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The Use of State Constitutional Provisions in Criminal Defense after *Michigan v. Long*

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Note

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I. INTRODUCTION

In the past decade, those concerned with the protection of individual rights have confronted an increasingly unsympathetic Supreme Court. The Court's retreat from its Warren-era role as guarantor of civil rights has led to bitter divisions within the Court itself and to increasing questions over the purpose of the Court. This rift led Justice Stevens to state:

> [W]e must not forget that a central purpose of . . . a life-tenured federal judiciary, was to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State governments . . . . Yet the Court's recent history indicates that . . . it has been primarily concerned with vindicating the will of the majority and less interested in its role as a protector of the individual's constitutional rights.[1]

While the Court's internal debate is likely to continue, the civil rights practitioner is unlikely to find her or himself in a much improved position. Reagan-era appointments to the federal courts are typified by three factors—volume, conservatism, and youth.[2] Faced with an evolving federal hostility to civil rights jurisprudence, attorneys and the judiciary in many states have begun to turn to the parallel bills of rights found in state constitutions.[3] The strength of this tactic is that, if pursued in pure form, federal jurisdiction is precluded since no federal question is present.[4]

However, the technique is seldom pursued in its purest form. Civil rights decisions almost never rest exclusively on state law. Federal decisions may be used for purposes of comparison, or to support an alternative holding. Worse, the typical decision is a haphazard mix of federal and state precedent, resulting in a holding invoking both state and federal constitutions. The likelihood that these decisions will be reviewed by the United States Supreme Court depends on whether, in the Court's balancing, the perceived need for uniformity outweighs the deference due the state court system. Notions of comity and judicial restraint in a two-tiered state/federal court system lead to a presumption against federal review in ambiguously grounded decisions.[5]

Under the Court's 1983 decision in *Michigan v. Long*,[6] however, the strong presumption against Supreme Court review of cases decided under state law gave way to a presumption in favor of review.[7] This

1. Florida v. Meyers, 466 U.S. 380, 385-86 (1984) (Stevens, J., dissenting from denial of certiorari) (emphasis in original) (footnote omitted).
2. Browning, *Reagan Molds the Federal Courts in His Own Image*, 71 A.B.A. J., Aug. 1985, at 60, 61-63.
3. For perhaps the most highly placed "call to action" in this respect (though far from the only one), see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See also* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 434-36 (1974).
4. *But see supra* notes 15-17 and accompanying text.
5. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117 (1945). In *Pitcairn*, the Court stated:
   > [W]e cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment . . . . [I]n cases where the answer is not clear to us, it seems consistent with the respect due the highest courts of the states of the Union that they be asked rather than told what they have intended.

   Id. at 127-28.
6. 463 U.S. 1032 (1983).
7. *Id.* at 1040-41.

doctrinal reversal created some unusual results. In several decisions, the Supreme Court has reversed and remanded state court decisions only to have the result of the original decision reinstated on remand by a state court relying on state constitutional provisions.[8] This trend has been accompanied by an expansion in the already rapidly growing area of state constitutional jurisprudence.[9]

This article addresses these issues in three parts. To develop the framework for subsequent discussion, the first part examines the treatment of state court cases with ambiguous state and federal grounds of decision prior to *Long*. The *Long* decision is also examined. The second part examines the impact of *Long* in the three years after that decision. This inquiry examines trends within the Supreme Court itself and the reaction of the state courts to these developments. Finally, consistent with the increasing need for practitioners to rely on state constitutional law, the third part discusses the more common techniques used for arguing the independence and adequacy of state constitutional provisions.[10]

II. THE DOCTRINE OF ADEQUATE AND INDEPENDENT STATE GROUNDS

Article III, § 2 of the Constitution grants the Supreme Court appellate power to review cases arising under the laws and Constitution of the United States,[11] subject to congressional regulations.[12] Since 1789,

8. *See, e.g.*, People v. Ramos, 37 Cal. 3d 136, 150-59, 689 P.2d 430, 437-44, 207 Cal. Rptr. 800, 807-14 (1984), *cert. denied*, 105 S. Ct. 2367 (1985); Commonwealth v. Upton, 394 Mass. 363, 370-73, 476 N.E.2d 548, 553-55 (1985); State v. Neville, 346 N.W.2d 425, 427-29 (S.D. 1984); State v. Chrisman, 100 Wash. 2d 814, 817-22, 676 P.2d 419, 422-24 (1984); State v. Opperman, 247 N.W.2d 673 (S.D. 1976). *See generally* Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court*, 55 HARV. L. REV. 1357 (1942).

9. It can also be argued that *Long* and its progeny have substantially weakened the perceived authority of the Supreme Court. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." Railroad Comm'n v. Pullman, 312 U.S. 496, 500 (1941). *See also* Note, *Emerging Jurisdictional Doctrines of the Burger Court: A Doctrine of Convenience*, 59 ST. JOHN'S L. REV. 316 323-24 (1985).

Even prior to *Long*, state courts differed from the Supreme Court based on state constitutional provisions on a number of occasions. However, as the Court grew more conservative, the number of differences increased. One source indicates that since 1970, over 250 state appellate courts have rejected corresponding federal decisions under state constitutions. *See* State v. Jewett, __ Vt. __, __, 500 A.2d 233, 234 (1985).

10. This section was suggested in part by *Jewett*. In *Jewett*, the Vermont Supreme Court ordered supplemental briefs on a state constitutional issue. After concluding that most practitioners overlooked state constitutional arguments, the court provided advice on their use. *Id.* at __, 500 A.2d at 236.

11. U.S. CONST. art. III, § 1.

12. U.S. CONST. art III, § 2, cl. 2.

Congress has authorized appellate review of state court decisions involving federal questions.[13]

The precise extent of this grant of power has never been clear. At various times in its history, the Court has debated the contours of its power to review state court judgments in terms of three questions. The first, a threshold jurisdictional question, is whether the Supreme Court may review a state court decision interpreting the law of that state. If it may not, the second question is when should the Supreme Court review the federal portions of an opinion resting upon both state and federal law. Finally, if the second question is answered in some manner other than "always" or "never," the third question is to what extent does comity[14] require that the Supreme Court decline review of a state court decision in which the state law issues may be determinative.

A. The Pre-*Long* Rules of Adequate and Independent State Grounds

Although the Supreme Court reviews only federal and not state law,[15] this limitation on the Court's adjudicatory authority may not be constitutionally compelled. The potential for broader powers of judicial review stems from the Constitution's grant of jurisdiction to "cases" rather than "questions." It could be argued, therefore, that an Article III "case" includes all of the "questions" within it, including questions of state law.[16] For present purposes, this view is of only theoretical interest. In response to the first question, then, the Supreme Court could theoretically reverse the judgment of a state court on that

13. Judiciary Act of 1789, Ch. 20, § 25, 1 Stat. 86-87. This section, now 28 U.S.C. § 1257, allows Supreme Court review of a final decision of the highest state court: (1) By appeal, where the validity of a federal statute or treaty is drawn in question, and the decision is against its validity; (2) By appeal, where the validity of a state statute is drawn in question on the ground that it violates the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; or (3) By certiorari, where the validity of a federal statute or treaty is drawn into question; where the validity of a state statute is drawn into question on the ground it violates the Constitution, treaties, or laws of the United States; or where any title, right, privilege or immunity is claimed under the Constitution, treaties, or laws of the United States. 28 U.S.C. § 1257 (1982).

14. One early definition of comity is perhaps the best:

> Comity concedes and allows, but does not withhold or prohibit. It yields as a favor what cannot be claimed as a right. When it is the basis of judicial determination, the court extending the comity out of favor and good will extends to foreign laws an effect they would not otherwise have.

Stowe v. Belfast Sav. Bank, 92 F. 90, 96 (C.C.D. Me. 1897).

15. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626-29 (1874).

16. *See* Note, *The Buck Stops There*: Michigan v. Long *and the Development of State Constitutional Law*, 17 CONN. L. REV. 197, 198 n.9 (1984). *See also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 641 (1874) (Bradley, J., dissenting).

court's construction of its own state law, but is not at all likely to.[17]

The second question, when should the Supreme Court review the federal portion of an opinion resting upon both state and federal law, has its answer in the doctrine of adequate and independent state grounds. The classic statement of this doctrine is found in *Herb v. Pitcairn*:[18]

> [The Supreme Court] will not review judgments of state Courts that rest on adequate and independent state grounds . . . [The reason] is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights [and] not to revise opinions.[19]

Despite the jurisdictional language in *Pitcairn*, the actual question is more likely one of comity.[20] But even given this judicial restraint, difficulties arise when it is unclear whether a decision rests on state or federal grounds. The original balance of comity struck between the state and federal courts left the Supreme Court with four options. First, the Court could place the burden on the party invoking the Court's jurisdiction to show that adequate and independent state grounds did not exist. Second, the Court could vacate the opinion and remand for clarification. Third, the Court could continue the case and force the litigants to seek clarification from the state court.[21] Finally, if it was clear that the state ground was insubstantial, the Court could review the case without clarification from the state court.[22]

The final option raises a question important to any analysis of *Long*. To what degree must the Supreme Court be certain that a decision below did not rest on dispositive state grounds before it accepts jurisdiction? Prior to *Long*, some opinions required a clear showing of

17. *But see* Florida v. Casal, 462 U.S. 637 (1983). In *Casal*, Chief Justice Burger disagreed with a result compelled by state law, and wrote separately to remind the Florida electorate that it was within their power to "ensure rational law enforcement." *Id.* at 639.

18. 324 U.S. 117 (1945).

19. *Id.* at 125-26.

20. If the doctrine is not merely a matter of comity, and is instead jurisdictionally mandated, the presumption of federal jurisdiction in *Long* is a per se usurpation of the Supreme Court's constitutionally described role. The possibility suggests the need for caution in both the adoption and use of the presumption.

21. This technique did, on occasion, prove ineffective. For example, in Dixon v. Duffy, 344 U.S. 143 (1952), a case was continued to allow the petitioner to secure clarification from a state court. The state court only replied informally, indicating that "it doubted its jurisdiction to render such a determination." *Id.* at 145. The Supreme Court was ultimately forced to vacate and remand. More than a year lapsed between the request for clarification and the vacation of the state court's opinion.

22. C. WRIGHT, FEDERAL COURTS 552-53 (3d ed. 1976). The last option, which is the most similar to the presumption established in *Long*, was only rarely used. Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 COL. L. REV. 822, 825-26 (1962).

the federal grounds. For example, in *Durley v. Mayo*,[23] the Court stated that it must take "scrupulous care" to ensure that the opinion below was based on federal grounds.[24] At other times, the Court indicated that "jurisdiction cannot be founded upon a surmise," and that the federal grounds must affirmatively appear from the record.[25] In *Long*, the Court gave a very different set of answers.

B. The Rule in *Michigan v. Long*

1. *Statement of the Case*

Long involved a typical search and seizure issue. When viewed on federal grounds, the issue concerned the extent of the "stop and frisk" rule first enunciated in *Terry v. Ohio*.[26]

Late one evening, two deputies of the Barry County, Michigan Sheriff's Department observed a vehicle pass them traveling in the opposite direction at 71 m.p.h. in a 55 m.p.h. zone.[27] Deciding to investigate, the deputies found the vehicle partially driven into a ditch. As they approached the vehicle, David Long stepped out of the car. He left the driver's door open and the dome light on. Mr. Long then moved to the rear of the vehicle and met the deputies. He appeared disoriented and unresponsive and, on the deputies' second request, produced his drivers' license. When asked a second time for the car registration, he walked toward the open car door. At this point, one of the deputies observed a "large folding knife"[28] lying on the floor of the vehicle. He ordered Mr. Long to halt, and conducted a *Terry* search for more weapons.

Finding no weapons on the defendant's person, the deputy pointed his flashlight into the car "looking for another weapon."[29] He observed a leather pouch under the armrest on the driver's side of the vehicle. After lifting the armrest and shining his light on the pouch, the deputy determined that it contained what appeared to be marijuana. The deputy then placed Mr. Long under arrest. After a more extensive search of the vehicle's interior, which included the glove box, the deputy impounded the vehicle. The deputy then asked Mr. Long for the trunk key. However, after noticing that the trunk lock had been removed, the deputy opened the trunk with a pocket knife. A subsequent search of the trunk uncovered 70-75 pounds of mari-

23. 351 U.S. 277 (1956).
24. *Id.* at 281.
25. Lynch v. New York, 293 U.S. 52, 54 (1934).
26. 392 U.S. 1 (1968). *Terry* established that an officer may conduct a limited warrantless search in circumstances where there is a possible threat to safety. *Id.* at 27-31.
27. People v. Long, 94 Mich. App. 338, 341, 288 N.W.2d 629, 630 (Mich. Ct. App. 1979).
28. *Id.* at 341, 288 N.W.2d at 630.
29. *Id.* at 342, 288 N.W.2d at 630.

juana.[30] Mr. Long was later convicted for possession of marijuana, sentenced to 2 years probation, fined $750.00, and assessed $300.00 in court costs.

On appeal, Long contended that both the contraband discovered in the car and in the trunk were inadmissible evidence as the result of an impermissible search. Resting its analysis solely on *Terry* and the fourth amendment, the Michigan Court of Appeals held that the initial search was valid as a protective search under *Terry*.[31] The court further held that the search of the trunk was a valid inventory search under *South Dakota v. Opperman*,[32] and affirmed as valid both the search of the vehicle and trunk.

The Michigan Supreme Court reversed.[33] The court initially noted that the issue was whether the search had "violated the constitutional proscription against unreasonable searches and seizures,"[34] and by way of explanation cited both the United States and Michigan Constitutions in a footnote.[35] The court then undertook an analysis of *Terry*, "[t]he test set forth by the United States Supreme Court to justify the warrantless protective search."[36] The court held that "the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution, and art. 1, § 11 of the Michigan Constitution."[37] Since the decision to impound the vehicle was based on an invalid search, the evidence in the trunk was also suppressible.[38]

Subsequently, the state petitioned for certiorari, alleging that *Terry* had been misinterpreted by the Michigan Supreme Court.[39] The United States Supreme Court granted certiorari, reversed the Michigan Supreme Court's interpretation of *Terry*, and remanded the portion of the case dealing with the search of the trunk for separate consideration.[40] In its original decision, the Michigan Supreme Court had failed to reach this issue due to its conclusion that the original grounds for the search of the vehicle were improper.

2. *The Supreme Court's Decision*

Prior to holding the compartment search to be permissible under *Terry*, the Supreme Court addressed a threshold objection to its juris-

30. *Id.* at 343, 288 N.W.2d at 631.
31. *Id.* at 344-47, 288 N.W.2d at 631-32.
32. 428 U.S. 364 (1976). *Opperman* held that no warrant is necessary to enter impounded vehicles for the purpose of securing the owner's valuables. *Id.* at 369-71.
33. People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982).
34. *Id.* at 471, 320 N.W.2d at 869.
35. *Id.* at 471 n.4, 320 N.W.2d at 869 n.4.
36. *Id.* at 471, 320 N.W.2d at 869.
37. *Id.* at 472-73, 320 N.W.2d at 870.
38. *Id.* at 473, 320 N.W.2d at 870.
39. Petition for Writ of Certiorari at 5, Michigan v. Long, 463 U.S. 1032 (1983).
40. Michigan v. Long, 463 U.S. 1032, 1053 (1983).

diction. Long contended that the decision below rested on adequate and independent state grounds.[41] Justice O'Connor began analysis of this objection by noting:

> Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.[42]

The unsatisfactory nature of the previous methods, and their inconsistent application, were "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[43] Thus, "[r]espect for the independence of state courts" required a new rule:

> 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.[44]

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41. Respondent's Brief in Opposition to Writ of Certiorari at 4-5, Michigan v. Long, 463 U.S. 1032 (1983).

42. Michigan v. Long, 463 U.S. 1032, 1038 (1983) (footnote omitted). One puzzling feature of the *Long* opinion is the need to explain an apparent shift in the views of Justice O'Connor, the opinion's author. As recently as 1981, Justice O'Connor (then on the Arizona Court of Appeals) complained that "state appellate court judges occasionally become so frustrated with the extent of federal court intervention that they simply abdicate in favor of the federal jurisdiction." O'Connor, *Trends in the Relationship Between Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 801 (1981).

Presumably, more state court justices know this frustration after *Long*. *See supra* notes 111-12 and accompanying text. *See generally* Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983).

43. Michigan v. Long, 463 U.S. 1032, 1039 (1983). On the Court's perceived need for uniformity, see Colorado v. Nunez, 465 U.S. 324 (1984). In *Nunez*, the interest in uniformity prompted three Justices (White, Burger, and Rehnquist) to write explaining the federal position while dismissing a writ of certiorari as improvidently granted, since the decision below rested on adequate and independent state grounds. *Id.* at 324-27. *See also* Landreth Timber Co. v. Landreth, 105 S. Ct. 2297, 2312 n.2 (1985).

44. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). This portion of *Long* echoes language from Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). The opinion below, Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), rested either upon a state interpretation of tort law or on first amendment claims. The Supreme Court accepted jurisdiction, and rejected the argument that the decision below rested on adequate and independent state grounds:

> Even if the judgment in favor of the respondent must nevertheless be understood as ultimately resting on Ohio law, it appears 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.

Id. at 568.

A second doctrinal predecessor to *Long* is Delaware v. Prouse, 440 U.S. 648, 652 (1979). In the decision below, the Delaware Supreme Court struck down ran-

The Court also indicated that a state court wishing to avoid the presumption of jurisdiction "need only make clear by a plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result . . . reached."[45] However, the decision must indicate "clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds."[46] This rule, in the majority's view, served both state and federal interests:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.[47]

Finally, applying the new rule to *Long*, the majority was unconvinced that the holding rested on independent state grounds. No state cases were cited by the court below to support the proposition that the search of the passenger compartment violated the Michigan Constitution,[48] and only two references to that constitution were made.[49] With jurisdiction thus established, the Court held that the search of the passenger compartment was permissible under *Terry*.[50] Since the Michigan Supreme Court had assumed that the illegality of the first search rendered the trunk search invalid, that portion of the case was remanded for an independent determination of the legality of the trunk search.[51]

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dom stops and searches of automobiles, citing both state and federal constitutional law. State v. Prouse, 382 A.2d 1359 (Del. 1978). However, a portion of the opinion stated that "[t]he Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former." *Id.* at 1362.

The Supreme Court rejected a jurisdictional argument based on adequate and independent state grounds, and reversed on the theory that the state ground was not independent. Delaware v. Prouse, 440 U.S. 648, 651-53 (1979).

It is arguable whether *Long* in fact shows respect for the state courts. In a state having an elective judiciary, a state court justice on remand may be forced to decide between making a politically unpopular decision, or maintaining low political visibility by "knuckling under" to an incorrect federal decision.

45. Michigan v. Long, 463 U.S. 1032, 1041 (1983).
46. *Id.*
47. *Id.* (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).
48. In the majority's opinion, the reference to People v. Reed, 393 Mich. 342, 224 N.W.2d 867, *cert. denied*, 422 U.S. 1044 (1975), found in People v. Long, 413 Mich. 461, 472, 320 N.W.2d 866, 869-70 (1982), merely served to show that the state's case did not attempt to justify the search "by reference to other exceptions to the warrant requirement." People v. Long, 413 Mich. 461, 472, 320 N.W.2d 866, 869-70 (1982). The majority did not believe this to be a reference to any independent jurisprudence under Article I, § 11 of the Michigan Constitution. Michigan v. Long, 463 U.S. 1032, 1043 n.9 (1983).
49. Michigan v. Long, 463 U.S. 1032, 1043 (1983).
50. *Id.* at 1045-52.
51. *Id.* at 1053.

On remand,[52] the Michigan Supreme Court proved that *Long* had been a well-chosen case through which to announce the new presumption of federal jurisdiction. Although one concurring opinion indicated that one justice had placed exclusive reliance on the Michigan Constitution,[53] the majority stated that the original holding was "based on our interpretation of *Terry* . . . and other federal cases."[54]

With respect to the issue of the trunk search, the Michigan Supreme Court likewise decided the question on federal law grounds, despite the fact that Long made a state constitutional argument on the issue. "Since we conclude that the inventory search was improper under federal constitutional law . . . we need not address the defendant's state constitutional challenge."[55] Satisfied with this conclusion, or at least tired of trips to Washington, the state has not petitioned for certiorari to date.

3. The Separate Opinions

Only five justices joined in the *Long* majority, and three separate opinions were filed. Justice Brennan, with whom Justice Marshall joined, dissented, arguing that *Terry* did not support the search of the passenger compartment. Brennan's dissent, however, did not address the presumption of jurisdiction issue.[56] Justice Blackmun filed a one paragraph opinion, concurring in part and concurring in the judgment. While satisfied that the Court had jurisdiction in this case, Justice Blackmun explicitly refused to join in the new presumption of jurisdiction, which he felt would lead to "an increased danger of advisory opinions."[57]

By far the most significant opinion is Justice Stevens' dissent. Justice Stevens' opinion raises the two issues which have been significant in post-*Long* opinions—the exact relationship between the state and federal courts, and whether the role of the Court is to vindicate individual rights, or to aid prosecutors who disagree with the holdings of their own state courts.

Justice Stevens initially noted that "[t]he case raises profoundly significant questions concerning the relationship between two sovereigns—the State of Michigan and the United States of America."[58] From here, the Justice poses the following hypothetical and answer:

> If the Finnish police had arrested a Finnish citizen for possession of marijuana, and the Finnish courts had turned him loose, no American would have

52. People v. Long, 419 Mich. 636, 359 N.W.2d 194 (1984).
53. *Id.* at 650, 359 N.W.2d at 201 (Kavanagh, J., concurring in the judgment).
54. *Id.* at 639, 359 N.W.2d at 195.
55. *Id.* at 646 n.5, 359 N.W.2d at 198 n.5.
56. Michigan v. Long, 463 U.S. 1032, 1054-65 (1983) (Brennan, J., dissenting).
57. *Id.* at 1054 (Blackmun, J., dissenting).
58. *Id.* at 1065 (Stevens, J., dissenting).

> standing to object. If instead they had arrested an American citizen and acquitted him, we might have been concerned about the arrest but we surely could not have complained about the acquittal, even if the Finnish Court had based its decision on its understanding of the United States Constitution . . . . We would only be motivated to intervene if an American citizen were unfairly arrested, tried, and convicted by the foreign tribunal.[59]

He then criticizes the Court's conception of its role in recent years. "I believe that in reviewing the decisions of the state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[60] Instead, the Court has allocated its time to cases where those rights have been read too expansively. Here, "[t]he complaining party is an officer of the State itself, who asks us to rule that the state court interpreted federal rights too broadly and 'overprotected' the citizen" of that state.[61] The result of accepting these cases "is a docket swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens."[62] Thus, the Court has less time to spend in its proper function—the vindication of individual federal rights.[63]

Justice Stevens also noted that the need for uniformity was insufficient to support the majority's announcement of a presumption of jurisdiction. "We do not sit to expound our understanding of the Constitution to interested listeners in the legal community; we sit to

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59. *Id.* at 1068.
60. *Id.* (emphasis in original)
61. *Id.*
62. *Id.* at 1070 (footnote omitted).
63. *Id.* at 1068. One authority has described the difference between the O'Connor and Stevens opinions as follows:

> The positions expressed by Justices O'Connor and Stevens rest on two different models of federal/state relations. . . . Justice O'Connor subscribes to 'the interstitial model,' which holds that the dominance of federal civil liberties law has resulted in state bills of rights being assigned the narrow function of 'filling in the gaps.' In contrast, Justice Stevens' position follows the 'classical model,' which envisions a state court as primarily enforcing state law, including state constitutional law. Recourse to federal law is only necessary if state law fails to afford the desired relief. Under this model, federal law assumes the limited 'gap filling' role.

Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1120 (1984) (footnotes omitted). *See also Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1332-56 (1982).

The debate is not entirely theoretical and has a great deal to do with whether a given opinion will adjudicate state claims first (possibly not reaching federal claims) or federal claims first (possibly not reaching state claims). If the state claim is not reached due to a decision on a federal issue, the state constitutional jurisprudence is stunted. *See infra* notes 94-96 and accompanying text. *Compare* State v. Koppel, __ N.H. __, 499 A.2d 977 (1985), *with* People v. Long, 419 Mich. 636, 646 n.5, 359 N.W.2d 194, 198 n.5 (1984) (remand of *Long*). *See generally* Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

resolve disputes. If it is not apparent that our views would affect the outcome of a particular case, we cannot presume to interfere."[64]

Finally, returning to his hypothetical, he rejected the majority's suggestion that the presumption shows respect for the state courts. "Would we show respect for the Republic of Finland by convening a special sitting for the sole purpose of declaring that its decision to release an American citizen was based on a misunderstanding of American law?"[65]

III. ADEQUATE AND INDEPENDENT STATE GROUNDS AFTER *LONG*

A. Supreme Court Cases

In post-*Long* Supreme Court decisions, the mechanics of the use of the presumption of federal jurisdiction have become clearer, as have the criticisms of the presumption itself. Post-*Long* decisions show that the presumption of federal jurisdiction is quite strong, and that the Court meant to be taken literally when it announced its rule that a "plain statement" would be required from the court below to avoid Supreme Court review.[66]

An example of the use of the presumption is found in *California v. Carney*.[67] In *Carney*, officers entered a mobile home without a warrant and seized contraband. The state contended that the search was permissible under the "automobile exception" to the warrant requirement, developed in *Carroll v. United States*.[68] Arguably, a slightly different version of this exception was articulated by the California Supreme Court in *Wimberly v. Superior Court*.[69] The California Supreme Court cited *Wimberly* but did not otherwise discuss any differences between the state and federal standards.[70]

The California Supreme Court ruled that the search did not fall under the automobile exception, citing both California's constitution and the United States Constitution, which "provides a similar guarantee."[71] On appeal, the Supreme Court reversed. The Court dismissed in a footnote the defendant's contention that the decision below rested on adequate and independent state grounds. Citing *Long*, the Court

64. Michigan v. Long, 463 U.S. 1032, 1071 (1983) (Stevens, J., dissenting) (footnote omitted).
65. *Id.* at 1072.
66. *Id.* at 1041 (majority opinion).
67. 105 S. Ct. 2066 (1985).
68. 267 U.S. 132 (1925). *Carroll* held that an automobile's inherent mobility justified a limited exception to the warrant requirement. *Id.* at 153.
69. 16 Cal. 3d 557, 563, 547 P.2d 417, 421, 128 Cal. Rptr. 641, 645 (1976).
70. People v. Carney, 34 Cal. 3d 597, 604, 668 P.2d 807, 810, 194 Cal. Rptr. 500, 503 (1983), *rev'd*, 105 S. Ct. 2066 (1985).
71. *Id.* at 603, 668 P.2d at 809, 194 Cal. Rptr. at 502.

analyzed the issue in one sentence: "We read the opinion as resting on federal law."[72] A similar use of the proposition is found in *Oliver v. United States*, in which the Court again disposed of the jurisdictional attack in a brief footnote.[73]

An even more illustrative example of the use of the presumption is found in *New York v. Quarles*.[74] In *Quarles*, a jurisdictional attack was again disposed of in a footnote:

> Respondent also contends that, under New York law, there is an 'independent and adequate state ground' on which the Court of Appeals' judgment can rest. This may be true, but it is also irrelevant. Both the [courts below] . . . did not cite or expressly rely on any independent state ground in their published decisions. In these circumstances, this Court has jurisdiction.[75]

The Court went to even greater lengths to apply the presumption in *Ohio v. Johnson*.[76] In *Johnson*, the *text* of the opinion below expressly relied on a state statute defining double jeopardy to invalidate a conviction.[77] The use of the state grounds was not clearly stated in the *syllabus*, however. The Court ruled that the *Long* "presumption must be applied in light of the syllabus rule of the Ohio Supreme Court, which provides that the holding of the case appears in the syllabus, since that is the only portion of the opinion on which a majority of the court must agree."[78] The plain import of *Johnson* is that a state court seeking to avoid the presumption of federal jurisdiction must not only make a "plain statement" of state grounds, but must also be careful to negate every inference that it did not make the requisite "plain statement."

Another case seems to indicate that if a state court bases a holding on two state grounds, it must make the plain statement for each of the grounds to avoid Supreme Court review. In *People v. Ramos*,[79] the California Supreme Court reversed a death penalty in a murder conviction. That court ruled that certain testimony had been prejudicial under California law, and that a jury instruction had been improper under federal law.[80] The Supreme Court granted certiorari and re-

72. California v. Carney, 105 S. Ct. 2066, 2068 n.1 (1985).
73. 466 U.S. 170, 175 n.5 (1984).
74. 104 S. Ct. 2626 (1984).
75. *Id.* at 2637 n.2.
76. 104 S. Ct. 2536 (1984).
77. The court below in State v. Johnson, 6 Ohio St. 3d 420, 422-24, 453 N.E.2d 595, 598-600 (1983), ruled that aggravated robbery and grand theft were "allied offense[s] of similar import," and that further prosecution was barred under OHIO R. CIV. P. § 2941.25(B).
78. Ohio v. Johnson, 104 S. Ct. 2536, 2540 n.7 (1984). *Compare Johnson with* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 441-43 (1952) (Supreme Court is permitted to consult an Ohio opinion for understanding of the syllabus despite the syllabus rule).
79. 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982).
80. *Id.* at 591-602, 639 P.2d at 930-36, 180 Cal. Rptr. at 288-94 (1982).

versed. The defendant argued that the evidentiary ruling represented a possible adequate and independent state ground. The United States Supreme Court rejected this argument since "the adequacy of this ruling to support reversal of the sentence was not addressed by the state court."[81]

In addition, the presumption has been given effect sub silentio. In *New Jersey v. T.L.O.*,[82] respondent briefed a lengthy argument stating that the decision below rested on an adequate and independent state ground.[83] In its written opinion, the Court reversed on federal grounds and did not discuss the jurisdictional argument.

Florida v. Casal[84] provides a doctrinal insight into the Court's use of the *Long* presumption. *Casal* is remarkable not for its facts or the result reached, but for Chief Justice Burger's political pitch to the people of Florida to overrule their state court at the polls since he could not do so judicially. *Casal* was initially granted certiorari despite the possibility that the decision rested upon an independent and adequate state ground.[85] Later, the independence and adequacy of the state ground was conceded by the Court, and the writ was dismissed as improvidently granted. Chief Justice Burger concurred, but wrote separately "to emphasize that this Court has decided that Florida law, and not federal law or any decision of this Court, is responsible for the untoward result in this case."[86] The opinion concluded with an unprecedented plea to the Florida electorate:

> [W]hen 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. The people of Florida . . . have it within their power to do so with respect to Fla. Stat. § 327.56 (1981).[87]

As the majority's willingness to use *Long*'s presumption of federal jurisdiction in more diverse and less clear situations has increased, so too criticism of the presumption from other members of the Court has expanded. In particular, Justice Stevens has expounded on his views regarding the appropriate relationship of the state and federal courts. Criticism of the majority's view of the Supreme Court's role and function has also continued.

In *California v. Carney*,[88] Justice Stevens indicated that the pre-

81. California v. Ramos, 463 U.S. 992, 998 n.7 (1983).
82. 105 S. Ct. 733 (1985).
83. Respondent's Brief on the Merits at 8-15, New Jersey v. T.L.O., 105 S. Ct. 733 (1985).
84. 462 U.S. 637 (1983).
85. 459 U.S. 821 (1982).
86. Florida v. Casal, 462 U.S. 637, 637 (1983).
87. *Id.* at 639.
88. 105 S. Ct. 2066 (1985).

sumption is not only incorrect as a matter of comity, but causes the Court to enter into unsettled areas of law prematurely:

> Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles . . . . To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.[89]

Thus, while the states remain "different sovereigns," the federal courts can, and should, draw upon the experience of the states by exercising restraint while the correct approach "percolates"[90] from possible alternatives. While waiting, the Court is free to continue in its traditional role as vindicator of individual rights, rather than correcting "cases presenting fact bound errors of minimal significance."[91]

While the question of the fourth amendment status of mobile homes discussed in *Carney* has been considered by at least some lower courts, Justice Stevens found a more prematurely resolved question in *Ponte v. Real*.[92] In *Real*, prison officials refused an inmate's request to have another inmate testify on the prisoner's behalf at an administrative hearing for loss of "good time." The Court summarily reversed the Supreme Judicial Court of Massachusetts and held that the due process clause did not require that the reasons for the refusal be placed on the record. Justice Stevens again felt that the Court had entered the area too soon:

> No doubt the Court's sparse reasoning in this case and the utter lack of empirical foundation for its bald assertions is in part a product of the fact that *not a single lower court, state or federal*, appears to have considered the alternative of sealed records and *in camera* review that the Court today forecloses.[93]

Finally, in *Massachusetts v. Upton*,[94] Justice Stevens developed his

89. *Id.* at 2073-74 (Stevens, J., dissenting) (footnote omitted). Justice Stevens stated these views prior to *Long* in McCray v. New York, 461 U.S. 961 (1983). In *McCray*, the Court denied certiorari in a case involving peremptory jury challenges made on racial grounds. Justice Stevens explained his vote to deny certiorari by stating that "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *Id.* at 963.

The notion does have older roots. In the context of economic due process cases such as Lochner v. New York, 198 U.S. 45 (1905), Justice Brandeis indicated his belief that the Supreme Court should show deference to state legislation. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

90. California v. Carney, 105 S. Ct. 2066, 2075 n.8 (1985); *id.* at 2074 n.11 (Stevens, J., dissenting).
91. *Id.* at 2072 (Stevens, J., dissenting) (footnote omitted).
92. 105 S. Ct. 2192 (1985).
93. *Id.* at 2209 n.21 (Stevens, J., dissenting) (emphasis in original).
94. 104 S. Ct. 2085 (1984).

view that the ninth amendment provides further support for state courts in developing state constitutional jurisprudence. In *Upton*, the lower court invalidated a conviction on federal grounds, and as a result refused to reach the state constitutional question. Justice Stevens viewed this as the wrong order:

> The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' . . . The Ninth Amendment . . . goes to the very core of the constitutional relationship between . . . sovereigns exercising authority over the individual.[95]

The court below erred because it "permitted the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts under Art. 14 of the Massachusetts Declaration of Rights."[96]

Nor have Justice Stevens' criticisms of the rule in *Long* been limited to the Court's "cavalier disregard"[97] of the state courts. In *Florida v. Meyers*,[98] he evaluated a case that he believed to have been based on adequate and independent state grounds:

> [T]his case and cases like it pose disturbing questions concerning the Court's conception of its role. Each such case, considered individually, may be regarded as a welcome step forward in the never ending war against crime . . . . It may well be true that there have been times when the Court overused its power of summary disposition to protect the citizen against government overreaching. Nevertheless, the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor. The Framers surely feared the latter more than the former.[99]

While the debate continues within the Supreme Court over *Long*, the decision has not gone unnoticed in the state courts.[100] The changes which *Long* has caused in the state courts merits examination.

B. The State Courts

The trend of state courts to ground civil rights decisions on state

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95. *Id.* at 2090 (Stevens, J., dissenting in part).
96. *Id.*
97. Ohio v. Johnson, 104 S. Ct. 2536, 2543 n.* (1984) (Stevens, J., dissenting).
98. 104 S. Ct. 1852 (1984).
99. *Id.* at 1855-56 (Stevens, J., dissenting).
100. The decision has also generated considerable commentary. *See, e.g.*, Schleuter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079 (1984); Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory:* Michigan v. Long, 18 CREIGHTON L. REV. 1 (1984); Note, *Developing a State Jurisprudence Under* Michigan v. Long, 12 AM. J. CRIM. LAW 99 (1984); Note, *The Buck Stops There:* Michigan v. Long *and the Development of State Constitutional Law*, 17 CONN. L. REV. 197 (1984); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1983); Comment, Michigan v. Long: *The Supreme Court Establishes Presumptive Jurisdiction Over State Court Cases*, 20 NEW ENG. L. REV. 123 (1984).

constitutional provisions did not begin with *Long*. One authority indicates that "[s]ince 1970, there have been over 250 cases in which state appellate courts have viewed the scope of rights under state constitutions as broader than those secured by the federal constitution interpreted by the United States Supreme Court."[101] The cause of this trend is more accurately linked to increasing conservatism within the Supreme Court.[102] But *Long*, with its intrusive presumption of federal jurisdiction, only serves to increase the reliance of state courts on state constitutional provisions.

One obvious implication of this trend is that in the state courts an attorney who does not attempt to use state constitutional provisions in his or her client's defense is not providing that client with a complete defense. Justice Hans Linde, of the Oregon Supreme Court, has stated that "[a] lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."[103] Justice Jones, of the same court, stated further: "Any defense lawyer who fails to raise an Oregon Constitution violation and who relies solely on parallel provisions under the federal constitution, except to exert federal limitations, *should* be guilty of legal malpractice."[104]

While the specter of legal malpractice may have been invoked prematurely, the Oregon Supreme Court is far from alone in its views. In *State v. Jewett*,[105] the Vermont Supreme Court took the unusual step of requiring the parties to file supplemental briefs on possible state constitutional issues. The court reasoned:

> To protect his or her client, it is the duty of the advocate to raise state constitutional issues, where appropriate, at the trial level and to diligently develop and plausibly maintain them on appeal. It is the corresponding obligation of the Vermont Supreme Court, when state constitutional questions of possible merit have been raised, to address them or order that they be rebriefed . . . . If we breach this duty . . . 'we help to destroy the federalism that must be so carefully safeguarded by our people.'[106]

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101. State v. Jewett, __ Vt. __, __, 500 A.2d 233, 234 (1985).
102. As the Burger Court has retreated in fourth amendment jurisprudence, the state courts have been particularly active in finding independent guarantees in the search and seizure area. *See, e.g.*, State v. Jones, 706 P.2d 317 (Alaska 1985); Reeves v. State, 599 P.2d 727 (Alaska 1979); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974); State v. Koppel, __ N.H. __, 499 A.2d 977 (1985); State v. Benoit, __ R.I. __, 417 A.2d 895 (1980); State v. Opperman, 247 N.W.2d 673 (S.D. 1976); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); State v. Bartholomew, 101 Wash. 2d 631, 683 P.2d 1079 (Wash. 1984).
103. Welsh & Collins, *Taking State Constitutions Seriously*, 14 CENTER MAG. Sept.-Oct. 1981, at 6, 12.
104. State v. Lowry, 295 Or. 337, 365, 667 P.2d 996, 1013 (1983) (Jones, J., concurring) (emphasis added).
105. __ Vt. __, 500 A.2d 233 (1985).
106. *Id.* at __, 500 A.2d at 238.

Perhaps the best explanation of why this trend will be accelerated by *Long* is found in a dissenting opinion following the remand of *State v. Jackson*,[107] a case decided by the Supreme Court shortly before *Long*. In *Jackson*, the court held that the admission into evidence of a defendant's refusal to submit to a breathalyzer test violated state and federal guarantees.[108] The Supreme Court vacated and remanded for clarification and reconsideration in light of subsequent federal decisions.[109] On remand, the Montana Supreme Court relied upon federal cases to reinstate the defendant's conviction.[110] Two dissenters saw themselves as victims of the philosophy of the recently-decided *Long* case. After agreeing with Justice Stevens' dissent in *Long*, dissenting Justice Sheehy expressed what may well be the motivation for many state court justices in the post-*Long* world:

> Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.[111]

Dissenting Justice Shea seemed to agree. After discussing the Supreme Court's "intrusionary" policy, and describing Justice Burger's concurring opinion in *Casal* as "arrogant," Justice Shea stated:

> This philosophy appears to have permeated a majority of the members of that Court and I suggest that this philosophy is what led to the remand in this case. The Chief Justice would have state governments amend state constitutions and statutes to march lock-step with the judicial pronouncements of the United States Supreme Court.[112]

The state courts have also shown a willingness to avoid the presumption of federal jurisdiction by their use of a *Long* "plain statement."[113] The "plain statements" of the state courts range from simple to detailed, and from merely functional to almost sarcastic. In 1984, the Michigan Supreme Court (the initial victim of *Long*'s presumption of jurisdiction) showed no desire to fall victim a second time, stating that "for any future review, we offer the following 'plain statement.' As should be clear from our rejection of *Belle Terre*, our decision here is based solely on the Due Process Clause of the Michigan Constitution . . . ."[114]

Similarly, the Washington Supreme Court, in *State v. Bartholo-*

107. __ Mont. __, 672 P.2d 255 (1983) (*Jackson* II).
108. State v. Jackson, 195 Mont. 185, 637 P.2d 1 (1981) (*Jackson* I).
109. Montana v. Jackson, 460 U.S. 1030 (1983) (*Jackson* I).
110. State v. Jackson, __ Mont. __ , 672 P.2d 255 (1983) (*Jackson* II).
111. *Id.* at __, 672 P.2d at 260 (Sheehy, J., dissenting).
112. *Id.* at __, 672 P.2d at 264 (Shea, J., dissenting).
113. Michigan v. Long, 463 U.S. 1032, 1041 (1983).
114. Charter Township of Delta v. Dinolfo, 419 Mich. 253, 276 n.7, 351 N.W.2d 831, 843 n.7 (1984).

mew,[115] not only made a *Long* "plain statement," but specified that any Supreme Court review would result in an advisory opinion. It stated that "the independent state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached . . . . [A]ny decision by the Supreme Court limiting federal constitutional guarantees . . . will have no bearing on our decision in this case."[116]

It may be possible for a state court to make the *Long* "plain statement" once for all future opinions of that court. In *State v. Kennedy*,[117] the Oregon Supreme Court stated: "Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines."[118] While this statement may not deter the Burger Court, it will certainly aid any practitioner arguing the adequate and independent state grounds of any future opinion of the Oregon Supreme Court.

Even dissenting justices have preceded an opinion with a *Long* "plain statement."[119] The strength of this technique is that the dissent is preserved as persuasive authority for later decisions within the state. Any argument that the dissenting opinion rested on, or was interwoven with, federal law is foreclosed.

While *Long* may have provoked some state courts into increased reliance on state constitutional provisions, others have expressed skepticism with the technique. For example, some commentators have indicated that reliance on state constitutional provisions is used as a "shell game"[120] to avoid federal precedent, rather than as an ex-

115. 101 Wash. 2d 631, 683 P.2d 1079 (1984).

116. *Id.* at __, 683 P.2d at 1087; *See also* State v. Von Bulow, __ R.I. __, __, 475 A.2d 995, 1019, *cert. denied*, 105 S. Ct. 233 (1984) (independent state grounds as alternate grounds for decision otherwise resting on federal law). That the state petitioned for certiorari in *Von Bulow* is evidence that, as Justice Stevens has indicated, "[t]he Court's inventiveness in the search and seizure area has also emboldened state legal officers to file petitions for certiorari from state court suppression orders that are explicitly based on independent state grounds." California v. Carney, 105 S. Ct. 2066, 2072 n.4 (1985) (Stevens, J., dissenting).

117. 295 Or. 260, 666 P.2d 1316 (1983).

118. *Id.* at 267, 666 P.2d at 1321.

119. *See, e.g.*, State v. Wyer, 320 S.E.2d 92, 106 (W. Va. 1984) (Harshberger, J., dissenting); State v. Rodgers, 119 Wisc. 2d 102, 125, 349 N.W.2d 453, 464 (1984) (Abrahamson, J., dissenting).

120. People v. Ramey, 16 Cal. 3d 263, 277, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (Clark, J., dissenting), *cert. denied*, 429 U.S. 929 (1976).

One commentator is in agreement: for some state courts, "the state bill of rights is little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions." Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981).

pression of a result mandated by the state's own constitution. As one justice has stated:

> I am uneasy with decisions which reach a different result than the United States Supreme Court's interpretation of nearly identical language in the Federal Constitution . . . . Courts which fail to explain important divergences from precedent run the risk of being accused of making policy decisions based on subjective result-oriented reasons.[121]

People v. Norman[122] presents a similar pre-*Long* statement. In *Norman*, the majority of the California Supreme Court rejected the federal holding of *United States v. Robinson*[123] based on state constitutional provisions. One justice dissented, noting that the fourth amendment of the United States Constitution and article I, § 19 of the California Constitution contain nearly identical language. He concluded that "something more than personal disagreement by a majority of members of a state court with the decision of the United States high tribunal on search and seizure is required if the persuasion of that Court is not to be followed."[124]

While this criticism may be valid, it should be remembered that the United States Supreme Court's interpretation of similarly construed federal provisions is only persuasive on state courts interpreting their own state constitutions since the state courts have the ultimate authority and responsibility for the interpretation of their own state constitutions. A rejection of persuasive authority is thus validly based on philosophical differences.

A related criticism is that:

> The vagaries and uncertainties of constitutional interpretations, particularly in the Fourth and Fifth Amendment sectors of our criminal law, are hard facts of life with which the general public, the courts, and law enforcement officials must grapple daily. This condition necessarily breeds uncertainty, confusion, and doubt. It will not be eased or allayed by a proliferation of multiple judicial interpretations of nearly identical language.[125]

In *State v. Lowry*,[126] a decision based on the Oregon Constitution, dissenting Justice Jones makes the same point. "This opinion will cause

121. People v. Sporleder, 666 P.2d 135, 149 (Colo. 1983) (Erickson, C.J., dissenting). *See also* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), where a dissenting justice stated that "[t]he very obvious and substantial identity of *phrasing* of the two Constitutions strongly suggests the wisdom . . . of identity of *interpretation* of those clauses." *Id.* at 118, 545 P.2d at 283, 127 Cal. Rptr. at 371 (Richardson, J., dissenting) (emphasis in original).

122. 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).

123. 414 U.S. 218 (1973) (validity of warrantless search incident to unrelated arrest does not depend on probable cause to suspect contraband).

124. People v. Norman, 14 Cal. 3d 929, 941, 538 P.2d 237, 246, 123 Cal. Rptr. 109, 118 (1975) (footnote omitted) (Clark, J., dissenting) (quoting People v. Norman, 112 Cal. Rptr. 43, 49 (Cal. Ct. App. 1974) (opinion below, reversed on appeal)).

125. People v. Disbrow, 16 Cal. 3d 101, 119, 545 P.2d 272, 284, 127 Cal. Rptr. 360, 372 (1976) (Richardson, J., dissenting).

126. 295 Or. 337, 667 P.2d 996 (1983).

lawyers and judges to sit down for hours and unscramble what it [the opinion] stands for and to determine what are the fine line differences between state and federal interpretations of the same or similar wording of parallel constitutional provisions."[127]

In response to Justice Jones, it can be said that avoiding the introduction of uncertainty into the law is no reason to deprive defendants of rights otherwise due under state constitutions. That federal law fluctuates is no argument to fix it permanently; similarly, that the enforcement of state constitutional rights creates uncertainty is no argument for judicial abdication of those rights.

Perhaps the strongest criticism can be leveled against courts which indiscriminately combine state and federal constitutional provisions in the same holding. The criticism is that:

> By invoking the state constitution the court insulates its decisions from federal judicial review; by simultaneously invoking the Federal Constitution, the court effectively blocks popular review through the initiative process. In a sense, this dual reliance makes the people . . . the prisoners of the privileges conferred by their own state constitutions.[128]

The "dual reliance" technique has been criticized as "increas[ing] the state court's decision-making power vis-a-vis other branches of state government, perhaps beyond the effective control of even a supermajority of the state's citizens."[129]

IV. ARGUING STATE CONSTITUTIONAL PROVISIONS—A CHECKLIST

Three years after *Long*, and eight years after Justice Brennan admonished practitioners to invoke state constitutional arguments,[130] the techniques for invoking state constitutional provisions are becoming clearer. In *State v. Jewett*,[131] the Vermont Supreme Court outlined some of these techniques. The court noted that "it is important that the attorney consider the various approaches that can be taken to state constitutional argument . . . . The advocate in appellate argument may wish to combine several of these approaches, having in mind that any collegial tribunal contains members with varying legal backgrounds and philosophies."[132] In the same spirit, the following material outlines some of the more commonly used techniques.

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127. *Id.* at 365, 667 P.2d at 1012 (Jones, J., concurring).

128. Deukmejan & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996-97 (1980).

129. Bice, Anderson *and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 757-58 (1972).

130. *See* Brennan, *supra* note 3.

131. __ Vt. __, 500 A.2d 233 (1985).

132. *Id.* at __, 500 A.2d at 236.

A. Invoking the Independence of the State Constitution

Pre-*Long* state court decisions tended to "interweave" state and federal precedents. This high degree of interrelationship led to a possible inference that decisions which otherwise might reflect an independent state constitutional jurisprudence, in fact merely reflect outdated federal law.[133] By invoking the independence of the state constitution, this argument can at least be partially countered and the framework set for further state constitutional analysis. For example, in *People v. Brisendine*,[134] the California Supreme Court stated: "This court has always assumed the independent vitality of our state Constitution. In the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion."[135] In *California v. Carney*,[136] the defendant's attorney used this language to argue that although California precedent had been interwoven with federal precedent, the California constitution could still be interpreted as providing greater protection in the search and seizure area.[137]

The technique of invoking the independence of the state constitution was at least partially successful in *Long* itself. Long's attorney argued that "[e]xamples of the greater protection afforded by the Michigan Constitution abound."[138] This statement was followed by a series of paired opposites of rights granted by Michigan case law, yet denied in federal cases.[139] In oral arguments, Justice Stevens repeatedly referred to *People v. Secrest*,[140] a case which "says in words that the State Constitution imposes a higher standard of protection than does the Federal Constitution . . . ."[141] *Secrest*, while not mentioned in the lower court's opinion, was briefed by the respondent.[142]

133. For example, in *Long*, it was argued that "[t]he Michigan Supreme Court has interpreted Mich. Const. 1963, art. I, § 11, as being neither more nor less restrictive than US Const Am IV." Petition for Writ of Certiorari at 5, Michigan v. Long, 463 U.S. 1032 (1983).

134. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

135. *Id.* at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328.

136. 105 S. Ct. 2066 (1985).

137. Respondent's Brief on the Merits at 11, California v. Carney, 105 S. Ct. 2066 (1985).

138. Respondent's Brief in Opposition to Writ of Certiorari at 5, Michigan v. Long, 463 U.S. 1032 (1983).

139. *Id. See also* Respondent's Brief on the Merits at 28, Michigan v. Long, 463 U.S. 1032 (1983).

140. 413 Mich. 521, 321 N.W.2d 368 (1982).

141. Oral Arguments, Official Transcript at 16, Michigan v. Long, 463 U.S. 1032 (1983).

142. Respondent's Brief in Opposition to Writ of Certiorari at 4, Michigan v. Long, 463 U.S. 1032 (1983).

B. Analyzing the Wording of the State Constitutional Provision

In *Jewett*, the Vermont Supreme Court noted that "[a] state constitutional clause may . . . contain language that differs from parallel provisions in the National Charter so that the former invites distinction on independent grounds."[143] The differences in wording may be highly persuasive if properly raised. For example, in *State v. Chrisman*,[144] the Washington Supreme Court, on remand from the United States Supreme Court, found wider guarantees under the state constitution in a warrantless seizure case. The court stated that "[i]n the area of search and seizure we rely upon independent state grounds primarily because of the difference in language between [Wash.] Const., art. 1, § 7 and the Fourth Amendment."[145]

Differences in constitutional language permitted one state court to extend free speech protections beyond that required by the federal Constitution. In *State v. Coe*,[146] the Washington Supreme Court interpreted the Washington Constitution's provision that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[147] Because of the differences between the wording of the Washington and the United States Constitutions, the court accepted the defendant's contention that "unlike the first amendment to the United States Constitution, the plain language of art. 1, § 5, seems to rule out prior restraints under *any* circumstances . . . ."[148]

C. Analyzing the Philosophical and Historical Background of the State Constitutional Provisions

An historical and philosophical approach to state constitutional law may "touch upon the legislative history of a particular provision, 'or on the social or political setting in which it originated, or on the fate of the [provision] in subsequent constitutions.' "[149] For example, federal decisions now base the exclusionary rule almost exclusively on a deterrence theory.[150] If the state constitution mandates exclusion on another rationale (for example, reliability of evidence, or the autonomy of the individual), it would be possible to reach a result under the state

143. State v. Jewett, __ Vt. __, __, 500 A.2d 233, 236 (1985).
144. 100 Wash. 2d 814, 676 P.2d 419 (1984).
145. *Id.* at __, 676 P.2d at 422.
146. 101 Wash. 2d 364, 679 P.2d 353 (1984).
147. WASH. CONST. art. I, § 5.
148. State v. Coe, 101 Wash. 2d at 364, 679 P.2d 353, 359 (1984) (emphasis in original).
149. State v. Jewett, __ Vt. __, __, 500 A.2d 233, 236 (1985); Linde, *E Pluribus - Constitutional Theory and State Courts*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 285 (B. McGraw ed. 1985).
150. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Calandra, 414 U.S. 338, 347-48 (1974).

constitution different from that reached by the United States Supreme Court under the federal Constitution.[151]

D. Using Local Statutes

Subject only to the requirement that new arguments may not be raised on appeal, any statute adding local color also argues for an independent state ground. In *State in the Interest of T.L.O.*,[152] counsel for the defendant pointed to a local statute holding that juveniles have the same right as adults to be free from unreasonable searches.[153] Although the tactic was unsuccessful on appeal in *T.L.O.*,[154] the statute could well have provided a basis for a finding of an adequate and independent state ground.

E. Using Other State Constitutional Decisions as Persuasive Authority

"The advocate may also use a sibling state approach in state constitutional argument. This involves seeing what other states with identical or similar constitutional clauses have done."[155] For example in *State v. Coe*,[156] the Washington Supreme Court looked to two decisions from states with similarly worded constitutional provisions. The court used the reasoning contained in these decisions to establish a broader free speech right under the state constitution, stating that "[t]he reasoning of the California and Arizona Supreme Courts in interpreting identical or nearly identical provisions of their own constitutions is persuasive. It gives support for our own independent

151. *See* Oral Arguments, Official Transcript at 51, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (a Justice questions whether New Jersey law would mandate exclusion of evidence independently of federal law). In *T.L.O.*, briefs urging reversal frequently referred to the deterrent function of the exclusionary rule. *See, e.g.*, New Jersey School Bd. Ass'n, *Amicus Curiae* Brief at 21, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Washington Legal Found.'s *Amicus Curiae* Brief at i, 2-3, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Petitioner's Brief on the Merits at 8, New Jersey v. T.L.O., 105 S. Ct. 733 (1985). If New Jersey law mandated exclusion on grounds other than deterrence, the impact of these briefs could have been effectively countered.

152. State *ex rel.* T.L.O., 94 N.J. 331, 463 A.2d 934 (1983), *rev'd*, 105 S. Ct. 733 (1985).

153. *Id.* at 342 n.5, 463 A.2d at 939 n.5. *See also* Respondent's Brief on the Merits at 10, New Jersey v. T.L.O., 105 S. Ct. 733 (1985). The statute was N.J. STAT. ANN. § 2A:4-60 (West Supp. 1982), which stated that "[t]he right to be secure from unreasonable searches and seizures . . . shall be applicable in cases arising under this act [N.J. Code of Juvenile Justice] as in cases of persons charged with crime." Although repealed effective Dec. 31, 1983, see 1982 N.J. Laws 472, the statute was in effect at the time of T.L.O.'s arrest.

154. One of the most interesting features of the *T.L.O.* decision is that the defendant/respondent's argument that the decision below rested on adequate and independent state ground was not addressed by the Court in its opinion.

155. State v. Jewett, __ Vt. __, __, 500 A.2d 233, 238 (1985).

156. 101 Wash. 2d 364, 679 P.2d 353 (1984).

conclusion . . . ."[157]

In addition to the use of other state court decisions, federal decisions may be used for comparison or persuasive authority. As *Jewett* indicates, however, the practitioner should "[b]eware of using federal cases and saying that they 'compel' a given conclusion."[158] This technique only invites review and reversal under *Long*.[159]

Finally, in addition to the manner of invoking state constitutional provisions, timing is crucial. A state constitutional argument must be raised at the trial court stage. In *State v. Thornton*,[160] the Maine Supreme Court suppressed evidence based on an ambiguously grounded decision that mentioned both the state and federal constitutions.[161] The United States Supreme Court, applying *Long*, granted certiorari, then reversed and remanded the case.[162] On remand, the defendant argued for suppression of the state's evidence based on state constitutional grounds. The Maine Supreme Court refused to suppress, stating that "[t]his court has consistently held to the rule that issues will not be considered on appeal unless they were raised at the trial level . . . ."[163] While the possibility of a state constitutional decision was not foreclosed,[164] the failure to timely invoke state constitutional provisions may have been the difference between acquittal and conviction in *Thornton*.

V. CONCLUSION

In and of itself, the presumption of federal jurisdiction in *Long* represents, at best, an unwise use of federal jurisdiction. Used neutrally, the provision might lead to an occasional "advisory" opinion. What is disturbing is the fact that the proposition has not been used neutrally. Born as "a welcome step forward in the [Court's] never ending war

157. *Id.* at __, 679 P.2d at 361.

158. State v. Jewett, __ Vt. __, __, 500 A.2d 233, 238 (1985) (quoting Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 651 (1983)).

159. If certiorari is granted in an ambiguous case, one other technique may become relevant. Since *Long* mentioned the state constitution only twice, and quoted only limited state precedent, it may be possible to favorably compare the amount of state material in a given decision to *Long*. If favorable, this comparison would establish a stronger case for an independent state ground. *See, e.g.*, Respondent's Brief on the Merits at 5 n.2, California v. Carney, 105 S. Ct. 2066 (1985); Respondent's Brief in Opposition to Writ of Certiorari at 11, New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

160. 453 A.2d 489 (Me. 1982).

161. *Id.* at 493-96.

162. Maine v. Thornton, 104 S. Ct. 1735, 1739-40 (1984).

163. State v. Thornton, 485 A.2d 952, 953 (Me. 1984) (quoting State v. Desjardains, 401 A.2d 165, 169 (Me. 1979)).

164. State v. Thornton, 485 A.2d 952, 963 (Me. 1984).

against crime,"[165] the rule has helped the Court forget "its primary role as the protector of the citizen and not the warden or prosecutor."[166] The responsibility for the protection of individual rights is now primarily a function of the state courts and those who practice in them.

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165. Florida v. Meyers, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting from denial of certiorari).
166. *Id.* at 387 (Stevens, J., dissenting).