

## MICHIGAN v. LONG: A TWENTY YEAR RETROSPECTIVE

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### I. INTRODUCTION

Respect for judicial federalism requires the Supreme Court to avoid deciding questions of state law when reviewing state court decisions.<sup>1</sup> The Supreme Court's power lies only in interpreting federal legal questions raised by these courts. Accordingly, the Court will deny jurisdiction over issues that are settled on the basis of "independent . . . and adequate" state legal grounds.<sup>2</sup> However, determining whether state court decisions are controlled by state or federal law, when both are discussed in state court opinions, has proved to be a persistent problem for the Court.<sup>3</sup>

Citing problems with previous methods, the Court adopted a new approach in *Michigan v. Long*.<sup>4</sup> The Court held that when a state court discussed both state and federal law in its opinion, but was not clear about which was controlling, the Court would presume that the decision was based on federal law, unless the state court included a "plain statement" to the contrary.<sup>5</sup> The *Long* rule differed from past approaches in two ways. First, earlier approaches tended to presume that ambiguously worded decisions

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<sup>1</sup> See *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874).

<sup>2</sup> *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

<sup>3</sup> *Michigan v. Long*, 463 U.S. 1032, 1038 (1983) (explaining that the Court has "thus far not developed a satisfying and consistent approach for resolving th[e] vexing issue" of what constitutes an adequate and independent state ground).

<sup>4</sup> See, e.g., previous methods, *South Dakota v. Neville*, 459 U.S. 553 (1983) (reviewing state law to ascertain the basis of the state court decision); *Herb v. Pitcairn*, 324 U.S.117 (1945) (continuing until the state court could clarify its decision); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940) (vacating and remanding); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934) (dismissing the case). *Long*, 463 U.S. at 1038–39. According to the *Long* Court, each method was flawed. The procedure of dismissing a case was problematic because it undermined uniformity in federal law, while vacating or continuing raised concerns because of the burden placed on state courts to clarify their law for the Court and because of the delay and inefficiency created for judicial administration, and conducting its own review was troublesome because it required the Court to interpret state law with which it was generally unfamiliar. See *id.* at 1039–40.

<sup>5</sup> *Long*, 463 U.S. at 1040–41.

rested on state law.<sup>6</sup> *Long* reversed this presumption. Second, for the first time the Supreme Court provided a formula for state courts to use to signal that their decisions rested on state grounds.

As we approach the twentieth anniversary of the *Long* decision, this article offers a retrospective of the case, by primarily analyzing subsequent Supreme Court decisions that have cited *Long*.<sup>7</sup> Thus, this study essentially analyzes *Long* through the opinions and decisions of the Court itself. The results reveal that the Court has remained committed to the *Long* rule for the past two decades. However, the success of *Long* in achieving its goals has not been uniform. The realization of most of its goals depends on the responses of state courts, and their responses have not always been conducive to meeting these goals.

## II. OVERVIEW

The Supreme Court has cited *Long* in majority, concurring, and/or dissenting opinions in fifty-eight cases. The *Long* rule has been the subject of forty-one.<sup>8</sup> Most of these cases, thirty-four out of forty-

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<sup>6</sup> This is true for the practices of vacating and remanding (or continuing until the state court could clarify its decision) and for dismissing an action. Whether the practice of the court engaging in its own review of state law is more or less deferential than the *Long* rule depends on the court's standards for determining the legal basis of state court decisions.

<sup>7</sup> The cases were compiled through a LEXIS-NEXIS search of Supreme Court decisions using "Michigan v. Long" as the search term.

<sup>8</sup> *Ohio v. Reiner*, 532 U.S. 17 (2001); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida*, 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *American Trucking Ass'n Inc. v. Smith*, 496 U.S. 167 (1990); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *California v. Freeman*, 488 U.S. 1311 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *Colorado v. Nunez*, 465 U.S. 324 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

*Long* also has some importance as a Fourth Amendment case that extends the *Terry* Rule (permitting protective searches of people based on reasonable suspicion that they pose a danger), *Terry v. Ohio*, 392 U.S. 1 (1968), to include searches of passenger compartments of

one, or eighty-three percent, were decided in the first seven years following *Long*.<sup>9</sup> Only seven Supreme Court decisions have cited the *Long* rule in the past thirteen years.<sup>10</sup> Nearly half the states (twenty-four) generated cases that were decided by the Court when invoking *Long*.<sup>11</sup> Most of the cases, thirty-two out of forty-one, or seventy-eight percent, involved criminal defendant rights.<sup>12</sup> Two

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automobiles. *Long*, 463 U.S. at 1049. Citations to *Long* in ten cases were in support of Court decisions affirming the reasonableness of searches. *Knowles v. Iowa*, 525 U.S. 113 (1998); *Maryland v. Wilson*, 519 U.S. 408 (1997); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *California v. Acevedo*, 500 U.S. 565 (1991); *Maryland v. Buie*, 494 U.S. 325 (1990); *New York v. Class*, 475 U.S. 106 (1986) (*Class* was discussed both as a search and seizure case and for the *Long* rule); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *Hudson v. Palmer*, 468 U.S. 517 (1984), *Unites States v. Jacobson*, 466 U.S. 109 (1984).

<sup>9</sup> *Illinois v. Rodriquez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *American Trucking Ass'n Inc. v. Smith*, 496 U.S. 167 (1990); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *California v. Freeman*, 488 U.S. 1311 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n. v. Davis*, 476 U.S. 380 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *Colorado v. Nunez*, 465 U.S. 324 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

<sup>10</sup> *Ohio v. Reiner*, 532 U.S. 17 (2001); *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida*, 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991).

<sup>11</sup> **Alabama**, *Int'l Longshoremen's Ass'n*, 476 U.S. 380 (1986); **Arkansas**, *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167 (1990); **Arizona**, *Arizona v. Evans*, 514 U.S. 1 (1995); **California**, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); **Colorado**, *Colorado v. Nunez*, 465 U.S. 324 (1984); **Connecticut**, *Connecticut v. Barrett*, 479 U.S. 523 (1987); **Delaware**, *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); **Florida**, *Sochor v. Florida*, 504 U.S. 527 (1992); **Illinois**, *Illinois v. Rodriguez*, 497 U.S. 177 (1990); **Kentucky**, *Kentucky v. Stincer*, 482 U.S. 730 (1987); **Maine**, *Oliver v. United States* 466 U.S. 170 (1984); **Maryland**, *Maryland v. Garrison*, 480 U.S. 79 (1987); **Massachusetts**, *Ponte v. Real*, 471 U.S. 491 (1985); **Michigan**, *Michigan v. Chesternut*, 486 U.S. 567 (1988); **Minnesota**, *Minnesota v. Olson*, 495 U.S. 91 (1990); **Mississippi**, *Caldwell v. Mississippi*, 472 U.S. 320 (1985); **Missouri**, *Quinn v. Millsap*, 491 U.S. 95 (1989); **Montana**, *Montana v. Hall*, 481 U.S. 400 (1987); **New York**, *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); **North Carolina**, *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); **North Dakota**, *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984); **Ohio**, *Ohio v. Reiner*, 532 U.S. 17 (2001); **Pennsylvania**, *Pennsylvania Board of Probation and Parole*, 524 U.S. 357 (1998); **Virginia**, *Coleman v. Thompson*, 501 U.S. 722 (1991).

<sup>12</sup> These included sixteen search and seizure cases. See *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v.*

free expression cases,<sup>13</sup> a free exercise,<sup>14</sup> and an equal protection<sup>15</sup> case constituted the remainder of the civil rights and liberties cases. Five cases raised a variety of issues that were not related to civil rights and liberties.<sup>16</sup>

*Long* was cited by majority opinions thirty-four times,<sup>17</sup> dissenting opinions fourteen times,<sup>18</sup> and concurring opinions seven times.<sup>19</sup>

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Labron, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Maryland v. Garrison*, 480 U.S. 79 (1987); *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *New York v. Class*, 475 U.S. 106 (1986); *California v. Carney*, 471 U.S. 386 (1985); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *Colorado v. Nunez*, 465 U.S. 324 (1984). Also included were four self incrimination cases. *See Ohio v. Reiner*, 532 U.S. 17 (2001); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *New York v. Quarles*, 467 U.S. 649 (1984). Three *habeas corpus* cases were also included. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989). There were three jury-instruction-in-death-penalty cases. *See Sochor v. Florida*, 504 U.S. 527 (1992); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *California v. Ramos*, 463 U.S. 992 (1983). There are also two double jeopardy cases. *See Montana v. Hall*, 481 U.S. 400 (1987); *Ohio v. Johnson*, 467 U.S. 493 (1984). Two of the cases were right-to-confrontation cases. *See Kentucky v. Stincer*, 482 U.S. 730 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). One was a right to counsel case. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). Finally, there was one prisoner due process case. *See Ponte v. Real*, 471 U.S. 491 (1985).

<sup>13</sup> *See Milkovich v. Lorain*, 497 U.S. 1 (1990); *California v. Freeman*, 488 U.S. 1311 (1989).

<sup>14</sup> *See Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990).

<sup>15</sup> *See Quinn v. Millsap*, 491 U.S. 95 (1989).

<sup>16</sup> *See American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984); *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310 (1984).

<sup>17</sup> *Ohio v. Reiner*, 532 U.S. 17 (2001); *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida*, 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *California v. Freeman*, 488 U.S. 1311 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *California v. Carney*, 471 U.S. 386 (1985); *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

<sup>18</sup> *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida*, 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Montana v. Hall*, 481 U.S.

Relatively extensive discussions or debates about the *Long* rule were joined in at least ten cases.<sup>20</sup>

In his dissent in *Long*, Justice Stevens predicted that the Court would one day reconsider its decision.<sup>21</sup> So far it has not. For twenty years, the Court has invoked the *Long* rule for determining the legal basis of ambiguously worded state court decisions. Twelve years after *Long*, in *Arizona v. Evans*,<sup>22</sup> the majority reiterated its support for *Long* by declaring that it “properly serves its purpose and should not be disturbed.”<sup>23</sup> Further, the *Long* rule has been extended beyond its original application in a civil rights and liberties case raising a substantive issue on direct review, as the Court has applied the rule to non-civil rights and liberties,<sup>24</sup> state procedural,<sup>25</sup> and habeas corpus cases.<sup>26</sup>

The *Long* rule has enjoyed the support of solid majorities throughout its history.<sup>27</sup> Still, the dissenters have been persistent.

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400 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *Florida v. Meyers*, 466 U.S. 380 (1984); *Colorado v. Nunez*, 465 U.S. 324 (1984).

<sup>19</sup> *Ohio v. Robinette*, 519 U.S. 33 (1996); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *Ponte v. Real*, 471 U.S. 491 (1985); *Massachusetts v. Upton*, 466 U.S. 727 (1984).

<sup>20</sup> See *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida*, 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); see also W. Craig Williams, *Constitutional Law: Premature Federal Adjudication Through the Plain Statement Rule*; *Arizona v. Evans*, 8 J. LAW & PUB. POL’Y 129 (discussing the *Long* rule as applied in *Evans*).

<sup>21</sup> *Long*, 463 U.S. at 1070 (Stevens, J., dissenting).

<sup>22</sup> 514 U.S. 1 (1995).

<sup>23</sup> *Id.* at 8.

<sup>24</sup> See *supra* note 16 and accompanying text.

<sup>25</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

<sup>26</sup> *Harris v. Reed*, 489 U.S. 259, 265 (1989). Justice Stevens has argued—in dissent—that the Court also extended the *Long* rule in other cases. See *Pennsylvania v. Labron*, 518 U.S. 938, 947 (1996) (Stevens, J., dissenting) (criticizing the majority for extending *Long* and “stand[ing] its rationale on its head,” because the majority concluded that state and federal law were interwoven when the state court only cited two twenty-five year old federal cases); *Delaware v. Van Arsdall*, 475 U.S. 673, 690–91 (1986) (Stevens, J., dissenting) (applying the *Long* rule to a state court remedy for a federal violation); *Florida v. Meyers*, 466 U.S. 380, 384 n.1 (1984) (Stevens, J., dissenting) (implying that a plain statement was required, even when a state court opinion “indisputably” rested on state grounds).

<sup>27</sup> The Court has invoked the *Long* rule in thirty-nine cases in which it has sat en banc (Justices O’Connor and Rehnquist each decided one case as circuit judges; respectively, *California v. Freeman*, 488 U.S. 1311 (1989) and *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310 (1984)). On the question of the *Long* rule and its application, nineteen decisions have been unanimous (*Ohio v. Reiner*, 532 U.S. 17 (2001); *Parole v. Scott*, 524 U.S. 357 (1998); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S.

Justices Stevens, Marshall, Brennan, and Blackmun objected to the rule in the original *Long* decision.<sup>28</sup> In the ensuing twenty years, these four Justices, joined by Justice Ginsberg, have criticized the rule and/or its application in a number of cases.<sup>29</sup> Justice Stevens has been the primary critic of both the *Long* rule and its application. He has criticized some aspect of *Long* in eighteen of the thirty-nine cases in which the issue has been raised before the full Court.<sup>30</sup> Justice Marshall has criticized *Long* in seven cases,<sup>31</sup> Justice

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582 (1990); *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167 (1990); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) [5-3, Powell not participating]; *New York v. Quarles*, 467 U.S. 649 (1984); *Oliver v. United States*, 466 U.S. 170 (1984), nine have been 8-1 (*Ohio v. Robinette*, 519 U.S. 33 (1996); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *Montana v. Hall*, 481 U.S. 400 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Massachusetts v. Upton*, 466 U.S. 727 (1984) (dissenting from summary disposition); *Colorado v. Nunez*, 465 U.S. 324 (1984); *California v. Ramos*, 463 U.S. 992 (1983)), five been 7-2 (*Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida*, 504 U.S. 527 (1992) (dissenting in part); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984)), four have been 6-3 (*Coleman v. Thompson*, 501 U.S. 722 (1991); *California v. Carney*, 471 U.S. 386 (1985); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984)), one has been 5-4 (*Pennsylvania v. Finley*, 481 U.S. 551 (1987)), and one has been 4-4 (*Ponte v. Real*, 471 U.S. 491 (1985) [Powell not participating]).

<sup>28</sup> *Long*, 463 U.S. at 1032 (Blackmun, J. concurring in part and dissenting in part) (Brennan, J., Marshall, J., and Stevens, J., dissenting).

<sup>29</sup> There have been a total of fifteen justices who have served on the Supreme Court during *Long* and its aftermath. They include Justices Blackmun, Brennan, Breyer, Burger, Ginsburg, Kennedy, Marshall, O'Connor, Powell, Rehnquist, Scalia, Souter, Stevens, Thomas, and White.

<sup>30</sup> Justice Stevens has written or joined opinions that criticized *Long* in: *Arizona v. Evans*, 514 U.S. 1, 18 (1995); *Coleman v. Thompson*, 501 U.S. 722, 758 (1991); *Minnesota v. Olson*, 495 U.S. 91, 101 (1990); *Teague v. Lane*, 489 U.S. 288, 318 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 536 (1987); *Ponte v. Real*, 471 U.S. 491, 501 (1985); *California v. Carney*, 471 U.S. 386, 395 (1985); *Massachusetts v. Upton*, 466 U.S. 727, 735 (1984); and *Colorado v. Nunez*, 465 U.S. 324, 327 (1984). He has written or joined opinions that have criticized application of the rule in: *Sochor v. Florida*, 504 U.S. 527, 545 (1992); *Ohio v. Johnson*, 467 U.S. 493, 503 (1984); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 158 (1984); and *California v. Ramos*, 463 U.S. 992, 1029 (1983). He has written or joined opinions that have criticized both the rule and its application in *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996); *Pennsylvania v. Finley*, 481 U.S. 551, 570 (1987); *Montana v. Hall*, 481 U.S. 400, 410 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673, 675 (1986); and *Florida v. Meyers*, 466 U.S. 380, 383 (1984).

<sup>31</sup> Justice Marshall has written or joined opinions that have criticized the rule in: *Coleman v. Thompson*, 501 U.S. 722, 758 (1991); *Connecticut v. Barrett*, 479 U.S. 523, 536 (1987); *Ponte v. Real*, 471 U.S. 491, 504 (1985); and *California v. Carney*, 471 U.S. 386, 395 (1985). He has written or joined opinions that have criticized the application of the rule in: *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) and *Ohio v. Johnson*, 467 U.S. 493, 503

Brennan in five,<sup>32</sup> Justice Blackmun in four,<sup>33</sup> Justice Ginsburg in three,<sup>34</sup> and Justices Kennedy and Rehnquist in one case each.<sup>35</sup>

Although he has been the main critic of *Long*, Justice Stevens has taken a surprisingly wide range of positions in these cases. He has joined the Court in finding a federal question upon which to claim jurisdiction in more cases than he has criticized the rule and/or its application.<sup>36</sup> He even authored the majority opinion in *Maryland v. Garrison*.<sup>37</sup> In *Harris v. Reed*, he wrote a concurring opinion to explain why he favored use of the *Long* rule in habeas corpus cases but not in cases on direct review.<sup>38</sup> He also has criticized the majority in two cases in which it determined that state courts based their decisions on state law when they denied civil rights claims<sup>39</sup> and one case in which the majority determined that the state court based its decision on state law when it affirmed a rights claim.<sup>40</sup>

In recent years, Justice Ginsburg has emerged as a strong critic of the *Long* rule and its application. She has criticized some aspect of

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(1984), as well as an opinion that has criticized both the rule and its application in *Florida v. Meyers*, 466 U.S. 380, 383 (1984).

<sup>32</sup> Justice Brennan has written or joined one opinion that has criticized the rule. See *California v. Carney*, 471 U.S. 386, 395 (1985). He has written or joined opinions that have criticized the rules application in: *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987); *Ponte v. Real*, 471 U.S. 491, 504 (1985), and *Ohio v. Johnson*, 467 U.S. 493, 503 (1984), as well as opinions that have criticized both the rule and its application in *Florida v. Meyers*, 466 U.S. 380, 383 (1984).

<sup>33</sup> Justice Blackmun has written or joined opinions that have criticized the rule in: *Coleman v. Thompson*, 501 U.S. 722, 758 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987), and *Ponte v. Real*, 471 U.S. 491, 504 (1985). He has written or joined opinions that have criticized the rules application in: *Sochor v. Florida*, 504 U.S. 527, 545 (1992).

<sup>34</sup> Justice Ginsburg has written or joined opinions that have criticized the rule in: *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *Arizona v. Evans*, 514 U.S. 1, 23 (1995); and both the rule and its application in *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996).

<sup>35</sup> Justice Kennedy has criticized application of the rule in *Harris v. Reed*, 489 U.S. 255, 271 (1989), and Chief Justice Rehnquist has criticized the application of the rule in *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 159 (1984).

<sup>36</sup> Justice Stevens has joined the majority in finding jurisdiction in 21 cases: (*Ohio v. Reiner*, 532 U.S. 17 (2001); *Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Illinois v. Rodriquez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Muniz*, 496 U.S. at 582; *Am. Trucking Ass'n*, 496 U.S. at 167; *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); and *Oliver v. United States*, 466 U.S. 170 (1984).

<sup>37</sup> 480 U.S. 79 (1987).

<sup>38</sup> *Harris*, 489 U.S. at 266–67.

<sup>39</sup> *Sochor*, 504 U.S. at 545; *Coleman*, 501 U.S. at 758.

<sup>40</sup> *Nunez*, 465 U.S. at 327.

the decision in three of the nine cases in which independent and adequate state grounds have been raised as an issue during her tenure on the Court.<sup>41</sup>

### III. ASSESSING THE GOALS OF *LONG*

In *Michigan v. Long*,<sup>42</sup> the Court articulated its reasons for the *Long* rule: protecting the integrity of federal law by maintaining consistency in how it is interpreted; recognizing the autonomy of state courts by providing them with the opportunity of developing state law unimpeded by federal interference; sparing state courts the task of clarifying their decisions for the Court; conserving resources of the Court by obviating the need to examine state law to decide the nature of state court decisions; and minimizing the use of advisory opinions.<sup>43</sup> The following analysis reviews these goals and assesses the success of *Long* in achieving them.

#### A. *Consistency in Federal Law*

By exerting authority over federal law, the Court can maintain consistency in how it is interpreted against the various meanings that state courts might assign to it.<sup>44</sup> Failure to review interpretations of federal law by state courts would result in its fragmentation. By encouraging state courts to clarify the legal basis of their decisions, but presuming that their decisions are based on federal law when they do not, the Court broadens its jurisdiction, and expands its power over the interpretation of federal law.

Following *Long*, for the past two decades the Court has interpreted most state court decisions to be based on federal law when the legal authority for those decisions has been uncertain. Each of the forty-one cases under review involved a decision by a state court that raised some question about the legal grounds on which it rested and included no plain statement declaring it to be based on state grounds. In thirty-five out of forty-one, or eighty-five percent of the cases, the Court concluded that the state court decision was based on federal law, claimed jurisdiction, and

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<sup>41</sup> See *supra* note 34.

<sup>42</sup> 463 U.S. 1032 (1983).

<sup>43</sup> See *id.* at 1041.

<sup>44</sup> See *id.* at 1039; see also Patricia Fahlbusch & Daniel Gonzalez, Case Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAAMI L. REV. 159 (1987).

declared its interpretation of the federal question.<sup>45</sup> With an expansive definition of what constitutes a federal legal basis, the Court has positioned itself to impose uniformity across a wide range of cases.<sup>46</sup>

The Court's post-*Long* commitment to, and success in, exerting its authority over federal law in the name of maintaining consistency has not been doubted as much as the importance of the goal, itself, has been questioned. Justice Stevens has argued that the primary role of the Court should be to assure that federal rights claims are fairly heard.<sup>47</sup> According to this view, the Court ordinarily should not be concerned when state courts overprotect federal rights, even if their decisions are based on erroneous readings of federal law,<sup>48</sup> a position that Justice O'Connor has described as "novel."<sup>49</sup> Given Justice Stevens' conception of the role of the federal courts, these types of cases typically raise no important federal questions for him.<sup>50</sup> In this context, the goal of federal uniformity obscures and even conflicts with the Court's more important goal of protecting federal rights claims, and it expands the Court's jurisdiction into

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<sup>45</sup> See *Ohio v. Reiner*, 532 U.S. 17 (2001); *Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Rodriquez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167 (1990); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

<sup>46</sup> These findings are consistent with the results of a study that compared jurisdictional decisions in cases before and after *Long*. In the five and a half years immediately preceding *Long*, the Court reviewed seven of fourteen cases that raised independent and adequate state-grounds issues. In the four and a half years immediately following *Long*, the Court reviewed thirteen of fifteen of these types of cases. See Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 389-91 n.47 (1988).

<sup>47</sup> See *Olson*, 495 U.S. at 101-02; *Carney*, 471 U.S. at 396-98; *Long*, 463 U.S. at 1068.

<sup>48</sup> See *Upton*, 466 U.S. at 735-36.

<sup>49</sup> *Long*, 463 U.S. at 1042 n.7. See Justice Stevens' response to O'Connor in *Van Arsdall*, 475 U.S. at 690 n.2.

<sup>50</sup> See, e.g., *Labron*, 518 U.S. at 938; *Barrett*, 479 U.S. at 523; *Meyers*, 466 U.S. at 380; *Carney*, 471 U.S. at 386.

areas that are not worthy of its time and attention.

Justice Ginsburg has expressed concern that novel issues should not be too hastily decided by the Court. Here, state courts should serve as “laboratories for testing solutions to novel legal problems”<sup>51</sup> to allow the “percolation” of opinions so that the Court might benefit from a variety of views before setting national standards.<sup>52</sup> Justice Ginsburg has averred that the *Long* rule impedes this process in cases in which state courts base their decisions on state law, but fail to provide plain statements to that effect. Under *Long*, the Court could claim jurisdiction over these types of cases and impose a uniform federal rule, perhaps prematurely.<sup>53</sup> Abandoning the *Long* presumption in favor of an approach that is more deferential to the decisions of state courts would encourage diversity and generate more ideas about how to resolve emerging issues.<sup>54</sup>

These criticisms of the Court’s commitment to maintaining consistency in federal law suggest an alternative explanation for the Court’s decisions: that they are motivated by policy preferences in support of state governments over the rights claims of individuals. Justice Stevens has referred to the “disturbing questions concerning the Court’s conception of its role . . . in the never-ending war against crime.”<sup>55</sup> He has found it “quite striking” that the Court favored the position of prosecutors in nineteen summary disposition cases that the Court heard over a three-year period.<sup>56</sup> He also has described an opinion by the Court as based on “[n]othing more than an interest in facilitating the imposition of the death penalty.”<sup>57</sup>

In *Coleman v. Thompson*,<sup>58</sup> the Court expressed its concern that federal court review of state prisoner claims burdened state criminal justice systems with uncertainty, delay, and the costs of retrial.<sup>59</sup> In defending the majority opinion against Justice Stevens’

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<sup>51</sup> *Evans*, 514 U.S. at 24. For the classic statement of “state[s] . . . as . . . laborator[ies]” see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

<sup>52</sup> *Evans*, 514 U.S. at 23 n.1.

<sup>53</sup> *Id.* at 23–24.

<sup>54</sup> See *id.* at 7–9 (explaining that *Long* was adopted to “provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law” (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983))).

<sup>55</sup> *Meyers*, 466 U.S. at 385. Most of the cases under review (seventy-eight percent, 32/41) involve criminal defendant rights. See *supra* note 12.

<sup>56</sup> *Id.* at 386; see also *California v. Acevedo*, 500 U.S. 565, 600 (1991); *New Jersey v. T.L.O.*, 469 U.S. 325, 374–75 (1985).

<sup>57</sup> *California v. Ramos*, 463 U.S. 992, 1031 (1983) (Stevens dissenting).

<sup>58</sup> 501 U.S. 722 (1991).

<sup>59</sup> *Id.* at 738–39. Justice Blackmun criticized the Court’s opinion for distinguishing between the interests of state courts and states as if they were separate entities. He referred to the distinction as “inexplicable” and “unprecedented.” *Id.* at 766–67 (Blackmun, J. dissenting);

dissent in *Long*, Justice O'Connor argued that it was hardly surprising that the Court had become more interested in the use of federal law by state courts in "light of the recent significant expansion" of federal rights.<sup>60</sup> Justice White's concurring opinion in *Colorado v. Nunez*,<sup>61</sup> which was written solely to "make clear" that federal law did not compel a decision to vindicate a right,<sup>62</sup> Justices Stevens' and Marshall's reminder to Delaware's courts,<sup>63</sup> and Justice Ginsburg's reminder to Ohio's courts,<sup>64</sup> that, on remand, they were free to extend a right under their own law that had been denied under federal law, similarly suggest the importance of policy preferences in these decisions.

Most of the cases over which the Court claimed jurisdiction in this study resulted in decisions that denied a rights claim. Twenty-six of the thirty-one (eighty-four percent) cases that involved both a rights claim and a determination by the Court that the claim rested on federal grounds resulted in outcomes that denied the claim.<sup>65</sup> Even a majority (three of five) of the cases for which the Court determined that it did not have jurisdiction because the decisions were based on independent and adequate state grounds resulted in denying a rights claim.<sup>66</sup> Combining state and federal rights claims cases, eighty-one percent (29/36) of the outcomes denied a claim.

The voting patterns of individual justices in these cases are consistent with the results of other research that has analyzed the behavior of the justices. The results in a study of the justice's voting

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*see also Ramos* 463 U.S. at 1030–31 (Stevens, J., dissenting) (stating that the question of validity of jury instructions is best left to the state).

<sup>60</sup> *Michigan v. Long* 463 U.S. 1032, 1042 n.8.

<sup>61</sup> 465 U.S. 324 (1984).

<sup>62</sup> *Id.* at 327 (Stevens, J., concurring).

<sup>63</sup> *Delaware v. Van Arsdall*, 475 U.S. 673, 689–91 (1986) (Marshall, J., and Stevens, J., dissenting).

<sup>64</sup> *Ohio v. Robinette*, 519 U.S. 33, 42 (1996).

<sup>65</sup> See *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1978); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Connecticut v. Barrett*, 497 U.S. 523 (1987); *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

<sup>66</sup> See *Soghor v. Florida* 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990).

patterns for a range of civil rights and liberties issues arising under state and federal law from 1986 to 1999 reveal that the five justices who have objected most frequently to the *Long* rule over its twenty year history are the same five justices who have voted most frequently to affirm rights against the actions of the state and federal governments. On the other hand, the ten justices who have consistently supported the *Long* rule have been the most supportive of government authorities in civil rights and liberties cases.<sup>67</sup>

This evidence indicates that the *Long* rule has promoted both expansion of the Court's jurisdiction, which has enabled it to impose uniformity in the interpretation of federal law, and the interests of state authorities against rights claims by their inhabitants. The relationship between the jurisdictional and policy questions can be modeled in a two-by-two table, each cell of which represents an approach to judicial federalism. See Table 1.

According to the model, four outcomes are possible when the Court responds to a civil rights and liberties claim decided by a state court on ambiguous legal grounds:

1. *Denial of a civil rights and liberties claim on the basis of federal law.* This category represents the *Long* approach as evidenced by the significant majority of cases in this study that fall into it. Of the thirty-six cases that involved an identifiable rights claim, in twenty-six (seventy-two percent) the Court denied the claim on the basis of federal law.<sup>68</sup>

2. *Vindication of a civil rights and liberties claim under federal law.* This category might be titled the incorporation approach for the era in which federal courts recognized rights under federal law that were ordinarily denied by the states. Five (fourteen percent) of the cases under review were characterized by this approach.<sup>69</sup>

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<sup>67</sup> JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 123 (2002); see also *supra* notes 28–34 and accompanying text.

<sup>68</sup> See *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

<sup>69</sup> See *Ohio v. Reiner*, 532 U.S. 17 (2001); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Quinn v.*

3. *Vindication of a civil rights and liberties claim under state law.* When the Court declines to review a state court decision that vindicates a right because it is adequately and independently based on state law, it is consistent with the principles of the “new judicial federalism,” a movement that advocates expansion of rights under state law.<sup>70</sup> Two (six percent) of the cases under review followed this approach.<sup>71</sup>

4. *Denial of a civil rights and liberties claim under state law.* The pre-incorporation era of dual federalism is invoked when the Court declines to review a state court decision that denies a rights claim. All three (eight percent) of the cases in this category involved denial of criminal defendant rights claims on state procedural grounds.<sup>72</sup>

Based on the opinions and the voting behavior of the justices, it seems reasonable to conclude that the effect of the *Long* rule has been to expand the Court’s jurisdiction in the service of imposing unity in federal law and to promote policy that prefers the interests of state authorities over rights claims against them.

To place these effects of the *Long* rule in context, it is noteworthy that there has been more disagreement on the Court about the meaning of federal rights guarantees than there has been about the *Long* rule. In rights cases that were determined to be based on federal law and that were heard by the full Court,<sup>73</sup> there were more dissenting and concurring opinions critical of the majority’s interpretation of the federal question than there were criticisms of the jurisdictional issue. In seventeen cases, there was more disagreement on the Court about interpretation of the federal question than about the *Long* rule or its application.<sup>74</sup> There was

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Millsap, 491 U.S. 95 (1998); Harris v. Reed, 489 U.S. 255 (1989); Caldwell v. Mississippi, 472 U.S. 320 (1985). In *Olson*, the Court affirmed the state court’s decision, in the other four cases it reversed.

<sup>70</sup> See Shirley S. Abrahamson and Diane S. Gutmann, *The New Federalism: State Constitutions and State Courts* 71 JUDICATURE 88, 90 (1987); See also William J. Brennan, Jr. *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (pointing out that most states have the power to decide cases regarding rights governed by both federal and state law without following previous decisions of the Court).

<sup>71</sup> See California v. Freeman, 488 U.S. 1311 (1989); Colorado v. Nunez, 465 U.S. 324 (1984).

<sup>72</sup> See Sochor v. Florida, 504 U.S. 527 (1992); Coleman v. Thompson, 501 U.S. 722 (1991); Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378 (1990).

<sup>73</sup> These include two cases in which Justice Powell did not participate. See Caldwell v. Mississippi, 472 U.S. 320 (1985); Ponte v. Real, 471 U.S. 491 (1985).

<sup>74</sup> Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998); Illinois v. Rodriguez, 497 U.S. 177 (1990); Milkovich v. Lorain, 497 U.S. 1 (1990); Pennsylvania v. Muniz, 496 U.S. 582 (1990); Minnesota v. Olson, 495 U.S. 91 (1990); Teague v. Lane, 489 U.S. 288 (1989); Florida v. Riley, 488 U.S. 445 (1989); Kentucky v. Stincer, 482 U.S. 730 (1987); Montana v. Hall, 481 U.S. 400 (1987); Maryland v. Garrison, 480 U.S. 79 (1987); New York v.

more disagreement about the *Long* rule or its application than the federal issue in eight cases.<sup>75</sup> In six cases, the number of justices who disagreed about the federal question was equal to the number who criticized the *Long* rule or its application.<sup>76</sup>

### B. *Respect for the Autonomy of State Courts*

Promoting the autonomy of state courts involves both recognizing the freedom of state courts to develop their own law unimpeded by federal court interference and freeing state courts from the burden of having to clarify their decisions for the Court on remand.

It is difficult to argue that the *Long* presumption promotes respect for state courts. Presuming that state court decisions that identify both state and federal sources of law are based on federal grounds, and then overturning their decisions in relatively large numbers<sup>77</sup> hardly promotes the comity that *Long* sought to achieve.

Rather, the claim that the *Long* rule promotes state court autonomy rests on the efficacy of the *plain statement* requirement of the rule. The plain statement allows and even encourages state courts to base their decisions on state law. By merely declaring that

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P.J. Video Inc., 475 U.S. 868 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 992 (1983).

<sup>75</sup> *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Harris v. Reed*, 489 U.S. 255 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Ponte v. Real*, 471 U.S. 491 (1985); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984).

<sup>76</sup> *Ohio v. Reiner*, 532 U.S. 17 (2001); *Ohio v. Robinette*, 519 U.S. 33, 42 (1996); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *California v. Carney*, 471 U.S. 386 (1985).

<sup>77</sup> The Court overturned eighty-nine percent (31/35) of the state court decisions that the Court determined rested on federal grounds. *Quinn v. Millsap*, 491 U.S. 95 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *California v. Carney*, 471 U.S. 386 (1985) (reversed); *Ohio v. Reiner*, 532 U.S. 17 (2001); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Milkovich v. Lorain*, 497 U.S. 1 (1990); *American Trucking Ass'n Inc. v. Smith*, 496 U.S. 167 (1990); *Harris v. Reed*, 489 U.S. 255 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Montana v. Hall*, 481 U.S. 400 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *New York v. P.J. Video Inc.*, 475 U.S. 868 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 992 (1983) (reversed and remanded); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Ponte v. Real*, 471 U.S. 491 (1985); and *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) (vacated and remanded).

their decisions are based on state law, state courts free themselves from review by the Supreme Court and thereby realize the autonomy that *Long* promises.<sup>78</sup>

Of course, state courts must invoke the plain statement to avoid oversight by the Supreme Court. Otherwise, the Court is likely to impose its authority. Yet, the commitment of state courts to establishing state grounds for their decisions has been uneven.<sup>79</sup> Reasons for their reticence include the lack of historical precedent for grounding civil rights and liberties claims in state law,<sup>80</sup> a history of federal domination in the post-incorporation era,<sup>81</sup> the subsequent belief on the part of many state court judges that federal law and federal courts should take the lead in promoting rights,<sup>82</sup> the politics of criminal defendant rights,<sup>83</sup> and even lack of awareness that a plain statement is required.<sup>84</sup>

At least two commentators have linked these barriers to the policy preferences of the Court, arguing that the Court must have realized that the retreat of civil rights and liberties protections at the federal level would not be reversed by state courts under the *Long* requirements.<sup>85</sup> Motives of the Court aside, the surest means for state courts to achieve autonomy from federal court review is to issue a plain statement that their decisions rest on state grounds. That the record for issuing the plain statement is mixed indicates that state courts are not always interested in developing

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<sup>78</sup> *Long*, 463 U.S. at 1041.

<sup>79</sup> See generally Felicia A. Rosenfeld, Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988) (illustrating that “few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions”); see also James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1185–1191 (2000) (including a review of the literature on the use of state law by state courts).

<sup>80</sup> James A. Gardner *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1101 (1997).

<sup>81</sup> Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118, 1126 (1984).

<sup>82</sup> Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 31 (1994).

<sup>83</sup> *Id.* at 29.

<sup>84</sup> See *Arizona v. Evans*, 514 U.S. 1, 31 (1995) (Ginsburg, J., dissenting) (pointing out that “the [state] court may not recognize that its opinion triggers *Long*’s plain statement requirement”); see also *Pennsylvania v. Finley* 481 U.S. 551, 570-71 (1987) (Stevens, J., dissenting) (arguing that it is “unrealistic” and “unfair” to expect state courts to become familiar with Supreme Court jurisprudence and that based on the infrequent number of times a state court will confront a *Long* analysis, it is “far too rare to make it appropriate for them to become familiar with the *Michigan v. Long* presumption”).

<sup>85</sup> Patricia Fahlbusch & Daniel Gonzalez, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159, 192 (1987).

independent bodies of law.

Issuing a plain statement promotes the autonomy of state courts, but does not assure that state law will be developed in any meaningful way. *Long* only requires a formal statement that federal law is used for guidance, but does not compel a state court's decision.<sup>86</sup> Consequently, state courts may adopt a *rubber-stamp* approach in which they immunize themselves from the Court's review through a plain statement, when in fact their decisions rest almost entirely on federal law.<sup>87</sup> Far from developing an independent and adequate body of law such an approach reduces state law to a mere shadow of its federal counterpart.

In some circumstances the plain statement rule might actually retard the development of state law. Concurring in *Ohio v. Robinette*,<sup>88</sup> Justice Ginsburg argued that the Ohio Supreme Court probably thought that its decision rested on state grounds, but because it did not issue a plain statement to that effect the Supreme Court was obligated to consider the decision as a matter of federal law, thereby limiting the potential for developing state law in that case.<sup>89</sup>

The *Long* rule also purports to demonstrate respect for the autonomy of state courts by freeing them from having to explain the legal basis of their decisions on remand. Achieving this goal is largely dependent on the willingness of state courts to utilize a plain statement, just as it is for achieving the goal of providing state courts the opportunity to develop their own law. Moreover, issuing a plain statement will only spare state courts time and effort when they use it to *rubber-stamp* a Court decision. Any serious attempt to develop state law will involve considerable time and effort, whether state courts follow a primacy approach, which develops an analysis of state law before turning to federal requirements,<sup>90</sup> or whether state courts develop an analysis of their law in response to a request by the Court, on remand, to clarify the legal basis of their decisions.

The effect of the *Long* rule on judicial federalism is therefore

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<sup>86</sup> *Long*, 463 U.S. at 1041.

<sup>87</sup> See Fahlbush, *supra* note 85, at 199.

<sup>88</sup> 519 U.S. 33 (1996).

<sup>89</sup> *Id.* at 40.

<sup>90</sup> See Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980); see also MARIE L. GARIBALDI, *THE REHNQUIST COURT: A RETROSPECTIVE; THE REHNQUIST COURT AND STATE CONSTITUTIONAL LAW* 222 (Martin Belsky ed.) (2002).

mixed. Although the *Long* presumption hardly promotes autonomy for state courts to develop state law, the plain statement rule provides the opportunity to at least insulate state court decisions from federal review, if not to develop a truly independent and adequate body of law. However, realization of even this more limited goal is largely dependent on the willingness of sometimes recalcitrant state courts to issue plain statements.

### C. *Managing the Court's Resources*

The *Long* rule was also established to obviate the need for the Supreme Court to examine state court decisions to determine their legal foundations.<sup>91</sup> In her majority opinion, Justice O'Connor described this approach as "unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often . . . have not been discussed at length."<sup>92</sup>

Here again, whether or not state courts actually articulate a plain statement is pivotal to the achievement of an important goal of *Long*. Obviously, the Court avoids the need to examine state court decisions when they explicitly provide plain statements that their decisions rest on state law. However, when a plain statement is lacking, achieving this goal depends on how the Court reads the requirements of the *Long* rule.

One interpretation of *Long* holds that a plain statement is required to insulate a state court decision from Court review in all cases in which both state and federal grounds are raised. Absent such a statement the Court would conclude that the decision was based on federal law and assume jurisdiction.<sup>93</sup> Justice Blackmun, joined by Justices Marshall and Stevens, endorsed this position in his dissent in *Coleman v. Thompson*.<sup>94</sup> Such a bright-line rule would all but eliminate the need for the Court to review state law. If state courts provide a plain statement, the Court declines to review the case; if they do not, the Court moves directly to a review of the federal question. Either way, the Court avoids a full reading of the state court opinion.<sup>95</sup>

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<sup>91</sup> See *Long*, 463 U.S. at 1041.

<sup>92</sup> *Id.* at 1039.

<sup>93</sup> *Id.* at 1040, 1041.

<sup>94</sup> 501 U.S. 762, 763 (1991) (Blackmun, J., dissenting).

<sup>95</sup> Of course, whatever savings in time that might be realized from reviewing fewer state court opinions for their analysis of state law could be offset by an increased number of cases in which the Court would have to review federal law.

However, a majority of the Court has not adopted this reading of *Long*. Rather, the controlling interpretation holds that state courts do not necessarily have to include a plain statement to insulate their decisions from federal review. This interpretation focuses on the predicate to the *Long* presumption, mandating that a plain statement is required to protect state courts from federal court review only when the 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 . . . .”<sup>96</sup> Conversely, when it is clear to the Court that the decision rests primarily on state law, Court review is precluded even without a plain statement.<sup>97</sup>

The problem with this interpretation is that it defeats the goal of obviating the need for the Court to review state law. Following this interpretation, because none of the state court decisions in this study contained a plain statement, the Court was forced to review every opinion to uncover the legal basis of the decision. To be sure, some of the reviews were relatively straightforward and presumably quick.<sup>98</sup> In other cases, however, the Court’s analysis of state law was more involved and, no doubt, time consuming.<sup>99</sup>

The difficulty lies in the ambiguous term-of-art requirements of the predicate to the *Long* presumption. “[T]he state decision must ‘fairly appear’ to rest ‘primarily’ on federal law or be ‘interwoven’ with federal law, and the independence of the state ground must be ‘not clear’ from the face of the state opinion. These are not self-applying concepts.”<sup>100</sup> Applying them to ambiguously worded state

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<sup>96</sup> *Long*, 463 U.S. at 1041.

<sup>97</sup> *Coleman*, 501 U.S. at 735–37. This is also the position typically taken by Justice Stevens, who has criticized the majority for taking jurisdiction in cases in which the decision, from his perspective, was based on state law even though it included no plain statement. See generally *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Florida v. Meyers*, 466 U.S. 380 (1984).

<sup>98</sup> See *Ohio v. Reiner*, 532 U.S. 17 (2001); *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357 (1998); *Illinois v. Rodriquez*, 497 U.S. 177 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987).

<sup>99</sup> See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Sochor v. Florida* 504 U.S. 527 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Minnesota v. Olson*, 495 U.S. 91 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1978); *Montana v. Hall*, 481 U.S. 400 (1987); *Connecticut v. Barrett*, 497 U.S. 523 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Ponte v. Real*, 471 U.S. 491 (1985); *California v. Carney*, 471 U.S. 386 (1985); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984).

<sup>100</sup> *Evans*, 514 U.S. at 31 (Ginsburg, J., dissenting) (quoting HART & WECHSLER’S THE

court opinions often requires serious consideration. In effect, then, when state courts provide no guidance through a plain statement for understanding the basis of their decisions, the *Long* rule operates much like the earlier supposedly discredited approach in which the Court reviews state court opinions in search of their controlling legal grounds.

#### *D. Avoiding Advisory Opinions*

A final major goal of *Long* was to minimize the Court's use of advisory opinions.<sup>101</sup> Arguably, the Court issues advisory opinions in the context of judicial federalism when it renders an opinion on a federal question in a case that has been decided by a state court, but on remand, the state court finds an independent and adequate state basis for its decision.<sup>102</sup> The result is that the Court has issued an opinion on a federal question that is not outcome-determinative to a specific "case" or "controversy," and thus, is in violation of the ban on advisory opinions.<sup>103</sup>

The majority argued in *Long* that the new rule would all but eliminate the danger of these types of advisory opinions.<sup>104</sup> Yet in the same case, Justices Stevens and Blackmun expressed concern that the *Long* rule would actually lead to greater numbers of advisory opinions.<sup>105</sup> These differences in perception are rooted in varying expectations about the use of plain statements by state courts. The veracity of the majority's position depends on state courts issuing plain statements, whereas the concern of Justices Stevens and Blackmun is vindicated when state courts fail to include a plain statement.

Because the Court refuses jurisdiction when a plain statement is issued, there is little chance that it would issue an advisory opinion in this type of situation. However, absent a plain statement, under the *Long* presumption, the Court reviews a wider range of state court decisions than it otherwise would. This increases the number of chances that, on remand, state courts could claim independent

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<sup>101</sup> *Long*, 463 U.S. at 1041.

<sup>102</sup> Westling, *supra* note 46, at 398.

<sup>103</sup> *Id.* at 381; *see also* US CONST. art. III, § 2 (bestowing upon the Supreme Court authority over all cases or controversies arising under the Constitution); *Colorado v. Nunez*, 46 U.S. 324, 328 (1984) (Stevens, J., dissenting) (concurring though criticizing Justice White for writing what he believed to be an advisory opinion).

<sup>104</sup> *Long*, 463 U.S. at 1041.

<sup>105</sup> *Id.* at 1067 (Stevens, J., dissenting); *id.* at 1054 (Blackmun, J., concurring).

and adequate state grounds for their decisions, and render any Court opinions on federal law advisory.

As we have seen, state courts often do not make clear the basis of their decisions, which has led to growth in the number of cases that have been accepted for review by the Supreme Court under *Long*. However, the reaction of state courts has varied when these cases have been remanded. Some courts have found an independent and adequate basis for their decisions;<sup>106</sup> others have declined to challenge the Court's determination that their decisions were based on federal law.<sup>107</sup> Overall, advisory opinions have increased but apparently not in great numbers. In a study of state court decisions on remand, the number of advisory opinions increased slightly in the period immediately following the *Long* decision compared to a relatively equal period immediately preceding it.<sup>108</sup>

More fundamentally, there is some controversy about whether these types of cases involve significant violations of the advisory opinion ban. Opinions may be advisory because they are issued in cases that are not live or adversarial, or because the opinions lack finality.<sup>109</sup> When the Supreme Court produces advisory opinions in the context of judicial federalism, it is because the Court is rendering a decision that is not final, the least serious of the violations that constitute an advisory opinion.<sup>110</sup> Even when a state court finds a state legal basis for its decision on remand, the Court's analysis of federal law arguably is not advisory because its correction of the state court's misunderstanding of federal law *is* final.<sup>111</sup> Thus, to the extent that these types of decisions constitute advisory opinions, they are mild forms of it<sup>112</sup> and, at any rate, tend not to occur in great numbers.

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<sup>106</sup> See *People v. Class*, 494 N.E. 2d 444 (N.Y. 1986); *Commonwealth v. Upton*, 476 N.E. 2d 548 (Mass. 1985); *People v. P.J. Video, Inc.*, 483 N.E. 2d 1120 (N.Y. 1985); see also *Westling*, *supra* note 46, at 398.

<sup>107</sup> See *Meyers v. State*, 457 So. 2d 495 (Fla. 1984); *People v. Ramos*, 698 P.2d 430 (Cal. 1984).

<sup>108</sup> See *Westling* *supra* note 46 at 339 n47 (noting that from January 1978 to June 1983, two of fourteen independent and adequate state grounds cases ultimately resulted in advisory opinions and that from July 1983 through 1987, four of fifteen of these types of cases resulted in advisory opinions).

<sup>109</sup> *Id.* at 403.

<sup>110</sup> *Id.* at 403.

<sup>111</sup> *Id.* at 400.

<sup>112</sup> *Id.* at 403.

## IV. CONCLUSION

The *Long* rule was designed to facilitate the task of determining whether ambiguously worded state court decisions rested on state or federal legal grounds. The rule purported to promote consistency in the interpretation of federal law, to help the Supreme Court manage its resources, and to minimize the risk of issuing advisory opinions. The rule also was created to promote the autonomy of state courts in their interpretation of state law and to relieve them of the burden of having to clarify their decisions for the Court.

Of its stated goals, the *Long* rule has been most successful in expanding the meaning of what constitutes federal legal grounds. This has provided the Court with the opportunity to impose consistency in interpretation over a range of cases that under other approaches would not have been heard due to a lack of jurisdiction. The *Long* rule also has resulted in consistency in the denial of rights claims. Somewhat ironically, realization of the other goals of the *Long* rule depends not so much on the will of the Court but on the choices of state courts. When state courts invoke plain statements that their decisions rest on state law, there is strong potential for realizing most of the other goals of *Long*. Plain statements can achieve the goals of encouraging the autonomy of state courts and law, promoting the efficient use of the resources of both state courts and the Supreme Court, and avoiding the issuance of advisory opinions. However, when state courts fail to utilize plain statements it is unlikely that these goals will be realized.

Table 1  
Jurisdiction Decisions by Policy Preference Decisions of the USSC

Jurisdiction				
Policy Preference		Federal	State	Totals
	Deny Right	<i>Long</i> 26	Dual Federalism 3	29
	Affirm Right	Incorporation 5	New Judicial Federalism 2	7
	Totals	31	5	36