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DECIDE THE LAW, CLEARLY—A REPLY
TO JUDGE BETTMAN

BEN GLASSMAN¹

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From Akron comes a question. “Identical Constitutional Language: What Is a State Court to Do?” asks the Honorable Marianna Brown Bettman.² Her dilemma is roughly this: if a clause of a state constitution is worded similarly to a clause in the federal Constitution, how can a state court develop constitutional law? She sees this dilemma embodied in a series of opinions developing out of the criminal case of Robert Robinette.³ But in important respects, Judge Bettman’s question reflects a misunderstanding of the law. This misunderstanding prevents her from identifying what is really at stake in cases like the one she describes.

Specifically, Judge Bettman seems to have misread *Michigan v. Long*.⁴ The *Long* Court laid out a clear test for determining the Supreme Court’s appellate jurisdiction over state cases where the grounds—federal or state—of the state court’s decision are ambiguous. The Supreme Court correctly applied this test in *Robinette*. Judge Bettman’s conclusion that the Supreme Court was improperly stretching its jurisdiction to infringe on Ohio’s constitutional territory is therefore incorrect.

This error prevents Judge Bettman from squarely addressing the question of where state supreme court justices should rest their judgments when they might do so upon either the federal or the state constitution, or both. This is an important question raised by *Long*’s clear statement doctrine, but it has not been thoroughly considered.⁵ Although there are good reasons for the hypothetical state supreme

¹Law clerk to the Honorable Susan J. Dlott, U.S. District Court for the Southern District of Ohio; J.D., Harvard Law School, 2000; B.A., Rice University, 1997. I am particularly grateful to Richard Fallon for helping me to clarify my argument in Part III. Thanks also to Beth Collins, Chris Giampapa, and Jason Linder for their comments on earlier drafts of this Reply.

²Marianna Brown Bettman, *Identical Constitutional Language: What Is a State Court to Do? The Ohio Case of State v. Robinette*, 32 AKRON L. REV. 657 (1999).

³See *State v. Robinette*, No. 14074, 1994 WL 147806, at *1 (Ohio App. Apr. 15, 1994); *State v. Robinette*, 653 N.E.2d 695 (Ohio 1995); *Ohio v. Robinette*, 519 U.S. 33 (1996); *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997).

⁴463 U.S. 1032 (1983).

⁵For a summary of the literature dealing with Judge Bettman’s concern, see Donna M. Nakagiri, *Developing State Constitutional Jurisprudence after Michigan v. Long: Suggestions for Opinion Writing and Systemic Change*, 1998 DET. C.L. REV. 807. This rather curious article provides a catalog of approaches for state court judges to use to avoid Supreme Court

court justice to rest her decision on the state constitution alone, I will argue that from a global perspective, the country's legal system might be best served by resting on both the federal and state constitutions.

After briefly recounting the story of the *Robinette* case's journey through the state legal system to the federal one and back again, I will present Judge Bettman's analysis and show how she errs. Then I will consider the deeper question presented by a correct understanding of Supreme Court jurisdiction over state court judgments.

I. THE FACTS AND DISPOSITION OF *ROBINETTE*

Robert Robinette was driving about twenty-five miles per hour over the speed limit when county Sheriff's Deputy Roger Newsome stopped him. Newsome, on drug interdiction patrol at the time, was stopping speeders at that location. Before speaking with Robinette, Newsome had decided to issue only a warning, which was his routine practice. Newsome requested and received Robinette's driver's license. He returned to his own vehicle to check the license and found no violations. He then returned to Robinette's vehicle and asked him to step out of the car and to its rear. Robinette complied. Newsome turned on a video camera, issued a warning to Robinette, and returned his driver's license.

Then Newsome said, "One question before you get gone [sic]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"⁶ This procedure was also standard practice for Newsome. Robinette answered in the negative. Newsome asked whether he could search the car. Robinette, not feeling at liberty to refuse, consented. The ensuing search by Newsome uncovered certain controlled substances, which formed the basis for Robinette's arrest and charge for violating Ohio's anti-drug abuse law.

At trial Robinette's motion to suppress the evidence discovered by Newsome's search was denied, and he was convicted. But the court of appeals reversed his conviction, ruling that the trial court's failure to suppress was error. The court reasoned that Newsome's search constituted an unlawful detention since, after he had issued the warning for speeding, Newsome had no "reasonable and articulable suspicion"⁷ of any criminal activity. Whether Robinette consented to the search was therefore immaterial.

The Ohio Supreme Court affirmed.⁸ Justice Pfeifer's majority opinion discussed the justification required for any investigative stop under the Fourth Amendment. Opening with language from the United States Supreme Court's opinion in *Terry v. Ohio*,⁹ Justice Pfeifer continued by discussing *State v. Chatton*,¹⁰ the principal Ohio case construing the Fourth Amendment in the context of investigative stops. The court proceeded to consider the facts of the instant case in light of Supreme Court

review, yet it acknowledges that the plain statement discussed in *Long* will always accomplish this purpose. *See id.* at 837. It does not, however, consider whether state judges employing *Long*'s rule should also discuss federal law.

⁶*Robinette*, 653 N.E.2d at 696.

⁷*Robinette*, 1994 WL 147806 at *2.

⁸*Robinette*, 653 N.E.2d at 695.

⁹392 U.S. 1 (1968).

¹⁰463 N.E.2d 1237 (Ohio 1984).

precedents defining consensual encounters between citizens and police, and it concluded that a bright line rule was necessary. It stated this rule in its syllabus:

The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.¹¹

The United States Supreme Court granted certiorari¹² and reversed.¹³ Writing for a seven-member majority, Chief Justice Rehnquist first disposed of Robinette's claim that the Court lacked jurisdiction because the Ohio decision rested on adequate and independent state grounds. Applying *Long*, the Court correctly determined that "the adequacy and independence of any possible state law ground [was] not clear,"¹⁴ so it was proper for the Court to take jurisdiction. Next, the Court rejected the bright line test of the Ohio Supreme Court as incommensurate with Fourth Amendment jurisprudence. Justice Ginsburg concurred that Supreme Court jurisdiction was proper but wrote separately to point out that the Ohio Supreme Court could still choose to reaffirm its holding, so long as it clearly stated that it was relying on the state constitution.¹⁵

The Ohio Supreme Court did not choose this course. Instead, it announced that where, as here, "the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio's Constitution are coextensive with those provided by the United States Constitution."¹⁶ Then it applied the Supreme Court's totality-of-the-circumstances test to the facts before it and concluded that Newsome's detention of Robinette failed that standard, also, reaffirming the court of appeals' judgment.

II. EXERCISING FEDERAL JURISDICTION UNDER *MICHIGAN V. LONG*

Judge Bettman directs much of her disapproval toward the United States Supreme Court's exercise of jurisdiction. The thrust of her argument is that the Ohio Supreme Court's initial disposition of *Robinette* relied on adequate and independent state law grounds. Therefore, when the federal Court accepted jurisdiction, it improperly infringed on Ohio's constitutional terrain. The basis for her assertion is that portion of the syllabus quoted above. In her article Judge Bettman italicizes *federal and Ohio Constitutions* in the first sentence of the quoted paragraph to emphasize her view that the decision stood on independent state law. "Of

¹¹*Robinette*, 653 N.E.2d at 696.

¹²*See Ohio v. Robinette*, 516 U.S. 1157 (1996).

¹³*See Robinette*, 519 U.S. 33.

¹⁴*Id.* at 37 (quoting *Long*, 463 U.S. at 1040-41).

¹⁵*See id.* at 44-45 (Ginsburg, J., concurring).

¹⁶*Robinette*, 685 N.E.2d at 766.

significance to this article,” she points out, “is the stated reliance in the second paragraph of the syllabus on both the federal and state constitutions.”¹⁷

After briefly discussing the relevant rule of *Michigan v. Long*,¹⁸ Judge Bettman proceeds to misapply it. She complains that Chief Justice Rehnquist’s majority opinion “gave short shrift to the ‘independent state grounds’ alleged.”¹⁹ Then she concludes with disapproval bordering on sarcasm: “In short, boldly saying that a case is decided on an independent state ground will not necessarily make it so.”²⁰ In fact, precisely the opposite is true. Boldly saying that a case is decided on an independent state ground *will* make it so. Therefore, much of Judge Bettman’s objection to *Robinette* is based on a misunderstanding of the law.

A cursory review of *Long* should clarify. It is axiomatic that the federal courts have no power to change or even review a state’s construction of its own common or constitutional law.²¹ And it has long been settled that the Supreme Court will not accept jurisdiction to review a case that has been decided on adequate and independent state law grounds, even when the case also involves a federal question.²² These unquestioned principles ought to satisfy Judge Bettman. But *Long* asked a different question.

If the state court does not explicitly say so, how should the Court ascertain whether state law furnishes adequate and independent grounds for the decision? There are four possible responses to this dilemma. First, the Court could examine the relevant state law and form its own conclusion about its adequacy for the decision. Second, it could vacate the decision and ask the state court specifically. Third, it could assume that it has no jurisdiction. Or fourth, it could assume that it has jurisdiction. In *Long*, the Court adopted the fourth option. Writing for the majority, Justice O’Connor justified this rule in terms of efficiency, uniformity, and respect for state courts. In *Long* and henceforward, if state law grounds are adequate, the state court must say so. In *Long* itself the state court did not say so, and it decided the Fourth Amendment question incorrectly. Thus, the Supreme Court accepted jurisdiction and reversed.

One might certainly criticize the application of the *Long* rule to *Long* itself. Prior to Justice O’Connor’s opinion, state courts had no way of knowing that an explicit statement was required to preclude federal review. Therefore, according to the values that Justice O’Connor articulated to support the rule, it seems that vacating

¹⁷Bettman, *supra* note 2, at 659.

¹⁸The correct identification of the *Long* rule prompts two readings of Judge Bettman’s article that would not be subject to the present critique. First, she might have been suggesting that the Supreme Court should have overruled *Long*. Second, she might have been suggesting that, given *Long*’s plain statement rule, the Ohio syllabus should have satisfied it. One could engage each of these arguments on its merits, but I will not do so here because I do not think that they are the most natural readings of Judge Bettman’s article.

¹⁹*Id.* at 661.

²⁰*Id.*

²¹*See* *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

²²*See* *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

and remanding would have better furthered federal respect for state courts.²³ For all subsequent cases, however, *Long* clearly accomplishes its purposes.

This is why Judge Bettman's objection is both puzzling and wrong. Jurisdictionally, *Robinette* presented precisely the situation decided by *Long*. In both, the state court said, without more, that it was relying on both the federal and state constitutions. Does this mean that reliance on the state constitution is sufficient to decide the case? Trying to answer that question in *Robinette*, one confronts the paradigmatic ambiguity resolved by *Long*. As Justice Ginsburg pointed out in her *Robinette* concurrence, duly noted by Judge Bettman, if the Ohio Supreme Court really believed its decision to be based on adequate and independent state constitutional grounds, all it had to do was add to its opinion a sentence stating so explicitly. If it had done so, the Supreme Court would not have accepted jurisdiction. Thus, while the Court's substantive views about the Fourth Amendment in recent cases like *Robinette* might well be open to criticism.²⁴ Its exercise of jurisdiction should be decidedly non-controversial.

The challenge of *Robinette* identified by Judge Bettman therefore has, from a federal perspective, a mundane answer. She argues,

In this era of "new" states' rights, the challenge for the states will be how to satisfy the "independent state ground" requirement of *Michigan v. Long*, where the language of state and federal constitutional provisions is identical, and the state does not yet have a body of state precedent on which to draw.²⁵

To meet the challenge, all a state court need do is engage in regular legal analysis, and then conclude its opinion by stating, "This decision rests on adequate and independent state law grounds."

It is difficult to charitably reformulate this supposed challenge. I strongly suspect that Judge Bettman wants Ohio to interpret its state constitution so that it provides "more" protection to the individual against state action than does the federal constitution. No one disputes a state can plausibly read its constitution in this way,²⁶

²³One commentator has insisted that *Long* is a rule that is disrespectful of state judges in subsequent cases as well. See Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371, 379 (1991) ("presumption condescends to state judges").

²⁴For criticism of the Court's recent Fourth Amendment cases generally, see David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997). Another strong critique of Supreme Court jurisprudence in this area is David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91 (1998). For an argument that even Ohio's bright line test did not go far enough in protecting individual rights, see Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998).

²⁵Bettman, *supra* note 2, at 663.

²⁶In fact, many have celebrated the practice. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). For a good argument that state courts should rely on state constitutions in dealing with constitutional claims to various aspects of welfare, see Helen

but Ohio has declined to do so. After remand from the United States Supreme Court, the Ohio Supreme Court in *Robinette* stated that “this court has determined that protections afforded by Ohio’s Constitution are coextensive with those provided by the United States Constitution.”²⁷ Thus, even if there is a body of state precedent on which a state court might draw, so long as the state and federal constitutional provisions are virtually identical, Ohio will read its state constitutional provision to have the same meaning as its federal equivalent.

III. DECISIONAL ORDER AND CONSTITUTIONAL FIDELITY

Because her understanding of the relevance of *Long* to *Robinette* was incorrect, Judge Bettman did not recognize the interesting question that the *Long* rule presents for state judges. That is, on which grounds should a state court judge rest a decision when more than one option is plausible? Exploration of this question moves us beyond a critique of Judge Bettman’s argument. The *Long* rule allows a state supreme court, in certain circumstances, to rule on the federal Constitution without the ruling being subject to Supreme Court review. It follows from the critique, however, since such a question arises only if one recognizes that the *Long* rule allows a state supreme court, in certain circumstances, to rule on the federal Constitution without the ruling being subject to Supreme Court review. If the state court could not bar federal review with a plain statement of adequate and independent state law grounds, as Judge Bettman suggests, a state court judge will have no need to consider the question. To grasp the contours of the problem, imagine a state supreme court justice faced with a case in which a litigant has a valid claim of constitutional right that the justice could uphold on (1) state constitutional grounds alone, (2) federal constitutional grounds alone, or (3) both state and federal constitutional grounds, making clear in the opinion that the state ground is adequate and independent. Which course should the justice take?

Each choice differently affects Supreme Court jurisdiction over the decision. If the justice chooses the first option, there will be no Supreme Court review. The second option will permit review. And under *Long*, the third option, like the first, will prohibit review. If the justice wants her disposition of the case to be final, she should choose the first or third option, since the second option will allow a different court to review the judgment. Assume, however, that she truly believes the constitutional claim to be valid under both the state and federal constitutions. To articulate such a view, she must choose option three. This is precisely the course she should take. Judges ought to say what the law *is*; it behooves the judicial function to act on sincerely held beliefs about the law, not on strategic considerations of insuring the finality of a judgment. Our justice could rest her decision on state constitutional grounds alone, knowing that this would preclude Supreme Court review, and be pleased that the case was rightly decided in the final analysis. But if the federal Constitution also yields the same result, shouldn’t the justice say that as well?

Conventional institutional arguments counsel against an affirmative answer. The difficulty with deciding the case on both state and federal constitutional grounds, while stating explicitly that the state ground is adequate and independent, is that it

Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132 (1999).

²⁷*Robinette*, 685 N.E.2d at 766.

allows the state court to make a final, unreviewable ruling on the meaning of the federal Constitution. This poses no practical problem—unless the state supreme court and the federal Supreme Court have different understandings of the federal Constitution. In that case, the state supreme court would be in the position of pronouncing a view of the Constitution that the federal Supreme Court would reverse as error if it had jurisdiction. But since the state decision stated that the state ground was adequate and independent, no federal review is possible.

One might argue that we should take a dim view of such a state of affairs. Surely, this argument proceeds, for the highest state court to say the Constitution means one thing, while the Supreme Court says it means another, would confuse the public and undermine its confidence in the judiciary and perhaps the rule of law itself. As a practical matter, it might lead citizens to believe that one can successfully assert federal constitutional claims in federal court, based on the state court's exposition of its meaning. Since state court rulings on the Constitution do not bind federal courts, and since the Supreme Court can ultimately review all federal court decisions, litigants would lose these claims, resulting in yet more confusion.

These worries are not insubstantial. Indeed, it seems clear that if Congress preferred to avoid these difficulties by mandating that state courts take the first course instead (sticking to state law grounds alone when possible), it could do so under Article III and the Necessary and Proper Clause. Yet, the above probably overstates concerns over confusion and lost confidence. First, the public's confidence in the judiciary would probably not be significantly undermined by two courts reading the same Constitution two different ways. This happens all the time; it is the definition of a circuit split. And when the Supreme Court denies certiorari, those decisions are final. Second, it seems unlikely that litigants would actually seek to rely at their peril on state court interpretation of the Constitution in federal court. Knowing the controlling precedent of the specific forum for one's case is an absolutely basic requirement for the practicing lawyer.

In addition, I think other global considerations should lead us to endorse the state supreme court's unreviewable expounding on the Constitution. Here again I am interested in the case in which a state supreme court thinks the Constitution dictates one result, while the federal Supreme Court would reach the opposite conclusion.²⁸ In what sense would the state court be getting the law wrong? Isn't it equally possible that the state court is getting the Constitution right, while the Supreme Court is in error? The query requires some thought. One might be tempted to argue that the proposition is outrageous; the Constitution means what the Supreme Court says it

²⁸Of course, such a case exists squarely in the realm of the thought experiment. For any case over which the Supreme Court may and does exercise jurisdiction, principles of res judicata and collateral estoppel require any state court that subsequently deals with the case to respect its judgment. For any case (like the ones with which we are here concerned) in which the state supreme court rules on the state and federal constitutions and includes a plain statement of adequate and independent state law grounds, the Supreme Court will not review the case, and we will never know in fact whether the Supreme Court disagrees with the state court's understanding of the federal Constitution. Consider *Robinette* in this regard. If the Ohio Supreme Court had believed that the state constitution and the federal one dictated independent but identical results, it could have employed a plain statement to bar federal review. In that scenario, we would never know whether the Supreme Court agreed or not.

does. From a Holmesian, legal realist perspective, this is true, but this should not end our inquiry. I doubt anyone will be heard to argue that the Supreme Court has never erred in its interpretation of the Constitution. Indeed, dredging up the specter of *Lochner*²⁹ is a familiar rhetorical tack for almost all the Justices, and they do not hesitate to tell us now that “we think *Plessy* was wrong the day it was decided.”³⁰

Assuming, then, that getting the Constitution right should be the first goal of constitutional adjudication,³¹ and that the Supreme Court sometimes gets it wrong, we should ask which of the three options available to our hypothetical state supreme court justice will best further correct readings of the Constitution. I think it is the third option. But this is not the case because of substantive decisions. If the Supreme Court at a particular time interprets a provision of the Constitution incorrectly and a state supreme court gets the reading right, that is one more correct reading than if the state court had rested its judgment on state grounds alone. But this substantive argument goes nowhere quickly, since it is at least as likely that the Supreme Court will be right on any particular question, and the state court wrong. Instead, we should consider the process by which constitutional decisions are made.

Faithful readings of the Constitution cannot remain static. If a constitutional provision means one thing in a certain context, when the context changes, the reading must also change to preserve the same meaning. The full implications of this basic insight have been most thoroughly investigated by Professor Lawrence Lessig.³² As he has argued in detail, to determine whether a reading of the Constitution is one of fidelity, one must be sensitive to changes in foreground and background contexts. In addition, however, we should recognize that judges can never read the Constitution to mean something that we all know is false. That is, constitutional adjudication is subject to constraints of contestability.³³ Contextual transition to and from incontestability has many different, relevant permutations, but one basic point is that judges will shy away from otherwise faithful readings of the Constitution because the judicial institution, in order to avoid seeming political—or

²⁹*Lochner v. New York*, 198 U.S. 45 (1905) (striking down as unconstitutional New York’s maximum hour law for bakers). For an example of the rhetorical invocation of Lochnerian error, see Justice Souter’s dissent in *Seminole Tribe v. Florida*, 517 U.S. 44, 165 (1996) (Souter, J., dissenting) (decrying the majority’s resort to “textually unwarranted common-law rules, for it was just this practice in the century’s early decades that brought this Court to the nadir of competence that we identify with *Lochner v. New York*”).

³⁰*Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992).

³¹I recognize that such an assumption is not incontestable. For the view that a constitutional theory’s “fit” with the text itself does not of its own force justify the theory, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999). Without wishing here to engage Professor Fallon’s arguments, I think it sufficient for present purposes to note the widespread and persistent belief that fidelity to the Constitution is an adjudicatory value of the first order.

³²For his most important single work on the subject, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

³³On the particular relevance of incontestability/contestability, and its relation to the fact/value distinction, see Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837 (1997).

worse, dictatorial—abhors itself changing the contestability of a relevant context. Professor Lessig has called this “the Frankfurter constraint.”³⁴

What is contestable, however, may be quite different at the state and national levels. Citizens of one state might be willing to consider an argument that the rest of the nation would never hear of. For example, think of how a presidential candidate could carry the majority of one state though she is far behind in national polls. A state court may read the Constitution unencumbered by the Frankfurter constraint that would attend the Supreme Court’s reading of the same clause, because a state may be open to arguments or understandings to which the nation as a whole is not. Once a state court so decides, however, if its reading stands, the ensuing national dialogue may hasten a shift in the nation’s receptivity to the arguments or understandings relied on by the state supreme court. From the global perspective of American constitutional law, such a system would facilitate faithful Supreme Court readings of the Constitution, because it would render institutional constraints of contextual contestability more subject to change than otherwise. From this global perspective, then, we should favor the state supreme court justice basing her decision on state and federal constitutional grounds, while making clear that the state ground is adequate and independent.

Though this claim may strike some as unconventional, it is less controversial than on first appearance, since the only cases considered are the limited category of cases in which a state court could, in good conscience, rest its decision on either the state or federal constitutions, or both. Since I have elaborated no particular theory of constitutional interpretation or the role of precedent, one might push the argument to its logical extreme by asking whether it authorizes a state court to ignore Supreme Court precedent with which it disagrees. In fact, however, state courts may always pursue this tack, but unless there is an adequate and independent state law ground, the Supreme Court may accept jurisdiction and reverse the decision. In terms of adjudication, then, it makes no difference whether the state court explicitly disagrees with the Supreme Court, but the global benefits I have described will inhere only if the state court explains its decision openly and honestly. One need not push the argument so far, however, for it seems more likely that the state court would merely interpret Supreme Court precedent differently than would the Court itself. This is effectively the situation presented by *Robinette*, had the Ohio Supreme Court believed that the state and federal constitutions independently dictated the same result.

One would be foolish to argue that differential contestability justifies precluding Supreme Court review of *all* state court rulings on federal law. Not only would the argument run counter to the Constitution’s text, but also the cost, in evisceration of federal power, would be enormous, which is why this theory of federal review was properly rejected over 180 years ago.³⁵ But in the particular category of cases with which we have been concerned here, the cost is greatly reduced because, by definition, the outcome of the case does not turn on the federal Constitution. State constitutional law alone would be sufficient.

³⁴Lawrence Lessig, *Understanding Federalism’s Text*, 66 GEO. WASH. L. REV. 1218, 1221 (1998).

³⁵See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

IV. CONCLUSION

Which course should a state supreme court justice take when she could, in good conscience: decide a claim on the state constitution alone; the federal Constitution alone, or both, making clear that the state ground is adequate and independent? A global interest in constitutional fidelity counsels for the third choice. This is, however, a question that Judge Bettman never reaches because, in misreading *Long*, she erroneously concludes that a state supreme court that explicitly rests its judgment on independent state and federal constitutional grounds cannot preclude Supreme Court review. Since *Long* tells us precisely the opposite, the proper answer to Judge Bettman's question—identical constitutional language: what is a state court to do?—is to decide the law, clearly.