extreme—it is fairly well settled that state courts may not refuse to hear federal questions.[9] State courts also may not erect unreasonable procedural barriers to the airing of federal claims.[10] Resolution of a case may thus turn upon determination of a federal question, and a state court cannot very well avoid reaching the federal issue in such an instance.

But state courts may eschew determinations of federal law when such determinations are not necessary to resolution of the case. This is something of a Hohfeldian correlative[11] of the "adequate and independent state grounds" doctrine: While the United States Supreme Court will not inject the federal courts into a state case when it can be adequately resolved on purely state law grounds, so can state courts refrain from injecting federal questions into cases when they can similarly be resolved purely on state law grounds. In short, state courts can resort to resolving cases on state law grounds—including state constitutional grounds—whenever possible and, if the state ground is more encompassing than the federal, avoid any need even to discuss the federal issue.[12]

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7. *See infra* note 12.

8. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 544 (3d ed. 1976) (citing Johnson v. New Jersey, 384 U.S. 719 (1966); McCoy v. Shaw, 277 U.S. 302 (1928)).

9. *See, e.g.*, Howlett v. Rose, 110 S. Ct. 2430 (1990); Testa v. Katt, 330 U.S. 386, 392-94 (1947); *see also* P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 492-500 (3d ed. 1988).

10. *See infra* notes 55-56 and accompanying text.

11. "HOHFELDIAN. Adjective formed from the name of the American jurist W.N. Hohfeld, (1879-1918), whose study Some Fundamental Conceptions as Applied in Judicial Reasoning (first version, 1917 [sic]) represents a major clarification of the concept of a legal right." A. BULLOCK & O. STALLYBRASS, THE HARPER DICTIONARY OF MODERN THOUGHT 287 (1977) (entry written by H.L.A. Hart). For instance, as Hohfeld explained, " 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated." Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913) (quoting Lake Shore & Mich. S. Ry. v. Kurtz, 10 Ind. App. 60, 67, 37 N.E. 303, 304 (1894)). *See also* Note, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 575-76 & nn.66-67 (1986).

12. For instance, the Oregon Supreme Court established an explicit policy two years prior to *Long* of relying on the state constitution to dispose fully of claims before resorting to any arguments arising under the Fourteenth Amendment. *See* Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981). *Compare* People v. Rolfingsmeyer, 101 Ill. 2d 137, 461 N.E.2d 410 (1984)

In fact, not only can state courts take such an approach, they should. State court reliance primarily on state rather than federal law, particularly in the constitutional field, is preferable for several reasons. The first is that it conforms to the general nature of our federalist legal hierarchy: The United States operates in many ways under a system of "dual sovereignty," with citizens simultaneously subject to the laws of two governments, state and federal, both of which are "sovereign." Needless to say, however, in case of conflict one or the other "sovereign" must yield. The Constitution makes plain which one it is: The Supremacy Clause ranks the federal Constitution and laws "the supreme Law of the Land."[13]

Under well-established principles, the United States Constitution should be resorted to only when absolutely necessary to dispose of a case.[14] It follows that the *Ashwander* policies espoused by Justice Brandeis and endorsed repeatedly by the Supreme Court are served by resolving cases on "inferior" sources of law whenever possible, and that state laws, including state constitutions, are "inferior" in this sense.[15] In addi-

(resting on state constitutional provision limiting self-incrimination in the area of implied consent to submit to a sobriety test), *with* State v. Neville, 312 N.W.2d 723 (S.D. 1981) (reaching same result, but on basis of both federal and state constitutions), *rev'd*, South Dakota v. Neville, 459 U.S. 553 (1983), *and* State v. Jackson, 195 Mont. 185, 637 P.2d 1 (1981) (same), *vacated*, 460 U.S. 1030 (1983), *on remand*, 206 Mont. 338, 672 P.2d 255 (1983) (state constitutional ruling vitiated in light of United States Supreme Court interpretation of federal Constitution in *Neville*). *See also* Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 653 P.2d 970 (1982) (looking solely to state constitutional provisions); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981). For a discussion of methods to insulate decisions based on state grounds from Supreme Court review, see Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972).

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

14. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Brandeis, in a classic statement, elucidated seven rules developed to avoid "passing upon a large part of all the constitutional questions pressed upon [the Court] for decision." *Id.* at 346. Those relevant here include that the Court: will not decide questions of constitutional law not necessary to resolving the case, will not pass upon constitutional questions if other grounds, including statutory, common, or state law, are sufficient, and will not reach a constitutional question if a statute can be construed so as to avoid any claim of unconstitutionality. *See id.* at 346-48.

15. *See, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551, 555 (1940) (citation omitted):

> Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, consistently with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

See also Kirkpatrick v. Christian Homes of Abilene, Inc., 460 U.S. 1074 (1983) (remand for consideration of possible state grounds, the decision of which might obviate the need to address a federal constitutional question); Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973) (same); Musser v. Utah, 333 U.S. 95 (1948) (same).

tion, as Justice Stewart Pollock of the New Jersey Supreme Court observed, such an approach "is faithful to historical sequence when a state's constitution predated the federal constitution. It also is consistent with the proposition that state constitutions are the basic charters of individual liberties."[16]

Second, and relatedly, state court eschewal of federal questions when not necessary to resolve a case reduces the negative effects of essentially advisory opinions on federal law.[17] In that context, the question is simply whether the courts of one sovereign ought properly to render opinions on the laws of another sovereign when to do so is not necessary to the disposition of the case before it. The federal courts, despite state court perceptions of federal arrogance, have a long-standing preference for deference to the state courts, which is elaborated in the fields of abstention[18] and habeas corpus review.[19] To the extent that the "adequate and independent state grounds" doctrine is prudential rather than jurisdictional,[20] it also reflects this same policy. It does not seem unreasonable to expect state courts to exercise the same deference to federal hegemony over federal law;[21] such hegemony also promotes the federal goal of uniformity of interpretation of federal law, a staple of federal ju-

16. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983-84 (1985).

17. Of course, for many state court systems the advisory opinion doctrine does not pose the same jurisdictional dilemmas as it does in the federal system. Moreover, since alternative grounds of decision are both holdings—that is, neither are dictum—when a case can be disposed of by either a federal or state law ruling the federal determination cannot be said to be truly "advisory." *See* Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340 (1928). So we are dealing here with a question of comity, not of power.

18. *See, e.g.*, Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 10-17 (1987) (applying abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), because of the state's interest in enforcing the judgments and orders of its courts, and because the Court would not assume that state courts were unable to decide federal questions or would do so improperly); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) (extending *Pullman* abstention to situations in which "sovereign prerogatives" and complicated areas of state law are involved); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (federal courts should abstain from decisions in which federal constitutional questions can be avoided and interference with state organs averted if the decision is based on the state issues).

19. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494-96 (1976) (although federal courts do not lack jurisdiction and fourth amendment violation may in fact have occurred, federal court should not consider claim of constitutional violation where defendant had "full and fair" opportunity to litigate issue in state court).

20. *See* Sandalow, *supra* note 1, at 188 n.6.

21. *But see* Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1048 n.156 (1985) (arguing that state courts are "no less privileged to discover" the meaning of federal law than are federal courts, and that "[i]f one believes the federal system will benefit from dialogue about the Constitution, then the fact that the state court opinion is advisory and unnecessary is irrelevant").

risdiction doctrine since at least *Martin v. Hunter's Lessee*.[22]

Third, state court avoidance of federal questions in favor of resolution on a state basis serves values of judicial economy: Why bring the Supreme Court into it if you do not have to? Not only is needless Supreme Court review invited where a state court fails to resist the urge to expound upon federal law, but also the state court's own time will likely be further consumed with reiterating its original state-law holding following a United States Supreme Court remand. In fact, Justice Stevens has taken to task one state supreme court explicitly on this basis for premising a decision on federal grounds.[23]

2. *The Tendency of State Courts to Ignore* Long

Of course, not all courts are inclined to follow this wisdom, for several reasons. One is that old habits die hard, and most lawyers, including those who are now judges, are not accustomed to addressing state constitutional issues or to ignoring federal ones. A related although less complimentary reason may be that many state court judges are not prepared to address or create an independent body of state reasoning if federal precedents appear to dispose of the issue.[24]

Justice Pollock of New Jersey calls such an approach, addressing state constitutional issues only if necessary after resolving federal constitutional questions, the "supplemental" approach to state constitutional law. He argues that "the supplemental approach is more consistent with the roles of state and federal constitutional law as those roles have evolved in this century. Since the enactment of the Fourteenth Amendment, federal jurisprudence has exercised the dominant influence on constitutional law."[25] Others feel that it is important for state courts to reach and discuss independent federal claims, either out of thoroughness or out of a commitment to the value of widespread and diverse interpre-

22. 14 U.S. (1 Wheat.) 304, 347-48 (1816).

23. Massachusetts v. Upton, 466 U.S. 727, 735-37 (1984) (Stevens, J., concurring). *See also* South Dakota v. Neville, 459 U.S. 553, 566-71 (1983) (Stevens, J., dissenting).

24. As one leading state supreme court justice has written:

> There are several possible reasons for a court's failure to examine the state constitution. One explanation may be judicial oversight and carelessness. Another may be that the court might not have been ready to decide the state constitutional issue; or the author of the majority opinion might not be receptive to state constitutional arguments . . . .

Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1160 (1985).

25. Pollock, *supra* note 16, at 984.

tation of the federal Constitution.[26]

But the fact remains that many state court judges simply seem to be unaware that *Michigan v. Long* provides a clear method by which state court judges can insulate their decisions from federal review. As one state high court judge has told me, "I keep trying to get my colleagues to include a *Michigan v. Long* statement in order to keep the decision away from the Supreme Court, but they just don't seem to understand."

3. *The "Surgeon General's Warning" Approach*

When a state court feels compelled for whatever reason to address a federal question, the Supreme Court has at least given it a simple method by which it can establish an "adequate and independent state ground" and thereby evade federal review. This method is to include a "plain statement" that the court meant to rest its holding on state, and not on federal, grounds.[27]. This step is in essence a disclaimer system: So long as the state court explicitly disclaims any intention of making federal law, it can prattle on all it wants about federal precedents and the meaning of extant Supreme Court opinions.[28]

As might be expected, some state courts have taken the Supreme Court at its word and adopted a sort of "Surgeon General's Warning" to be inserted into any opinion in which both state and federal grounds for a

26. *See supra* note 21. As I have indicated, I believe that the notion of the inherent value of state court interpretation of the federal Constitution is incorrect, and conflicts with the values announced by the federal courts, whose views on development of their own law should control over those of the state courts. This is a completely different issue, of course, from the value of the development of state constitutional law independent of federal constitutional development. *See* Kaye, *Dual Constitutionalism in Practice and Principle*, 42 RECORD OF ASS'N OF THE BAR OF THE CITY OF NEW YORK 285 (1987); Schnurer, *It Is A Constitution We Are Expanding: An Essay on Constitutional Past, Present and Future*, 1 EMERGING ISSUES IN ST. CONST. L. 135 (1988).

27. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

28. As the Supreme Court has noted, when a nonfederal ground is sufficient to sustain the judgment "we have no power to disturb it." Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917). *See also* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

Thus, in State v. Ball, 124 N.H. 226, 235, 471 A.2d 347, 353 (1983), after declaring a search invalid under the state constitution, the New Hampshire Supreme Court launched into a gratuitous discussion of the federal Constitution with the comment, "We note that the United States Supreme Court has recently spoken on the probable cause requirement of the plain view doctrine." Similarly, in State v. Badger, 141 Vt. 430, 448, 450 A.2d 336, 346 (1982) (citations omitted), the Vermont Supreme Court reviewed the question of suppression of evidence under both the state and federal constitutions, noting that while "[o]n federal issues, we are no more than an intermediate court, . . . if our ruling is based upon an adequate and independent state ground, federal review is limited to a determination of whether Vermont law violates some provision of federal law."

holding are discussed.[29] Of course, a requirement that such a consumer warning label appear in every opinion would seem to be rather tedious. Thus, Justice Souter's former court, the New Hampshire Supreme Court, took the logical step, shortly after *Michigan v. Long*, of publishing in one opinion the following "quit-claim": "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."[30]

This declaration exposes the absurdity of the *Michigan v. Long* rule. Certainly, a court should be able to take the position taken by the New Hampshire Supreme Court. In fact, its statement is merely a summary of the role of persuasive authority that any first-year law student would immediately recognize and comprehend. But if the requirements of *Michigan v. Long* are met by simply publishing such a disclaimer once and for all, then what does *Long* really amount to?

On the other hand, if the once-and-for-all disclaimer is not sufficient, then we are back to rote recitation of the disclaimer in every case. Such a rule is patently unbecoming. It is a commonplace of federal practice today that totemic invocations are not required in pleadings.[31] If litigants, who are due no deference, are not expected by the federal courts to kowtow to catechismal verbal formulations, then certainly state judges—who are accorded some degree of deference by federal courts—ought not to be so required either. It trivializes the role of judging in both the state courts and the United States Supreme Court if the outcome turns not on an appreciation of the logic of decision but rather upon the incantation *vel non* of magic words.[32]

B. What's so Wrong with *Long*?

The major problem with *Long* goes a bit deeper than this, however. Under *Long*, the Supreme Court essentially has said that rather than presuming that state judges have come to their own reasoned analysis of

29. *See Ball*, 124 N.H. at 233, 471 A.2d at 352; State v. von Bulow, 475 A.2d 995, 1019 (R.I.), *cert. denied*, 469 U.S. 875 (1984).

30. *Ball*, 124 N.H. at 233, 471 A.2d at 352. *See also* State v. Kennedy, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983) (general statement that when the Oregon Supreme Court cites federal precedent in interpreting Oregon law, it does so because it finds the federal precedent persuasive, not controlling).

31. *See* Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

32. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 571 (1987) (Stevens, J., dissenting) (terming it "denigrating . . . to require the justices of the 50 State Supreme Courts to include such a statement in their decisions").

their own law, however misguided their reliance on federal caselaw as persuasive authority might be, the Court will instead presume that state court judges are simply too lazy to have really independently interpreted their own laws.[33]

Such a presumption condescends to state judges and denigrates the concept of federalism, particularly with respect to state court competence—generally advocated in the habeas context by precisely those on the Court who supported the *Michigan v. Long* doctrine in the direct review context.[34]

It will be interesting to see whether Justice Souter joins this condescending view of state high courts. In the past decade, the Court's two former state court judges, Justices Brennan and O'Connor, split on this issue along result-oriented, ideological grounds. In fact, the "adequate and independent state grounds" doctrine has been used generally to serve the Court's current ideological aims.[35]

As has been widely noted, state courts have long been viewed as less than vigilant in their protection of individual liberties.[36] For most of its history, the same could be said of the United States Supreme Court. Only in the Warren Era did the Court attain the image of the great bulwark of civil rights and civil liberties.[37] When that occurred, a diver-

33. Thus, for instance, Professor Lawrence Sager asserts that *Long* "canonizes the somewhat odd presumption that state judges are deeply under the sway of federal precedent, even when they are avowedly interpreting their own state constitutions." Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 n.1 (1985).

34. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976).

35. For instance, compare Justice Brennan's assault on state procedural bars in Henry v. Mississippi, 379 U.S. 443 (1965), *infra* note 42 and accompanying text, and Fay v. Noia, 372 U.S. 391 (1963), *infra* note 60 and accompanying text, with his dissent in Pennsylvania v. Finley, 481 U.S. 551, 560 (1987) (Brennan, J., dissenting), in which he would have found a determination that a lower state court had not followed a remand order from the state supreme court to be a sufficient bar to the United States Supreme Court's determination of whether a criminal defendant's federal right to counsel had been violated. For the views of Justice O'Connor and other members of the Burger/Rehnquist Courts' majority, see *infra* note 41.

36. *See* Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1, 6 (1988).

37. In all American history no better period than that from the mid-1950s through the 1960s can be offered as an example of one when a close link occurred between political and social change and the performance of the Supreme Court. Dynamic and extensive political and social change nurtured the sentiment of the Supreme Court under Warren and in a reciprocal manner the Court fostered the development of that political and social change. . . .

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Affected by the current political and social trends, the Warren Court worked a revolution in constitutional law.

A. RICE, THE WARREN COURT, 1953-1969, 8 THE SUPREME COURT IN AMERICAN LIFE ix-x (G. Lankevich ed. 1987).

gence arose between the conceptions of individual liberties in the United States Supreme Court and the state supreme courts.[38] Justice Brennan and the other members of the Court remedied this situation by altering the "adequate and independent state grounds" doctrine to "reach out and touch" more errant state court opinions.[39]

When the Warren Court transformed rapidly and dramatically under President Nixon into the Burger Court and, later, the Rehnquist Court, those who had previously looked to the Supreme Court for judicial protection began turning, partly at the incessant urging of Justice Brennan,[40] to the state courts. State benches are now filled largely with lawyers who were drawn to the bar and cut their teeth during the Warren Era. There is, thus, again a divergence—although running the other way—between the conceptions of individual liberties in the United States Supreme Court and the state supreme courts. And, *mirabile dictu*, Justice O'Connor and the other members of the Court have remedied this situation by altering the "adequate and independent state grounds" doctrine to "reach out and touch" more errant state court opinions.[41]

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38. *See* Howard, *supra* note 36, at 6.

39. *See Henry*, 379 U.S. 443; *see also infra* note 42.

40. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

41. Ironically, the same Court that has made federalism the centerpiece of its constitutional philosophy now regularly upsets state court decisions protecting individual rights. During its 1982 term the Court favorably reviewed nearly four of every 10 petitions brought to it by government officials dissatisfied with state court rulings sustaining civil liberties claims. Incredibly, during the same term the justices did not review a single case brought to their regular docket by an individual whose constitutional challenge was denied by a state court.

Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92 (Mar. 1984) (citing Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 827 (1983)).

As Justice Stevens notes in his dissent in *Long*, "Until recently [the Court] had virtually no interest in" cases in which a state sought review of a decision of its own courts vindicating a federal right. Michigan v. Long, 463 U.S. 1032, 1069 (1983) (Stevens, J., dissenting). In 1953, the Court received one such request and reviewed the case; in the 1967 Term, it received three requests and reviewed none. *Id.* At the time of *Long*, the Court had reviewed twelve other such cases that Term, while certiorari petitions had been filed in eighty. *Id.* at 1070 n.3. Stevens dates this change to "[s]ome time during the past decade," *id.* at 1069, suggesting as a possible turning point the Court's "5-to-4 decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)." *Id.* at 1070. Justice Stevens says ambiguously, "[O]ur priorities shifted." *Id.* This is more oblique than attributing the change directly to the Court's changing views toward law enforcement during the same period.

Justice O'Connor comes closer to saying this herself. In response to Justice Stevens' assertion that the Court should concern itself primarily with vindicating federal rights of individuals, *see id.* at 1068 (Stevens, J., dissenting); *see also infra* note 63, O'Connor retorts simply that "[t]he state courts handle the vast bulk of all criminal litigation in this country." 463 U.S. at 1043 n.8. She concludes, "It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent signifi-

The differences between Justice Brennan's permutations of the "adequate and independent state grounds" doctrine and those of the *Michigan v. Long* Court spring from the fact that the *Long* approach extends the reach of the Supreme Court into state court rulings by questioning the "independence" of state court reasoning. The Warren Court, in contrast, extended its reach into state decisions by questioning the "adequacy" of the state court reasoning in such cases as *Henry v. Mississippi*.[42] We will see the ramifications of this distinction when I conclude with some comments on adequacy.

As for the independence of state grounds, however, the Court ought to return to the pre-*Long* presumption of independence (rather than non-independence) of the state law interpretation. As Professor Charles Wright has observed, "since the burden is on the party invoking the jurisdiction of the Supreme Court to establish that that Court has jurisdiction, it may dismiss if its jurisdiction is ambiguous."[43] The Court thus should presume that a state court decision rests on an independent state ground unless the party seeking review can demonstrate that the state court found its interpretation of the state provision to depend upon federal law—thereby avoiding Supreme Court pronouncements on federal law that will not, a priori, disturb the result in the case.

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cant *expansion* of federally created standards that we have imposed on the States." *Id.* (emphasis added). That comment rather misses the mark, however. The job undertaken by the cases evidencing this greater interest in the application and development of federal law by state courts, of which *Long* is an example, has been to *deflate* the "federally created standards . . . imposed on the States." *Id.* Compare, for example, Justice Rehnquist's votes to assume jurisdiction in criminal cases such as *Long*, with his assertion in Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978) (per curiam) (Rehnquist, J., dissenting). This case concerned first amendment rights of press access to pretrial suppression hearings in state criminal proceedings. Justice Rehnquist asserted that the Court should not assume jurisdiction unless a federal basis of the decision below is demonstrated. *See id.* at 244 (Rehnquist, J., dissenting).

42. 379 U.S. 443 (1965). The *Henry* case concerned a highly publicized and politically explosive criminal trial of a leading civil rights advocate. The state courts had admitted that illegally obtained evidence had been introduced at the trial, but upheld the conviction on the ground that Henry had failed to comply with the requirements of the state's "contemporaneous objection" rule governing the admission of evidence. Henry v. State, 253 Miss. 263, 279-81, 154 So. 2d 289, 295-96 (1963). Justice Brennan argued that, while the adequate state ground doctrine applied to procedural as well as substantive rules, state procedural rules could not, like state substantive law, be determinative of a case's outcome regardless of determination of the federal right, nor could they be permitted to interfere with vindication of federal rights unless the procedural rule serves a legitimate state interest. *Id.* at 447. The ramifications of this distinction are developed further in Part II.

43. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 547 (3d ed. 1976). *See also* cases cited therein, *id.* at 547 n.95; Durley v. Mayo, 351 U.S. 277, 281, 285 (1956) (petitioner bears burden of establishing Supreme Court's jurisdiction).

Thus, see Stembridge v. Georgia, 343 U.S. 541, 547 (1952) (case dismissed where grounds of state court decision unclear); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54-55 (1934) (same).

Regardless of how conscientious a state court is in attaching a "Surgeon General's Warning" to all its opinions or how lackadaisical in warming over the reasoning of federal courts in analogous areas, a state ruling should be taken to be "independent" of federal law if it is not, in the state court's view, compelled by federal precedent.

Now, when does such a situation occur? There is, first of all, the odd case of Florida, where this occurs every time an issue involving criminal defendants arises. This is because the people of Florida amended their constitution to require that it be interpreted in line with United States Supreme Court decisions on the Fourth, Fifth, and Sixth Amendments.[44]

This is an extreme case, but it is not the only instance in which state courts feel that the content of their state constitutional provisions are controlled by the content of parallel federal provisions. For instance, in *Delaware v. Prouse*,[45] the Supreme Court reviewed a Delaware decision involving that state's counterpart to the Fourth Amendment's Search and Seizure Clause. The Delaware Supreme Court had held the search in *Prouse* violative of both the federal and state constitutions.[46] The Supreme Court, per Justice White, found that the decision did not rest on an independent and adequate state ground, because "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did."[47]

But the state court's conclusions of federal law are integral to the holding, and therefore properly reviewable by the Supreme Court, only if the state court believes that it must follow federal law to interpret the state provision.[48] It is worth noting that the Supreme Court has held that it may review a state court decision where a state statute incorporates federal law by reference—passing on the federal question incorporated by reference, and remanding for the state court to reconsider the statute in the light of the "correct" interpretation of the underlying fed-

44. *See* FLA. CONST. art. I, § 12; Florida v. Casal, 462 U.S. 637 (1983) (per curiam) (Burger, C.J., concurring). In this unusual concurrence in a dismissal of certiorari, Chief Justice Burger noted that Florida voters had amended their state constitution following the state court decision in question to preclude a repetition of what he termed the "untoward" result in this case, and then observed that Florida voters could also force repeal of the state statute on which the Florida court seemed to have rested in part.

45. 440 U.S. 648 (1979).

46. State v. Prouse, 382 A.2d 1359, 1362, 1364 (1978).

47. *Prouse*, 440 U.S. at 653 (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977)).

48. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 732 n.1 (1983); South Dakota v. Neville, 459 U.S. 553, 556 n.5 (1983); *Prouse*, 440 U.S. at 653; *Zacchini*, 433 U.S. at 568.

eral law.[49]

But when a state court looks to federal law as persuasive authority, even adopting the perceived reasoning wholesale, but does not announce that the state's constitution must be interpreted consistent with a federal provision, this is not properly reviewable by the United States Supreme Court. The state court decision does not constitute a holding as to the content of federal law that requires—or permits—Supreme Court correction. The Supreme Court cannot correct fallacious rationalizing of federal law used for purposes of analogy, but not legal mandate, in state court opinions.[50]

It might be difficult in some concrete instances to tell whether a state court has in fact simply adopted what it perceives to be federal reasoning because of admiration of the logic of the reasoning, because of pure laziness, or because the court believed itself bound as a matter of state law by whatever it perceived to be the federal law.[51] In instances when indicia of dependence, rather than simple reliance, upon federal law are absent, the better course is to presume that the state ground is indeed independent of any discussion in the opinion of what federal law might be.

But, in any event, if the question is truly in doubt, then at the least the Supreme Court should, in terms of both federalism principles and judicial economy, ask the state court for clarification on this point, rather than assume jurisdiction and possibly needlessly decide the federal question. Before *Michigan v. Long*[52] that was essentially the practice,[53] and it should be the law once again.

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49. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942).

50. Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions.").

51. *See, e.g.*, Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196-98 (1965), *on remand*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965) (per curiam) (upholding prior decision as mandated by state constitution); Minnesota v. National Tea Co., 309 U.S. 551, 555-57 (1940), *on remand*, 208 Minn. 607, 294 N.W. 230 (1940) (upholding prior decision as mandated by state constitution); State Tax Comm'n v. Van Cott, 306 U.S. 511, 513-14 (1939), *on remand*, 98 Utah 264, 96 P.2d 740 (1939) (upholding prior state court decision as correct interpretation of state legislative intent). *See also Neville*, 459 U.S. 553; *Prouse*, 440 U.S. 648; *supra* text accompanying notes 45-46; *Zacchini*, 433 U.S. 562; Department of Motor Vehicles v. Rios, 410 U.S. 425, 426 (1973); *Herb*, 324 U.S. at 127-28.

52. 463 U.S. 1032 (1983).

53. *See* Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978); California v. Krivda, 409 U.S. 33 (1972); *cf.* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (where state law unclear and federal constitutional question can be avoided, federal court should abstain from deciding federal question pending resort to state court for determination of state law question).

II. The Not-So-Adequate State Ground

In order to bar Supreme Court review, a state ground must be not only "independent" but also "adequate." Inadequacy comes in many guises: a lack of fair and substantial support in the facts,[54] a new state rule employed for the occasion in order to defeat the federal claim,[55] or refusal to consider the merits of a federal claim on the basis of a rule "more properly deemed discretionary than jurisdictional."[56] Of course, all other cases in this area pale in interest in comparison to *Henry v. Mississippi*.[57]

As Professor Wright argues, "The question of the adequate state ground is much confused by the decision in *Henry v. Mississippi*. . . . It is difficult to determine what was held in *Henry*, much less what effect, if any, it has on previous notions of the adequate state ground."[58] The Court held in *Henry* that a state procedural rule of general applicability still might not be adequate to bar Supreme Court review if the rule served in the case at bar to defeat a federal claim and did not further a legitimate state interest.[59] *Henry* was, along with the previous year's habeas case of *Fay v. Noia*,[60] part of Justice Brennan's drive to find state

54. *See, e.g.*, Ward v. Board of County Comm'rs, 253 U.S. 17, 22-24 (1920) (Supreme Court, finding no evidence in record to support state court's factual finding, reviewed state court refusal to grant Native Americans relief from state taxation because of asserted federal immunity on the ground that the Native Americans had voluntarily paid the state tax).

55. *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 293-302 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455-58 (1958). These cases, both part of the same protracted litigation, concerned Alabama's attempt to bar all NAACP activity in the state, beginning in 1956, under the state's corporate licensing laws. The United States Supreme Court twice reversed the Alabama Supreme Court's failure to reach the NAACP's defenses by raising procedural hurdles never before invoked.

56. Sullivan v. Little Hunting Park, Inc., 369 U.S. 229, 234 (1969). *Sullivan* concerned a suit against discrimination in the use of community facilities. The Virginia Supreme Court of Appeals refused to hear the appeal on the basis of a rule requiring reasonable notice and opportunity for opposing counsel to review the trial transcript. The United States Supreme Court found that while the rule had not been manufactured spontaneously, as in the Alabama NAACP litigation, *supra* note 55, it had never before been treated by the Virginia court as a jurisdictional bar, and therefore did not bar the Court's review. *Id.* at 233-34.

57. 379 U.S. 443 (1965).

58. C. WRIGHT, *supra* note 43, at 545 (italics added).

59. *Henry*, 379 U.S. at 447-48.

60. 372 U.S. 391 (1963). *Fay* intimated that any federal claim could now be raised on habeas by state prisoners. Neither state substantive nor procedural rules could, in this vision, stand in the way of some sort of ultimate federal review, based either on collateral attack under a writ of habeas or on direct review because of a weakened view of the adequacy of state grounds. *See, e.g.*, Sandalow, *supra* note 1, at 189:

> The significance of *Henry v. Mississippi* is in its intimation that a majority of the Court apparently are prepared to redefine the adequate state ground doctrine with a view toward substantial restriction of the situations in which a non-federal ground of decision will be adequate to preclude review of the federal questions presented.

bars to Supreme Court review of retrograde state opinions "inadequate." In this sense, as noted earlier, it is similar to *Michigan v. Long*.

But there is a distinct difference. It has been widely noted that Justice Brennan's distinction between substantive and procedural rules doesn't hold up. While Brennan attempted to justify the holding in *Henry* on the contention that, unlike substantive state law, state procedural rules can actually defeat federal claims by barring their airing, state substantive rules also can defeat federal rights.[61] In fact, that is in essence what the case of *Martin v. Hunter's Lessee*,[62] one of the grandest and hoariest in constitutional law, was all about.

The significant problem addressed in *Henry* is that when the scope given individual rights by the state is more constrained than that recognized by the federal Constitution, allowing state rulings to preclude Supreme Court review wipes out the supposedly "supreme" federal right. In contrast, in the *Michigan v. Long* situation, no federally created right is defeated if Supreme Court review is precluded, because the scope given individual rights is actually broader under state law.[63] Thus, no Supreme Court review is actually needed to protect federally guaranteed individual rights. Under *Long*, the Court "reaches out" to make clear that rights under federal law are not as broad as under state law. This is a pronouncement that need not be made because it will not ultimately affect the duty imposed upon the state's agents in the case at bar.

The habeas prong of the Brennan offensive was beaten back by the Burger Court in Stone v. Powell, 428 U.S. 465 (1976), and Wainwright v. Sykes, 433 U.S. 72 (1977).

61. *See* Sandalow, *supra* note 1, at 197-98.

62. 14 U.S. (1 Wheat.) 304 (1816).

63. *See* Michigan v. Long, 463 U.S. 1032, 1067-68 (1983) (Stevens, J., dissenting). Justice Stevens therefore propounds the view that the Supreme Court should hear cases from state courts in which individuals have unsuccessfully sought "to *vindicate* federal rights." *Id.* at 1068 (emphasis in original). The Court rejects Stevens' view as "novel," overly broad, and ignorant of the federal interest in state law enforcement. *Id.* at 1043 n.8; *see also supra* note 41. Justice Stevens cites as proper examples of the Court's review, however, cases in which a state court rejected a federal claim on the basis of a state bar unrelated to the nature of the federal claim. *Long*, 463 U.S. at 1069-72 (Stevens, J., dissenting). The relevance of such cases, however, is that the state ground is not adequate, not that it is not independent—which it plainly is.

The problem with *Long* is not, as Justice Stevens suggests, that it puts the Supreme Court in the wrong business, upholding government power rather than individual rights, *see Long*, 463 U.S. at 1068 (Stevens, J., dissenting), but rather that such decisions of federal law are gratuitous. Unless it could be demonstrated that the Michigan Supreme Court's determination of state constitutional requirements was, in its view, mandated by federal law, the search of Long's vehicle would be ruled improper and the fruits of the search thrown out of Long's trial by the state courts, regardless of any lesser constraints the federal Constitution might impose. There was therefore no reason for the Supreme Court to correct the Michigan Supreme Court's view of federal law, and to provide an exposition of its own views on the subject, because to do so would in no way "decide the case."

In short, while *Long*-type and *Henry*-type intervention are both "imperialistic" on the Supreme Court's part, *Long*-type intervention is gratuitous, unlike *Henry*-type intervention, because the Court's expression of federal law does not change the outcome of the case. Rather, the only end achieved by the Supreme Court in expounding its view on the Constitution in a *Long*-type case is to issue a policy pronouncement, not to affect a specific case's resolution. *Henry*-type intervention is also concerned with protecting federally guaranteed individual rights; *Long*-type intervention is not. What *Long* protects is federal conceptions of the powers of government, not conceptions of the rights of individuals.

Now, one might believe that some people place too much emphasis on "individual rights," and should be more concerned with governmental authority and capability, particularly in the area of criminal law. That may be, but the relevant point is that it is the state government whose powers are being constrained by the state court ruling. If a state chooses to see itself as more circumscribed in the exercise of power than the federal Constitution actually requires, then the arguments for Supreme Court intervention—supremacy, sovereign interpretation of one's own law, or federalist comity—are all at their weakest.

None of this is to say, however, that the "adequacy" prong of the "adequate and independent state grounds" doctrine is any the less "imperialistic" or potent than the "independence" prong—any more than it is to say that liberal activist Justices have used the doctrine in pursuit of substantive goals any less than have conservative activist Justices. Rather, the basic point is that the "adequate and independent state grounds" doctrine can be used by any activist Court to "reach out and touch someone" anytime it chooses.

State courts that seek the security from Supreme Court review possible if only they include a *Michigan v. Long* warning label in their opinions still are not perfectly safe from all review. It is possible to "beat the Court" at the *Michigan v. Long* game by avoiding discussions of federal law in state opinions, or by including whatever specific disclaimer the Court will recognize. It is possible to establish that a state ground is "independent" of federal law, under whatever standard the Court may want to impose. But it is never possible wholly to preclude review under the "adequacy" prong.

As Justice Brennan demonstrated in *Henry*, if the Supreme Court wants to dismiss a state ground as "inadequate," it is reasonably easy to do so.[64] The "inadequacy" standard will inevitably be employed, how-

64. Henry v. Mississippi, 379 U.S. 443, 446-48 (1965).

ever, not just to expand individual rights as a matter of federal mandate, but also to contract them.

It is very much in vogue, at least among "liberals," to extol the ability of state courts to devise new "individual rights" that the United States Supreme Court is unwilling to accept at this time.[65] For instance, in the celebrated case of *Pruneyard Shopping Center v. Robins*,[66] a group of students in California brought suit under the free speech provision of the state constitution. The students alleged a violation of their constitutional rights by a private shopping center that had them removed from the property for distributing political leaflets. The First Amendment would not have protected the students on purely private property,[67] but the California Supreme Court ruled that the analogous state constitutional provision did in fact extend such a right.[68] The United States Supreme Court in *Pruneyard Shopping Center* upheld the power of state governments to define individual rights more expansively than would the federal Constitution or the federal courts.[69]

However, as Earl Maltz, a law professor at Rutgers University, notes:

> [T]he case also implicated a countervailing right: the right of the owners to use their property as they saw fit. Accordingly, it is misleading to view the California court's decision for the plaintiffs in *Pruneyard* as expanding the scope of individual rights against government interference; it simply elevated the rights of one group (the students) over those of another (the shopping center owners).[70]

In short, any question of extending (or abridging) an individual's rights vis-à-vis the government can be transmogrified into a question of

65. For example, many state courts have declared that the state constitution's right of privacy mandates the availability of public funds for performance of abortions. *See* Doe v. Maher, 40 Conn. Supp. 394, 515 A.2d 134 (1986); Moe v. Secretary of Admin. and Fin., 382 Mass. 629, 417 N.E.2d 387 (1981); Right to Choose v. Byrne, 173 N.J. Super. 66, 413 A.2d 366, *aff'd as modified*, 91 N.J. 287, 450 A.2d 925 (1982); Doe v. Celani, No. 581-84 (Vt. Super. Ct. May 23, 1986); *see also* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 626 P.2d 779, 172 Cal. Rptr. 866 (1981). The United States Supreme Court has held to the contrary under the federal Constitution. Roe v. Maher, 432 U.S. 464 (1977) .

66. 447 U.S. 74 (1980).

67. *See* Hudgens v. NLRB, 424 U.S. 507 (1976). The exception is the unique instance of the "company town" in which all normally public property is actually private property. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

68. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

69. *Pruneyard Shopping Center*, 447 U.S. at 81.

70. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1008 (1985) (footnote omitted).

one individual's rights vis-à-vis another individual's rights.[71] This result should not be too surprising because it is merely the converse of *Shelley v. Kraemer*'s[72] conversion of conflicting private rights into state action. But once a second individual's rights are at issue, a new possibility arises that a federal question not even addressed by the state court must necessarily be at issue. For instance, in the *Pruneyard Shopping Center* case, what appears to be a question solely of free expression rights under the California Constitution can, if properly framed, involve instead a question of the property owner's due process rights under the federal Constitution. In fact, as the more radical theorists would argue,[73] virtually any government action could be said to implicate the Takings Clause[74] or the Contract Clause.[75]

In short, no matter how carefully crafted a state law opinion may be to avoid dependence upon federal law, a state ground will only be "adequate" when the United States Supreme Court either does not oppose its underlying or resultant policy implications or is unwilling to do something about it. State grounds will never be securely "adequate and independent" when the state and federal systems are ideologically out of line and the United States Supreme Court is activist.[76]

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71. *See* Gormley, *Ten Adventures in State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 29, 50-55 (1988); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 631-34 (1981):

> [T]he Constitution contains other sorts of values as well. It gives the federal government powers, but also enacts limitations on those powers. The limitations, too, count as setting forth constitutional values. . . . When a court upholds a state criminal statute against the claim that it violates the first amendment, it is rejecting one sort of constitutional claim, but it is also upholding principles of separation of powers and federalism which themselves have constitutional status.

72. 334 U.S. 1 (1948). In *Shelley*, the Court confronted the problem of whether it could utilize the Fourteenth Amendment to overturn racially restrictive covenants in private property deeds. The Court overcame this hurdle by reasoning that by giving the private covenant effect in the state courts under normal principles of property law, the state had engaged in "state action" sufficient to invoke the Equal Protection Clause. *Id.* at 19-20.

73. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

74. U.S. CONST. amend. V, cl. 4. The Supreme Court has held, for instance, that government authorization of air navigation effectuates "takings" requiring compensation. Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

75. U.S. CONST. art. I, § 10, cl. 1. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); Wood v. Lovett, 313 U.S. 362 (1941). The most famous use of the Contract Clause to strike down laws at the heart of the regulatory state was, of course, Lochner v. New York, 198 U.S. 45 (1905).

76. Note that most of the cases using the *Long* presumption involved situations where the Court wished to correct state-court overenforcement of federal constitutional restrictions on the enforcement of the criminal law—an area in which the Court has been active in changing the underlying substantive rules. . . . *Michigan v. Long* thus illustrates a general principle: jurisdictional rules tend to move in the direction of allowing more intense supervision in areas of the law where the Supreme

Does this mean that "adequate and independent state grounds" is a bad doctrine? Certainly not. It means only that it is a doctrine that requires the vigilance of advocates at the bar to ensure that it is not honored only in the breach.

Court is in the process of changing the relevant substantive rules and wants to assure itself that the state courts are complying with the new dispensation.

P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, *supra* note 9, at 554 (italics added).