



# WHEN AVOIDING FEDERAL QUESTIONS SHOULDN'T EVADE FEDERAL REVIEW

*MICHIGAN V. LONG MEETS, AND TRUMPS,  
ASHWANDER V. TVA*

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LITIGANTS AGGRIEVED BY STATE LAWS sometimes make the strategic judgment that they are better off pursuing their cause in state rather than federal court, based on perceptions of the relative receptivity of the two judicial audiences.<sup>1</sup> They can keep their case in state court provided they litigate under state laws that are “adequate” and sufficiently “independent” of federal law to foreclose the possibility of U.S. Supreme Court review under the doctrinal framework fashioned by the Court in *Michigan v. Long*.<sup>2</sup> Take, for example, the controversy over California’s recently enacted ban on same-sex marriage, Proposition 8. Opponents of the voter-approved initiative attacked the measure on state law grounds in the California Supreme Court, and even after that attack proved unsuccessful, many leaders of the gay marriage

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<sup>1</sup> See, e.g., William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-53 (1986).

<sup>2</sup> 463 U.S. 1032 (1983).

movement were openly dissatisfied (and even angry) when two prominent attorneys – Ted Olson and David Boies – filed a complaint on behalf of gay couples in a high-profile federal court lawsuit challenging Proposition 8 under the U.S. Constitution.<sup>3</sup>

But even as state court claimants sometimes want to avoid (potentially unfriendly) U.S. Supreme Court review, they also want to avail themselves as much as possible of the backdrop of federal substantive law that may assist them in narrowing the meaning and scope of the state law to which they are objecting. Consider again the Proposition 8 litigation in the California Supreme Court. Although they seemed determined to avoid opening the door to U.S. Supreme Court review, the state court challengers also tried to use the federal constitutional backdrop to limit the reach of Proposition 8. In particular, they argued that Proposition 8, in the event it is valid at all, should be construed by the California Supreme Court so as not to apply to marriages that were entered into prior to the initiative's enactment because such "retroactive" application of the measure would raise substantial questions of federal due process.<sup>4</sup> In invoking the Fourteenth Amendment as a reason to construe the meaning of state law in one particular direction, the state court plaintiffs were tapping into the "avoidance" doctrine most often associated with language from a concurring opinion in *Ashwander v. Tennessee Valley Authority*<sup>5</sup> to the effect that if a statute can be interpreted in two plausible ways, the interpretation that avoids a serious constitutional question is to be heavily favored. As the U.S. Supreme Court put the point 50 years after it decided *Ashwander*, "where an otherwise acceptable construction of a statute would raise constitutional problems, the Court will construe the statute to

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<sup>3</sup> As a *Time* magazine story put things, "gay-rights veterans worry that Olson and Boies' approach could backfire." See [www.time.com/time/nation/article/0,8599,1902556,00.html](http://www.time.com/time/nation/article/0,8599,1902556,00.html) (last viewed on July 19, 2009).

<sup>4</sup> See, e.g., Answer Brief of the Attorney General of California to the Petition for Extraordinary Relief in *Tyler v. State of California*, at 71-72, viewable at [www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168066-answer-brief-petition.pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168066-answer-brief-petition.pdf) (last viewed on August 3, 2009).

<sup>5</sup> 297 U.S. 288 (1936).

avoid such problems unless such construction is plainly contrary to the intent” of the legislative body that enacted the statute.<sup>6</sup>

But this raises a question: When does invocation of the *Ashwander* avoidance idea – under which federal law is urged by the parties to do some of the work in determining the meaning of a state law like Proposition 8 – undermine the “adequacy” or “independence” of the state law ground on which a state court ruling rests, such that U.S. Supreme Court review is permissible under the *Long* framework?

In the balance of this essay, we analyze the intersection of the *Long* and *Ashwander* doctrines by looking carefully at each of them, and then offering a few observations about how the Court ought to resolve the question of its own power to review cases that seem to implicate both.

### LONG – CRITICISM AND JUSTIFICATION

In *Michigan v. Long*, the U.S. Supreme Court had before it a Michigan Supreme Court decision involving the not-uncommon situation in which a criminal defendant has challenged, under both the state and U.S. constitutions, a police search that turned up incriminating evidence on which his prosecution has been based. In order to decide whether review of the state court’s ruling in favor of the defendant was appropriate, the Court adopted a bright-line approach to govern reviewability in cases where state court opinions discuss both state and federal law. The Court held that henceforth it would feel free to review any “state court decision [that] fairly appears to rest primarily on federal law, or to be interwoven with the federal law,” unless the state court opinion includes “a plain statement” saying that the court’s analysis and conclusion are based on an “independent” and “adequate” state law ground that would render the Court’s resolution of any federal question irrelevant to the judgment in the lawsuit.<sup>7</sup>

The Court’s opinion in *Long* is open to significant criticism. Most fundamentally, the Court’s explanation for its new standard seems

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<sup>6</sup> *Edward J. DeBartolo Corp. v. Florida Gulf Coastal Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>7</sup> *Long*, 463 U.S. at 1040-41.

remarkably unpersuasive on its own terms. Justice O'Connor, writing for the majority, insisted that her doctrinal innovation was justified by "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, [which] have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."<sup>8</sup> Yet both of these objectives would quite obviously be better served by a rule which presumed that ambiguous state court decisions citing both state and federal precedent were grounded on state law, and accordingly, were not subject to federal review: Telling state courts to use "Simon says" language lest they be reviewed doesn't seem particularly consistent with federalism etiquette, and declining federal review unless federal law undeniably affects the judgment in a case would reduce the incidence of non-consequential Court decisions.

A different kind of explanation for the Court's result, albeit one the Court didn't really begin to offer, seems much more plausible. By grounding their decisions on an unclear mix of federal and state law, state courts may shield their rulings from both federal court review and political oversight within their respective states. In other words, state courts – many of whose members are supposed, in theory at least, to be electorally accountable – might fuzz up their opinions to foreclose U.S. Supreme Court reversal of results they favor, but at the same time invoke enough federal law to suggest – even when such federal law isn't really constraining – federal responsibility for the outcome of controversial disputes. If the *Long* Court had adopted a presumption against rather than in favor of federal review, state courts could manipulate, or at least would be sorely tempted to try to manipulate, the clarity of their opinions and the transparency of their reasoning. Subsequent attempts by state electorates to amend their constitutions or to impose electoral sanctions on state court judges could be discouraged by the not-unrealistic possibility that the state law options were constrained by federal requirements.<sup>9</sup>

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<sup>8</sup> *Long*, 463 U.S. at 1040.

<sup>9</sup> See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal*

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One response to this justification for the rule in *Long* is to ask: What federal interest is the Court furthering by thwarting state court attempts to untether themselves from political constraints within their states? Some jurists, most prominently Justice Stevens in his *Long* dissent, have argued that the *only* federal interest warranting Court review of state courts is the vindication of individual federal rights.<sup>10</sup>

We think Justice Stevens' focus on individual federal rights is too narrow. Although the *Long* majority did not respond to Justice Stevens at length, legitimate federal interests justifying Court review go beyond individual rights, and include other values expressed in constitutional doctrines and provisions. One important value implicated by our explanation of *Long* is the desire for clear state and federal lines of accountability featured prominently in *New York v. United States*<sup>11</sup> and *Printz v. United States*<sup>12</sup> to explain the so-called "anticommandeering" or "anticonscription" rule. Just as the federal government should not be allowed to conscript the labor of state executive or legislative branches to do federal bidding, neither should state courts be able to use federal work product to shirk their own decisionmaking and explanatory responsibilities. In both settings, the constitutional injury is the same – the peoples of the states are hampered in their right to hold government properly accountable. At a minimum, federal law ought not to be used by state courts as a *means* to conceal the true bases of state court rulings.

The "converse-*New York v. United States*" idea we offer here is grounded in more than Supreme Court caselaw and constitutional

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*Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1378-80 (1986) (state judges "whose opinions promote disfavored classes or rights expose themselves to sanctions by the majority" and "in the absence of external pressure to write opinions in one fashion or another, state judges could write ambiguously – rubbing together state and federal grounds to create enough smoke to give themselves freedom to act").

<sup>10</sup> See *Long*, 463 U.S. at 1065 (Stevens, J., dissenting). See also Matasar and Bruch, *supra* note 9, at 1380.

<sup>11</sup> 505 U.S. 144 (1992).

<sup>12</sup> 521 U.S. 898 (1997).

structure. As Justice O'Connor's majority opinion in *New York* suggested, promoting accountability in the states is tied to Article IV's textual guarantee to states of "Republican" forms of government.<sup>13</sup> The popular sovereignty that Republican government dictates naturally argues in favor of transparency in state political decisionmaking. And even if the Court has seemed reluctant to wield Article IV's Guarantee Clause affirmatively to invalidate state laws and executive actions,<sup>14</sup> that certainly does not preclude the Court from invoking the Clause to ensure federal law is not a passive participant in frustrating the very accountability interests the Clause seeks to advance.<sup>15</sup>

For these reasons, while we realize that state law constitutionally can, and often does, fail to provide as much transparency in judicial decisionmaking as some of us prefer – for example, by refusing to require opinions to be published – we think the "accountability account" of *Long* has valuable precedential and normative force.

### ASHWANDER – JUSTIFICATION AND CRITICISM

Two principles – the first grounded in respect for legislative intent and the second in respect for legislative power – are often advanced to justify the prudential requirement, embodied in the

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<sup>13</sup> See U.S. CONST., art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."). When discussing accountability, the *New York* Court cited Deborah Jones Merrit, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61-62 (1988), in which Professor Merrit observes that "confusion over the lines of political responsibility is unacceptable in a republican government; in order to fulfill the ideal of popular control, the citizens must know which officials are responsible for unpopular" decisions. See 505 U.S. at 169.

<sup>14</sup> But see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753 (1994).

<sup>15</sup> Another arguable federal upside of *Long* is an increase in policy experimentation by states since phantom federal limits on state power can be removed by Court review. Experimentation by states acting as laboratories, from which the nation can learn, is often touted as one valuable incident of federalism.

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“nearly canonical”<sup>16</sup> concurrence by Justice Brandeis in *Ashwander v. TVA*, that directs lower federal courts to give laws narrow constructions to avoid even potential constitutional conflicts.

The first principle rests on two premises concerning judicial respect for legislative intent: (1) courts should interpret statutes to promote the legislature’s purpose; and (2) courts should presume that legislators (who, after all, take an oath to defend the Supreme Law) do not intend to violate the Constitution when they act. Accordingly, courts should interpret statutes to avoid constitutional problems.

We question the second premise as it applies to legislatures. Often legislatures *do* intend to cross, or at least test, established doctrinal constitutional limits.<sup>17</sup> Moreover, a legislative desire to avoid constitutional violation is very different – and much more common as an empirical matter – than a legislative intent to avoid doing things that may simply raise constitutional questions.

And whatever the weaknesses of legislative intent as a justification for *Ashwander* in the context of enactments by legislatures, those weaknesses are dramatically magnified when we apply the doctrine to direct democracy initiatives. Our personal experience in our home state of California (where both of us have resided and observed law and politics for decades) reveals far too many enacted initiatives that were constitutionally suspect at the time of adoption for anyone to reasonably believe that the electorate, the members of which do not take any oath, generally cares whether an initiative may arguably violate the Constitution.

More generally, interpretive presumptions developed by courts are more defensible on the ground of legislative intent when there is

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<sup>16</sup> RICHARD J. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER AND DAVID L. SHAPIRO, *HART AND WECHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 76 (6th ed. 2009) (HART AND WECHSLER).

<sup>17</sup> One prominent example involves the attempt by the South Dakota legislature to test existing constitutional doctrine by prohibiting all abortions except those necessary to save the life of the mother. *See, e.g.*, [www.usatoday.com/news/politicselections/vote2006/SD/2006-11-08-abortion-ban\\_x.htm](http://www.usatoday.com/news/politicselections/vote2006/SD/2006-11-08-abortion-ban_x.htm) (last viewed on July 20, 2009).

a dialectic relationship between the enacting body and the reviewing court, such that over time the lawmaker really could reasonably know about, and craft its work product around, the court's interpretive canons. It is one thing for a court to say to a legislature like Congress that it will not: (1) apply a generally-worded Congressional statute against states unless the statute explicitly so requires;<sup>18</sup> or (2) find in a federal statute a private right of action that is not affirmatively mentioned;<sup>19</sup> or (3) enforce a statutory enactment retroactively unless the enactment overtly so provides.<sup>20</sup> In each of these instances, not only is there an independent constitutional (or policy) value beyond avoidance for avoidance's sake doing the work in narrowing the scope of the enactment; in each of these settings, the apprehensions that drive the interpretive rule are sufficiently confined that a legislature could conceivably draft its language in light of the court's stated concerns. But a court telling 20 million Californians that it will interpret the words of any initiative so as to avoid any serious constitutional questions – when voters (and indeed most lawyers) could have no clue of the entire range of constitutional questions their desired initiatives might implicate – is hardly a plausible device for discerning what the electorate that passed an initiative in fact wanted.<sup>21</sup>

The second principle often said to underlie *Ashwander* has greater surface plausibility. The idea here is that striking down laws under the U.S. Constitution raises separation of powers concerns about the displacement of democratic decisionmaking by judges who are often not directly answerable to the people. Under this view, *Ashwander* at its core is, like the reconceptualization of *Long* we discuss above, about political accountability. In these circumstances, the argument runs, separation of powers is best protected by “mini-

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<sup>18</sup> See *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>19</sup> For a discussion of this issue, see *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>20</sup> For a discussion of the dangers of retroactivity, see *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

<sup>21</sup> *Cf.* In *Re Lance W.*, 37 Cal. 3d 873 (1985) (“The electorate would be deemed to know of the superseding impact of federal constitutional provisions on state laws . . .”).



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miz[ing] disagreement between the branches by preserving [legislative] enactments that might otherwise founder on constitutional objections.”<sup>22</sup>

Yet this account too falls apart on closer examination. While concerns about political answerability and restraint by judges are no doubt intrinsic to judicial review in our constitutional system, it would not seem that *Ashwander*'s recommendation that courts narrowly construe statutes is an appropriate response to the problem. For starters, a court's decision to construe a statute narrowly because of potential constitutional problems communicates a substantive message about the constitutional boundaries within which legislation must be drafted. That statement may be more ambiguous about the precise limits of the Constitution than would overtly invalidating an unconstitutional statute, but it is a statement of constitutional limitation nonetheless. Thus, although the act of narrowly construing a law may obscure the full extent to which the Constitution prohibits legislation in a certain realm, it certainly overrides the legislature's judgment and thus raises profound separation of powers problems by limiting the meaning of a duly-enacted statute. Making “disagree[ment]s between the branches” less precise does not eliminate the reality that a conflict that frustrates legislative will exists.<sup>23</sup>

This phenomenon is illustrated nicely by the recent Court decision involving the meaning and constitutional permissibility of Section 5 of the Voting Rights Act (Act).<sup>24</sup> In that case, *Ashwander* was deployed aggressively to limit the scope of the Act (or more accurately expand the scope of exceptions to the Act)<sup>25</sup> in a way that might undermine, rather than promote, accountability; the Court in dicta effectively invalidated the Act (forcing Congress to amend the

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<sup>22</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998).

<sup>23</sup> See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (“[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.”).

<sup>24</sup> *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504 (2009).

<sup>25</sup> *Id.* at 2513-16.

statute under pain of formal judicial nullification in a future case) without ever having to own up to, and answer to the American people for, the gutting of the landmark enactment. This seems a good example of how, as Professor Schauer has explained, *Ashwander* invites judges to use disingenuous interpretations of statutes “to substitute their judgment for that of Congress,”<sup>26</sup> without ever having to take responsibility for issuing a constitutional holding.

Here is yet another drawback of *Ashwander*: If a court strikes down a law as unconstitutional, the legislature can at least enact new legislation that attempts to further its goals while avoiding the specific transgression(s) that led to the earlier law’s invalidation. But the uncertainty created when a court construes a law narrowly may well *expand* the potential parameters of conflict and displace a broader range of legislative discretion than would invalidating the law overtly.

These shortcomings of *Ashwander* are particularly acute in the context of laws adopted by initiative. The cost of re-initiating a ballot measure may be substantial. And uncertainty about a new initiative’s constitutionality can only discourage attempts to marshal the resources necessary to move forward with an alternative ballot proposal.

### EVALUATING THE TENSION BETWEEN *LONG* AND *ASHWANDER*

From our perspective, then, *Ashwander*’s directive in favor of narrow interpretation and the *Long* plain-statement rule both are best understood as judicial responses to concerns about political accountability. Yet we believe the plain-statement requirement of *Long* more effectively furthers political accountability goals than does *Ashwander*’s emphasis on the narrow construction of statutes to avoid constitutional conflicts. Indeed, the *Ashwander* rule often tends to hinder, rather than promote, full accountability.

We do not mean to overstate the utility of the *Long* requirement here. A state court opinion that discusses federal law at length, but that also includes a plain statement (satisfying *Long*) that the court

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<sup>26</sup> Schauer, *supra* note 23, at 98.

relied independently on state law in reaching its decision, may still blunt the political reaction to its conclusion.<sup>27</sup> Often, however, this result will be the unavoidable consequence of the reality that federal law does in fact limit, at least to some extent, political (and judicial) discretion in the area at issue.

We also want to make clear our belief that federalism may limit the extent to which the federal government can actively impose transparency on state governmental operations to further political accountability. Neither the Guarantee Clause nor the Court's reasoning in *New York* and *Printz* gives the federal government unfettered license to regulate states in the name of promoting democratic openness and clarity. Nonetheless, we do not believe the obligations that *Long* places on state courts cross any such state autonomy lines, in part because the Court in *Long* is doing less than requiring transparency generally; it is merely choosing not to let federal work product be involved in obscuring state court responsibility.

### HOW CASES IMPLICATING BOTH *LONG* AND *ASHWANDER* SHOULD BE RESOLVED

All of this brings us to the question, then, of how the U.S. Supreme Court should respond to cases in which a state court narrowly construes a state law adopted through the initiative process in order to avoid a potential federal constitutional conflict. Let us get at this question by first discussing some easy cases. When a state court narrowly interprets state law and explains its narrow reading by reference to its stated belief that a broader interpretation *would* run afoul of the federal constitution, federal law would seem to be so central to the analysis as to clearly permit federal court review, else state courts could go unreviewed and remain unaccountable.<sup>28</sup> Thus, when a state court says, "we're interpreting state law in a particular way because the other plausible interpretations

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<sup>27</sup> Cf. George Deukmejian & Clifford K. Thompson, *All Sail and No Anchor – Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996-97 (1979).

<sup>28</sup> Cf. *Oregon v. Hass*, 420 U.S. 714, 719-20 (1975).

would violate federal law,” the U.S. Supreme Court would clearly be justified in reviewing and reversing the state court’s decision to the extent that it concluded that the state court had erroneously conceived the meaning of federal constitutional principles.<sup>29</sup>

So, for example, in a case pending before the California Supreme Court, California’s Attorney General has argued that if the state’s Proposition 209 (passed by the voters in 1996 to ban “racial preferences”) is interpreted to mean that race-conscious affirmative action programs that would survive review under the Fourteenth Amendment’s Equal Protection Clause are foreclosed in California, the initiative would be unconstitutional.<sup>30</sup> If the California Supreme Court agrees with that position, its ruling should be subject to federal Supreme Court review. In such situations, a plain statement that the state court was relying on “independent and adequate” state law grounds simply because it is construing the meaning of state law would be incoherent and thus not entitled to respect.

An easy case in the opposite direction is one in which a state court reads an enactment narrowly based on an *Ashwander*-like avoidance doctrine designed to avoid *state*, rather than federal, con-

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<sup>29</sup> An analogy to federal question “arising under” jurisdiction governed by 28 U.S.C. § 1331 comes to mind. As Justice Souter recently wrote for the Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005), there is a “commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” We would add “promoting accountability” to Justice Souter’s list of potential virtues of federal court review.

The Supreme Court itself has, without focusing on the issue, sometimes used careless language that, if read out of context, would suggest that federal review would be foreclosed in these kinds of situations. In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992), for example, the Court said “[i]n construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court,” even though the Minnesota court’s narrow interpretation of state law was explicitly based on its view that a broader construction would have violated the First Amendment.

<sup>30</sup> See Letter Brief of the California Attorney General in *Coral Construction, Inc. v. City & County of San Francisco*, No. S152934, April 22, 2009, at 1.

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stitutional complexity. So, for example, when the California Supreme Court decided in its Proposition 8 ruling that the Proposition ought to be construed narrowly because otherwise it might repeal other state constitutional provisions and repeal of state constitutional provisions by implication is to be avoided where possible,<sup>31</sup> the court's ruling ought not to be subject to federal review. Even though it makes little sense to think the California electorate knows and intends that implied repeal of other state constitutional provisions is disfavored, there would not seem to be a federal question here into which the U.S. Supreme Court could get its hooks, nor any reason to think a state court wouldn't be fully accountable within the state for its decision in this regard.

The toughest cases are ones in which state courts invoke potential, but not inevitable, conflicts with the federal Constitution, that is, when state courts say they are construing state laws in particular ways to avoid serious or significant questions of federal unconstitutionality. Here is where the conflict between *Long* and *Ashwander* principles is crisp and must be resolved.

One important question to ask in any such case is whether the state court's inclination to make use of the *Ashwander* avoidance doctrine is itself an independent state decision or instead seems to be understood by the state court as being dictated by federal law. Interestingly enough, some state court references to the avoidance doctrine, especially some of the earlier ones, cite only to federal cases in which federal courts are construing federal statutes in the shadow of *Ashwander*.<sup>32</sup> *Ashwander* is obviously binding on lower federal courts, because the U.S. Supreme Court has complete supervisory power over the federal judiciary. But it would not seem that state courts must employ any *Ashwander*-type doctrines with respect to possible federal unconstitutionality, so it becomes important to know whether a state court's use of *Ashwander* is itself an independent state law decision. In other words, there may often be a *Long*

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<sup>31</sup> See *Strauss v. Horton*, 46 Cal. 4th 364, 474 (2009).

<sup>32</sup> See, e.g., *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. 2d 818 (1943).

plain-statement question imbedded in a state court's invocation of an avoidance-of-federal-issues approach. If a state court employing the avoidance doctrine hasn't made clear, under the *Long* framework, that the avoidance idea is independently enshrined in state law, then the proper application of the federal avoidance doctrine in the particular case may itself be a federal question on which the U.S. Supreme Court can weigh in.

If the avoidance-of-federal-issues rule does seem to emanate from state law, then the question gets thornier. We think the key question in resolving whether such cases are reviewable by the U.S. Supreme Court is: How relevant is the actual size and scope of the possibility of federal conflict to the state court's decision about how to interpret state law? To use a nautical simile, if state law says, "We want our judicial ships to steer clear of icebergs, and whenever there is a blip on the radar that may be an iceberg, we change course," federal courts should be able to clarify whether the blip isn't an iceberg at all, but rather an ice floe or a non-ice piece of debris, or a mirage. If, on the other hand, state law says, "We want our ships to steer clear of all blips, whether or not the blips are in fact icebergs," then federal courts have no business intervening to help provide information on the nature of the blips.

To put our point another way, a state can, if it wants, determine that state laws should be applied in such a way that no person might ever doubt their constitutionality, whether such doubts are well-grounded or not. This is essentially a state law conclusion.

But we think state courts should have to be clear that they care about blips and not just icebergs, because we think that when there is tension between *Long* and *Ashwander*, that tension should be resolved in favor of *Long*'s concern for accountability. As explained above, we do not think *Ashwander* justifications hold up to close scrutiny generally, and we find *Ashwander* justifications particularly unpersuasive in initiative contexts. Since any state interest in steering clear of blips is nonobvious, and because the accountability problem underlying the *Long* rule is non-trivial, we conclude that something like *Long*'s clear-statement rule should apply here. Such a "plain statement" rule would better enable the electorate of a state

to challenge a state court's conclusion through an amendment to the state constitution or other political means.



Were we to package our doctrinal offering for the U.S. Supreme Court's consumption, we might do so along the following lines: "Whenever a state court invokes the possibility of federal unconstitutionality as a reason for construing state law in a particular way, this Court shall assume that the precise extent and contours of the possibility of unconstitutionality are important to the meaning of state law, such that this Court may readily review the case and opine on the meaning of the federal constitution, *unless* the state court makes clear by a 'plain statement' that its reasons for avoiding the possibility of conflict with federal law do not depend in any meaningful way on its current understanding of the limits imposed by federal law."

To repeat and summarize, our prescription derives from our conclusion that the accountability concerns driving *Long* are more plausible than those offered to defend *Ashwander*. If, on examination of this conflict between two doctrinal lines, one finds *Long* less convincing or *Ashwander* more convincing than we do, our prescription might, of course, be less attractive.

