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Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds

Larry M. Elison  
University of Montana School of Law

Dennis NettikSimmons  
University of Montana School of Law

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ARTICLES

FEDERALISM AND STATE CONSTITUTIONS: THE NEW DOCTRINE OF INDEPENDENT AND ADEQUATE STATE GROUNDS

Larry M. Elison* and Dennis NettikSimmons**

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* Professor of Law, University of Montana School of Law. A.B., Idaho State College; LL.B., University of Utah; S.J.D., University of Michigan.
I. INTRODUCTION

From Chief Justice Marshall to the appointment of Chief Justice Burger and most dramatically during the Warren Court years, states have been forced to conform to minimum federal standards on an ever grander scale. Concomitantly, state constitutions were relegated to a position of insignificance. Until the Burger Court reversed directions, state constitutional interpretations tended to mimic the federal constitution and largely failed to elicit thoughtful, conscientious, or independent consideration.

A change has been wrought. The U.S. Supreme Court is no longer the conscience of a nation. It has passed that awesome responsibility to fifty unsuspecting state courts. Some are delighted, others bemused. Some may decline the responsibility while others will be slow to accept. It is no small task to be conscience, seer, and grand interpreter. It is much easier to be a mime.

Why did the Burger Court reverse directions? The underlying motivation is a renewal of federalism buttressed by the majority’s disenchantment with the long-term growth of federal protection of political and civil liberties, especially for criminal defendants. The principal tool in accomplishing the change has been the doctrine of adequate and independent state grounds. The primary result of the change is diminished protection for political and civil liberties. A secondary result is renewed interest in state constitutions. The purpose of this article is to identify the issues raised by the doctrine of independent and adequate state grounds; to describe the present posture of the doctrine; and to suggest how a state court might best respond to the doctrine.

The doctrine of independent and adequate state grounds pertains to the jurisdiction of the United States Supreme Court to review state court judgments. The general rule is that the Supreme Court does not have plenary appellate jurisdiction over state court decisions. In keeping with our federal system, the Court is not authorized to construe state law; state law is a matter solely for the state courts to decide. The sovereign power of the states to make and construe their own laws is limited only by the supremacy clause of the federal Constitution. It is the supremacy clause that permits litigants to raise federal questions in state court proceedings;1 and it is the presence of a federal question that permits the

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1. U.S. Const. art. VI, § 2 provides:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any
Supreme Court to review the judgment of a state court.\textsuperscript{3}

The doctrine of independent and adequate state grounds not only encompasses this general rule, but also serves to preclude Supreme Court review of state court judgments that are fully supported by state grounds, even though the state court might peripherally address a federal question or alternatively base its judgment on federal grounds.

The state grounds on which a state court decision rests must satisfy two conditions before the Supreme Court will deem itself barred from taking jurisdiction of the case. First, the state grounds must be independent: they must not be explicitly or implicitly intertwined with or dependent on a federal question.\textsuperscript{8} Second, the state grounds must be adequate: they must be bona fide,\textsuperscript{4} broad enough to dispose of the case,\textsuperscript{5} and of sufficient importance\textsuperscript{6} to warrant the Court's declining to address the federal right whose vindication is sought.

State to the Contrary notwithstanding.


4. Hathorn v. Lovorn, 457 U.S. 255 (1982). The Court, per O'Connor, J., stated that “[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.” Id. at 263. Examining state case law and statutes for itself, the Court concluded that the Mississippi Supreme Court “either decided the federal question on the merits . . . or avoided the federal question by invoking an inconsistently applied procedural rule.” Id. at 265 n.15. See also Barr v. City of Columbia, 378 U.S. 146, 150 (1964); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1942); Rogers v. Alabama, 192 U.S. 226, 230 (1904); Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887).

5. See, e.g., Abie State Bank v. Bryan, 282 U.S. 765 (1931). In Abie State Bank the state court had held that the petitioner bank was estopped from asserting its claim that the state bank guaranty law violated the fourteenth amendment since the bank had referred to the law in its advertisements in order to gain customers. The Court held that the theory of estoppel was not broad enough to dispose of the case, since “earlier compliance with the regulation [did] not forfeit the right of protest when the regulation [became] intolerable.” Id. at 776. Cf. Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917) (estoppel held to be sufficiently broad to bar consideration of a federal due process question). See also Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 634 (1875) (state grounds “not of such controlling influence on the whole case that they are alone sufficient to support the judgment” are not adequate to bar Supreme Court jurisdiction).

6. See, e.g., Henry v. Mississippi, 379 U.S. 443, 447 (1965) (“[A] litigant's procedural faults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.”).
II. STATUTORY AND JUDICIAL DEVELOPMENT OF THE DOCTRINE

A. Statutory Design

The Supreme Court's appellate jurisdiction of state court decisions is exercised pursuant to the federal Constitution and federal statutes. Hence the question whether a state court's judgment rests on independent and adequate state grounds is itself a federal question. In construing its constitutional and statutory grant of appellate jurisdiction, the Supreme Court fashioned the requirement that a state judgment that raises a federal question will not be subject to Supreme Court review if firmly based on state law that is both independent of federal law and adequate apart from federal law.

In developing this doctrine of adequate and independent state grounds the Supreme Court was forced to respond to a number of statutory changes. The broad outline of these changes follows.

Prior to 1867, the Supreme Court's appellate review of state court decisions was in effect limited to decisions that held against

7. See U.S. Const. art. III, § 2, cl. 1, 2. The Constitution does not specifically grant the Supreme Court appellate jurisdiction of state court decisions. Nonetheless Congress, in 1789, pursuant to its powers to regulate the Court's appellate jurisdiction, enacted § 25 of the First Judiciary Act, Act of September 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789), which gave the Court such jurisdiction. Even though the challenge to this jurisdiction was definitively rejected in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), and in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Court had already reviewed sixteen state court cases before Martin without the contention that it was unconstitutional. See, e.g., Ulney v. Arnold, 3 U.S. (3 Dall.) 308 (1797). See also 1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 443 (1922).

Currently, 28 U.S.C. § 1257 (1982) provides for the Court's appellate jurisdiction of state court decisions:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

8. See Angel v. Bullington, 330 U.S. 183, 189 (1947) ("But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court . . . has the last say."). See also Lawrence v. State Tax Comm'n of Mississippi, 286 U.S. 276, 282 (1932).
the validity, applicability, or supremacy of the federal law. All appeals were by writ of error, and review of state court judgments by the Supreme Court was limited to federal issues that appeared on the face of the record.10

In 1867 Congress substantially reenacted the First Judiciary Act, but omitted a final sentence that specifically prohibited Supreme Court appellate review of state judgments not raising a federal question on the face of the record.11 There was no affirmative grant of increased jurisdiction and the Supreme Court declined to expand its jurisdiction by implication on the basis of the omission.12 After the omission the review of a state court judgment was no longer limited to the face of the record, which meant that the Supreme Court was permitted to examine the opinions of state courts.13

In 1914 Congress expanded the scope of the Supreme Court's jurisdiction to review state court judgments by allowing the exercise of appellate jurisdiction whenever those judgments rested on the determination of a federal question, regardless of whether the federal question was determined in favor of or against the validity, applicability, or supremacy of the federal law.14

10. The final sentence of § 25 of the First Judiciary Act provided:
   But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute.
12. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 618-619 (1875). Three Justices dissented, arguing that Congress had granted the Court jurisdiction to review the entire case—including the state law—if the state court decided a federal question. See generally C. Warren, supra note 7, at 402-04 (noting that it was "highly probable" and consistent with other enactments that Congress intended to enlarge the Court's jurisdiction). But cf. C. Wright, The Law of Federal Courts 488 (2d ed. 1970).
13. At that time the term "record" had a more restricted meaning than it has today. In Armstrong v. Treasurer of Athens County, 41 U.S. (16 Pet.) 281, 285 (1842), the Court stated what constituted the record. It included the "express averments" or "necessary intentions of the pleadings," the "directions given by the Court and stated in the exception," an official entry, by order of the state appellate court, on the record of its proceedings, or the body of the final decree of a court of equity. The only state court whose opinions constituted part of the "record" was Louisiana. Id. See also Williams v. Norris, 25 U.S. (12 Wheat.) 117, 118-20 (1827).

In Murdock, however, the Court construed the amended Judiciary Act to permit the Court to review the state court opinions, since the "record" requirement had been omitted. 87 U.S. (20 Wall.) at 633-44.
14. Act of December 23, 1914, ch. 2, 38 Stat. 790 (1914). Congress was prompted to expand the Court's jurisdiction by a much criticized New York decision, Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), which struck down social welfare legislation as violating the fourteenth amendment. See 16 C. Wright, A. Miller, E. Cooper & E. Gress-
In a series of subsequent congressional enactments the Supreme Court’s appellate jurisdiction to review state court decisions was divided between review by appeal and review by writ of certiorari. Appeals, which are theoretically a matter of right, were limited to judgments against the validity of federal statutes or treaties or favorable to conflicting state statutes. The review of all other federal questions became discretionary and were to be raised by writ of certiorari.

As a result of these modifications the Court’s appellate jurisdiction changed in three respects. First, in determining whether a federal question was raised and decided in the state court, the Supreme Court may consider not only the “record,” but also the opinion of the state appellate court. Second, the Court may now review state court decisions that uphold the federal right claimed by a litigant. Third, it is solely a matter of the Court’s discretion whether to exercise its appellate powers to review state court decisions, unless the state court has decided against the validity of a federal statute or treaty or has upheld a state statute alleged to be repugnant to federal law.

B. The Judicial Development

1. 1789-1870

Although the framers of the Constitution intended to restrict the sovereignty and autonomy that the states enjoyed under the ineffective Articles of Confederation, they did not intend to eliminate that sovereignty and autonomy. The states retained their...

15. Act of September 6, 1916, ch. 448, § 2, 39 Stat. 726 (1916) (making review of all cases that do not decide against the validity of a federal treaty, statute, or authority exercised under the federal government, or in favor of the validity of a state statute or authority exercised under a state, discretionary, i.e. reviewable by writ of certiorari); Act of February 13, 1925, ch. 229, § 237, 43 Stat. 936, 937-38 (transferring review of an authority exercised under a state or the federal government from writ of error to writ of certiorari); Act of January 31, 1928, ch. 14, 45 Stat. 54; Act of April 26, 1928, ch. 440, 45 Stat. 446. (replacing writ of error with appeal procedure).


17. See The Federalist No. 9, at 50-51 (A. Hamilton) (H. Lodge ed. 1888) (“The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation
sovereignty subject to the specified and limited powers of the federal government. It was necessary, however, that where state and federal law conflicted, the federal law would be supreme. 18

In its early period the Supreme Court assumed for itself the roles of final arbiter of the Constitution and of delineating the limits of federal law. 19 The Court struggled with the coordinate branches of the federal government and confronted resistance from the states in its attempt to shore up the supremacy of the federal government. 20

While the Supreme Court recognized and proclaimed that the states have the exclusive authority to decide issues of state law, it assumed for itself the authority to decide federal law. 21 Reasoning that it was important that federal law be uniformly applied among

in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power.") ; id. No. 14, at 79 (J. Madison) (the federal government's "jurisdiction [was] limited to certain enumerated objects . . . "); id. No. 82, at 513 (A. Hamilton) (The state courts would retain all of their prior jurisdiction less that which has been specifically granted to the federal government. Over the latter the state courts would have concurrent jurisdiction, subject to appeals to the federal courts.

18. See U.S. Const. art. VI, § 2; Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (asserting that the powers of the national and state legislatures are subject, at least, to the limitations of the federal Constitution); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (striking down a Georgia statute that attempted to void prior land sales as a statute impairing the obligation of contracts).

19. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that the Constitution was "the fundamental and paramount law of the nation" and that it was the "province and duty of the judicial department to say what the law is").

20. See 1 C. Warren, supra note 7, at 5 ("[T]he chief conflicts in the first century arose over the Court's decisions restricting the limits of State authority and not over those restricting the limits of Congressional power. Discontent with its decisions on the latter subject arose, not because the Court held an Act of Congress unconstitutional, but rather because it refused to do so . . . ").

21. In Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 248 (1833), the Court, per Chief Justice Marshall, not only rejected the contention that the federal Bill of Rights applied to state governments, but also acknowledged that a state constitution "is a subject on which [state courts] judge exclusively, and with which others interfere no farther than they are supposed to have a common interest." When state law was repugnant to federal law a "common interest" came into play.

In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), the Court reaffirmed that it would be the final interpreter of federal law, the interpretations of state courts notwithstanding. Justice Story, writing for the Court in Martin, construed U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ") affirmatively to grant jurisdiction to the Supreme Court over all such "Cases." Justice Story rejected the argument that "appellate jurisdiction over state courts [was] inconsistent with the genius of our governments, and the spirit of the constitution [and that] the latter was never designed to act upon state sovereignties . . . ". Martin, 14 U.S. (1 Wheat.) at 342-43. Noting that the Constitution contained many provisions restricting what state governments could do and that the judges of the states are expressly bound by the Constitution, Justice Story pointed out that the sovereignty of the states, including their tribunals, was subject to federal law.
the states, the Court further assumed the authority to determine whether a state court decision had raised and decided a federal question. Before the Court would assume appellate jurisdiction of state court decisions, however, it had to be clear from the face of the record that a federal question had been raised and decided by the state court. In some instances during this period, the Court was willing to infer from the facts of the case and the judgments of the state courts that a federal question must have been decided, although not stated on the record. In others, the Court refused to apply what it considered to be erroneous state law that the appellee contended to be a state ground sufficient to preclude the Court's jurisdiction. Such cases first raised the spectre of a vague

22. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficiency, in any two states.


24. In Martin, the Court proceeded to examine the title that was in question in the case to see whether it was affected by a federal treaty.

25. In Crowell v. Randall, 35 U.S. (10 Pet.) 367 (1836), the Court was required to construe § 25 of the First Judiciary Act. The preliminary issue was whether a federal question had sufficiently arisen in the state court to enable the Court to have appellate jurisdiction. Justice Story stated that two conditions had to be satisfied before the Court could take jurisdiction. First, it must have been clear from the record that a federal question "did arise in the court below." Id. at 390. Second, it must have been clear that "a decision was actually made thereon, by the same court . . . ." Id. This general rule embodied notions of federalism. By requiring that state courts had to have actually passed on a federal question before the Court could have appellate jurisdiction, it showed respect for the independence of state court proceedings and thus precluded the Court from exercising a general supervisory power over state courts.

Nonetheless, Justice Story assumed for the Court the power to police its own exercise of jurisdiction. This power permitted the Court to decide for itself whether a federal question had arisen and was decided by the state court. Although refusing to take jurisdiction when it was merely possible that a federal question was raised and decided below, the Court reserved for itself the right to infer that such a question had been decided. Although the Court in Crowell ultimately dismissed the writ of error for want of jurisdiction, the Court had used its power to infer that a federal question had been decided in taking jurisdiction of prior cases. See also, Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830); Wilson v. The Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

26. See Neilson v. Lagow, 53 U.S. (12 How.) 98 (1851). In Neilson the state court below had decided the case without opinion. Its judgment could have rested on either state or federal grounds. Noting that there was no evidence in the record that the state court's decision did not rest on federal grounds, and rejecting the respondent's contention that there was precedent for the state grounds, the Court stated:

[When put to infer what points may have been raised, and what that court below did decide, we cannot infer that they decided wrong; otherwise, nothing
doctrinal approach based on broad exercise of discretion—an approach that was more closely related to subject matter and Court membership than doctrinal rules.

2. 1870-1935

While the Supreme Court has inexorably expanded its legal domain, the expansion has been neither smooth nor consistent. The sixty-five years from 1870 to 1935 are an example of transition and change of direction. Some few years after the end of the Civil War the strength of the federal government and supremacy of federal law were clearly established, and the Court’s role as final arbiter was firmly secured. As a result of this fact plus an uncomfortable increase in case load and other more pressing concerns, the Court began to show considerable deference to the judgments of state courts. When the state court’s judgment clearly rested on

would be necessary in any case to prevent this court from reversing an erroneous judgment under the twenty-fifth section of the Judiciary Act, but that counsel should raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon. Id. at 110.

In rejecting a state court precedent as “erroneous” and inferring that the state court below would not have wrongly decided the instant case, the Court found the state grounds urged by the respondent to be inadequate to support the state court’s judgment. The necessity to make inferences was, in large measure, the result of the restricted meaning of “record” under the First Judiciary Act. See Note, Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision, 62 COLUM. L. REV. 822 (1962).

In addition to the method of construing state law utilized in Neilson, the Court in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), asserted that the federal courts were not barred from rejecting state law when it addressed a question in the domain of “questions of a more general nature.” In Postal Tel. Cable Co. v. Newport, 247 U.S. 464 (1918), the Court utilized a similar principle to reject a state court’s determination of res judicata, which otherwise would have barred the Court’s jurisdiction to review the case. Swift was overruled in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). See Note, The Untenable Nonfederal Ground in the Supreme Court, 74 HARV. L. REV. 1375, 1386 (1961); Hart, The Relation Between State and Federal Law, 54 COLUM. L. REV. 489, 504 (1954).

27. See 3 C. WARREN, supra note 7, at 140.

28. Id. at 255. In 1873 the Court thought that it had severely restricted the recently ratified fourteenth amendment in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). This general shift in the Court’s attitude toward the states was reflected in cases addressing the doctrine of adequate and independent state grounds.

Although from 1870 to 1888 it was the strong deference given to state courts which accounted for the Court’s treatment of the doctrine, other factors came into play in subsequent years. First, Congress had expanded the scope of the jurisdiction of the federal circuit courts to include all suits arising under the Constitution and statutes of the federal government. Thus the strong support given by the Court to the burgeoning national government during the first half of this period did not require it aggressively to review state court decisions. Second, from 1890 to 1925 the Court found itself inundated with an increasing number of petitions and sought ways of avoiding obligatory review. Third, the Court’s active use of the due process clause to strike down state legislation was mirrored by an equally active use of state constitutions to do the same thing. See, e.g., Wynehamer v. People, 13 N.Y. 378
state grounds, the Supreme Court would not review it. Even when it appeared that the state court’s decision might have been based on a state ground or when the grounds for the judgment were ambiguous, the Court summarily dismissed the writ.

(1856) (state court’s use of substantive due process antedating the drafting of the fourteenth amendment); Gulf, Colorado & Santa Fe Railway Co. v. Dennis, 224 U.S. 503 (1912) (vacating the judgment of a lower state court that could not be appealed to the state’s highest court, noting that the state’s highest court had declared that the law in question violated the state constitution). See generally Paulsen, Substantive Due Process in the States, 34 Minn. L. Rev. 91 (1950).

29. In Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1871), the Court was presented with a case where the Missouri Supreme Court had affirmed the trial court’s finding that the petitioner was unfit for jury service. The petitioner had argued that he was found unfit because he refused to take a loyalty oath prescribed by the Missouri Constitution. The Klinger Court stated the general rule:

Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, law or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.

Id. at 263.

The Court examined the record to see whether the petitioner had been excluded from jury duty “for no other reason than that he declined to take the oath . . . .” Id. at 261-62. Although the record only revealed that the petitioner had been a rebel and still professed to be one, the Court hypothesized that he “may well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman . . . .” Id. at 262. Where the Court might have held that the requirement of a retroactive loyalty oath was repugnant to the President’s grant of amnesty to rebels, it instead inferred that there might have been other grounds, not constitutionally suspect, for the trial court’s decision.

In Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), the Court not only expanded the materials it could use to review state court decisions, but also set out that thenceforth it “must so far look . . . to see . . . whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question” in order to affirm the state court’s judgment. Id. at 635.

In Eustis v. Bolles, 150 U.S. 361 (1893), the Court made clear that the doctrine of independent and adequate state grounds was a jurisdictional rather than merely a dispositional matter, as the Court in Murdock had conceived of it.


In Lynch, where it could be “surmised” that the New York appellate court had “intended to rest its decision upon a determination of the application of the Fourteenth Amendment,” the Court concluded that “jurisdiction cannot be founded on surmise.” 293 U.S. at 54.
By contrast, where the Court deemed an important federal right to be at stake and found the state ground to be untenable, it assumed jurisdiction and reversed the judgment. 31 Occasionally the Court vacated a state court’s judgment in order to allow the state court to reconsider its judgment in light of a supervening event. 32 The hallmark of this period, however, was Supreme Court deference to state court judgments.

3. 1935-1945

The New Deal years sparked the Court’s concern for the federal position relative to the states. Not only was the Court more willing to permit Congress to exercise greater powers, but it was also concerned with disassociating itself from the policies of the Lochner Era Court. 33 Both of these concerns fostered in the Court a renewed interest in the supremacy and uniformity of federal law, as well as an acute sense of itself as the final arbiter of that law. In Minnesota v. National Tea Co. 34 the Court stated:

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.

31. This usually occurred when the state court had decided adversely to an entity with which the federal government had a special relationship. See, e.g., Ward v. Love County, 253 U.S. 17 (1920) (Indians); Davis v. Wechsler, 263 U.S. 22 (1923) (railroad).

32. See, e.g., Patterson v. Alabama, 294 U.S. 600, 607 (1935); Gulf, Colorado & Santa Fe Railway, Co. v. Dennis, 224 U.S. 503 (1912).

33. The Court was being pressured into refraining from striking down economic and social welfare legislation. See, e.g., Nebbia v. New York, 291 U.S. 502 (1934) (upholding minimum milk price legislation); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law for women). The Court had hesitantly begun to turn its attention to civil and political rights. See, e.g., Near v. Minnesota, 283 U.S. 697 (1931) (striking down statute that placed prior restraint on newspaper); Brown v. Mississippi, 297 U.S. 278 (1936) (state may not use a coerced confession in a criminal trial). See generally R. McCloskey, The Modern Supreme Court 3-15 (1972).

34. 309 U.S. 551, 557 (1940). The Supreme Court was not convinced that the state court’s judgment rested on independent state grounds by the fact that the state court’s syllabus stated that its judgment rested on state and federal constitutional grounds, and the petitioner had cited no state authority that made the syllabus the law of the case. Though the Court acknowledged it was “possible that the state court [had] employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution [and that] [i]f that were true, [it] would have no jurisdiction to review,” id. at 556, it did not dismiss the case because “there [was] strong indication . . . that the federal constitution as judicially construed controlled the decision below.” Id.
During this period the Court refused to infer the existence of alternative state grounds if an important federal right was at stake and the state court had decided the federal question. Similarly, where the federal question was less significant and the state grounds appeared to be interwoven with a federal question, the Court vacated the state court's judgment and remanded the case for clarification. In some instances, the Court not only vacated the judgment, but also included an opinion interpreting the federal law relied on by the state court.

4. 1945-1955

In 1945, in *Herb v. Pitcairn,* the Court promoted a new method of clarification that both showed respect for state court judgments and ensured that important federal questions would reach the Supreme Court for decision. The *Pitcairn* case held that

35. *See, e.g.*, Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938). The Supreme Court assumed jurisdiction of the case, stating that it "[could] not refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground," and reversed. *Id.* at 98. The Court rejected precisely what the Court in *Klinger* had mandated. *See supra* note 29.

36. *See, e.g.*, State Tax Comm'n v. Van Cott, 306 U.S. 511 (1939). The Court in vacating the judgment of the Utah Supreme Court pointed out that a supervening event had occurred. That very day the Court had overruled one of its prior cases, *Rogers v. Graves*, 299 U.S. 401 (1937), on which it found the state court in *Van Cott* to have relied. In *Van Cott* the respondent asserted two grounds for taking exemptions for his salary from a federal instrumentality on his state income tax. He asserted that the terms of the state tax statute itself allowed him to take the exemptions and that to tax his salary would violate federal law. The state court annulled the Tax Commission's disallowance of the exemptions. Despite the respondent's contention that the state statute provided an independent and adequate state ground, the Supreme Court vacated the judgment and remanded the case because it found that "the opinion as a whole show[ed] that the court felt constrained to conclude as it did because of the Federal Constitution and [the Supreme] Court's prior adjudication of Constitutional immunity," and that, at best, the state and federal grounds were "so interwoven that [the Court] [was] unable to conclude that the judgment rest[ed] upon an independent interpretation of the state law." *Id.* at 514.

37. The Court in *Williams v. Kaiser*, 323 U.S. 471 (1945), examined state law and found the state procedural grounds advanced by the Attorney General to be "insubstantial." Concluding that it could "only assume therefore" that the state court had decided the federal question, the Court reversed the judgment. Even though the Court decided the merits of the federal decision and reversed, it stated that "[i]f perchance the Supreme Court of Missouri [had] meant that some reason of state law preclude[d] a decision of the federal question, that question is not foreclosed by this decision." *Id.* at 479. The explicit invitation to the state court to clarify the grounds for its prior decision in effect transformed the reversal into a vacation with an opinion. *See also* Note, *Final Dispositions of State Court Decisions Reversed and Remanded by the Supreme Court, October Term 1931, to October Term 1940*, 55 *Harv. L. Rev.* 1357 (1942) (pointing out the ways in which the state courts on remand from a Supreme Court reversal have avoided reaching the judgment logically required by the Supreme Court's decision).

38. 324 U.S. 117 (1945).
if it was unclear whether the state court had rested its judgment on state or federal law, the writ should not be dismissed, nor should the judgment be vacated. Instead, the case should be held on the Court's docket and continued "pending application to the state court for clarification or amendment." The state's reply did not need to "be elaborate or formal if it is clear and decisive in stating whether a federal question, and if so, what federal question, was decided as a necessary ground for reaching the judgment under review." Although the author of the Pitcairn opinion, Justice Jackson, was optimistic about the prospect of this method, it not only failed to replace the others, but was difficult to administer.

39. In Pitcairn Justice Jackson, writing for the Court, surveyed the dual tendencies exhibited in the Court's prior treatment of state court judgments where it was not clear whether they rested on state or federal grounds, and noted that it was a question that had "long vexed the Court." Id. at 126. He sought to overcome the defects by implementing a new remedy. What was needed was a remedy that would accommodate the interests of both federal and state law. Even before they were required to adjudicate a growing body of fourteenth amendment questions in criminal and civil law, state courts, as courts of general jurisdiction, were often called upon to adjudicate federal statutory causes of action. The Court acknowledged the difficulties that state courts faced as a result of this, noting that "courts may adjudicate both [federal and state] questions and because it is not necessary to their functions to make a sharp separation of the two their discussion is often interlaced." Id. at 127. It was this inherent difficulty in a federalist legal system and the "respect due the highest courts of states of the Union" that prompted the Court's search for a method in which the state courts would "be asked rather than told what they [had] intended." Id. at 128.

40. Id. Amendment of the state court's order or certificates of clarification were not entirely new. In dismissing the writ in Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934), the Court noted that no effort had been made by the petitioner to obtain an amendment or to ask for a continuance to obtain one. See also Int'l Steel & Iron Co. v. National Sur. Co., 297 U.S. 657 (1936), where a continuance was granted to seek clarification from the state court. But see Honeyman v. Hanan, 300 U.S. 14, 18-19 (1937) (Where the rest of the record disclosed no federal question, the Court stated that "[a] certificate or statement by the state court that a federal question had been presented to it and necessarily passed upon is not controlling.").

41. Pitcairn, 324 U.S. at 128.

42. See, e.g., Hammerstein v. Superior Court, 340 U.S. 622 (continued for clarification), 341 U.S. 491 (1951) (writ dismissed, even though the state court had certified that a federal question had been decided); Dixon v. Duffy, 342 U.S. 33 (1951) (continued for clarification), 343 U.S. 393 (second continuance), 344 U.S. 143 (1952) (vacated).

Dixon was continued twice before the Court finally vacated the judgment for failure of the California court to render an official reply. The petitioner had been convicted and sentenced. He did not appeal the conviction; instead he sought a writ of habeas corpus from the California Supreme Court on the ground that his federal constitutional rights had been violated. The California Supreme Court, without opinion, denied the writ. The United States Supreme Court granted certiorari. After the California Attorney General argued that there was an adequate and independent state ground for the court's denial—that according to state law the petitioner should have presented the federal question in an appeal—the Court continued the case for clarification from the California court. The California court, however, did not officially respond. Instead, the court's clerk sent a letter that was not accepted by
In this decade, the Court showed more concern for civil and political rights but proceeded cautiously and exhibited great deference to the states when rights of the criminal accused were at issue. As a result, the Court inconsistently employed the doctrine of independent and adequate state grounds in an almost nonsensical pattern and utilized the techniques of dismissal, clarification, vacation or reversal in a somewhat random fashion.43

5. 1955-1970

Ultimately, abdication of responsibility for review of economic legislation seemed to rechannel the Court’s energy toward civil and political rights. While the preceding decade was unclear and transitional, in the late 1950’s and the 1960’s a heightened concern for civil and political rights resulted in rapid development of the concepts of due process and equal protection.44 The years of the War-

the United States Supreme Court as an official clarification. After the second continuance did not produce a response, the Court vacated the judgment and remanded the case. The Court did not, however, address the merits of the case. Instead, by vacating the judgment, it forced the California court to clarify its prior decision.

43. E.g., in Edelman v. California, 344 U.S. 357 (1953), the court dismissed a writ of certiorari based on a state procedural default. In Williams v. Georgia, 349 U.S. 375 (1955), the Court remanded for reconsideration notwithstanding flagrantly unconstitutional state court procedure and what appeared to be obvious incompetence of counsel, where defendant had failed to make timely objection. In Black v. Cutter Laboratories, 351 U.S. 292 (1956), the Court found adequate state grounds to deny certiorari to a petitioner who had been dismissed from a job for membership in the Communist party. In Durley v. Mayo, 351 U.S. 277 (1956), four Justices dissented from dismissal of a habeas corpus petition for lack of jurisdiction, thus hinting at an imminent change in the Court’s direction.

44. In the criminal law area the Court skirted state procedural bans and inadequate fact finding by an expanded use of habeas writs. In 1963, for example, the Supreme Court opened wide the door to federal jurisdiction in habeas cases. In Fay v. Noia, 372 U.S. 391, 398-99 (1963), the court held:

Federal courts have power under the federal habeas statute to grant relief despite the applicant’s failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which such procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute.

Townsend v. Sain, 372 U.S. 293, 312 (1963), added the rule that “[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.”

In a vast number of criminal and civil cases arising out of a myriad of contexts, the Court found asserted independent state grounds inadequate to justify restrictions on rights guaranteed by the federal Constitution. See, e.g., Koningsberg v. State Bar, 353 U.S. 252 (1957); NAACP v. Alabama ex rel. Patterson, 357 U.S. 499 (1958); Lynumn v. Illinois, 372 U.S. 528 (1963); Jankovich v. Indiana Toll Road Comm’n, 379 U.S. 487 (1965); Dep’t of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Chapman v. California, 386 U.S. 18 (1967); Avery v. Midland County, 390 U.S. 474 (1968); Street v. New York, 394 U.S. 576 (1969).
ren Court were electric: prayers and Bible reading in the public schools were banned;\(^45\) reputation was given less protection, while freedom of the press was given more;\(^46\) advocacy and assembly were given increased protection;\(^47\) the right of privacy was recognized as a constitutional right;\(^48\) issues of racial discrimination were vigorously addressed;\(^49\) right to counsel in a criminal case was given new meaning;\(^50\) and the right against self-incrimination was made more meaningful, especially for the uneducated and inexperienced.\(^51\)

Establishing new minimum standards of due process and equal protection necessarily diminished the need for careful analysis of adequate and independent state grounds. With the Supreme Court taking the lead, it was not constitutionally permissible for a state court to support a judgment with separate, different, and lesser standards. Adequate and independent state grounds could not support a judgment violative of constitutional rights; consequently the doctrine dwindled in significance.


In the early 1970's the Burger Court reversed directions. Under the philosophical leadership of Justice Rehnquist and the nominal leadership of Chief Justice Burger, the Court cautiously began reshaping the constitutional rules of criminal procedure, equal protection, and substantive due process.\(^52\) The more conservative Supreme Court vacated state court cases that gave too much protection to the civil and political rights of individuals on

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the theory that the state cases relied on false federal constitutional assumptions. The Supreme Court has added that the state may grant the protection granted, may reach the conclusion reached, provided the state does not rely on misunderstood federal constitutional doctrine, but instead grants the right or reaches the conclusion by a clear and unequivocal reliance on state law. In addition to its attempts to redefine and clarify what the federal constitutional minimums are, the Court has reduced access to the federal system by sharply curtailing the powers of the federal courts to grant writs of habeas corpus to state court defendants or state court prisoners.

As the Burger Court's conservative position has gained support on the Court itself, there has been an increased number of writs of certiorari granted to state prosecutors whose state courts have been overly protective of the rights of the accused. Appellants, in these cases, are more often forced to argue that the state judgments rest on adequate and independent state grounds. Unfortunately, the state court opinions reviewed regularly cite both federal and state cases and constitutional provisions, and rely on both federal and state constitutional theories. Ultimately, the Burger Court formulated its own version of the doctrine of independent and adequate state grounds. In the process of formulating a doctrine, the Court employed a new method of clarification: it reversed and remanded, in traditional fashion, but informed the state court that it was free to reach the same judgment solely on state grounds, assuming the state court could express and support


The Supreme Court has categorically rejected the contention that state courts may impose greater federal constitutional restrictions upon state governments than those imposed by the Supreme Court. Oregon v. Hass, 420 U.S. 714, 719 n.4 (1975). But see Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978) (suggesting that to vacate such cases was a misallocation of the Court's resources and that allowing the state courts to be more protective did little harm, since the state courts do not have the same institutional restraints as the Supreme Court has).

54. See, e.g., Hass, 420 U.S. at 719 ("[A] state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."). Prior to the decision in Oregon v. Hass, there was still considerable support for the position that insofar as the state court protected the individuals rights to the extent demanded by federal law, an additional protection would not result in federal review. See also Justice Stevens' dissent in South Dakota v. Neville, 103 S. Ct. 916, 924 (1983).


56. See cases cited in Long, 103 S. Ct. at 3491 (Stevens, J., dissenting).
independent and adequate state grounds and was willing to do so.⁵⁷

III. Development of the Burger Court Doctrine

In Zacchini v. Scripps-Howard Broadcasting Co.,⁵⁸ the Court reversed an Ohio Supreme Court decision that might have had an independent and adequate state ground. The case pitted the right of a free press against the right of privacy. In deciding the case in favor of the defendant's claim that as a member of the press it was privileged, the state court placed principal reliance on two United States Supreme Court cases construing the first amendment.⁵⁹ On appeal to the Supreme Court, however, the defendant respondent claimed that the Ohio court had independently relied on Ohio common law for its judgment.⁶⁰

The Supreme Court assumed jurisdiction and reversed the case. It stated that it had jurisdiction because "it appear[ed] that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did."⁶¹ Even though the Court reversed the Ohio court's decision, rather than vacating and remanding, it did not preclude the Ohio court from reaching the same conclusion on state grounds. The Court stated: "[I]f the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law."⁶²

In Delaware v. Prouse,⁶³ a criminal case involving drugs, the defendant moved to suppress the evidence claiming that it was obtained illegally. The trial court granted the motion and ordered

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⁵⁷. Since the seminal decision in Michigan v. Long, the Court has already added an opinion that raises more doubt about the honest intention of the majority to leave decisions to the states where there is an unquestioned state ground that is both adequate and independent. In Colorado v. Nunez, 104 S. Ct. 1257 (1984) (per curiam), the court dismissed a writ as improvidently granted where it appeared that the judgment of the court below rested on adequate and independent state grounds. Notwithstanding the per curiam dismissal, Justice White (joined by Chief Justice Burger and Justice O'Connor) wrote an opinion explaining the federal position, since the state was more protective of individual rights than was demanded by federal law.


⁶⁰. 433 U.S. at 568.

⁶¹. Id.

⁶². Id.

that the evidence be suppressed. The Delaware Supreme Court af-
firmed the order, holding that the search and seizure violated the
fourth amendment of the federal Constitution and a similar provi-
sion of the Delaware Constitution. The state sought and was
granted a writ of certiorari by the United States Supreme Court,
which subsequently affirmed the order to suppress. The Court
noted that the state court had declared that its own state constitu-
tional provision was "substantially similar to the Fourth Amend-
ment and [that] a violation of the latter is necessarily a violation of
the former." Furthermore, the state opinion primarily consisted
of an analysis of the fourth amendment. For these reasons, the
Court rejected the contention that the state court judgment rested
on adequate and independent state grounds, concluding that "the
Delaware Supreme Court did not intend to rest its decision inde-
pendently on the State Constitution."

The Court made clear that merely mentioning a state constitu-
tional ground in tandem with its federal counterpart was not suffi-
cient to establish an independent state ground. What was crucial
was whether the state ground was truly an independent ground for
the state court's judgment. The Court reasoned that "[h]ad state
law not been mentioned at all, there would be no question about
our jurisdiction, even though the State Constitution might have
provided an independent and adequate state ground."

In the spring of 1983, the Court in *South Dakota v. Neville* devoted an extensive footnote to an analysis of whether a South
Dakota decision had rested on independent and adequate state
grounds. Despite the state court's recognition that the state constitutio-
nal prohibition against self-incrimination might be more pro-
tective than the federal provision, the Supreme Court found that
the South Dakota court's construction of its own constitution was
compelled by its understanding of the federal Constitution. The
Court reached this conclusion because the state court, though ac-
knowledging that its state constitution might be more protective,
stated that there was no need to distinguish between the state and
federal constitutional provisions. Furthermore, the state court's
analysis consisted of an extensive discussion of two Supreme Court

64. State v. Prouse, 382 A.2d 1359 (Del. 1978).
65. 440 U.S. at 652 (quoting State v. Prouse, 382 A.2d at 1362).
66. 440 U.S. at 652.
67. Id. at 653.
68. 103 S. Ct. 916, 919 n.5 (1983).
70. 103 S. Ct. at 919 n.5 (citing State v. Neville, 312 N.W.2d at 726).
decisions.\textsuperscript{71} It was in \textit{Neville}, however, that Justice Stevens attempted more fully to analyze the doctrine of adequate and independent state grounds and criticized the way in which the Burger Court was reviewing state court cases that addressed state and federal constitutional issues.\textsuperscript{72}

Writing for the majority in \textit{Michigan v. Long},\textsuperscript{73} Justice O'Connor articulated a new test for determining when the United States Supreme Court will undertake review of a state court decision that rests on both federal and state grounds. The \textit{Long} test recognizes and makes explicit that the Court has departed from the standards of \textit{Murdock v. City of Memphis}\textsuperscript{74} and \textit{Herb V. Pitcairn}.\textsuperscript{75} Although the \textit{Long} decision does not carry the Court to an extreme position, it does raise a number of questions about the encouragement of autonomous state law, the protection of fundamental liberties, and the exercise of federal jurisdiction.

\textbf{IV. The Michigan v. Long Test}

\textbf{A. Michigan v. Long}

In \textit{Michigan v. Long} the state trial court denied Long's motion to suppress evidence of marijuana and convicted him of possession. The Michigan Court of Appeals affirmed.\textsuperscript{76} On appeal, the Michigan Supreme Court reversed,\textsuperscript{77} holding that the search violated both the fourth amendment of the United States Constitution and a similar provision of the Michigan Constitution. The opinion, however, consisted solely of an application of the \textit{Terry v. Ohio}\textsuperscript{78} analysis, in the process of which the state court distinguished four United States Supreme Court cases.

The Supreme Court in \textit{Michigan v. Long} rejected defendant's argument that it lacked jurisdiction to decide the case because the state court decision rested upon an adequate and independent state ground. Noting that the state court "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law"\textsuperscript{79} and that "[n]ot a single state case was cited to sup-

\begin{itemize}
\item \textsuperscript{71} Schmerber v. California, 384 U.S. 757 (1966); Miranda v. Arizona, 384 U.S. 436 (1966).
\item \textsuperscript{72} \textit{Neville}, 103 S. Ct. at 924 (Stevens, J., dissenting).
\item \textsuperscript{73} 103 S. Ct. 3469 (1983).
\item \textsuperscript{74} 87 U.S. (20 Wall.) 590 (1875).
\item \textsuperscript{75} 324 U.S. 117 (1945).
\item \textsuperscript{76} People v. Long, 94 Mich. App. 338, 288 N.W.2d 629 (1979).
\item \textsuperscript{77} People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982).
\item \textsuperscript{78} 392 U.S. 1 (1968).
\item \textsuperscript{79} 103 S. Ct. at 3474.
\end{itemize}
port the state court's holding that the search was unconstitu-
tional," the Court held that the "references to the state constitu-
tion in no way indicate that the decision below rested on grounds
in any way independent from the state court's interpretation of
federal law." The Court admitted that it had yet to develop "a satisfying
and consistent approach for resolving this vexing issue." Dissatis-
fied with an "ad hoc method of dealing with cases that involve pos-
sible adequate and independent state grounds" and convinced that
"none of the various methods of disposition . . . employed thus far
recommends itself as the preferred method that we should apply to
the exclusion of others," the Court set out to reexamine the vari-
ous federal and state considerations in the question.

The court reviewed its past practices in resolving ambiguity as
to the independence and adequacy of state grounds. The Court
had previously dismissed, vacated, continued to obtain clarifica-
tion and, most recently, examined state law to determine whether
federal law guided or provided the basis of the decision.

The Court rejected these approaches as "antithetical to the
doctrinal consistency that is required when sensitive issues of fed-
eral-state relations are involved." The Court reasoned that vacat-
ing and continuing for clarification was inefficient, and placed too
great a burden on the state courts. Examining state law required
the Court to construe unfamiliar law. Dismissal, the Court con-
cluded, should not be the rule because the important need for uni-
formity in federal law "goes unsatisfied when we fail to review an
opinion that rests primarily upon federal grounds and where the
independence of an alleged state ground is not apparent from the
four corners of the opinion." Noting that it must balance respect
for state courts and avoidance of advisory opinions with the "im-
portant need for uniformity in federal law," the Court formulated
the following test:

80. Id. at 3477.  
81. Id. at 3474.  
82. Id. at 3475.  
83. Id. at 3475.  
85. See, e.g., Montana v. Jackson, 103 S. Ct. 1418 (1983); Minnesota v. National Tea
   Co., 309 U.S. 551 (1940).  
86. See, e.g., California v. Krivda, 409 U.S. 33 (1972); Herb v. Pitcairn, 324 U.S. 117
   (1945).  
   (1982).  
88. Long, 103 S. Ct. at 3475.  
89. Id.
When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.  

The test, however, allows state courts to focus their analysis on federal cases as long as decisions are explicitly based on state constitutional grounds. The Court stated:

If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Justice Stevens, in his dissenting opinion, attacked the new test on three grounds. First, he argued, the new test radically departs from the Court's previous approaches—not only the "traditional presumption" of adequacy and independence of the state ground, but also the two "intermediate approaches," i.e., seeking clarification or directly examining state law. The new presumption flies in the face of "a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene . . . ."

Second, he declared that cases where "the state court interpreted federal rights too broadly and 'overprotected' the citizen . . . should not be of inherent concern to [the] Court." Conversely, the Court should intervene precisely where persons "seek to vindicate federal rights." Establishing its priorities in this way would conserve the Court's resources.

Third, Justice Stevens contended that although the majority expressed concern about rendering advisory opinions, its desire to maintain uniformity in federal law seemed to require that it do just that. He would have the Court scrupulously avoid the chances

90. Id. at 3476.
91. Id.
92. Id. at 3489 (Stevens, J., dissenting).
93. Id.
94. Id. at 3490.
95. Id.
96. Id.
of rendering advisory opinions: "If it is not apparent that our views would affect the outcome of a particular case, we cannot presume to interfere."97

In deciding to assume jurisdiction of a state court case whose judgment did not clearly rest on independent state grounds, the Court in Long attempted to rectify the shortcomings of prior approaches and remedies. Historically the Court had pursued one of two alternative courses. In some cases the Court closely scrutinized state law to determine whether there were indeed adequate and independent state grounds for the state court's judgment. In others the Court declined to second guess the state court and vacated the judgment and remanded the case, dismissed the petition for review, or continued the case and sought a statement of clarification from the state court. These approaches are no longer acceptable.

B. Critique of Michigan v. Long

Like Justice Stevens, some commentators have expressed alarm at what they perceive to be the Supreme Court's recent encroachment upon the interests of federalism, as well as the Court's abandonment of primary responsibility for the protection of individual liberties. Characterizing the Long test as an "unparalleled effort to curtail state court efforts to preserve personal rights,"98 Professor Ronald Collins also attacked the test as an impediment to federalism:

If the U.S. Supreme Court were serious about promoting principled federalism, it would announce a jurisdictional rule that no state decision upholding a civil liberties claim not in conflict with federal law would be reviewed unless there were a "plain statement" that the state law did not provide the relief sought.99

It is interesting to note the irony that in the 1970's, interest in federalism has joined with an interest in increased protection of individual liberties, when, for much of the history of the Supreme Court, those two interests were pitted against each other.

It is also interesting to note the views of Justice Brennan and Chief Justice Burger. In 1964, Justice Brennan wrote that "[t]he Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty."100 In 1977, he wrote: "The

97. Id. at 3492.
99. Id.
Adequate state grounds: legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.” Conversely, in a 1976 address Chief Justice Burger advocated innovation and experimentation by the states in the area of criminal procedure. In the summer of 1983, concurring in the dismissal of a writ of certiori in *Florida v. Casals*, Chief Justice Burger stated that “when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement.”

These ideological vacillations by so-called liberals and conservatives demonstrate the ambiguity of the notion of state grounds. Such vacillations are not peculiar to the last twenty years. In 1962, one commentator concluded:

> If there is one thing that stands out in an examination of the disposition of ambiguous grounds cases in the last ten years, it is that each disposition resulted from an *ad hoc* decision by the Court to apply one dispositive technique or another. It would be nearly impossible today to predict what will be done with such cases or to explain the reasons for the dispositions selected.

The flexibility of the rule is no doubt due to its origin as an attempt by the Court to police its own powers. Other doctrines that have been developed to limit jurisdiction, such as standing, ripeness, political question, mootness, advisory opinions, and abstention, often have been employed to refrain from deciding inappropriate or irksome questions. Notwithstanding the use of these doctrines as avoidance techniques, the Court carved out exceptions whenever a majority of the court decided that significant constitutional issues demanded resolution.

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105. *See* A. BICKEL, *The Least Dangerous Branch* (1962) (arguing that the Court should make greater use of case or controversy doctrines to decline to decide cases, in order to ensure that judicial activism does not impede a rational and principled development of constitutional law).
106. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979). In Orr the Court decided that a state alimony statute that only provided for the payment of alimony by husbands violated the equal protection clause. The Court decided the constitutional issue, even though the resolution of the constitutional issue might not have disposed of the husband’s refusal to pay.
and adequate state grounds has been similarly employed.

V. Other Theories Affecting Supreme Court Review

A. Mootness and Advisory Opinions

Is there an underlying legal theory that has been or could be consistently applied to afford some measure of predictability? Or is the concept of independent and adequate state grounds ultimately to be controlled by unfettered judicial discretion with a continuing guarantee of legal ambiguity?

Commentators have discussed two theories as possible guides: mootness and advisory opinions. Unfortunately, a careful evaluation of the doctrine of independent and adequate state grounds does not support the conclusion that it is based on the constitutional prohibition against deciding moot cases and rendering advisory opinions, or some separate jurisdictional bar. Although the Court in cases such as *Pitcairn* has asserted that the doctrine expresses a bar to the Court's jurisdiction, it is evident that this view had not been fully adopted as late as *Murdock* in 1875. In *Murdock* the Court remarked that reversal of a state court judgment resting on state grounds because a federal question had been wrongly decided would be profitless, since the state court on remand could validly reach the same decision. But the *Murdock* Court also noted that it had been its practice to affirm state court decisions that rested on valid state grounds and correctly construed a federal question. The Court's disposing of such judgments by affirmance, rather than by a dismissal of the writ of error, indicates that the Court found no jurisdictional bar to its review of cases where there were independent and adequate state grounds.

It was not until *Eustis v. Bolles* in 1893 that it became standard practice summarily to dismiss writs of error when it appeared that there were independent and adequate state grounds. The claim that such a practice was constitutionally mandated was not made until *Pitcairn*, where the Court identified the doctrine as an expression of the case or controversy requirement's prohibition against rendering advisory opinions.

109. *Id.* See supra note 29.
110. 150 U.S. 361 (1893).
111. *Pitcairn*, 324 U.S. at 126 ("We are not permitted to render an advisory opinion,
Although members of the Court have continued to identify the review of federal questions in some of these cases with rendering an advisory opinion, such a review is not an advisory opinion. An advisory opinion is direct advice by the Court, usually to another branch of government concerning the legality of its acts, without deciding a bona fide case or controversy. Implicit within the case or controversy requirement is the constitutional policy of the separation of the powers of coordinate branches of government. The judiciary was not intended to usurp the powers of the legislative and executive branches. As Justice Frankfurter wrote, "the most costly price of advisory opinions is the weakening of legislative and popular responsibility." The very nature of the judicial function, in contrast to the legislative function, requires the judiciary to interpret the law as it applies to a particular set of facts.

The doctrine of independent and adequate state grounds, however, presupposes that there is a case or controversy that has been decided by a state court. There is no risk of undue interference with a coordinate branch of government where there is a real dispute upon actual facts.

The question whether a case is moot, or otherwise nonjusticiable, is itself a federal question. Since a moot case is not as "justiciably infirm" as an advisory opinion, the Court has relaxed

and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review would amount to nothing more than an advisory opinion.


113. See, e.g., Muskrat v. United States, 219 U.S. 346 (1911) (refusing to decide a case contrived by the other branches of the federal government to test the constitutionality of a particular piece of legislation).

114. A proposal to authorize the Supreme Court to render advisory opinions was rejected by the framers of the Constitution. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340-41 (M. Farrand ed. 1937).


117. Even when there has been an actual case or controversy, it may not be justiciable. Essentially, a justiciable case or controversy is one that is "definite and concrete, touching the legal relations of parties having adverse legal interests... and admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). A state court decision that clearly rests upon independent and adequate state grounds would not be justiciable, since it would not admit of specific relief on appeal.


119.

[M]oot cases do not present all the dangers of advisory opinions. The "impact of actuality" may well be lacking if the court knows that its decree cannot affect the
the rule and reviewed cases that are technically moot. This is partly because the rule, though found to be a case or controversy requirement, really pertains to the efficient allocation of judicial resources.\textsuperscript{120} If deciding a moot case is an efficient use of these resources, exceptions are made. Among other exceptions,\textsuperscript{121} the Court has reviewed moot cases that are "capable of repetition, yet evading review." The Court has also decided moot questions when there is significant public interest in the outcome of the decision.\textsuperscript{122} Whether the Court reviews a moot case turns on an appraisal of the future effects of a decision on the merits on either the same petitioner or on some other member of a class of persons. Reaching the merits of federal questions decided in a state court decision that also rests on independent and adequate state grounds might sufficiently affect the petitioner or some class of persons similarly situated to be an exception.

At any rate, those cases in which the state court's construction of state grounds might have rested on independent and adequate state grounds are by no means moot. The controversy is "live" even after the Supreme Court has decided the case, since the state court would be free either to reach its original judgment or a new one, as a result of the Supreme Court's decision on the federal question.

\textbf{B. Appellate Review as a Matter of Discretion}

As noted above, the only state judgments that may be appealed as a matter of right to the Supreme Court are those that decide against the validity of the federal statute or treaty, or uphold a state statute against an argument based on federal law.\textsuperscript{123}

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rights of the parties. But . . . there is probably as much experience under the statute as might be had in a case which is not moot; and there are advocates before the court who are prepared to argue the issues.


\textsuperscript{120} This appears to be the reasoning in \textit{Eustis}, 150 U.S. at 370, for dismissing petitions for review when the cases rested on adequate state grounds. \textit{See supra} note 29. \textit{See also} \textit{Long}, 103 S. Ct. at 3491 (Stevens, J., dissenting). \textit{See generally} Murphy, \textit{Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis}, 25 St. Louis U.L.J. 473, 476 (1981).


Even the so-called “appeals” have become largely a matter of discretion through the Court’s requirement of a “substantial” federal question.124 The highly discretionary nature of Supreme Court review allows the Court to utilize jurisdictional doctrines to justify reaching or declining to reach the merits of a federal question presented in a case. It is evident that there can be no hard and fast rules with which to make these decisions; that is why they are a matter for discretion. It is equally evident that the particular way in which the Court resolves the question will be influenced by the ideological view of a majority of the members of the Court. What makes decisions more problematic is that antithetical ideological views may often appeal to the same principle. In the discussion of the doctrine of independent and adequate state grounds, the principle in question has been federalism.

C. The Ambiguity of Federalism and the Function of Federal Law

The general principle of federalism was best stated by Justice Black in Younger v. Harris:125

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of “comity,” that is, 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. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as “Our Federalism,” and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of “Our Federalism.” The concept does not mean blind deference to “States’ Rights” any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is 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 rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

124. See supra note 16.
125. 401 U.S. 37, 44 (1971).
It may have been easier to determine what the states' interests were and which federal rights required vindication during the Warren Court's tenure, when on occasion the legislative, executive, and judicial branches of state government joined to deny some federal right that the Supreme Court believed required vindication. The Burger Court, on the other hand, seeking to reverse the expansion of federal rights, particularly the rights of the accused, has frequently encountered resistance by state judiciaries, but support from state legislatures and executives.\(^\text{126}\) It is precisely when the coordinate branches of state governments are in conflict with each other that the notions of federalism and federal interests become most ambiguous.

To which branch of state government should the Court defer out of respect for the independence of the state? Clearly, if the state court decision is strictly a matter of state law, the principle of federalism mandates that the Court decline review, unless the state law is repugnant to federal law. When the state court has invoked federal law, as well as state law, in deciding against the executive and legislative branches, the principle of federalism could be used to justify the Court's either reviewing or declining to review the state court's decision. If the Court believes that the state court felt compelled by its interpretation of federal law to be more protective of the accused, it would be entirely consistent with the interests of federalism to clarify the federal law, so that the state court would be free from federal compulsion in deciding the state law. Additionally, there may be a valid federal interest in deciding the federal merits of the case. The Court's interest in vindicating the federal rights of the accused may result in the affirmation of the state court decision; a federal standard is then imposed on all of the states via the fourteenth amendment. On the other hand, the Court might find it prudent to avoid rendering a decision that may be moot insofar as it impacts the case at hand, although it would clarify some point of federal law.

It could be argued that such active involvement of the Supreme Court in the internal conflicts of state governments is itself an intrusion inconsistent with the principle of federalism. The Court, accordingly, should exercise restraint, unless a significant federal right requires vindication, i.e., if state law is repugnant to federal law. Likewise, the Court should wait until it is presented with a decision by a state or federal court that is based solely on

federal law, before it attempts to qualify or diminish the breadth of a federal right. To do otherwise would be to overvalue the uniformity of federal law and to undervalue the integrity of the state judiciaries.

This latter argument assumes, as Justice Stevens contends in his dissent in *Michigan v. Long,* that the Supreme Court's primary function in construing the Constitution is to vindicate guaranteed individual liberties. Since it is intended only to vindicate rights, the fact that a state court has furnished more protection of those rights than the Supreme Court believes necessary should not trigger appellate review. In other words, a federal interest antithetical to the considerations of federalism that justifies review of a state court decision should be found only when the state court has decided against the exercise of a federal right.

Like the notion of federalism, what constitutes a federal interest is ambiguous. At the time Chief Justice Marshall justified appellate review of state court decisions as being necessary to ensure uniformity of federal law, United States Supreme Court review was only permissible if the federal right or claim had been denied by the state court. Today federal interest in uniformity of federal law might equally justify aggressive review to halt overzealous application of federal precedent to expand the purported scope of federal rights. It is precisely this justification on which the Court in *Michigan v. Long* relies. Since denials of certiorari are taken seriously by the bench and bar, a state court misconstruction of federal law bolstered by the Supreme Court's denial of certiorari might be used as authority in another jurisdiction. This possibility might warrant an intrusion upon the judicial determination of a state.

D. Conclusion

Given the uncertainty of the rationale for the doctrine of independent and adequate state grounds, the discretionary nature of appellate review, and the ambiguity of federalism and federal interests, critiquing a particular Court's interpretation of the doctrine of independent and adequate state grounds is a difficult task. The parameters of an acceptable interpretation are broad and depend, in large measure, on what is the fundamental purpose of the federal Constitution. It is unlikely that members of the bench, bar, or public will reach agreement on that issue.

128. See supra note 19 and accompanying text.
Since the Court has broad authority to determine what constitutes a federal question, it was properly within the Burger Court's discretion to adopt the Long test. Even if the Court reviews and reverses a state court decision supported by state grounds, the state court, on remand, is entitled to reach its original judgment, but solely on state grounds. If state courts respond energetically and thoughtfully, their integrity and independence will not be impaired by the Long test.

VI. STATE v. JACKSON: INDEPENDENT AND ADEQUATE STATE GROUNDS?

For better or worse, state courts must now be cognizant of the Burger Court's interpretation of the independent and adequate state ground doctrine if they are to avoid unnecessary Supreme Court review. Although the Montana case State v. Jackson (Jackson I) was vacated by the Supreme Court before Michigan v. Long was decided, the Long test was clearly operative. On remand, the Montana Supreme Court agreed that the state grounds supporting its original judgment were not independent and adequate, and declined to enlarge or further support them.

A. The Facts

Robert Jackson was arrested for driving under the influence of alcohol. He was taken to the police station, where the police requested that he take a breathalyzer examination and perform some coordination movements. They videotaped the interrogation and Jackson's coordination exercises. Although Jackson complied with their request that he perform the coordination exercises, he refused to submit to the breathalyzer test.

Jackson sought to have the evidence concerning his refusal to take the breathalyzer test suppressed. He claimed that the Montana statute that allowed into evidence a defendant's refusal to take a breathalyzer test violated due process and the privilege against self-incrimination. The district court granted Jackson's motion and suppressed all evidence concerning his refusal to take the test. The case was appealed to the Montana Supreme Court.


B. Jackson I

On appeal the Montana Supreme Court affirmed. The court held that the introduction of defendant's refusal to take a breathalyzer test would violate Jackson's federal and state constitutional privilege against self-incrimination. The court examined the two aspects of the fifth amendment's protection against self-incrimination and held that Jackson was, in effect, compelled to testify against himself and that this testimony was prejudicial to him. The court cited cases from seven sister states that held the introduction of such evidence to violate the privilege against self-incrimination. Agreeing with the rationale of those decisions, the court declared that evidence of a person's failure to take a breathalyzer test, like other self-incriminatory evidence, is both unreliable and prejudicial to the defendant.

After the foregoing analysis the court stated that "[t]he issue is also controlled by Art. II, § 25 of our own constitution." Distinguishing a prior Montana case, State v. Finley, the court held that the introduction of Jackson's refusal to take the breathalyzer test violated "not only the United States Constitution, but also" the Montana Constitution.

The dissenting opinion would have found that evidence of a refusal to take the breathalyzer test is both relevant and probative. Noting that any innocent reasons for the refusal could be considered by the jury along with all other evidence, the dissent argued that the majority had erred in concluding that such evidence is unreliable. In addition, the dissent pointed out that the United States Supreme Court had not construed the federal Constitution as broadly as the Jackson majority was construing it, and that two federal circuit courts and sixteen states had already held that the introduction of such evidence did not violate the privilege against self-incrimination.

C. Montana v. Jackson

The United States Supreme Court granted the state's petition for a writ of certiorari, vacated the Montana Supreme Court's decision, and remanded it for further consideration in light of South
Several weeks before the Jackson decision, the Court in South Dakota v. Neville held that the introduction of evidence of a defendant’s refusal to take a blood-alcohol sobriety test did not violate the federal constitutional privilege against self-incrimination.140

Justice Stevens dissented141 from the majority’s remand in Montana v. Jackson, claiming that the Montana Supreme Court decision rested on an adequate and independent state ground and that the United State Supreme Court did not have jurisdiction to vacate. In support of this position, Justice Stevens quoted the latter part of the Jackson I decision,142 in which the Montana court held that the Montana Constitution had been violated.

D. Jackson II

After the United States Supreme Court vacated Jackson I, the Montana Supreme Court overruled its prior holding and reversed the district court’s order suppressing the evidence of Jackson’s refusal to take the breathalyzer test.143 Of the original justices who signed the Jackson I majority opinion, one had left the bench in the interim. Another concurred in Jackson II, stating that he had voted with the majority in the early case not because of the existence of an independent state constitutional ground, but solely because he had misguessed how the United State Supreme Court would construe the fifth amendment.144 The other two members of the Jackson I majority dissented in Jackson II.145

In Jackson II the court stated that in Jackson I it had felt compelled to construe the Montana Constitution to afford the same protection against self-incrimination as the federal Constitution. Since the Supreme Court expressly rejected the construction of the fifth amendment given by the Montana court, it followed that the Montana Constitution afforded no more protection than the fifth amendment (as interpreted by the United States Supreme Court). The Jackson II court noted that its prior judgment primarily rested on an analysis of federal cases and state cases construing the federal Constitution.146 The court also pointed out that

140. Neville, 103 S. Ct. at 923.
141. Montana v. Jackson, 103 S. Ct. at 1418 (Stevens, J., dissenting).
142. Id. at 1418-19.
144. Id. at 260 (Morrison, J., concurring).
145. Id. (Sheehy, J., dissenting); id. at 261 (Shea, J. dissenting).
146. Id. at 257-58.
the *Jackson I* court had neither overruled *Finley*, which expressly linked the interpretation of state protection against self-incrimination to federal protection, nor presented any argument for interpreting the Montana provision more broadly.147

The dissents in *Jackson II* did not present any basis for asserting that the self-incrimination provision in the Montana Constitution should be more protective than the interpretation given to the federal provision. They merely echoed Justice Steven's claim that the United States Supreme Court had vacated a judgment that rested on an adequate and independent state ground.148

E. Critique

It is important to discern why the United States Supreme Court did not find *Jackson I* to rest on adequate and independent state grounds. Two features of the *Jackson I* decision, in particular, seem likely to have been factors in the Court’s determination. First, although the state and federal grounds in *Jackson I* were not as interwoven as they have been in other cases reviewed by the Court, the holding under the Montana Constitution came enclosed in an analysis of federal cases.149 Similarly, statements that the Montana Constitution was violated were repeatedly joined with statements that the federal Constitution was violated.150 Even though *Jackson I* cited decisions from other states as authority, it did not distinguish cases holding on federal grounds from those holding on state grounds.151 Second, and more significantly, the only Montana case cited in the discussion of the Montana Consti-

147. *Id.* at 258.

148. Justice Shea's dissent primarily consisted of a quotation of Justice Stevens' dissent in *Jackson*, 103 S. Ct. at 1418. Justice Stevens’ dissent merely quoted an extensive passage from *Jackson I* that Justice Shea had authored.

149. The *Jackson I* majority analyzed the federal constitutional provision first, ending with a discussion of a footnote in Schmerber v. California, 384 U.S. 757 (1966), which it construed to approve of the suppression of a refusal to take a blood test. 195 Mont. at 190-91, 637 P.2d at 4. The court then devoted a mere two paragraphs to an analysis of the Montana Constitution, which consisted of distinguishing *Finley*. *Finley* held that post-arrest videotapes of a defendant’s blurred speech and uncoordinated movements were admissible to show intoxication. The court then cited a United States Supreme Court case for the proposition that a negative reply or silence in the face of police interrogation is testimonial. Finally, the court ended its opinion: “The United States Supreme Court has declared that the privilege against self-incrimination must be liberally construed in favor of the accused . . . .” *Jackson I*, 195 Mont. at 192, 637 P.2d at 5. Justice Stevens did not quote this statement in his Montana v. Jackson dissent.

150. *Jackson I*, 195 Mont. at 186, 191, 637 P.2d at 1, 4.

151. Four of the seven cases based their judgments solely on the federal Constitution, one was based on both state and federal provisions, and only two were based solely on state constitutions. See *Jackson II*, ___ Mont. at ___, 672 P.2d at 258.
tution was *State v. Finley*, which was distinguished. The *Jackson I* majority did not address the rule expressed in *Finley* that the Montana position on self-incrimination was the same as the parallel federal constitutional provision; the dissenting opinion did.

On appeal, the United States Supreme Court was faced with deciding whether the *Jackson I* court had implicitly overruled *Finley*, or had fully complied with *Finley* by matching its holding under the Montana Constitution to its holding under the federal Constitution. In light of these alternatives, as well as *Jackson I*'s heavy emphasis on the federal Constitution, it was reasonable for the Court to vacate and remand the case. It would have been more intrusive into matters of state law if the Supreme Court assumed that the Montana Supreme Court in *Jackson I* had overruled a prior Montana case.

**VII. STATE COURT OPTIONS AFTER MICHIGAN V. LONG**

If state courts desire to avoid federal review by resting a state judgment on independent and adequate state grounds, they must make certain that the state law ground is "clear from the face of the opinion." The Supreme Court does not want to reexamine state law. This does not mean the state court cannot rest its judgment on federal grounds, and alternatively on state grounds. It does mean the state court must "clearly and expressly" announce its reliance on alternative state grounds.

The *Long* test does not preclude the use of federal authority in analyzing state law. It is permissible to use federal case law as persuasive authority, but the state court 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 . . . ."

*Michigan v. Long* presents the Montana Supreme Court with several options. First, the Montana Supreme Court may require that, as a procedural rule, all questions of state law must be decided first; if state law is dispositive of the case, the federal questions would not be decided. Unless the decision is repugnant

153. *Finley*, 173 Mont. at 164, 566 P.2d at 1121 (citing State v. Armstrong, 170 Mont. 256, 552 P.2d 616 (1976)).
154. 195 Mont. at 196, 637 P.2d at 7 (Haswell, C.J., dissenting).
156. Id.
157. Id.
158. See, e.g., Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981), where the Oregon Supreme Court implemented such a rule. See also Carson, "Last Things Last": A Method-
ADEQUATE STATE GROUNDS

to federal law, it will not be reviewable by the United States Supreme Court.

A second option is to urge counsel to argue independently parallel federal and state law provisions. This could be beneficial, since it would require the bench and bar to keep abreast of federal constitutional law. As the Long test indicates, the independence of the court’s interpretation of federal and state law could be preserved in the court’s judgment if the court states that the federal and state law are strictly alternative bases for the judgment.159

Third, the court may still risk federal review by ambiguously stating federal and state grounds for its judgment. The court may consciously choose this alternative when it seeks, in effect, an “advisory opinion” from the Supreme Court to determine the meaning of some federal law, or when it seeks actively to influence the development of federal law. Even if the state court’s decision is reversed, the court may, on remand, reach the same judgment solely on state grounds.160 Another reason for rendering an ambiguous judgment may be to immobilize political opposition to an unpopular state court decision.161 If the decision rests on federal grounds, the state court is less responsible for the decision and the decision is subject to review by the Supreme Court. Further, the state court

ological Approach to Legal Argument in State Courts, 19 WILLAMETTE L. REV. 641 (1983) (whether the United States Constitution has been violated ought to be the very last issue to be examined, and only if state law and the state constitution are not dispositive of the case).

159. See People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, cert. denied, 412 U.S. 919 (1973). After the California Supreme Court’s original judgment had been vacated in California v. Krivda, 409 U.S. 33 (1972), the California court concisely stated: Pursuant to the mandate hereinabove quoted we have reexamined our opinion in the subject case . . . and certify that we 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. . . . [W]e reiterate that decision in its entirety. 8 Cal. 3d at 624, 504 P.2d at 457, 105 Cal. Rptr. at 521.

The Long Court has not precluded such statements of alternative bases for a state court’s judgment. The Court stated that if a state court opinion states “clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds,” it would not review the decision. 103 S. Ct. at 3476. The inclusion of the requirements that the alternative grounds be “bona fide” and “separate,” however, seem to rule out the ad hoc statement of the California court in Krivda. It appears that any disclaimer of dependence of a state ground on federal law must be accompanied by an appropriate, independent analysis of state law.

160. See, e.g., State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983), where the Oregon Supreme Court, on remand, reinstated the judgment rendered by the Oregon Court of Appeals that had been reversed by the United States Supreme Court in Oregon v. Kennedy, 102 S. Ct. 2083 (1982).

may benefit from the delay involved in appeal proceedings; even a brief delay may be sufficient to smooth the waves caused by an unpopular decision.

Although the Burger Court has exercised what seems tantamount to a supervisory power in applying the independent and adequate state grounds doctrine, the independence of state courts can only be strengthened by the Court's recent applications of the doctrine. State courts must take the next step in the renewal of state constitutional law; they must be weaned from an uncritical use of federal analyses. It is only by being required to assert independent state grounds that such grounds will be developed.

This is not to say that federal constitutional law should not be a useful source for the development of state constitutional law. Likewise, the construction by other state courts of their own constitutions will provide assistance. But without the conscious articulation of a Montana constitutional jurisprudence that is rooted in the judicial and political experience of Montana, these other resources cannot be critically employed.

Even though the Montana Constitution is new and case law construing it is sparse, there are other sources of Montana jurisprudence. There are analyses and principles of jurisprudence expressed in case law under the 1889 Constitution that may be pertinent to the new Constitution. Principles expressed in statutes enacted by the legislature or by initiative may be applicable to construction of the Montana Constitution. Finally, the unique and rich indigenous culture of Montana as expressed in its arts, institutions, and history can give both substance and direction to the interpretation of its constitution and the growth of its law.

VIII. CONCLUSION

Acknowledging the sovereignty of the states and the independence of their judiciaries, the doctrine of independent and adequate state grounds is rooted in the principles of federalism. There is, however, a dialectical relationship between these principles of

162. See, e.g., State ex rel. Samlin v. District Court, 59 Mont. 600, 198 P. 362 (1921) (applying the exclusionary rule to violations of the Montana Constitution's search and seizure provision 40 years before it was applied by the United States Supreme Court to the states in Mapp v. Ohio, 367 U.S. 643 (1961)).

163. See, e.g., MONT. CODE ANN. § 53-21-115 (1983) (guaranteeing procedural rights to those involuntarily detained or against whom a petition for civil commitment has been filed). MONT. CODE ANN. § 49-2-305 (1983) is more protective than a similar federal provision, 42 U.S.C. § 3604 (1976). The Montana statute prohibits housing discrimination based on race, color, religion, sex, or national origin, to which the federal statute is limited, as well as on physical or mental handicaps.
federalism and competing federal interests, the supremacy of which is guaranteed by the United States Constitution. Although state judiciaries are independent, they may not ignore federal law. Furthermore, in applying federal law, state judiciaries must be mindful that even though they may serve as laboratories for the development of federal law, they are not the final arbiters of federal law; the United States Supreme Court has that responsibility.

The result of this dialectical relationship between federalism and the supremacy of federal interests, together with the discretionary nature of the United States Supreme Court’s appellate jurisdiction, is that historically the doctrine of independent and adequate state grounds has been fluid. Different members and configurations of members of the Court have balanced these competing interests differently. Consequently, the scope of the doctrine of independent and adequate state grounds has been restricted or enlarged to mirror the importance that the Court has attached to a particular federal interest or concern of federalism.

At present, the Burger Court’s version of the doctrine, as expressed in Michigan v. Long, demonstrates the Court’s concern to delineate clearly the boundaries of the individual liberties—particularly the rights of the accused—afforded by the federal Constitution. State courts have been put on notice that if they would like to afford greater protection than the federal constitutional minimum, they must candidly announce that they are doing so solely as a matter of state law. By forcing the state courts to be candid about the grounds of their judgments, the Supreme Court has shifted potential conflicts between the judiciary and the other branches of state governments to the state constitutional arena.

If the Montana Supreme Court would like to avoid United States Supreme Court review of its decisions, the court’s decisions must clearly distinguish the federal and state grounds for the judgments reached. This can be accomplished in several ways. The supreme court may require that issues must be disposed of solely on the basis of state grounds, where possible. Or, it may require counsel to address separately state and federal grounds as alternative grounds for the disposition of an issue. Neither option precludes the use of federal authority in explicating state law. When federal authority is used, counsel and the court need only expressly state that such authority does not compel the court to reach a particular decision, but that it is being used solely for guidance.

The Burger Court’s version of the independent and adequate state ground doctrine must serve to promote the development of

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state constitutional law. The necessity of tapping the vast re-
sources of Montana's own legal heritage is full upon us.