

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

MICHAEL E. SOLIMINE*

INTRODUCTION

Over two centuries ago, the Framers of the Constitution contemplated that the United States Supreme Court would, in certain circumstances, review decisions of state courts. Fulfilling that vision, the Supreme Court has periodically reviewed cases from state courts—at least those dealing in some way with federal law. As a result, there is nothing particularly novel about the Supreme Court hearing cases on appeal from state court, along with those from the lower federal courts.

The Supreme Court's monitoring of litigation in state court is simply another aspect of judicial federalism. That oft-used term¹ carries various meanings in different contexts. In modern discussions, it usually denotes two related themes. One theme involves examination of how courts, particularly federal courts, police the boundaries of power between federal and state government. This includes, for example, how federal courts interpret congressional power under the Commerce Clause or Section 5 of the Fourteenth Amendment; how federal courts interpret the Eleventh Amendment to prevent Congress from authorizing private plaintiffs to sue states for violations of federal law in federal court; or how the Supreme Court requires states to follow the Bill of Rights, incorporated through the Due Process Clause of the Fourteenth Amendment.

The second theme of judicial federalism relates to the interaction of federal and state courts. Examples here include the impact of jurisdictional and other procedural requirements in federal court by past, concurrent, or future litigation in state court; how state courts adjudicate issues of federal law; how the Supreme Court reviews such adjudication; and how state courts have interpreted their own constitutions to protect rights to an extent not found in federal constitutional law. The latter development of the past three decades is often referred to as the “new judicial federalism.”²

* Donald P. Klekamp Professor of Law, University of Cincinnati College of Law. B.A., 1978, Wright State University; J.D., 1981, Northwestern University. This Article was presented at the symposium *Caught in the Middle: A National Symposium on the Role of State Intermediate Appellate Courts* at Indiana University School of Law—Indianapolis on March 30-31, 2001. Thanks to Marianna Brown Bettman, Evan Caminker, Tracey George, Lonny Hoffman, Rick Pildes, and James Walker for their helpful comments on an earlier draft. They do not necessarily agree with the views expressed here. Thanks also to Jennifer Bergeron for her excellent research assistance.

1. A search of the LEXIS law review database in March 2001 produced over 750 hits for the term “judicial federalism.”

2. For a more complete discussion of the various strands of judicial federalism, see MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 4-9 (1999). For brief discussions of the origin of the term “new judicial federalism,”

In this Article, I will address the second theme of judicial federalism, with particular focus on the role of Supreme Court review of decisions of state courts and its impact on the judicial system. In that regard, I will consider two apparent shocks to the system of review, one recent and well known, the other one long-standing, not so well known, and less the subject of comment. The first is *Bush v. Gore*,³ in which the Supreme Court reversed a decision of the Florida Supreme Court, thus resolving the post-presidential election controversy in favor of then Texas Governor George W. Bush. The Florida court's decision, ordering manual recounts of votes, was ostensibly based on state law, yet the Supreme Court majority (or at least three Justices thereof), in effect, disagreed with the interpretation of state law to enable it to reach the federal issues. The question is whether the majority's aggressive review portends a new role for the Court in other state court cases.

The second, less noticeable but potentially as profound a shock to the understood system of Supreme Court review, is the Court's decreasing caseload. Through most of the Twentieth Century the Court was deciding well over 100 cases per Term on the merits. As late as the mid-1980s, the number was almost 150. But starting in about 1990, the number has spiraled sharply downward, and for much of the 1990s, the Court was only deciding seventy to eighty cases per Term. Meanwhile, caseloads in the lower federal courts, and state courts, are either increasing or, at least, static. So the likelihood of review of any given decision, not high to begin with, is even lower today. What might account for the Supreme Court's shrunken caseload, and what are its implications for state court decision-making?

In this Article, I will focus on these two potential systemic shocks and address related issues. Part I considers the effect of Supreme Court review on the development of state constitutional law. After briefly surveying the history of Supreme Court review of state court decisions and of the new judicial federalism, Part I addresses the impact of two controversial Court decisions: *Michigan v. Long*,⁴ in which the Court held that review of federal issues was possible, unless the state court plainly stated that it was relying on state law, and the aforementioned *Bush v. Gore*.

Part II of this Article turns toward the Supreme Court's recent shrunken docket, and in particular its possible impact on the adjudication of federal issues in state courts. To that end, Part II documents the diminished overall caseload and the lessened review of cases from state courts. It then turns to the evidence on "parity," the concept that state courts are usually just as capable as federal courts of fully and fairly adjudicating federal rights. Lastly, Part II addresses whether parity is—or should be—dependent in part on the availability of Supreme Court review of state court decisions, and how the diminished caseload impacts that dependence.

Finally, Part III of this Article considers the role of state intermediate

see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 48, 138-39 (1998).

3. 531 U.S. 98 (2000) (per curiam).

4. 463 U.S. 1032 (1983).

appellate courts (IACs) regarding the issues addressed in Parts I and II. Most of the cases and literature concern decisions by state supreme courts and the review of those decisions. Part III considers the heretofore neglected role of IACs in the new judicial federalism, and Supreme Court review of decisions of IACs, when the latter are not first reviewed by state supreme courts.

I. MICHIGAN V. LONG, BUSH V. GORE, AND THE DEVELOPMENT OF STATE CONSTITUTIONAL LAW

A. *Setting the Stage: Supreme Court Review and the New Judicial Federalism*

As already stated, the Supreme Court has been reviewing decisions from state courts for two centuries. It is beyond dispute that the Supreme Court is, and should be, the final expositor of federal law (within the court system, at least), as derived from the text and history of Article III of the Constitution. To perform that role and to ensure uniformity of federal law, the Supreme Court has from the beginning been statutorily empowered by Congress to review decisions of state courts. The somewhat complicated history of those provisions and the cases interpreting them need not concern us here.⁵ The principal statute as it stands now, enacted in 1914,⁶ has been interpreted to limit Supreme Court review to state court decisions based on federal law, not those based on state law grounds.⁷

State courts have long been deciding issues of federal constitutional and statutory law, and have, for equally long, been rendering decisions interpreting their own state constitutions as well.⁸ But only in the last three decades has state constitutional law, particularly regarding individual rights and liberties, been the special focus of attention by judges, litigants, and commentators. In the new judicial federalism, some state courts (particularly the highest courts of a state) have interpreted their own constitutions to protect liberty interests above the floor of rights found in the U.S. Constitution, as interpreted by the Supreme Court. *State Constitutions and the Protection of Individual Rights* was an

5. For overviews of the history of Supreme Court review of state court decisions, see RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 492-509 (4th ed. 1996) [hereinafter *HART & WECHSLER*]; CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 782-800 (6th ed. 2002).

6. 28 U.S.C. § 1257 (1994).

7. While the language of 28 U.S.C. § 1257 would seem to limit review to state cases presenting federal issues, it has been argued persuasively that there is no *constitutional* barrier to the Court also reviewing state decisions that were based on state law. The norm limiting review to cases raising federal issues is better viewed as a prudential one, based on respect for state autonomy when a state court interprets its own law. See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1294, 1372 (1986).

8. For an excellent historical discussion of the two-century development of state constitutions and of state constitutional law, see generally TARR, *supra* note 2.

influential law review article by U.S. Supreme Court Justice William Brennan, who urged state judges to interpret expansively the rights-granting provisions of their own constitutions in response to the restrictive decisions of his own Court.⁹ As a result, for several decades state courts have issued hundreds of decisions expanding rights based on state law, beyond that found in the federal constitution.¹⁰

These developments have generated an enormous amount of scholarly literature as well.¹¹ A full summary of that literature is unnecessary here. Suffice it to say, there is much discussion of how state judges might interpret state constitutional provisions that are often (though not always) similar to their federal constitutional counterparts; whether and how state judges differ in their adjudication of state rights as compared to federal rights; and when and how activism by state judges is justified in areas largely bereft of federal judicial supervision (e.g., public school finance).¹²

More relevant for present purposes, however, is the fact that systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions. In other words, the majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts. This trend was first documented by Barry Latzer¹³ and James Gardner¹⁴ in the early 1990s and has been confirmed by numerous subsequent studies.¹⁵ Some of these studies either covered limited time periods or studied only one or two specific issue areas. More recent and comprehensive empirical studies essentially have confirmed the dominance of lockstep analysis, but also present a more nuanced picture than previous studies. For example, one recent study examined 627 state supreme court decisions, from twenty-five randomly chosen states, covering states' bills of rights in nineteen issue areas.¹⁶ The study

9. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977). As a measure of the significance of the article, one survey found that this article ranked twenty-sixth on the list of the 100 most-cited law review articles. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 768 (1996).

10. For useful summaries and discussions of the burgeoning case law, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW* (2d ed. 1996 & Supp. 1999); TARR, *supra* note 2, at 165-72.

11. In her detailed treatise, Jennifer Friesen has a 107-page bibliography of books and law review articles, *see* FRIESEN, *supra* note 10, at 825-931, and an additional twenty-seven pages in the most recent supplement, *see id.* at 289-315 (Supp. 1999).

12. *See generally* SOLIMINE & WALKER, *supra* note 2, at 88-96.

13. *See* Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190 (1991).

14. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

15. For discussion and summaries of other studies, *see* SOLIMINE & WALKER, *supra* note 2, at 89-96; TARR, *supra* note 2, at 167-68.

16. *See* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1191-94 (2000) (describing methodology).

confirmed the dominance of the lockstep for most issue areas, but found at least three areas (free exercise of religion, right to jury trial, and certain search and seizure issues) in which over half of the cases departed from the lockstep and granted more protection to the right involved.¹⁷ Another recent study, covering forty-nine states, examined state constitutional and statutory provisions, which in addition to case law, covered thirteen issues of criminal procedure.¹⁸ It found that forty-one of the states provided protection greater than federal law in at least one area, while four states departed from federal practice in nine of the areas.¹⁹ The mean number of doctrines per state in which there was greater protection than the federal standard was 3.14.²⁰

B. The Impact of Michigan v. Long

United States Supreme Court decisions have played some role in the development of the new judicial federalism. Recent developments in state constitutional law can be attributed, in part, to explicit or implicit reaction to Supreme Court decisions refusing to uphold or expand a particular right. It might seem, however, that potential Supreme Court review of state court decisions would not play a role. Since those decisions are based on *state* law, normally the Supreme Court should not be reviewing them at all.

The review function comes into play when the state court decision explicitly relies on both federal and state law, or is ambiguous on the issue of what source(s) of law is relied upon. In the former situation, the Supreme Court has held that review is normally unavailing if the state law component of the reasoning is adequate to resolve the case and is independent of federal law grounds. That principle, or something like it, has been the rule for years.²¹ In the latter situation, to determine if the independence prong has been met, the Court used various approaches, but settled in 1983 on a clear statement approach in the oft-discussed case, *Michigan v. Long*.²² The facts and holding are no doubt familiar and need only brief review here. The Michigan Supreme Court held a police search to be unlawful, and in doing so relied exclusively on federal case

17. *See id.* at 1194-1202 (describing results).

18. *See* David C. Brody, Criminal Procedure Under State Law: A State-Level Examination of Selective New Federalism 7-8 (paper presented at National Conference on Federalism and the Courts, University of Georgia, Feb. 23-24, 2001) (describing methodology) (on file with author). The excluded, fiftieth state was California, the reason being that a constitutional provision in that state, added by referendum in 1982, limits the ability of state judges to depart from the lockstep in criminal cases. *Id.* at 25 n.1 (citing CAL. CONST. art. I, § 28(d)). The author of the study apparently felt that this provision so deprived California state judges of freedom of action that include California data would skew the national results.

19. *Id.* at 8.

20. *Id.* at 9-10 (describing results).

21. For discussions of the adequate and independent state ground doctrine, see HART & WECHSLER, *supra* note 5, at 524-90; LARRY W. YACKLE, FEDERAL COURTS 161-74 (1999).

22. 463 U.S. 1032 (1983).

law, but for brief citations to the provisions of the Michigan Constitution analogous to the Fourth Amendment. The majority opinion by Justice O'Connor adopted as an interpretative rule that the adequacy and independence of a state ground must be "clear from the face of the opinion."²³ This default rule was necessary, the Court explained, to avoid advisory opinions, refrain from the "intrusive practice of requiring state courts to clarify" their opinions, and to maintain the uniformity of federal law.²⁴ Under the newly clarified test, the Court found no plain statement of reliance on state law in the Michigan Supreme Court opinion and thus proceeded to reach the merits of the case.²⁵ The Court has adhered to and applied the "plain statement rule" in subsequent cases.²⁶

I have previously summarized some questions raised as to the impact of *Michigan v. Long* on the new judicial federalism:

Coming as it did, just as the idea of increased state court reliance on their own constitutions began to flower, it was no shock that *Michigan v. Long* generated considerable academic commentary. Some argued that the new plain statement rule unnecessarily expanded federal jurisdiction and was a thinly veiled attempt to chill the expansion of rights by state courts. Others supported the decision, arguing that it preserved the need for uniformity in federal law and could encourage an intersystem dialogue on the scope of rights between different levels of court. Likewise, some argued that the plain statement rule would be a disincentive for state courts to expand rights under their own constitutions, as it would purportedly be difficult to comply with, and expose a forthright state court to the displeasure of the electorate. Others contended that the rule would encourage state courts to develop their own law, since those courts would, presumably, be motivated to consider whether they should rely on federal or state law.²⁷

In my view, *Michigan v. Long* has had relatively little effect on state court decision-making, and to the extent that it has, it has been more positive than negative. Start with the proposition of some critics that the Supreme Court should not at all be reviewing state court decisions that overenforce federal rights.²⁸ The proposition is not persuasive. In our hierarchical system of courts, it has long been the norm that appellate courts will review the actions of lower

23. *Id.* at 1041.

24. *Id.*

25. *See id.* at 1043-44.

26. *See, e.g.,* *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam); *Arizona v. Evans*, 514 U.S. 1 (1995).

27. SOLIMINE & WALKER, *supra* note 2, at 99 (footnotes omitted).

28. *See Michigan v. Long*, 463 U.S. 1032, 1065-70 (1983) (Stevens, J., dissenting); *cf.* Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1188-1205 (1998) (extolling benefits of state courts overenforcing federal rights, and discussing though apparently not expressly disagreeing with *Michigan v. Long*).

courts. The norm has a long pedigree for Supreme Court review of state courts.²⁹ Since state courts are, after all, staffed by state personnel, it is no insult to state judges that their exposition of federal law will be subject to review by the final expositor of federal law for all fifty states. Indeed, such review heightens the probability that state judges are correctly following federal law, no small matter given the vast numbers of state court cases and the limited caseload capabilities of the Supreme Court.³⁰

To the extent *Michigan v. Long* in theory permits more review of state court decisions bearing on federal law, it will in theory lead to greater uniformity of federal law. This seems unobjectionable enough, but in a federal system of government, a “fetish should not be made out of uniformity.”³¹ Even with regard to federal law, uniformity is impossible. The Supreme Court cannot review even a significant percentage of cases raising federal issues decided in the lower federal courts, much less those from state courts, and as a result federal law will always be marked by some lack of uniformity.³² However, we should not go out of our way to institutionalize a lack of uniformity in federal law either.

Difficulty in compliance with the plain statement rule likewise cannot be seriously contended.³³ More intriguing is, given that ease, why it appears that

29. See generally Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

30. This point is developed *infra* Part III.

31. SOLIMINE & WALKER, *supra* note 2, at 101. Making uniformity the paramount or only value would unnecessarily denigrate other values of federalism, such as promoting experimentation and protecting liberty by decentralizing power. For an excellent discussion of the various aims of federalism, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

32. LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HAND CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 101 (2001). Some disparity in federal law is not only inevitable, but tolerable and even welcome. The precedential authority of rulings of the lower federal courts and of state courts will be confined to either one state (or part of one state) or at most several states within a U.S. Court of Appeals Circuit. Disparate federal law rulings on whose effects are not externalized beyond those regions are not especially problematic. In addition, there may be advantages to having such disparity should the Supreme Court eventually decide to settle the issue. SOLIMINE & WALKER, *supra* note 2, at 71; see also Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (studying unresolved conflicts among the federal circuit courts and finding that disruption and uncertainty of such conflicts are often less problematic than commonly assumed).

33. Jennifer Friesen lists several model plain statements, drawn from those used in cases:

1. In reaching this conclusion, we do not rely on federal authorities, and any reference to them is solely for illusive purposes. The [State] Constitution provides separate, adequate, and independent grounds upon which we rest our findings.”
2. “Our decision is based solely upon adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983).”
3. “We base our decision strictly upon the [State] Constitution; any reference to the United States Constitution is merely for guidance and does not compel our decision.”

many state courts do not make plain statements of reliance on state law when given the opportunity, or simply remain ambiguous on the issue. One possible reason, of course, is that state judges may find it inappropriate to depart from federal precedent, and thus reject developing a different state constitutional rule. In many instances, however, they do not clearly articulate that in their opinions. Another possible reason is that attorneys out of design or ignorance may ignore the issue and rely exclusively on federal law in their briefing.³⁴

The relatively low rate of making plain statements has also been linked to the alleged electoral effects of *Michigan v. Long*. Some supporters and critics of the decision appear to argue, to varying degrees, that the plain statement rule encourages strategic behavior by judges. State judges, many of whom are elected, may take more or less political heat from interested people for decisions, depending on the reasoning they supply for the decision. Thus, for example, Ann Althouse has suggested that the plain statement rule “forces state judges to endure one form of scrutiny or the other and deprives them of the ability to immunize themselves with ambiguity.”³⁵ Or, as Edward Hartnett has argued, the plain statement rule encourages or at least reminds state judges to rely on federal law:

A state court that invalidates state action on federal constitutional grounds is protected from popular accountability by the availability of review in the Supreme Court. In effect, the state court can say, “If you don’t like what we’ve done, ask the Supreme Court of the United States to review it.” If the Supreme Court denies certiorari—as it does in the vast majority of cases—responsibility for the judgment is spread between the state court and the Supreme Court.³⁶

Hartnett goes on to suggest that this “helps explain why state judges have voiced so little opposition to *Michigan v. Long*,” and why they frequently rely on the lockstep analysis in practice.³⁷

4. “Federal precedents cited herein are merely illustrative and do not compel the result we reach.”

5. “In this case, as in all cases [decided by this court], any reference to federal law is for illustrative purposes only and in no way compels the result reached in this or any other case.”

FRIESEN, *supra* note 10, at 56 (footnotes omitted) (alterations in source).

34. See Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1071 (1997); cf. Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 105 (1998) (“Of course the best strategy available to litigants in constitutional litigation is to brief claims under both federal and independent state grounds.”).

35. Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 989 (1993).

36. Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 980 (1997) (footnote omitted).

37. *Id.* at 981-82.

While there is some validity in these arguments, the asserted electoral connection is overstated. It is well documented that the vast majority of state judicial elections, whether in contested races or for retention elections, are low-profile affairs. Many voters do not vote in judicial races at all. Those who do often base their vote on name recognition or partisan affiliation rather than on the “issues” in any meaningful sense of the term. There is a very high rate of reelection for incumbent judges under any electoral scheme, and many judges, especially on lower courts, run unopposed.³⁸

To be sure, there is evidence that elections for state judges, particularly on supreme courts, have become more contentious and contested. Some of this is due, at least in part, to controversial rulings based on state constitutional law.³⁹ But there seems to be little systemic evidence that the increasing attention given to some judicial races is driven by the parsing of court decisions to see if reliance has been made on federal or state law. If anything, data from a broad range of cases seems to suggest the lack of a connection between the judicial electoral structure of a state and its propensity to develop state constitutional law. For example, one of the systemic studies of the new judicial federalism, referenced earlier, found that states whose supreme court justices were appointed or selected by merit with retention elections were *less* likely to provide protections above the federal floor than states that used contested elections.⁴⁰ Studies of state supreme court decision-making on more specific issues, such as school-financing litigation⁴¹ or the legality of confessions to police,⁴² found no correlation between

38. For summaries and discussion of the considerable literature supporting the assertions made in this paragraph, see Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (1999); Richard L. Hasen, “*High Court Wrongly Elected*”: A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305 (1997); Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, CAP. U. L. REV. (forthcoming 2002).

39. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 99-107 (1998); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

40. Brody, *supra* note 18, at 17, 19; see also James N.G. Cauthen, *Judicial Innovation under State Constitutions: An Internal Determinants Investigation*, 21 AM. REV. POL. 19, 19, 32-34 (2000) (discussing study of state constitutional bill of rights cases, from state supreme courts in twenty states, covering 532 cases from 1970 to 1994, that indicates inter alia that judicial independence is not correlated with upholding such rights in a statistically significant way).

41. See Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1136 (2000); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1174 (2000). Perhaps illustrating the lack of consensus on whether state judicial selection methods impact state constitutional law, these studies started out with opposite hypotheses. Compare Swenson, *supra*, at 1152 (“Elective courts are more likely to strike down school finance schemes than are appointive courts.”), with Lundberg, *supra*, at 1128 (“[e]lected judges would be less likely to vote to overturn state school finance legislation. . .”).

For purposes of this Article, these conclusions must be used with caution. School finance

the method of judicial selection and the level of activism (or lack thereof) on these issues.

These studies, then, seem to undermine the notion that the plain statement rule, for good or ill, impacts the propensity of judges to rely on state constitutional law. If it did, we would expect state judges less subject to popular accountability to be more likely to develop state constitutional law. Over the broad range of cases and issues, the evidence does not support that view.

C. *The Impact of Bush v. Gore*

We now come to the two Supreme Court decisions handed down in December 2000, *Bush v. Palm Beach County Canvassing Board* (*Bush I*),⁴³ and *Bush v. Gore* (*Bush II*).⁴⁴ The two cases vacated decisions from the Florida Supreme Court, upheld the certification of Florida's electoral votes for then-Governor George W. Bush, and effectively determined the winner of the presidential election. Some critics, arguing that the decisions were result-oriented, contended that the Supreme Court had unnecessarily and inappropriately reviewed state court decisions based exclusively on state law. Much can and should be said about the cases.⁴⁵ But in my 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 aggressive Supreme Court review in the future.

To see why, we need to review briefly *Bush I* and *Bush II*. Given that most

litigation does not implicate *Michigan v. Long*, because the Supreme Court held almost three decades ago that the issue would only be subject to rational basis scrutiny under the Equal Protection Clause. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973). Thus, such cases are not brought in federal court, given their low likelihood of success in that forum. Also, such litigation is arguably in many cases an exception to the low profile norm. Death penalty cases might be another rare exception. For discussions of these types of cases, see SOLIMINE & WALKER, *supra* note 2, at 92-93, 118-19.

42. Sara C. Benesh & Wendy L. Martinek, *State-Federal Judicial Relations: The Case of State Supreme Court Decision Making in Confession Cases* 24-25, 28 (paper presented at conference on federalism and the courts, University of Georgia, Feb. 23-24, 2001) (studying 399 cases from state supreme courts from 1970 to 1991) (on file with author).

43. 531 U.S. 70 (2000) (per curiam).

44. 531 U.S. 98 (2000) (per curiam).

45. For an extensive compilation of contemporary material and commentary about the cases, see *BUSH V. GORE, THE COURT CASES AND THE COMMENTARY* (E.J. Dionne, Jr. & William Kristol eds., 2001). For a small sampling of early academic commentary, see SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001); *THE VOTE: BUSH, GORE AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Symposium, *Bush v. Gore*, 68 U. CHI. L. REV. 613 (2001); Lonny Sheinkopf Hoffman, *A Window into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533 (2001) (reviewing ISSACHAROFF ET AL., *supra*); Note, *Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170 (2001).

readers will know the facts in excruciating detail, for present purposes I need only focus on the procedural and jurisdictional posture of the cases. In *Bush I*, the Florida Supreme Court ordered the Florida Secretary of State to permit certain manual recounts of votes in the presidential election to go forward. The Supreme Court granted certiorari on whether the Florida court's order effectively changed state electoral law after the vote in a way that violated federal statutory and constitutional provisions that: seemingly limit such changes after election day; and lodge exclusive authority in state legislatures to designate presidential electors.⁴⁶ The Florida Supreme Court had only briefly referred to the federal statutes in a footnote, and the Supreme Court thought the opinion was unclear on the Florida court's construction and application of state law in light of the federal provisions.⁴⁷ In a unanimous per curiam decision, the Supreme Court vacated and remanded for further proceedings, given the "considerable uncertainty as to the precise grounds for the [Florida court's] decision."⁴⁸

Several days later, in parallel litigation, the Florida Supreme Court again ordered that certain manual recounts of votes for President go forward. Review was again sought and obtained, and this time the Supreme Court in *Bush II* reversed on the merits. The five-member majority, in a per curiam opinion, held that the Equal Protection Clause was violated by the Florida court ordering that manual recounts could proceed by different standards in different counties.

Chief Justice Rehnquist, in a concurring opinion joined by Justices Scalia and Thomas, further found that the Florida Supreme Court's interpretation and application of the state election statute so departed from the original legislative scheme that it violated Article II.⁴⁹ To reach that conclusion, the concurring opinion extensively reexamined the state law basis of the opinion. As a preface to doing that, the opinion provided several pages justifying the Court's review of the state law basis of the decision below. "In most cases," the concurring members of the Court conceded, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."⁵⁰ But the opinion cited two examples where "the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."⁵¹

One example cited was the 1958 decision of *NAACP v. Alabama ex rel.*

46. 531 U.S. at 73 (citing U.S. CONST. art. II, § 1, cl. 2, the Due Process Clause, and 3 U.S.C. § 5 (2000)).

47. *Id.* at 78.

48. *Id.* (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555 (1940)). On the day before the U.S. Supreme Court decided *Bush II*, the Florida Supreme Court reached on remand the same result as it did originally. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1281, 1291 (Fla. 2000) (per curiam). "But it reached that result in a strikingly different manner[.]" ISSACHAROFF ET AL., *supra* note 45, at 95, heavily emphasizing that it was engaging in standard legislative interpretation. The decision the next day in *Bush II* rendered the Florida Supreme Court's decision "essentially moot." *Id.* at 96.

49. *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

50. *Id.* at 112.

51. *Id.* at 114.

Patterson,⁵² in which the Supreme Court refused to defer to the Alabama Supreme Court's asserted reason for not permitting a federal issue to be raised, specifically that the correct appellate remedy had not been sought.⁵³ That was not an adequate ground of state law, the Court held, because the novelty of the rationale could not be squared with Alabama precedent.⁵⁴ Similarly, in the 1964 decision of *Bouie v. City of Columbia*,⁵⁵ the Court concluded that the South Carolina Supreme Court had violated due process by improperly broadening the scope of a state criminal statute, as that reading was not supported by state precedent.⁵⁶ The concurrence in *Bush II* stated that what it was doing "in the present case [was] precisely parallel."⁵⁷

All four dissenting Justices submitted separate opinions, but for present purposes the most relevant is Justice Ginsburg's dissent because she was the only one who directly confronted the concurring opinion's treatment of precedent on the review issue. Justice Ginsburg, like the Chief Justice, began with the customary reminder that the Court should only reexamine state law to protect federal rights in rare occasions, with deference to a state court's interpretations of its own law.⁵⁸ "Rarely," she wrote, "has this Court rejected outright an interpretation of state law by a state high court."⁵⁹ The cases cited by the Chief Justice, she acknowledged, were "such rare instances,"⁶⁰ but she argued that "those cases are embedded in historical contexts hardly comparable to the situation here."⁶¹ She noted that *NAACP* was decided "in the face of Southern resistance to the civil rights movement," as was *Bouie*⁶² and that "this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court."⁶³ She concluded that the Florida Supreme Court's construction of election statutes was reasonable and did not

52. 357 U.S. 449 (1958).

53. *Id.* at 454-55, 458.

54. *Id.* at 456-58.

55. 378 U.S. 347 (1964).

56. *Id.* at 361-62.

57. 531 U.S. at 115 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

58. *See id.* at 135-39 (Ginsburg, J., joined by Stevens, Souter, & Breyer, JJ., dissenting). She added in this regard that the Court could "resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake." *Id.* at 138. However, she did not expressly call for the use of certification in *Bush II*, perhaps due to time constraints, or because it was more appropriate to use it in *Bush I* as opposed to *Bush II*. For a rare example of the Supreme Court using the certification process, see *Fiore v. White*, 531 U.S. 225 (2001) (per curiam) (deciding case in light of answer by Pennsylvania Supreme Court to previously certified question).

59. *Bush II*, 531 U.S. at 139.

60. *Id.* at 140.

61. *Id.*

62. *Id.*

63. *Id.* at 140-41.

violate the Federal Constitution.⁶⁴

Despite the obvious high importance and drama of these decisions, to the extent they frame the Supreme Court's relationship with state courts, they are for the most part unexceptional applications of settled doctrine.⁶⁵ First, consider *Bush I*. When it was vacated and remanded for further clarification by the Florida Supreme Court, it relied on precedent permitting that disposition in deference to the state court.⁶⁶ Invoking the *Michigan v. Long* plain statement rule would have been inappropriate, because "the ambiguity of the state court opinion was not about whether it rested on a state or a federal ground, but rather (at least with regard to the question of the import of the state constitution) about what the state ground of decision was."⁶⁷ It is unlikely that *Bush I* makes any change to *Michigan v. Long* and its progeny.

Bush II is something else but, properly understood, works no change in existing doctrine. For present purposes the most significant part of that opinion is the debate between Chief Justice Rehnquist and Justice Ginsburg on the propriety of the Supreme Court reexamining state law on its own terms, even when expounded by the state's highest court. At the outset, this debate did not implicate the core of the adequate and independent state ground doctrine. The typical case is one where the state court does not reach an asserted federal ground because the party pressing that issue has waived the issue for failure to comply with a state procedural rule. Here, in contrast, the lower court did not purport to fail to reach a federal issue for that reason. Rather, it was the very state-law-based nature of the decision below that itself was alleged to violate the Federal Constitution. Ample precedent permits the Supreme Court to review such a case.⁶⁸ In any event, despite Justice Ginsburg's efforts to undermine the

64. *See id.* at 141-43.

65. I do not consider here whether the same could be said for the majority's resolution of the merits of the cases, e.g., whether the majority's Equal Protection holding can or should be cabined to presidential elections. For discussion of those issues, see ISSACHAROFF ET AL., *supra* note 45; Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345 (2001).

66. Vacation, used in the case cited as precedent for the disposition, *see supra* note 48 and accompanying text, had been discussed in *Michigan v. Long* as one of the relatively unsatisfactory prior approaches the Court had taken to dealing with ambiguity in state court opinions. *See Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983). However, in *Michigan v. Long* the Court expressly noted that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* at 1041 n.6.

67. HART & WECHSLER, *supra* note 5, at 3 (Jan. 2001 Special Update Memorandum on the Supreme Court's Decisions Concerning the 2000 Presidential Election). Also, "the Court may have been particularly eager in this setting to avoid definitive resolution of novel constitutional questions unless truly necessary, as well as to seek a disposition that, by avoiding the merits, permitted unanimity." *Id.*

68. This point is carefully and persuasively explained in Michael Wells, *Were There Adequate State Grounds in Bush v. Gore?*, CONST. COMM. (forthcoming 2002) (manuscript on file with author).

precedential value of the cases where the Court reexamined state law, those cases have an impressive pedigree. For example, the two modern cases relied upon by the Chief Justice, *NAACP* and *Bouie*, were written by Justices Harlan (for a unanimous Court) and Brennan, respectively. Those cases, and others, have been routinely discussed by scholars as unexceptional and almost uncontroversial precedent permitting the Court to reexamine state law.⁶⁹

Justice Ginsburg also suggested that the generative force of those cases was lessened by their being rendered to vindicate federal rights undermined by state courts during the civil rights movement. The Florida Supreme Court in *Bush II*, she said, “surely should not be bracketed with state high courts of the Jim Crow South.”⁷⁰ Her forthright description of the political context of the decisions, then and now, is refreshingly candid and to my knowledge not matched in other opinions involving the adequate and independent grounds doctrine.⁷¹

Considerable evidence also supports her view of the recalcitrance of at least some of the state courts in the deep South during the Civil Rights Era, and of subsequent changes.⁷² Nor is Justice Ginsburg the first to suggest that the Court may have bent jurisdictional rules during the Civil Rights Era to enable it to reach the merits of cases where, for example, review would otherwise have been barred by the adequate and independent state ground doctrine.⁷³ But it is hard to take seriously her apparent argument that cases like *NAACP* and *Bouie* are contextual, situational, and entitled to little or no precedential value, depending

69. See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 270-71 (2d ed. 1990); YACKLE, *supra* note 21, at 172-73; see also 16B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4027, at 387 (2d ed. 1996) (describing *NAACP* as the “leading decision”).

70. 531 U.S. 98, 141 (2000) (Ginsburg, J., dissenting).

71. No doubt, this is because it is “both difficult and awkward for the Supreme Court to inquire into the motives of the state court.” REDISH, *supra* note 69, at 269. The Court, therefore, usually focuses on more objective criteria, such as whether the state ground is arbitrary, lacks “fair or substantial support,” or is novel. *Id.* at 269-71.

Agreeing with Justice Ginsburg’s interpretation of *NAACP* and *Bouie*, Michael Klarman has argued that those cases were inopposite to *Bush II*, because “the rule generated by these cases seems to be one requiring evidence of bad faith by the state courts in their interpretation of state law.” Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1738 (2001). But neither case discusses, much less requires, “bad faith,” however defined. Nor to my knowledge do other cases exploring the adequacy prong of the adequate and independent ground doctrine, not all of which, of course, come from state courts in the Deep South during the Civil Rights Era. See also Wells, *supra* note 68, for further discussion of this point. For a careful and nuanced discussion of the structural considerations that might justify systemic distrust of state court application of state law, at least in election law cases, see Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 711-25 (2001).

72. For a summary and discussion of sources that largely support Justice Ginsburg’s points, see SOLIMINE & WALKER, *supra* note 2, at 35-36.

73. See HART & WECHSLER, *supra* note 5, at 576-77; Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870 (1994).

on the “real” motives of the court below. Such an inquiry on that basis alone would open other precedent to similar attack. For example, a number of modern authorities assert that many path-breaking criminal procedure decisions of the Warren Court were driven, at least in part, by the treatment of black suspects in deep South courts.⁷⁴ Now that conditions in southern courts have presumably and hopefully changed, would Justice Ginsburg urge that those precedents be discarded as well?

A more persuasive component of Justice Ginsburg’s opinion was her argument that the Florida Supreme Court’s construction of its own election law was due greater deference. She observed that simply disagreeing with another tribunal’s construction of its own law does not make it unreasonable.⁷⁵ While both she and the Chief Justice called for some level of deference, neither were entirely clear on the *level* of deference.⁷⁶ From the standpoint of using 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 arguably undeferential reexamination of state law. Add to that the highly unusual facts presented, and it is fair to conclude that “*Bush v. Gore* seems unlikely to become a leading precedent for the scope of review [by the Supreme Court] of state law questions that implicate federal protections.”⁷⁷

74. See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48-49 (2000); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 315-16; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997).

75. See *Bush v. Gore*, 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting).

76. For careful and extended analysis of this point, see Harold J. Krent, *Judging Judging: The Problem of Second Guessing State Judges’ Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493 (2001).

The concurring opinion did seem to indicate that deference would be limited through the language of Article II, Section 1, Clause 2 of the Constitution (“[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” presidential electors). It asserted that “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Bush II*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring) (citing U.S. CONST. art. II, § 1, cl. 2). Justice Ginsburg disputed the assertion, arguing that under a republican form of government, which the State of Florida has, it would be understood that “the judiciary would construe the legislature’s enactments.” *Id.* at 141 (Ginsburg, J., dissenting). Hence, she wrote, “Article II does not call for the scrutiny undertaken by this Court.” *Id.* at 142.

77. HART & WECHSLER, *supra* note 5, at 9 (Jan. 2001 Special Update Memorandum on the Supreme Court’s Decisions Concerning the 2000 Presidential Election).

II. THE SUPREME COURT'S SHRUNKEN DOCKET AND THE DEVELOPMENT OF FEDERAL LAW IN STATE COURTS

A. *The Shrunk Docket*

The adequate and independent state ground doctrine, whatever its formulation, in theory permits the Supreme Court to review and, if necessary, correct state court holdings that were based on federal law. Whether the Supreme Court has the institutional resources or desire to seriously undertake this function is another matter. The Court's own docket is the starting point for studying this issue.

For virtually all of the Twentieth Century, the Supreme Court decided an average of 150 cases per Term. As of the late 1980s, that number was almost 130 per Term. Starting in 1990, the numbers began rapidly falling below 100, until by the late 1990s the Court was only deciding seventy or eighty cases per Term.⁷⁸ What accounts for the shrunken docket of late? There are few official reasons given for the size or content of the Court's docket in any given Term. The Court's own rules state obliquely that it will review important issues of federal law, conflicts among federal courts, and conflicts between federal and state courts. Beyond that, the Court rarely states why it is granting review, either at the time of doing so or in its subsequent opinion on the merits. It is rarer still for the Court or an individual Justice to state why a case is *not* being reviewed.⁷⁹

The Court, similarly, has not made any official pronouncements about the decreasing size of the docket over the past decade. This has led to considerable speculation as to the Justices' motivations in denying review at an increasing rate, despite the fact that the number of certiorari petitions has not abated.⁸⁰ Among the arguments advanced are that a more conservative Court majority has found fewer lower court cases to reverse; that the Court wishes to spend more time on each case and opinion; or even that the Justices are lazier or simply enjoy their leisure time.⁸¹ Several years ago, Arthur Hellman compared the docket of

78. Data for recent Terms can be found in the Supreme Court's annual Year-End Reports on the Federal Judiciary, available on the Court's website, <http://www.supremecourtus.gov/publicinfo/year-end/year-end-reports.html> (last visited Jan. 22, 2002). For a good summary of data, drawn from various sources, for the 1926 through 1995 Terms, see LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 84-85 tbl.2-7 (2d ed. 1996) (signed opinions, cases disposed of by signed opinion, and cases disposed of by per curiam opinion, 1926-1995 Terms). Other useful sources of data on the Supreme Court's docket can be found in *United States Law Week*, the statistics section of each annual review of the previous Term found in the November issue of the *Harvard Law Review*, and the Supreme Court Judicial Data Base. On the latter, see generally Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228 (2000).

79. For an overview of the Supreme Court's certiorari policy, see HART & WECHSLER, *supra* note 5, at 1691-1714.

80. For an overview, see LAWRENCE BAUM, *THE SUPREME COURT* 117-22 (7th ed. 2001).

81. See Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 558-59 (1998) (book

several Terms of the Rehnquist Court to the docket of several Terms of the Burger Court, when the latter was deciding almost twice as many cases.⁸² Hellman sought to test several of the hypotheses, including those mentioned above, for the recent decline.⁸³ In a comprehensive and thorough analysis, he concluded that none of the standard explanations for the decline had much persuasive force.⁸⁴ In developing his own explanation for the falling docket, Hellman wrote:

In short, the Justices who have joined in the Court in the last [ten] years take a substantially different view of the Court's role in the American legal system than the Justices of the 1980s. They are less concerned about rectifying isolated errors in the lower courts (except when a state-court decision threatens the supremacy of federal law), and they believe that a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues.⁸⁵

For our purposes the qualification he makes is important, and I will return to it shortly. Before I do, it is worth mentioning that some authorities worried about the institutional capacity of the Supreme Court to review state court decisions on federal law, even before the recent decline. Writing in 1986, for example, Justice Brennan lamented:

One might argue that this Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law

review).

82. See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403.

83. The hypotheses he tested were as follows:

1. The virtual elimination of the Supreme Court's mandatory appellate jurisdiction allows the Court to deny review in some cases that would have received plenary consideration under the pre-1988 regime.
2. After the retirement of its three most liberal Justices, the Court took fewer cases in which lower courts had upheld convictions or rejected civil rights claims.
3. Twelve years of Reagan-Bush judicial appointments brought greater homogeneity to the courts of appeals, resulting in fewer intercircuit conflicts that the Supreme Court had to resolve.
4. The Federal Government was losing fewer cases in the lower courts and therefore filed fewer applications for review in the Supreme Court.
5. The 12 years of Reagan-Bush appointments made the courts of appeals more conservative, resulting in fewer "activist" decisions of the kind that a conservative Supreme Court would choose to review.

Id. at 405.

84. *Id.* at 425.

85. *Id.* at 430-31 (footnote omitted).

is interpreted and applied uniformly. . . . [However,] having served on this Court for [thirty] years, it is clear to me that, realistically, it cannot even come close to “doing the whole job”⁸⁶

How often did the Court “do the job” prior to the recent decline of the entire docket? In the four decades prior to the 1990s, the Supreme Court reviewed on the average about thirty-seven cases from state courts per Term.⁸⁷ This was roughly twenty-five percent of the cases decided on the merits by the Court during that period (assuming an average docket each Term of about 150 cases). Not surprisingly, in the decade of decline fewer cases have come from state courts. As Table 1 indicates, the number of cases from state courts has fallen into the twenties or teens, and the percentage of total cases has fallen as well. Indeed, it appears that the sharp decline of state court cases reviewed has significantly, and perhaps disproportionately, contributed to the decline of the overall docket.⁸⁸

86. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting). In *Merrell Dow*, the majority held that a case based on state law that raised federal issues nevertheless did not “arise under” federal law for purposes of the general federal question statute, 28 U.S.C. § 1331 (1994); *Merrell Dow*, 478 U.S. at 807. Hence, the case could not be brought in federal district court as an original matter or removed from state to federal court as a federal question case. *See id.* Concerns about the uniformity of federal law, given that fifty state courts and no federal courts might be rendering disparate interpretations of federal law, were, according to the majority, ameliorated in part by the power the Court retained “to review the decision of a federal issue in a state cause of action.” *Id.* at 815-16. Justice Brennan was responding to that point.

87. I derived this estimate from data found in Richard A. Brisbin Jr. & John C. Kilwein, *U.S. Supreme Court Review of State High Court Decisions*, 78 JUDICATURE 33, 34 nn.5-6 (1994) (indicating that the Court decided 1370 cases from state supreme courts and lower state courts during the 1953-1990 Terms).

88. The declining number of state court cases reviewed may be attributable to changing personnel on the Court. Two liberal members of the Court, Justices Brennan and Marshall, might have been more cognizant of state court decisions denying asserted federal rights and perhaps more likely to vote to review such cases. These Justices retired in 1990 and 1991, respectively. Perhaps relatedly, these Justices (along with Justice Stevens) did not participate in the clerk pool, in which the other Justices shared their clerks in preparing memoranda that evaluated certiorari petitions. The clerks for the three other Justices prepared their own memoranda. Prior to 1991, when a pool memo recommended denial of a certiorari petition, it was possible that certiorari would nonetheless be granted, depending on the votes of the three non-pool Justices. This seems less likely after 1991, because the two replacement Justices, Souter and Thomas, joined the pool. Justice Stevens is the only non-pool member of the current Court. For a discussion of these points, linking them to the overall decline of the docket (though not specifically to the fewer state court cases being reviewed), see David M. O’Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 J.L. & POL. 779, 784, 790, 799-803 (1997). Thanks particularly to Evan Caminker for his insights on the internal dynamics of the Court during the 1989-91 period.

Table 1

Supreme Court Docket, 1989-1999 Terms: Subject Matter of Dispositions with Full Opinions

Term	State courts—civil actions	State courts—criminal cases	TOTAL	Total of cases for Term	Percentage of cases from state courts
1989	17	24	41	137	30%
1990	9	19	28	120	23%
1991	14	11	25	114	22%
1992	4	9	13	114	11%
1993	16	7	23	87	26%
1994	10	4	14	86	16%
1995	8	3	11	79	14%
1996	4	3	7	86	8%
1997	7	3	10	93	11%
1998	4	7	11	81	14%
1999	5	7	12	77	16%

Source: *Harvard Law Review*⁸⁹*B. The Supreme Court's Monitoring of Federal Law in State Court*

In the 1990s both the absolute and proportional number of cases from state courts reviewed on the merits by the Supreme Court has declined. What has been the effect of this decline on the adjudication of federal issues in state courts? The same question can be posed with regard to the development of federal law in the lower federal courts. Hellman has suggested that over the long run, a limited docket will create “the risk that the paucity of decisions will leave wide gaps in the doctrines governing important areas of law.”⁹⁰ Those gaps may make it difficult for federal and state lower court judges to resolve correctly or uniformly issues of federal law. Likewise, under a reduced docket, “[l]ower-court judges will no longer feel the spirit of goodwill and cooperation that comes

89. These statistics were compiled and calculated from volumes 104-114 of the *Harvard Law Review*'s annual review of Supreme Court statistics, Table II, Part E (Origins of Cases and Their Dispositions) and Table III (Subject Matter of Dispositions with Full Opinions).

90. Hellman, *supra* note 82, at 434.

from participation in a shared enterprise. Without that spirit, it is hard to see how a hierarchical judiciary can function effectively.”⁹¹

Beyond these abstractions it is difficult to test in more detail how, if at all, the shrunk docket has affected adjudications in state courts. Indeed, it is too soon to tell, because the smaller docket is a relatively recent phenomenon, albeit one that has been consistent over the last decade. However, several sources of data can suggest some tentative conclusions on the effect of the recent docket.

One source of data could be the rate of reversal of state court decisions. If the rate of reversal of such decisions by the Supreme Court were relatively high, it might suggest that state courts were not doing a noteworthy job of adjudicating federal law. Over the past half-century, the average reversal rate by the Court for *all* cases has been about sixty percent.⁹² During the same time period, the Supreme Court reversed and/or remanded state supreme court decisions at a higher rate, about seventy percent.⁹³ Perhaps not surprisingly, the rate of reversal was particularly high during the Warren Court and was closer to the overall average during the Burger and Rehnquist Courts.

The data available for the 1990s is for the last three Terms, as set forth in Table 2. For those Terms, the overall reversal/vacate rate for all cases was about sixty-five percent. In the same time period, the same rate for state court cases was again higher, about seventy-three percent. This data might suggest that state courts have not been correctly applying federal law, as compared to their federal court counterparts. But any conclusion like this must be drawn with great caution, not only because of the small number of cases involved, but because reversal could be based on a variety of factors. The Supreme Court does not sit merely to correct errors—its primary function is law development.⁹⁴ If that were not the case, we might expect *all* cases accepted for review to be reversed.⁹⁵

91. *Id.* at 436-37.

92. *See* EPSTEIN ET AL., *supra* note 78, at 212 tbl.3-6 (Disposition of Cases, 1946-1994 Terms).

93. This figure was calculated from data supplied in Brisbin & Kilwein, *supra* note 87, at 34 tbl.1 (covering 1953-1990 Terms). The study only covered review of state supreme court decisions, not that of decisions of lower state courts, which for various reasons were not reviewed on the merits by the state high courts before reaching the Supreme Court. *See id.* at 34.

94. *See* SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 47 (1986).

95. *See* Cross, *supra* note 81, at 560-61.

Table 2

Supreme Court Docket, 1997-1999 Terms: Source of Cases Disposed on the Merits

1997 Term

Lower court	Reversed	Vacated	Affirmed	TOTAL	Percent
federal	37	13	33	83	89%
state	5	2	3	10	11%
TOTAL	42	15	36	93	

1998 Term

Lower court	Reversed	Vacated	Affirmed	TOTAL	Percent
federal	35	14	21	70	86%
state	9	0	2	11	14%
TOTAL	44	14	23	81	

1999 Term

Lower court	Reversed	Vacated	Affirmed	TOTAL	Percent
federal	37	1	26	64	84%
state	8	0	4	12	16%
TOTAL	45	1	30	76	

Source: *Harvard Law Review*⁹⁶

The disposition of cases decided on the merits by the Supreme Court tells us something, but formally it is only the top rung of the appellate ladder. To get a better sense of the effect of the Court's docket, ideally, we should examine *all* cases decided by lower courts. Only that examination would enable us to determine how well the Court supervises lower courts. A useful metaphor to frame our thinking here is to envision the Supreme Court as a manager. The metaphor has both normative and empirical force. Regarding the former, rather than accepting cases in a largely ad hoc way, the managerial Court would usually only accept a case for review if the issues raised have been thoroughly addressed in one or more cases below, and it would give more substantive content to the

96. These statistics compiled and calculated from *Harvard Law Review*'s annual review of Supreme Court statistics, Table II, Part E (Sources of Cases Disposed on the Merits) (first set forth for the 1997 Term).

“importance” criterion.⁹⁷ This managerial model also suggests ways in which to gauge empirically its workability. If we conceive the Supreme Court and the lower courts as having a principal-agent relationship, then we would be concerned with how the principal monitors its agents. Among other things, this suggests that we should examine the vast majority of lower court cases where Supreme Court review is either denied or not sought at all, to see whether those courts are nevertheless following Court precedent.⁹⁸

One way to test these models is to examine the concept of parity, meaning whether and to what extent state courts can and do fully and fairly adjudicate federal constitutional rights. Many aspects of federal jurisdiction doctrine are predicated, at least in part, on the existence of some notion of parity.⁹⁹ The concept is not without its critics. Most famously, Burt Neuborne declared parity to be a myth because many state judges face periodic election and thus are not as likely to enforce unpopular, counter-majoritarian rights as compared to their life-tenured counterparts.¹⁰⁰ The argument continues that federal judges are better qualified, trained, and have more institutional support than most state judges, so federal rights are apt to be better adjudicated and protected in federal court.¹⁰¹

Parity also has implications for the managerial and principal-agent models

97. See generally ESTREICHER & SEXTON, *supra* note 94, at 48-70.

98. The seminal work advancing this model is Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

In this Article, I am focusing primarily on the Supreme Court monitoring state courts by hearing appeals of cases directly from the latter. There are two other ways in which the Supreme Court could, in effect, monitor the decisions of state courts. One way is to review lower federal court disposition of federal habeas case petitions filed to overturn convictions obtained in state court where the conviction was tainted by violation of federal constitutional rights. Another way would be to review the disposition of federal civil rights cases filed in federal court that seek to have state court convictions or other processes set aside as violative of federal law. Relatively speaking, few such cases are filed, and various doctrinal and statutory barriers prevent either avenue from being a significant check on state courts. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 636 n.68 (1981) (discussing various reasons why “federal habeas corpus [cannot] simply be characterized as an alternate form of federal appellate review”). This is not to say that these avenues play no role at all. For example, federal habeas cases, many of which have been reviewed by the Supreme Court, have served as a significant monitor of death penalties handed down in state courts. See SOLIMINE & WALKER, *supra* note 2, at 123-24; Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000). A full discussion of these avenues is beyond the scope of the present paper. For general discussion, see Joseph L. Hoffmann & Lauren K. Robel, *Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 154 (1996).

99. See JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 47 n.1 (9th ed. 2001); SOLIMINE & WALKER, *supra* note 2, at 29-34; Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1552 n.12 (2001).

100. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105, 1127-28 (1977).

101. *Id.* at 1121-22.

of Supreme Court review. If parity were not a viable concept, it would suggest (among other things) that the Court is unable to perform its monitoring role particularly well. There is a growing literature testing some of the claims of parity. Some have questioned the assumptions of critics like Neuborne, observing, for example (as noted in Part I), that state judicial elections rarely perform the posited majoritarian check. Several studies have compared the adjudication of specific federal constitutional rights in federal and state courts.¹⁰² While studies are ongoing and do not all point in one direction, in my view, it is fair to say that most of these studies show that, overall, state courts as compared to federal courts are not systematically under-enforcing federal rights.

This is not to say that in contemporary America all federal rights enjoy the fullest protection in state courts; consider the administration of the death penalty by state courts. Recent studies by James Liebman and others demonstrate that well over one-half of capital sentences handed down in state courts are initially overturned in some manner by a later reviewing court.¹⁰³ Because denial of federal constitutional rights is often the source of error, the high rate of reversal undermines notions of parity. To some, it is evident that elected state judges, beholden to voters in favor of the death penalty, improperly deny the federal rights of capital defendants.¹⁰⁴ There is evidence supporting this concern,¹⁰⁵ but it must be tempered by the realization that many state actors (e.g., prosecutors, defense counsel), not just judges, are also potential sources of error.¹⁰⁶ Moreover, it is worth noting that the high error rate is due in significant part to state appellate courts identifying and reversing error in trial courts.¹⁰⁷

Some recent studies of state court decision-making, in part, examined the Supreme Court's monitoring ability. One study examined a sample of search and

102. For an overview of the literature up to 1998, see SOLIMINE & WALKER, *supra* note 2, at 42-55. For more recent studies, see Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233 (1999) (discussing Takings Clause cases); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (discussing gay rights cases); Daniel R. Pinello, *The Myth of Parity Revisited: An Empirical Test of Whether Federal Courts Protect Rights More Vigorously than State Courts*, Paper Presented at Annual Meeting of the Midwest Political Science Association, Chicago, Ill. (Apr. 19-22, 2001) (on file with author).

103. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1853-54 (2000).

104. See, e.g., Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1805 (2000); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760 (1995).

105. See SOLIMINE & WALKER, *supra* note 2, at 118-19 (reviewing studies).

106. See *id.* at 115; John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 468 (1999); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2032 (2000).

107. See Liebman et al., *supra* note 103, at 1847-48; see also Barry Latzer & James N. G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64, 66-67 (2000) (reporting data on reversal of capital case convictions or sentences by state supreme courts from 1990 to 1999).

seizure cases from state supreme courts from 1961-1990.¹⁰⁸ Compliance with Supreme Court doctrine over the same period was tested by, among other things, coding the results and fact patterns in both Supreme Court and state high court cases.¹⁰⁹ The study found substantial compliance with Supreme Court doctrine, indeed as much compliance as in similar cases between the Supreme Court and the U.S. Court of Appeals.¹¹⁰ A methodologically similar study has been done of cases in state supreme courts concerning the legality of confessions to the police.¹¹¹ It, too, concluded that the results of the cases substantially mirrored the results of similar cases in the Supreme Court over the same time period.¹¹²

C. Supreme Court Monitoring in the Twenty-First Century

More empirical work needs to be done to examine the development of federal law in state courts.¹¹³ Nonetheless, the studies discussed above do suggest that, by and large, state courts (or at least state high courts) comply with Supreme Court precedent. Does this necessarily mean that the Supreme Court is acting as an effective monitor of state courts? It is difficult to say. The vast majority of these state court decisions, of course, are not reviewed by the Court. While the possibility of any given state court decision being reviewed is quite low, it would seem that the threat of review and possible reversal by the Supreme Court nonetheless plays a role.¹¹⁴ Still, those possibilities are so remote, it would seem that the simple norm of following Supreme Court precedent is the principal compelling force.

To what extent does a shrunken or expanded docket of the Supreme Court affect its monitoring role? This, too, is difficult to say. With regard to reviewing decisions of state courts, in my view, it does not make a quantum difference

108. Wendy L. Martinek, *Judicial Impact: The Faithfulness of State Supreme Courts to the U.S. Supreme Court in Search and Seizure Decision Making*, Paper Presented at Annual Meeting of the American Political Science Association, Atlanta, Ga. (Sept. 2-5, 1999) (on file with author).

109. *Id.* at 10-14 (explaining research design).

110. *Id.* at 14-17 (reporting results). For the similar study of search and seizure cases examining compliance by the U.S. Courts of Appeals, see Songer et al., *supra* note 98.

111. See Benesh & Martinek, *supra* note 42.

112. *Id.* at 23, 26-27 (discussing results on this issue).

113. Most of the studies so far have focused on the decisions of state high courts, not state trial courts or intermediate appellate courts. The focus is understandable, given that empirical study of lower court decisions is more difficult, as their decisions and opinions are less accessible to researchers. Even the studies of state high courts have usually focused on one or two specific federal rights. Study of state supreme court decision-making on the parity issue will be facilitated by a recently developed online database that codes all decisions of such courts for several years in the 1990s. The database is described in Paul Brace & Melinda Gann Hall, *Comparing Courts Using the American States*, 83 JUDICATURE 250 (2000).

114. See SOLIMINE & WALKER, *supra* note 2, at 57; John C. Kilwein & Richard A. Brisbin, Jr., *Policy Convergence in a Federal Judicial System: The Application of Intensified Scrutiny Doctrines by State Supreme Courts*, 41 AM. J. POL. SCI. 122, 131 (1997); see also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

whether the docket is shrunken or not. Even in the heyday of the expanded docket, only a small percentage of state court decisions susceptible to review were reviewed. To be sure, severely downsizing the docket at some point will limit the ability of the Court to monitor state courts. Perhaps the Court's current docket approaches that limit. Future Courts in this century may well re-expand the docket, but even if they do, it seems doubtful that the docket will go beyond the 150 case average of most Terms in the past century.

Whether under an expanded or shrunken docket, available evidence seems to indicate that the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function. Data from the Terms before the shrunken docket indicates (not surprisingly) that cases from more densely populated states were more likely to appear on the docket, as did decisions from state supreme courts in the deep South during the Civil Rights Era.¹¹⁵ Even during the current diminished docket, Hellman concludes that, as compared to earlier Terms, the Court has continued to accept certiorari petitions from litigants asserting federal rights in state court cases.¹¹⁶ Hellman optimistically concludes that:

In this respect, however, the Court is simply going back to its roots. From the earliest days of the nation's history, no function of the Court has ranked higher than the protection of federal rights from hostility or misunderstanding on the part of state courts. We would not expect the Court to break with that tradition, and it has not.¹¹⁷

The creation of the Supreme Court's docket does not operate in a vacuum. Certiorari petitions are not filed in all cases that in theory could be reviewed by the Supreme Court. Though available data is nowhere near definitive, it would seem that important decisions (under any definition of that term), or decisions that arguably depart significantly from federal law, will usually be appealed.¹¹⁸ When many petitions are before the Justices each Term, compelling evidence suggests that they rely heavily on certain cues in deciding whether to accept the petition. Among these cues are conflicts between federal and state courts on the issue at hand and amicus curiae briefs filed by various organizations on behalf of or against the petition.¹¹⁹ In these ways, litigants and interest groups play a significant role in shaping the Court's docket. Litigants and interest groups can thus aid the Supreme Court in its monitoring activity.

115. EPSTEIN ET AL., *supra* note 78, at 672-73 tbl.7-34 (State and Territorial Court Decisions Affirmed by the Vinson, Warren, Burger, and Rehnquist Courts); Brisbin & Kilwein, *supra* note 87, at 38-39.

116. See Hellman, *supra* note 82, at 428.

117. *Id.* (footnote omitted).

118. The decision to appeal, in general, is an understudied phenomenon. For a discussion of the small amount of literature and how it supports, to a degree, the statements made in the text, see SOLIMINE & WALKER, *supra* note 2, at 44 & n.47.

119. For a review of the considerable literature documenting the Supreme Court's apparent use of cues to decide which certiorari petitions to accept, see BAUM, *supra* note 80, at 109-17.

III. THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS

So far, I have said nothing explicit about state intermediate appellate courts (IACs). Like virtually all of the literature on the issues discussed in Parts I and II of this Article, I have almost exclusively addressed state high courts. This silence is unintentionally reflective of much of the scholarly literature on state courts, which focuses on state supreme courts and trial courts, not state IACs.¹²⁰ This lack of attention is particularly unfortunate and inappropriate, because, as one writer put it, "IACs have become the draft animals of state appellate review. . . ."¹²¹ The point was that IACs, not high courts, dispose of the vast majority of cases that are appealed within state court systems. Keeping with this theme, state IACs did not play a role in the *Bush I* or *Bush II* cases. In both cases, the state IACs of Florida were bypassed and the appeals from trial court decisions were certified directly by the IACs to the Florida Supreme Court.¹²²

The relative lack of attention to state IACs is unfortunate for several reasons. As of 1995, some thirty-nine states had established IACs.¹²³ The jurisdiction of most IACs is mandatory, i.e., they hear appeals as of right, compared to state supreme courts' discretionary control over almost all of their dockets. So state IACs, like the U.S. Courts of Appeals in the federal system, dispose of the vast majority of appellate cases. Typically only a small percentage is thereafter reviewed on the merits by state supreme courts. State IACs were established in part to lessen the caseload demands on state high courts. As already stated, they rule on the vast number of appeals from state trial courts, primarily to correct error. In effect they 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.¹²⁴ The screening and channeling function of state IACs should

120. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 28 (1997) ("Social scientists have written relatively little about state intermediate appellate courts."); HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 349 n.6 (2d ed. 1998) ("State intermediate appellate courts are discussed in a number of publications, although much is still unknown regarding their operations."). As one example of this lack of attention, consider an oft-cited book of essay reviews by different political scientists on various aspects of federal and state courts: *THE AMERICAN COURTS* (John B. Gates & Charles A. Johnson eds., 1991). This volume has essays on, among other things, all three levels of courts in the federal system, state supreme courts, and state trial courts, but no chapter on state IACs.

Good summaries of the limited literature on state IACs are found in DANIEL J. MEADOR ET AL., *APPELLATE COURTS* 236-55, 349-91 (1994); STUMPF, *supra*, at 349-56.

121. STUMPF, *supra* note 120, at 352.

122. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 74-75 (2000) (per curiam) (discussing state appellate procedure in case); *Bush v. Gore*, 531 U.S. 98, 101 (2000). For a brief discussion of the certification process in state courts, see MEADOR ET AL., *supra* note 120, at 380.

123. SOLIMINE & WALKER, *supra* note 2, at 45 n.48 (citing ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 69-72 (4th ed. 1998)).

124. See STUMPF, *supra* note 120, at 349; see also COMM. ON STANDARDS OF JUDICIAL ADMIN., AM. BAR ASS'N, *MODEL JUDICIAL ARTICLE* § 3 (1995) (recommending that IACs be established); COMM'N ON STANDARDS OF JUDICIAL ADMIN., AM. BAR ASS'N, *STANDARDS RELATING TO COURT ORGANIZATION* § 1.13 (1974) (discussing reasons for establishing IACs).

lead to better decision-making by the state supreme courts in the cases the latter review.¹²⁵

Despite the fact that IACs played no role in the *Bush* litigation, a significant number of state court cases reviewed by the Supreme Court have been IAC decisions in which the state supreme court declined review.¹²⁶ Some of these decisions have been historically significant. Two important constitutional law cases, *Terry v. Ohio*¹²⁷ and *Brandenburg v. Ohio*¹²⁸ were both reviews of Ohio IAC decisions. In both instances the Ohio Supreme Court dismissed the appeals. Several cases in the 2000 Term of the Supreme Court are reviews of state IAC decisions.¹²⁹

To what extent do state IACs play a different role than state high courts with regard to issues addressed in the previous parts of this Article? One possible difference involves use of the plain statement rule of *Michigan v. Long*.¹³⁰ Any state court presumably is in a position to indicate clearly whether state law is being relied upon. Nonetheless, it would seem awkward for lower state courts to make those statements, given that state supreme courts are the final expositors of state law. Thus, if the state high court has not yet passed on whether a particular state constitutional provision will be interpreted more expansively than the analogous federal constitutional right, the IAC faces the issue without guidance from the high court. It would seem that in such circumstances, the IAC could address the issue, but my guess is that in most instances an IAC would defer to the supreme court.¹³¹ On the other hand, if the supreme court had previously addressed the state constitutional issue, then the IAC would, and indeed should be, in a position to issue definitively a plain statement (or not).¹³²

125. For empirical evidence, albeit dated, supporting some of the assertions in the text, see Burton M. Atkins & Henry R. Glick, *Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort*, 20 AM. J. POL. SCI. 97, 112 (1976) (finding inter alia that presence of IACs is associated with the state supreme court deciding fewer routine, private law cases and more public law cases, both civil and criminal). But cf. Benesh & Martinek, *supra* note 42, at 24-25 (finding no correlation between presence or absence of an IAC and the state supreme court faithfully following Supreme Court doctrine in confession cases).

126. According to a study of the Supreme Court's docket in the 1953-1990 Terms, of the 1370 cases from state courts, 416 of those (about thirty percent) were from state IACs or trial courts. See Brisbin & Kilwein, *supra* note 87, at 34 nn.5-6.

127. 392 U.S. 1 (1968).

128. 395 U.S. 444 (1969) (per curiam).

129. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (reviewing Maryland state IAC); *Illinois v. McArthur*, 531 U.S. 326 (2001) (reviewing Illinois state IAC); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (reviewing Wisconsin state IAC).

130. 463 U.S. 1032 (1983).

131. For discussion of the options available to state lower courts in this and similar situations, see Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMP. L. REV. 1003 (1994).

132. Some light on these issues is shed by a now-dated study of the use of plain statements by state courts. See Felicia A. Rosenfeld, Note, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 FORDHAM L. REV. 1041 (1988). Although the study does not expressly address the issue, a few of the cases discussed and cited were from IACs. The vast majority of cases were

As noted, state trial courts and state IACs will be disposing of the vast majority of cases dealing with federal issues in state courts. Of the three levels of state courts, it is possible that state IACs generally raise the least concerns about the alleged lack of parity. Electoral accountability would seem most pertinent for those judges most visible to the public: state high court justices and trial court judges. Relatively speaking, state IAC judges might tend to be the most independent of the three levels. They are distant and abstract from the actual adjudication under review, yet, also have a distance from the electorate as compared to members of elected state supreme courts. I advance this hypothesis with some caution, because most of the literature on parity focuses on state high courts, not lower courts.¹³³

Another possibly different role for IACs is ascertaining what is federal law. Of course it is easy enough when the United States Supreme Court has directly spoken to an issue. But what if the Supreme Court has not? In that situation, what precedential weight, if any, should be given to the decisions of federal judges on the issue, whether in or outside of that state? Most state courts have not directly addressed this issue. It appears, however, that most state courts, at least implicitly, will accord federal court decisions some precedential weight in these circumstances, but do not consider themselves bound by the lower federal court decisions.¹³⁴ This inquiry is difficult enough for a state high court, but consider the additional complications faced by the judges on a state IAC. What if the lower federal courts and the state high court disagree on an issue of federal law? Various IACs from different states are split on the issue.¹³⁵ Donald Zeigler has rightly pointed out that “[l]ower state courts are in an extremely difficult position here.”¹³⁶ Norms of state decisions in a hierarchical judicial system strongly push an IAC to follow the state supreme court’s declaration of federal law, if available. But given the truism that the Supremacy Clause¹³⁷ 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.¹³⁸

CONCLUSION

By any measure, the vast majority of cases raising federal issues are litigated in state courts, not federal courts. That adjudication takes place in the shadow

from state supreme courts, however.

133. See SOLIMINE & WALKER, *supra* note 2, at 45 n.48.

134. See, e.g., *State v. Burnett*, 755 N.E.2d 857 (Ohio 2001). For an excellent and comprehensive discussion of this issue, see Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143 (1999).

135. For discussion of, and citations to, various cases on point, see Zeigler, *supra* note 134, at 1160-62.

136. *Id.* at 1221.

137. U.S. CONST. art. VI, cl. 2.

138. See Zeigler, *supra* note 134, at 1221-22.

of review by the final expositor of federal law, the United States Supreme Court. In other words, the Supreme Court monitors the development of federal law in state courts. In this Article, I have addressed two potential problems with the monitoring function: ascertaining whether a particular state court decision presents a federal issue capable of being reviewed, and the implication of the recent diminishing docket of the Supreme Court.

The first problem should not be of much concern. It is easy for a state court to declare whether or not its decision is based on reviewable federal law or (usually) unreviewable state law. The interpretative rule established by the Supreme Court in *Michigan v. Long*, in my view, serves both the Court and state courts well. The second problem is more troublesome. The Supreme Court never has and never will be able to review more than a small percentage of the cases from state courts where direct review is sought. Even so, the Court's monitoring role may be sorely tested if few cases from state courts are consistently reviewed. Although a cause for concern, it should not be a cause of despair. Contemporary evidence demonstrates that, for the most part, state courts are faithful agents of the Supreme Court in applying federal law. Faithful agents need to be monitored, but not as closely as unfaithful ones.