

THE SILVER ANNIVERSARY OF *NEW JUDICIAL  
FEDERALISM*

*Ken Gormley\**

For those of us who have been writing and teaching about state constitutional law for several decades, it hardly seems possible that we have been at this endeavor so long. Nor does it seem possible that Justice Brennan's seminal article, *State Constitutions and the Protection of Individual Rights*<sup>1</sup>—which advocated an increased emphasis upon state constitutional jurisprudence in order to safeguard individual rights and liberties in the United States—has now celebrated its 25th anniversary.

Looking back upon the gestation period of *New Judicial Federalism* in America, one is struck by the fact that state constitutional law has now reached a certain level of maturity. Early commentators criticized renegade decisions of state courts relying upon their own independent constitutional provisions as illegitimate efforts to circumvent the presumptively correct pronouncements of the U.S. Supreme Court.<sup>2</sup> Professor James A. Gardner, a thoughtful scholar who has raised criticisms concerning “New [Judicial] Federalism,” wrote in 1992 that state constitutional law was “a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”<sup>3</sup> Yet the body of state constitutional jurisprudence has continued to grow at a rapid rate, producing an increasingly impressive array of cases emanating from

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\* Professor of law, Duquesne University, School of Law. Professor Gormley is the principal editor of the forthcoming treatise, GORMLEY ET AL., *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON INDIVIDUAL RIGHTS AND LIBERTIES* (2003).

<sup>1</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>2</sup> See, e.g., Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 875 (1974–75) (discussing the emergence of “evasion” cases during the Burger Court era, which involved state court decisions relying on a mixture of both state and federal grounds). These decisions, according to Wilkes, were arguably designed to dodge review by the U.S. Supreme Court that might further restrict the asserted federal right. *Id.* See generally Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

<sup>3</sup> James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

all fifty states.<sup>4</sup> Indeed, many of these state decisions have guided the evolution of federal constitutional law with respect to major societal issues.<sup>5</sup>

As a young law professor first gathering materials for a course in state constitutional law in the early 1980s—just as *New Judicial Federalism* was lifting off the ground—I had the unexpected pleasure of getting to know Justice Brennan, then nearing the end of his career on the Supreme Court. Because the confraternity of those professors and jurists interested in this relatively obscure topic was rather small, I found myself visiting Justice Brennan at his Chambers periodically for informal chats. We would talk about new, interesting cases being handed down by state supreme courts around the country and about the long-term prognosis for state constitutional jurisprudence. I was dubious that this new scholarly avocation would sustain itself long; many colleagues warned me that teaching state constitutional law was a passing fad. But Justice Brennan was far more optimistic. He predicted that I would be in the classroom teaching new cases in this area for years.

During one of our informal conversations, I steered Justice Brennan towards the subject of the U.S. Supreme Court's decision in *Michigan v. Long*,<sup>6</sup> which had recently revamped the *adequate and independent state grounds* doctrine. *Long* made it easier for the Court to review—and thus to overturn—decisions of the highest state courts if those decisions straddled the line between relying upon state and federal constitutional precedent. What did Justice Brennan think of *Long*? Would it not stunt the growth of *New Judicial Federalism* by making it more difficult for state jurists to rely upon their independent state constitutions? Would it not make it dramatically easier for U.S. Supreme Court Justices to intervene

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<sup>4</sup> For the best compendium of state constitutional case-law from a national perspective, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* (3d ed. 2000).

<sup>5</sup> See generally *Michigan Dep't of State Police v. Sitz*, 496 U.S. 443 (1990) (measuring states' holdings on search and seizure—in relation to drunk-driving roadblocks and sobriety checkpoints—against the U.S. Supreme Court's interpretation of what the Federal Constitution requires). See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 130 n.1 (1994) (listing more than a dozen state cases that have already addressed the "constitutionality of gender-based peremptory challenges" to determine whether the Equal Protection Clause prohibits challenges in such circumstances); *Batson v. Kentucky*, 476 U.S. 79, 82 n.1 (enumerating many state court decisions regarding racial discrimination in jury selection that were followed in federal courts, and also, many decisions that were rejected by federal courts); *In Re Quinlan*, 355 A.2d 647, 672 (N.J. 1976) (providing an origination point for the constitutional analysis surrounding the right to withdraw life-sustaining treatment that would later be utilized in *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269–71 (1990)).

<sup>6</sup> 463 U.S. 1032 (1983).

if they disliked a particular result reached by a state court if that court had departed from federal precedent? In my seminars on the subject, I lectured students that *Michigan v. Long* posed a danger to the long-term health of state constitutional jurisprudence. I was anxious to hear validation of this theory from the horse's mouth.

I recall being startled when Justice Brennan settled back in his chair and ruminated:

I think *Long* will be a good decision for state constitutional law. It keeps us from wasting time on cases that we have no business deciding. If a state supreme court wants to decide a case based on its own constitution, it just has to say so in plain language, and there won't be any misunderstanding.<sup>7</sup>

I was depressed the entire trip back to Pittsburgh from the U.S. Supreme Court. I had been lecturing students so stridently that *Long* would prove to be a disaster for the future of state constitutionalism in the United States. Now, the man who had authored the critical work on the subject was telling me that this decision was a great milestone. Where had I gone wrong as an academic?

I trudged to work the next day to re-read the *Long* decision in the privacy of my office. When I reached the end of the opinion, I discovered that Justice Brennan had dissented in the case.<sup>8</sup>

So we live, learn, and make the best with the cards that are dealt. In moments of nostalgic reflection, when I think back upon my conversations with Justice Brennan, I often slip into a game of *what-if*. What if *Michigan v. Long* had never been decided? Would state constitutional law have flourished more expansively, or would it have evolved in such an undisciplined fashion that it would have fizzled out? Was *Michigan v. Long*, in retrospect, positive or disruptive for state constitutionalism and for the already-tenuous relationship between state and federal courts? Two decades later, I have concluded that the answer is: *Some of both*.

Certainly, the direst predictions about *Long* have not come to

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<sup>7</sup> Informal Conversation with Justice Brennan, United States Supreme Court. The precise date of this conversation—occurring sometime in the mid 1980s—is unknown. A later such conversation, however, took place on March 29, 1991, at which time the author met with Justice Brennan for an interview relating to certain historic U.S. Supreme Court decisions.

<sup>8</sup> See *id.* at 1054 (Brennan, J., dissenting). In all fairness to Justice Brennan, he dissented on other grounds. While Justice Brennan agreed that the Court had jurisdiction in the case, he vigorously disagreed with the majority's Fourth Amendment analysis. *Id.* & n.1 (Brennan, J., dissenting). But he certainly did not express great enthusiasm over the Court's new methodology in *Long*. See *id.*

pass. Justice Stevens, the most ardent critic of *Long*, argued from the start that the plain statement rule would leave wreckage in its wake. He predicted that it would disrupt the harmony between federal and state courts by placing an unfair burden on state jurists to declare that they were relying upon an adequate and independent state ground when a hundred years of U.S. Supreme Court practice had been to the contrary. Where federal and state citations were intermingled, the Court was, in effect, presuming that the state had failed to meet its burden,<sup>9</sup> but the opposite had been the norm since *Murdock v. City of Memphis* was decided in 1874.<sup>10</sup> More specifically, Justice Stevens warned that the *Long* approach would indicate disrespect for state courts, thus dealing a blow to federal/state comity. It would also lead to advisory opinions, and it would encourage the wasting of scarce federal judicial resources.<sup>11</sup> In later cases, Justice Stevens—at times joined by Justice Ginsburg—repeated this harsh view of *Long*, suggesting that the Court “should be concerned by . . . [that decision’s] inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend.”<sup>12</sup>

There has been little written about *Long*’s impact upon the development of state constitutional law, and its impact, more broadly, upon the sensitive relationship between national and state courts in our federal system.<sup>13</sup> Twenty years after that decision was handed down, however, I believe that several useful observations can be gleaned from the decisions spawned by *Long*. First, *Michigan v. Long* has not proved to be a major impediment to the blossoming of state constitutional jurisprudence, as some critics feared. It has not stunted the growth of state constitutionalism. At the same time, as Justice Stevens warned, it has contributed to a certain amount of unhealthy friction and dissatisfaction between the federal and state courts, which must now be addressed by the

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<sup>9</sup> See *id.* at 1065–67 (Stevens, J., dissenting).

<sup>10</sup> 20 Wall. 590 (1874).

<sup>11</sup> See *Long*, 463 U.S. at 1065–67 (Stevens, J., dissenting).

<sup>12</sup> *Delaware v. Van Arsdall*, 475 U.S. 673, 699 (1986) (Stevens, J., dissenting); see also *Arizona v. Evans*, 514 U.S. 1, 24–34 (1995) (Ginsburg, J., dissenting) (urging the Court to retreat from the expanded power to review state court decisions that arose from the *Long* decision).

<sup>13</sup> One of the best examinations of the impact of *Michigan v. Long* is Richard W. Westling, *Advisory Opinions and the “Constitutionally Required” Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379 (1988). For a more recent examination, see Mathew G. Simon, Note, *Revisiting Michigan v. Long After Twenty Years*, 66 ALB. L. REV. 967 (2003).

Court if *Long's* goals are to be achieved.

Justice O'Connor's opinion in *Michigan v. Long* identified "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions" as the bases for the adequate and independent state grounds doctrine,<sup>14</sup> and, concurrently, the bases for establishing the plain statement rule. The theory was this:

If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.<sup>15</sup>

Justice O'Connor—herself a former state court judge—concluded that such an approach “avoids the . . . intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court . . . . [This approach] will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law.”<sup>16</sup>

Yet the *Long* approach has continued to cause federal and state courts to clash as adversaries, in a fashion that is not healthy for federalism. It is true that in the twenty years since that decision was handed down, state judges at all levels, and across the nation, have gradually come to realize the importance of engaging in a detailed and conspicuous analysis of state constitutional issues if that analysis is going to be deemed controlling for the U.S. Supreme Court. Although that educational process at the state level took years, if not decades, the olden days of state judges slapping down a citation to a state constitutional provision amidst pages of federal constitutional analysis seem to be gone—or at least receding into the past.<sup>17</sup> That is a positive development, both for state courts—to the extent that they are serious about constructing meaningful bodies of state constitutional jurisprudence—and for the U.S. Supreme Court, which was never meant to sift through jumbled state court opinions to find a single, glittering state constitutional needle in the haystack of precedent.

Yet the post-*Long* cases indicate a nagging problem. Twenty

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<sup>14</sup> See *Long*, 463 U.S. at 1040.

<sup>15</sup> *Id.* at 1041.

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *id.* at 1037 (indicating that the Michigan Supreme Court in *Long* cited the state constitution twice, in passing, and “otherwise relied exclusively on federal law”).

years after the plain statement rule was enunciated by the Court, it is possible to isolate a number of instances of overly-technical applications of the *Long* rule by the U.S. Supreme Court. These instances have led, in some cases, to angry backlashes by the state courts—sometimes justifiably so. It is one thing for a state judge to issue an opinion that makes virtually no serious reference to state constitutional grounds—amidst a lengthy discussion of federal constitutional precedent—and to expect that this will be insulated from federal review. The U.S. Supreme Court is certainly justified in stepping in to prevent confusion by lawyers and litigants who will inevitably read such jumbled state court pronouncements as the final word on *federal* constitutional issues. The U.S. Supreme Court must safeguard the integrity of jurisprudence flowing from the Federal Constitution.

It is quite another thing, however, for a state court judge to issue an opinion that contains extensive analysis under the state constitution and to have that decision reviewed and overturned by the U.S. Supreme Court simply because it lacked certain *magic language* such as: “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.”<sup>18</sup> It is that sort of hyper-technical application of the *Long* rule that has consistently angered state jurists. It has also frustrated the goal of nurturing federal/state comity, and, ironically, led to an even greater expenditure of judicial resources since such cases are inevitably remanded back to the state courts, which then promptly re-decide the matter under the state constitution, rendering the federal decision advisory.<sup>19</sup> Such federal overreaching has done little to promote a positive sense of federalism within the federal/state judicial system.

For instance, in *State v. Jackson*<sup>20</sup>—a determination handed down by the Montana Supreme Court shortly after *Long* was decided—several members of that state court reacted bitterly to the U.S. Supreme Court’s overturning of their court’s decision, which involved the admissibility of a defendant’s refusal to submit to a breathalyzer test. They believed that the case had been decided

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<sup>18</sup> A typical example of such magic plain statement language can be found in *Commonwealth v. Edmunds*, 586 A.2d 887, 906 (Pa. 1991).

<sup>19</sup> See generally Westling, *supra* note 13, at 391 (contending that since the *Long* decision has been handed down, the presumption it carries has led to a proliferation of advisory opinions).

<sup>20</sup> 672 P.2d 255 (Mont. 1983).

squarely under the Montana Constitution. Justice Sheehy of the Montana Supreme Court wrote in his dissenting opinion:

In our original opinion in this case, we had examined the rights guaranteed our citizens under state constitutional principles, in the light of federal constitutional decisions. Now the United States Supreme Court has interjected itself, commanding us in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits proscribed by the federal decisions. Effectively, the United States Supreme Court has intruded upon the rights of the judiciary of this sovereign state.

Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.<sup>21</sup>

More recently—in a post-*Long* case that set off fireworks in Pennsylvania—the U.S. Supreme Court in *Pennsylvania v. Labron*<sup>22</sup> overturned a decision of that state's highest court that suppressed evidence obtained from the warrantless search of an automobile, concluding that it lacked a plain statement, which was mandated by *Long*. In a *per curiam* opinion, the U.S. Supreme Court stated that the law of the Commonwealth was interlaced with federal law, and thus, the Pennsylvania court's opinion did not evince an adequate and independent state law ground.<sup>23</sup>

The Pennsylvania Supreme Court—in a chilly opinion penned by Justice Zappala—indicated obvious displeasure at the federal court's intrusion. Justice Zappala pronounced that the court's earlier decision in *Labron* “was, in fact, decided upon independent state grounds, i.e., Article I, Section 8 of the Pennsylvania Constitution . . . [and] [a]lthough we cited United States Supreme Court cases in our discussion of the automobile exception, we continually referred to our Court's prior interpretation of the exception to the warrant requirement.”<sup>24</sup> The Pennsylvania

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<sup>21</sup> *Id.* at 260 (Sheehy, J., dissenting); see also *id.* at 264 (Shea, J., dissenting) (stating that the U.S. Supreme Court had “arrogated to itself the powers that should, in our federal system, belong only to the states”).

<sup>22</sup> 518 U.S. 938 (1996).

<sup>23</sup> See *id.* at 941 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)).

<sup>24</sup> *Commonwealth v. Labron*, 690 A.2d 228, 228 (Pa. 1997).

Supreme Court went on to restore its earlier order, overturning the order of the Superior Court under the state constitution, notwithstanding the U.S. Supreme Court's prior reversal based upon federal grounds.<sup>25</sup>

In *New York v. Class*,<sup>26</sup> the U.S. Supreme Court overturned a decision of the New York Court of Appeals dealing with a police officer's nonconsensual entry into an automobile in order to obtain a vehicle identification number, concluding that a "plain statement" under *Michigan v. Long* was lacking.<sup>27</sup> The highest court of New York, on remand, swiftly reinstated its original holding.<sup>28</sup> In a terse *per curiam* opinion, the state court declared that it "initially and expressly relied on the State Constitution."<sup>29</sup> In effect, the court simply disregarded the federal decision. Again, in *Van Arsdall v. State*,<sup>30</sup> the Delaware Supreme Court—after having been reversed by the U.S. Supreme Court—held that it agreed with the federal analysis described by the U.S. Supreme Court but declared that the federal analysis violated Delaware constitutional law, and because of this, the Delaware court refused to follow the federal decision.<sup>31</sup>

Ironically, such strict applications of the *Long* rule by the U.S. Supreme Court are counter-productive on several different levels. Regardless of what the Court decides, the highest state court can always reclaim jurisdiction over the matter and re-decide the case under the state constitution if it wishes to do so. Often, that is what state courts have done to silently rebel against unappreciated intrusion. In our federal system, the highest state court remains master of its own docket and jurisprudence. State supreme courts have every right to insist that no judicial body can meddle with their own state jurisprudence and spawn confusion with respect to that body of law—even the U.S. Supreme Court. In the end, nothing can stop a state court from re-deciding its own case so that litigants and lawyers in that jurisdiction know precisely where the

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<sup>25</sup> See *id.* at 229.

<sup>26</sup> 475 U.S. 106 (1986).

<sup>27</sup> See *id.* at 109.

<sup>28</sup> *People v. Class*, 494 N.E.2d 444, 445 (N.Y. 1986) (expressing refusal to adhere to the U.S. Supreme Court's ruling in this matter, noting that while the Court's holdings have been followed in the past, because in this case "the State Constitution has been violated . . . a different result following reversal on Federal constitutional grounds" should not be reached).

<sup>29</sup> *Id.*

<sup>30</sup> 524 A.2d 3 (Del. 1987).

<sup>31</sup> See *id.* at 6 (pointing out the mistake of the U.S. Supreme Court in assuming that the prior Delaware court's decision was based on federal law simply because a "plain statement" to the contrary was wanting).

*state* stands on that particular issue, pursuant to the *state* constitution. Indeed, a number of state courts have aggressively done so, when they concluded that *Long* was improperly invoked by their federal brethren.<sup>32</sup>

Two decades after the plain statement rule of *Michigan v. Long* was adopted, the resulting case-law should cause the U.S. Supreme Court to take notice. In a considerable number of cases in which that Court has granted *certiorari* because a plain statement was lacking under *Long*, the state courts have ended up re-deciding the cases on remand and reaching opposite results from those arrived at by their federal counterparts.<sup>33</sup> If the U.S. Supreme Court's objective in creating this rule was to increase efficiency, show "[r]espect for the independence of state courts" and accomplish "avoidance of rendering advisory opinions,"<sup>34</sup> it has failed to do so, at least in a conspicuous chunk of the *Long*-related cases.

The U.S. Supreme Court should take stock of these angry reply-volleys by state courts, and implement one important adjustment to the plain statement rule. Rather than applying that rule in a heavy-handed, overly-rigid fashion—particularly in an age during which state constitutionalism has blossomed and grown into a stage of maturity in many states—the Justices should add a simple plain statement of their own when they sit down to author such opinions. Each time a state decision is reviewed and overturned based upon a *Long* determination that an adequate and independent state ground is lacking, the U.S. Supreme Court should take one additional step. It should make explicit, in simple and respectful language, that it is

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<sup>32</sup> See, e.g., *People v. Ramos*, 689 P.2d 430, 432 (Calif. 1984) (concluding that a jury charge found by the U.S. Supreme Court to not violate the Federal Constitution *did* in fact violate the state constitution, and therefore, refusing to adhere to U.S. Supreme Court precedent upholding its use). The Supreme Court of California expressed its sentiment by accepting responsibility for determining state law matters and by refusing to relegate that "grave responsibility" to "the judicial guardians of the federal Constitution." *Id.* at 439. In *State v. P.J. Video, Inc.*, New York's Court of Appeals denounced the U.S. Supreme Court's ruling that allowed into evidence video tapes obtained in such a way that satisfied the Fourth Amendment, and the court rejected this finding on remand by suppressing that evidence pursuant to the more exacting standards of Article I, Section 12 of the state's constitution. See 501 N.E.2d 556, 557–58 (N.Y. 1987). The New York court's decision to rely on the state constitution rather than the federal counterpart was "motivated also by concerns of federalism and separation of powers." *Id.* at 563.

<sup>33</sup> See Simon, *supra* note 13 (detailing instances in which state high courts have differed in opinion from the U.S. Supreme Court and explaining that in doing so some courts have openly criticized the U.S. Supreme Court for finding a lack of a plain statement while other state courts have taken a more "reserved and deferential approach" in demonstrating their judicial inconsistency).

<sup>34</sup> *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

resolving the case—and thus clarifying federal law—based upon the assumption that the state court did not intend to, and did not succeed at, basing its holding upon a wholly adequate and independent state ground. The Court should go on to make clear that the state court is indeed the final arbiter of state law, and has the opportunity to clarify the matter under state law if it wishes to do so. Thus, in each case in which *Long* is invoked, the matter should be remanded with explicit instructions that the highest state court possesses the opportunity to correct its defect and to re-decide the case under the state constitution, if that is what it initially intended.

Mere semantics? Not at all. Such an approach would soften the hard edges of the *Long* rule and send a message of respect to hard-working judges in the state judiciary. It would amount to a post-*Long* adaptation of the approach once followed by the U.S. Supreme Court in cases like *Minnesota v. National Tea Co.*<sup>35</sup> and *Herb v. Pitcairn*,<sup>36</sup> which were the norm during the 1940s. In such cases, the U.S. Supreme Court vacated and remanded, or continued the case—if it had any hesitancy about the basis of the decision—to give the state court an opportunity to make clear whether it was relying upon an adequate and independent state ground.<sup>37</sup> The Court could take a positive step forward by inverting that approach, still requiring the state court to make a plain statement that it had relied upon state constitutional law, as directed by *Long*, but adapting the *Long* approach to give the state court a final *out*. It could do so by adding an additional, tangible expression of respect and deference to the state courts, openly providing them with the last chance to correct any mistake, on remand, if the intent was to render the decision squarely under state law. In this fashion, the integrity of federal law would be carefully safeguarded since the U.S. Supreme Court would make clear the commands of the Federal Constitution. At the same time, there would be no danger that the federal courts would unwittingly muddy the waters with respect to *state* constitutional law, causing the parameters of state law to be clouded within that jurisdiction, thus creating unnecessary friction with their state brethren. Such a modified-*Long* approach would go

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<sup>35</sup> 309 U.S. 551 (1940).

<sup>36</sup> 324 U.S. 117 (1945).

<sup>37</sup> For a fuller discussion of these cases—and the evolution of the adequate and independent state grounds doctrine—see Ken Gormley, *Special Project, State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 OR. L. REV. 689, 698–702 & nn.34 & 35 (1988).

a long way to eliminate problems that have surfaced over the past two decades.

Twenty-five years after his seminal article, *State Constitutions and the Protection of Individual Rights*, which coincided with the birth of *New Judicial Federalism* in the United States, Justice Brennan would most likely proclaim *Michigan v. Long* an overall success in terms of helping to develop a sturdy body of state constitutional jurisprudence. Yet, some bugs still need to be worked out.

The secret to a long-term durability of state constitutional law—I have come to believe over the course of two decades—is that it must not be viewed as liberal or conservative, pro-government or anti-government, a product of the Warren Court or the Rehnquist Court, or any other over-broad designation seeking to pin an ideological badge on it. Rather, an enduring body of state constitutional law will only be constructed if it is a product of those neutral principles that inspired its rebirth in the first place. Not all judicial pronouncements concerning the scope of individual rights and liberties in the United States were meant to flow from the U.S. Supreme Court. Not all of the rights and liberties belonging to citizens in our federal system of government were meant to flow from the text of the U.S. Constitution. Rather, our democratic experiment—dating back to the Revolutionary period and the birth of our nation—always contemplated a respect for the independent state constitutions, many of which preceded the Federal Constitution by a decade.<sup>38</sup> These documents were designed to make the United States not a single monolithic entity that extinguished the identities of the several states but a democratic union that celebrated the rich identity of all fifty states and their unique charters of government.

*Michigan v. Long* was not constructed to spark friction between the federal and state judiciaries. It was not meant to dampen the legitimate development of state constitutional jurisprudence, nor was it designed to provoke hostility or anger by state judges attempting to carry out their oaths to protect and defend their own constitutions, just as U.S. Supreme Court Justices must protect and defend the sacred federal document. To the extent that the U.S. Supreme Court can tweak and temper *Long* to allow the state and federal courts to work in harmony—rather than as competitors and

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<sup>38</sup> See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (2001).

adversaries—federalism will have taken a great step forward.