

SUPREME COURT MONITORING OF STATE COURTS IN THE TWENTY-FIRST CENTURY:

A RESPONSE TO PROFESSOR SOLIMINE

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In the preface to their recent book, *Respecting State Courts*, Professor Solimine and his co-author refer to themselves by describing one as the “more leftist of the two” and the other as the “more centrist of the two,” without explicitly identifying who is who.¹ Having read Professor Solimine’s symposium paper,² I assume he is the “more centrist.” His views are nuanced and balanced, not the products of an ideological agenda, and I agree with much of what he has to say. In this response, however, I will highlight the areas in which our analyses or emphases—if not always our basic conclusions—appear to differ.

I. THE PLAIN STATEMENT RULE

In the well-known formulation of *Michigan v. Long*,³ the U.S. Supreme Court held:

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.⁴

The Supreme Court, therefore, cast on state courts the obligation clearly to demonstrate whether their decisions are grounded in state law rather than federal law.

State judges, who clearly elaborate adequate and independent state law grounds, when they exist, can effectively insulate their decisions from possible reversal by the U.S. Supreme Court. It seems to me obvious, as it is to Professor Solimine,⁵ that state judges who intend to rely on an independent state law ground of decision can easily do so by straightforward compliance with the plain statement rule of *Michigan v. Long*. Moreover, because compliance is easily achieved, this rule reflects a salutary respect for state courts and their

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1. MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM*, at xi (1999).

2. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335 (2002).

3. 463 U.S. 1032 (1983).

4. *Id.* at 1040-41.

5. Solimine, *supra* note 2, at 341.

applications of state law. In addition to the examples of plain statements cited by Professor Solimine,⁶ the opinion of Judge Edward Najam of the Indiana Court of Appeals in *State v. Gerschoffer*⁷ provides a model application of the plain statement rule. Having surveyed federal decisional law relevant to the constitutionality of sobriety checkpoints under the Fourth Amendment, Judge Najam cautioned: “Decisions of the Supreme Court and other federal courts . . . may be persuasive, ‘but Indiana courts should grant neither deference, nor precedential status to such cases when interpreting provisions of our own constitution.’”⁸ He concluded:

In sum, Article I, Section 11 of the Indiana Constitution prohibits police stops of motorists except on the reasonable suspicion required by [cited Indiana cases] We hold, therefore, that a sobriety checkpoint such as the one at issue here, which is conducted absent probable cause or reasonable suspicion of illegal activity, constitutes an unreasonable seizure as proscribed by Article I, Section 11.⁹

A clearer application of the plain statement rule in the service of state law would be difficult to formulate.

The plain statement rule also honors and protects the Supreme Court’s role as the final expositor of federal law. As Professor Solimine observes, by assuming, that ambiguous state court opinions are predicated on federal law, *Long* permits “more review of state court decisions bearing on federal law . . . [and] will in theory lead to greater uniformity of federal law.”¹⁰ However, he expresses only faint praise for the value of uniformity, characterizing it as “unobjectionable enough” but cautioning that it should not be made a “fetish.”¹¹

In my judgment, uniformity—or at least an increased potential for uniformity of federal law—is a value of the first rank. Of course, no one thinks that perfect uniformity is possible. At any given time dozens of circuit court splits on issues of federal law persist within the federal judicial system itself. Indeed, uniformity may even be undesirable if achieved too precipitously, before the competing visions of federal law, which produced disuniformity, have been carefully considered and fully matured in state appellate courts and lower federal courts. Still, if *Long* increases the number of cases eligible for review, it maximizes the Supreme Court’s flexibility in managing its docket by providing the Court with more opportunities to identify the appropriate cases for resolving important federal issues and establish uniformity where it may be most needed.

The hostile reaction of some commentators to the decision in *Long* was, no doubt, driven by the result in the case: the Court *reversed* the Michigan Supreme Court’s decision *upholding* the defendant’s claim of a Fourth Amendment right

6. *Id.* at 341-42 n.33.

7. 738 N.E.2d 713 (Ind. Ct. App. 2000).

8. *Id.* at 720 (citations omitted).

9. *Id.* at 726 (footnote omitted).

10. Solimine, *supra* note 2, at 341.

11. *Id.* (footnote omitted).

to exclusion of incriminating evidence. Specifically, *Long* has been criticized on the basis that the Supreme Court simply should not review state court decisions that over-enforce federal rights.¹² This, indeed, was the centerpiece of Justice Stevens' dissenting opinion in the case.¹³

Professor Solimine finds the "over-enforcement" argument unpersuasive in a structural sense: "In our hierarchical system of courts, it has long been the norm that appellate courts will review the actions of lower courts. The norm has a long pedigree for Supreme Court review of state courts."¹⁴ True enough. But beyond this truism, I discern a more fundamental reason for rejecting the "over-enforcement" criticism.

A state court's *mis*application of federal law should be neither subject to, nor insulated from, Supreme Court review based on the result produced. Why an obviously erroneous application of federal law should be regarded as tolerable is not obvious. Indeed, if uniformity of federal law is important at all, surely disuniformity resulting from misapplication of settled federal law is more egregious than disuniformity which exists because a definitive resolution of a federal law issue has not yet been obtained. However, if a state court identifies protections of individual rights in its *own* law that enhance those afforded by federal law, that is unobjectionable in a federalism sense and may be desirable from an individual rights perspective. Judge Najam's opinion for the Indiana Court of Appeals in the *Gerschoffer* case¹⁵ is a recent example of such an approach.

It is not easy to explain why many state courts have not availed themselves of the opportunity presented by *Long* to rely on available state law, although Professor Solimine rehearses some plausible explanations.¹⁶ Whatever the reasons, however, it appears that the plain statement rule "has had relatively little effect on state court decision-making."¹⁷

II. *BUSH I* AND *II*

I turn now to Professor Solimine's discussion of the impact of *Bush v. Palm Beach County Canvassing Board* (*Bush I*)¹⁸ and *Bush v. Gore* (*Bush II*).¹⁹ In his view, "the Supreme Court reviewing these purportedly state-law-based decisions was unremarkable, given precedent, and it is unlikely to be an omen for more

12. See, e.g., Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984).

13. *Michigan v. Long*, 463 U.S. 1032, 1067-69 (1983) (Stevens, J., dissenting).

14. Solimine, *supra* note 2, at 340. (footnote omitted).

15. *State v. Gerschoffer*, 738 N.E.2d 713 (Ind. Ct. App. 2000); *supra* notes 7-9 and accompanying text.

16. Solimine, *supra* note 2, at 342.

17. *Id.* at 340.

18. 531 U.S. 70 (2000).

19. 531 U.S. 98 (2000).

aggressive Supreme Court review in the future.”²⁰ As a confirmed waffler, I admire his courage in staking out these definitive—and perhaps contrarian—positions. If, however, the Internet listservs to which I subscribe fairly represent the views of most academic lawyers, these two Supreme Court decisions were *remarkable* departures from prior practice. They signal the Court’s willingness, or at least the willingness of certain “unprincipled” Justices, to exercise the power of judicial review as aggressively as may be deemed necessary in future cases. The word “alarmist” comes to mind.

Professor Solimine concludes that the Supreme Court’s remand in *Bush I* did not implicate *Michigan v. Long* because the Florida Supreme Court’s opinion was ambiguous about the *state law* ground of decision and not about whether the opinion was grounded in federal or state law.²¹ I think this is a fair characterization. Although the Supreme Court’s remand did invite clarification of “the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5,”²² it was not to determine whether the federal statute was the *ratio decidendi*. Rather, the purpose of clarification was to determine the extent to which the Florida Supreme Court had construed its *own* election code in light of the “safe harbor” provision in the federal statute.²³

As for *Bush II*, Professor Solimine believes that “properly understood” it “works no change in existing doctrine.”²⁴ Presumably, this is in reference to “the propriety of the Supreme Court reexamining state law on its own terms, even when expounded by the state’s highest court.”²⁵

The concurring opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, found that the Florida Supreme Court had misapplied state law because “[t]he scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the ‘legislative wish’ [of Florida’s legislature] to take advantage of the safe harbor provided by 3 U.S.C. § 5.”²⁶ The Chief Justice went on to say that “in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the ‘safe harbor’ provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an ‘appropriate’ one It significantly departed from the statutory framework in place”²⁷ In her dissenting opinion, Justice Ginsburg condemned the Chief Justice’s rejection of the Florida Supreme Court’s interpretation of Florida law, insisted that greater deference should be given to the Florida Supreme Court’s construction of its own election law, and regarded the cases relied on in the concurring opinion as inapposite.²⁸

20. Solimine, *supra* note 2, at 344.

21. *Id.* at 345.

22. *Bush I*, 531 U.S. at 78.

23. *Id.* at 77-78.

24. Solimine, *supra* note 2, at 347.

25. *Id.*

26. *Bush v. Gore* (*Bush II*), 531 U.S. 98, 120-21 (2000) (Rehnquist, C.J., concurring).

27. *Id.* at 122.

28. *Id.* at 136, 140-41 (Ginsburg, J., dissenting).

Although unpersuaded by Justice Ginsburg's attempt to distinguish the cases cited in the concurring opinion, Professor Solimine seems to approve her call for greater deference.²⁹ With respect to the *level* of deference which is appropriate, he says:

From the standpoint of utilizing precedent, this is perhaps the most problematic aspect of the jurisdictional basis of *Bush II*. Even on these narrow points, only opinions joined by four Justices were fully engaged on the issue, and only the concurring opinion undertook what arguably undeferential reexamination of state law.³⁰

The different conclusions reached by Chief Justice Rehnquist and Justice Ginsburg do reflect different levels of deference in this case. Given the *state* legislative authority conferred by Article II, Section 1, Clause 2, the Chief Justice argued that "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."³¹ Justice Ginsburg said that "Article II does not call for the scrutiny undertaken by this Court."³²

As I read these opinions, however, I think the operative difference in approach has less to do with deference and much more to do with underlying and contrasting views about the *adequacy* of the Florida Supreme Court's construction of Florida law. Terming its remedy "inappropriate," Chief Justice Rehnquist essentially concluded that the Florida Supreme Court's interpretation of the Florida election law was an inadequate state law ground of decision because it "significantly departed from the statutory framework in place" on the date of the election and was inconsistent with the intent of the Florida legislature—which the Florida Supreme Court had itself identified—to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5.³³ By contrast, Justice Ginsburg accepted the Florida Supreme Court's view that "counting every legal vote was the overriding concern of the Florida Legislature"³⁴ regarding this as an adequate state law basis for the recount remedy ordered.

These two opinions, in which seven Justices joined—three in concurrence and four in dissent—portray important differences on the issue of the adequacy of a state law ground of decision where federal interests are arguably implicated, and to a lesser extent, on the related issue of the level of deference owed by federal courts to a state high court's construction of the state law in question. These differences may be problematic strictly in terms of precedential value, but they are real and should not be discounted.

Finally, in *Bush II* seven members of the Supreme Court (not simply a "five-member majority" to which Professor Solimine refers)³⁵ agreed that the Equal

29. Solimine, *supra* note 2, at 349.

30. *Id.*

31. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

32. *Id.* at 142 (Ginsburg, J., dissenting).

33. *Id.* at 122 (Rehnquist, C.J., concurring).

34. *Id.* at 141 (Ginsburg, J., dissenting).

35. Solimine, *supra* note 2, at 345.

Protection Clause of the Fourteenth Amendment was violated by the varying standards and processes by which the manual recounts ordered by the Florida Supreme Court would be conducted in different counties. Of course, two of these seven members, Justices Souter and Breyer, would have remanded the case to the Florida courts “with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments.”³⁶ I do not think Professor Solimine has expressed a view about what this expanded constitutionalization of the right to vote may mean in future election cases, and I am not sure I know what to think. In one of the first published scholarly analyses of *Bush II*, the authors ventured that “there is nothing in the Court’s opinion that suggests any reason the Equal Protection concerns it announces are limited to Presidential elections, nor is there any reason to think these concerns should be limited to that one electoral context.”³⁷ Sometimes, however, context is everything, and *Bush II* may be seen over time as a *sui generis* election case.

III. THE SUPREME COURT’S SHRUNKEN DOCKET

I will touch only lightly on Professor Solimine’s discussion of the Supreme Court’s shrunk docket, which has been well documented and its implications for the Supreme Court’s monitoring of state courts. Consistent with the overall reduction in the numbers of cases decided by the Supreme Court in more recent years, the percentage of state court cases disposed of with full opinions has declined from thirty percent in 1989 to sixteen percent in 1999.³⁸ In terms of Supreme Court oversight, however, this reduction may not be problematic. Based on studies Professor Solimine has examined (and I have not), he tentatively concludes that “by and large, state courts (or at least state high courts) comply with Supreme Court precedent.”³⁹ The good news, then, is that “[w]hether under an expanded or shrunk docket, available evidence seems to indicate that the Supreme Court has been able ‘to a tolerable degree’ to carry out the monitoring function.”⁴⁰ For those of us who believe that state courts are competent to decide federal law issues and, in general, are faithfully committed to following Supreme Court precedents, these conclusions are reassuring.⁴¹

36. *Bush II*, 531 U.S. at 134 (Souter, J., dissenting).

37. SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 48 (2001).

38. Solimine, *supra* note 2, at 353 tbl.1.

39. *Id.* at 358.

40. *Id.* at 359.

41. Like Professor Solimine, my legal career began with a federal judicial clerkship. My clerkship was with Judge Ruggero Aldisert of the Third Circuit Court of Appeals, and my earliest views on the parity of state and federal courts were influenced by my work with him. Judge Aldisert’s earlier experience as a state court trial judge informed his commitment to a truly federalist allocation of power between the national courts and state courts. He was troubled, for example, by what he saw as an “infatuation with federal courts as the preferred forum for litigation.” Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge’s Thoughts on*

IV. STATE INTERMEDIATE APPELLATE COURTS

Now, what can be said about state intermediate appellate courts in particular? Professor Solimine cites one characterization of intermediate appellate courts: “the draft animals of appellate review.”⁴² Others have termed the job of intermediate appellate courts “donkey work.”⁴³ I take these characterizations to be less than felicitous ways of making the point that an overwhelming majority of the cases appealed within state court systems are resolved by their intermediate appellate courts. For example, in 1999 the Indiana Court of Appeals, composed of fifteen judges, decided 2220 appeals by written opinion, for an average of 148 opinions per judge (not counting dissenting or concurring opinions).⁴⁴ During the same period, the Indiana Supreme Court, composed of five justices, issued written opinions in 216 cases, for an average of forty-three opinions per justice.⁴⁵ In other words, judges of the Indiana Court of Appeals issued over ten times more written opinions in total and over three times more opinions per judge than justices of the Indiana Supreme Court.

It is common place that state intermediate appellate courts, whose jurisdiction is generally non-discretionary (thus explaining their substantial caseloads) perform primarily an error-correcting role: because they experience the general flow of appellate litigation, the principal responsibility of ensuring fidelity to existing law in judicial decision-making falls on them. In discharging this important function, the intermediate appellate courts screen out cases for the state high courts, “enabling the latter (in conjunction with their discretionary jurisdiction) to better engage in their law development role.”⁴⁶

That the flow of appeals is centered in the intermediate appellate courts also implicates a role for them which reaches beyond error-correcting and screening.

[I]t is those courts which are in a better position to determine in what areas of the law confusion is occurring and where reform or clarification is necessary. This suggests a second role for the intermediate court—to stimulate revision in the law, either by the highest court through common

Section 1983, Comity and the Federal Caseload, 1973 LAW & SEC. ORD. 557, 559. He was bluntly critical of federal judicial opinions which reflect “deep distrust of state law, state courts, state government, and state and locally elected officials.” Ruggero J. Aldisert, *Philosophy, Jurisprudence, and Jurisprudential Temperment of Federal Judges*, 20 IND. L. REV. 453, 494 (1987). Such views are not shared by some academic lawyers, whose focus on the importance and excellence of the federal judicial system comes at the expense of a more balanced view of the proper and complementary roles of federal courts and state courts. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), cited in Solimine, *supra* note 2, at 356 n.100.

42. Solimine, *supra* note 2, at 360.

43. DANIEL J. MEADOR ET AL., APPELLATE COURTS 250 (1994).

44. SUPREME COURT OF INDIANA, 1999 INDIANA JUDICIAL REPORT 26-27 (1999).

45. *Id.* at 21.

46. Solimine, *supra* note 2, at 360.

law doctrine or by the legislature through the enactment of statutes.⁴⁷

The intermediate appellate courts can accomplish this by embedding in their written opinions direct or oblique signals to the state legislature or the state's highest court that change or reform is needed. Indeed, these courts can take the impulse for reform into their own hands—less legitimately perhaps—by the process of distinguishing unwelcome precedent for the purpose of modifying or undermining established doctrine.⁴⁸

Is it legitimate, however, for a state intermediate appellate court openly to refuse to follow a state supreme court decision because it is convinced that the supreme court itself would no longer adhere to its earlier decision? Consider the view of Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit:

[J]ust as an intermediate federal appellate court may properly decline to follow a U.S. Supreme Court decision when convinced that the Court would overrule the decision if it had the opportunity to do so . . . , so many intermediate state appellate courts decline to follow earlier state supreme court decisions for the same reason—especially when almost a century has passed since the earlier decisions. And if we think the intermediate state appellate court has made a correct or even, perhaps, just a defensible prediction of what the state supreme court would do if the question were put to it, then we are bound to follow its ruling in a diversity case or any other case where the issue is one of state law⁴⁹

This seems to be a sensible portrayal of a state intermediate appellate court's legitimate function under the circumstances described.

If federal courts are permitted to look to decisions of state intermediate appellate courts in ascertaining state law, to what sources may the latter look in ascertaining federal law, assuming that the U.S. Supreme Court has not spoken directly on the issue? Presumably, they may canvas the decisions of lower federal courts for guidance. However, Professor Solimine poses a stickier question: "What if the lower federal courts and the state high court disagree on an issue of federal law?"⁵⁰ His answer:

[G]iven the truism that the Supremacy Clause binds all parts of the federal and state governments, including state IACs, it would seem to follow that an IAC could justifiably depart from a state supreme court holding if the overwhelming weight of authority (from lower federal courts, and from other states' courts) was to the contrary.⁵¹

These qualifiers load the conclusion, but it seems to me that a state

47. MEADOR ET AL., *supra* note 43, at 247.

48. *Id.* at 247-48.

49. *Indianapolis Airport Auth. v. Am. Airlines, Inc.*, 733 F.2d 1262, 1272 (7th Cir. 1984).

50. Solimine, *supra*, note 2, at 362.

51. *Id.*

intermediate appellate court should adhere to its state supreme court's interpretation of the federal law unless—to add my own qualifier—the intermediate appellate court concludes for legitimate reasons that the state's highest court would no longer follow its earlier interpretation (e.g., it bears the earmarks of a legal relic). This would be congruent with hierarchical expectations, and I think a contrary conclusion based on the Supremacy Clause begs the question. While the Supremacy Clause obligates state courts to abide by federal law, including federal law announced in orders of lower federal courts having geographical jurisdiction within the state, the authoritative expositor of federal law is the United States Supreme Court, not “overwhelming” (but non-binding) authority from “lower federal courts, and from other states’ courts.”⁵² Why then should a state intermediate appellate court reject its supreme court's considered interpretation of federal law, especially if it is true—as Professor Solimine has argued—that state courts are fully competent to decide issues of federal law, subject only to ultimate monitoring by the United States Supreme Court?

52. *Id.*