ARTICLE

Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments

By ROBERT C. WELSH*

Introduction

An enduring theme of the Burger Court's approach to civil liberties has been insulating state judicial and political processes from what a majority of the Justices regard as unwarranted intermeddling by federal courts. In marked contrast to the centralizing tendencies of the civil liberties revolution inaugurated by the Warren Court, the current majority has limited the ability of state civil liberties claimants to gain access to federal tribunals for the vindication of their constitutional rights. Under the banner of "Our Federalism,"[1] federal courts have been barred from interfering with pending state criminal[2] and civil[3] proceedings; door closing techniques such as the requirement of exhausting available state remedies have been strictly applied;[4] and the availability of habeas corpus review has been significantly curtailed.[5]

Ironically, at the same time that the Burger Court has invoked the tenets of federalism and state autonomy to close federal courthouse doors to state civil liberties claimants, it has flung those doors wide

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1. Younger v. Harris, 401 U.S. 37, 44 (1971).

2. *See* Hicks v. Miranda, 422 U.S. 592 (1975); Samuels v. Mackell, 401 U.S. 66 (1971).

3. *See* Judice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue Ltd., 420 U.S. 592 (1975).

4. *See* Rose v. Lundy, 455 U.S. 509 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); Braden v. Thirtieth Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

5. *See* Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976).

open for prosecutors and other state officials complaining that state courts have adopted overly expansive interpretations of Bill of Rights guarantees. Given the tensions between the Supreme Court and state courts during the Warren era,[6] one might have assumed that the willingness of many state courts to actively protect individual rights would finally end the twenty year struggle over the course of civil liberties decisionmaking. Yet the struggle continues. Only the sides have changed. Instead of reversing state judgments because they fall below minimum federal requirements,[7] the Court now regularly upsets state court decisions because too much protection has been afforded individuals in the name of the Bill of Rights. For the first time in modern civil liberties history, the Bill of Rights is being used by the Supreme Court to police the "outer limits" of state court civil liberties decisionmaking.

The increasing frequency with which expansive state civil liberties judgments are being subject to review and reversal belies the Burger Court's oft-repeated allegiance to a principled conception of federalism and decentralized decisionmaking. The values of decentralization, state experimentation, and local autonomy are also jeopardized when state court decisions extending more than the absolute "minimum" are overturned. This is especially true during a period when state courts are beginning to develop a separate body of rules and principles protecting individual rights under their state constitutions.

The renewed interest in state constitutional law represents a sharp departure from the recent past.[8] State bills of rights were one of the

6. *See* 1958 REPORT OF THE CONFERENCE OF STATE CHIEF JUSTICES, which declared that "the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint." *Quoted in* W. MURPHY & C. PRITCHETT, COURTS, JUDGES AND POLITICS 619 (1961).

7. The use of the term "minimum" may be somewhat confusing. Supreme Court decisions interpreting the Bill of Rights establish the constitutional minimum in the sense that state courts, although forbidden from affording less than the Court has decreed, are free to provide greater protection under the state constitution. This is different from saying that Supreme Court standards are "minimums" in the sense that they afford no more than "those minimal historic safeguards for securing trial by reason . . . and below which we reach what is really trial by force." McNabb v. United States, 318 U.S. 332, 340 (1943). Justice Frankfurter's *McNabb* opinion is a vivid reminder that as recently as four decades ago, the Court thought about federal "minimums" in the latter sense of the term. "Minimums" is used in this Article in the first sense.

8. The literature on state constitutional law has grown dramatically during the past decade. For a collection of recent articles on the subject, see Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 957, 972-74 (1982); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328 n.20 (1982); and the column on state constitutional law by Ronald K.L. Collins which is a regular feature of the *National Law Journal.*

major casualties of the incorporation of the Bill of Rights. "The federalization of all our rights," remarked Vermont Supreme Court Justice Charles Douglas, "has led to a rapid withering of the development of state decisions based upon state constitutional provisions."[9] One can hardly expect state judges, who for the past two decades have thought about civil liberties almost exclusively in terms of Supreme Court interpretations of the Bill of Rights, to forsake overnight the immense body of federal precedent and begin deciding cases solely on the basis of their own long neglected state constitutional guarantees. Given the rather underdeveloped condition of state civil liberties law, it is understandable that state judges—despite the formal independence they enjoy under the adequate state ground doctrine[10]—continue to look to the Bill of Rights for inspiration and guidance.

Whether state courts are truly capable of assuming the role of "frontier agent[s] of American reform"[11] remains to be seen. But one thing appears certain: independent state civil liberties decisionmaking in the post-incorporation era must, of necessity, be innovative decisionmaking,[12] and the only way innovation will take place is if state courts are permitted to expand individual rights free from the constraining oversight of federal judicial review. The reticence of many state judges to question restrictive Supreme Court civil liberties rulings[13] means that the impact of federal review and reversal will often be to thwart the process of independent state constitutional decisionmaking. Even when state judges do not feel constrained as a matter of judicial propriety from openly departing from operative Supreme Court rulings, they may find themselves constrained politically. Innovative state courts, such as the California Supreme Court,[14] are already under political attack by conservative groups that oppose the expansion of rights for various groups.[15] State courts generally do not enjoy the same degree of

9. Douglas, *State Judicial Activisim—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1140 (1978).

10. *See infra* text accompanying notes 64-88.

11. Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1199 (1971).

12. For a discussion of the impact of incorporation on Supreme Court/state court relations, see *infra* text accompanying notes 210-41.

13. *See, e.g.*, People v. Norman, 112 Cal. Rptr. 43, 48-49 (1974), *vacated*, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975); People v. Level, 117 Cal. App. 3d 462, 172 Cal. Rptr. 904 (1981); State v. Jackson, 672 P.2d 255 (Mont. 1983).

14. For a recent assessment of the California Supreme Court, see P. STOLZ, JUDGING JUDGES (1981), and *infra* notes 146-48.

15. For a discussion of the political attack launched by conservatives against the California Supreme Court, see Ellis, *Judges and Politics: Accountability and Independence in an Election Year*, 12 N.M.L. REV. 873 (1982); Kleps, *Can Our Supreme Court Survive?*, L.A.

institutional independence as their federal counterparts,[16] and hence are particularly vulnerable to such attacks.[17] Wittingly or unwittingly,[18] the Burger Court's policy of reversing expansive state judgments plays into the hands of those who would impose greater political control on state judges. Given popular perceptions that one's rights begin and end with the latest Supreme Court pronouncement, a state court decision expanding rights—especially in the face of a High Court reversal on the subject—may appear to be an irresponsible "gesture of defiance."[19]

In an effort to understand the Burger Court's treatment of state civil liberties judgments, this Article examines all paid civil liberties appeals coming directly from state courts in which one of the parties was a state official and the other an individual rights claimant.[20] The study spans thirteen terms of the Burger Court (i.e., the 1970-1982 terms). Each appeal has been classified according to the party seeking review, civil liberties claimant or state official, as well as the civil liberties issue involved. Knowing which party initiated the appeal indicates whether the state court decision below adopted an expansive or narrow interpretation of the civil liberties claim involved. The Court's handling of these appeals has also been classified by whether review was granted or denied, or whether the state court judgment was summarily reversed or vacated for further proceedings. Finally, the disposition of the handful of cases in which the Justices granted full review was recorded in terms of whether the state court judgment was affirmed or

Daily J., Aug. 18, 1982, at 4, col. 3; Kleps, *Court Baiting*, L.A. Daily J., Apr. 7, 1981, at 4, col. 3; Mosk, *The Supreme Court: The Sky Is Not Falling: "Only A Few Clouds,"* L.A. Daily J., Apr. 7, 1981, at 4, col. 3.

16. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). *See generally* Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

17. *See* B. MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS (1983); Davis, *The Bench Cannot be Bullied*, 10 BARRISTER 26 (1983) (interview with Chief Justice Rose Bird of the California Supreme Court); Oazell, *Chief Justice Rose Bird: The Second Scene of a Two Act Play*?, 12 LINCOLN L. REV. 77 (1981) (discussion of attempts by conservatives to recall Chief Justice Bird).

18. It has, in part, been both, although the evidence increasingly points to the latter interpretation. *See* Montana v. Jackson, 460 U.S. 1030 (1983); Michigan v. Long, 103 S. 3469 (1983) and *infra* text accompanying notes 118-79. *See also* Florida v. Casal, 459 U.S. 821 (1982), *cert. dismissed*, 462 U.S. 637 (1983) (Burger, C.J., concurring).

19. *See* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1980).

20. Excluded from this study are state civil liberties judgments involving two private parties and all *in forma pauperis* petitions.

reversed.[21]

This Article is divided into three sections. Section I examines the Burger Court's overall record of reviewing state civil liberties judgments. Of particular interest is comparison of the relative success rate experienced by each side in obtaining some kind of favorable action by the Court.[22]

Section II focuses on one small but significant subset of state civil liberties petitions, namely, those petitions filed by state officials in which there is some uncertainty whether the state judgment rested on state law—and hence was insulated from review under the adequate state ground doctrine—or grounded entirely in federal law and thus subject to review.[23]

In the final section, the Court's treatment of state civil liberties cases is assessed from the perspective of federalism. How can the Court square its allegiance to federalism with its one sided review of state civil liberties judgments? Just whose federalism is being served?

I. The Style and Substance of the Court's Review of Expansive State Court Decisions

The 1970 Term proved to be a benchmark in the struggle between state courts and the Supreme Court over the direction of civil liberties decisionmaking. For the first time in a criminal case, the Supreme Court reversed a state court decision because it had adopted an excessively expansive interpretation of Bill of Rights protections.[24] In *California v. Green*,[25] the Court ruled that the California Supreme Court had erred in reading the Sixth Amendment's Confrontation Clause to prohibit the prosecution's introduction of a witness' prior inconsistent statement into evidence against the defendant. Despite the novelty of the Court's action, neither the majority nor the dissent questioned the propriety of reversing expansive state court judgments. The Justices apparently saw their decision as simply disabusing state judges of the

21. In cases in which the state court judgment was affirmed in part and reversed in part, it was determined whether or not the primary civil liberties claim was affirmed or reversed, and the case was classified accordingly.

22. By "favorable action" it is meant that the Court did one of three things: it vacated the judgment, reversed, or granted full review. This does not mean, however, that the party receiving this favorable action necessarily won on the merits.

23. For a discussion of the adequate state ground doctrine, see *infra* text accompanying notes 64-88.

24. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 432-33 (1974).

25. 399 U.S. 149 (1970).

view that the Sixth Amendment "impelled"[26] the exclusion of this testimony from trial. For example, Justice Harlan, writing separately, characterized the state high court's decision as "an understandable misconception, as I see things, of numerous decisions of this Court . . . that have indiscriminately equated 'confrontation' with 'cross-examination.' "[27]

When viewed in the context of the Warren Court era, the *Green* decision signaled a significant shift in perspective—perhaps even more significant than the *Green* Court Justices themselves realized. During the 1960's not a single state civil liberties decision was reversed on the ground that federal civil liberties standards were exceeded.[28] Indeed, during this period only four state initiated appeals were accepted for review; in three of these cases, the state court judgment was affirmed[29] and in one, the judgment was vacated to determine whether the decision rested on an independent state ground.[30]

Whereas the Warren Court only reversed state court decisions for tolerating less than the Bill of Rights was held to require, the Burger Court increasingly turned its attention to defining the outer reaches of federal civil liberties requirements. During the past thirteen Terms, 120 out of a total of 427 state initiated petitions—twenty-eight percent—were either reversed, vacated or granted full review. The Justices' willingness to review and reverse over one out of four petitions brought by state officials contrasts sharply with the relative lack of success experienced by civil liberties claimants. During the same period, a total of 2,250 paid petitions were filed, of which 120—or five percent—were reversed, vacated or granted full review.

Figure 1 shows the relative success experienced by state officials and civil liberties claimants in gaining access to the High Court. Observe that with the exception of the 1971 and 1976 Terms, state officials were uniformly more successful in obtaining some form of favorable action[31] by the Court. The overall trend throughout the period is unmistakably toward greater success for state officials as opposed to more restrictive access—and finally a complete denial of access during the 1982 Term—for civil liberties claimants.

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26. *Id.* at 153.

27. *Id.* at 172 (Harlan, J., concurring).

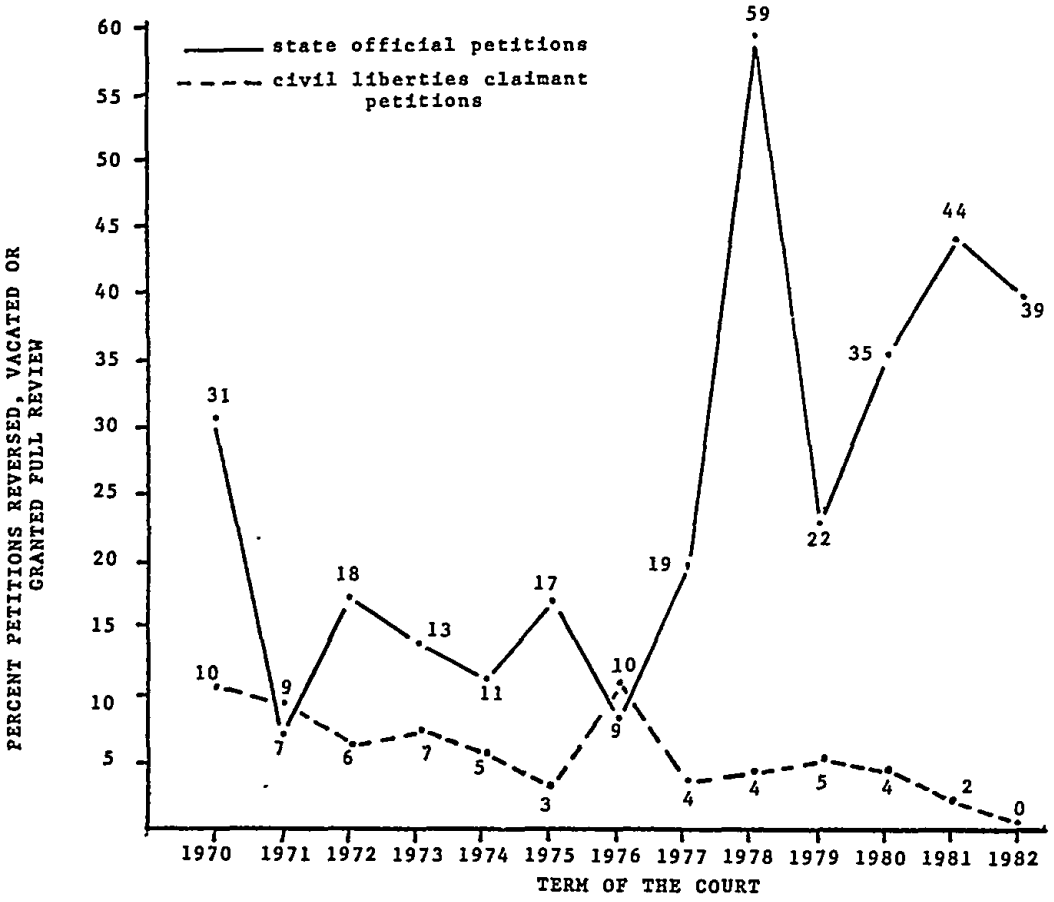
28. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1244 n.101 (1978).

29. Central School Dist. v. Allen, 392 U.S. 236 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); California v. Stewart, 384 U.S. 436 (1965).

30. Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965).

31. For an explanation of the term "favorable" as used here, see *supra* note 22.

Figure 1



The differential treatment accorded petitioners is most pronounced during the past six Terms. Whereas the Justices reviewed thirty-eight percent of all petitions brought by state officials (93 out of 246), civil liberties claimants had less than four percent of their petitions reviewed (37 out of 1088). Thus, state initiated petitions, which made up roughly eighteen percent of all appeals from state civil liberties judgments, constituted over seventy percent of the state cases receiving federal review.

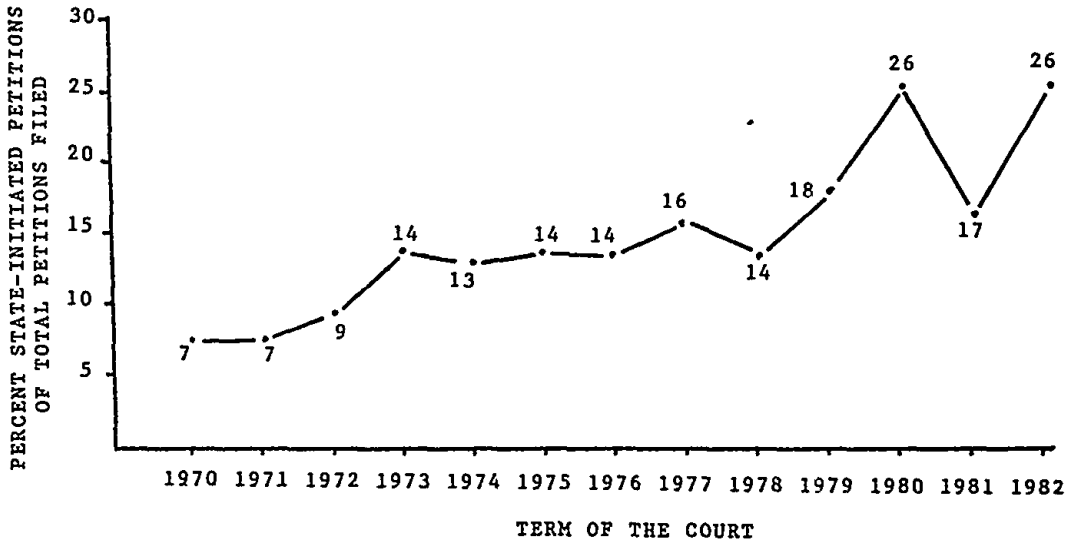
The success experienced by state officials is also reflected in the growing volume of state initiated petitions during the period of study.[32] In the 1970 Term only thirteen such petitions were filed; yet this figure rose steadily throughout the 1970's to the point where eighty petitions

32. The following table reports the number of state initiated appeals filed during this 13 Term period:

1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
12	14	17	31	27	24	23	33	25	45	77	48	46

were filed during the 1980 Term. For the last two Terms, the number of petitions has declined to an average of forty-seven per Term. The increase in petitions brought by civil liberties claimants was proportionately much smaller. As Figure 2 documents, state initiated appeals have constituted an ever larger share of the total number of civil liberties petitions coming from state courts—from seven percent in the 1970 Term to twenty-six percent last Term.

Figure 2



The increasing scrutiny given expansive state civil liberties judgments has not only served to stimulate the number of state initiated appeals, it has led to a curious transformation of the relationship between the Supreme Court and state courts. The federal judiciary, tutored under the liberal activism of the Warren Court, became the refuge for the individual, especially minorities and politically powerless groups within society.[33] State courts, reflecting traditional patterns of dominance and dependence, were considered to be insensitive to the growing demand for a just and more equitable social order. The Bill of Rights became the instrument by which the Court sought to check state governmental usurpations and advance social and political egalitarianism.[34]

It was no doubt inevitable that the pace of social change instituted during the Warren years would at some point begin to slow, and that in

33. *See* G. WHITE, THE AMERICAN JUDICIAL TRADITION, 317-68 (1976).

34. For a theory of judicial review which supports this role for the Court, see J. ELY, DEMOCRACY AND DISTRUST 73-104 (1981).

some areas even the direction of civil liberties decisionmaking would be altered. But it was not so clear that the Court would chart this new course by closing access to civil liberties claimants, and become instead the last resort for state officials complaining that state courts had gone too far in protecting rights. Yet this is exactly what has occurred. Last Term, close to four out of ten state initiated petitions were acted upon by the Court. By contrast, not a single petition filed by an individual rights petitioner was reviewed.[35]

General statistics tell only part of the story. Equally significant is the manner in which the Court has exercised its review of state civil liberties judgments. One can identify two distinguishing features: the summary character of review and the intensity of review. Both of these features contribute to the success that state officials have had in overturning expansive state court decisions.

A. The Summary Character of Burger Court Review

Dissenting in *Idaho Department of Employment v. Smith*,[36] Justice Stevens criticized the Court's increasing willingness to reverse summarily expansive state judgments. The Justice wrote: "Whenever we attempt [to overturn state decisions summarily] we court the danger of either committing error ourselves or of confusing rather than clarifying the law."[37] The error to which Stevens referred was the rendering of a decision in a case which, so far as the Justices knew, rested on an independent state ground. Determining the basis of a state court's judgment is a difficult task even with the benefit of full briefs and argumentation; without them the risk of error is substantially increased. In the *Smith* case the risk was especially high because the respondent had been too poor to hire a lawyer to file a brief opposing the state's petition for certiorari.[38]

Since *Smith*, Justice Stevens has on several occasions reiterated his opposition to the Court's practice of summarily reversing state civil lib-

35. The following table reports the number of state versus individual petitions reviewed by the Court:

	1978	1979	1980	1981	1982
State Petitions	16	10	28	21	18
Individual Petitions	7	10	10	4	0

36. 434 U.S. 100 (1977) (per curiam).

37. *Id.* at 104 (Stewart, J., dissenting).

38. *Id.*

erties decisions.[39] In *State ex rel. Cooper v. Mitchell Brothers Santa Ana Theater*,[40] Stevens dissented from the Court's per curiam opinion overturning a California Court of Appeal decision that required city officials to prove obscenity beyond a reasonable doubt before an adult theater could be closed down as a public nuisance. The Justice argued that "the Court ha[d] no jurisdiction to express [its opinion on this case] unless the California courts imposed [the beyond a reasonable doubt] standard because they understood it to be required by federal law" and in this instance "it [was] by no means clear" that they felt so constrained.[41]

The fact that the state court opinion had extensively discussed federal law was not decisive; what was crucial was whether state judges believed they were commanded by federal law to reach the conclusion they did. "State courts surely know the difference between opinions that merely contain persuasive reasoning and opinions that are authoritative because they explain a rule that is binding on lower courts," Stevens wrote.[42] Turning to the state court opinion in *Cooper*, the Justice observed:

> The explanation by the California Court of Appeal of its ruling on the standard-of-proof . . . [is] based on the reasoning of Mr. Justice Brennan's concurring opinion in *McKinney v. Alabama* . . . . After citing *People v. Frangadakis*, . . . and rejecting the City Attorney's argument that the standard of proof required in normal public nuisance abatement actions should be applied in an obscenity case, the California Court of Appeal stated that it "agree[d]" with the burden of proof portion of Justice Brennan's opinion and found one passage "particularly persuasive."[43]

The mere fact that Justice Brennan's *McKinney* opinion could not command the support of five members of the Court, Stevens can be heard to say, does not afford an adequate basis for striking down the California court's decision. That the state judges were persuaded by Brennan's reasoning rather than compelled by the Court's ruling should be sufficient to insulate their decision from review.

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39. *See* California *ex rel.* Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 94-95 (1981) (per curiam) (Stevens, J., dissenting); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 478 (1981) (Stevens, J., dissenting); Pennsylvania v. Mimms, 434 U.S. 106, 116 (1977) (per curiam) (Stevens, J., dissenting). Justice Stevens expressed these views in an address before the American Judicature Society in San Francisco on August 6, 1982. *See* L.A. Daily J., Aug. 18, 1982, at 4, col. 3.

40. 454 U.S. 90 (1981) (per curiam).

41. *Id.* at 96.

42. *Id.*

43. *Id.* at 96-97.

Summary reversals of expansive civil liberties decisions increase the possibility that the Court will issue what may amount to no more than advisory opinions;[44] more generally they convey a hostility toward state court innovation that seems inconsistent with the Court's own stated commitment to federalism and decentralized decisionmaking. Decentralization, Stevens correctly noted in *Pennsylvania v. Mimms*,[45] not only serves the interests of autonomous state court decisionmaking, it also promotes informed decisionmaking at the national level: "In . . . constitutional adjudication, . . . it is of paramount importance that the Court have the benefit of differing judicial evaluations of an issue before it is finally resolved on a nationwide basis."[46] The continued participation by state courts, Stevens goes on to say, is jeopardized when the overriding message the Court communicates to state judges is that they should not be too concerned with protecting individual rights—that in most contests between state officials and private rights claimants, the interests of the former should take precedence over the rival concerns of the latter: "[T]his Court's random and spasmodic efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights."[47] Reversing expansive state civil liberties rulings without the benefit of full review constitutes more than an expression of the Justices' views on the merits; it reflects their hostility to the entire enterprise itself.

Justice Stevens' concern with the summary reversal of state court decisions is borne out by the data gathered in this study. Of the 101 recorded reversals of expansive state judgments, 71 or roughly seventy percent were accomplished without full briefs or argumentation.[48] Despite Stevens' protests, the trend toward summary reversal has actually increased during the last three Terms: a total of forty-one summary reversals were handed down as compared to eleven following full review.[49] During the same period, the Court summarily reversed twelve state court decisions challenged by civil liberties claimants, while another eleven reversals were obtained after full review.

44. *See infra* text accompanying notes 67-76.

45. 434 U.S. 106 (1977) (per curiam).

46. *Id.* at 117 (Stevens, J., dissenting).

47. Idaho Dep't of Employment v. Smith, 434 U.S. 100, 104-05 (1977) (per curiam).

48. The Court's all-too-ready use of summary reversals suggests that the Justices are more interested in curbing state judicial activisim than in declaring general constitutional principles.

49. It is interesting to note that over half the summary reversals of expansive state court opinions occurred in the 1978-80 Terms.

B. The Intensive Character of Burger Court Review

In the *Green* case,[50] the implicit justification offered by the Court for overturning of the California Supreme Court's decision was the belief that the state court had been misled by recent federal precedents into thinking that the Confrontation Clause required the exclusion of the witness' previous cross-examined testimony. The Burger Court, however, has not limited its review of expansive state court decisions to instances in which the state court incorrectly believed it was compelled to reach the result it did. Rather, the criterion that has apparently guided the Court in exercising its review authority has been whether five of its members would have reached the same result as did the state court—a criterion which authorizes a far more intensive form of the review than the *Green* mistake of law standard.

The Court's decision in *Oregon v. Hass* is illustrative.[51] In *Hass*, the Court reversed an Oregon Supreme Court decision for failing to follow the Court's earlier holding in *Harris v. New York*.[52] *Harris* held that incriminating remarks obtained by police pursuant to incomplete *Miranda* warnings, while inadmissible in the prosecution's case in chief, might nonetheless be introduced to impeach the defendant's trial testimony. The Oregon Supreme Court distinguished *Harris* on the ground that the police had interrogated Hass after he had been properly warned and had invoked his right to consult with an attorney, whereas Harris had made incriminating remarks after receiving incomplete warnings. The court reasoned that in *Harris*-type situations, "the police do not know whether or not they will get incriminating information from the defendant if they give the required warnings"[53] and the mere possibility of obtaining evidence to be used for impeachment purposes will not be a sufficient inducement to fail to give proper warnings. By contrast, once Hass invoked his *Miranda* rights, it was unlikely the police would get anything further from the defendant and "therefore they [have] nothing to lose and something to gain by violating *Miranda* if the State is permitted to use such information as was secured by continued interrogation for impeachment purposes."[54] Thus, in order to remove any incentive created by the *Harris* case's impeachment exception, the court concluded that "the prophylactic ex-

50. California v. Green, 399 U.S. 149 (1970).

51. 420 U.S. 714 (1975). The Oregon and United States Supreme Courts differ in their spelling of the defendant-respondent's name. For purposes of this Article the version adopted by the United States Supreme Court will be used.

52. 401 U.S. 222 (1971).

53. State v. Hass, 267 Or. 489, 492, 517 P.2d 671, 673 (1973).

54. *Id.* at 493, 517 P.2d at 673.

clusion of the evidence as dictated by *Miranda* . . . is still required."[55]

One need not believe that the state court's reasoning was faultless or that another court might not just as reasonably have reached a different conclusion to recognize that the Oregon court's *Hass* decision was an honest attempt to apply the principles of *Miranda* to a situation that was not expressly covered by *Harris*. Further, it is apparent that the state court's decision was not reached on the basis of a mistaken belief that it was compelled to do so under applicable federal precedent. *Harris* provided ample justification for reaching the opposite conclusion had the state court so desired. Instead, the court decided that a mechanical application of *Harris* would undermine the deterrent purposes of the exclusionary rule.

The central question before the Supreme Court in *Hass* was whether the Fifth Amendment permitted the state court to make that decision. Speaking for himself and five of his colleagues, Justice Blackmun ruled that the state court was not so permitted. Perhaps the most striking feature of Blackmun's opinion is the casual way he dismissed the state court's opinion as an impermissible reading of *Harris*. Blackmun evidenced no interest in truly participating in a dialogue on the merits of the state court's approach; he seemed more interested in establishing that the Supreme Court would have the final say in the matter. "[A] State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them," Blackmun declared.[56] But there is no evidence that the Oregon Supreme Court understood itself to be expanding federal rights beyond what the Supreme Court would tolerate; its *Hass* decision was no gesture of defiance.

Blackmun's two paragraph response to the state court's reasoning raised more questions than it answered. The Justice wrote: "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material."[57] Having made this admission, Blackmun then seemed to concede everything, for he observed that "[t]his speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer."[58] In other words, once one accepts the

55. *Id.*
56. 420 U.S. at 719 (emphasis in original).
57. *Id.* at 723.
58. *Id.*

proposition that permitting the introduction of statements that violate *Miranda* for impeachment purposes will serve as an inducement for police to violate the rights of suspects, then it follows that *Harris* is inconsistent with, and actually undermines, *Miranda*. Surely this was an important concession, even if only for the purposes of argument; it would seem to call for some kind of reasoned response. But no such response was forthcoming. Instead, the entire issue was simply dismissed with the following *ipse dixit*: "In any event, the balance was struck in *Harris*, and we are not disposed to change it now."[59]

What did state courts learn from *Oregon v. Hass*? They were taught very little about how to apply the Court's *Harris* decision, but a great deal about the Justices' personal antipathy toward *Miranda* and their unwillingness to extend *Miranda's* prohibitions to the impeachment context. While *Harris* has been criticized by commentators for being unprincipled,[60] it would be incorrect to characterize *Hass* as being either principled or unprincipled. Strictly speaking, *Hass* is aprincipled. There is really no attempt to be principled; there is instead the desire to communicate to state courts that the Court will brook no dissension over the admission of statements obtained in violation of *Miranda* to impeach the defendant's credibility.

The Court's approach in *Hass* typifies the current interaction between the Supreme Court and many state courts. The Justices routinely reverse state civil liberties judgments without openly considering the impact of federal intervention on state civil liberties development.[61] Nor have the Justices felt it necessary to go beyond the assertion in *Hass* that "because we have the power to review, we will review."[62] However one settles the question of the authority to review these state decisions,[63] the question of whether such review is a wise use of federal judicial power remains. Should the Court be exercising its certiorari jurisdiction to encourage state courts to pull in the reins on the devel-

59. *Id.*

60. *See, e.g.*, Ely & Dershowitz, Harns v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

61. See the discussion of the impact of the Court's intervention in Oregon v. Kennedy, 456 U.S. 667 (1982) and *infra* text accompanying notes 269-72.

62. The single exception is Justice O'Connor's opinion for the Court in Michigan v. Long, 103 S. Ct. 3469, 3474-78 (1983). For a brief discussion of the *Long* decision, see *infra* text accompanying notes 129-31.

63. This Article does not question the Court's authority to review state judgments vindicating civil liberties, but merely the propriety of exercising review, given the Justices' stated allegiance to the principles of federalism. However, the authority question is far from settled. *See* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L.J. (1984).

opment of civil liberties law? Is subjecting state judgments protecting rights to exacting judicial scrutiny consistent with the Court's pronouncements on federalism and preserving state court autonomy?

II. The Court's Treatment of Ambiguously Grounded State Civil Liberties Judgments

Ascertaining the correct body of law relied on by state courts is crucial to the Supreme Court's determination of whether it may exercise jurisdiction over the case. Under the adequate state ground doctrine, state court judgments resting on an independent body of state law are constitutionally immune from federal judicial review, provided, of course, that they do not disparage any federal right or privilege. This section opens with a discussion of the adequate state ground doctrine and its importance in fostering independent constitutional interpretation. Next, the various techniques developed by the Court for handling ambiguous state court decisions are examined in terms of their effect on state court autonomy as well as in terms of the conception of federal/state court relations on which they are premised. Finally, the section focuses on the Burger Court's handling of ambiguously grounded decisions, and appraises the impact Supreme Court intervention has had upon state court decisionmaking.

A. The Adequate State Ground Doctrine: Delimiting the Scope of the Supreme Court's Jurisdiction Over State Courts

The authority of state courts to interpret independently their own constitutions has its origins in the nature of our federal system. Historically, the doctrine of federalism has rested on the proposition that "diffusing power by allocating separate functions to the national and constituent states is a bulwark of individual liberties."[64] Federalism's solicitude for decentralization, however, has never been unbridled. State courts may not, under the guise of federalism, interpret state constitutional guarantees so as to contravene minimum federal constitutional requirements.[65] But state courts are free to interpret state guarantees to afford their citizens greater protections than the Supreme Court mandates under the Bill of Rights. This one way relationship between state and federal courts has been described as follows:

> The Supreme Court has jurisdiction to prescribe only the minimum that a state must grant. It does not have the authority

64. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 690 (1980).

65. *See Developments in the Law, supra* note 8, at 1333.

> to establish the maximum. Although a state court cannot expand a state provision to the point where it conflicts with a countervailing federal right, short of such a collision the states have the power to enlarge individual liberties as much as they deem appropriate.[66]

The autonomy granted state courts under the adequate state ground doctrine extends not only to cases in which the judgment is based exclusively on state law but also to instances where both state and federal law are involved. So long as the state ground is truly adequate[67] and independent[68] of the federal issue, then review by the Supreme Court is prohibited even where the Court believes that federal law has been erroneously interpreted. This latter prohibition is derived from the ban on advisory opinions. As Justice Jackson explained in *Herb v. Pitcairn*:[69]

> 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.[70]

In the context of Supreme Court review over expansive state court judgments, however, there is more at stake than concern about the Court issuing an advisory opinion. Consider the case of *Air Pollution Variance Board v. Western Alfalfa Corp.*,[71] in which the Court ruled that a state health inspector did not violate the Fourth Amendment when he entered the company's property without consent and conducted a visual inspection of smoke emitted from the company's chimneys. In reversing a Colorado Court of Appeals decision, Justice Douglas declared that "[d]epending upon the layout of the plant, the inspector may operate within or without the premises but in either case he is well within the 'open fields' exception to the Fourth Amendment approved in *Hester* [*v. United States*]."[72] Having disposed of the Fourth Amendment claim, Douglas then observed that the state court had also ruled that the pollution inspector's failure to notify the com-

66. Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 285 (1973).

67. *See* cases and authorities discussed in R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.32 (5th ed. 1978).

68. *See* cases and authorities discussed *id.*, at § 3.33.

69. 324 U.S. 117 (1945).

70. *Id.* at 125-26.

71. 416 U.S. 861 (1974).

72. *Id.* at 865.

pany of the tests "lacked the fundamental elements of due process."[73] Being unable to determine "[w]hether the Court [of Appeals] referred to Colorado 'due process' or Fourteenth Amendment 'due process,' "[74] he concluded that the case should be remanded to the state court with instructions to specify whether the decision rested on an independent state ground.

On remand, the Court of Appeals reinstated its original judgment, declaring that, "our decision is compelled by both the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution."[75] As a formal matter, it would appear that *Western Alfalfa* was purely an advisory opinion.[76] As a practical matter, however, it was much more than that. It was an official determination by the Court that the principles and policies embodied in the Fourth Amendment do not mandate imposition of a warrant requirement on pollution inspectors. Henceforth, state courts considering whether pollution inspections should be held to search and seizure standards must confront what, for all intents and purposes, is an authoritative decision by the Supreme Court exempting such inspections from Fourth Amendment requirements.

The *Western Alfalfa* case points up an aspect of the adequate state ground doctrine that has not been fully appreciated: the adverse impact that Supreme Court pronouncements limiting the scope of federal constitutional protections can have on innovative state court decisionmaking. It should come as no surprise to find that most state courts that have considered analogous issues involving governmental visual surveillance have followed *Western Alfalfa*.[77] Several have gone so far as to suggest that such surveillance is completely immune from constitutional restriction. One state court, for example, interpreted *Western Alfalfa* as holding that "no invasion of constitutionally protected privacy [occurs] in observing what is visible for all to see,"[78] and another concluded that such forms of governmental surveillance only present

73. *Id.*

74. *Id.* at 866.

75. Western Alfalfa Corp. v. Air Pollution Variance Bd., 35 Colo. App. 207, 210-11, 534 P.2d 796, 799 (1975).

76. *See* Commonwealth v. Baldwin, 11 Mass. App. Ct. 386, 416 N.E.2d 544 (1981); Williams v. State, 157 Ga. App. 476, 277 S.E.2d 923 (1981); State v. Osborn, 63 Ohio Misc. 17, 409 N.E.2d 1077 (1980); Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980); Lupro v. State, 603 P.2d 468 (Alaska 1979).

77. Lupro v. State, 603 P.2d 468 (Alaska 1979); State v. Larkin, 588 S.W.2d 544 (Tenn. 1979).

78. Lupro, 603 P.2d at 477 (upholding warrantless search of exterior of impounded van).

abstract and theoretical invasions of privacy.[79]

In the post-incorporation era, state courts have come to accept Supreme Court opinions as embodying the first and last word on civil liberties. There is a reluctance to depart from Court rulings limiting rights and a greater reluctance to consider novel approaches once the Court has issued its view of the matter. The following statement by a California Court of Appeal is, unfortunately, all too typical of the attitudes of many state judges:

> Decisions of the United States Supreme Court construing constitutional phraseology are highly persuasive . . . . By the nature of federal and state jurisdiction the court has acquired a degree of expertise not shared by any state court. Matters of constitutional import are likely to reach the United States high court on a cleaner record and to be better briefed and argued than are similar issues in the state system . . . . The more courts feel free to adopt ground rules unpersuaded by contrary decisions of other courts, the greater the likelihood there is of uncertainty in those ground rules. The uncertainty is mitigated if proper deference is paid United States Supreme Court holdings.[80]

It is understandable that state judges accustomed to acquiescing to Supreme Court decisions expanding rights should similarly close ranks behind the Justices when they reverse ground. This does not mean that it is defensible. "First Things First," instructs Justice Hans Linde, who reminds state judges that "state bills of rights are first in two senses: first in time and in logic."[81] If state judges would begin to consider the independent guarantees afforded citizens under the state constitution *before* they consulted the latest Supreme Court pronouncement on the subject, they might just be surprised at the wealth of civil liberties treasures they would discover.[82] Indeed, taking state constitutional guarantees seriously might prompt state courts to follow the lead of the Oregon Supreme Court which has declared that its "first obligation is to determine the law of Oregon before reaching the fourteenth amendment."[83]

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79. Williams v. State, 157 Ga. App. 476, 478, 277 S.E.2d 923, 925 (1981) (upholding police observation of marijuana from airplane).

80. People v. Norman, 112 Cal. Rptr. 43, 48-49 (1974), *vacated*, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).

81. Linde, *supra* note 8, at 383.

82. A number of state bills of rights offer civil liberties protections that have no federal analogues. For a sampling of some of the different protections afforded under the state constitution, see Welsh & Collins, *Taking State Constitutions Seriously*, 14 THE CENTER MAG. 6 (Sept./Oct. 1981).

83. State v. Smith, 286 Or. 293, 297, 593 P.2d 1166, 1168 (1979); *accord* Sterling v. Cupp, 290 Or. 611, 615, 625 P.2d 123, 126 (1981); State v. Scharf, 288 Or. 451, 454, 605 P.2d

Rendering civil liberties decisions under the state constitution significantly alters the institutional relationship between state and federal supreme courts. When a state supreme court rests its decision on an interpretation of federal law, it assumes the character of an intermediate appellate court vis-a-vis the High Bench: the state court is bound to follow operative Supreme Court precedents despite whatever misgivings it may have about the wisdom of the rulings themselves. Where a state supreme court invokes state law, however, the institutional relationship is almost (but not quite) reversed.[84] The state supreme court now has the final say. As a result, United States Supreme Court decisions are no longer binding, but are instead regarded much the same way as any "ultimate court" views the decisions of an "intermediate court"—as persuasive but not authoritative pronouncements.

The "role reversal" that occurs when state supreme courts ground their decisions in state constitutional provisions is illustrated by the following passage from the California Supreme Court's decision in *People v. Longwill*.[85] Responding to the State's contention that a state court's authority to engage in independent interpretation is confined to a few "limited circumstances,"[86] the majority correctly replied:

> This argument presupposes that on issues of individual rights we sit as no more than an intermediate appellate tribunal, and that to the presumption of further review there is but a "limited" exception which must be "clearly delineated." On the contrary, in the area of fundamental civil liberties . . . we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citi-

690, 691 (1980). The rationale behind the Oregon Supreme Court's policy of first addressing state constitutional issues is explained in the following passage: "Before addressing [any] federal issues, however, a court's responsibility is first to decide the effect of the state's own laws, because if the state provides what defendant claims, it does not deprive her of the due process commanded by the 14th Amendment. Conversely, a procedure not forbidden by the United States Constitution is not by that fact 'authorized' in the absence of contrary state law, for the Constitution only limits the actions of state officials; authority to take these actions must be found in state law . . . . If the state law is determined to be adverse to [the] defendant, of course, the federal issues remain to be decided. But the court will not needlessly interpret state law in a manner that would reach an unconstitutional result." Scharf, 288 Or. at 454-55, 605 P.2d at 691-92 (1980).

84. The relationship is not completely reversed because state courts may not interpret their own constitutions to afford less protection than demanded by the Bill of Rights, whereas the United States Supreme Court may interpret federal guarantees to afford less than is guaranteed by state bills of rights. *See* Note, *State Constitutional Guarantees As Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 763-71 (1976) (discussing whether federal courts should honor state guaranteed rights).

85. 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975).

86. *Id.* at 951 n.4, 538 P.2d at 758 n.4, 123 Cal. Rptr. at 302 n.4.

> zenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due.[87]

The decisions of the Supreme Court, the state justices concluded, "are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."[88]

There is a lesson here for the United States Supreme Court: just as state courts should not blindly follow every pronouncement from Washington, D.C., so too should the inhabitants of that marble temple be careful not to exercise their jurisdiction so as to interrupt or thwart the process by which state judges flesh out the independent guarantees of their own declaration of rights. Viewed in this light, the adequate state ground doctrine serves not only to guard against the issuance of advisory opinions, but also to guarantee that state courts will be accorded the autonomy and independence necessary to begin to fashion for themselves a separate jurisprudence of civil liberties.

B. Various Techniques for Handling Ambiguously Grounded State Court Judgments

The Supreme Court has developed three techniques for responding to ambiguously grounded state cases: dismissal of the writ of certiorari; continuance of the petition until the party bringing the appeal can obtain certification from the state court; and vacating the judgment and remanding it to the state court to make clear the basis of its decision. Although some commentators have expressed puzzlement over the Court's particular choice of technique,[89] arguably the selection is made on the basis of the Court's perception of the importance of the federal interest involved as well as its conception of appropriate federal/state court relations. In those cases in which the issue is deemed to be within the primary competence of the states and the countervailing federal interest is deemed to be negligible, the Court has generally resolved all ambiguity in favor of the independent basis and has dismissed the writ of certiorari. Where, however, the Justices concluded that the federal interest was weighty enough to require some federal judicial monitoring but were also concerned with preserving state court

87. *Id.*

88. *Id.*

89. *See* Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 COLUM. L. REV. 822 (1962): "Why the Court selected one or the other of these techniques in any given case is not clear, in part because the small number of ambiguous grounds cases considered by the Court renders accurate synthesis impossible, in part because, with the exception of Mr. Justice Jackson's opinion in *Herb*, the Court never indicated the reasons for using the technique selected." *Id.* at 842 (footnote omitted).

independence, the certification technique has been employed. Finally, in those instances where the goal of national uniformity was deemed to outweigh the competing state concerns, the Justices have resorted to the vacate and remand method.

The present Court has chosen to handle ambiguously grounded decisions expanding rights through the vacate and remand method. This method is the one most likely to interfere with the process of independent constitutional interpretation at the state level. Moreover, the Court has maintained its vacate and remand policy with apparent ambivalence toward the important aspects of federalism implicated by that policy. This suggests that the Court may perceive state court civil liberties experimentation as somehow contrary to federal interests.

1. Dismissal of the Writ of Certiorari

Until the 1930's, dismissal was the only method employed by the Court for handling ambiguously grounded state court decisions. The leading case employing this technique is *Lynch v. New York ex rel. Pierson*.[90] Writing for a unanimous Court, Chief Justice Hughes concluded that the writ of certiorari had to be dismissed as improvidently granted even though the state court opinion relied extensively on Supreme Court decisions:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.[91]

So long as it was possible that the state court had relied on a nonfederal ground, the Court was precluded from exercising jurisdiction.

Underlying this approach was a conception of federal/state court relations premised on a "partnership model,"[92] in which "the responsibility for protecting basic rights was divided"[93] between the Supreme Court and the states. According to this perspective, the Supreme Court's role in the civil liberties arena was limited to guaranteeing only those rights which "existed by virtue of the government's 'national

90. 293 U.S. 52 (1934).

91. *Id.* at 54.

92. Project Report, *supra* note 66, at 279.

93. *Id.* at 282.

character.' "[94] Vindicating this select, if ill-defined, set of national rights was not thought to require significant federal oversight and, because of the deference traditionally accorded state courts as "the dominant partners in the bill of rights enterprise,"[95] the Justices were willing to grant litigants only the most limited opportunity to challenge state activities under the Bill of Rights.

Another important ingredient of this model was trust in the willingness of state courts to protect civil rights. In *Woods v. Nierstheimer*,[96] for example, the Court dismissed its original grant of certiorari to consider the claims of a state prisoner who contended that he had been physically coerced by police officers into signing a confession to murder. Declaring that these allegations, if proved, "would show that conviction and sentencing of the petitioner violated the due process clause of the Fourteenth Amendment,"[97] the Court nonetheless concluded that the state court's refusal to overturn the conviction was probably based on the fact that, under state law, petitioner had applied for the wrong kind of relief. Even though a significant federal constitutional issue was presented in the case, the Court was unwilling to assume jurisdiction without requiring the petitioner to first present a proper appeal to the state court. "We cannot assume that Illinois would so far depart from its general appellate procedure as to deny appellate review of orders denying applications for habeas corpus, if such applications were the proper procedure for challenging violations of fundamental rights of life and liberty guaranteed by the United States Constitution."[98] Similarly in *Phyle v. Duffy*,[99] a case involving a challenge brought by a state prisoner under a death sentence, the writ was dismissed after the court concluded that the state court had based its adverse decision on the prisoner's failure to request the correct remedy under state law. Writing separately, Justice Frankfurter made explicit the extent to which the Court's dismissal was premised on further remedial action being undertaken by the state court:

> Whatever may be the elegancies of procedure by which the matter is to be determined, our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that State is what our decision presupposes

94. *Id.* (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873)).
95. *Id.*
96. 328 U.S. 211 (1946).
97. *Id.* at 214.
98. *Id.* at 216.
99. 334 U.S. 431 (1948).

> it to be, namely that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity.[100]

2. Certification

Beginning in the 1940's and accelerating with the nationalization of the Bill of Rights, a "national model"[101] supplanted the traditional model of divided responsibility and, as a result, federal dominance over civil liberties was firmly established. One can identify at least three primary factors that contributed to the tremendous growth of federal judicial power over the states. First, Americans no longer identified with the historical distrust of national governmental power which had fueled much of the concern with protecting state autonomy. Second, the Justices no longer believed that state courts could be trusted with the protection of fundamental national rights. Third, twentieth century America was no longer a collection of states loosely held together by a weak national state. Increasingly, states were perceived as anachronistic and out of step with the dominant technological, economic and political forces of nationalism. "In a country where transcontinental travel was commonplace, state to state variation in fundamental rights was intolerable."[102]

The collapse of the partnership model also resulted in judicial experimentation with alternative techniques for handling ambiguously grounded state court decisions. In *Herb v. Pitcairn*,[103] the Court adopted the method of having the petitioner obtain a certificate from the state court indicating whether its decision was based on an independent state ground. The petitioner had brought a cause of action in state courts under the Federal Employers' Liability Act (FELA) for an injury suffered while working as a switchman with the Wabash Railroad. The original award of $30,000 had been overturned by the Illinois Supreme Court because the trial court had lacked jurisdiction to entertain the suit. The defendant then moved to have the suit dismissed because no action had been brought before a court competent to decide the case within the two year period specified by the FELA The trial court granted defendant's motion and was upheld on appeal by the Illinois Supreme Court.

In ruling that under the FELA claimants must institute action in a state court having competent jurisdiction within the two year limitation

100. *Id.* at 445 (Frankfurter, J., concurring).
101. Project Report, *supra* note 66, at 283.
102. *Id.* at 283-84. *See generally* Scheiber, *supra* note 64.
103. 324 U.S. 117 (1945).

period, the state court had passed on an important question of federal law. Despite this fact, the Supreme Court felt it did not necessarily have jurisdiction to hear the case. Before the power to review could be conclusively established, the Court had to satisfy itself that the decision rested entirely on federal law. Uncertainty over this point led the Justices to conclude that the proper course was to continue the case on the Court's docket until the petitioner had an opportunity to obtain clarification from the state supreme court.

Two arguments were advanced in support of this procedure. First, it was contended that certification is the only option available to the Court in those cases involving a possible independent state ground. So long as there remained a possibility that the state court rested its decision on state law, any assumption of jurisdiction by the Court—even if only to vacate the judgment and remand to the state court—would be an unwarranted intrusion of federal judicial power. Presumably, this is what Justice Jackson meant when he said that "in cases where [the basis for the decision] is not clear to us, it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended."[104] This sentiment is even more forcefully expressed in a subsequent case,[105] in which Jackson—writing in dissent—declared that "[d]oubt of our jurisdiction is no justification for exercising it; quite the contrary is the rule."[106]

Second, Jackson argued that ambiguously grounded state court opinions should not be viewed as unwarranted obstacles in the exercise of Supreme Court jurisdiction but as reflecting a somewhat different though quite acceptable orientation toward the state courts' dual responsibility under federal and state law. "It is no criticism of a state court," wrote Jackson, "that we are unable to say in a case [involving] both state and federal questions . . ., that judgment would have been the same had only one of the grounds been present."[107] Since relevant state and federal law often parallel and reinforce each other, state judges will not always be careful to distinguish between the federal and state basis of their decisions. In Jackson's view, the obligation to distinguish between state and federal law rests primarily with the Supreme Court, and derives from its "duty to refrain from interfering in state law questions and also to review federal ones without making a deter-

104. *Id.* at 127-28.

105. Dixon v. Duffy, 344 U.S. 143 (1952).

106. *Id.* at 147 (Jackson, J., dissenting).

107. 324 U.S. at 127.

mination whether the one or the other controls the judgment."[108]

3. Vacation and Remand

Judicial employment of the techniques of dismissal and certification reflects a common concern with minimizing federal judicial interference with state court decisionmaking. The third technique—vacating the state court judgment and remanding the case with instructions to make clear the basis of the judgment—seems much less concerned with preserving state autonomy than with ensuring that the Supreme Court shall have the final say over the interpretation of federal law.

The first case in which the Court employed the vacate and remand technique as a way of clarifying the basis of the state court's decision was *Minnesota v. National Tea Co.*[109] The Court remanded a Minnesota Supreme Court decision declaring unconstitutional a state statute imposing a graduated gross sales tax on retail chain stores. What makes the case so interesting is that the Court acknowledged that the state supreme court found the statute to violate both the Fourteenth Amendment and article IX, section 1 of the Minnesota Constitution, which provides that "taxes shall be uniform upon the same class of subjects . . . ."[110]

The only question about which the Court seemed in some doubt was the reason that prompted the state court to invoke the state constitution. Justice Douglas wrote:

> In support of this position [that the Minnesota Supreme Court decision rested on an adequate state ground and was therefore immune from review] they point to the court's discussion of the Minnesota constitution and to the fact that the syllabus states that such a tax is violative of both the federal and state constitutions. But as to the latter we are not referred to any Minnesota authority which, as in some states, makes the syllabi the law of the case. And as to the former the opinion is quite inconclusive. For the opinion as a whole leaves the impression that the court probably felt constrained to rule as it did because of the five decisions which it cited and which held such gross sales taxes unconstitutional by reason of the Fourteenth Amendment. That is at least the meaning, if the words used are taken literally. For if, as stated by the court, the 'precise question here presented' was ruled by those five cases, that question was a federal one. And in that connection it is perhaps significant that the court stated not

108. *Id.*
109. 309 U.S. 551 (1940).
110. MINN. CONST. art. IX, § 1.

> only that it 'should follow' those decisions but that 'it is our duty to do so.'
>
> Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision.[111]

Douglas did not doubt that the state court's decision rested in part on the state constitution. What was unclear was whether the state court had sought to apply a preferred rule, shaped by what it understood to be the requirements of federal law. In this respect, *National Tea* was a truly revolutionary decision. Prior to this decision, the mere presence of an adequate nonfederal ground had usually been sufficient to trigger the adequate state ground doctrine. In *National Tea*, Douglas informed state judges that in addition to explicitly invoking nonfederal grounds, they had to recite their nonfederal reasons for doing so or else the Supreme Court would review.

Chief Justice Hughes, joined by Justices Stone and Roberts, filed a strongly worded dissent objecting to the Court's conducting an inquiry into the reasons behind the state court's decision to invoke state law.

> The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provision of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review.[112]

Hughes also pointed out that past decisions of the Minnesota Supreme Court made clear that state judges fully understood the consequence of resting a decision upon their own constitution. Hence, there was no danger that the court felt "constrained" or "obligated" to interpret its own constitution to conform to what it took to be federal requirements.

Hughes, rather than Douglas, proved to be correct. On remand the court reinstated its original decision under state law.[113] Reflecting

111. 309 U.S. at 554-55.

112. *Id.* at 558-59.

113. On remand the Minnesota Supreme Court declared: "If we were in error, assuredly the opportunity to be set aright should be cheerfully and thankfully accepted. Having so reexamined them, we conclude that our prior decision was right. There is no need of further discussion of the problems presented for the former opinion adequately covers the ground. We think that the section of the statute here involved . . . is violative of the uniformity clause of our own Constitution." National Tea Co. v. State, 208 Minn. 607, 608, 294 N.W. 230, 231 (1940) (per curiam).

on this matter some thirty-four years later in *Department of Motor Vehicles v. Rios*, Douglas came around to Hughes' position:

> *Minnesota v. National Tea Co.* . . . taught me that it is wise to insist that cases taken from a state court be clearly decided on a federal ground and not, as here, on both state and federal grounds, save where the state and federal questions are so intertwined as to make the state ground not an independent matter.[114]

Douglas' reappraisal, it should be pointed out, occurred in a case involving Supreme Court review over a state court decision expanding civil liberties.[115]

Not surprisingly, one's view of the appropriateness of the vacate and remand method will vary depending on one's assessment of the threat posed by the state court decision to countervailing federal interests.[116] Those who favor the dismissal and certification techniques are primarily concerned with preserving state court autonomy; advocates of the vacate and remand method tend to view state courts less as autonomous decisionmakers than as obstacles in the way of federal judicial review. The decision to vacate and remand a case serves two related purposes. First, intervention informs state judges that the Justices regard the state judgment as sufficiently divergent from their own views to warrant closer inspection and, second, the state court is given the opportunity to reconsider the propriety of the original holding in light of this expression of Supreme Court concern. In this way, it is hoped, state courts will be discouraged from invoking state law in order to thwart federal judicial review.[117]

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114. 410 U.S. 425, 430 (1973).

115. Invoking the guarantee of due process, the California Supreme Court ruled that prior to suspending a motorist's driver's license, the Department of Motor Vehicles must conduct a hearing and that "at such a hearing the licensee is entitled to review the reports or other evidence upon which the department contemplates determining that he is possibly responsible for the accident, and to present reports or testimony to establish his claim of non-culpability, all within reasonable due process procedures which the department may employ." Rios v. Cozens, 7 Cal. 3d 792, 799, 499 P.2d 979, 984, 103 Cal. Rptr. 299, 304 (1972).

116. This certainly appears to be the case with Justice Rehnquist. In the 14 expansive state court judgments vacated by the Court, the Justice never openly expressed any concern with intruding upon state court autonomy. Yet in the single instance I have been able to locate in which a state court judgment against the civil liberties claimant was vacated because the Court was unable to ascertain the basis for the decision, Rehnquist protested: "The Court today summarily vacates the judgments of the State Supreme Court and remands for further proceedings. Neither past decisions of this Court nor policy considerations support this unwarranted assumption of jurisdiction and imposition on the state courts." Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241, 242 (1978) (Rehnquist, J., dissenting).

117. This was Douglas' concern in *National Tea*, as is evident in his reminder to state judges that "it is equally important that ambiguous or obscure adjudications by state courts

Vacating and remanding ambiguous state court decisions stretches the jurisdiction of the Supreme Court to its farthest limits consistent with the basic terms of the adequate state ground doctrine. It is therefore the preferred method where the Court is seeking to impose uniform national standards. In striking a balance between the competing concerns of protecting state autonomy and ensuring federal supremacy, the vacate and remand technique clearly favors the latter over the former. Only those state court decisions that rest explicitly on state law for reasons which are independent of the state judges' perceptions of federal requirements will be permitted to depart from operative Supreme Court pronouncements.

C. The Burger Court's Response

The Court established its policy of vacating and remanding expansive state court decisions in *California v. Krivda*.[118] In *Krivda*, the California Supreme Court had extended the privacy rationale of *Katz v. United States*[119] to include police searches of garbage cans. Stating that they were unable to determine "whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both,"[120] the Justices vacated the judgment. On remand, the state high court reinstated the decision, declaring that it had relied "upon both the Fourth Amendment to the United States Constitution and Article I, section 19, of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result we reached in that opinion."[121]

The events that occurred in *Krivda* have been replayed many times.[122] State judgments containing one or more references to state

do not stand as barriers to a determination by this court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases . . . . For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states." 309 U.S. 551, 557 (1940).

118. 409 U.S. 33 (1972).

119. 389 U.S. 347 (1967). *See* People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).

120. 409 U.S. at 35.

121. People v. Krivda, 8 Cal. 3d 623, 624, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

122. Including *Krivda*, 409 U.S. at 33, at least 15 cases have been returned to state courts because the Justices said they were unable to determine the basis of the state court judgment. *See* Montana v. Jackson, 460 U.S. 1030 (1983); Michigan v. Hurd, 454 U.S. 807 (1981); California v. Silver, 453 U.S. 918 (1981); Michigan v. Peques, 452 U.S. 934 (1981); Califor-

law but lacking any separate discussion of the state claim routinely have been returned by the Court for clarification. Almost as regularly, state courts have reinstated their original judgments,[123] and in most instances the state tribunals did so by invoking an independent state ground.[124] In only four instances state courts declared that their decision was based exclusively on federal law,[125] and in only two of those instances the Court ultimately granted review.[126]

Where state courts invoke both state and federal sources, it is no easy task to discern the exact point at which one body of law leaves off and another begins. Nonetheless, the fact that the Supreme Court and state courts disagreed almost sixty percent of the time suggests that the Justices are not very good judges of whether an independent state ground is present. Why has this problem in communication persisted for so long? Is it that state judges are not speaking clearly enough? Or is it that the Justices are not listening?

Actually, the problem is not so much poor communication as it is divergent conceptions of the constitutional status of state law under the Constitution. State judges apparently apply a conception of federal/state relations that presumes the independence of state law. State judges are not mindless of the consequences of invoking their own constitution under the adequate state ground doctrine. Hence, when state judges cite to the state constitution or declare, "we hold under our state

nia v. Level, 449 U.S. 945 (1980); California v. Superior Court, 449 U.S. 945 (1980); California v. Braeseke, 446 U.S. 932 (1980); Illinois v. Vitale, 439 U.S. 974 (1978); Percy v. Terry, 434 U.S. 808 (1977); Ohio v. Gallagher, 425 U.S. 257 (1976); Louisiana v. Mora, 423 U.S. 809 (1975); Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974); Pennsylvania v. Campana, 414 U.S. 808 (1973); Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973).

123. Of the 13 cases for which state court responses have been located, the original judgment was reinstated in all but two cases. The two exceptions are People v. Level, 117 Cal. App. 3d 462, 172 Cal. Rptr. 90 (1981) (in denying a hearing, the California Supreme Court ordered that this opinion not be officially published) and State v. Jackson, 672 P.2d 255 (Mont. 1983).

124. State courts reaffirmed the independent basis of their holdings in eight cases. *See* State v. Peques, 412 Mich. 851, 312 N.W.2d 83 (1982); People v. Superior Court (Engert), 120 Cal. App. 3d 721, 174 Cal. Rptr. 901 (1981); State v. Gallagher, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976); State v. Mora, 330 So. 2d 900 (La. 1976); Air Pollution Variance Bd. v. Western Alfalfa Corp., 35 Colo. App. 207, 534 P.2d 796 (1975); Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854 (1974); Rios v. Cozens, 9 Cal. 3d 593, 509 P.2d 696, 107 Cal. Rptr. 784 (1976); People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973). In each instance the independent basis for the decision was indicated in the original decision.

125. State v. Jackson, 672 P.2d 255 (Mont. 1983); People v. Braeseke, 28 Cal. 3d 86, 618 P.2d 149, 168 Cal. Rptr. 603 (1980); State *ex rel.* Terry v. Percy, 95 Wis. 2d 476, 290 N.W.2d 713 (1980); *In re* Vitale, 71 Ill. 2d 229, 375 N.E.2d 87 (1979).

126. Illinois v. Vitale, 447 U.S. 410 (1980); Percy v. Terry, 443 U.S. 902 (1979). Not surprisingly, the Court reversed the state court judgment in both instances.

constitution . . .,"[127] they usually mean what they say. Witness the responses of state courts to the Burger Court's *Krivda* remands: in most cases state judges reiterated their original reliance on state law.[128]

If state judges assume the independence of state law, the Burger Court assumes just the opposite. State law is presumed to be dependent on federal law unless state courts demonstrate otherwise. This is the import of the Court's recent decision in *Michigan v. Long*.[129] Writing for the majority, Justice Sandra Day O'Connor, herself a former state judge, declared:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so.[130]

Simply citing to the state constitution, Justice O'Connor informed state judges, would not be sufficient to insulate a decision from review. State judges must "make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the Court has reached."[131] Absent such a "plain statement," state judgments will be presumed to be reviewable.

A notable example of the Court's "presumption of dependence" is the remand order in *Montana v. Jackson*,[132] a case involving the use of a motorist's refusal to submit to a breathalyzer test in his trial for driving while under the influence of intoxicants. In ruling that a motorist's refusal to undergo such a test is testimonial in nature and hence may not be introduced as evidence, the Montana Supreme Court invoked the state constitutional privilege against self-incrimination no less than seven times.[133] The following quotations are a few examples:

> [1] We hold that such refusal is testimonial in nature and that to admit evidence of the fact of refusal would violate the defendant's Fifth Amendment privilege as guaranteed by the United States Constitution, and would further violate defendant's privilege as guaranteed by [Article] II, [section] 25 of the Montana

127. *See, e.g.*, State v. Jackson, 637 P.2d 1, 4 (Mont. 1981).

128. *See supra* notes 123-24.

129. 103 S. Ct. 3469 (1983).

130. *Id.* at 3476.

131. *Id.*

132. 460 U.S. 1030 (1983).

133. State v. Jackson, 637 P.2d 1, 4-5 (Mont. 1981). For a discussion of the *Jackson* case, see Collins, *High Court Asserts Its Authority*, Nat'l L.J., May 16, 1983, at 13.

> Constitution.[134]
>
> [2] The issue is also controlled by [Article] II, [section] 25 of our own constitution, which provides that "No person shall be compelled to testify against himself in a criminal proceeding." The issue involves a communication that is testimonial in nature, and we must resolve the issue by applying [Article] II, [section] 25. Clearly to permit evidence of defendant's refusal to take the breathalyzer test would violate not only the United States Constitution, but also our own constitution.[135]
>
> [3] We hold under our own constitution, that if a communication of refusal, whether written, verbal or otherwise involves the defendant's consciousness of the facts and the operation of his mind in expressing it, the communication is testimonial in nature.[136]

Despite these unequivocal references to state law, the Supreme Court expressed uncertainty whether the reliance on state law was truly independent.[137]

Apparently, the Justices were troubled by an earlier state supreme court decision, *State v. Finley*,[138] which was brought to their attention by the State Attorney General in his petition for certiorari. In *Finley*, the Montana Supreme Court stated:

> [T]he Montana constitutional guarantee of the privilege against self-incrimination affords no broader protection to an accused than does the Fifth Amendment. . . . The opinions of the United States Supreme Court, therefore, delineate the maximum breadth of the privilege against self-incrimination in Montana.[139]

The State Attorney General argued in *Jackson* that since "the Montana Court neither overruled nor disapproved . . . [the *Finley*] precedent,"[140] the "state court in interpreting its own constitution ha[d] voluntarily chosen to adopt federal constitutional interpretations of a corresponding federal constitutional right . . . ."[141]

The Attorney General's petition failed to mention, however, that the *Finley* dictum had been effectively undercut by *Madison v. Yunker*.[142] Rejecting the *Finley* "no broader protection" thesis, the

134. 637 P.2d at 1.

135. *Id.* at 4.

136. *Id.* at 4-5.

137. Montana v. Jackson, 460 U.S. 1030 (1983).

138. 173 Mont. 162, 566 P.2d 1119 (1977).

139. *Id.* at 164, 566 P.2d at 1121.

140. Petition for a Writ of Certiorari at 8, Montana v. Jackson, *petition for cert. filed*, 50 U.S.L.W. 3696 (U.S. Feb. 13, 1982) (No. 81-1531).

141. *Id.* at 9.

142. 180 Mont. 54, 589 P.2d 126 (1978); *quoted in* Supplemental Brief of Amicus Curiae American Civil Liberties Union, Montana Affiliate at 16, Montana v. Jackson, 460 U.S. 1030 (1983).

Yunker Court declared:

> [S]tate constitutional provisions [which are] identical or nearly identical with language in the United States Constitution . . ., each constitute separate and enforceable constitutional rights insofar as the jurisdiction of Montana extends. Where state and federal constitutional provisions are identical, each is enforceable in its own respective sphere where those principles attach.[143]

Even the dissenting state justices in *Jackson* understood that *Finley* was no longer controlling. "The majority holding," Chief Justice Haswell declared, "extends the breadth of Montana's constitutional provision beyond that afforded by the United States Constitution and overrules sub silentio this Court's own interpretation of Montana's constitutional privilege against self incrimination."[144]

There is no ambiguity—provided one were willing to take state judges at their word.[145] But such reliance on state courts is precisely what the Supreme Court seems unwilling to do. Instead, the Justices presumed that the state supreme court's reference to state law was dependent on its understanding of federal law—a presumption that even repeated invocations of the state constitution were unable to overcome. Apparently nothing less than an express and unequivocal disclaimer of any reliance on federal precedents will guarantee the "nonreviewability" of state court decisions.

The Burger Court's handling of *Jackson* suggests that the Justices are being guided by considerations that have less to do with the ambiguity of a state court's decision than with hostility toward the merits of the state court's holding. When the Court vacates a state judgment and remands it for clarification, the state court is served notice that its reliance on the Bill of Rights was probably incorrect. Since the original judgment is no longer in force, the state court is invited to reconsider its

143. 180 Mont. at 60, 589 P.2d at 129.

144. State v. Jackson, 637 P.2d 1, 7 (Mont. 1981) (Haswell, C.J., dissenting).

145. On remand, the Montana Supreme Court reversed its original holding and sustained the validity of the state statute. This prompted Justice Daniel Shea, author of the first Jackson opinion to protest in dissent: "As the author of *Jackson I*, I clearly made a mistake, for I did not recognize the extent to which the United States Supreme Court stood ready to intrude on the judicial affairs of this state in interpreting our own constitution. However, the remand order failed to analyze our decision, for to have done so would have been to recognize that we did indeed rely on Art. II, § 25, as an independent ground of decision. Instead, the Supreme Court remanded the case to this Court to determine whether our decision 'was based upon federal or state constitution grounds, *or both*, . . .' (emphasis added). A reading of our decision should have told an objective United States Supreme Court that our decision was based *on both* and that a decision based on our own constitution was sufficient for that Court to deny certiorari." State v. Jackson, 672 P.2d 255, 262 (Mont. 1983) (Shea, J., dissenting).

holding in light of this new piece of information. The *Krivda* type remand becomes a test of wills, so to speak, in which state judges must demonstrate their "commitment" to their original ruling. A state court will register its relative commitment by reinstating its decision under state law, reinstating the decision under federal law alone, or reversing its original holding.

Understanding the Burger Court's vacate and remand policy in terms of a test of wills helps explain the curious correlation between the incidence of *Krivda* remand orders and a state court's willingness to expand rights under the state constitution: the more active a state court is in interpreting state civil liberties guarantees, the more likely it will have its decisions vacated. Hence, the California judiciary, whose Supreme Court has been variously described as "the preeminent state forum in the bills of rights arena,"[146] "the birthplace of . . . new judicial federalism,"[147] whose supreme court is said to "lead all states in placing decisions involving individual rights on state constitutional grounds,"[148] has also been the state system that accounts for over one-third of all vacate and remand orders. California is not alone. Two-thirds of the state judgments vacated originated in state courts noted for expanding rights under a state charter. Quite clearly, these are state courts that understand the significance of relying on their own constitution—an understanding which makes implausible the Court's stated concern that state judges may have invoked their own constitution because they felt compelled to do so by federal precedent.

The *Krivda* remand has become an instrument, not for resolving ambiguous state judgments, but for expressing the Justices' policy orientations toward the judgments themselves. Every time the Court overturns a state judgment, the message communicated to state judges is that so far as the Bill of Rights is concerned, the constitutional interest at stake does not warrant as much protection as the state court had chosen to give it. Such communication is bound to thwart the process of independent state constitutional decisionmaking as well. Denying state judges the support of the Bill of Rights may lead them to question the legitimacy of extending additional protections under either the federal or state charters.[149]

146. Project Report, *supra* note 66, at 326.

147. Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 482, 483 (1974).

148. Note, People v. Pettingill: *The Independent State Ground Debate in California*, 67 CALIF. L. REV. 768, 770 (1979) (footnote omitted).

149. This is apparently what occurred on remand in *State v. Jackson*. Writing in dissent, Justice Shea charged: "In the guise of compliance with the mandate of the United States

One can observe the "chilling effect" of the Court's *Krivda* remands in those cases in which the state court reinstated its judgment entirely on federal law and the original decision appeared to have been based in part on state law. In *State ex rel. Terry v. Schubert*,[150] the Wisconsin Supreme Court held that the procedures for review established under the state Sex Crimes Act violated the due process rights of those committed for sexual offenses. Throughout the opinion the state court interlaced state statutory and constitutional sources with federal precedents.[151] The Supreme Court vacated the judgment.[152] On remand the state justices reinstated their judgment, but this time grounded their decision entirely on federal law.[153] Two justices, however, wrote a separate opinion reminding their colleagues that "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the Fourteenth Amendment."[154] They urged the court to "rest [its] decision on the state statutes and the state constitution, as well as the federal constitution."[155] The case then came back before the Supreme Court and again the decision was vacated, only this time it was remanded "for further consideration in light of"[156] two Supreme Court decisions involving the due process rights of prisoners.[157] The state court finally relented and modified its decision to conform to federal precedents.[158]

Terry is an example of a state court in the midst of deciding whether to afford greater protection under the state constitution. The Wisconsin Supreme Court's initial decision freely borrowed from both state and federal sources. It was only when ordered to explain itself more clearly that the court backed away from invoking the state constitution. Had the United States Supreme Court not intervened in this case, and had the state court been given an opportunity to experiment

Supreme Court's order of remand vacating our judgment, the majority has simply rewritten *Jackson* to comport with its own views as to interpreting our state constitution. In doing so, the majority has delegated to the United States Supreme Court our duty to interpret our constitution. This constitutes an abdication of our duty to interpret our own constitution." State v. Jackson, 672 P.2d 255, 262 (Mont. 1983) (Shea, J., dissenting).

150. 74 Wis. 2d 487, 247 N.W.2d 109 (1976).

151. *Id.* at 488-93, 247 N.W.2d at 109-12.

152. Percy v. Terry, 434 U.S. 808 (1977).

153. State *ex rel.* Terry v. Percy, 84 Wis. 2d 693, 267 N.W.2d 380 (1978).

154. *Id.* at 698-99, 267 N.W.2d at 383.

155. *Id.*

156. 443 U.S. 902 (1979).

157. The two cases were Parham v. J. L. and J. R., 442 U.S. 584 (1979) and Greenholtz v. Inmates of Nebraska Penal Complex, 442 U.S. 1 (1979).

158. State *ex rel.* Terry v. Percy, 95 Wis. 2d 476, 290 N.W.2d 713 (1980).

with its innovation, it might have eventually decided to engraft the decision on to the state charter as well. Forced to choose before the experiment had a chance to proceed, the state court bowed to federal authority.

As *Terry* illustrates, once federal law is perceived to be contrary to a state court's interpretation of state law, various pressures operate to induce abandonment of the independent state ground. One of these pressures is the political opposition state judges encounter when extending civil liberties beyond minimum federal requirements. Concern over political reprisal for expansive state civil liberties rulings is especially evident in the area of the rights of criminal suspects. Any state court that expands criminal procedure guarantees does so at its own peril.[159] Thus, innovative state courts are caught between Scylla and Charybdis: either they must toe the federal line or risk political retaliation at home.

Consider the California Supreme Court's curious behavior in *People v. Braeseke*.[160] In the original *Braeseke* decision, the state high court reversed the defendant's conviction because it found his confession to have been illegally elicited under the state constitution. There can be no doubt as to the independent basis of the court's opinion. With the sole exception of *Miranda v. Arizona*[161]—which itself is a requirement of the state constitution[162]—there is not a single reference to a federal decision. But there are numerous references to independent state decisions. For example, after declaring that "the continued interrogation of defendant was in violation of *Miranda* and that the confession resulting therefrom is inadmissible,"[163] the court cited four of its own opinions excluding confessions under the state self-incrimination guarantee.[164]

159. All but one case, Department of Motor Vehicles v. Rios, 410 U.S. 425 (1972), involved the rights of persons accused of crime; four of the cases involved search and seizure or confessions claims—two areas where state courts have been under political attack for "coddling criminals." *See supra* notes 14-19.

160. 25 Cal. 3d 691, 602 P.2d 384, 159 Cal. Rptr. 684 (1979), *vacated and remanded*, 446 U.S. 932 (1980), *aff'd on other grounds*, 28 Cal. 3d 86, 618 P.2d 149, 168 Cal. Rptr. 603 (1980).

161. 384 U.S. 436 (1966).

162. *See, e.g.*, People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

163. 25 Cal. 3d at 703, 602 P.2d at 391, 159 Cal. Rptr. at 691.

164. The cases were People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1979); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970); and People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

Despite these unequivocal references to state law, the Supreme Court concluded that the decision was ambiguously grounded and remanded it to the state supreme court. Rather than immediately reinstating the decision under state law, the court ordered supplemental briefs and, on reconsideration, decided to rest the decision entirely on federal law.[165] One can only speculate about the justices' motives for this change of position, but it may not be too wide of the mark to suggest that fear of being subjected to further public criticism may have been a primary factor. Casting a controversial ruling in terms of federal requirements does not force state judges to shoulder the full responsibility for the decision. State judges, after all, are not the final arbiters of federal law. But they are the final arbiters over state law and so must bear complete responsibility for what they decide under the state constitution. Assuming that responsibility—given the current political climate[166]—was something the California Supreme Court was not prepared to do in *Braeseke*.

Forcing state courts to choose between submitting to federal authority or facing political attack at home can hardly be said to further state court autonomy. Nor can it be said that independence is advanced when *Krivda* remand orders serve to dissuade state appellate courts from following the independent decisions of their own supreme court and to adopt instead the Burger Court's more relaxed standards. Yet this is exactly what happened in *Braeseke* as well as in a second case originating in California, *People v. Level*.[167] Like *Braeseke*, the *Level* case involved the question of custodial interrogation and, again, the state court reversed the conviction, citing the same independent state supreme court precedents.[168] The only significant difference was that the court of appeal clearly did not endorse this extension of state law. Writing for the court, Judge Lillie spoke of being "compelled under *Miranda* and the holdings of its California progeny"[169] to find the confession inadmissible—to which she added, "we do so reluctantly."[170] A lengthy dissent was filed by Judge Hanson in which he criticized the majority's opinion as "a classic example of how *Miranda* has been a contributing factor to the bankruptcy of California's criminal justice system."[171]

165. People v. Braeseke, 28 Cal. 3d 86, 618 P.2d 149, 168 Cal. Rptr. 603 (1980).
166. *See supra* note 14 and accompanying text.
167. 103 Cal. App. 3d 899, 162 Cal. Rptr. 682 (1980).
168. *See id.* at 905, 162 Cal. Rptr. at 685.
169. *Id.*
170. *Id.*
171. *Id.* at 919 n.8, 162 Cal. Rptr. at 698, n.8.

On remand, the court of appeal reversed its original holding, with Judge Hanson writing the opinion for the court. Hanson justified the court's about face on the ground that the *Krivda* remand order offered an appropriate occasion for reconsidering the merits of the earlier holding: "[I]t is clear when our original opinion in the instant case was 'vacated' by the United States Supreme Court and the matter 'remanded' to us that upon such a 'remand' we are authorized to decide the issue anew so that 'a new judgment may be entered.' "[172] Judge Hanson then turned to the California Supreme Court's behavior in *People v. Braeseke*[173] for additional support. In *Braeseke*, he wrote, the state high court "acknowledged its authority to 'alter' an original opinion if it so desired after its original opinion is vacated and the matter remanded by the United States Supreme Court . . . ."[174] Judge Hanson reasoned that "this reviewing court is clothed with the same authority by reason of the procedural posture of the case at bench . . . ."[175]

Turning to the merits, Judge Hanson began by rejecting the court of appeal's original determination that California law governed this case: "*Miranda*'s California progeny . . . are all factually distinguishable or inapplicable."[176] Nor was Hanson willing to extend California law to cover the situation in *Level*:

> We decline to employ the 'independent state grounds doctrine' as urged by the State Public Defender since the California constitutional prohibitions against self-incrimination are essentially identical to those of the federal Constitution and such an extension of *Miranda* safeguards would have a substantial adverse effect on California law enforcement efforts by impeding legitimate police investigative activity and be inimical to an efficient and economical system of criminal justice.[177]

Having succeeded in wresting the case away from California precedent, Judge Hanson then grounded his decision upholding the conviction entirely on federal law.

The state appeals court's reversal in *Level* is a sober reminder that when the Supreme Court interferes with state court decisions expanding rights, it may undermine the development of independent

172. People v. Level, 117 Cal. App. 3d 462, 468, 172 Cal. Rptr. 904, 907 (1981).

173. 28 Cal. 3d 86, 618 P.2d 149, 168 Cal. Rptr. 603 (1980).

174. 117 Cal. App. 3d at 468, 172 Cal. Rptr. at 907.

175. *Id.*

176. *Id.* at 478, 172 Cal. Rptr. at 914.

177. *Id.* at 491, 172 Cal. Rptr. at 922.

state constitutional interpretation.[178] In California, where state appeals judges do not always share their supreme court's penchant for expanding rights, the Supreme Court's *Krivda* type remands encourage "evasion"[179] of the independent requirements established by the state supreme court.

III. Federalism and the Protection of Civil Liberties

The Burger Court's brand of federalism, it would appear, only rewards one kind of state experimentation: experiments conducted in the service of narrowing rights. Although state civil liberties claimants have been told that federalism requires that access to federal courts must be significantly limited, federalism has proven to be almost no barrier at all to the Supreme Court's review of state court judgments protecting rights. To quote Justice Stevens again, the Court's one sided conception of federalism "has created the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights."[180]

This is not the same brand of federalism that Justice Black spoke so eloquently about in *Younger v. Harris*.[181] Rejecting the extremes of either "blind deference to 'States Rights' " or "centralization of control over every important issue in our National Government and its courts,"[182] Black argued instead that federalism entails

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[183]

178. *See* R. Gerstein, Serving Two Masters: The California Courts of Appeal and Criminal Procedure (paper delivered to the 1982 American Political Science Ass'n.).

179. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

180. Pennsylvania v. Mimms, 434 U.S. 100, 104-05 (1977) (Stevens, J., dissenting). See *supra* text accompanying notes 44-48 for a brief discussion of the *Mimms* case.

181. 401 U.S. 37 (1971).

182. *Id.* at 44.

183. *Id.*

Nor is the Court's treatment of state civil liberties decisions consistent with Justice Brandeis' concept of federalism, which considers state court experimentation to be "one of the happy incidents of the federal system."[184] Decentralization, Brandeis contended, fosters an independence of thought and attitude that is crucial if states are to "serve as laborator[ies] and try novel social and economic experiments."[185]

According to the Black/Brandeis perspective, vigorous enforcement of civil liberties constitutes one of those "legitimate activit[ies] of the States"[186] that should be protected from federal interference. Both Justices built their judicial careers around the idea that preservation of our federalist structure and protection of civil liberties are compatible goals. To them, the willingness of state courts to expand civil liberties was one of the blessings of federalism and merited the Court's support and encouragement—not its condemnation.

The Burger Court's bias against expansion of civil liberties is apparent in the highly formalistic way in which the Court has interpreted the adequate state ground doctrine. Determining whether an expansive state court judgment is insulated from review is, under the Court's approach, essentially an exercise in citation checking. The only question is whether the state judgment is adequately supported by references to state law or state decisions expressly resting on state law so as to establish its independence from federal precedents.

What is missing, however, is any sensitivity to the impact of Supreme Court review on the process of independent state court interpretation. As applied in the context of review of expansive state court decisions, the Court's conception of federalism lacks any appreciation for the contributions of federalism based limitations to civil liberties development. Lacking an understanding of how federalism *furthers* rights,[187] the Court's formalistic application of federalist principles has led to results which, from a Black/Brandeis perspective, must be re-

184. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

185. *Id.*

186. Younger v. Harris, 401 U.S. at 44.

187. The following passage by Justice Stanley Mosk of the California Supreme Court bespeaks this understanding: "Encouraging the fifty states to experiment, to retain their historic individuality, to seek innovative responses to problems of protecting individual liberty, may ultimately produce more of the answers [than will reliance on the national government] in the century ahead. . . . Using the state constitution in this way is no mere scheme to thwart federal review by the current Court, though that may be a salutary byproduct. And though some fragmentation may occur . . . the expanded liberty of individual citizens that this approach makes possible fully justifies any absence of seamless uniformity." Mosk, *In the Future Will State High Courts Guard Our Individual Rights*?, L.A. Times, Jan. 1, 1978, at 5 (*quoted in* Scheiber, *supra* note 64, at 686).

garded as bizarre. In effect, the Justices have applied the adequate state ground doctrine to thwart the very innovative forces that the Court is supposed to be encouraging. Consider, as one example,[188] the current anomaly in which state judgments that contain cursory and largely unexplained citation to state law will be held immune from review whereas independently reasoned opinions that may lack this ritualistic citation will not.[189] If the rationale behind federalism in the civil liberties area is that decentralization fosters social experimentation, then should not the Court be encouraging principled state court independence? The current approach seems only to reward result oriented citation shuffling.[190]

This section appraises the conception of federalism that underlies the Burger Court's review of expansive state civil liberties decisions. This appraisal takes the form of an examination of three cases—*Delaware v. Prouse*,[191] *Minnesota v. Clover Leaf Creamery Co.*,[192] and *Ore-*

188. *But see* Delaware v. Prouse, 440 U.S. 648 (1979) and discussion of the *Prouse* case *infra* at text accompanying notes 195-209.

189. *Compare, e.g.*, People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973), where the Justices denied review to a California Supreme Court decision in which the state ground was merely asserted without any accompanying rationale, *with* Fare v. Michael C., 442 U.S. 707 (1979), in which the Court reversed an independently reasoned decision of the same state high court which lacked explicit reference to a state constitutional provision. At least one member of the California Supreme Court believed that *Michael C.* was independently grounded. In a recent interview, Justice Stanley Mosk declared: "Well, first of all, in *Michael C.*, Justice Mathew Tobriner's opinion didn't rely on federal cases; he relied on *Burton* and on *Randall* which were both California cases. And, indeed, *Burton* plowed some new ground. It held that a minor who asked to see his father or parents was entitled to exercise his *Miranda* rights by asking to see them. So, in *Michael C.*, only state cases. I don't think you'll find a single federal case in the *Michael C.* opinion of Justice Tobriner. [Interviewer: Your interpretation of *Michael C.* is at odds with the U.S. Supreme Court which granted certiorari and reversed the state court decision. Was the high court incorrect in taking review?] I don't think they should have taken it, but they did and they reached a different conclusion. *Michael C.* was a state interpretation of *Miranda*; the California court started with *Miranda*, assumed *Miranda* was good law. We then adapted *Miranda* to our state procedure and it was held that pursuant to the cases of *Burton* and *Randall* which were state cases, a majority of the court felt that Michael C. had exercised his right to remain silent on *Miranda* when he asked in this instance to see his probation officer. You'll recall I also wrote a separate opinion suggesting that wasn't going to be much help to him because there's an adversary relationship between a probation officer who is an agent of the state and the minor." Collins & Welsh, *An Interview with Stanley Mosk*, 2 W.L.J. 8 (1981). On remand from the United States Supreme Court, however, the California Supreme Court refused to reverse the defendant's conviction under state law. *See, In re* Michael C., 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978). The *Michael C.* case is discussed in Gerstein, *supra* note 178, at 5-11.

190. *See Developments in the Law, supra* note 8, at 1336-47.

191. 440 U.S. 648 (1979).

192. 449 U.S. 456 (1981).

gon v. Kennedy.[193] Study of these cases is instructive because each illuminates a different aspect of the conceptual distance that separates the Court's approach from the Black/Brandeis perspective.

A. *Delaware v. Prouse*: What Constitutes an Independent Decision?

Under the adequate state ground doctrine, a state court not only must invoke a nonfederal basis for its decision, but the nonfederal ground must be truly "independent" of any federal basis in order to be insulated from review.[194] Unfortunately, there is no value neutral test for determining independence. One's view of what constitutes an independent state ground is often a reflection of whether one sees the Court's role in terms of fostering or curbing state court independence. The Black/Brandeis conception of federalism, for example, would favor a broad realm to state experimentation because it respects the integrity of independently reasoned state court opinions. The Burger Court, by contrast, has adopted an unusually strict interpretation of this requirement, as is illustrated by its handling of this issue in *Delaware v. Prouse*.[195]

Prouse involved an appeal by state officials of a Delaware Supreme Court decision declaring unconstitutional random automobile stops to check drivers licenses and vehicle registration. Concluding that the constitutional ban against unreasonable searches and seizures requires that stops be justified by at least articulable and reasonable suspicion, the state supreme court held that random searches violated the Fourth Amendment as well as the search and seizure provision of the state constitution.[196] On review, the United States Supreme Court acknowledged that the state constitution had been invoked, but nonetheless ruled that the nonfederal ground was not sufficiently independent of federal law to insulate the decision from review.[197]

Speaking for the Court, Justice White justified this conclusion by quoting from the state court opinion in which it was said that the state guarantee "is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former."[198] This passage, taken from a 1963 Delaware Supreme Court opinion,[199] was interpreted by White to mean that the state search and seizure provi-

193. 456 U.S. 667 (1982).
194. *See supra* note 68.
195. 440 U.S. 648 (1979).
196. State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978).
197. 440 U.S. at 653.
198. *Id.* at 652 n.4.
199. State v. Moore, 55 Del. 356, 187 A.2d 807 (1963).

sion lacked any independent vitality. Once this hypothesis was indulged, it was but a small step to the conclusion that "this is one of those cases where '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.' "[200]

Observe that Justice White simply assumed that the Delaware court's desire to keep state constitutional requirements abreast of its view of federal constitutional principles meant that the state court was acting out of a sense of compulsion because of what it believed to be federal requirements. There is nothing in the state *Prouse* opinion, however, to support this interpretation. Although federal precedents and principles are invoked, it is apparent from the way in which federal law is used that the state court's decision was independently arrived at and not the product of compulsion. This is confirmed by the cases cited by the court in the crucial paragraph announcing its decision. Not a single United States Supreme Court decision is invoked. Instead, every element of its holding is accompanied by references to decisions of other state courts. It is simply implausible to suppose that the Delaware Supreme Court felt compelled to rule the way it did by decisions handed down by the New York Court of Appeals[201] or the South Carolina Supreme Court.[202]

The Burger Court's misreading of *Prouse* points up a fundamental flaw in its entire approach to the question of what constitutes an independent state ground. The error, simply, is that the Court's conception of federal/state court relations rules out the possibility that meaningful interplay between state and federal constitutional principles can take place without loss of independence to state law. To the extent that this view adopts and builds upon federal standards, state law loses its own distinctive character.[203]

200. 440 U.S. at 653.

201. People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975).

202. State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

203. Amending the Court's rigid federal law/state law dichotomy to include a third category—a hybrid of state and federal constitutional principles—preserves a broader realm for state court experimentation. Hybrid constitutional law is still independent constitutional law, not necessarily because of its textual grounding in state law, but because of the independence of the reasoning process that produced it. *Prouse* was clearly independent in this latter sense. Presently, the only options state courts have are to either explicitly incorporate federal standards into the state constitution, as the California Supreme Court has done in the confession context, *see* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 310 (1976), and *supra* text accompanying notes 160-77, or use federal standards without any citation of federal cases.

The Supreme Court's insistence in *Prouse* that state courts refrain from adopting federal reasoning as a basis for their independent judgments has the effect of discouraging innovation. By forcing state courts to segregate their state and federal rulings, the Court "steers state courts away from the most fruitful and legitimate route to the reasoned elaboration of state constitutional law."[204] Under *Prouse*, state judges are presented with "the unpalatable choice of either truncating—or at least carefully circumscribing—that reasoning that informs their elaborations of state law, or risking Supreme Court review."[205] The experimental method, however, is not one in which each experiment is conducted in isolation from all others. Rather, each builds upon the others' successes and failures. The experimental method, in other words, is a cumulative process in which each advance adds to the general storehouse of knowledge.

State courts, operating within the common law tradition, often borrow ideas and approaches from other jurisdictions as part of the development of their own law. This is how the common law traditionally has operated and continues to operate in many areas of state law.[206] No one has suggested that in these areas state law lacks independence because it is heavily influenced by the decisions of other state courts.

Perhaps the best response to the kind of thinking that guided the Burger Court's *Prouse* decision is found in Chief Justice Hughes' dissent in *Minnesota v. National Tea Co*.[207] In many ways, *Prouse* was an exact replica of *National Tea*. In both, the state court had explicitly invoked state law while relying on federal reasoning to justify its decision. The federal law invoked in both cases was itself undergoing substantial doctrinal alteration: in *National Tea*, the majority was in the process of abandoning substantive due process; in *Prouse*, a fundamental rethinking of automobile search law was taking place. Further,

204. *Developments in the Law, supra* note 8, at 1342.

205. *Id.*

206. Consider, *e.g.*, Baum & Cannon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 83 (M.C. Porter & G.A. Tarr eds. 1982): "Courts, for instance, often make radical changes in policy by overruling their own precedents or by substantially modifying or abrogating traditional doctrines that have all the force of precedent. Although this variety of activism can be found in constitutional or other kinds of public law, it occurs much more frequently in the development of the common law where virtually all policy is of judicial origin. Common law doctrines often have important political implications—they determine who gets what, when, and how, to use Harold Lasswell's phrase—but they receive at best only sporadic legislative attention." *Id.*

207. 309 U.S. 551 (1940).

Hughes' penetrating critique rings as true today as it did forty years ago. "That the state court may be influenced by the reasoning of our opinions makes no difference," Hughes objected.[208] It is the decision to reach an independent result, not the source of the reasoning of that result, which is important. "It cannot be supposed," the Chief Justice wrote, "that the Supreme Court of Minnesota is not fully conscious of its independent authority to construe the constitution of the State, whatever reasons it may adduce in so doing."[209] So long as the state judgment does not violate federal statutory or constitutional requirements, the Supreme Court has no business conducting an inquiry into the sources of a state court's reasoning.

It should require little argumentation to defend the proposition that having one's decisions treated as deliberate, reasoned actions rather than as unintended blunders is part of the institutional autonomy that federalism guarantees to state courts. That autonomy is undermined when the Court assumes that state judgments affording greater protection for civil liberties are the consequence of a misconception of federal law rather than an expression of an independent judgment.

B. *Minnesota v. Clover Leaf Creamery Co.*: The Importance of Constitutional Context

Part and parcel with the Burger Court's failure to recognize the independent existence of hybrid state/federal constitutional law has been its inattention to the divergent constitutional contexts in which state and federal courts operate. The Justices have simply assumed that in applying federal constitutional standards, state courts must also adhere to the implicit institutional restraints that the Constitution has imposed upon federal courts in the review of Congressional or state statutes. This assumption, however, is questionable and deserves more serious judicial attention than it has thus far received. Why for example, could not a state court, by virtue of authority granted under state law, render an advisory opinion on the meaning of federal law; or apply federal constitutional standards to what federal courts would consider "political questions"; or adhere to a more liberalized set of standing limitations even though federal law was being applied?[210]

208. *Id.* at 559.

209. *Id.*

210. *See* Porter, *State Supreme Courts and the Legacy of the Warren Court* 3, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, *supra* note 206, at 9, who raises the same issue: "[S]tate supreme courts have considerably more leeway than their federal counterparts. They are not constrained by considerations of federalism. The reach

Recently, the Justices conducted their first exchange on the "constitutional context" question in *Minnesota v. Clover Leaf Creamery Co.*[211] At issue was whether the Minnesota Supreme Court had exceeded federal standards in striking down a state statute which banned the use of nonrecyclable plastic milk containers while permitting other nonrefillable containers. In an exhaustive survey of factual data relating to the impact of plastic containers in terms of solid waste management, state recycling efforts, preserving natural resources and promoting energy conservation, the state supreme court concluded that "upon our independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives."[212]

Writing for a seven member majority, Justice Brennan quarrelled neither with the state court's selection of the rationality standard nor with the factual conclusions upon which the state court had rested its judgment.[213] Instead, Brennan attacked the intensity of the state court's scrutiny of the facts supporting the validity of the statute, declaring that, in effect, the state judges had "substitute[d] their evaluation of legislative facts for that of the legislature."[214] Reiterating the Court's abandonment of substantive due process,[215] the Justice wrote that the Equal Protection Clause does not require states "to convince the courts of the correctness of their legislative judgments."[216] So long as courts can perceive a basis on which the legislature "*could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives,"[217] then the legislative classification met the strictures of the Equal Protection Clause.

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of their decisions is limited, and they have not felt compelled, in the interests of prudence, to avoid 'political questions' or to refrain from passing judgment on the necessity for, or wisdom of, economic regulation. Their decisions may be based on the common law, state or federal statutes, and on state and federal constitutional grounds, either separately or in combination. They hear the kinds of cases that seldom reach federal courts; as pertains to workman's compensation and products liability, state courts have, one study noted, become increasingly 'concerned with the individual and the downtrodden' and are becoming 'more willing to consider rulings that promote social change.' " *Id.* at 9 (footnote omitted).

211. 449 U.S. 456 (1981).

212. Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 82 (Minn. 1980).

213. For a discussion of Justice Brennan's *Clover Leaf Creamery Co.* opinion, see Tribe, *Federal-State Relations in the Constitutional Doctrine*, in CHOPER, KAMISAR & TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980-1981, at 216-19 (1982).

214. 449 U.S. at 470.

215. *Id.*

216. *Id.* at 464.

217. *Id.* at 466 (emphasis in original).

In a lone dissent, Justice Stevens charged that the majority had intruded upon state court independence by imposing federal constitutional limitations on the relationship between state courts and state legislatures. "The keystone to the Court's equal protection analysis,"[218] Stevens observed, "is its contention that courts should defer to the legislature's judgment of the facts supporting the challenged statute." Accepting this as an accurate statement of the authority of federal courts, Stevens queried: "[W]hat is the source—if indeed there be one—of this Court's power to make the majestic announcement that it is not the function of a *state court* to substitute its evaluation of legislative facts for that of a state legislature?"[219]

The only response Justice Brennan offered came in a footnote in which he dismissed Stevens' thesis as "novel" but "without merit."[220] Brennan acknowledged that state courts are free to impose more exacting requirements under the state constitution—something which he has lauded on several occasions.[221] Nevertheless, he insisted that "when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed."[222]

Another way to state the Brennan thesis is that when state courts apply federal standards, they must behave as *federal* rather than *state* courts. But is not the distribution of power between the branches of state government a state, rather than a federal, issue? For the Court to claim otherwise is to sanction federal judicial tampering with the organization of state governmental authority. As Stevens protested in dissent:

> I should have thought the allocation of functions within the structure of a state government would be a matter for the State to determine. Nor is there anything in the Federal Constitution that prevents a state court from reviewing factual determinations made by a state legislature or any other state agency. If a state statute expressly authorized a state tribunal to sit as a Council of Revision with full power to modify or to amend the work product of its legislature, that statute would not violate any federal rule of which I am aware. The functions that a state shall perform

218. *Id.* at 477 (Stevens, J., dissenting).

219. *Id.* at 479 (Stevens, J., dissenting) (emphasis in original).

220. *Id.* at 461 n.6.

221. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Brennan, *The Bill of Rights and the States*, in THE GREAT RIGHTS 65 (E. Cahn ed. 1963).

222. 449 U.S. at 461 n.6. Justice Brennan cited Oregon v. Hass, 420 U.S. 714 (1975), as support for this proposition. For a critique of the *Hass* case, see *supra* text accompanying notes 51-60.

> within the structure of state government are unquestionably matters of state law.[223]

The divergent constitutional contexts in which state and federal courts operate must have an impact on the ultimate decision reached by state courts. Simply because a federal court in similar circumstances would be institutionally constrained from reaching the same result is not, by itself, an adequate reason for upsetting the state judgment.

Additional support for Justice Stevens' position can be found in Professor Lawrence Sager's insightful analysis of Supreme Court/state court relations.[224] According to Sager, Supreme Court decisions will often underenforce constitutional norms out of respect for the institutional limits that define federal judicial authority. Where such institutional concerns have led the Court to truncate the reach of its constitutional holding, Sager suggests that "federal judicial doctrine regarding these norms . . . mark only the boundaries of the federal courts' role of enforcement,"[225] leaving a broader realm within which state courts may operate.

As an example of his "underenforcement thesis,"[226] Sager cites *City of Pittsburg v. Alco Parking Corp*.[227] in which the Court reversed a Pennsylvania Supreme Court decision striking down a state gross receipts tax on the ground that it constituted a taking of property without just compensation. Noting that the Court's more limited view of the Takings Clause was largely the product of institutional concerns peculiar to the federal judiciary, Sager argues that the contrary state decision should have been immune from federal judicial scrutiny:

> If an underenforced constitutional norm is valid to its conceptual boundaries, the decision of the state court can be understood as the enforcement of the unenforced margin of a constitutional norm, that is, as the assumption of an important constitutional role which the federal courts perceive themselves constrained to avoid because of institutional concerns. On this basis, state court decisions which voluntarily extend the application of such norms should be left intact.[228]

Professor Sager is not the first to point out the institutional component of the Supreme Court's constitutional decisionmaking. Throughout the 1960's, Justice John M. Harlan, the Warren Court's steadfast

223. 449 U.S. at 479-80.

224. Sager, *supra* note 28.

225. *Id.* at 1221.

226. *Id.* at 1213.

227. 417 U.S. 369 (1974). Professor Sager's discussion of *Alco Parking* can be found in Sager, *supra* note 28, at 1245-50.

228. Sager, *supra* note 28, at 1248.

critic of the incorporation of the Bill of Rights,[229] argued that the extension of federal civil liberties standards would ultimately affect the strictness with which the Court interpreted those standards. Justice Harlan developed this insight in his separate opinion in *Ker v. California*.[230] In *Ker*, decided two years after *Mapp v. Ohio*[231] applied the exclusionary rule to the states, the Court held that state law enforcement agents would be governed by the same substantive standards governing searches and seizures as federal agents. In contemporary parlance, *Ker* incorporated the Fourth Amendment to the states through the Fourteenth Amendment's Due Process Clause.[232]

One of the reasons Harlan gave for opposing incorporation was his fear that it would lead the Court to dilute the Bill of Rights in order to accommodate its requirements to the diverse needs of the states. Declared Harlan:

> The rule [of incorporation] is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional strait jacket. . . . And if the Court is prepared to relax [federal] standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system—unless the Fourth Amendment is to mean one thing for the States and something else for the Federal Government.[233]

Justice Harlan returned to this theme many times throughout his career,[234] in effect warning his liberal colleagues that incorporation would ultimately lead to some very illiberal results.

Williams v. Florida[235] was, for Harlan, confirmation of incorporation's impact on the Court's interpretation of the Bill of Rights. In *Williams*, the Court held that the Sixth Amendment's guarantee of a jury trial did not include the right to be tried by a common law twelve member jury. This decision was startling because it upset an understanding of the jury trial guarantee that had held sway on the Court for over seventy years—an understanding that until *Williams* was deemed so self-evident that it was not even considered open to challenge. Why would a Court dominated by "liberals" abandon such a longstanding

229. For an excellent discussion of Harlan's criticism of incorporation, see Wilkinson, *supra* note 11.

230. 374 U.S. 23 (1963).

231. 367 U.S. 643 (1961).

232. *See* R. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS 177-204 (1981).

233. 374 U.S. at 44-46 (1963).

234. *See* cases cited in Justice Harlan's separate opinion in Williams v. Florida, 399 U.S. 78, 131 n.14 (1970).

235. 399 U.S. 78 (1970).

precedent in order to reach an arguably "conservative" result? Harlan believed he had the answer:

> The historical argument by which the Court undertakes to justify its view that the Sixth Amendment does not require 12-member juries is, in my opinion, much too thin to mask the true thrust of this decision. The decision evinces, I think, a recognition that the "incorporationist" view of the Due Process Clause of the Fourteenth Amendment, which underlay *Duncan* [*v. Louisiana*] . . . must be tempered to allow the States more elbow room in ordering their own criminal systems. With that much I agree. But to accomplish this by diluting constitutional protections within the federal system itself is something to which I cannot possibly subscribe.[236]

Harlan's analysis is persuasive. It is difficult to believe the Court would have been prompted to abandon the twelve member jury requirement had the Sixth Amendment not been applied to the states in *Duncan v. Louisiana*.[237] Having done so, however, the Court was faced with the problem of reconciling incorporation with the fact that many states had for years utilized juries with fewer than twelve persons. Because the Court was unwilling to assert that the twelve person jury requirement was "not a necessary ingredient of 'trial by jury,' "[238] there was no alternative short of abandoning incorporation that would permit state diversity, except the excising of the twelve person requirement from the Sixth Amendment. As Harlan correctly observed, this did indeed constitute a "diluting [of] constitutional protections within the federal system."[239]

Another way of phrasing Harlan's insight is to say that the victory of incorporation did not signal the demise of federalism. Federalism survived but manifested itself in a different way. Prior to incorporation, federalism was recognized through the dual standards by which state and federal actions were judged: the federal government by the more exacting standards of the Bill of Rights, and the states by the more permissive standard of "fundamental fairness" under the Fourteenth Amendment.[240] Once the Court decided to hold the states and national government to the same standards, however, a foreseeable consequence was that the need for state diversity would be accommo-

236. *Id.* at 118.

237. 391 U.S. 145 (1968).

238. Williams v. Florida, 399 U.S. 78, 87 (1970).

239. *Id.* at 118 (Harlan, J., concurring and dissenting).

240. For a discussion of the "double standard" under which the Court operated, see ABRAHAM, FREEDOM AND THE COURT 8-28 (2d ed. 1972); R. CORTNER, *supra* note 232, at 152-77.

dated by weakening federal civil liberties requirements. In effect, the Court ended up doing precisely what those who favored incorporation accused Harlan of advocating, namely, "appl[ying] to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.' "[241] The real irony is that the logic of incorporation demanded that the same "watered-down version" be applied to the federal government as well.

Recognition that the Court's interpretation of the Bill of Rights contains a built in "discount factor" necessitated by the demands of federalism argues strongly in favor of permitting state courts to adopt reasonable extensions of federal guarantees.[242] There is simply no adequate justification for holding state courts to the same set of federalism based limitations that apply to federal judicial review. As Justice Stevens' *Clover Leaf Creamery* dissent explains, much of the disagreement between state courts and the Supreme Court over the outer limits of federal civil liberties guarantees can be accounted for by the divergent constitutional contexts in which state and federal courts operate. Even when disagreement cannot be explained solely in terms of institutional disparities, Justice Harlan's analysis suggests that the Court itself might have adopted the state court's more expansive view were it not saddled with the responsibility of fashioning nationwide standards. State courts, whose decisions by definition do not extend beyond their own borders, have the freedom to engage in civil liberties experimentation without fear of causing disruption in other jurisdictions.

C. *Oregon v. Kennedy*: Understanding the Dynamics of Independent Interpretation

For a tribunal which has so often praised the theoretical virtues of decentralization and state autonomy,[243] the Burger Court has remained remarkably insensitive to the actual impact of federal judicial review on the dynamics of independent interpretation. State experimentation,

241. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

242. *See* Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981): "In interpreting their own charters, state courts need not only *apply* differently those federal standards incorporated into their constitutions, but more importantly, may announce their own original standards. Thus, state courts whose constitutions so permit have the opportunity to consider anew a jurisprudence of freedom of speech, or they may want to think through the wisdom of employing the 'rationality' analysis presently in vogue in the federal courts. In the criminal procedure context, state judges, by relying on their state constitutions, could reformulate the law of confessions or rearticulate the constitutional premises underlying the exclusionary rule. The possibilities are almost endless." *Id.* at 7-8 (emphasis in original) (footnotes omitted).

243. *See supra* cases cited in notes 1-5.

to be meaningful, must be more than a collection of cursory citations to some provision of the state constitution. What is needed is the development of an independently reasoned body of principles. Inevitably, it will be a slow, halting, and difficult process.

Much of the difficulty stems from the fact that in the post-incorporation era, independent interpretation is not an autonomous process. The federalization of civil liberties law has diminished substantially the opportunity for truly autonomous state court decisionmaking. Predictably, this has inhibited the development of state court independence. Unless the Court is willing to permit state courts the necessary "elbow room" to develop independent approaches to civil liberties problems, little innovation can occur. The dynamics of independent interpretation, in other words, require that state judges look somewhere other than Washington, D.C. to learn their constitutional law.[244] Yet by continually reviewing expansive state court judgments, the Court directs attention *away* from independent sources and *to* its own pronouncements.

The anti-experimental impact of Burger Court review is most apparent in states which have attempted to develop an independent jurisprudence. In California, for example, Robert Gerstein studied state court of appeal responses to divergent state and federal supreme court criminal procedure decisions and concluded that

> where [the United States Supreme Court and state supreme] courts . . . take fundamentally different views of what the shape and weight of the relevant rights are, the Federal Supreme Court may penetrate the state judicial hierarchy and successfully challenge the claim of the state Supreme Court to be the ultimate articulator of legal doctrine for the lower courts.[245]

No state has exceeded Oregon in trying to develop an autonomous body of civil liberties law.[246] Under the leadership of Justice, and former law professor, Hans Linde, the Oregon Supreme Court has stood

244. *See* Linde, *supra* note 8, at 395: "In modern times . . . [i]t became the assumption, not without cause, that the states would have to learn constitutional law from Washington, D.C. Yet there have been occasions when the older view would have stood us in good stead. . . . [W]hat reason is there for confidence that the national version of the first amendment, or the fourth, or the fifth, will always be the best the nation could want?"

245. R. Gerstein, *supra* note 178, at 1.

246. According to the Oregon Supreme Court, all state law issues, including those arising under the Oregon Constitution, must be disposed of prior to any consideration of federal law. *See* Cole v. State *ex rel.* Oregon Dep't of Revenue, 294 Or. 188, 190-91, 655 P.2d 171 (1982); Sterling v. Cupp, 290 Or. 611, 614, 624 P.2d 123 (1981). Only where the state court decides all state law questions adversely to the claimant must the court address the federal claims. *See, e.g.*, State v. Clark, 291 Or. 231, 630 P.2d 810, *cert. denied*, 454 U.S. 1084 (1981); Haynes v. Burks, 290 Or. 75, 619 P.2d 632 (1980).

the traditional preference for federal law on its head. In *Sterling v. Cupp*,[247] the state high court announced the general rule that whenever state and federal claims are presented in a case,

> [t]he proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.[248]

State courts may insist upon this ordering of claims because, as Justice Linde has argued elsewhere, "[w]hen the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment."[249] Once the state court has granted the desired relief under state law, in other words, there may be no outstanding federal claim left to be resolved.

Requiring state courts to dispose of all state claims first is the most effective method available for encouraging the independent development of state law.[250] The more opportunities presented to state judges for thinking about constitutional issues outside the context of strict application of federal standards, the more likely the development of a truly fresh and independent jurisprudence of civil liberties. It is relatively easy for a state supreme court to announce the rule that state claims be addressed first. Implementing such a policy, however, has proved to be a much more difficult enterprise, as *Oregon v. Kennedy*[251] illustrates.

The *Kennedy* case involved the question whether double jeopardy principles barred the retrial of a defendant whose first prosecution resulted in a mistrial due to prosecutorial misconduct. The pre-*Kennedy* federal approach, although far from clear on this issue, tended to emphasize the element of intent, requiring that the prosecutor's misconduct be part of some plan "to goad the [defendant] into requesting a mistrial."[252] The Oregon Supreme Court, by contrast, had interpreted the state double jeopardy provision more broadly. In *State v. Rath-*

247. 290 Or. 611, 625 P.2d 123 (1981).

248. *Id.* at 614, 625 P.2d at 126.

249. Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970).

250. *Cf.* Suess Builders Co. v. City of Beaverton, 294 Or. 254, 263-68, 656 P.2d 306, 312-15 (1982) (discussing relationship between state law and claims of denial of federal rights brought under 45 U.S.C. § 1983).

251. 456 U.S. 667 (1982).

252. United States v. Dinitz, 424 U.S. 600, 611 (1976).

bun,[253] the court ruled that a bailiff's improper remarks to a sequestered jury constituted misconduct prohibited by the state constitution even though the behavior was not " 'triggered by prosecutorial or judicial desire to harass the defendant or afford the prosecution a more favorable opportunity to convict.' "[254] Moreover, the *Rathbun* court reached this conclusion in full awareness that its holding was not compelled by federal law. Indeed, the court emphasized that "there is little to be gained by our attempting to guess what the United States Supreme Court might do . . . if this case were before the Court,"[255] and therefore "we shall dispose of this case under Oregon law . . . ."[256]

Counsel for Kennedy raised both state and federal claims before the state court of appeals. Contrary to the mandate of *Sterling v. Cupp*, the court of appeals did not explicitly take up the state issue first. Instead, without citation to either the federal or state constitutional text, the court spoke in terms of a general "theory of prior jeopardy" that prohibited defendant's retrial.[257] The Oregon Supreme Court denied the state's appeal, at which point a writ of certiorari was filed before the United States Supreme Court.

The Burger Court granted review and, in an opinion by Justice Rehnquist, reversed.[258] Acknowledging that there was some question about the basis for the state court's decision, Justice Rehnquist stated that "before turning to the merits of the double jeopardy claim," the Court must first take up "respondent's contention that the Court of Appeals' decision is based upon an adequate and independent state ground."[259] It took the Justice only a single paragraph to "reject . . . these contentions."[260]

In Justice Rehnquist's view, the issue could be resolved through a simple exercise in citation checking. On the basis of his examination of the cases cited in the state opinion, the Justice concluded that "with one exception, the cases . . . outlining the 'general rule' that guided its decision are decisions of this Court."[261] The single exception was the

253. 287 Or. 421, 600 P.2d 392 (1979).

254. *Id.* at 431, 600 P.2d 397 (quoting the state court of appeals opinion in State v. Rathbun, 37 Or. App. 259, 264, 586 P.2d 1136, 1138 (1978), *rev'd on other grounds*, 287 Or. 421, 600 P.2d 392 (1979)).

255. 287 Or. at 431, 600 P.2d at 397.

256. *Id.*

257. State v. Kennedy, 49 Or. App. 415, 417, 619 P.2d 948, 949 (1980).

258. Oregon v. Kennedy, 456 U.S. 667 (1982).

259. *Id.* at 670-71.

260. *Id.*

261. *Id.*

court of appeals' decision in *State v. Rathbun*[262]—the decision that was subsequently reviewed by the Oregon Supreme Court when it announced its broader reading of the state double jeopardy guarantee. Reference to the court of appeals decision in *Rathbun*, however, was found to be insufficient to shield the *Kennedy* judgment from review. According to Justice Rehnquist, "the Court of Appeals' decision [in *Rathbun*] . . . clearly rested on federal grounds, a fact which was so recognized by the Oregon Supreme Court."[263]

Justice Rehnquist failed to recognize that it really made no difference whether independent sources were expressly invoked. The absence of any express references to state law was hardly conclusive on the propriety of the Court's exercising review. The crucial question was whether the state judgment was supported by state law. Clearly, *Rathbun* refutes any suggestion that federal law was the only basis for the court of appeals judgment in *Kennedy*. As the Oregon ACLU brief submitted in *Kennedy* correctly noted,[264] if the Oregon Supreme Court's *Rathbun* decision supported the judgment in *Kennedy*, then any United States Supreme Court pronouncement on the merits would amount to rendering an advisory opinion.[265] On remand, "the defend-

262. 37 Or. App. 259, 586 P.2d 1136 (1978).

263. 456 U.S. at 671.

264. Amicus Curiae Brief for the American Civil Liberties Union Foundation of the State of Oregon at 4, Oregon v. Kennedy, 456 U.S. 667 (1982).

265. To say that the *Kennedy* decision was an advisory opinion does not mean that it was without significance. Certainly in terms of its impact on double jeopardy law generally, *Kennedy* will have widespread national ramifications. One can expect that state prosecutors will invoke *Kennedy* in an attempt to persuade state courts to follow the Supreme Court's less stringent approach. This, at any rate, seems to have been on the mind of the Oregon Attorney General, Mr. David Frohnmayer, who argued the state's case before the Supreme Court in *Kennedy*. Consider the import of the following exchange between Justice O'Connor and Mr. Frohnmayer during oral arguments: "JUSTICE O'CONNOR: Mr. Frohnmayer, even if we were to agree with you in your argument here today as far as the federal rule is concerned, if the case were to go back to Oregon, would Oregon apply a more stringent test, as has been suggested in one of the amicus briefs, so that under the Oregon constitution and under Oregon law, for example, in the *Rathbun* case, is a stricter standard applied? . . . MR. FROHNMAYER: [T]o address your question, Justice O'Connor, it is not clear what the *Rathbun* case would dictate, because at the time the supreme court decided *Rathbun*, it noted that there was no state or federal constitutional authority precisely on point on the double jeopardy question where a bailiff attempts improperly to influence a jury, and there is still no such federal case, so we would have to know whether or not this Court, for example, would extend double jeopardy protection to a defendant where a bailiff engaged in improper conduct."

What was "not clear" about *Rathbun* was not whether the decision supported the state court of appeals ruling in *Kennedy*, but whether the state court would adhere to the broader view adopted in *Rathbun* in light of a contrary decision by the U.S. Supreme Court.

Having the Burger Court air its views on double jeopardy may have served the Attorney General's interests but it hardly furthered the Oregon Supreme Court's legitimate objec-

ant would be entitled to reassert his state constitutional claims in Oregon regardless of what this Court says about federal law."[266] The fact that existing state law supported the defendant's claim meant that reversal by the Supreme Court would have no bearing on the appropriateness of the state court judgment. Therefore, consistent with the teaching of *Herb v. Pitcairn*,[267] the Court should have declined review. Only when federal law forms the necessary and not merely a sufficient basis for the state court's holding is it permissible for the Court to exercise review.

The Burger Court's handling of *Kennedy* was not only inconsistent with the ban on advisory opinions, it also interfered with the state appellate review process. The state's highest court had, in unmistakable terms, established the general rule that state courts address state claims first. Operative state law afforded the defendant the relief he sought.[268] Thus, it was implausible to suggest that the decision was simply the product of an erroneous interpretation of federal law. As Justice Stevens wrote, concurring in the result, "it is entirely possible that that court's refusal to review the Court of Appeals' decision was predicated on its view that the decision was sound as a matter of state law regardless of whether it is compelled by federal precedents."[269] At the very least, the Court should have asked for clarification before exercising review.[270]

Not only was it likely that the state high court's denial of review was based on its reading of state law, but in terms of insuring the integrity of the state's appellate process, it was essential that the Court treat

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tive of developing independent standards under the state constitution. Indeed, the task of ensuring compliance with the *Rathbun* standards will be more difficult to achieve since state courts will be able to "evade" the independent requirements of their own highest court through the expedient of rendering judgment solely on the basis of federal law—or worse still, to interpret state law in the shadow of the United States Supreme Court's pronouncement in *Kennedy*.

This is not a matter of mere speculation. On remand, the Oregon Court of Appeals reversed its original holding and affirmed the defendant's conviction solely on the basis of federal law. State v. Kennedy, 61 Or. App. 469, 619 P.2d 717 (1983). The Oregon Supreme Court affirmed the Court of Appeals judgment but did so exclusively on the basis of *state* law. State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983).

266. Amicus Curiae Brief, *supra* note 264 at 3-4.

267. 324 U.S. 117 (1945). "[O]ur 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 view of federal laws, our view would amount to nothing more than an advisory opinion*." *Id.* at 126 (emphasis added).

268. *But see* State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983) (affirming defendant's conviction under state law).

269. 456 U.S. at 681 n.1 (Stevens, J., concurring).

270. *Id.*

the state decision as independently based. If state courts are to have the necessary breathing room to develop an independent jurisprudence, then once the state's highest court has declared its intention to develop a separate body of civil liberties law, that tribunal's decision to deny review should be interpreted by the United States Supreme Court as an indication that the decision was consistent with the requirements of state law. Any other assumption would undermine the state's system of discretionary review by the state supreme court. This point is underscored by Justice Hans Linde in his opinion for the Oregon Supreme Court in the second round of appeals in *Kennedy*:[271]

> In effect, when this court might reach the same result under the Oregon law that a lower court reaches by citing federal precedents, we would have to allow review at the instance of a losing party objecting only to the federal holding, while the successful party who might prefer a decision on state grounds has no reason to petition us for review. Surely a practice that requires a winning party to seek review solely in order to shift a favorable judgment from federal to state grounds is wholly unreasonable, apart from its logical flaws.[272]

There is no small irony in Justice Linde's observation that as a result of the Supreme Court's certiorari policies, state civil liberties claimants may now have to appeal favorable lower state court judgments to the state supreme court solely in order to have the decision reaffirmed as being a matter of state law. Equally troublesome are the new burdens that the Court's review policies impose on state supreme courts: the only way to guarantee the integrity of its own review process is to make sure that every decision carries the appropriate citations to state law. One wonders why Supreme Court Justices, who know firsthand the judicial headaches created by an overcrowded docket, would so needlessly make more work for an already overextended state judiciary. The final irony is that these additional burdens are being imposed on state judges in the name of federalism and respect for state autonomy. With friends like these, state judges might reasonably begin to wonder, who needs enemies?

Conclusion

For nearly one-half of a century, the United States Supreme Court has exercised largely unquestioned leadership over the pace and direc-

271. State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983).

272. *Id.* at 263, 666 P.2d at 1319.

tion of civil liberties development.[273] Having become so accustomed to thinking about Supreme Court review of state court decisions solely in terms of preserving individual rights, little attention has been given to the impact that federal judicial intervention can have in terms of narrowing rights. The Burger Court's treatment of expansive state civil liberties judgments is a poignant reminder that federal intervention can hinder the protection of rights. The Court's insensitive approach to the demands of independent constitutional interpretation has resulted in the exercise of federal judicial review in a manner that thwarts the very innovative forces that the Black/Brandeis conception endeavors to protect.

The relationship between the United States Supreme Court and state courts is complex and dynamic. The conventional portrait of state judges as personally unsympathetic toward and institutionally incapable of vindicating individual rights[274] no longer depicts current realities.[275] An increasing number of state judiciaries are in the process of openly questioning whether "the national version of the first amendment, or the fourth, or the fifth, will always be the best the nation could want."[276] The existence of active state courts willing to expand rights is a reminder that "federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty."[277] It also presents the Court with a rare opportunity to demonstrate that decentralization can serve to foster civil liberties protection—to make the Black/Brandeis ideal a constitutional reality—if only the Justices would refrain from staying the hand of state experimentation.[278]

273. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See also* L. LUSKY, BY WHAT RIGHT? 97-114 (1975); J. ELY, *supra* note 34.

274. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

275. *See* Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

276. Linde, *supra* note 8, at 395.

277. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

278. It is difficult to improve on the sober reminder with which Justice Brandeis closed his dissent in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932): "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences of the Nation . . . . This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *Id.* at 311.