Federalism and Supreme Court Review: Is Article V an Exception to the Independent and Adequate State Grounds Doctrine?

Introduction

A basic tenet of federalism is the recognition that the power to govern lies in more than one central governmental unit.[1] This balancing of power has produced many theories on the proper relative authority and independence of each governmental unit.[2] Although various theories may give greater or lesser guidance in resolving federal/state conflicts, none will extinguish the underlying tension inherent in any system that recognizes sovereign authority in more than one central governmental unit.[3]

It is a long established rule that the United States Supreme Court may review state court rulings on federal law.[4] However, nowhere is the tension of federalism more apparent than in questions of Supreme Court appellate jurisdiction over state court judgments when those judgments involve both state and federal grounds.[5] In these cases, the Supreme Court has long tried to harmonize state autonomy and federal judicial review through the jurisdictional doctrine of "independent and adequate state grounds."[6] However, litigation involving Article V, the amendment

---

1. *See* THE FEDERALIST No. 39 (J. Madison).

2. *See generally* Skover, *"Phoenix Rising" and Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271 (1986); Wisdom, *Forword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984).

3. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 205-31 (1980).

4. Hunter v. Martin's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (discussed *infra* notes 34-38 and accompanying text).

5. *See* M. REDISH, *supra* note 3, at 6.

6. Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), is generally regarded as the first enunciation of the independent and adequate state grounds doctrine, *see* P. HAY & R. ROTUNDA, THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE 212 (1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 119-20 (1978), although controversy has arisen over its more recent applications. *See* Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 819-20 (1984) (arguing that the Supreme Court now reverses state court judgments that afford "too much protection" of individual rights).

provision of the United States Constitution, raises some unanticipated problems for the independent state grounds solution.

This Comment will examine the problem of Supreme Court review of cases involving Article V when the state court decision rests on independent and adequate state grounds. Part I places this problem in its current context by reviewing Justice Rehnquist's opinions in *Uhler v. AFL-CIO*[7] and *Montanans for a Balanced Federal Budget Committee v. Harper.*[8] Part II discusses the Supreme Court's jurisdiction over state court decisions and the doctrine of independent and adequate state grounds, focusing particularly on the criteria by which the Court determines whether a state ground is inadequate to support a judgment. Part III examines two difficulties in analyzing Article V litigation under traditional independent state grounds theory: defining the right guaranteed by Article V, and identifying the nature of the states' power under Article V. The Comment concludes that Article V issues can never be subject to the independent state ground limitation on Supreme Court review because state court decisions involving Article V can never rest on *state* grounds.

I. The "Independent State Grounds" of *Uhler v. AFL-CIO* and *Montanans For a Balanced Federal Budget Committee v. Harper*

In *AFL-CIO v. Eu,*[9] the California Supreme Court prohibited the placement of a proposed "Balanced Federal Budget Statutory Initiative" on California's November 1984 ballot. The initiative would have required the California legislature to apply to Congress under Article V of the federal Constitution to convene a constitutional convention for consideration of a balanced federal budget amendment.[10] Despite the fact that the initiative had satisfied every procedural requirement,[11] the court

7. 105 S. Ct. 5 (Rehnquist, J., in chambers), *denying stay sub nom.* AFL-CIO v. Eu, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

8. 105 S. Ct. 13 (Rehnquist, J., in chambers), *denying stay sub nom.* State *ex rel.* Harper v. Waltermire, 691 P.2d 826 (Mont. 1984).

9. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

10. *Id.* at 692-94, 686 P.2d at 612-13, 206 Cal. Rptr. at 92-93. The California court's unusually swift decision was reached only days after the filing of the original complaint. *Id.* at 717-18, 686 P.2d at 630, 206 Cal. Rptr. at 110 (Lucas, J., dissenting).

11. The California court stated, "[o]n March 18, 1984, respondent Secretary of State certified that the proposed initiative had received sufficient signatures to appear on the November 1984 ballot." 36 Cal. 3d at 694, 686 P.2d at 613, 206 Cal. Rptr. at 93. Art. II, § 8(b) of the California Constitution provides that "[a]n initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election."

held that the initiative violated both the state[12] and federal constitutions.[13] Interpreting Article V of the federal Constitution,[14] the court ruled that the right of application by the "Legislatures of the several States" does not extend to the direct action of the polity by initiative,[15] nor to a "rubber stamp legislature" compelled to act.[16] The court also held that because the initiative proposed neither a state statute nor a state constitutional amendment, it exceeded the scope of the initiative power granted under the California Constitution.[17] The petition for a stay of the California court's writ of mandate was denied by Justice Rehnquist, who reasoned that although the "federal questions [involving Article V] are important and by no means settled . . . [w]e have long held that we will not review state court decisions such as this, largely for the reason that decisions on the federal questions in such cases would amount to no more than advisory opinions."[18] Because the California Supreme Court relied on the California Constitution as an independent and adequate basis for its decision, the United States Supreme Court's review of the federal questions could not affect the outcome of the case.[19]

In a parallel case, *Montanans for a Balanced Federal Budget Committee v. Harper,*[20] Justice Rehnquist refused to stay a mandate of the Supreme Court of Montana that prohibited the placement of a "Balanced Federal Budget" initiative on Montana's November 1984 ballot. Although the denial of stay was issued in advance of the Montana Supreme Court's opinion,[21] Justice Rehnquist observed that the Montana court's per curiam order had stated that not only did the initiative violate Article V, but that the initiative "independently and separately [is] facially invalid under the Montana Constitution."[22] Justice Rehnquist reasoned, "The Montana Supreme Court has rested its decision on the Montana Constitution, and it is the final authority as to the meaning

12. 36 Cal. 3d at 715, 686 P.2d at 628, 206 Cal. Rptr. at 108.

13. *Id.* at 707, 686 P.2d at 622, 206 Cal. Rptr. at 102.

14. U.S. CONST. art. V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

15. 36 Cal. 3d at 703, 686 P.2d at 620, 206 Cal. Rptr. at 100.

16. *Id.* at 706, 686 P.2d at 622, 206 Cal. Rptr. at 102.

17. *Id.* at 715-16, 686 P.2d at 628, 206 Cal. Rptr. at 108.

18. Uhler v. AFL-CIO, 105 S. Ct. 5, 6 (Rehnquist, J., in chambers), *denying stay sub nom.* AFL-CIO v. Eu, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

19. *Id.*

20. 105 S. Ct. 13 (Rehnquist, J., in chambers), *denying stay sub nom.* State *ex rel.* Harper v. Waltermire, 691 P.2d 826 (Mont. 1984).

21. *Id.*

22. *Id.*

of that instrument. Accordingly, for the same reasons given in *Uhler,* the application for a stay is denied."[23]

At first blush, this reasoning appears almost too obvious to be challenged. In most instances state supreme courts are certainly the ultimate arbiters of their state constitutions.[24] However, the cursory "state's rights" approach[25] of both *Uhler* and *Harper* holds potentially far reaching consequences for future Article V litigation and, more importantly, for the amendment process itself.[26]

II. Supreme Court Jurisdiction and the Independent State Grounds Doctrine

A. The Power of Review

The jurisdiction of the United States Supreme Court is of both constitutional and statutory creation. Article III of the Constitution vests the federal judicial authority in the United States Supreme Court and in other inferior courts established by Congress.[27] Section Two of Article III extends this power to "all cases . . . arising under this Constitution [and] the Laws of the United States."[28] Congress has further defined the scope of the Supreme Court's appellate jurisdiction over state court decisions. The appellate review power is available when a state court has ruled a treaty or a federal statute unconstitutional,[29] or upheld a state statute against a federal constitutional challenge.[30] The Court will exercise its appellate review power when it finds that a "substantial federal

23. *Id.*

24. *See, e.g.,* People v. Disbrow, 16 Cal. 3d 101, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) ("We pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). Of course, state courts may not construe their own constitutions in a way that violates the federal Constitution. *See* Bator, *The State Courts and Federal Constitutional Litigation,* 22 WM. & MARY L. REV. 605, 605 n.1 (1981). *See also infra* notes 97-107 and accompanying text.

25. As Dean Sandalow stated, "[A]ny expansion of the jurisdiction of federal courts is an occasion for alarm for those to whom the slogan 'state's rights' is a substitute for analysis." Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals For a Revised Doctrine,* 1965 SUP. CT. REV. 187, 187.

26. *See infra* note 118.

27. U.S. CONST. art. III, § 1.

28. U.S. CONST. art. III, § 2.

29. 28 U.S.C. § 1257(1) (1982).

30. 28 U.S.C. § 1257(2) (1982).

question" is presented.[31] The Court's power of discretionary review through a grant of certiorari is available whenever the validity of a state or federal statute is questioned "on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."[32]

As early as 1796 the Supreme Court had ruled that it had the power to determine the validity of a state law when it conflicted with federal law.[33] In *Martin v. Hunter's Lessee* the Court established its power to review state court determinations of federal law.[34] The issue before the Court was the Virginia court's holding unconstitutional section twenty-five of the Judiciary Act, which gave the Supreme Court jurisdiction over state court rulings on federal questions. In the underlying dispute, the successors in interest to a British subject and the state of Virginia both claimed title to land located in Virginia. The state argued that as a matter of Virginia law the land had escheated before the effective dates of federal treaties protecting British property rights.[35] The Supreme Court reversed the Virginia court's judgment for the state and confirmed the British titles. On remand the state court refused to obey the Supreme

31. Although appeal is often considered to guarantee mandatory plenary review, it does not. The Court may consider the merits of the case, but in most circumstances it will summarily dismiss the appeal for lack of a "substantial federal question" without receiving briefs or hearing oral argument. *See* Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959); *see also* Note, *The Supreme Court Dismissal of State Court Appeals for Want of a Substantial Federal Question,* 15 CREIGHTON L. REV. 749 (1982).

The Judiciary Act of 1916, Pub. L. No. 258, ch. 448, 39 Stat. 726, together with the Judiciary Act of 1925, Pub. L. No. 415, ch. 229, 43 Stat. 936 (current version at 28 U.S.C. §§ 1251-94 (1982)), made the Court's appellate jurisdiction discretionary rather than mandatory in a wide range of cases. Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Laws and the Logistics of Direct Review,* 34 WASH. & LEE L. REV. 1043, 1049 (1977). *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 211-16, 265-66 (1928).

32. 28 U.S.C. § 1257(3) (1982).

33. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (state law confiscating British owned property in Virginia nullified by Treaty of Peace of 1783 between United States and Great Britain).

34. 14 U.S. (1 Wheat.) 304 (1816).

35. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 625-27 (1812). Although the vesting of title was a matter of state law, the Court held that no divestment had occurred. The Court did not explain why the Virginia decision did not rest on an adequate and independent state ground. *See* Hill, *The Inadequate State Ground,* 65 COLUM. L. REV. 943, 954 n.43 (1965); *but see* Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) at 631-32 (Johnson, J., dissenting). Although Justice Johnson agreed with the Virginia court that title had passed prior to the effective date of the treaty, he concurred with the majority that the Supreme Court must review this determination: "[T]he title of the parties litigant must necessarily be enquired into, and . . . such an enquiry must, in the nature of things, precede the consideration how far the law, treaty, and soforth, is applicable to it; otherwise an appeal to this Court would be worse than nugatory." *Id.* at 632. *See* Wechsler, *supra* note 31, at 1051-52.

Court's mandate, arguing that the Supreme Court had no constitutional power to review state court decisions.[36]

The case once again came before the Supreme Court, which again reversed the Virginia court. Confirming the Supreme Court's power to review state court judgments, Justice Story wrote that "[t]he constitution has presumed . . . that state attachments, state prejudices and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[37] He argued, "If there were no revising authority to control these jarring and discordant judgments, . . . the laws, the treaties, and the constitution of the United States would be different, in different states. . . . [A]ppellate jurisdiction must continue to be the only adequate remedy for such evils."[38]

B. The Doctrine of Independent and Adequate State Grounds

The one hundred years following ratification of the Constitution saw few Supreme Court decisions analyze the independent state grounds doctrine.[39] In keeping with the Marshall Court's dirigist political theory, the Court asserted the supremacy of federal law,[40] often even in the face of

36. Hunter v. Martin, 18 Va. (4 Munf.) 1, 7 (1813), *rev'd*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

37. 14 U.S. (1 Wheat.) at 347.

38. *Id.* at 348. *See also* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). Only five years after the decision in *Martin v. Hunter's Lessee*, Virginia again challenged the appellate jurisdiction of the Supreme Court over state court decisions, arguing that the Court's appellate jurisdiction extended only to cases decided in lower federal courts. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Chief Justice Marshall vigorously rejected this argument: "The mischievous consequences of the construction contended for on the part of Virginia . . . would prostrate . . . the government and its laws at the feet of every State in the Union." *Id.* at 385. *See generally* Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 681-701 (1982) (discussing Marshall Court's review of state court decisions). Justice Story's argument in *Martin v. Hunter's Lessee* for the necessity of Supreme Court appellate authority remains as true today as it was in 1816. It is doubtful, for instance, that the gains of the civil rights movement would have been possible without this power. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison* for the "basic principle" of our constitutional system that the federal judiciary is "supreme in the exposition of the law of the Constitution"). *See also* Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387. Some of Justice Story's language was overly broad, however. He argued that Congress was required by Article III to authorize Supreme Court review of state court decisions. 14 U.S. (1 Wheat.) at 331. This argument was unnecessary, since Congress already had given the Court that power statutorily. *See* Currie, *supra*, at 682-87.

39. *See* Hill, *supra* note 35, at 953-54.

40. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (upholding supremacy of federal power to regulate commerce); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding the power of Congress to charter a national bank, rejecting a restrictive view of the Necessary and Proper Clause, and striking a state tax as an interference with the exercise of a valid federal action); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the nationalist predominance of the Constitution as interpreted by the Supreme Court). *See generally* G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (1969).

an arguably independent state ground.[41] Although the supremacy of federal law was clearly intended by the framers,[42] it was not a settled political issue,[43] and the competing theory—that the states enjoyed equal constitutional status with the federal government—gained limited acceptance with the advent of the Taney Court.[44]

Accommodation to this dual federalism theory may have led the Court in *Murdock v. City of Memphis*[45] to give the doctrine of independ-

---

American nationalism was Marshall's "one and only great conception, and the fostering of it the purpose of his life . . . ." 4 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 1 (1919). *See infra* note 42.

41. *See, e.g.,* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). For a discussion of the "sub silentio" treatment of the arguably independent state ground in cases of this era, see Hill, *supra* note 35, at 954-55 n.43. Professor Hill suggests several reasons for the late enunciation of the independent and adequate state grounds doctrine, including the unavailability of state court records on Supreme Court review and the later development of case law more conducive to the assertion of the doctrine. *Id. See* Rector v. Ashley, 73 U.S. (6 Wall.) 142, 148 (1867).

42. Corwin, *The Passing of Dual Federalism,* in ESSAYS IN CONSTITUTIONAL LAW (R. McCloskey ed. 1962):

> It was quite plainly the intention of the Federal Convention that National laws, otherwise constitutional except for being in conflict with State laws, should invariably prevail over the latter; or, as Madison later phrased the matter, State power should be "no ingredient of national power." This was also Marshall's theory. Indeed, the principle of "national supremacy" was in his estimation the most fundamental axiom of constitutional interpretation touching the federal relationship . . . .

Id. at 199. *See also* P. HAY & R. ROTUNDA, *supra* note 6, at 203 ("As a matter of legal history it is not difficult to justify U.S. Supreme Court review of state court decisions on issues of federal law."); R. MCCLOSKEY, THE AMERICAN SUPREME COURT 61, 63-64 (1960) (the Marshall Court repeatedly asserted its federal authority over the states). This is not to suggest that the framers vested in the Supreme Court the power of review over cases decided on purely state law grounds. *See* Note, *The Untenable Nonfederal Ground in the Supreme Court,* 74 HARV. L. REV. 1375, 1375 & n.2 (1961); *but cf.* St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 n.9 (1981). The Supreme Court in *St. Martin* determined that the state court analysis did not rest on any independent and adequate state ground, even though the court was construing a state statute. The Court stated:

> We therefore are at liberty to review this judgment, although, literally it concerns the construction of a state statute. While the South Dakota courts remain free to construe the State's own law differently, they deserve to be made aware of the proper, and here, significant interpretation of the intertwined federal law.

Id.

43. The period prior to the Civil War saw several political attempts to limit the Supreme Court's authority over acts of the states. P. HAY & R. ROTUNDA, *supra* note 6, at 208; R. MCCLOSKEY, *supra* note 42, at 64.

44. Corwin, *supra* note 42, at 200-01. The "states' rights" theory of dual federalism asserted that because the states created the Union under the Constitution, the powers of the national government could not encroach upon state sovereignty, and thus the state and national governments faced each other as equals. *Id.* at 200. *See* Collector v. Day, 78 U.S. (11 Wall.) 113, 126 (1870). For an excellent summary of the many different perceptions of the concept of American federalism, including the "dual federalism" of the Taney and Waite Courts, see Wisdom, *supra* note 2.

45. 87 U.S. (20 Wall.) 590 (1874).

ent state grounds a "constitutional resonance."[46] The Court stated that although the case presented a federal issue, the Court was not statutorily authorized to review the state law issues decided by the state court.[47] The constitutional roots of the jurisdictional bar found in *Murdock* are suggested by the "case or controversy" requirement of Article III, which prohibits advisory opinions.[48] The Court repeated this suggestion in *Herb v. Pitcairn*:[49]

> 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. The reason is so obvious

46. *Id.* at 626, 633. *See* L. TRIBE, *supra* note 6, at 120, 301 (1978).

47. 87 U.S. (20 Wall.) at 633, 635-36. The dissent argued that Article III "declares that 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 under their authority—not to all *questions*, but to all *cases*." *Id.* at 641 (Bradley, J., dissenting) (emphasis in original).

48. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) ("The controversy must be . . . a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."). *See also* Dyer v. Blair, 390 F. Supp. 1287, 1290 (N.D. Ill. 1974).

Because Article III limits jurisdiction to *cases* raising a federal question, state law questions raised in such cases are also within the power of federal jurisdiction. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). As a general rule, however, the Supreme Court reviews only federal questions when it reviews decisions of a state court, and will not do so if the state judgment rests on adequate and independent state grounds. Herb v. Pitcairn, 324 U.S. at 125-26.

Although the Court has characterized Article III as the source of this limitation, some scholars have found fault with this rationale. Sandalow, *supra* note 25, at 201 ("Although *Herb v. Pitcairn* contains overtones of constitutional or statutory limitations on the assertion of jurisdiction by the Court, commentators have generally agreed that refusal to review a federal question where the judgment is based upon an adequate state ground rests upon a self-imposed rule of judicial administration.") (footnotes omitted); P. HAY & R. ROTUNDA, *supra* note 6, at 213 (By deciding a federal issue when the state decision rested on an alternative adequate and independent state ground, "the federal decision is more like a moot decision rather than an advisory one, for the case is a concrete controversy. While the Court has called mootness a constitutional requirement, it has also been more willing to relax the requirement in the public interest . . . .") (footnotes omitted). *See Developments in the Law: The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1332 (1982) [hereinafter cited as *Developments—State Constitutions*]. *See also infra* note 56; Fay v. Noia, 372 U.S. 391, 430 n.40 (1963) (specifically referring to but not endorsing the constitutional justification in Herb v. Pitcairn, 324 U.S. at 125-26; *but see* Fay v. Noia, 372 U.S. at 466-67 (Harlan, J., dissenting) (arguing that jurisdictional limitation is constitutionally mandated); Note, *The Untenable Nonfederal Ground in the Supreme Court,* 74 HARV. L. REV. 1375, 1379 (1961); *cf.* Sandalow, *supra* note 25, at 188-89 (arguing that it is of little consequence whether the Constitution compelled the result in *Murdock*—which held that the presence of a federal question did not confer on the Court a general power to decide all questions presented—because the principles of *Murdock* "are so deeply imbedded in our law that it may fairly be deemed a part of our 'working Constitution.' " (footnote omitted)). However, Dean Sandalow has pointed out another shortcoming of the advisory opinion rationale: "It does not speak to the questions which state grounds are adequate or how that is to be determined." Rather, it addresses only "the appropriate disposition of the case once it is determined that the state ground is adequate." *Id.* at 197-98.

49. 324 U.S. 117 (1945).

> that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[50]

Despite these hints of a constitutional source for the independent and adequate state grounds doctrine, the better view is that the doctrine is a self-imposed rule of judicial administration created by the Supreme Court.[51] The Court has the constitutional and statutory authority to review any state court decision that raises a federal question.[52] Thus, although the rule is often stated that the Court may not interfere with a decision based on an adequate state ground,[53] if a case raises a question within the Court's jurisdiction, the Court may examine any nonfederal ground upon which the lower decision may have rested to determine whether it is adequate to support the state court judgment.[54]

Not only has the Court never clearly identified the source of the independent and adequate state grounds rule, it has never clearly defined the circumstances in which it will find exceptions to this self-imposed restraint.[55] The Court recently acknowledged that the rules governing the application of the independent and adequate state grounds doctrine are often obscure: "[W]e openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue . . . ."[56] *Michigan v. Long* partially resolved the difficulty, holding that

---

50. *Id.* at 125-26 (citations omitted).

51. *See supra* note 48. *See also* M. REDISH, *supra note* 3, at 205 (adequate state ground doctrine is judicially established limitation).

52. U.S. CONST. art. III; 28 U.S.C. § 1257 (1982). *See Developments—State Constitutions, supra* note 48, at 1332.

53. *E.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Wood v. Chesborough, 228 U.S. 672, 677 (1913); Eustis v. Bolles, 150 U.S. 361, 366 (1893).

54. *See, e.g.*, Street v. New York, 394 U.S. 576, 583 (1969) ("The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which [the] Court is not bound by the decision of the state courts.").

55. *See* Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 111 & n.80 (1959) (To permit the Supreme Court to reexamine and revise a state ground of decision "would be unsettling one of the foundation stones in the existing structure of analysis of [the Court's] jurisdiction to review state-court judgments." To do so "really would put an end to the federal system as hitherto understood.").

56. Michigan v. Long, 463 U.S. 1032, 1038 (1983). Although Justice O'Connor in *Michigan v. Long* used the "avoidance of advisory opinions" language, she added that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* at 1041 n.6.

Supreme Court review of a state court decision is precluded when "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds . . . ."[57] The first question then is whether the state court clearly identified the state grounds as separate on "the face of the opinion."[58] The second issue is whether the state ground is a bona fide adequate ground for the decision. The disposition in *Michigan v. Long* turned only on the first question, since the Court found that the presumption in favor of Supreme Court review was not overcome through a clear statement of independent state grounds in the state court opinion.[59] Thus, although *Michigan v. Long* offers a more consistent approach to the question of how the Supreme Court will read state court opinions to find independent state grounds,[60] it left unanswered the much more difficult issue: when does the determination of a state law issue provide an "adequate" state ground when a federal question is also raised?

C. When Is a State Ground "Adequate"?

Perhaps because "questions of jurisdiction [are] questions of power

57. *Id.* at 1041.

58. *Id.*

59. *Id.* at 1043. *See id.* at 1042 n.8.

60. Justice O'Connor has emphasized the need for clear rules in a number of contexts. *See* Comment, *The Emerging Jurisprudence of Justice O'Connor,* 52 U. CHI. L. REV. 389, 396 n.18, 402 n.49 (1985), and the opinions cited therein.

Before the Court's enunciation in *Michigan v. Long* of its presumption favoring review of state court decisions, the question of the independence of the nonfederal ground from the federal ground was problematic only when the state court either issued no opinion, *see, e.g.,* Stembridge v. Georgia, 343 U.S. 541 (1952); Dixon v. Duffy, 342 U.S. 33 (1951); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934), or an ambiguous opinion, *see, e.g.,* Black v. Cutter Laboratories, 351 U.S. 292 (1956); Herb v. Pitcairn, 324 U.S. 117 (1945); Minnesota v. National Tea Co., 309 U.S. 551 (1940). Prior to *Michigan v. Long,* the Court often presumed that a decision rested on an adequate state ground if one were available. *See, e.g.,* Stembridge v. Georgia, 343 U.S. 541, 547-48 (1952); Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206, 212-13 (1938); Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54 (1934); Bachtel v. Wilson, 204 U.S. 36, 41-42 (1907); De Saussure v. Gaillard, 127 U.S. 216, 233-34 (1888); Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1871). *See also* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW 41 (4th ed. 1977). The Court fashioned several means to obtain enlightenment when state court decisions contained an incomplete or ambiguous record. *See, e.g.,* Herb v. Pitcairn, 324 U.S. 117 (1945) (on Court's own motion the petitioner ordered to obtain clarification from the state court); Minnesota v. National Tea Co., 309 U.S. 551 (1940) (judgment vacated and remanded for clarification). *See also* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 200-01 (1965) ("While the ambiguity of the opinion might normally lead us to dismiss the writ of certiorari as improvidently granted, we think the preferable course is to leave the way open for obtaining clarification from the California Supreme Court . . . ."). Although less true in recent decades, the Court frequently summarily dismissed appeals exhibiting ambiguous grounds of decision. *See, e.g.,* New York *ex rel.* Doyle v. Atwell, 261 U.S. 590 (1923); Johnson v. Risk, 137 U.S. 300 (1890). *See generally* Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision,* 62 COLUM. L. REV. 822, 835-48 (1962).

as between the United States and the several States,"[61] the Supreme Court has traditionally been reluctant to establish a definitive test for what constitutes adequate state grounds[62] and has directly examined the problem only infrequently.[63] When it does address the issue, the Court repeatedly insists that it applies "settled principles"[64] to determine the inadequacy of state grounds; but scholars examining the cases have been hard pressed to identify those principles.[65]

The underlying interest in finding a state ground adequate to support the judgment is the need to preclude Supreme Court review when review would unjustifiably intrude on the sovereignty of the state and the power of the state court to determine state law. The doctrine reaches its limit, however, when the federal interest is so important that it justifies the intrusion on state sovereignty.[66] This limit arises in two types of cases that present both state and federal issues. First, the state court decision may turn on a logically antecedent state issue that necessarily precludes reaching the federal issue.[67] In these cases, the antecedent state issue usually—but not necessarily— involves a failure to comply

61. 2 THE LIFE AND WRITINGS OF B.R. CURTIS 341 (Curtis ed. 1879); Sandalow, *supra* note 25, at 187.

62. *See supra* note 55; *cf.* M. REDISH, *supra* note 3, at 216-31 (discussing the numerous approaches, exceptions, and explanations for the adequate state grounds doctrine).

63. When confronted with an adequate state ground issue, the Court has frequently merely repeated conclusory language of an earlier case. *See* Hill, *supra* note 35, at 944; *cf.* Sandalow, *supra* note 25, at 188-89 (the independent state grounds doctrine of *Murdock* "has not been seriously questioned for nearly a century") (footnote omitted).

64. *See, e.g.,* Henry v. Mississippi, 379 U.S. 443, 452 (1965); Rogers v. Alabama, 192 U.S. 226, 230 (1904); Eustis v. Bolles, 150 U.S. 361, 366 (1893).

65. *See* Hill, *supra* note 35, at 944; Sandalow, *supra* note 25, at 196-97:

> [T]he Court's . . . curious insistence that the standard for determining adequacy stated in the opinion "will not inevitably lead to a plethora of attacks on the application of state procedural rules," [Henry v. Mississippi, 379 U.S. at 448 n.3] [is] a reassurance which would hardly have been necessary if the Court contemplated merely the application of "settled principles."

66. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The proposition of *Marbury*—that the Supreme Court is the ultimate arbiter of the constitutionality of federal statutes—requires the corollary conclusion that state court rulings on federal matters must also be subject to federal judicial review. P. HAY & R. ROTUNDA, *supra* note 6, at 204-05 (1982). In addition to the nationalizing interest served by the supremacy of federal law established in *Marbury* and *Martin v. Hunter's Lessee,* other interests may be served when the Supreme Court reviews state court decisions. In the context of antecedent state issues, the Court always faces the defeat of a federal claim and must balance the state's interest in the substance of the federal interest against the state procedural requirement or substantive determination that defeats the federal claim. *See, e.g.,* Henry v. Mississippi, 379 U.S. 443 (1965) (discussed *infra* notes 87-95 and accompanying text). When a separate "independent" state issue is the foundation of a state court decision involving a federal claim, the federal interest is not necessarily defeated, and the Court will examine whether the state court protection of the state interest exceeds the boundaries of the federally defined federal interest. *See infra* notes 97-107 and accompanying text.

67. *See, e.g.,* Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

with state procedural rules.[68] Whether the antecedent state ground insulates the federal issue from review depends on the nature of the state ground and the importance of the federal issue. Second, the state court may base its decision on state substantive grounds wholly separate from the federal issue presented. Here, the rationale for finding an independent state ground is often stated as the desire to avoid advisory opinions.[69] But notwithstanding the clarity of a state court opinion on the independence of its state court ruling, state law may be inadequate to supply an independent rule of decision—for instance, when federal constitutional violations are sanctioned on state grounds.

1. *Antecedent State Issues*

The federal Constitution provides a minimum threshold of protection to which every citizen is entitled, and a state cannot enforce its own laws when they conflict with the minimum protections guaranteed by federal law.[70] However, state procedural rules, such as statutes of limitation,[71] laches,[72] rules for perfecting appeal,[73] and rules of pleading,[74] may be legitimate prerequisites to the protection of federal rights.[75] When are these antecedent state grounds inadequate to preclude review of the federal issue? In *Davis v. Wechsler*[76] the Court recognized:

68. *See infra* note 89.

69. *See, e.g.,* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). *See also* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (advisory opinion justification for the doctrine has "no application where the state ground is purely procedural").

70. U.S. CONST. art. VI, cl. 2; *see, e.g.,* Kalb v. Feuerstein, 308 U.S. 433, 439 (1940) ("The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.").

71. *See, e.g.,* Elder v. Wood, 208 U.S. 226, 233 (1908); Johnson v. Risk, 137 U.S. 300, 307-09 (1890).

72. *See, e.g.,* Utley v. St. Petersburg, 292 U.S. 106, 111 (1934).

73. *See, e.g.,* Monger v. Florida, 405 U.S. 958 (1972), *denying cert. to* 249 So.2d 433 (Fla. 1971). *See also* Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978) (state supreme court may refuse to consider federal issue when petitioner failed to argue the federal issue in state trial court and appellate court as required by state procedural rule); New York Times v. Sullivan, 376 U.S. 254, 264 n.4 (1964) (Supreme Court review of due process objection to jurisdiction is foreclosed by ruling of the state court that petitioner failed to preserve its objection under state procedure when it entered a general appearance).

74. *See, e.g.,* Wilson v. Loew's, Inc., 355 U.S. 597, 598 (1958) (per curium); Ellis v. Dixon, 249 U.S. 458, 463-64 (1955).

75. In John v. Paullin, 231 U.S. 583 (1913), the Court stated:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and . . . practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

Id. at 585.

76. 263 U.S. 22 (1923).

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.[77]

Although this passage has often been cited as an explication of the adequacy principles, it fails to shed much light on the proper standard.[78] The Court has described an inadequate state ground as one which is "so unfair or unreasonable in its application to those asserting a federal right

---

77. *Id.* at 24-25. Before *Davis,* the Court in *Rogers v. Alabama,* 192 U.S. 226 (1904), had announced as a "necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." *Id.* at 230. The Court continued:

> It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. Jefferson Branch Bank v. Skelly, 1 Black 436, 443. But that is merely an illustration of a more general rule. On the same ground there can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement.

Id. at 230-31.

The Court in *Rogers v. Alabama* reversed an Alabama state court decision that had upheld the denial of a motion to quash an indictment for murder. The state court had ignored the Fourteenth Amendment equal protection claim of the defendant, who was black, and who alleged that blacks had been systematically excluded from the grand jury. *Id.* at 229. The state court had upheld the striking of the motion to quash, which was two pages long, under its state law power to strike "any pleading [that] is unnecessarily prolix." *Id.* at 230.

In *Lawrence v. State Tax Comm'n,* 286 U.S. 276 (1932), the Court stated:

> [T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis.

Id. at 282. As Professor Tribe has suggested, this reasoning indicates that the Supreme Court's constitutional authority to override state court barriers to its exercise of Article III jurisdiction does not derive from Article III, but from the substantive character of the claim asserted. L. TRIBE, *supra* note 6, at 123 (1978).

78. C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4027, at 741 (1977); Hill, *supra* note 35, at 944 (this passage from *Davis* "is quoted more often than any other as expressive of the applicable principle"). Some 20 years ago, Professor Hill blamed the general insufficiency of doctrinal development in this area partly on the fact that this passage from *Davis* "represents one of the fuller explications of the Supreme Court on the subject." *Id.* Notwithstanding the Court's effort in *Michigan v. Long,* discussed *supra* notes 56-61 and accompanying text, the last twenty years has seen little clarification of the standards of adequacy, despite the expansion of the use of independent state grounds by state courts, *see* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 502 (1977); Galie, *Judicial Activism Among State Supreme Courts,* 33 SYRACUSE L. REV. 731, 740 (1982); Wright, *In Praise of State Courts: Confessions of a Federal Judge,* 11 HASTINGS CONST. L.Q. 165, 181-88 (1984); *see generally Developments—State Constitutions, supra* note 48, at 1394-1408, 1442, 1459-63.

as to obstruct it,"[79] or "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent review of the decision upon the federal question."[80] The Court has found state grounds insufficient to deny the claim of a federal right when the procedural requirements imposed were inconsistent with previous state court holdings,[81] the record suggested intentional evasion by the state court of the federal claim,[82] and when the state court action "denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."[83]

However, the Court's willingness to decline jurisdiction is clearly not limited to cases in which a state intentionally evades federal rights or the proceeding itself is a denial of due process.[84] In *Williams v. Georgia,*[85] a discretionary state procedural rule allowed the state trial court to grant a motion for a new trial after the verdict. The trial court denied the motion and the Supreme Court concluded that the state court's refusal to exercise its discretion "is, in effect, an avoidance of the federal right."[86]

The Supreme Court in *Henry v. Mississippi*[87] reviewed a state court judgment which had affirmed a criminal conviction despite the introduction of evidence obtained through an illegal search. Defendant's counsel, who had failed to make a timely objection to the evidence as required by

79. Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 195 (1925).

80. Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917).

81. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). Underlying the Court's decision was the suspicion that the newly fashioned procedural rule employed by the Alabama court to defeat the federal right served no legitimate state interest and was designed to hinder the assertion of federally protected rights. *Id.* at 457, 466. *See also* James v. Kentucky, 466 U.S. 341, 348-49 (1984) (state distinction between jury admonitions and jury instructions "is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights."); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) (failure to comply with state procedural rule may constitute an independent and adequate state ground, but a state procedural rule is not adequate unless it is strictly or regularly followed); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (same).

82. *See, e.g.,* Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920); *see also* Nickel v. Cole, 256 U.S. 222, 225 (1921); Leathe v. Thomas, 207 U.S. 93, 99 (1907); Johnson v. Risk, 137 U.S. 300, 307 (1890).

83. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930).

84. Even in cases in which the state ground involves a procedural default that denies a litigant's fair opportunity to be heard on his federal claim, the Court has rarely invoked the Due Process Clause to support its holding. *See* L. TRIBE, *supra* note 6, at 124-25; Hill, *supra* note 35, at 959-60.

85. 349 U.S. 375 (1955).

86. *Id.* at 383. *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969) (notice requirement, "more properly deemed discretionary than jurisdictional, does not bar review . . . by certiorari"). *See also* Wolfe v. North Carolina, 364 U.S. 177, 191-92 (1960) (independent state procedural ground that bound state appellate court to evidence in the record and thus defeated the federal claim held valid as a nondiscretionary state rule).

87. 379 U.S. 443 (1965).

state law, instead had waited until the end of trial and then requested a directed verdict.[88] The Supreme Court stated that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest."[89] The Court found that although the contemporaneous objection rule "clearly does serve a legitimate state interest" to avoid delay in the case, that interest was equally well served by allowing the objection at the end of trial.[90] In effect, the Court balanced the federal and state interests and found that the state interests could be substantially served through a procedure less prejudicial to the assertion of the federal claim.[91]

Henry v. Mississippi portended an increase in the Supreme Court's scrutiny of state procedures affecting the assertion of federal claims.[92] Although this generally has not proven to be the case,[93] one commenta-

---

88. *Id.* at 444-46.

89. *Id.* at 447. The Court distinguished adequacy of procedural grounds from adequacy of state substantive grounds. *Id.* This distinction has been criticized as a "patent analytical defect." Wechsler, *supra* note 31, at 1054:

> State court rulings on substantive state questions obviously may prevent "the implementation" of a federal right no less than state procedural determinations, witness the title issue in the *Hunter* case, the contract issue when impairment is asserted, the property issue when a deprivation without due process is claimed . . . . [T]he point is simply that the existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law.

Id. Indeed, the Court has acknowledged this very point. *See* Rogers v. Alabama, 192 U.S. 226, 230-31 (1904) (discussed *supra* note 77). *See also* Sandalow, *supra* note 25, at 197 (arguing that both state procedural and substantive law determinations may defeat a federal right and in either case the Supreme Court must determine for itself whether a federal right has actually been violated).

90. 379 U.S. at 448-49. Because the Court found it unclear whether the accused had deliberately waived his objection to the evidence, it vacated the conviction and remanded for a rehearing on that issue. *Id.* at 446.

91. For a discussion of this balancing test prior to its application in *Henry v. Mississippi,* see Note, *supra* note 48, at 1388-91 (1961).

92. *See* L. TRIBE, *supra* note 6, at 127.

93. *See* Wechsler, *supra* note 89, at 1055 ("The decisions . . . [since *Henry*] do not dispel the possibility that [*Henry*] is merely being treated with intelligent neglect."). *See also* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 98 (2d ed. 1983). *But see* Monger v. Florida, 405 U.S. 958, 962 (1972) (Douglas, J., dissenting from denial of certiorari, joined by Brennan & Stewart, JJ.) (urging acceptance of certiorari and reversal of state court decision as inadequate ground to bar federal claim).

The Burger Court has been criticized for using jurisdictional doctrines selectively to nullify what some commentators view as states' attempts to increase state constitutional protections of individual rights in an era in which federal protections are being restricted. *See* Nichol, *An Activism of Ambivalence* (Book Review), 98 HARV. L. REV. 315 (1984). However, much of this criticism has been directed at the Court's majority for finding that a state court decision was not placed on independent state grounds, not that clearly stated independent grounds were inadequate. *See* Michigan v. Long, 463 U.S. at 1054 (Blackmun, J., concurring in part); 463 U.S. at 1065-72 (Stevens, J., dissenting); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions,* 71 VA. L.

tor has asserted that there is no reason to believe that *Henry*'s "legitimate state interest" test has been abandoned.[94] It should be remembered, however, that the court in *Henry* found a legitimate state interest in the state ground, but applied a least restrictive means test.[95] At least in this aspect, *Henry* has no apparent progeny.[96]

2. *Independent Substantive State Grounds*

If the state ground relied upon is not antecedent to the federal right, but independent of it, the adequacy analysis necessarily differs. If the proceeding raises both state and federal issues wholly independent from each other, and the state court upholds the federal right, the Supreme Court should not review the decision, even if it would have decided the state issue differently, or even if it disagrees with the reasoning used by the state court to uphold the federal right. In this way the state court may use a state ground to expand a federally guaranteed right beyond the limits of the federal right.[97] However, a state court may not defeat a federally guaranteed right by upholding a right independently guaranteed under state law.

For example, in *Pruneyard Shopping Center v. Robins*,[98] shopping

---

REV. 625, 648 n.125 (1985); Comment, *Michigan v. Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision,* 69 IOWA L. REV. 1081 (1984).

94. M. REDISH, *supra* note 3, at 231.

95. 379 U.S. at 448.

96. Although the Court has infrequently addressed the independent and adequate state ground problem since its decision in *Henry,* M. REDISH, *supra* note 3, at 231, several cases have failed to cite *Henry* when a broad reading of *Henry* would have indicated opposite results. *See* Monger v. Florida, 405 U.S. 958 (1972), *denying cert. to* 249 So.2d 433 (Fla. 1971) (holding state ground adequate when state supreme court dismissed defendent's appeal as improperly taken because it was filed before entry of written judgment although after oral pronouncement); Parker v. North Carolina, 397 U.S. 790 (1970) (holding state ground adequate when defendent failed to object to grand jury compostion prior to entry of guily plea, as required by state rule); Johnson v. New Jersy, 384 U.S. 719 (1966) (holding state rule precluding reconsideration of issue adjudicated in prior litigation adequate to bar that issue on Supreme Court review of state post-conviction proceedings). Other post-*Henry* cases have failed to cite it when it would have supported the decision. *See* Parrot v. Talahassee, 381 U.S. 129 (1965) (failure to obtain certification of lower court record for review in higher state court held not an adequate state ground); Douglas v. Alabama, 380 U.S. 415 (1965) (failure to continuously raise objection already rejected to prosecution's piecemeal reading of an accomplice's confession not an adequate state ground). *But see* Camp v. Arkansas, 404 U.S. 69 (1971) (per curium) (citing *Henry* and holding that failure to object until state court appeal was not a procedural default that would bar Supreme Court review of the constitutional claim). *Henry* has been cited for the more narrow proposition that the asserted state ground would "further no perceivable state interest." James v. Kentucky, 466 U.S. 341, 349 (1984).

97. Independent state constitutional protections do not always mean that the federal protection will be expanded. *See Developments—State Constitutions, supra* note 48, at 1404-08, 1411-16.

98. 447 U.S. 74 (1980).

center owners challenged a California decision[99] which had held that state freedom of speech guarantees included the right to petition at privately owned shopping centers. Pruneyard asserted that the new California constitutional right to free speech at shopping centers violated the owners' federal property rights under the Fifth and Fourteenth Amendments as well as their federal free speech rights under the First and Fourteenth Amendments.[100]

The Supreme Court rejected these arguments and affirmed the California judgment.[101] The Court distinguished *Lloyd Corp. v. Tanner:*[102] "In *Lloyd* . . . there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here."[103] In effect, the Supreme Court held that although the federal Constitution does not guarantee a free speech right on privately owned shopping centers, it does not prohibit a state constitution or statute from doing so. The Supreme Court's exercise of jurisdiction in

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

100. 447 U.S. at 76-77. An earlier California decision, Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974), had interpreted the state constitutional provision as consistent with the United States Supreme Court determination that private property interests of shopping center owners outweighed federal first amendment rights. *Id.* at 335, 521 P.2d at 463, 113 Cal. Rptr. at 471 (citing Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)). Despite the similar nature of the activity—freedom of expression— protected by both the California and the federal constitutions, the content of their respective protections differs substantially. 11 Cal. 3d at 337-38, 521 P.2d at 465, 113 Cal. Rptr. at 473 (Mosk, J., dissenting). The California court acknowledged this difference when it overruled *Diamond* in Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). The difference is rooted in the text of the two documents. The federal Constitution is a limit on governmental action abridging freedom of expression, U.S. CONST. amend. I, while the California guarantee protects its reasonable exercise by an individual, CAL. CONST. art. I, § 2 (a). Thus, unlike *Lloyd,* it was unnecessary to argue in *Robins* that the privately owned shopping center had replaced a traditionally public function to invoke the California constitutional protection. *Compare* Laguna Publishing Co. v. Golden West Publishing Corp., 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1980) (giving publisher right of access to private residential community for distribution of its uninvited complimentary newspaper when another newspaper has access by permission) *with* Marsh v. Alabama, 326 U.S. 501 (1946) (First Amendment protects freedom of speech on streets of privately owned company town because town had become the functional equivalent of a public municipality). For a survey of textual differences of free speech protections found in state constitutions and the federal Constitution, see *Developments—State Constitutions, supra* note 48, at 1398-1401.

101. 447 U.S. at 75-76. In an age in which unanimity among United States Supreme Court Justices has become an infrequent occurrence, all nine Justices voted to affirm. Justice Rehnquist's majority opinion was joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, and Stevens, joined in pertinent part by Justice Blackmun, and joined in part by Justices White and Powell. *Id.* at 74.

102. 407 U.S. 551 (1972) (finding no First Amendment guarantee to exercise freedom of speech at privately owned shopping center).

103. 447 U.S. at 81.

Pruneyard was permissible under the adequate and independent state grounds doctrine because the Court was examining whether the extension of the plaintiff's rights under California law violated the defendant's federal rights.[104] In fact, the Court could have agreed with the defendant and reversed the California judgment without violating the independent and adequate state grounds doctrine.[105]

Would the result have changed if *Lloyd* had upheld a first amendment right on privately owned shopping centers, and the California court had upheld a state property right to exclude those who wished to exercise their federal right on a privately owned shopping center? In this case state property rights would be limited by federal first amendment rights.[106] Despite the independence of the state property rights, the state court decision would require defining the federally imposed limits of the right, which is never an adequate state ground.

Thus, the independent and adequate state ground doctrine is limited in two kinds of cases: First, if the federal right is defeated by a decision on an antecedent state issue, the Court will examine the method by which the state court made the determination. If the method is without fair or substantial support or if the substantive federal interest so outweighs the state's purpose in the application of its procedure, the state ground is inadequate and the Court will determine the federal issue on the merits. Second, if the state ground is independent of the federal claim, the Court will review the state decision if upholding the state right lessens the protection of the federal right beneath the federal constitutional minimum. In effect, this determination involves a balancing of the strength of the federal guarantee with both the substance of the state limitation and the interest of maintaining state autonomy in the federal system.[107] Defining the scope of federal guarantees can never be beyond

---

104. No jurisdictional objection was raised.

105. In *Robins,* the California court could have found that although federal protections of property rights were not violated, state protections were. *See* Collins, *Reliance on State Constitutions—Away From a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1, 9 (1981). In effect, the holding would be that although the state protects the right of free expression on private property, to allow it in this instance would violate state guaranteed property rights. Thus, the decision of the state court would reach the same result as *Lloyd,* but for entirely different reasons. Because the state court decision would extend the plaintiff's corollary first amendment right beyond its federal floor but the state limitation is at least coextensive with the corollary federal ceiling, no federal right would be denied by the state court judgment.

106. For a discussion in somewhat different terminology of state limits on federal protections of freedom of expression, see *Developments—State Constitutions, supra* note 48, at 1411-18.

107. The Supreme Court's holding in *Pruneyard* could be restated as follows: Although the Court will not in most instances extend the right of free speech to include its exercise in violation of the property rights of shopping center owners, neither will it extend those property rights to prohibit the exercise of freedom of speech when that freedom is guaranteed by a state law source. Merely because the Constitution protects an interest—in this instance a property interest—does not mean that that interest cannot be overcome by another interest subject to

Supreme Court jurisdiction.

III. Does the Independent and Adequate State Grounds Doctrine Apply to State Decisions Involving Article V?

Cases involving Article V present several unique problems for the independent and adequate state grounds doctrine. First, if, as in *Uhler* and *Harper*, the state decision has the effect of invalidating a step in the Article V amendment process, does the state court's remedy deny a constitutionally guaranteed right? This requires an examination of the scope of the right guaranteed by Article V. If the state judgment denies a claim of an Article V guarantee, the independent state grounds doctrine is inapplicable unless (1) the state determination is on an antecedent state ground that serves a legitimate state purpose or (2) the determination on the independent state issue is not in conflict with the boundaries of federal protection. The state decisions in *Uhler* and *Harper* certainly were not placed on antecedent state issues. Unlike the decisions in *NAACP v. Alabama ex rel. Patterson* and *Henry v. Mississippi*, which did not reach the federal issue because of the failure to follow state procedural rules,[108] the California and Montana courts ruled that the state initiatives violated state constitutional provisions wholly independent of Article V. Accordingly, only the independent state issue analysis of adequacy is involved in *Uhler* and *Harper*.

Second, even if a state court decision is placed on state grounds that do not abridge the federally guaranteed right, independent state grounds in the context of Article V litigation requires an additional examination: is the amendatory power guaranteed by Article V a power reserved by the states under the Tenth Amendment as part of state sovereignty, or one delegated to them by Article V itself? If the sole source of authority to participate in the Article V amendment process flows from the Constitution to a state by virtue of the state's explicitly subordinate function as a member of the United States,[109] the state retains no sovereign authority to limit that amendatory power on an "independent" state basis.

state law protection. *But see* Comment, *California Diminishes Federally Protected Constitutional Rights—Robins v. Pruneyard Shopping Center*, 2 WHITTIER L. REV. 423, 435-39 (1980), arguing that the California court impermissibly diminished federally guaranteed property rights in violation of the Supremacy Clause. This argument is valid only if the California court had attempted to insulate its decision by way of the independent state grounds doctrine. Because the United States Supreme Court had the final say on the extent of the federal protection, no Supremacy Clause problem is presented.

108. *See supra* notes 81, 87-91 and accompanying text.

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

A. The "Adequate Grounds" Requirement: Was a Federal Right Abridged?

Article V provides a two-step amendment process: one for proposing amendments and one for ratifying them.[110] The Applications Clause of Article V gives two alternate but parallel[111] means of proposing amendments: (1) upon the assent of two-thirds of both houses of Congress; or (2) by convention called "on the Application of the Legislatures of two-thirds of the several States."[112]

Madison defended the proposed amendment process of Article V in *The Federalist*: "That useful alterations will be suggested by experience, could not but be foreseen. . . . [Article V] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[113] This captures the tension of Article V and reveals the difficulty in defining its "guarantee." On one hand, the Framers were concerned to avoid the problems of the Articles of Confederation, under which the states retained a paralyzing veto power.[114] On the other hand, the Framers also understood that without proper procedural barriers to new amendments, the Constitution could become an ineffective repository of transient political whims that could not guide the principles of law for the nation.[115] Thus the procedural restrictions on the amendment process

---

110. *See supra* note 14.

111. Madison voiced the parallel nature of the Applications Clause in the *Federalist Papers*: "Article V, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other." THE FEDERALIST No. 43, at 286 (J. Madison) (Bicentennial ed. 1976). *But see* Gunther, *Constitutional Brinksmanship: Stumbling Toward a Convention,* 65 A.B.A. J. 1046, 1047 (1979).

112. U.S. CONST. art. V.

113. THE FEDERALIST No. 43, at 286 (J. Madison) (Bicentennial ed. 1976).

114. ARTICLES OF CONFEDERATION art. XIII provided: "[N]or shall any alteration at any time hereafter be made in [these Articles] . . . unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State."

One of the drafters of the Constitution, Charles Pinckney, condemned the veto power of the states under the Articles of Confederation:

> [I]t is to this unanimous consent, the depressed situation of the Union is undoubtedly owing. Had the measures recommended by Congress and assented to, some of them by eleven and others by twelve of the States, been carried into execution, how different would have been the complexion of Public Affairs? To this weak, this absurd part of the Government, may all our distresses be fairly attributed.

Pinckney, *Observations on the Plan of Government submitted to the Federal Convention, reprinted in* 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 120-21 (1911).

115. *See* Mathias, *What's the Constitution Among Friends?,* 67 A.B.A. J. 861, 862 (1981). Since the adoption of the Constitution in 1787, over 10,000 resolutions to amend the Constitution have been introduced in the Congress and over 400 applications have been submitted by the states for constitutional conventions. *Id.* Of course, only 26 of those resolutions were successful, and no constitutional convention has been called. Those zealous for change by

are part of the federal right guaranteed by Article V.

In *AFL-CIO v. Eu* and *Harper*, the state courts sought to determine the content of the Article V guarantee. The California Supreme Court in *AFL-CIO v. Eu* ruled on whether the word "Legislature" in the Applications Clause of Article V (1) encompasses the voters of a state acting under their initiative power and (2) includes a legislature compelled to act by reason of a state initiative resolution. As Justice Rehnquist noted, "[t]hese federal questions are important and by no means settled . . . ."[116] Yet he concluded that because an independent state ground could be found, no "substantial federal question" was raised.[117] In effect, this conclusion means that although the Supreme Court has not yet spoken on many important questions raised by Article V,[118] state courts may prevent it from doing so through the use of independent state grounds. Yet the doctrine of independent state grounds should not lead to this result: the determination of guarantees of Article V should never be beyond Supreme Court review.[119]

---

amendment are seemingly undaunted by the statistical rate of failure of previous efforts. In the first four months of the 97th Congress alone, 144 constitutional amendment resolutions were offered. *Id.* at 863.

116. Uhler v. AFL-CIO, 105 S. Ct. at 6 (Rehnquist, J., in chambers), *denying stay sub nom.* AFL-CIO v. Eu, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89.

117. *Id.*

118. Problems of Article V range from what constitutes a valid application to Congress to what powers a convention would have if convened. *See* Dellinger, *Con Con Con,* The New Republic, April 7, 1986, at 10; Dellinger, *The Recurring Question of the "Limited" Convention,* 99 YALE L.J. 1623 (1979); Gunther, *Constitutional Brinksmanship: Stumbling Toward a Convention,* 65 A.B.A. J. 1046 (1979); Noonan, *The Convention Method of Constitutional Amendment— Its Meaning, Usefulness, and Wisdom,* 10 PAC. L.J. 641 (1979); Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment,* 10 PAC. L.J. 627 (1979); Van Alstyn, *The Limited Constitutional Convention: The Recurring Answer,* 1979 DUKE L.J. 985.

Petitioners in *Uhler* argued that the Supreme Court has no role to play in adjudicating Article V questions because they are nonjusticiable. 105 S. Ct. at 6. This argument relies upon the plurality decision in Coleman v. Miller, 307 U.S. 433 (1939), in which the Court held that the time within which a state may ratify a proposed amendment is a political question better decided by Congress. In broad dictum four Justices asserted that "[t]he [amending] process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point." *Id.* at 459 (Black, J., concurring, joined by Roberts, Frankfurter, and Douglas, J.J.). Justice Rehnquist rejected petitioners expansive reading of the politcal question doctrine, which did not command a majority in *Coleman* and would not be likely to do so today. 105 S. Ct. at 6. Other Courts and commentators have reached the same conclusion as Justice Rehnquist. *See* AFL-CIO v. Eu, 36 Cal. 3d at 698, 669 P.2d at 616, 206 Cal. Rptr. at 96, citing Idaho v. Freeman, 529 F. Supp. 1107 (D. Id. 1981), *vacated as moot,* 459 U.S. 809 (1982); Dyer v. Blair, 390 F. Supp. 1291, 1300-03 (N.D. Ill. 1975); Note, *Good Intention, New Inventions, and Article V Constitutional Conventions,* 58 TEX. L. REV. 131, 158-62 (1979).

119. *See, e.g.,* Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920); *see also* Nickel v. Cole, 256 U.S. 222, 225 (1921); Leathe v. Thomas, 207 U.S. 93, 99 (1907); Johnson v. Risk, 137 U.S. 300, 307 (1890).

The right of amendment is perhaps the most fundamental of all rights guaranteed by the Constitution.[120] Without it, many of what we regard as our traditions of liberty would find no textual constitutional foundation. Changing the language of the Constitution is at the same time a check on the judiciary, which interprets it, and an alteration of the fundamental principles that guide our rule of law. The interest in uniformity in the validity of applications is certainly as great as that interest in the context of ratification. Indeed, confusion over what constitutes a valid application is not merely hypothetical,[121] and without Supreme Court review, that confusion would possibly be endless. As Judge Wisdom has pointed out: "Although the substantive source of civil rights and civil liberties lies preeminently in article V of the Constitution, the first eight amendments, and the Civil War amendments, the predicate for enforcement of constitutional rights lies in Madison's foresight in insisting on a judiciary that would exercise a federalizing function as well as a dispute settling function."[122] Although a state retains the power to determine its own political processes, that power is limited by the need for uniformity in the federal amendment process, which requires priority over state interests.

B. Can Article V Decisions Ever Be Placed on State Grounds?

An additional problem arises when Article V decisions are analyzed within the traditional independent state grounds doctrine. The central issue that a state court faces in Article V litigation is whether Article V is subject to state law limitations. Can a state court judgment on an Article V issue ever be placed on an independent state ground when the state's role in the Article V process is itself a *federal* function?

According to the view expressed in *Uhler,* the Supreme Court would not review the state decision regardless of the state determination of the federal issue. But what if the California court had decided the federal issue differently—ruling that the term "Legislature" in Article V does include action by initiative—yet reached the same judgment because it invalidated the initiative on state grounds. Further, assume the Montana court had upheld the claimed federal right of application for amendment by initiative and had not found an adequate state basis for prohibiting placement of the initiative on the state ballot. California state law would prohibit Californians from petitioning Congress under Article V by initi-

120. *See* Wisdom, *supra* note 2, at 1077.

121. By the time *AFL-CIO v. Eu* was decided by the California court, 32 of the required 34 states had submitted applications to the Congress to convene a constitutional convention to consider an amendment requiring a balanced federal budget. 36 Cal. 3d at 692, 686 P.2d at 612, 206 Cal. Rptr. at 91. These applications are far from uniform, and whether each is valid is subject to controversy. *See* Dellinger, *Con Con Con, supra* note 118, at 10-11; Note, *Is This Any Way to Amend the Constitution,* 22 ARIZ. L. REV. 1011, 1017-20 (1980).

122. Wisdom, *supra* note 2, at 1077.

ative, while Montanans would be allowed to do so. The inconsistent judgments seem difficult to justify. Although it may be proper, for instance, for California state law to allow petitioners a right of free expression on California's privately owned shopping centers while Montana denies similar access to its malls,[123] this inconsistency seems peculiar when applied to the right of amendment of the federal Constitution.

States retain the power to legislate and adjudicate by virtue of their sovereign status in the federal system.[124] The Tenth Amendment, which reserves to the states and to the people the powers not delegated by the Constitution to the federal government, only elevated to explicit constitutional status the principle of dual sovereignty already implicit in the federal system created by the Constitution.[125] Within this dual system are powers delegated exclusively to the federal government, powers reserved exclusively to the states, and powers shared by both the states and the federal government.[126] The power created under Article V is unique in that action by the states is required to amend the federal Constitution, but the power to amend is not within the sovereign power reserved to the states. It is a delegated federal function.[127] Although the Court has never squarely ruled on the nature of the Applications Clause power of Article V, both logic and policy indicate its exclusive federal nature.

This understanding is reflected in several analogous decisions involving the Ratification Clause. The Supreme Court rejected a Tenth Amendment argument in *Hawke v. Smith,* which reversed an Ohio Supreme Court decision that upheld state procedural obstacles to ratification of the Eighteenth Amendment.[128] The Ohio Constitution required ratification of a proposed amendment to the federal Constitution by both the state general assembly and by referendum.[129] Although the Amendment had already been ratified by the state legislature, the Ohio

---

123. *See supra* notes 98-106 and accompanying text.

124. Although the Tenth Amendment is the most explicit statement of the independent sovereignty of the states, the Constitution as a whole presupposes the states' independent and sovereign existence. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) ("The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve.")

125. *See* United States v. Darby, 312 U.S. 100, 123-24 (1941) (the Tenth Amendment "states but a truism . . . .").

126. The precise determination of which powers are exclusive to the federal government and the states, respectively, remains an unsettled question. *Compare* Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985) *with id.* at 1033 (Rehnquist, J., dissenting) *and* National League of Cities v. Usery, 426 U.S. 833 (1976). For a discussion of the "checkered career" of the Tenth Amendment, see Wisdom, *supra* note 2, at 1070 n.24. *See generally* L. TRIBE, CONSTITUTIONAL CHOICES 121-37 (1985).

127. *See infra* notes 129-137 and accompanying text.

128. 253 U.S. 221 (1920), *rev'g* 100 Ohio St. 385, 126 N.E. 400 (1919). The Court also rejected identical objections to the validity of the Nineteenth Amendment. Hawke v. Smith (No. 2), 253 U.S. 231 (1920).

129. 253 U.S. at 225.

court interpreted "Legislature" in Article V to include ratification by referenda and affirmed a dismissal of an injunction to prevent the state from submitting a referendum to the electorate.[130]

The Supreme Court not only held that the Ohio court had misinterpreted Article V, it also ruled that Article V creates an exclusively federal power: "[T]he power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."[131] The Court rejected the Ohio court's view that under the Tenth Amendment a state retains the power "to determine for itself its own political machinery and its own domestic policies"[132] when used to carry out the federal ratification function given by Article V.[133] "Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states."[134]

In *Leser v. Garnett*[135] the Supreme Court rejected the claim that state constitutions can override the federal amendatory power. State voters sued to require the Maryland Board of Registry to strike the names of women from the register of voters on the grounds that the state constitution limited suffrage to men and that the Nineteenth Amendment had not been validly adopted by several of the ratifying states. The Court held that the Maryland Constitution could not affect the validity of a federal constitutional provision.[136] The Court then addressed the contention that the Nineteenth Amendment had not been validly ratified because several state constitutional provisions or procedural restrictions allegedly rendered the ratifications inoperative: "[T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[137]

That these cases addressed the Ratification Clause and not the Applications Clause is not a distinguishing fact. Just as the power to ratify proposed amendments finds its source in the federal Constitution, so too does the power to propose amendments. The ratification function of a state is federal; the proposing function of Congress is federal; and the application function of a state is federal. When a state participates in the

130. 100 Ohio St. at 385, 390, 126 N.E. at 400, 402.
131. 253 U.S. at 230.
132. 100 Ohio St. at 388, 126 N.E. at 403 (Wanamaker, J., concurring).
133. 253 U.S. at 230.
134. *Id.*
135. 258 U.S. 130 (1922).
136. *Id.* at 136.
137. *Id.* at 137. *See also* The National Prohibition Cases, 253 U.S. 350, 386 (1920).

amendment of the Consitution, it acts to bind all citizens of the United States, not just those within its authority as a sovereign. It derives this power from the federal union itself.

Neither *Hawke v. Smith* nor *Leser v. Garnett* explicitly raised the question of independent and adequate state grounds, but it is inconceivable that these cases would have been decided differently if the state courts had placed their decisions on independent state grounds. If the amendment process of Article V is an exclusively "federal function . . . [which] transcends any limitations sought to be imposed by the people of a State,"[138] then only federal law may supply the rule of decision.

Conclusion

Conflict between state and national sovereignty may never be resolved in a system that constitutionally protects both. The Framers, knowing the failure of the "classic federalism"[139] of the Articles of Confederation, which gave complete sovereignty to the states, sought to create a new system of federalism. No one understood this better than Madison:

> The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.[140]

The independent and adequate state grounds doctrine is the logical extension of the unique United States system of federalism. Unbridled United States Supreme Court review of state court decisions of state law would mock independent state authority. Contrary to the implication of some Supreme Court opinions, however, the doctrine of independent and

138. 258 U.S. at 137.

139. Wisdom, *supra* note 2, at 1075.

140. THE FEDERALIST NO. 39, at 250 (J. Madison) (Bicentennial ed. 1976). Madison stated that if the amendment power were wholly national in character, the majority of the citizens of the Union would hold ultimate authority, which could be exercised to alter or abolish the government itself. Were it wholly federal, on the other hand, each state would hold a veto power.

> The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances toward the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character.

Id. at 249-50 (emphasis in original). Article V accomplished this purpose by delegating to the states as states a necesssary role in the amendment process.

adequate state grounds is not constitutionally compelled. The Court has recognized several circumstances in which it will overcome its self-imposed jurisdictional limitation and review state court decisions. If a state court finding on a state law issue necessarily defeats the claimed federal right, the Court will examine whether the state court finding is supported by a legitimate state interest sufficient to defeat the federal right. If the state court rests its decision on a wholly separate issue of state law, the Court will not review the decision unless the state remedy abridges a federally guaranteed right.

Article V presents unique problems for the independent and adequate state grounds doctrine. Its guarantee—the freedom to amend the Constitution, but not too freely—is not easily defined. Moreover, as Madison recognized, the amendment process under Article V has a peculiar status within our federal system. It is not wholly within the power of the Congress, since action by the states is required. But neither is it wholly within the power of the states. The states' function in the amendment process transcends limitations imposed by the states[141] because such limitations are beyond their sovereign power. Thus, an asserted state ground can never be independent and adequate to insulate a state court judgment in an Article V decision from Supreme Court review.

*By David W. Thill**

141. In *Uhler,* Justice Rehnquist expressed the concern that acceptance of petitioner's "political question" argument would mean

> that courts . . . would be powerless to prevent the placing on the ballot of initiative measures designed to play a part in the process of amending the United States Constitution even though such initiative proposals clearly did not comply with State requirements as to the necessary number of signatures, time of filing, and the like.

105 S. Ct. at 6. Declining review for nonjusticiability of at least the type of Article V issues presented in *Uhler* and *Harper* is unlikely, and Jusitce Rehnquist's reasoning is valid. *See supra* note 118. However, the same reasoning does not apply to the recognition of Article V as an exception to the independent and adequate state grounds doctrine. The Supreme Court, when faced with a challenge to a state court judgment involving an Article V issue may always decline to review for lack of a "substantial federal question." *See supra* note 31. This is much different from stating that a Supreme Court review would be an inappropriate venture into the realm of advisory opinions that could not affect the outcome of the case. Justice Rehnquist's language in *Uhler* implies that because of the adequate state grounds doctrine, the Supreme Court is without jurisdiction to hear the case. However, when a case fails to present a substantial federal question, the Court declines plenary review despite satisfaction of the jurisdictional requirements. *See* Note, *supra* note 31, at 750.

* Member third year class.