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## Fulfilling the goals of *Michigan v. Long*: The State Court Reaction

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## NOTES

### FULFILLING THE GOALS OF *MICHIGAN V. LONG*: THE STATE COURT REACTION

#### INTRODUCTION

American federalism embodies a fundamental tension between the national government and the network of sovereign states.<sup>1</sup> This tension is illustrated vividly by the continuing difficulty state courts have in analyzing issues of personal rights guaranteed by the federal and state constitutions.<sup>2</sup> Since the application of the federal Bill of Rights to the states through its incorporation via the fourteenth amendment,<sup>3</sup> parties have been permitted to raise personal rights claims under both their state *and* the federal constitutions.<sup>4</sup> State courts, therefore, must analyze issues from a double perspective.<sup>5</sup>

The necessity of dual constitutional analysis has resulted in a large number of ambiguous state court opinions that fail to clarify on which constitution they are based.<sup>6</sup> These confusing opinions cause problems for the United States Supreme Court when deciding whether to grant a writ of certiorari.<sup>7</sup> Moreover, this lack of clarity stymies the states' development of their own constitutional jurisprudences.<sup>8</sup>

This Note reviews state court opinions that adjudicate federal and state constitutional issues. Part I discusses the concerns implicated when state courts fail to articulate the basis of their decisions. Part I also examines *Michigan v. Long*,<sup>9</sup> the United States Supreme Court's most recent attempt to clarify its position on review of state court decisions and to encourage states to cultivate independent state constitutional jurisprudence. Part II first sets forth the structure of the survey, including the cases examined and method of analysis used. It then explores the various styles state courts employ to delineate the bases of their decisions. Using

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1. See Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 Notre Dame L. Rev. 1079, 1081-82 (1984).

2. For a discussion of dual constitutionalism, see Brennan, *The Bill of Rights: State Constitutions as Guardians of Individual Rights*, 59 N.Y. St. B.J. 10, 10-11 (May 1987); Kaye, *Dual Constitutionalism In Practice and Principle*, 42 Rec. of N.Y. B.A. 285, 288-94 (1987); Comment, *Supreme Court Review of State Court Cases: Principled Federalism or Selective Bias?*, 36 Emory L.J. 1279, 1279-83 (1987).

3. For a discussion of incorporation, see Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 380-83 (1980).

4. See, e.g., *People v. Deitchman*, 695 P.2d 1146, 1148 (Colo. 1985); *State v. Barnett*, 68 Haw. 32, 36, 703 P.2d 680, 683 (1985).

5. State courts now must be able to engage in both federal and state constitutional analyses. See *State v. Cadman*, 476 A.2d 1148, 1150-52 (Me. 1984).

6. For examples, see *infra* notes 154-68 and accompanying text.

7. See *infra* notes 24-25 and accompanying text.

8. Cf. *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) (stating Court hoped to foster independent development of state constitutional jurisprudence).

9. 463 U.S. 1032 (1983).

the results of the survey, Part II examines the extent to which each type of opinion-writing has satisfied the two goals of *Michigan v. Long*.

This Note concludes that, despite fairly plain guidance from the Supreme Court and the current interest in broadening the scope of state constitutional protection,<sup>10</sup> most state courts fail to indicate clearly the basis for their constitutional rulings.<sup>11</sup> Until states make a clear delineation between state and federal constitutional analysis, the working relationship between state high courts and the Supreme Court will remain uneasy, and sovereign State constitutional law will not evolve fully.

# I. *MICHIGAN V. LONG* AND THE CONCERNS ADDRESSED BY THE PLAIN STATEMENT REQUIREMENT

State high courts engage in both federal and state constitutional analysis when addressing a party's claim that her personal rights have been violated.<sup>12</sup> When a state court bases a decision on the federal Constitution, the United States Supreme Court has jurisdiction to review the case.<sup>13</sup> The Supreme Court, however, will refuse to review a state court decision that is based on independent and adequate state constitutional grounds.<sup>14</sup> This occurs for several reasons,<sup>15</sup> the most important of

10. The Burger and Rehnquist Courts have seen an increase in independent state constitutional interpretation and interest. See Brennan, *supra* note 2, at 17 (noting increasing unwillingness by state courts to follow the lead of the United States Supreme Court); Note, *The Use of State Constitutional Provisions in Criminal Defense after Michigan v. Long*, 65 Neb. L. Rev. 605, 606 (1987) (concluding this pattern is a response to the "evolving federal hostility to civil rights jurisprudence"). This increase may signal the beginning of a more rapid move by states to clarify their constitutional position in their opinions. See *id.*, *supra*, at 629-30. Colorado, Maryland, New Hampshire, and Oregon already have adopted such a policy. See, e.g., *infra* notes 65-75, 91-95, 188-91 and accompanying text.

11. See Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 Ga. L. Rev. 799, 836-38 (1985).

12. See *supra* note 3 and accompanying text.

13. The Supreme Court has the authority to review all cases that contain a federal question. See U.S. Const. art. III, §§ 1 & 2 (vesting judicial power in Supreme Court and extending Court's power to cases arising under federal constitution and laws); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Supreme Court may review state court decisions involving a federal constitutional issue, including cases adjudicated in state judicial system); 28 U.S.C. § 1257 (1982) (procedural statute dealing with Supreme Court review of state cases and certiorari). See generally Schlueter, *supra* note 1, at 1080-83 (overview of Supreme Court jurisdiction over state court decisions).

14. See *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487, 489 (1965) (quoting *Cramp v. Bd. of Public Instruction*, 368 U.S. 278 (1961) for proposition that the Court's "jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment"); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *Fox Film, Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("settled rule" that Court will not review state court decisions based on both federal and nonfederal grounds if nonfederal ground is both independent and adequate to support state court judgment); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875) (early expression of adequate and independent doctrine).

15. Most scholars view the adequate and independent state grounds doctrine as one that has developed as a result of Supreme Court traditions of self-restraint, see Matasar &

which is the desire to avoid issuing an advisory opinion.<sup>16</sup>

Advisory opinions usually result because the state high court has engaged in an ambiguous constitutional analysis.<sup>17</sup> Under such circumstances, if the Supreme Court reviewed a state case upholding a constitutional rights claim,<sup>18</sup> reversed, and remanded it to the state high court,<sup>19</sup> the state court might decide to reinstate its original ruling solely on state constitutional grounds,<sup>20</sup> thus rendering the Supreme Court's opinion advisory.<sup>21</sup> If, however, the state court clearly had based its

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Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1322 (1986), respect for state courts, and unwillingness to issue advisory opinions. See Schlueter, *supra* note 1, at 1084. Neither the federal constitution nor congressional enactments mandate this doctrine. See Matasar & Bruch, *supra*, at 1295.

16. See *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); Matasar & Bruch, *supra* note 15, at 1301-10. In addition to the philosophical policies of respect for state autonomy and dual judicial systems, see Matasar & Bruch, *supra* note 15, at 1310 n.74, the pragmatic problems of a swollen docket and limited judicial resources have made the Court hesitant to review a state case when there is a good chance the state court will ignore the Supreme Court and reinstate its original judgment on remand. See *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting); Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 180 (1982).

17. See Collins & Galie, *Upholding Rights Left Unprotected By U.S. Supreme Court Decisions*, Nat'l L.J., Nov. 9, 1987, at 32, col. 1-2; *infra* notes 154-77 and accompanying text.

18. See Collins & Galie, *supra* note 17, at 32, col. 1 ("Between October 1983 and July 1987, the Supreme Court reviewed 33 criminal justice cases in which a state court upheld a constitutional rights claim. During these four Supreme Court terms, 72 percent of these cases were reversed."); Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. Miami L. Rev. 159, 162 (1987) (chart of certiorari dockets).

19. See *infra* notes 20-22 and accompanying text; see also Collins, *High Court's Rights-Claims Record: A Challenge to 'New Federalism'?*, Nat'l L.J., Aug. 31, 1987, at 26, col. 1-2.

To differentiate the original state court opinion from the one on remand, this Note uses a roman numeral I to indicate the original opinion and roman numeral II to indicate the state court's opinion following reversal by the United States Supreme Court.

20. The state court, however, might choose to follow one of several other paths. It might acknowledge the Supreme Court's reversal *pro forma*, without further discussion. See, e.g., *State v. Rogers II*, 28 Ohio St. 3d 427, 427, 504 N.E.2d 52, 53 (1986). It might find an outcome under the state constitution, in agreement with the Supreme Court's reversal. See, e.g., *Commonwealth v. Sheppard II*, 394 Mass. 381, 391, 476 N.E.2d 541, 547 (1985). It may decide the case on other federal grounds and reinstate its original holding that there was some sort of rights violation. See, e.g., *State v. Jackson*, 672 P.2d 255, 258-60 (Mont. 1983) (redeciding case in light of *South Dakota v. Neville*, 459 U.S. 553 (1983), and rejecting argument that there are adequate and independent state grounds to support the determination).

21. See *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) ("if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion" (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945))); see, e.g., *People v. Ramos II*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984), *cert. denied*, 471 U.S. 1119 (1985); *State v. Neville II*, 346 N.W.2d 425 (S.D. 1984).

For example, in *State v. Neville I*, 312 N.W.2d 723 (S.D. 1981), the South Dakota Supreme Court affirmed the suppression of evidence that the defendant refused to take a blood alcohol test. *Id.* at 726. The court also addressed the constitutionality of the state

original holding on the state constitution, this series of decisions would have been avoided.<sup>22</sup>

The definition of what constitutes a state court decision based on adequate and independent state grounds<sup>23</sup> has caused continuous debate among justices of both the United States Supreme Court and state high courts.<sup>24</sup> The Supreme Court has addressed this difficult problem on sev-

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statute that allowed admission of such a refusal. *Id.* at 725. ("the question before us today is whether SDCL 32-23-10.1 is a violation of Neville's federal and state constitutional privilege against self-incrimination"). In so doing, both constitutions were mentioned briefly at the outset and close of the opinion, but only a federal fifth amendment analysis followed. *Id.* The United States Supreme Court reversed the South Dakota Supreme Court's decision, finding that although the South Dakota court supported its holding with an adequate state ground, the state ground lacked independence. *South Dakota v. Neville*, 459 U.S. 553, 556 n.5 ("Although this would be an *adequate* state ground for decision, we do not read the opinion as resting on an *independent* state ground." (emphasis in original)). *But see id.* at 567-71 (Stevens, J., dissenting) (arguing that the South Dakota decision was based on both adequate and independent state grounds). On remand, in *State v. Neville II*, 346 N.W.2d 425 (S.D. 1984), the South Dakota Supreme Court found that despite the Supreme Court's reversal, the state constitution still failed to allow admission of the evidence. *Id.* at 429-30.

22. See Collins & Galie, *supra* note 17 at 32, col. 2; Stevens, *supra* note 16, at 180-81.

23. A state court decision is independent if it relies on state law that is not tied to federal law, such as a provision of the state constitution. See Matasar & Bruch, *supra* note 15, at 1292 n.2; Schlueter, *supra* note 1, at 1084-85. If the Supreme Court concludes that the state court rested its decision on an independent state ground, it must then find that the state ground was adequate to support the state court's ultimate determination. See Schlueter, *supra* note 1, at 1085. The Supreme Court will deny review of a state court decision when these requirements have been met. See, e.g., *Colorado v. Nunez*, 465 U.S. 324 (1984) (per curiam); *Aimone v. Finley*, 465 U.S. 1095 (1984); *Florida v. Casal*, 462 U.S. 637 (1983) (per curiam); see also *infra* note 96 and accompanying text.

The application of the federal Bill of Rights to the States through its incorporation via the fourteenth amendment has complicated the determination of whether a state court has based its decision on adequate and independent state grounds. As a result of incorporation, state courts increasingly have addressed civil liberty issues encompassed by both state and federal constitutional provisions. See Althouse, *How to Build A Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1490 (1987) ("[I]ncorporation of the Bill of Rights into the fourteenth amendment has layered federal constitutional law onto state criminal law"); Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. Cin. L. Rev. 317, 322 (1986) ("Incorporation has had an enormous impact on the constitutional law applied by state courts. After incorporation, there are no entirely independent models of state judicial review.").

24. See *Pennsylvania v. Finley*, 107 S. Ct. 1990, 1996-97 (1987) (Brennan, J., dissenting); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 31-33 (1985) (per curiam) (Stevens, J., dissenting); *New York v. Uplinger*, 467 U.S. 246, 252 (1984) (per curiam) (White, J., dissenting); *Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (per curiam) (Stevens, J., concurring); *Michigan v. Long*, 463 U.S. 1032, 1039-42 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 395-96 (1976) (Marshall, J., dissenting); *People v. Timmons*, 690 P.2d 213, 218-19 (Colo. 1984) (Erickson, C.J., dissenting); *State v. Lang*, 105 Idaho 683, 685, 672 P.2d 561, 563 (1983) (Bistline, J., dissenting); *State v. Brown*, 708 S.W.2d 140, 147 (Mo. 1986) (Welliver, J., dissenting in part). For articles on this topic written by Supreme Court and state court justices, see Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141 (1985); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Kaye, *supra* note 2; Linde, *supra* note 3; and O'Connor, *Trends in the Relation-*

eral occasions in an effort to give uniform guidance to the states and to achieve a workable method of review, as well as to preserve relative autonomy between the state and federal judicial systems.<sup>25</sup>

Prior to 1983, the United States Supreme Court presumed that a state court decision, ambiguous as to its foundation, was based on state grounds and thus denied review of the case.<sup>26</sup> In 1983, however, it decided *Michigan v. Long*,<sup>27</sup> and dramatically shifted its position with respect to review of state court decisions.<sup>28</sup> The Court said it would presume that federal jurisdiction exists and would grant certiorari despite any ambiguity, unless state law grounds appear clear from the face of the opinion.<sup>29</sup> In addition, for the first time, the Court formulated the plain statement rule, establishing stylistic guidelines for state courts to follow when adjudicating dual constitutional claims.<sup>30</sup> Justice O'Connor wrote

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*ship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981).

25. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (presumption in favor of federal review); *Illinois v. Gates*, 462 U.S. 213, 217-21 (1983) (history of the doctrine); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (no review of decisions based on adequate and independent state grounds); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940) (vacating so as to seek clarification from the state court); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934) (declining review if the basis for the decision was at all unclear).

A year before *Michigan v. Long*, the United States Supreme Court decided *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), which stated that lower federal courts also could rest their rulings on independent and adequate state grounds so as to preclude Supreme Court review. *Id.* at 293-95. The Court of Appeals for the Ninth Circuit followed this suggestion by engaging exclusively in a state law analysis when it invalidated a city law prohibiting the solicitation of donations in certain areas used by a local stadium. See *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-50 (9th Cir. 1985); see also *Collins & Galie*, *supra* note 23, at 346-48 (discussion of *Carreras*).

26. See, e.g., *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487, 491-92 (1965); *Herb v. Pitcairn*, 324 U.S. 117, 125-28 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-10 (1935).

27. 463 U.S. 1032 (1983).

28. See O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 8 (1984) ("the Supreme Court adopted a new approach to resolving ambiguity about the existence of an adequate and independent state ground") (emphasis in original); Comment, *supra* note 2, at 1285 (Supreme Court adopted an activist approach to state court review).

In *Long*, Justice O'Connor first discussed the difficulties of determining the meaning of "adequate and independent" state grounds as a standard for precluding federal review. *Long*, 463 U.S. at 1038-39. The Court rejected as unsatisfactory previous methods of dealing with ambiguous state cases, such as dismissing the case or vacating the case for clarification. *Id.* at 1039 ("This ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved.").

29. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Justice Stevens, in his dissent to *Long*, demonstrated the novelty of this jurisdictional approach, listing four possible ways of determining whether the Michigan Supreme Court had based its ruling on an interpretation of the Michigan Constitution that was independent of federal law. See *Long*, 463 U.S. at 1066 (Stevens, J., dissenting). The fourth method was the one articulated by Justice O'Connor in the majority opinion. Justice Stevens noted that "[t]his Court has, on different occasions, employed each of the first three approaches; never until today has it even hinted at the fourth." *Id.* (emphasis added).

30. *Id.* at 1041. At trial, respondent Long was convicted of possession of marijuana,

the majority opinion which held that when

a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] 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. . . . *If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, [this Court] . . . will not undertake to review the decision.*<sup>31</sup>

By establishing the plain statement rule, the Supreme Court hoped to eliminate, or at least reduce, the number of its opinions that are rendered advisory when, on remand, the state court reinstates its original ruling on state grounds.<sup>32</sup> Further, it intended to encourage state judges to develop an independent body of state constitutional law.<sup>33</sup>

When a state court upholds constitutional rights claims, it is essential that it comply with the plain statement rule. To do so, the state court must indicate whether it based its decision upon federal or state law. Such compliance decreases the number of advisory opinions issued by the Supreme Court because it allows the Court to grant review of a case only where the state court based its decision of the issue in question on federal law. In addition to fulfilling this first goal of *Michigan v. Long*,<sup>34</sup> reduc-

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found by police in the passenger compartment and trunk of his car. *Id.* at 1036. The Michigan Supreme Court reversed Long's conviction, finding the searches of both the trunk and passenger compartment illegal. *Id.* at 1037 (citing *People v. Long*, 413 Mich. 461, 472, 320 N.W.2d 866, 869 (1982)). The Supreme Court granted certiorari to review (1) the validity of the search in light of *Terry v. Ohio*, 392 U.S. 1 (1968), and (2) Long's argument that the decision below rested on an adequate and independent state ground and was, therefore, beyond the Supreme Court's jurisdiction. *Long*, 463 U.S. at 1037. The Supreme Court reversed the Michigan Supreme Court's search and seizure determination and remanded the case to the Michigan Supreme Court. *Id.* at 1053.

In addressing Long's state grounds argument, Justice O'Connor took the opportunity to discuss the longstanding jurisdictional problem of the Supreme Court's ability to review state court decisions. *Id.* at 1038-42. Long had argued that, in the past, Michigan courts had provided greater protection from illegal searches and seizures under the state constitution than was afforded by the fourth amendment and, therefore, the references to the Michigan Constitution supported an adequate and independent decision by the Michigan Supreme Court. *Id.* at 1037-38. Justice O'Connor, writing for the majority, disagreed, however, stating that two brief references to the Michigan Constitution did not establish an independent determination. *Id.* at 1043-44.

31. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (emphasis added). Justice O'Connor continued:

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

*Id.* at 1041.

32. See *supra* note 21 and accompanying text.

33. See *Long*, 463 U.S. at 1041.

34. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

ing the number of state cases open to review by the Supreme Court also clears its docket, an important concern of the Court.<sup>35</sup>

Even when a state court rejects a constitutional rights claim,<sup>36</sup> the court should adopt a policy of following the plain statement rule so as to develop a body of independent state constitutional law, the second aim of *Michigan v. Long*.<sup>37</sup> From the state court's perspective, there are several theoretical reasons for encouraging clearly written opinions. Because litigants are entitled to raise state constitutional claims, these claims merit unique attention under the state constitution.<sup>38</sup> Moreover, state citizens have an interest in understanding the importance of their state constitution and its effect on their lives.<sup>39</sup> Finally, from a practical standpoint, state courts should endeavor to establish consistency in their adjudication of constitutional claims. Clarity in opinion writing addresses all these concerns successfully.

## II. STATE COURT RESPONSE TO *MICHIGAN V. LONG*

### A. Methodology

This Note explores state reaction to the objectives set forth in *Michigan v. Long* as seen through an examination of caselaw. The survey examines over five hundred state cases that involved constitutional rights claims decided from July 6, 1983, the date the Court issued *Michigan v. Long*, to January 1988.<sup>40</sup> It contains examples from all fifty states.<sup>41</sup> The majority of cases surveyed involve criminal prosecutions,<sup>42</sup> although a

35. See *Long*, 463 U.S. at 1068 (Stevens, J., dissenting).

36. When a state court finds no constitutional violation under the state constitution, it also implicitly holds that there is no federal constitutional violation either. See, e.g., *State v. Cadman*, 476 A.2d 1148 (Me. 1984). Because the federal constitution provides a threshold of protection, the state constitution may only broaden the available protection.

37. See *Long*, 463 U.S. at 1041.

38. See, e.g., *State v. Cadman*, 476 A.2d 1148, 1150-52 (Me. 1984); *State v. Ball*, 124 N.H. 226, 232, 471 A.2d 347, 351 (1983); Kaye, *supra* note 2, at 296-99.

39. Cf. Linde, *supra* note 3, at 380 (state courts "take primary responsibility for most of the individual rights that concern most people most of the time").

40. State court opinions that constitute this survey were collected in a number of ways. The author conducted computer searches, on both Lexis and Westlaw, according to key phrases, such as "adequate and independent." The base of cases amassed for each state from the computer searches led to others that also dealt with the issue. Further, cases were found through articles on the subject of state constitutional law and by shepardizing *Michigan v. Long*, 463 U.S. 1032 (1983), and several important state supreme court cases. E.g., *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983); *State v. Ball*, 124 N.H. 226, 471 A.2d 347 (1983).

41. States that are well represented include Arizona, California, Colorado, Florida, Kansas, Mississippi, New Hampshire, New York and Wyoming. The state cases used as examples in each category of cases, see *infra* notes 59-205 and accompanying text, were selected because those opinions provide clear models of styles that should or should not be followed. The discussion tries to examine cases from throughout the United States, rather than concentrating on those representing any one region.

42. Most of the criminal cases examined dealt with search and seizure issues. See, e.g., *People v. Corr*, 682 P.2d 20 (Colo.), *cert. denied*, 469 U.S. 855 (1984); *State v. Barnett*, 68 Haw. 32, 703 P.2d 680 (1985); *State v. Havlat*, 218 Neb. 602, 357 N.W.2d 464



few cases address other constitutional issues.<sup>43</sup>

This Note categorizes the cases examined according to their language—the actual wording of the opinions—rather than according to jurisprudence or conceptual methodology. In contrast, most commentators characterize methods of constitutional review according to three basic models:<sup>44</sup> the primacy theory,<sup>45</sup> the coequal approach,<sup>46</sup>

(1984); see also *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (Justice O'Connor noted that, increasingly, the majority of criminal cases are filed in state, as opposed to federal, courts).

43. See, e.g., *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985) (free speech), *rev'd and remanded*, 106 S. Ct. 3172 (1986); *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.) (right to privacy), *cert. denied*, 107 S. Ct. 290 (1986); *Witters v. Washington State Comm'n for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984) (en banc) (separation of church and state), *rev'd and remanded sub nom.*, *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).

44. See, e.g., *Abrahamson*, *supra* note 24, at 1169; Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 Tex. L. Rev. 977, 983-85 (1985). Scholars and critics have created refinements and other categories as well. See, e.g., *Collins & Galie*, *supra* note 23, at 322-39 (dividing the states into five models of constitutional review); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 Notre Dame L. Rev. 1118, 1122-25 (1984) (two models: interstitial and primacy or "classic").

45. State courts that practice the primacy method always begin their analyses of a constitutional issue by examining the appropriate provision of the state constitution. See *State v. Kennedy*, 295 Or. 260, 265, 666 P.2d 1316, 1319-20 (1983). If the state provision does not afford a remedy, the court next examines the issue under the federal constitution. See *Linde*, *supra* note 3, at 383-84; see also Carson, "Last Things Last": *A Methodological Approach to Legal Argument in State Courts*, 19 Willamette L. Rev. 641, 647-50 (1983) (asserting that state constitution should be analyzed first). The United States Supreme Court has jurisdiction over any federal law issues adjudicated in the case. See *supra* note 13 and accompanying text. More often than not, however, state cases using the primacy approach reach a satisfactory determination on an independent state law basis, thereby precluding federal judicial review. See *infra* note 75; *infra* notes 59-121 and accompanying text.

A minority of states, including Maine, Montana (after 1986), New Hampshire, and Oregon, follow the primacy theory of constitutional analysis. See, e.g., *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984); *State v. Johnson*, 719 P.2d 1248, 1254-55 (Mont. 1986); *State v. Ball*, 124 N.H. 226, 233, 471 A.2d 347, 351 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123, 126 (1981); see also Carson, *supra*, at 647-50 (discussing the primacy theory); Welsh, *supra* note 44, at 1144 (observing that state law is the primary source for state courts to resolve civil liberties disputes).

46. Commentators label the constitutional methodology of states that rely on both constitutions the "co-equal" or "equivalence" method. Representative states include Florida, Hawaii, Kansas, Maryland and Utah. See, e.g., *State v. Cross*, 487 So. 2d 1056, 1057 (Fla. 1986) (per curiam), *cert. dismissed*, 107 S. Ct. 248 (1987) (dead respondent); *State v. Ching*, 67 Haw. 107, 109 n.1, 678 P.2d 1088, 1090 n.1 (1984); *State v. Freeman*, 236 Kan. 274, 281, 689 P.2d 885, 892 (1984); *Webster v. State*, 299 Md. 581, 592 n.3, 474 A.2d 1305, 1310 n.3 (1984); see also Pollock, *supra* note 44, at 983 (discussing the coequal approach). These states fail, or refuse, to recognize any difference between particular state and federal constitutional provisions. See, e.g., *State v. Dilyerd*, 467 So. 2d 301, 303 (Fla. 1985); *State v. Ching*, 67 Haw. 107, 109 n.1, 678 P.2d 1088, 1091 n.1 (1984); *Collins & Galie*, *supra* note 23, at 323.

The language of the state constitutional provision in question often is the same as, or similar, to its federal counterpart. See, e.g., *People v. Tisler*, 103 Ill. 2d 226, 235-36, 469 N.E.2d 147, 152 (1984); *State v. Freeman*, 236 Kan. 274, 281, 689 P.2d 885, 892 (1984).

and the interstitial method.<sup>47</sup> As evidenced by this survey, however, commentators may classify states according to these methodologies to establish convenient categorizations as well as substantive findings. Actual examination of a range of cases from a particular state, reveals that few states apply a consistent methodology. Therefore, no clear labels generally can be applied.<sup>48</sup> Further, state courts' members and philosophies change, often resulting in a change of methodology as well.<sup>49</sup>

State courts, however, may also interpret state provisions to mirror the United States Supreme Court's interpretation of their federal counterparts, even though the language is not identical. See, e.g., *State v. Dilyerd*, 467 So. 2d 301, 303 (Fla. 1985); *Webster v. State*, 299 Md. 581, 592 n.3, 474 A.2d 1305, 1310 n.3 (1984); *People v. Smith*, 420 Mich. 1, 7 n.2, 360 N.W.2d 841, 842 n.2 (1984); *infra* notes 181-206 and accompanying text. This type of analysis usually leads to Supreme Court review because the ultimate basis for the decision involves some interpretation of a federal constitutional provision. See O'Connor, *supra* note 28, at 6 (this type of "state law decision . . . is not independent of federal law"); *infra* note 203 and accompanying text (discussing the availability of Supreme Court review for this type of case).

47. State courts using the "interstitial" approach analyze the issue first on federal constitutional grounds and then on state grounds. See Welsh, *supra* note 44, at 1133. Many states, including Connecticut, New Jersey and New York, issue opinions consistent with this model of review. See, e.g., *State v. Jarzbek*, 204 Conn. 683, 690-93, 529 A.2d 1245, 1246-49 (1987), *cert. denied*, 108 S. Ct. 1017 (1988); *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987); *People v. Smith*, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987); see also Brennan, *supra* note 24, at 491 (favoring the interstitial approach).

If the state constitution offers further or different protection than the United States Constitution, the state court may base its ruling on both constitutional provisions or exclusively on the applicable state provision. See, e.g., *People v. Smith*, 34 Cal. 3d 251, 264, 667 P.2d 149, 156-57, 193 Cal. Rptr. 692, 699-700 (1983) (basing its holding on the California Constitution, which offers greater protection than the United States Constitution); *People v. Millan*, 69 N.Y.2d 514, 522 n.7, 508 N.E.2d 903, 907 n.7, 516 N.Y.S.2d 168, 172 n.7 (1987) (stating decision rests on both federal and state constitutional grounds); see also Brennan, *supra* note 24, at 503 (state courts may extend due process guarantees under the state constitution). The Supreme Court may review the judgments decided solely on federal law, as well as those rulings based on intertwined state and federal law. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *supra* note 31 and accompanying text. When the Supreme Court reverses a case decided interstitially and remands it, the state court is free to reinstate its original ruling based on independent state grounds. See *Colorado v. Spring*, 107 S. Ct. 851, 862 n.2 (1987) (Marshall, J., dissenting); *Delaware v. Fensterer*, 474 U.S. 15, 24 (1985) (Stevens, J., concurring); *South Dakota v. Opperman*, 428 U.S. 364, 396 (1976) (Marshall, J., dissenting). Such a result on remand renders the Supreme Court's opinion advisory, see *supra* notes 32-33 and accompanying text, a result the Court sought to prevent when it decided *Michigan v. Long*. See *Michigan v. Long*, 463 U.S. at 1041.

48. For example, commentators have labeled Washington a primacy state, one that addresses state constitutional issues before addressing any federal issue. See Abrahamson, *supra* note 24, at 1170 n.112; Collins & Galie, *supra* note 23, at 334. But see Pollock, *supra* note 44, at 983 (categorizing Washington as following the co-equal approach). An examination of Washington cases, however, reveals that Washington Supreme Court opinions run the stylistic gamut, from citing *Michigan v. Long* to preclude Supreme Court review, see *State v. Stroud*, 106 Wash. 2d 144, 149, 720 P.2d 436, 439 (1986), to engaging in exclusively federal constitutional analysis, see *State v. Hennings*, 100 Wash. 2d 379, 382, 670 P.2d 256, 258 (1983) (en banc).

49. Such state court changes resemble the shifting viewpoints that occur on the United States Supreme Court itself as justices leave the bench and new ones are appointed. Cf. *supra* note 10 (change in Supreme Court attitude toward civil rights).

This Note adopted its language-based characterization for two reasons.<sup>50</sup> First and most important, regardless of whether a particular state's methodological jurisprudence is known—if indeed a state has adopted one<sup>51</sup>—the United States Supreme Court grants review of a state case based on the Court's examination and interpretation of the language of the opinion, emphasized by the plain statement ruling.<sup>52</sup> Second, the Court in *Michigan v. Long* expressed dissatisfaction with the need for Supreme Court Justices to research extensively a state's caselaw and philosophy in order to determine the adequacy and independence of a decision's state grounds.<sup>53</sup>

This survey divides its cases into four major categories, beginning with those cases that most clearly indicate upon which constitution their rulings are based and moving to those cases that are ambiguous and likely to cause confusion on petition for Supreme Court review.<sup>54</sup> Most states, proving internally inconsistent, appear in more than one category.<sup>55</sup> A few states that appear in more than one group, however, belong to categories that are similar in the effect they have on review. For example, New Hampshire cases appear in two categories,<sup>56</sup> both of which are groups that clearly establish the foundation for the New Hampshire

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50. Also taken into consideration is the fact that a vast body of literature already exists on the subject of state constitutional jurisprudence and methodology. See, e.g., Althouse, *supra* note 23; Matasar & Bruch, *supra* note 15; Welsh, *supra* note 44; Comment, *Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 U. Kan. L. Rev. 593 (1987).

51. See *supra* notes 48-49.

52. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); see also *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (basis of a state court decision must be clear from the face of the opinion (citing to *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983))); Pollock, *supra* note 44, at 985 ("As a practical matter, it may be unimportant whether a court looks initially or secondarily to the state constitution as long as it knows what the state constitution means, understands what that constitution demands, and makes a plain statement that it is relying on the state constitution.").

53. See *Long*, 463 U.S. at 1039. See generally Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. Chi. L. Rev. 389, 434 (1985) (discussing Justice O'Connor's reasoning in *Michigan v. Long*).

54. For example, this survey separately categorizes cases that base their decisions exclusively on federal constitutional grounds from those that construe a state constitutional provision to be similar to its federal counterpart. Compare *State v. Zayas*, 195 Conn. 611, 490 A.2d 68 (1985) (conducting exclusively federal constitutional analysis with no mention of state constitution) with *Tarr v. State*, 486 A.2d 672 (Del. 1984) (finding the state and federal provisions to be similar). In the former category, the Supreme Court would have jurisdiction to review the case, whereas in the latter, the Justices are likely to disagree with respect to this issue. See *Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985) (per curiam); *infra* notes 181-206 and accompanying text; see also *Michigan v. Long*, 463 U.S. 1032, 1066 (1983) (Stevens, J., dissenting) ("The state law ground is clearly adequate to support the judgment, but the question whether it is independent of the Michigan Supreme Court's understanding of federal law is more difficult."); O'Connor, *supra* note 28, at 6 (cases that construe provisions as similar would be open to review).

55. All states except Delaware, see *infra* app. II(D)(3); Indiana, see *infra* app. II(D)(2); Maryland, see *infra* app. II(D)(3); and Missouri, see *infra* app. II(B), appeared in more than one category.

56. See *infra* notes 65-76 and accompanying text.

court's determination.<sup>57</sup> The internal inconsistency of the majority of states supports this Note's ultimate conclusion that states have not fully integrated the *Michigan v. Long* directives into their systems of constitutional adjudication.<sup>58</sup>

## B. Examining the Cases

### 1. Literal Compliance with the Plain Statement Rule<sup>59</sup>

The clearest way for a state court to follow *Michigan v. Long*'s guidelines is to include in its opinion a plain statement that the court reached its decision on independent state grounds, citing to *Long* for support.<sup>60</sup> Conversely, a state court may cite to *Michigan v. Long* when explicitly basing its ruling on federal constitutional grounds,<sup>61</sup> thus making a "qualifying statement." Among the 151 cases that cited *Michigan v. Long* as support for their plain statements, 22 states were represented.<sup>62</sup> Very few states, however, consistently follow this policy,<sup>63</sup> and several states are represented by only 1 case in the group.<sup>64</sup> Cases decided by New Hampshire courts provide the best example of literal compliance.<sup>65</sup>

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57. See *infra* notes 65-76 and accompanying text.

58. See Baker, *supra* note 11, at 836-38. Most of the opinions that include a plain statement of some sort come from the years 1986-1988. See *infra* app. I-II. This leads to speculation that in recent years, certain state courts have become more concerned with delineating the basis for constitutional review. Most states, however, did not show an increase in use of a plain statement during the five years examined. See *infra* app. III-VI.

59. See *infra* app. I for all cases examined in this category.

60. See, e.g., State v. Ault, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986) (en banc) ("This holding regarding the inevitable discovery doctrine is based upon our own cases and constitution and thereby complies with the United States Supreme Court dictates of holdings based on independent state grounds." (citing *Michigan v. Long*, 463 U.S. 1032 (1983))); State v. Jenkins, 128 N.H. 672, 674, 517 A.2d 1182, 1184 (1986) (citing to *Long* in support of its plain statement). See generally Collins & Galie, *supra* note 17, at 32, col. 1 (discussing state court cases that have extended civil liberties under the state constitution).

61. See, e.g., State v. Miskolczi, 123 N.H. 626, 628, 465 A.2d 919, 920 (1983) ("[the defendant] did not present, argue, or brief any legal issues involving this [state] constitutional provision before the trial court. . . . We therefore need decide only whether the defendant's rights under the fourth and fourteenth amendments to our Federal Constitution were violated. . . ." (citing *Michigan v. Long*, 463 U.S. 1032 (1983))).

62. These states are Alaska, Arizona, California, Colorado, Connecticut, Kansas, Maine, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Washington and Wisconsin. See *infra* app. I.

63. The states that seem to follow this approach with some frequency are New Hampshire, (32 of 39 New Hampshire cases examined), Arizona (7 of 12 Arizona cases examined), Washington (6 of 13 Washington examined) and Mississippi, (5 of 15 Mississippi cases examined).

64. The states with only one case in this category are California, Colorado, Kansas, Maine, Oklahoma, Oregon, Rhode Island, Utah, Vermont and Wisconsin. See *infra* app. I.

65. The New Hampshire Supreme Court follows a consistent approach more consistently than any other state court. See *supra* note 63; see, e.g., State v. Jenkins, 128 N.H. 672, 674, 517 A.2d 1182, 1184 (1986); State v. Castle, 128 N.H. 649, 651, 517 A.2d 848, 849 (1986); State v. Mercier, 128 N.H. 57, 61, 509 A.2d 1246, 1249 (1986).

Historically, the New Hampshire Supreme Court has based its decisions on independent state grounds.<sup>66</sup> After *Long* was handed down, the New Hampshire court quickly and easily adapted the latest mandate of the Supreme Court and began regularly inserting plain statements in its opinions.<sup>67</sup> In *State v. Ball*,<sup>68</sup> for example, the New Hampshire Supreme Court discussed New Hampshire's jurisprudence with respect to the jurisdictional question of independent state grounds. Ball alleged on appeal violations of both the federal and state constitutions.<sup>69</sup> Justice Charles G. Douglas III stated that a defendant who raises a state constitutional claim is entitled to have the state court examine the relevant provision and make an independent determination of the protection afforded by the New Hampshire Constitution.<sup>70</sup>

To encourage the development of an independent body of state constitutional law, two recent New Hampshire opinions provide guidance as to the procedure state counsel should follow when raising a constitutional claim.<sup>71</sup> The New Hampshire Supreme Court will address state constitutional claims only if a party has raised them in the lower court proceed-

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66. See, e.g., *State v. Settle*, 122 N.H. 214, 217, 447 A.2d 1284, 1285 (1982); *State v. Osborne*, 119 N.H. 427, 433, 402 A.2d 493, 497 (1979); see also Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 Suffolk U.L. Rev. 1123, 1142-47 (1978) (early advocacy of the primacy theory by a New Hampshire state justice).

67. See *State v. Miskolzi*, 123 N.H. 626, 628, 465 A.2d 919, 920 (1983) (issuing a qualifying statement that court based its decision on federal constitution and citing to *Long*).

68. 124 N.H. 226, 471 A.2d 347 (1983). *State v. Ball* involved the search and seizure of a defendant convicted of unlawful possession of marijuana. *Id.* at 230, 471 A.2d at 350.

69. *Id.*

70. In the *Ball* opinion, New Hampshire Supreme Court Justice Douglas discusses New Hampshire's jurisprudence regarding the doctrine of independent state grounds:

Even if it appears that the Federal Constitution is more protective than the State Constitution, the right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees. This is because any decision we reach based upon *federal* law is subject to review by the United States Supreme Court, whereas we have unreviewable authority to reach a decision based on articulated adequate and independent *State* grounds. *Michigan v. Long*, — U.S. —, 103 S. Ct. 3469, 3475, 77 L.Ed.2d 1201 (1983). Since this court is the final authority on New Hampshire law, initial resolution of State constitutional claims insures that the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims. Therefore, we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.

*Id.* at 232, 471 A.2d at 351 (emphasis in original).

71. See *State v. Dellorano*, 128 N.H. 628, 632-33, 517 A.2d 1163, 1166 (1986) (refusing to perform a state constitutional analysis of defendant's claim because defendant failed to satisfy the required preconditions of raising the state constitutional issue in the lower court and invoking the appropriate state provision in that party's appellate brief); *State v. Bradberry*, 129 N.H. 68, 71, 522 A.2d 1380, 1381 (1986) (laying out when the court will perform state constitutional analysis); *infra* note 207 (recommending that courts develop such guidelines).

ing and if that party's appellate brief specifically invokes the protection of a state constitutional provision.<sup>72</sup> These guidelines help the United States Supreme Court when deciding whether to grant certiorari, because the Court is not so much concerned with what procedure a state court follows for reviewing a dual constitutional claim as with the way the state court has handled the communication of its dual constitutional analysis.<sup>73</sup> The insertion of a plain statement citing to *Michigan v. Long* to support independent state grounds, like the one in *Ball*, precludes United States Supreme Court review of constitutional issues on a petition for certiorari.<sup>74</sup> Further, the New Hampshire Supreme Court's endeavor to establish and clarify its policy of reviewing constitutional issues indicates that New Hampshire is building a body of state constitutional law that is independent of its federal counterpart.<sup>75</sup>

Those state opinions that make plain statements citing to *Long* illustrate the clearest delineation between state and federal law and pose the fewest, if any, problems for the United States Supreme Court.<sup>76</sup> The Court will have no difficulty determining that it should decline to review a case when the state court upheld the constitutional right and clearly based its decision on adequate and independent state grounds,<sup>77</sup> citing directly to *Long* for its express holding to that effect.<sup>78</sup> Conversely, the Supreme Court will grant review of a constitutional issue when the qualifying statement plainly indicates that the state court based its conclusion

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72. See *Dellorfono*, 128 N.H. at 632-33; 517 A.2d at 1166; *Bradberry*, 129 N.H. at 71, 522 A.2d at 1381 (1986).

73. See *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (holding basis of decision should be clear from the face of the opinion); *supra* notes 29-31 and accompanying text.

74. This survey found no United States Supreme Court review of cases emanating from New Hampshire between 1983-1987 that have dealt with constitutional claims decided under the state constitution.

75. Cf. *Michigan v. Long*, 463 U.S. 1032, 1039-41 (1983) (Court hoped that states develop independent constitutional jurisprudences); *supra* note 33 and accompanying text.

76. See *Long*, 463 U.S. at 1041. The Supreme Court has denied certiorari to seven cases found in this category. See *State v. Jarzbeck*, 204 Conn. 683, 707, 529 A.2d 1245, 1256 (1987), *cert. denied*, 108 S. Ct. 1017 (1988); *State v. Scully*, 195 Conn. 668, 674 n.11, 490 A.2d 984, 987 n.11 (1985), *cert. denied*, 108 S. Ct. 293 (1987); *State v. Cohane*, 193 Conn. 474, 485, 479 A.2d 763, 770, *cert. denied*, 469 U.S. 990 (1984); *State v. Bruzzese*, 94 N.J. 210, 217 n.3, 463 A.2d 320, 324 n.3 (1983), *cert. denied*, 465 U.S. 1030 (1984); *Turner v. City of Lawton*, 733 P.2d 375, 381 & n.34 (Okla.), *cert. denied*, 107 S. Ct. 3232 (1987); *State v. von Bulow*, 475 A.2d 995, 1019 (R.I.), *cert. denied*, 469 U.S. 875 (1984). Although the Court gave no explanation for its denial of certiorari, the clear communication of a plain statement may provide one reason.

77. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *supra* text accompanying note 31.

78. In addition, several New Hampshire cases make a plain statement without citing to *Michigan v. Long*. See, e.g., *State v. Goding*, 128 N.H. 267, 273, 513 A.2d 325, 330 (1986) (citing *State v. Ball*, 124 N.H. 226, 471 A.2d 347 (1983)); *City of Claremont v. Truell*, 126 N.H. 30, 35-39, 489 A.2d 581, 586-87 (1985); *State v. Scarborough*, 124 N.H. 363, 368, 470 A.2d 909, 913 (1983); *infra* notes 81-90 and accompanying text. Whatever the chosen style, however, the New Hampshire court conscientiously and routinely deals with this jurisdictional issue.

on federal law.<sup>79</sup> A state court that clearly communicates the grounds on which it has based its determination and cites to *Michigan v. Long* to support that message has complied successfully with the aims of the plain statement ruling. Such opinions will not lead to the rendering of advisory opinions and will add to an independent body of state constitutional law.

## 2. Plain Statements Without Citing to *Michigan v. Long*<sup>80</sup>

Many state court opinions contain a plain statement that the decision is based solely on state law without citing to *Michigan v. Long*.<sup>81</sup> State cases also may make a qualifying statement, without citing to *Long*, indicating clearly that their holdings are based on the federal Constitution.<sup>82</sup> Among the 112 cases in this category, 39 states were represented,<sup>83</sup> but only a few states follow this style of opinion-writing with frequency.<sup>84</sup> The Colorado Supreme Court provides a good example of a court that

79. For examples of state cases the Supreme Court would review on these grounds, see *State v. Chung*, 202 Conn. 39, 45 n.7, 519 A.2d 1175, 1179 n.7 (1987); *Souder v. Commonwealth*, 719 S.W.2d 730, 735 (Ky. 1986); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 141 n.2, 449 N.E.2d 349, 352 n.2 (1983); *State v. Miskolczi*, 123 N.H. 626, 628, 465 A.2d 919, 920 (1983); see also, O'Connor, *supra* note 28, at 6 (discussing types of cases as either reviewable or unreviewable by the Supreme Court).

80. For cases included in this category, see *infra* app. II. Although categories II(B)(1), see *supra* text accompanying notes 59-80, and II(B)(2), see *infra* text accompanying notes 82-120, basically stand for the same principle—both issuing clear statements to either preclude or assure review—they are distinct because those cases in II(B)(1) contain even stronger plain statements than those in II(B)(2) due to the citations in the former cases to *Michigan v. Long*, and thus offer the clearest type of jurisdictional statements possible.

81. See, e.g., *State v. Tanaka*, 67 Haw. 658, 661, 701 P.2d 1274, 1276 (1985) (“[W]e are not bound by these [federal] decisions. ‘[A]s the ultimate judicial tribunal in this state, this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution’” (quoting *State v. Kaluna*, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974))); *Sibley v. Board of Supervisors*, 477 So. 2d 1094, 1107 (La. 1985) (“[w]e conclude that the federal jurisprudence should not be used as a model for the interpretation or application of that part of the Louisiana Declaration of Rights”); *Mhoun v. State*, 464 So. 2d 77, 80 (Miss. 1985) (“our decision today is grounded upon the independent and adequate remedies provided by the jurisprudence of this state”).

82. See, e.g., *State v. Hoak*, 107 Idaho 742, 749 n.3, 692 P.2d 1174, 1181 n.3 (1984) (“we need not decide whether the Idaho Constitution should be interpreted to allow such a seizure”); *People v. Wiese*, 425 Mich. 448, 450 n.1, 389 N.W.2d 866, 867 n.1 (1986) (“[w]e do not . . . consider the independent application of the Michigan Constitution due process provision”).

States that often make qualifying statements follow either the equivalency model (for example, Montana (before 1986), Utah and Hawaii) or the interstitial model (for example, Connecticut, Michigan and New Jersey) of constitutional analysis. See *supra* note 46 (discussing the equivalency theory); note 47 (discussing the interstitial approach).

83. The states in this category are Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. See *infra* app. II.

84. These states include California (8 of 23 California cases examined), Colorado (5

uses both a plain statement to preclude United States Supreme Court review without citing *Long*,<sup>85</sup> as well as one that makes a qualifying statement to signal a federal constitutional analysis, also without citing to *Long*.<sup>86</sup>

In *People v. Sporleder*,<sup>87</sup> decided soon after *Long*, the Colorado Supreme Court issued a plain statement that it based its decision solely on state law.<sup>88</sup> The *Sporleder* court articulated its view on the Colorado Constitution's search and seizure provision and of its state constitution in general. It held that even if a state constitutional provision resembles its federal counterpart, United States Supreme Court interpretation of the federal provision does not bind the Colorado Supreme Court, which independently determines the scope of its state constitutional guarantees.<sup>89</sup>

On at least one occasion,<sup>90</sup> however, the Colorado Supreme Court relied on the federal Constitution in deciding an issue and clearly articulated its decision not to analyze the issue independently under the state constitution.<sup>91</sup> In *People v. Sheppard*,<sup>92</sup> the towing and destruction of a vehicle under a hold order from the state patrol without first obtaining authorization was found to violate the defendant's due process rights.<sup>93</sup>

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of 13 Colorado cases examined), Maine (5 of 8 Maine cases examined), New Jersey (5 of 9 New Jersey cases examined) and Oregon (5 of 9 Oregon cases examined).

85. 5 of 13 Colorado cases examined fall within this category. See, e.g., *People v. Oates*, 698 P.2d 811, 818 (Colo. 1985); *People v. Deitchman*, 695 P.2d 1146, 1148 (Colo. 1985); *People v. Timmons*, 690 P.2d 213, 215 (Colo. 1984); *People v. Corr*, 682 P.2d 20, 26 (Colo.), cert. denied, 469 U.S. 855 (1984); *People v. Sporleder*, 666 P.2d 135, 136 (Colo. 1983).

86. See *People v. Sheppard*, 701 P.2d 49, 53-54 (Colo. 1985).

87. 666 P.2d 135 (Colo. 1983). The lower court in *Sporleder* suppressed evidence obtained by a pen register, basing its conclusion on article II, section 7 of the Colorado Constitution, which is similar to the fourth amendment to the United States Constitution. See *Id.* at 136. The Colorado Supreme Court, acknowledging that defendant's privacy expectation qualified for state constitutional protection from unreasonable searches and seizures, upheld the lower court's independent interpretation of the state constitutional provision. See *id.* at 140.

88. See *id.* at 140; accord *People v. Timmons*, 690 P.2d 213, 215 (Colo. 1984); *People v. Corr*, 682 P.2d 20, 26 (Colo.), cert. denied, 469 U.S. 855 (1984).

89. See *Sporleder*, 666 P.2d at 140; see also *People v. Oates*, 698 P.2d 811, 815-16 (Colo. 1985) (holding expectation of privacy under Colorado Constitution is broader than that of the federal Constitution); *People v. Deitchman*, 695 P.2d 1146, 1170-71 (Colo. 1985) (Neighbors, J., concurring) (focussing on independent state constitutional argument).

While Colorado opinions fall into more than one of this survey's categories, see *supra* text accompanying note 55, they, for the most part, clearly enunciate the bases for their decisions. For example, in addition to the 5 cases that issue plain statements without citing to *Long*, one opinion cites to *Michigan v. Long* in support of a plain or qualifying statement. See *People v. Pope*, 724 P.2d 1323, 1326 n.1 (Colo. 1986). But see *Kwiatkoski v. People*, 706 P.2d 407, 408 (Colo. 1985) (en banc) (mentioning both federal and state constitutional provisions in passing); *People v. Walker*, 666 P.2d 113, 118 (Colo. 1983) (same).

90. See *People v. Sheppard*, 701 P.2d 49 (Colo. 1985).

91. See *id.* at 53.

92. 701 P.2d 49 (Colo. 1985).

93. See *id.* at 50-51.



The court stated that it need not examine the issue under the Colorado Constitution because even the federal Constitution, which offered the defendant narrower protection, had been violated.<sup>94</sup>

State courts issuing a plain statement that the decision is based on state grounds, even without citing to *Michigan v. Long*, successfully preclude the United States Supreme Court from reviewing those decisions.<sup>95</sup> To establish adequate and independent state grounds, state courts must make an obvious statement of state constitutional grounds before or after its analysis of the issues. Similarly, if a state court makes a qualifying statement that it based its ruling on federal law, its decision is open to Supreme Court review.<sup>96</sup> By taking the time to analyze the state constitutional claim separately, the state court fulfills one of its primary purposes, to interpret state law out of fairness to the litigants. In so doing, the court also provides state citizens with independent state constitutional authority.<sup>97</sup>

State decisions that include a plain statement when conducting state constitutional analysis theoretically have set forth adequate and independent state grounds.<sup>98</sup> Nonetheless, the language of such opinions may foster confusion as to the basis for the court's ruling when the court's state constitutional analysis relies on federal authority.<sup>99</sup> To alleviate this confusion, these decisions should state that any references to federal law carry no greater weight than the precedent of any other jurisdiction and are not binding, thereby reaffirming that the decision is based

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94. *See id.* at 53-54 ("We need not decide here whether the *Trombetta* standard of materiality should be adopted by this court in evaluating due process challenges under the Colorado constitution, because . . . even under the strict test announced in *Trombetta*, the evidence destroyed in the case before us must be considered material." (citing *California v. Trombetta*, 467 U.S. 479 (1984))).

95. Since *Michigan v. Long*, the Supreme Court has refused to review at least two state cases that were decided on adequate and independent state grounds. *See* *People v. Nunez*, 658 P.2d 879, 881 n.2 (Colo. 1983) (basing decision on Colorado search and seizure statutes), *cert. dismissed*, 465 U.S. 324 (1984) ("writ is dismissed . . . [because] the judgment of the court below rested on independent and adequate state grounds"); *Aimone v. Finley*, 113 Ill. App. 3d 507, 508, 447 N.E.2d 868, 869 (1983) (relying on Illinois caselaw to determine plaintiff's statutory rights), *appeal dismissed*, 465 U.S. 1095 (1984) (appeal dismissed for want of jurisdiction); *infra* app. VII. *But see* Comment, *supra* note 2, at 1309-11 (noting that Supreme Court is increasing its review of state court cases because it seeks to reverse a trend of broadened protection of individual liberties under state constitutions).

96. *See, e.g.,* *People v. Ciruolo*, 161 Cal. App. 3d 1081, 1085 n.1, 208 Cal. Rptr. 93, 94 n.1, *rev'd and remanded*, 476 U.S. 207 (1986); *People v. Bertine*, 706 P.2d 411, 419 (Colo. 1985), *rev'd*, 107 S. Ct. 738 (1987); *infra* notes 113-18 and accompanying text.

97. *See* *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984); *State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983).

98. *See, e.g.,* *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983); *Mhoon v. State*, 464 So. 2d 77, 79-80 (Miss. 1985).

99. *See, e.g.,* *State v. Asherman*, 193 Conn. 695, 711-16, 478 A.2d 227, 239-42 (1984) (alternating between federal and state authority), *cert. denied*, 470 U.S. 1050 (1985); *Head v. State*, 253 Ga. 429, 430-31, 322 S.E.2d 228, 230-31 (1984) (intertwining federal and state law); *see also* *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (stating if state and federal law are intertwined, federal jurisdiction will be presumed).

on state grounds and precluding Supreme Court review.<sup>100</sup> Absent such a statement, the Supreme Court advances to the second step of the *Michigan v. Long* test—that is, to examine whether federal and state law are “interwoven” so as to justify the granting of certiorari.<sup>101</sup>

California courts have intertwined state analysis and federal precedent with some regularity.<sup>102</sup> In *People v. Cook*,<sup>103</sup> the California Supreme Court concluded that an illegal search and seizure had occurred, thereby violating the appellant’s rights under the California Constitution.<sup>104</sup> It based its constitutional analysis, however, on a discussion of the federal constitutional right to privacy.<sup>105</sup>

In *In re William G.*,<sup>106</sup> another search and seizure case, the court examined both federal and state constitutional provisions, citing both constitutions at the outset of the opinion,<sup>107</sup> and then intertwining the authority on which it relied.<sup>108</sup> A “clarifying” footnote stating both that the decision was based on federal and state law and that references to federal cases supported the “independent state grounds” of the holding further muddled the basis of the decision.<sup>109</sup> These opinions undermine *Michigan v. Long*, which sought to untangle the federal and state judicial systems.<sup>110</sup> The United States Supreme Court has reviewed and reversed at least one California Supreme Court case that used this confusing type of constitutional analysis.<sup>111</sup>

Several cases that contained qualifying statements indicating that the

100. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); see, e.g., *State v. Kennedy*, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983) (“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 there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.”).

101. See 463 U.S. at 1040-41; see also *supra* note 31 and accompanying text (quoting language in *Michigan v. Long* regarding intertwined state and federal grounds).

102. See, e.g., *People v. Cook*, 41 Cal. 3d 373, 378-85, 710 P.2d 299, 302-07, 221 Cal. Rptr. 499, 502-07 (1985); *In re William G.*, 40 Cal. 3d 550, 558-68, 709 P.2d 1287, 1288-93, 221 Cal. Rptr. 118, 121-29 (1985); *People v. Ruggles*, 39 Cal. 3d 1, 8-13, 702 P.2d 170, 176-79, 216 Cal. Rptr. 88, 92-95 (1985). But see Note, *Independent Interpretation: California’s Declaration of Rights or Declaration of Independence?*, 21 Santa Clara L. Rev. 199, 201 (1981) (California preeminent in the field of independent state constitutional interpretation).

103. 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985).

104. See *id.* at 385, 710 P.2d at 307, 221 Cal. Rptr. at 507.

105. See *id.* at 378-85, 710 P.2d at 302-07, 221 Cal. Rptr. at 502-07.

106. 40 Cal. 3d 550, 709 P.2d 1287, 221 Cal. Rptr. 118 (1985).

107. See *id.* at 556, 709 P.2d at 1288, 221 Cal. Rptr. at 121.

108. See *id.* at 558-68, 709 P.2d at 1288-93, 221 Cal. Rptr. at 121-29.

109. *Id.* at 557 n.5, 709 P.2d at 1290 n.5, 221 Cal. Rptr. at 121 n.5. The opinion reads:

We rest our decision on *both* state and federal law. Unless otherwise indicated, references to the Fourth Amendment are also intended to refer to article I, section 13, of the California Constitution. Similarly, the federal cases upon which we rely are intended to also support certain aspects of the *independent state grounds* of our decision . . . .

*Id.* (emphasis added).

110. See *supra* note 33 and accompanying text.

111. See *People v. Carney*, 34 Cal. 3d 597, 603, 668 P.2d 807, 809, 194 Cal. Rptr. 500,

judges had based their rulings on federal grounds resulted in the rendering of an advisory Supreme Court opinion.<sup>112</sup> For example, in *California v. Ramos*,<sup>113</sup> the Supreme Court held that it had jurisdiction to review *Ramos* because the California Supreme Court had based its commutation of the defendant's death sentence exclusively on federal law and had declined to undertake any state constitutional review.<sup>114</sup> Justice O'Connor noted that, on remand, the California Supreme Court remained free to examine the issues under state law.<sup>115</sup> The California Supreme Court followed Justice O'Connor's suggestion and reinstated its original ruling,<sup>116</sup> based on the California Constitution and California case authority.<sup>117</sup>

Had the state court dealt with the state constitutional issue in its original opinion, the additional decisions would not have been necessary. Such ambiguity negates the effect of the plain statement and results in unnecessary confusion on a petition to the United States Supreme Court for certiorari.<sup>118</sup> Because the Court has jurisdiction to review the federal portion of the analysis,<sup>119</sup> it properly could grant certiorari, thus creating the possibility that, on remand, the Supreme Court opinion could be rendered advisory. Further, the state high court hinders its own constitutional development by intertwining state and federal caselaw and perpetuating confusion as to which authority should be followed for in-

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502 (1983) (alternately discussing both state and federal constitutions but ultimately bases its judgment on the federal Constitution), *rev'd and remanded*, 471 U.S. 386 (1985).

112. See, e.g., *People v. Trombetta I*, 142 Cal. App. 3d 138, 143, 190 Cal. Rptr. 319, 322 (1983) ("Since the *Hitch* rule implements a federal due process standard, it is unaffected by California Constitution, article I, section 28, subdivision (d).") (citation omitted), *rev'd and remanded*, 467 U.S. 479 (1984), *on remand*, 173 Cal. App. 3d 1093, 219 Cal. Rptr. 637 (1985); *People v. Ramos I*, 30 Cal. 3d 553, 600 n.24, 639 P.2d 908, 936 n.24, 180 Cal. Rptr. 266, 294 n.24 (1982) ("Whether or not the Briggs Instruction also independently violates one or more provisions of the California Constitution is an issue we need not decide . . ."), *rev'd and remanded*, 463 U.S. 992 (1983), *on remand*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984), *cert. denied*, 471 U.S. 1119 (1985); *Commonwealth v. Upton I*, 390 Mass. 562, 573, 458 N.E.2d 717, 723-24 (1983) ("Because we conclude that the evidence seized . . . should have been suppressed by application of Fourth Amendment principles . . . we need not consider . . . art. 14 of the Massachusetts Declaration of Rights . . ."), *rev'd and remanded*, 466 U.S. 727 (1984), *on remand*, 394 Mass. 363, 476 N.E.2d 548 (1985); see also *supra* notes 100-22 and accompanying text (discussing possible confusion, even with a plain statement). See *infra* app. VI(D) for a list of remand cases in this category.

113. 463 U.S. 992 (1983) (decided the same day as *Michigan v. Long*).

114. See *id.* at 997 n.7 (citing *People v. Ramos I*, 30 Cal. 3d 553, 600 n.24, 639 P.2d 908, 936 n.24, 180 Cal. Rptr. 266, 294 n.24 (1982) (issuing a qualifying statement)).

115. See *Ramos*, 463 U.S. at 997 n.7.

116. See *People v. Ramos II*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984), *cert. denied*, 471 U.S. 1119 (1985).

117. See *id.* at 143, 689 P.2d at 432, 207 Cal. Rptr. at 802 ("For the reasons discussed below, we conclude that, considered in light of longstanding California principles and authorities, the Briggs Instruction is incompatible with state constitutional doctrine . . .").

118. Such analysis could be considered an intertwining of state and federal analysis. See *supra* notes 31, 101-02 and accompanying text.

119. See *supra* note 13 and accompanying text.

dependent state constitutional arguments.<sup>120</sup>

A state court that makes a plain statement precluding Supreme Court review, or a qualifying statement inviting review, must be extremely meticulous in drafting its opinion to ensure that such a statement is understandable and supported by appropriate caselaw. By so doing, the court will avoid potential confusion of its state and federal constitutional jurisprudence and will pose no problems of review for the Supreme Court.

### 3. Federal Constitutional Analysis Only<sup>121</sup>

The cases in this category engage in federal constitutional analysis without mentioning any state constitutional provision in the text of the opinion.<sup>122</sup> Courts undertake this type of analysis for several reasons, including the failure of the parties to raise a state constitutional issue in the lower court or in their appellate briefs.<sup>123</sup> More often, however, a state court engages in purely federal analysis because the state constitution plays a small role in the state's constitutional jurisprudence, at least in the area of criminal procedure.<sup>124</sup> Among 72 cases in this category, 31 states are represented.<sup>125</sup> Opinions issued by the Oklahoma Court of

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120. See *supra* notes 33-39 and accompanying text.

121. For cases included in this category, see *infra* app. III.

122. See, e.g., *Richardson v. State*, 283 Ark. 82, 671 S.W.2d 164 (1984); *State v. Barrett*, 401 N.W.2d 184 (Iowa 1987); *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), *cert. denied*, 469 U.S. 1230 (1985).

Juxtaposed to those cases discussed in this section are state court cases that exclusively analyze the state constitution, with little or no mention of the federal constitution. See, e.g., *Welch v. State*, 254 Ga. 603, 607, 331 S.E.2d 573, 577 (1985); *In re Dostert*, 324 S.E.2d 402, 409 (W.Va. 1984); see also *infra* app. IV (complete list of cases examined). This, however, results from the circumstances of each case, rather than from any consistent methodology. For example, a court faced with a guarantee not enumerated expressly in the federal constitution will conduct only a state constitutional analysis. See, e.g., *City & Borough of Juneau v. Quinto*, 684 P.2d 127, 128 (Alaska 1984) (construing right of privacy under Art. I, §§ 14 and 22 of the Alaska Constitution); *State v. Long*, 700 P.2d 153, 156 (Mont. 1985) (addressing right to privacy because Montana Constitution is one of few state constitutions that contains such a guarantee). This situation also may occur if the lower court based its disposition solely on the state constitution. See *State v. Thornton*, 253 Ga. 524, 525, 322 S.E.2d 711, 712 (1984).

123. See *State v. Jewett*, 146 Vt. 221, 229, 500 A.2d 233, 239 (1985) (instructing parties to file supplemental briefs addressing state constitutional issues if they raise the claim on appeal).

124. See, e.g., Collins, Galie, & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 Hastings Const. L.Q. 599, 609 (1986) ("The Supreme Court of Georgia does not favor the use of State Constitutional law in view of the fact that in the criminal law field, especially, the state constitution gives the individual more protection than does the Federal." (quoting Justice George T. Smith of the Georgia Supreme Court)); see also Abrahamson, *supra* note 24, at 1158 ("many, if not most, state court opinions in criminal cases refer only to the federal constitution").

125. The states represented are Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin and Wyoming. States that provided the most cases in this category are

Criminal Appeals provide good examples.<sup>126</sup>

In *Lowry v. State*,<sup>127</sup> the defendant appealed from his burglary conviction.<sup>128</sup> When it reversed the conviction, the state supreme court examined only the appropriate federal provisions, without explaining its failure to address the state constitutional issues.<sup>129</sup> In another case, *Post v. State*,<sup>130</sup> the defendant appealed his rape conviction, claiming that his right to privacy had been violated by an Oklahoma obscenity statute.<sup>131</sup> Again, the Oklahoma court conducted only a federal constitutional analysis of the defendant's right to privacy.<sup>132</sup> It reversed the conviction and declared the Oklahoma obscenity statute federally unconstitutional as applied to the facts of the case.<sup>133</sup>

State cases that conduct exclusively federal constitutional analysis do not pose a problem under *Michigan v. Long*. The Supreme Court properly can hear such cases because they are based solely on federal law and thus fall within the Supreme Court's discretion for review.<sup>134</sup> Further, in the event that the Supreme Court reverses and remands the case, it is unlikely that a state court would reinstate its original judgment on remand because the original opinion made no mention of the state constitution.<sup>135</sup> Thus, little danger exists that the Court's decision will be rendered advisory. A court, however, seems to trivialize its state constitution by declining to analyze the state claims, sending a message to the litigants and to the State's citizenry that the state constitution has little, if any, independent value.

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Arkansas (4 of 7 Arkansas cases examined), Kansas (6 of 16 Kansas cases examined), and Oklahoma (9 of 14 Oklahoma cases examined). See *infra* app. III.

126. See, e.g., *Lowry v. State*, 729 P.2d 511, 512 (Okla. Crim. App. 1986); *Lucas v. State*, 704 P.2d 1141, 1143 (Okla. Crim. App. 1985); *Beeler v. State*, 677 P.2d 653, 657 (Okla. Crim. App. 1984).

127. 729 P.2d 511 (Okla. Crim. App. 1986).

128. See *id.* at 512.

129. See *id.* at 512-13. See also *Lucas v. State*, 704 P.2d 1141, 1143 (Okla. Crim. App. 1985) (affirming in part and reversing in part conviction for drug possession).

130. 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 107 S. Ct. 290 (1986).

131. See *id.* at 1107. The court recognized that the right to privacy is guaranteed to Oklahoma citizens by statute, Okla. Stat. tit. 21 § 886 (1981). *Id.* at 1106-07.

132. See *id.* at 1107-09.

133. See *id.* at 1109.

134. See, e.g., *People v. Brown*, 40 Cal. 3d 512, 538-44, 230 Cal. Rptr. 834, 847-52, 726 P.2d 516, 529-34 (1986), *rev'd and remanded*, 107 S. Ct. 837 (1987); *People v. Connelly*, 702 P.2d 722, 728-29 (Colo. 1985), *rev'd and remanded*, 107 S. Ct. 515 (1986); *State v. Murphy*, 324 N.W.2d 340, 340 (Minn. 1982), *rev'd and remanded*, 465 U.S. 420 (1984).

State cases that conduct only state constitutional analysis and do not mention the federal constitution are not subject to Supreme Court review unless there are other federal questions to be answered. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *supra* note 13 and accompanying text.

135. See, e.g., *State v. Murphy II*, 348 N.W.2d 764, 764 (Minn. 1984); *State v. Rogers II*, 32 Ohio St. 3d 70, 71, 512 N.E.2d 581, 582 (1987). But see *State v. Chrisman II*, 100 Wash. 2d 814, 815, 676 P.2d 419, 421 (1984) (Washington Supreme Court reinstates, on state constitutional grounds, its original decision, which was based only on federal analysis).

4. The Gray Areas<sup>136</sup>

State high courts frequently have failed to clarify the grounds on which they have decided constitutional issues.<sup>137</sup> Three types of cases fall within this category: opinions that refer to the "constitution," but do not specify which constitution;<sup>138</sup> opinions that mention both state and federal constitutional provisions in the same sentence or citation but otherwise do not resolve the jurisdictional issue;<sup>139</sup> and opinions that conclude that state and federal constitutional provisions are similar or identical.<sup>140</sup> Because of their inherent ambiguity, opinions from these categories most often cause problems for the Supreme Court when determining whether to review them and result in the issuance of advisory opinions.

Each of the three types of "gray area" categories provides an example of a style of opinion-writing that does not satisfy the plain statement objectives of *Michigan v. Long*.<sup>141</sup> By failing to structure the opinions in these categories to communicate obviously their constitutional jurisdiction, these state courts invite Supreme Court review<sup>142</sup> and fail to further the federalist goal of unique state constitutional law.<sup>143</sup>

a. *Cases that Mention "the Constitution," but do not Specify which Constitution*<sup>144</sup>

This survey found 11 cases, from 10 states, that discuss the "constitution" but do not specify whether they are speaking about the federal or state constitution.<sup>145</sup> That so few of these cases exist indicates that no state consistently follows this opaque style of opinion writing.<sup>146</sup>

136. See *infra* app. V, VI for complete list of cases in this category.

137. See, e.g., *Jones v. New Mexico Racing Comm'n*, 100 N.M. 434, 436, 671 P.2d 1145, 1147 (1983) (discussing "due process" without clarifying to which constitution it refers); *State v. Buell*, 22 Ohio St. 3d 124, 135-36, 489 N.E.2d 795, 806 (1986) (mentioning state and federal provisions in passing), *cert. denied*, 107 S. Ct. 240 (1986); *State v. Brennan*, 526 A.2d 483, 484-85 (R.I. 1987) (finding scope of state and federal provisions similar).

138. See, e.g., *State v. Galvan*, 222 Neb. 104, 105, 382 N.W.2d 337, 338 (1986); *Parkerson v. State*, 100 Nev. 222, 225, 678 P.2d 1155, 1157 (1984); *State v. Walstad*, 119 Wis. 2d 483, 486, 351 N.W.2d 469, 473 (1984).

139. See, e.g., *State v. Brooks*, 505 So. 2d 714, 723 (La. 1987); *State v. Bynum*, 680 S.W.2d 156, 160 (Mo. 1984); *Wilde v. State*, 706 P.2d 251, 256 (Wyo. 1985).

140. See, e.g., *Argenta v. City of Newton*, 382 N.W.2d 457, 460 (Iowa 1986); *Little v. State*, 300 Md. 485, 493 n.3, 479 A.2d 903, 907 n.3 (1984); *People v. Smith*, 420 Mich. 1, 6 n.1, 360 N.W.2d 841, 842 n.1 (1984).

141. Because cases within the "gray areas" are ambiguous, they could be remanded for clarification, but the United States Supreme Court declared this procedure undesirable in *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

142. See *supra* notes 18-19 and accompanying text.

143. See *supra* note 55 and accompanying text.

144. See *infra* app. V(A), VI(A) for a list of the cases in this subcategory.

145. The 10 states represented are Colorado, Nebraska, New Mexico, Nevada, Ohio, South Carolina, South Dakota, Tennessee, Utah and Wisconsin. See *infra* app. V(A), VI(A).

146. See *infra* app. V(A).

In some of these cases, the reader can assume that the court is referring to the federal Constitution.<sup>147</sup> For example, the opinion in *People v. Spring*,<sup>148</sup> refers only to "the constitution," without specifying which constitution.<sup>149</sup> The issue, however, involved *Miranda v. Arizona*,<sup>150</sup> signalling a probable federal basis.<sup>151</sup> The uncertainty caused by the *Spring* court's failure to specify on which constitution it relied, however, invokes the presumption under *Michigan v. Long* that the court based its decision on federal law.<sup>152</sup> This presumption subjects the state court judgment to Supreme Court scrutiny. Thus, the Supreme Court granted certiorari,<sup>153</sup> reversed the Colorado court's judgment and remanded the case.<sup>154</sup> The *Long* presumption also leaves open the possibility that, on remand, the state court could reinstate its original judgment on state constitutional grounds, a possibility recognized by Justice Marshall in his dissent in *Spring*.<sup>155</sup> Justice Marshall emphasized the ability of the Colorado court to interpret the state constitution so as to afford greater rights for the defendant.<sup>156</sup> If the Colorado panel followed Justice Marshall's suggestion, it would render the Supreme Court's holding advisory, in effect indicating that the Supreme Court had unnecessarily spent time deciding the case.

These state court cases are the most ambiguous because they fail to specify whether their rulings are based on state or federal constitutional grounds.<sup>157</sup> This inherent ambiguity forces the Supreme Court to go beyond the face of the opinion<sup>158</sup> to decipher whether federal or state law supports the state court's holding. In addition, it deprives litigants of

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147. See, e.g., *Jones v. New Mexico State Racing Comm'n*, 100 N.M. 434, 436, 671 P.2d 1145, 1147 (1983) (failing to specify whether analysis is of state or federal due process provision, but seeming to base decision on federal authority); *State v. Holmes*, 338 N.W.2d 104, 105 (S.D. 1983) (mentioning the constitution without specifying which one while quoting *California v. Ramos*, 463 U.S. 992 (1983)); *State v. Martin*, 719 S.W.2d 522, 523 (Tenn. 1986) (examining "constitutionality" of state obscenity statute and using federal precedent).

148. 713 P.2d 865 (Colo. 1985).

149. *Id.* at 870.

150. 384 U.S. 436 (1966).

151. *Spring*, 713 P.2d at 870.

152. See *id.* at 869 n.3 (Colo. 1985); see also *supra* text accompanying note 29 (discussing federal jurisdictional presumption under *Long*).

153. See 476 U.S. 1104 (1986).

154. See *Colorado v. Spring*, 107 S. Ct. 851 (1987).

155. *Id.* at 862 (Marshall, J., dissenting).

156. See *id.* at 862 n.2. Since this survey has not found a disposition from the state court on remand, it is too early to tell whether the Colorado court will follow Justice Marshall's suggestion.

157. See, e.g., *State v. Gilbert*, 100 N.M. 392, 398, 671 P.2d 640, 646 (1983) (holding a statute is "constitutionally sound" without further clarification), *cert. denied*, 465 U.S. 1073 (1984); *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 483-84, 347 S.E.2d 99, 100 (1986) (discussing equal protection without distinguishing between state and federal provisions).

158. See *supra* note 53 and accompanying text.

information regarding what rights and protections are offered by the state constitution.

b. *Opinions that Mention Both Constitutional Provisions in Passing or in Citation*<sup>159</sup>

Cases in this category purportedly address both the state and federal constitutions, but the decisions merely mention the applicable constitutional provisions one after the other in a sentence or in citation.<sup>160</sup> These opinions fail to include a clarifying statement indicating on which constitution the judges based their analyses.<sup>161</sup> This category contains 51 cases from 26 states.<sup>162</sup> New York provides cases for purposes of illustration.<sup>163</sup>

In *People v. Class*,<sup>164</sup> the New York Court of Appeals reversed the defendant's conviction on charges of weapon possession.<sup>165</sup> It cited the state constitution in a parenthetical at the outset of the opinion<sup>166</sup> but decided the issue solely on the basis of the federal Constitution.<sup>167</sup> On certiorari, the Supreme Court reversed the New York Court of Appeals decision and remanded the case, stating that the New York Court had failed to satisfy the plain statement requirement of *Michigan v. Long*.<sup>168</sup> In support of its jurisdiction, the Supreme Court explained that the New

159. For cases included in this subcategory, see *infra* app. V(B), VI(B).

160. See, e.g., *Taylor v. State*, 284 Ark. 103, 104, 679 S.W.2d 797, 797 (1984) ("The quick answer is that both the federal and state constitutions guarantee that 'the accused shall enjoy the right to a speedy and public trial.' U.S. Const., Sixth Amendment; Ark. Const., Art. 2 § 10 (1874)."); *State v. Bynum*, 680 S.W.2d 156, 160 (Mo. 1984) (en banc) (both provisions listed consecutively); *State v. Armfield*, 693 P.2d 1226, 1231 (Mont. 1984) (referring to both constitutions in same citation); *Jordon v. Housewright*, 101 Nev. 146, 148, 696 P.2d 998, 999 (Nev. 1985) (per curiam) ("Legislative regulation of the writ process . . . is neither an unconstitutional encroachment on the powers of the judiciary nor a suspension of the writ of habeas corpus in violation of the federal or state constitutions.").

161. See, e.g., *State v. Robinson*, 153 Ariz. 191, 203, 735 P.2d 801, 813 (1987); *State v. Gaston*, 198 Conn. 435, 445, 503 A.2d 594, 599 (1986); *Thompson v. State*, 384 N.W.2d 461, 463 (Minn. 1986). Thus, cases in this category fail to comply with *Long*'s plain statement requirement. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

162. The 26 states are Alabama, Arizona, Arkansas, Colorado, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia and Wyoming. See *infra* app. V(B), VI(B).

At least one commentator has indicated that this is a rather common way of structuring an opinion. See Abrahamson, *supra* note 24, at 1158 (most state court opinions make only passing reference to the state constitution).

163. 6 of 13 New York cases examined fall within this category. See, e.g., *People v. P.J. Video, Inc. I*, 65 N.Y.2d 566, 569, 483 N.E.2d 1120, 1122, 493 N.Y.S.2d 988, 990 (1985); *People v. Class I*, 63 N.Y.2d 491, 493, 472 N.E.2d 1009, 1010, 483 N.Y.S.2d 181, 182 (1984).

164. 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984).

165. See *id.* at 497, 472 N.E.2d at 1013, 483 N.Y.S.2d at 185.

166. See *id.* at 493, 472 N.E.2d at 1010, 483 N.Y.S.2d at 182.

167. See *id.* at 494, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

168. See *New York v. Class*, 475 U.S. 106, 109-10 (1986), *rev'g* *People v. Class I*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984).



York decision merely mentioned both constitutions and, in addition, intertwined state and federal authority.<sup>169</sup> On remand,<sup>170</sup> the New York Court of Appeals rather angrily reinstated its original decision.<sup>171</sup>

In support of its own jurisdiction to hear the case, the Supreme Court stated that our decision did not rest on "an independent and adequate state ground" because it lacked the requisite "plain statement." At this juncture, in our consideration of the case under State law, we cannot disregard the fact that we held that article I, § 12 of our State Constitution was violated by the search. Although on remand we have in the past, as a matter of State law, followed Supreme Court decisions in several cases, in none of those cases had we initially and expressly relied on the State Constitution. Where, as here, we have already held that the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds unless respondent demonstrates that there are extraordinary or compelling circumstances.<sup>172</sup>

In *New York v. P.J. Video, Inc.*,<sup>173</sup> Justice Rehnquist, writing for the majority, dismissed the respondent's argument that the state court decision rested on independent state grounds because the New York Court of Appeals had not issued a plain statement establishing the adequacy and independence of state law grounds.<sup>174</sup> Because the New York Court of Appeals decision was unclear on its face,<sup>175</sup> under *Michigan v. Long*, the Court assumed that the state had based its decision on federal grounds.<sup>176</sup> Justice Rehnquist recognized that the *Video* court cited the New York Constitution only once, at the beginning of the opinion, in the same parenthetical as it cited to the fourth amendment to the United States Constitution.<sup>177</sup> On remand, however, the New York Court of Appeals reinstated its original decision, this time explicitly basing its ruling on the state constitution.<sup>178</sup>

New York judges increasingly emphasize the need for reliance on the state constitution when deciding constitutional issues.<sup>179</sup> Even when citing to *Michigan v. Long* in an attempt to support its "independent" state

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169. *See id.*

170. *See* *People v. Class II*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (per curiam).

171. *See id.* at 433, 494 N.E.2d at 445, 503 N.Y.S.2d at 314.

172. *See id.* (citations omitted).

173. 475 U.S. 868 (1986), *rev'g*, *People v. P.J. Video, Inc. I*, 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985).

174. *See* 475 U.S. at 872 n.4.

175. *See supra* text accompanying note 172.

176. *See* *New York v. P.J. Video, Inc.*, 475 U.S. at 872 n.4 (1986) (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

177. *See id.* (citing *People v. P.J. Video, Inc. I*, 65 N.Y.2d 566, 569, 483 N.E.2d 1120, 1122, 493 N.Y.S.2d 988, 990 (1985)).

178. *See* *People v. P.J. Video, Inc. II*, 68 N.Y.2d 296, 299, 501 N.E.2d 556, 558, 508 N.Y.S.2d 907, 909 (1986), *cert. denied*, 107 S. Ct. 1301 (1987).

179. *See* *Kaye, supra* note 2, at 296-99.

law holding, however, the court has failed to clarify its position.<sup>180</sup> The New York Court of Appeals will continue to butt heads with the Supreme Court on this jurisdictional issue as long as it continues to ignore *Long*'s plain statement requirement. While the New York Court of Appeals may review the case on state constitutional grounds on remand, the Court of Appeals can help to avoid Supreme Court review by issuing in its original decisions a plain statement that it is basing its holding on independent state constitutional grounds.<sup>181</sup> This will also insure increased reliance on the New York Constitution in future state constitutional litigation by showing that the court routinely takes independent review seriously.<sup>182</sup>

The fleeting references to the state constitutions in conjunction with the federal constitutional analysis found in the cases in this category are far from the plain statements envisioned in *Michigan v. Long*,<sup>183</sup> and the states that continue to issue this type of opinion fail to comply with the plain statement requirement.<sup>184</sup> These kinds of references are insufficient to insulate state court judgments from Supreme Court review and do not seem to foster the development of an autonomous body of state constitutional law.<sup>185</sup>

### c. *Cases that Find the Two Constitutional Provisions Identical or Similar*<sup>186</sup>

This category consists of cases that construe state constitutional provisions as similar or identical to their federal counterparts.<sup>187</sup> In these

180. See, e.g., *People v. Millan*, 69 N.Y.2d 514, 522 n.7, 508 N.E.2d 903, 907 n.7, 516 N.Y.S.2d 168, 172 n.7 (1987) (citing to *Long* but also stating that the decision rests "equally" on adequate and independent state grounds while engaging in federal analysis); *People v. Stith*, 69 N.Y.2d 313, 316, 506 N.E.2d 911, 912, 514 N.Y.S.2d 201, 202 (1987) (see asterisked material) (same); *In re Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 72, 510 N.E.2d 325, 333, 517 N.Y.S.2d 456, 464 (1987) (Simons, J., concurring) (see asterisked material) (trying to make clear that decision is based on adequate and independent state grounds); see also *Kaye*, *supra* note 2 (discussing the significance of the New York Constitution).

181. See *supra* notes 29-31 and accompanying text.

182. See *supra* note 174 and accompanying text.

183. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

184. See, e.g., *People v. Cruz*, 66 N.Y.2d 61, 485 N.E.2d 221, 495 N.Y.S.2d 14 (1985), *rev'd and remanded*, 107 S. Ct. 1714 (1987); *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985), *rev'd and remanded*, 106 S. Ct. 3172 (1986); see also *supra* notes 152-77 and accompanying text (cases from this category reviewed by the Supreme Court).

185. See *Long*, 463 U.S. at 1042; *supra* note 32-39 and accompanying text.

186. For cases included in this subcategory, see *infra* app. V(C), VI(C).

187. See, e.g., *Tarr v. State*, 486 A.2d 672, 673 n.1 (Del. 1984) ("[t]hese constitutional provisions are virtually identical"); *Argenta v. City of Newton*, 382 N.W.2d 457, 460 (Iowa 1986) ("[W]e have interpreted the equal protection and due process provisions of our federal and state constitutions to be substantially similar."); *Little v. State*, 300 Md. 485, 493 n.3, 479 A.2d 903, 907 n.3 (1984) ("We have said that [Article 26] is *in pari materia* with its federal counterpart and that decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect."). This method of opinion writing

cases, state courts dismiss the need for any independent state constitutional analysis, analyzing the issues solely under the federal Constitution.<sup>188</sup> The 40 cases in this category represent 17 states, including<sup>189</sup> Maryland<sup>190</sup> and Florida,<sup>191</sup> both of which exemplify this type of analysis.<sup>192</sup>

In *Garrison v. State*,<sup>193</sup> the defendant appealed his conviction of possession with intent to sell narcotics.<sup>194</sup> The Maryland Supreme Court interpreted the applicable state and federal provisions as basically identical,<sup>195</sup> analyzed the issue under federal law, and reversed the conviction.<sup>196</sup> The United States Supreme Court granted certiorari<sup>197</sup> and reversed the Maryland Court's decision.<sup>198</sup> Writing for the majority, Justice Stevens carefully noted that "[r]ather than containing any 'plain statement' that the decision rests upon adequate and independent state grounds, the opinion indicates that the Maryland constitutional provision is construed *in pari materia* with the Fourth Amendment."<sup>199</sup>

While the Maryland court made a judicial determination to construe the state and federal provisions as similar, Florida amended its constitution in 1982 to require that the state search and seizure provisions be interpreted in conformity with the fourth amendment to the United States Constitution and current Supreme Court precedent.<sup>200</sup> As a re-

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is consistent with the co-equal method of analyzing constitutional issues. See *supra* note 46.

188. State constitutional analysis in these cases parallels the Supreme Court interpretation of the federal counterpart. See, e.g., *Tarr v. State*, 486 A.2d 672, 673 n.1 (Del. 1984); *Riley v. State*, 511 So. 2d 282, 289 (Fla. 1987); *State v. Brennan*, 526 A.2d 483, 484-85 (R.I. 1987).

189. The 17 represented states are California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Oklahoma, Rhode Island and Washington. See *infra* app. V(C), VI(C).

190. All of the Maryland cases examined fall within this category. See, e.g., *Garrison v. State*, 303 Md. 385, 391, 494 A.2d 193, 196 (1985), *rev'd and remanded*, 107 S. Ct. 1013 (1987); *Little v. State*, 300 Md. 485, 493 n.3, 479 A.2d 903, 907 n.3 (1984); *State v. Gee*, 298 Md. 565, 568 n.1, 471 A.2d 712, 713 n.1, *cert. denied*, 467 U.S. 1244 (1984).

191. 6 out of the 11 Florida cases examined fall within this category. See, e.g., *Dean v. State*, 478 So. 2d 38, 41 (Fla. 1985); *State v. Dilyerd*, 467 So. 2d 301, 303 (Fla. 1986).

192. It should be noted that in most of these cases, the court finds no constitutional violation on either the federal or state level, especially in search and seizure cases. See, e.g., *Tarr v. State*, 486 A.2d 672, 673 (Del. 1984); *State v. Deskins*, 234 Kan. 529, 530, 673 P.2d 1174, 1177 (1983); *State v. Bishop*, 240 Kan. 647, 658, 732 P.2d 765, 773-74 (1987).

193. 303 Md. 385, 494 A.2d 193 (1985).

194. See *id.* at 387, 494 A.2d at 195.

195. See *id.* at 391, 494 A.2d at 196 ("Article 26 is *in pari materia* with the Fourth Amendment.").

196. See *id.* at 392-95, 494 A.2d 196-98.

197. *Maryland v. Garrison*, 475 U.S. 1009 (1986).

198. *Maryland v. Garrison*, 107 S. Ct. 1013, 1019 (1987).

199. *Id.* at 1016-17 (citation omitted).

200. See Fla. Const. art. I, § 12 (1982). For a discussion of Florida's unique amendment, see generally Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. Fla. L. Rev. 653 (1987); Note, *State Con-*

sult, all Florida opinions involving search and seizure issues, before they begin to discuss any constitutional question, include a statement that state and federal provisions must conform.<sup>201</sup>

States that have amended their state constitutions to require conformity<sup>202</sup> may be distinguished from those that construe federal and state constitutional provisions based on judicially-created practice.<sup>203</sup> States, such as Maryland, that consistently have construed state and federal constitutional provisions to be similar remain free in future decisions to reinterpret the state provisions independently.<sup>204</sup> In Florida, however, the state constitution, absent further amendment, binds the court to follow the federal lead.<sup>205</sup>

Opinions that link the state constitution to the federal Constitution are confusing in that they do not distinguish their analytical foundations.<sup>206</sup> They technically are ambiguous because the judgments are based on both state and federal constitutions.<sup>207</sup> As a result, the United States Supreme Court can adjudicate the federal portion of the decision that is often inextricably intertwined with the state portion of the analysis.<sup>208</sup> Further,

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*stitutions Realigning Federalism: A Special Look at Florida*, 39 U. Fla. L. Rev. 733 (1987).

201. See, e.g., *State v. Hume*, 512 So. 2d 185, 187 (Fla. 1987); *Dean v. State*, 478 So. 2d 38, 41 (Fla. 1985); *State v. Dilyerd*, 467 So. 2d 301, 303 (Fla. 1985).

202. In addition to Florida, California has amended its constitution to contain a provision that requires conformity to United States Supreme Court decisions concerning the exclusionary rule. See Cal. Const. art. I, § 28(d) (1982) (making all relevant evidence admissible in criminal proceedings).

203. In addition to Maryland, these states are Kansas and Delaware. See, e.g., *Tarr v. State*, 486 A.2d 672, 673 n.1 (Del. 1984); *State v. Deskins*, 234 Kan. 529, 531, 673 P.2d 1174, 1177 (1983).

204. This survey did not find such an example. See *infra* app. VI(C). Presumably, once the state court has determined the state constitutional provision to be the same as its federal counterpart, there could be nothing new to consider under the state constitution. For example, in *Commonwealth v. Goldhammer II*, 512 Pa. 587, 517 A.2d 1280 (1986), cert. denied, 107 S. Ct. 1613 (1987), the Pennsylvania Supreme Court expressly declined to extend double jeopardy protection further under the state constitution than provided for by the federal Constitution. See *id.* at 592, 517 A.2d at 1283.

205. See *supra* text accompanying note 197.

206. See, e.g., *People v. Whitt*, 36 Cal. 3d 724, 737 n.8, 685 P.2d 1161, 1168 n.8, 205 Cal. Rptr. 810, 817 n.8 (1984); *State v. James*, 393 N.W.2d 465, 466 (Iowa 1986); *Dixon v. State*, 737 P.2d 942, 944-45 (Okla. 1987).

207. See *supra* notes 182-83 and accompanying text.

208. See Abrahamson & Gutmann, *The New Federalism: State Constitutions and State Courts*, 77 Judicature 88, 97 (1987) ("The Court will presume that state court decisions resolving federal and state issues rest on the resolution of the federal issues in the case."); Althouse, *supra* note 23, at 1503 (presumption in favor of federal review); Collins & Galie, *supra* note 23, at 323-24; Comment, *supra* note 50, at 611-15; Note, *supra* note 10, at 616 (discussing the mechanics of this presumption).

For purposes of Supreme Court review, holding the state and federal provisions to be similar or identical resembles issuing a qualifying statement, because the state court rejects any independent state constitutional interpretation and engages in federal constitutional analysis. Compare *Garrison v. State*, 303 Md. 385, 391, 494 A.2d 193, 196 (1985) (holding state provision *in pari materia* with federal counterpart), *rev'd and remanded*, 107 S. Ct. 1013 (1987) with *People v. Ramos I*, 30 Cal. 3d 553, 600 n.24, 639 P.2d 908,

these cases create an interpretation of the state constitution that parallels the Supreme Court's interpretation of the federal Constitution.

### CONCLUSION

In *Michigan v. Long*, the Supreme Court indicated that it would determine its ability to review state court decisions upholding constitutional rights based on the language of the decisions themselves, and that it would favor federal review if the state decision was ambiguous on this point. It believed that this approach would promote the development of the states' constitutional philosophies, unimpeded by federal interpretation. Significantly, the Court suggested a systematic and concise way for state courts to delineate the constitutional foundation of their decisions to the Supreme Court.

An examination of the various methods of opinion-writing used by state courts after *Michigan v. Long* and their potential consequences for United States Supreme Court review and independent constitutional development leads to the conclusion that few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions. Although a few exceptions exist, state courts have failed to establish universal procedural guidelines for structuring constitutional decisions over the past five years.

If state courts seek to develop state constitutional jurisprudence, they should do so using federal constitutional interpretation only for guidance, not for results.<sup>209</sup> State courts can begin this process by plainly stating the bases for their constitutional decisions and by encouraging litigants and the attorneys appearing before them to raise state constitutional issues at all phases of the proceedings. Until state courts clearly and systematically address this issue, the dual fora provided by state and federal courts for the development of constitutional thought will remain confused and inefficient. The United States Supreme Court will continue to review decisions in which the jurisdiction is ambiguous or unclear and will continue to render advisory opinions, and state constitutional law,

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936 n.24, 180 Cal. Rptr. 266, 294 n.24 (1982) (finding no need to reach independent analysis under state constitution), *rev'd and remanded*, 463 U.S. 992 (1983).

209. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). State courts also can foster development of an independent body of state constitutional jurisprudence by establishing guidelines for attorneys within their jurisdiction to raise distinct state constitutional arguments in their briefs and at trial. See, e.g., *State v. Dellorlano*, 128 N.H. 628, 632, 517 A.2d 1163, 1166 (1986); *Sterling v. Cupp*, 290 Or. 611, 613-19, 625 P.2d 123, 126-29 (1981); *State v. Jewett*, 146 Vt. 221, 229-30, 500 A.2d 233, 238-39 (1985). For possible guidelines, see Bamberger, *Boosting Your Case With Your State Constitution*, A.B.A. J. Mar. 1, 1986, at 49; Carson, *supra* note 95, at 650-52; Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635 (1987); Note, *supra* note 10, at 625-28.

entitled to a unique development and existence, will remain in the shadow of its federal counterpart.

*Felicia A. Rosenfeld*

## APPENDIX

## I. LITERAL COMPLIANCE WITH THE PLAIN STATEMENT RULE

- Stephan v. State*, 711 P.2d 1156 (Alaska 1985)  
*State v. Jones*, 706 P.2d 317 (Alaska 1985)  
*State v. Powers*, 154 Ariz. 291, 742 P.2d 792 (1987)  
*Large v. Superior Court*, 148 Ariz. 229, 714 P.2d 399 (1986)  
*State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986)  
*Winter v. Coor*, 144 Ariz. 56, 695 P.2d 1094 (1985)  
*State v. Bolt*, 142 Ariz. 260, 689 P.2d 519 (1984)  
*Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984)  
*People v. Hill*, 37 Cal. 3d 491, 691 P.2d 989, 209 Cal. Rptr. 323 (1984)  
*People v. Pope*, 724 P.2d 1323 (Colo. 1986)  
*State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), *cert. denied*, 108 S. Ct. 1017 (1988)  
*State v. Williams*, 204 Conn. 523, 529 A.2d 653 (1987)  
*State v. Simms*, 201 Conn. 395, 518 A.2d 35 (1986)  
*State v. Flemming*, 198 Conn. 255, 502 A.2d 886, *cert. denied*, 475 U.S. 1142 (1986)  
*State v. Kimbro*, 197 Conn. 219, 496 A.2d 498 (1985)  
*State v. Scully*, 195 Conn. 668, 490 A.2d 984 (1985), *cert. denied*, 108 S. Ct. 293 (1987)  
*Gaines v. Manson*, 194 Conn. 510, 481 A.2d 1084 (1984)  
*State v. Cohane*, 193 Conn. 474, 479 A.2d 763, *cert. denied*, 469 U.S. 990 (1984)  
*State v. Binet*, 192 Conn. 618, 473 A.2d 1200 (1984)  
*State v. Ferrell*, 191 Conn. 37, 463 A.2d 573 (1983)  
*Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987)  
*State v. Flick*, 495 A.2d 339 (Me. 1985)  
*People v. Chapman*, 425 Mich. 245, 387 N.W.2d 835 (1986)  
*Charter Township of Delta v. Dinolfo*, 419 Mich. 253, 351 N.W.2d 831 (1984)  
*Stringer v. State*, 491 So. 2d 837 (Miss. 1986)  
*Killingsworth v. State*, 490 So. 2d 849 (Miss. 1986)  
*Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 469 U.S. 1221 (1985)  
*State v. Murray*, 129 N.H. 645, 531 A.2d 323 (1987)  
*State v. Cote*, 129 N.H. 358, 530 A.2d 775 (1987)  
*State v. MacDonald*, 129 N.H. 13, 523 A.2d 35 (1986)  
*State v. Jenkins*, 128 N.H. 672, 517 A.2d 1182 (1986)  
*State v. Castle*, 128 N.H. 649, 517 A.2d 848 (1986)  
*State v. Brown*, 128 N.H. 606, 517 A.2d 831 (1986)  
*State v. Kilgus*, 128 N.H. 577, 519 A.2d 231 (1986)  
*State v. Lescard*, 128 N.H. 495, 517 A.2d 1158 (1986)  
*State v. Pliskaner*, 128 N.H. 486, 517 A.2d 795 (1986)  
*State v. Jaroma*, 128 N.H. 423, 514 A.2d 1274 (1986)  
*State v. Saucier*, 128 N.H. 291, 512 A.2d 1120 (1986)

- State v. Pinder*, 128 N.H. 66, 514 A.2d 1231 (1986)  
*State v. Mercier*, 128 N.H. 57, 509 A.2d 1246 (1986)  
*State v. Baillargeon*, 127 N.H. 782, 508 A.2d 1051 (1986)  
*State v. Dukette*, 127 N.H. 540, 506 A.2d 699 (1986)  
*State v. Parker*, 127 N.H. 525, 503 A.2d 809 (1985)  
*State v. Jones*, 127 N.H. 515, 503 A.2d 802 (1985)  
*Soucy v. State*, 127 N.H. 451, 506 A.2d 288 (1985)  
*State v. Bailey*, 127 N.H. 416, 503 A.2d 762 (1985)  
*State v. Oxley*, 127 N.H. 407, 503 A.2d 756 (1985)  
*State v. Glidden*, 127 N.H. 359, 499 A.2d 1349 (1985)  
*Hopps v. State Bd. of Parole*, 127 N.H. 133, 500 A.2d 355 (1985)  
*State v. Cooper*, 127 N.H. 119, 498 A.2d 1209 (1985)  
*State v. Dayutis*, 127 N.H. 101, 498 A.2d 325 (1985)  
*State v. Corey*, 127 N.H. 56, 497 A.2d 1196 (1985)  
*State v. Langone*, 127 N.H. 49, 498 A.2d 731 (1985)  
*State ex rel. McLellan v. Cavanaugh*, 127 N.H. 33, 498 A.2d 735 (1985)  
*State v. Camargo*, 126 N.H. 766, 498 A.2d 292 (1985)  
*State v. Farnsworth*, 126 N.H. 656, 497 A.2d 835 (1985)  
*State v. Barham*, 126 N.H. 631, 495 A.2d 1269 (1985)  
*State v. Maya*, 126 N.H. 590, 493 A.2d 1139 (1985)  
*State v. Cimino*, 126 N.H. 570, 493 A.2d 1197 (1985)  
*State v. Cote*, 126 N.H. 514, 493 A.2d 1170 (1985)  
*State v. Tapply*, 124 N.H. 318, 470 A.2d 900 (1983)  
*State v. Ball*, 124 N.H. 226, 471 A.2d 347 (1983)  
*State v. Miskolczi*, 123 N.H. 626, 465 A.2d 919 (1983)  
*State v. Haskell*, 100 N.J. 469, 495 A.2d 1341 (1985)  
*State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983), *cert. denied*, 465 U.S. 1030 (1984)  
*In re Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987)  
*People v. Millan*, 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987)  
*People v. Stith*, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987)  
*People v. Johnson*, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985)  
*State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987)  
*Beard v. North Carolina State Bar*, 320 N.C. 126, 357 S.E.2d 694 (1987)  
*Turner v. City of Lawton*, 733 P.2d 375 (Okla. 1986), *cert. denied*, 107 S.Ct. 3232 (1987)  
*State v. Lowry*, 295 Or. 337, 667 P.2d 996 (1983)  
*Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986)  
*Krenzelak v. Krenzelak*, 503 Pa. 373, 469 A.2d 987 (1983)  
*In re T.R.*, 502 Pa. 165, 465 A.2d 642 (1983)  
*State v. von Bulow*, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984)  
*McCambridge v. State*, 712 S.W.2d 499 (Tex. Crim. App. 1986)



*Love v. State*, 687 S.W.2d 469 (Tex. Civ. App. 1985)  
*Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984)  
*State v. Jewett*, 146 Vt. 221, 500 A.2d 233 (1985)  
*State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 435 (1986)  
*State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986)  
*State v. Bartholomew*, 101 Wash. 2d 631, 683 P.2d 1079 (1984)  
*State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984)  
*State v. Ringer*, 100 Wash. 2d 686, 674 P.2d 1240 (1983)  
*State v. Rodgers*, 119 Wis. 2d 102, 349 N.W.2d 453 (1984)

## II. PLAIN STATEMENTS WITHOUT CITING TO *MICHIGAN v. LONG*

*State v. Jones*, 706 P.2d 317 (Alaska 1985)  
*Schafer v. Vest*, 680 P.2d 1169 (Alaska 1984)  
*Pool v. Superior Ct. for County of Pima*, 139 Ariz. 98, 677 P.2d 261 (1984)  
*People v. Cook*, 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985)  
*In re William G.*, 40 Cal. 3d 550, 709 P.2d 1287, 221 Cal. Rptr. 118 (1985)  
*Serna v. Superior Court*, 40 Cal. 3d 239, 707 P.2d 793, 219 Cal. Rptr. 420 (1985), *cert. denied*, 475 U.S. 1096 (1986)  
*Conservatorship of Valerie N., Mildred G. v. Valerie N.*, 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985)  
*Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985)  
*People v. Ruggles*, 39 Cal. 3d 1, 702 P.2d 170, 216 Cal. Rptr. 88 (1985)  
*In re Bower*, 38 Cal. 3d 865, 700 P.2d 1269, 215 Cal. Rptr. 267 (1985)  
*People v. Chapman*, 36 Cal. 3d 98, 679 P.2d 62, 201 Cal. Rptr. 628 (1984)  
*People v. Laiwa*, 34 Cal. 3d 711, 669 P.2d 1278, 195 Cal. Rptr. 503 (1983)  
*People v. Smith*, 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983)  
*People v. Sheppard*, 701 P.2d 49 (Colo. 1985)  
*People v. Oates*, 698 P.2d 811 (Colo. 1985)  
*People v. Deitchman*, 695 P.2d 1146 (Colo. 1985)  
*People v. Timmons*, 690 P.2d 213 (Colo. 1984)  
*People v. Corr*, 682 P.2d 20 (Colo. 1984), *cert. denied*, 469 U.S. 855 (1985)  
*People v. Sporleder*, 666 P.2d 135 (Colo. 1983)  
*State v. Evans*, 203 Conn. 212, 523 A.2d 1306 (1987)  
*State v. Chung*, 202 Conn. 39, 519 A.2d 1175 (1987)  
*State v. Shifflet*, 199 Conn. 718, 508 A.2d 748 (1986)  
*State v. Brown*, 199 Conn. 47, 505 A.2d 1225 (1986)  
*State v. Toste*, 198 Conn. 573, 504 A.2d 1036 (1986)  
*State v. Leecan*, 198 Conn. 517, 504 A.2d 480, *cert. denied*, 476 U.S. 1184 (1986)  
*State v. Thompson*, 197 Conn. 67, 495 A.2d 1054 (1985)  
*State v. Braxton*, 196 Conn. 685, 495 A.2d 273 (1985)

- State v. Asherman*, 193 Conn. 695, 478 A.2d 227 (1984), *cert. denied*, 470 U.S. 1050 (1985)
- State v. Marino*, 190 Conn. 639, 462 A.2d 1021 (1983)
- State v. Glosson*, 462 So. 2d 1082 (Fla. 1985)
- Head v. State*, 253 Ga. 429, 322 S.E.2d 228 (1984)
- State v. Barnett*, 68 Haw. 32, 703 P.2d 680 (1985)
- State v. Tanaka*, 67 Haw. 658, 701 P.2d 1274 (1985)
- State v. Newman*, 108 Idaho 5, 696 P.2d 856 (1985)
- State v. Hoak*, 107 Idaho 742, 692 P.2d 1174 (1984)
- State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), *cert. denied*, 468 U.S. 1220 (1984)
- Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986)
- Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985)
- City of Portland v. Jacobsky*, 496 A.2d 646 (Me. 1985)
- State v. Murphy*, 496 A.2d 623 (Me. 1985)
- State v. Chapman*, 496 A.2d 297 (Me. 1985)
- State v. Philbrick*, 481 A.2d 488 (Me. 1984)
- State v. Rowe*, 480 A.2d 778 (Me. 1984)
- State v. Cadman*, 476 A.2d 1148 (Me. 1984)
- State v. Larrivee*, 479 A.2d 347 (Me. 1984)
- Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985)
- Commonwealth v. Ford*, 394 Mass. 421, 476 N.E.2d 560 (1985)
- Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983)
- People v. Catania*, 427 Mich. 447, 398 N.W.2d 343 (1986)
- People v. Wiese*, 425 Mich. 448, 389 N.W.2d 866 (1986)
- State v. Fuller*, 374 N.W.2d 722 (Minn. 1985)
- Stringer v. State*, 477 So. 2d 1335 (Miss. 1985)
- Mhoon v. State*, 464 So. 2d 77 (Miss. 1985)
- Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983)
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- State v. Bradberry*, 129 N.H. 68, 522 A.2d 1380 (1986)
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- State v. Goding*, 128 N.H. 267, 513 A.2d 325 (1986)
- State v. Riley*, 126 N.H. 257, 490 A.2d 1362 (1985)
- City of Claremont v. Truell*, 126 N.H. 30, 489 A.2d 581 (1985)
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- State v. Hamel*, 123 N.H. 670, 466 A.2d 555 (1983)
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*State v. Ragland*, 105 N.J. 189, 519 A.2d 1361 (1986)  
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*Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987)  
*Commonwealth v. Simon*, 509 Pa. 548, 506 A.2d 392 (1986)  
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*State v. Moretti*, 521 A.2d 1003 (R.I. 1987)  
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*State v. Jones*, 406 N.W.2d 366 (S.D. 1987)  
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*State v. Jennette*, 706 S.W.2d 614 (Tenn. 1986)  
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*State v. Shaffer*, 725 P.2d 1301 (Utah 1986)  
*State v. Earl*, 716 P.2d 803 (Utah 1986)  
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*American Fork City v. Cosgrove*, 701 P.2d 1069 (Utah 1985)  
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*State v. Bonham*, 317 S.E.2d 501 (W. Va. 1984)  
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*Brown v. State*, 738 P.2d 1092 (Wyo. 1987)

### III. FEDERAL CONSTITUTIONAL ANALYSIS ONLY

*Ex parte Love*, 513 So. 2d 24 (Ala. 1987)

*Ex parte Cochran*, 500 So. 2d 1179 (Ala. 1985), *cert. denied*, 107 S. Ct. 1965 (1987)

*Ex parte Hilley*, 484 So. 2d 485 (Ala. 1985)

*Robison v. Francis*, 713 P.2d 259 (Alaska 1986)

*Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987)

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*Richardson v. State*, 283 Ark. 82, 671 S.W.2d 164 (1984)

*State v. Smith*, 200 Conn. 465, 512 A.2d 189 (1986)

*State v. Aversa*, 197 Conn. 685, 501 A.2d 370 (1985)

*State v. Castro*, 196 Conn. 421, 493 A.2d 223 (1985)

*State v. Alfonso*, 195 Conn. 624, 490 A.2d 75 (1985)

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*Bassett v. State*, 449 So. 2d 803 (Fla. 1984)

*Ledesma v. State*, 251 Ga. 885, 311 S.E.2d 427, *cert. denied*, 467 U.S. 1241 (1984)

*State v. Langley*, 110 Idaho 895, 719 P.2d 1155, *cert. denied*, 107 S. Ct. 210 (1986)

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*State v. Barrett*, 401 N.W.2d 184 (Iowa 1987)

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*State v. Dittrich*, 223 Neb. 461, 390 N.W.2d 527 (1987)  
*State v. Burchett*, 218 Neb. 78, 352 N.W.2d 188 (1984)  
*Odoms v. State*, 714 P.2d 568 (Nev. 1986)  
*State v. Chapman*, 104 N.M. 324, 721 P.2d 392 (1986)  
*People v. Mercado*, 68 N.Y.2d 874, 501 N.E.2d 27, 508 N.Y.S.2d 419 (1986), *cert. denied*, 107 S. Ct. 1313 (1987)  
*People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984)  
*State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986)  
*State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985)  
*State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984)  
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*Rawlings v. State*, 740 P.2d 153 (Okla. Crim. App. 1987)  
*Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 107 S. Ct. 290 (1987)  
*Lowry v. State*, 729 P.2d 511 (Okla. Crim. App. 1986)  
*Lucas v. State*, 704 P.2d 1141 (Okla. Crim. App. 1985)  
*Liles v. State*, 702 P.2d 1025 (Okla. Crim. App. 1985), *cert. denied*, 476 U.S. 1164 (1986)  
*Cooks v. State*, 699 P.2d 653 (Okla. Crim. App.), *cert. denied*, 474 U.S. 935 (1985)  
*Beeler v. State*, 677 P.2d 653 (Okla. Crim. App. 1984)  
*Cooper v. State*, 671 P.2d 1168 (Okla. Crim. App. 1983)  
*Gary Concrete Prods. v. Riley*, 285 S.C. 498, 331 S.E.2d 335 (1985)  
*State v. Perry*, 278 S.C. 490, 299 S.E.2d 324, *cert. denied*, 461 U.S. 908 (1983)  
*State v. Bonrud*, 393 N.W.2d 785 (S.D. 1986)  
*State v. Devine*, 372 N.W.2d 132 (S.D. 1985)  
*Bemis Pentacostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987), *appeal dismissed*, 108 S. Ct. 1102 (1988)  
*Koonce v. State*, 651 S.W.2d 46 (Tex. Ct. App. 1983)  
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*Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986)  
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*Fondren v. State*, 724 P.2d 461 (Wyo. 1986)

*Patterson v. State*, 691 P.2d 253 (Wyo. 1984), *cert. denied*, 471 U.S. 1020 (1985)

#### IV. STATE CONSTITUTIONAL ANALYSIS ONLY

*City of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984)  
*Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 717 P.2d 434 (1986)  
*People v. Turner*, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984)  
*Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985)  
*State v. Thornton*, 253 Ga. 524, 322 S.E.2d 711 (1984)  
*State v. Woolridge*, 237 Kan. 737, 703 P.2d 1375 (1985)  
*People v. Turmon*, 417 Mich. 638, 340 N.W.2d 620 (1983)  
*State v. Long*, 700 P.2d 153 (Mont. 1985)  
*State v. Ball*, 104 N.M. 176, 718 P.2d 686 (1986)  
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*In re Dostert*, 324 S.E.2d 402 (W. Va. 1984)  
*State v. Buck*, 314 S.E.2d 406 (W. Va. 1984)

#### V. GRAY AREAS

##### A. Cases that Mention the "Constitution" but not which Constitution

*Jones v. New Mexico Racing Comm'n*, 100 N.M. 434, 671 P.2d 1145 (1983)  
*State v. Gilbert*, 100 N.M. 392, 671 P.2d 640 (1983), *cert. denied*, 465 U.S. 1073 (1984)  
*State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986)  
*Parkerson v. State*, 100 Nev. 222, 678 P.2d 1155 (1984)  
*State v. Zuern*, 32 Ohio St. 3d 56, 512 N.E.2d 585 (1987), *cert. denied*, 108 S. Ct. 786 (1988)  
*Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986)  
*State v. Holmes*, 338 N.W.2d 104 (S.D. 1983)  
*State v. Martin*, 719 S.W.2d 522 (Tenn. 1986)  
*State v. Shaffer*, 725 P.2d 1301 (Utah 1986)  
*State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984)

##### B. Opinions that Mention Both Constitutions in Passing or in Citation

*Ex parte Maddox*, 502 So. 2d 786 (Ala. 1986), *cert. denied*, 107 S. Ct. 2185 (1987)  
*State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987)  
*State v. Martin*, 139 Ariz. 466, 679 P.2d 489 (1984)  
*State v. Yslas*, 139 Ariz. 60, 676 P.2d 1118 (1984)  
*Taylor v. State*, 284 Ark. 103, 679 S.W.2d 797 (1984)  
*Arkansas State Highway Comm'n v. Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985)  
*J.W. Black Lumber Co. v. Arkansas Dep't of Pollution Control & Ecology*, 290 Ark. 170, 717 S.W.2d 807 (1986)

- Kwiatoski v. People*, 706 P.2d 407 (Colo. 1985)  
*People v. Walker*, 666 P.2d 113 (Colo. 1983)  
*State v. Gaston*, 198 Conn. 435, 503 A.2d 594 (1986)  
*State v. Perry*, 195 Conn. 505, 488 A.2d 1256 (1985)  
*State v. Johnson*, 190 Conn. 541, 461 A.2d 981 (1983)  
*Riley v. State*, 511 So. 2d 282 (Fla. 1987), *cert. granted*, 108 S. Ct. 1011 (1988)  
*People v. Stout*, 106 Ill. 2d 77, 477 N.E.2d 498 (1985)  
*People v. Gaines*, 105 Ill. 2d 79, 473 N.E.2d 868 (1984), *cert. denied*, 471 U.S. 1131 (1985)  
*People v. Hoskins*, 101 Ill. 2d 209, 461 N.E.2d 941, *cert. denied*, 469 U.S. 840 (1984)  
*People v. Gurell*, 98 Ill. 2d 194, 456 N.E.2d 18 (1983)  
*Hicks v. State*, 510 N.E.2d 676 (Ind. 1987)  
*Gee v. State*, 508 N.E.2d 787 (Ind. 1987)  
*B & M Coal Corp. v. United Mine Workers*, 501 N.E.2d 401 (Ind. 1986), *cert. denied*, 107 S. Ct. 2183 (1987)  
*Merriweather v. State*, 499 N.E.2d 209 (Ind. 1986)  
*Brown v. State*, 495 N.E.2d 178 (Ind. 1986)  
*State v. Freeman*, 236 Kan. 274, 689 P.2d 885 (1984)  
*Smith v. Commonwealth*, 734 S.W.2d 437 (Ky. 1987), *cert. denied*, 108 S. Ct. 762 (1988)  
*Ford v. Commonwealth*, 665 S.W.2d 304 (Ky. 1983), *cert. denied*, 469 U.S. 984 (1984)  
*State v. Brooks*, 505 So. 2d 714 (La.), *cert. denied*, 108 S. Ct. 337 (1987)  
*State v. Berry*, 430 So. 2d 1005 (La. 1983)  
*People v. Hayes*, 421 Mich. 271, 364 N.W.2d 635 (1984)  
*Thompson v. State*, 384 N.W.2d 461 (Minn. 1986)  
*State v. Bynum*, 680 S.W.2d 156 (Mo. 1984)  
*State v. Armfield*, 693 P.2d 1226 (Mont. 1984)  
*State v. Purdie*, 209 Mont. 352, 680 P.2d 576 (1984)  
*State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987)  
*Jordon v. Housewright*, 101 Nev. 146, 696 P.2d 998 (1985)  
*People v. Kozlowski*, 69 N.Y.2d 761, 505 N.E.2d 611, 513 N.Y.S.2d 101 (1987)  
*People v. Rodriguez*, 69 N.Y.2d 159, 505 N.E.2d 586, 513 N.Y.S.2d 75 (1987)  
*State v. Buell*, 22 Ohio St. 3d 124, 489 N.E.2d 795, *cert. denied*, 107 S. Ct. 240 (1986)  
*Gridier v. State*, 743 P.2d 678 (Okla. Crim. App. 1987)  
*Miles v. State*, 742 P.2d 1150 (Okla. Crim. App. 1987)  
*Stohler v. State*, 696 P.2d 1038 (Okla. Crim. App. 1985)  
*State v. Ricci*, 472 A.2d 291 (R.I. 1984)  
*State v. Lawson*, 279 S.C. 266, 305 S.E.2d 249 (1983)  
*Stacey v. State*, 349 N.W.2d 439 (S.D. 1984)  
*State v. Seagroves*, 691 S.W.2d 537 (Tenn. 1985)

*State v. Mitchell*, 682 S.W.2d 918 (Tenn. 1984)  
*Haddad v. Commonwealth*, 229 Va. 325, 329 S.E.2d 17 (1985)  
*Charpentier v. State*, 736 P.2d 724 (Wyo. 1987)  
*Pellatz v. State*, 711 P.2d 1138 (Wyo. 1986)  
*Roberts v. State*, 711 P.2d 1131 (Wyo. 1985)  
*Wilde v. State*, 706 P.2d 251 (Wyo. 1985)  
*Hunter v. State*, 704 P.2d 713 (Wyo. 1985)

C. *Cases that Find Two Constitutional Provisions  
to be Similar or Identical*

*People v. Whitt*, 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984)  
*In re Carolyn S.S. and Michael J.S.*, 498 A.2d 1095 (Del. 1984)  
*Tarr v. State*, 486 A.2d 672 (Del. 1984)  
*State v. Hume*, 512 So. 2d 185 (Fla. 1987)  
*State v. Cross*, 487 So. 2d 1056 (Fla.), *cert. dismissed*, 107 S. Ct. 248 (1986)  
*State v. Jones*, 483 So. 2d 433 (Fla. 1986)  
*Dean v. State*, 478 So. 2d 38 (Fla. 1985)  
*State v. Dilyerd*, 467 So. 2d 301 (Fla. 1985)  
*Washington v. Fireman's Fund Ins. Cos.*, 708 P.2d 129 (Haw. 1985), *cert. denied*, 476 U.S. 1169 (1986)  
*State v. Ching*, 67 Haw. 107, 678 P.2d 1088 (1984)  
*State v. Ankney*, 109 Idaho 1, 704 P.2d 333 (1985)  
*State v. Lewis*, 107 Idaho 616, 691 P.2d 1231 (1984)  
*State v. Lang*, 105 Idaho 683, 672 P.2d 561 (1983)  
*People v. Tisler*, 103 Ill. 2d 226, 469 N.E.2d 147 (1984)  
*State v. James*, 393 N.W.2d 465 (Iowa 1986), *appeal dismissed*, 107 S. Ct. 1881 (1987)  
*Argenta v. City of Newton*, 382 N.W.2d 457 (Iowa 1986)  
*Stracke v. City of Council Bluffs*, 341 N.W.2d 731 (Iowa 1983)  
*State v. Seager*, 341 N.W.2d 420 (Iowa 1983)  
*State v. Bishop*, 240 Kan. 647, 732 P.2d 765 (1987)  
*State v. Strauch*, 239 Kan. 203, 718 P.2d 613 (1986)  
*State v. Lambert*, 238 Kan. 444, 710 P.2d 693 (1985)  
*State ex rel. Pringle v. Heritage Baptist Temple, Inc.*, 236 Kan. 544, 693 P.2d 1163 (1985)  
*State v. Freeman*, 236 Kan. 274, 689 P.2d 885 (1984)  
*State v. Fortune*, 236 Kan. 248, 689 P.2d 1196 (1984)  
*Little v. State*, 300 Md. 485, 479 A.2d 903 (1984)  
*Webster v. State*, 299 Md. 581, 474 A.2d 1305 (1984)  
*State v. Gee*, 298 Md. 565, 471 A.2d 712, *cert. denied*, 467 U.S. 1244 (1984)  
*People v. Smith*, 420 Mich. 1, 360 N.W.2d 841 (1984)  
*State v. Lohnes*, 344 N.W.2d 605 (Minn. 1984)  
*Neal v. State*, 451 So. 2d 743 (Miss.), *cert. denied*, 469 U.S. 1098 (1984)  
*Dixon v. State*, 737 P.2d 942 (Okla. Crim. App. 1987)



*Champeau v. State*, 678 P.2d 1192 (Okla. Crim. App.), *cert. denied*, 469 U.S. 880 (1984)

*State v. Brennan*, 526 A.2d 483 (R.I. 1987)

*State v. Timms*, 505 A.2d 1132 (R.I. 1986)

VI. CASES REVIEWED BY THE UNITED STATES SUPREME COURT:  
REMAND CASES; REVERSED AND NOT REMANDED;  
REVERSED AND AFFIRMED

A. Cases that Mention the "Constitution" but do not  
Specify which Constitution

*People v. Spring*, 713 P.2d 865 (Colo. 1985), *rev'd and remanded*, 107 S. Ct. 851 (1987)

B. Opinions that Mention Both Constitutional Provisions in Passing  
or in Citation

*Van Arsdall v. State*, 486 A.2d 1 (Del. 1984), *vacated and remanded*, 475 U.S. 673 (1986), *on remand*, 524 A.2d 3 (Del. 1987)

*People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985), *rev'd and remanded*, 107 S. Ct. 1160 (1987)

*Stincer v. Commonwealth*, 712 S.W.2d 939 (Ky. 1986), *rev'd*, 107 S. Ct. 2658 (1987) (not remanded)

*People v. Bladel*, 421 Mich. 39, 365 N.W.2d 56 (1984), *aff'd*, 475 U.S. 625 (1986)

*People v. Long*, 413 Mich. 461, 320 N.W.2d 866 (1982), *rev'd and remanded*, 463 U.S. 1032 (1983), *on remand*, 419 Mich. 636, 359 N.W.2d 194 (1984)

*State v. Jackson*, 195 Mont. 185, 637 P.2d 1 (1981), *vacated for clarification*, 460 U.S. 1030, *on remand*, 206 Mont. 338, 672 P.2d 255 (1983)

*People v. P.J. Video, Inc.*, 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985), *rev'd and remanded*, 475 U.S. 868, *on remand*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 107 S. Ct. 1301 (1987)

*People v. Cruz*, 66 N.Y.2d 61, 485 N.E.2d 221, 495 N.Y.S.2d 14 (1985), *rev'd and remanded*, 107 S. Ct. 1714 (1987), *on remand*, 70 N.Y.2d 733, 514 N.E.2d 379, 519 N.Y.S.2d 959 (1987)

*People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985), *rev'd and remanded*, 478 U.S. 697, *on remand*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986)

*People v. Class*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984), *rev'd and remanded*, 475 U.S. 106, *on remand*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (per curiam)

*State v. Rogers*, 17 Ohio St. 3d 174, 478 N.E.2d 984, *vacated and remanded*, 474 U.S. 1002 (1985), *on remand*, 28 Ohio St. 3d 427, 504 N.E.2d 52 (1986)

*State v. Neville*, 312 N.W.2d 723 (S.D. 1981), *rev'd and remanded*, 459 U.S. 553 (1983), *on remand*, 346 N.W.2d 425 (S.D. 1984)

C. *Cases that Find Two Constitutional Provisions  
to be Similar or Identical*

*People v. Carney*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), *rev'd and remanded*, 471 U.S. 386 (1985)

*Garrison v. State*, 303 Md. 385, 494 A.2d 193 (1985), *rev'd and remanded*, 107 S. Ct. 1013 (1987)

*State v. Johnson*, 6 Ohio St. 3d 420, 453 N.E.2d 595 (1983), *rev'd and remanded*, 467 U.S. 493 (1984)

*Commonwealth v. Goldhammer*, 507 Pa. 236, 489 A.2d 1307, *rev'd and remanded*, 474 U.S. 28 (1985), *on remand*, 512 Pa. 587, 517 A.2d 1280 (1986), *cert. denied*, 107 S. Ct. 1613 (1987)

*Commonwealth v. Finley*, 330 Pa. Super. 313, 479 A.2d 568 (1984), *rev'd and remanded*, 107 S. Ct. 1990 (1987)

*State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982), *vacated and remanded*, 466 U.S. 740 (1984)

D. *Qualifying Statements*

*People v. Ramos*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *rev'd and remanded*, 463 U.S. 992 (1983), *on remand*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984), *cert. denied*, 471 U.S. 1119 (1985)

*People v. Ciruolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984), *rev'd and remanded*, 476 U.S. 207 (1986)

*People v. Trombetta*, 142 Cal. App. 3d 138, 190 Cal. Rptr. 319 (1983), *rev'd and remanded*, 467 U.S. 479 (1984), *on remand*, 173 Cal. App. 3d 1093, 219 Cal. Rptr. 637 (1985)

*People v. Bertine*, 706 P.2d 411 (Colo. 1985), *rev'd*, 107 S. Ct. 738 (1987) (not remanded)

*State v. Barrett*, 197 Conn. 50, 495 A.2d 1044 (1985), *rev'd and remanded*, 107 S. Ct. 828 (1987), *on remand*, 205 Conn. 437, 534 A.2d 219 (1988)

*Fensterer v. State*, 493 A.2d 959 (Del.), *rev'd and remanded*, 474 U.S. 15 (1985), *on remand*, 509 A.2d 1106 (Del. 1986)

*Commonwealth v. Upton*, 390 Mass. 562, 458 N.E.2d 717 (1983), *rev'd and remanded*, 466 U.S. 727 (1984), *on remand*, 394 Mass. 363, 476 N.E.2d 548 (1985)

*Real v. Walpole*, 390 Mass. 399, 456 N.E.2d 1111 (1983), *vacated and remanded sub nom. Ponte v. Real*, 471 U.S. 491, *on remand*, *Real v. Walpole*, 396 Mass. 1001, 482 N.E.2d 1188 (1985)

*Commonwealth v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *rev'd and remanded*, 468 U.S. 981 (1984), *on remand*, 394 Mass. 381, 476 N.E.2d 541 (1985)

*Witters v. Washington State Comm'n for the Blind*, 102 Wash. 2d 624,

689 P.2d 53 (1984), *rev'd and remanded sub nom. Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986)

### E. Federal Constitutional Analysis Only

*People v. Brown*, 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), *rev'd and remanded*, 479 U.S. 157 (1987)

*People v. Connelly*, 702 P.2d 722 (Colo. 1985), *rev'd and remanded*, 479 U.S. 157 (1986)

*Myers v. State*, 432 So. 2d 97 (Fla. Dist. Ct. App. 1983), *rev'd and remanded*, 466 U.S. 380, *on remand*, 457 So. 2d 495 (Fla. Dist. Ct. App. 1984) (per curiam)

*James v. Commonwealth*, 647 S.W.2d 794 (Ky. 1983), *rev'd and remanded*, 466 U.S. 341, *on remand*, 679 S.W.2d 238 (Ky. 1984), *cert. denied*, 470 U.S. 1086 (1985)

*State v. Thornton*, 453 A.2d 489 (Me. 1982), *rev'd and remanded*, 466 U.S. 170, *on remand*, 485 A.2d 952 (Me. 1984)

*State v. Murphy*, 324 N.W.2d 340 (Minn. 1982), *rev'd and remanded*, 465 U.S. 420, *on remand*, 348 N.W.2d 764 (Minn. 1984)

*Caldwell v. State*, 443 So. 2d 806 (Miss. 1983), *rev'd and remanded*, 472 U.S. 320, *on remand*, 481 So. 2d 850 (Miss. 1985), *aff'd*, 492 So. 2d 575 (Miss. 1986), *vacated and remanded*, 107 S. Ct. 1269 (1987)

*People v. Burger*, 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986), *rev'd and remanded*, 107 S. Ct. 2636 (1987)

*People v. Quarles*, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *rev'd and remanded*, 467 U.S. 649 (1984), *on remand*, 63 N.Y.2d 923, 473 N.E.2d 30, 483 N.Y.S.2d 678 (1984) (mem.)

*Brown v. State*, 617 S.W.2d 196 (Tex. Crim. App. 1981), *rev'd and remanded*, 460 U.S. 730 (1983), *on remand*, 657 S.W.2d 797 (Tex. Crim. App. 1983)

*State v. Chrisman*, 94 Wash. 2d 711, 619 P.2d 971 (1980), *rev'd and remanded*, 455 U.S. 1 (1982), *on remand*, 100 Wash. 2d 814, 676 P.2d 419 (1984)

### VII. CERTIORARI DENIED OR DISMISSED DUE TO ADEQUATE AND INDEPENDENT STATE GROUNDS

*People v. Nunez*, 658 P.2d 879 (Colo. 1983), *cert. dismissed*, 465 U.S. 324 (1984)

*Casal v. State*, 411 So. 2d 1040 (Fla. Dist. Ct. App. 1982), *cert. dismissed*, 462 U.S. 637 (1983) (per curiam)

*Aimone v. Finley*, 113 Ill. App. 3d 507, 447 N.E.2d 868 (1983), *appeal dismissed*, 465 U.S. 1095 (1984)

*Commonwealth v. Blair*, 592 S.W.2d 132 (Ky. 1979), *cert. denied*, 449 U.S. 962 (1980)

*Blue Cross Hosp. Serv., Inc. v. Frappier*, 681 S.W.2d 925 (Mo. 1984), *vacated and remanded*, 472 U.S. 1014, *on remand*, 698 S.W.2d 326 (Mo. 1985)

*People v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), *cert. dismissed*, 467 U.S. 246 (1984) (per curiam)

*State ex rel. Jones v. Warmuth*, 165 W. Va. 825, 272 S.E.2d 446, *appeal dismissed*, 451 U.S. 977 (1981)

