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The constitutional limits of the Supreme Court's authority to review state civil liberties judgments have not been explored since the days of the Warren Court. Then, the issue was the incorporation of the Bill of Rights and its impact on United States Supreme Court/state court relations. The victory of incorporation seemed to transform every civil liberties case into a *federal* civil liberties case. The federalization of the Bill of Rights led to the almost wholesale abandonment of any interest in state civil liberties guarantees.[1] State constitutional law had so atrophied that the continuing usefulness of preserving state bills of rights was questioned openly.[2] Moreover, since virtually all civil liberties cases coming to the Court involved claims of deprivation of some federally guaranteed right,[3] the Justices could exercise review regardless of whether the state judgments were based on state or federal law.

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1 The renewed interest in state constitutional law represents a sharp departure from the recent past. Reflecting this significant development in American federalism, the literature on state constitutional law has grown dramatically during the past decade. For a collection of recent articles on the subject, see Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 972-74 (1982); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); *Developments in the Law-The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1428 n.20 (1980). A column, written by Ronald K. L. Collins, reports recent developments in state constitutional law and regularly appears in the *National Law Journal*.

2 *See, e.g.*, Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Force, *State "Bill of Rights": A Case of Neglect and the Need for a Renaissance*, 2 VAL. U.L. REV. 125 (1969); Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311 (1968).

3 Between 1960 and 1969, the Court reviewed only four state civil liberties decisions challenged by state officials. In three of those cases, the court affirmed the judgment while in one the decision was vacated and remanded for the state court to make clear whether the decision rested on state or federal grounds. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1244 n.104, 1248 n.119 (1978). For an examination of the Burger Court's record, see Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HAST. CONST. L.Q. 819 (1984).

Controversy over appropriate Supreme Court/state court relations has resurfaced. This time the battleground is the Supreme Court's authority to police the outer bounds of federal constitutional requirements. Beginning in 1970, and with increasing frequency over the succeeding thirteen terms, the Justices have reviewed and reversed state civil liberties decisions on the ground that the state court had interpreted federal constitutional requirements too expansively.[4] In these cases the parties petitioning for review are state officials who do not contend that they have been deprived of any federal right. Instead, the petitioners argue that the state judgment should be overturned because, in the words of the Court, "a State [court] may not impose such greater [civil liberties] restrictions as a matter of *federal constitutional law* when this court specifically refrains from imposing them."[5]

Justice Marshall was the first to protest this exercise of the Court's certiorari jurisdiction. Dissenting in *Oregon v. Hass*,[6] Marshall argued that preserving the independent authority of state courts to vindicate rights under the state constitution required the High Court to "decline to review a state-court decision reversing a conviction unless it is quite clear that the state court has resolved all applicable state-law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand."[7]

The Court has generally ignored such criticism or dismissed it as "novel" or "unorthodox."[8] In its 1983 Term, however, the Court openly defended its policy of reversing "expansive" state civil liberties judgments. Speaking for a six person majority in *Michigan v. Long*,[9] Justice O'Connor announced that state civil liberties decisions will be deemed "reviewable" by the Court unless accompanied by an explicit disclaimer of reliance on federal law. In the absence of a "plain statement" of non-reliance on federal law, Justice O'Connor declared, "we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."[10] Justice O'Connor defended the

4 *See* Welsh, *supra* note 3, at 305-09; *see also*, Collins & Welsh, The Court vs. Rights, N.Y. Times, Oct. 7, 1983, at 31, col. 5.

5 Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original) (footnote omitted).

6 420 U.S. 714 (1975).

7 *Id.* at 729 (Marshall, J., dissenting).

8 *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981).

9 103 S. Ct. 3469 (1983).

10 *Id.* at 3476.

new plain statement requirement against the charge that the Court was interfering with state court independence:

> It is precisely because of this respect for state courts, and this desire to avoid advisory opinons, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions.[11]

The Court's requirement that state judges make explicit the independent basis of their decisions is not meant to thwart state constitutional development but instead to facilitate "both justice and judicial administration."[12]

Writing in dissent, Justice Stevens questioned the propriety of the Court reversing state judgments vindicating rights. Stevens noted that the Court's eagerness to reverse state decisions protecting civil liberties seems inconsistent with its oft-proclaimed allegience to federalism and the protection of state autonomy: "I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the [state court] judgment . . . in order to show '[r]espect for the independence of state courts.' "[13]

The positions expressed by Justices O'Connor and Stevens rest on two different models of federal/state relations. These two models have yet to be explored in the debate over the proper scope of the Court's authority to review state civil liberties judgments. Justice O'Connor subscribes to "the interstitial model,"[14] which holds that the dominance of federal civil liberties law has resulted in state bills of rights being assigned the narrow function of "filling in the gaps." In contrast, Justice Stevens' position follows the "classical model,"[15] which envisions a state court as primarily enforcing state law, including state constitutional law. Recourse to federal law is only necessary if state law fails to afford the desired relief. Under this model, federal law assumes the limited "gap-filling" role.

The importance of *Michigan v. Long* lies not in the search and seizure law it announces,[16] but in the opposing visions offered of the

11 *Id.* at 3475-76.

12 *Id.* at 3476.

13 Michigan v. Long, 103 S. Ct. 3469, 3492 (1983) (Stevens, J., dissenting).

14 The phrase, "interstitial model," was coined by the editors of *Harvard Law Review's Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356 (1982).

15 *See id.* at 1332.

16 In People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982), the Michigan Supreme Court overturned the defendant's conviction for possession of marijuana on the ground that the search of Long's automobile without a warrant was unconstitutional. The United States

relationship between the Supreme Court and the state courts. The exchange of views between Justices O'Connor and Stevens—the first such judicial debate to be publicly aired—extends beyond a disagreement over the allocation of scarce judicial resources. At stake are profound "jurisprudential questions . . . concerning the relationship between two sovereigns."[17] This article will examine the "jurisprudential questions" raised by the contending views expressed in *Michigan v. Long*.[18]

Part I discusses the interstitial and classical models and examines their influence on the competing views of Justices Stevens and O'Connor in the *Long* case. Part II explores two jurisdictional problems posed by the interstitial model. These jurisdictional problems raise questions about the model's conceptual soundness. Part III discusses which model adheres to our constitutional heritage as well as accommodates present constitutional realities. Despite the Supreme Court's current support for the interstitial model, the classical model correctly portrays the constitutional relationship between federal and state judicial systems. The interstitial model's central tenet that federal constitutional law is the primary civil liberties law for state courts is mistaken. This mistake originates in the conceptual confusion about both the authority of state courts under the federal Constitution and the constitutional significance of the incorporation of the Bill of Rights.

I. The O'Connor/Stevens Exchange

Justices O'Connor and Stevens agree that state courts may constitutionally develop an independent body of civil liberties law. And, so long as no federally guaranteed rights are abridged in the process, state courts may follow state law to the exclusion of any reliance on comparable federal guarantees. When state courts cite both state and federal constitutional provisions, determining the principal basis for the decision becomes problematic, especially if both grounds would support the decision. Thus, although Justices O'Connor and

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Supreme Court reversed, declaring that where police have reason to believe that weapons may be secreted in the automobile, a protective search of the vehicle is justified under Terry v. Ohio, 392 U.S. 1 (1968). Michigan v. Long, 103 S. Ct. 3469, 3480-81 (1983). As important as this holding is in terms of evolution of search and seizure law, Justice Stevens is correct in his assessment that "[t]he jurisprudential questions presented in this case are far more important than the question whether the Michigan police officer's search of respondent's car violated the Fourth Amendment." *Id.* at 3489 (Stevens, J., dissenting).

17 103 S. Ct. at 3489 (Stevens, J., dissenting).

18 *Id.*

Stevens recognize the need for a clear rule for determining whether a state decision rests on an independent ground, they disagree on the nature of that rule.

Justice O'Connor and a majority of the Court have imposed a "plain statement" requirement. To satisfy this requirement, state judges must expressly disclaim reliance on federal law or risk Supreme Court review and possible reversal. O'Connor concedes that the plain statement requirement creates a presumption in favor of federal review; but while state courts must remain independent, the Justice argues that "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."[19]

The Court identifies two concerns which purportedly outweigh any inconvenience the plain statement requirement imposes on state judges. The first is ensuring the uniformity of federal constitutional law:

> "[I]t cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion."[20]

The second concern, related to the uniformity consideration, is protecting state officials from being shackled by federal constitutional requirements that the Supreme Court has not approved. Justice O'Connor writes that "[t]he state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process."[21] The possibility that state courts may erroneously impose federal constitutional obligations on state officials necessitates review by the Supreme Court. Requiring state judges to make plain statements aids in the detection and elimination of erroneous state court interpretations. Once the parties are accurately appraised of the basis for state decisions, they are thus informed of the appropriate route for appeal.[22]

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19 *Id.* (quoting Minnesota v. National Tea Co, 309 U.S. 551, 557 (1974)).

20 *Id.* at 3475 (emphasis in original).

21 *Id.* at 3477 n.8.

22 Obviously, if the decision rests entirely on federal constitutional grounds, the appropriate recourse is to petition for review by the Supreme Court. If the decision rests entirely on state constitutional law, amendment to the state constitution is the proper route. *See, e.g.*, Crawford v. Board of Educ., 458 U.S. 527 (1983) (upholding constitutionality of amendment to the California Constitution which prohibited state courts from implementing school busing

Justice O'Connor and other adherents of the interstitial model assume that state courts primarily apply federal constitutional law in civil liberties cases. Justice O'Connor notes: "It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States."[23] Presumably, the Justice is referring to the fourteenth amendment's incorporation of the Bill of Rights which, in practical effect, "federalized" civil liberties law. The dominance of federal standards creates the presumptions that the state judges rely upon federal law.

The perception that state courts primarily consult federal constitutional law results in according special recognition to a state court's reliance on the state constitution. Indeed, the interstitial model relegates state constitutional law to such a marginal role that state judges may ignore it altogether and render judgment exclusively under federal law.[24] If reliance on federal law is perceived as the norm, requiring notification of reliance on state constitutional law seems reasonable.

Moreover, the plain statement requirement comports with the Court's understanding of state court authority to impose federal constitutional obligations. Basically, the Court adheres to the "say-so" view: state judges *make* whatever law they *say* they are making. Therefore, requiring state judges to be explicit makes sense if simply changing the words alters the basis for the decision.

Taken on its own terms, it is difficult to quarrel with the Court's position. Few would assert that the Supreme Court should not have the final say over the meaning of the Bill of Rights.[25] Challenging

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plans unless required to remedy a violation of the equal protection of the fourteenth amendment). For a discussion of the problems created when state courts invoke both state and federal grounds, see text accompanying notes 35-39 *infra.*

23 Michigan v. Long, 103 S. Ct. 3469, 3477 n.8 (1983).

24 Interstitial model adherents regard primary reliance on state constitutional law as dysfunctional and ultimately threatening to the supremacy of federal law:

> When federal protections are extensive and well articulated, state court decision making that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the Supreme Court and commentators.

Developments in the Law, supra note 14, at 1357.

25 Professor Sager probably comes to closest to arguing this position. Sager contends:

> Where . . . a state court has invalidated state conduct on the basis of its interpretation of a federal constitutional norm which is underenforced by the federal judici-

the Court's authority to review state decisions would appear to call for a return to the doctrine of interposition[26]—a doctrine which, at least since *Martin v. Hunter's Lessee*,[27] the Court has steadfastly refused to countenance. But one need not upset the traditional supremacy of the Supreme Court over the interpretation of federal law to take issue with the assertion of jurisdiction in *Long*. It is the Court's conception of state authority under the United States Constitution that is questionable, not its understanding of the scope of Supreme Court review.

Under the interstitial mode, the federalization of the Bill of Rights was tantamount to the federalization of state courts. The effect of imposing federal civil liberties standards on the states was to transform state judges into mini-federal judges, having the same broad authority under the Constitution to enforce federal guarantees. But whether state courts have the same authority as federal courts to enforce federal civil liberties law is not certain.

Adherents of the classical model, such as Justice Stevens, question this portrayal of state courts under our federal system. In the context of state judgments vindicating individual rights claims, the classical model considers the relationship between the Supreme Court and state courts to be more akin to that between the United

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> ary, the situation is analogous in some respects to an exercise of congressional authority pursuant to section 5 of the fourteenth amendment. If an underenforced constitutional norm is valid to its conceptual boundaries, the decision of the state court can be understood as the enforcement of the unenforced margin of a constitutional norm, that is, as the assumption of an important constitutional role which the federal courts perceive themselves constrained to avoid because of institutional concerns. On this basis, state court decisions which voluntarily extend the application of such norms should be left intact.

Sager, *supra* note 3, at 1248.

26 The classic expression of the doctrine of interposition can be found in the famous Kentucky and Virginia Resolutions which claimed that each state "has an equal right to judge for itself, as well of [constitutional] infractions as of the mode and measure of redress." In addition, the response of the Virginia Court of Appeals to the United States Supreme Court's decision in Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) explains interposition:

> It has been contended that the constitution contemplated only the objects of appeal, and not the tribunals from which the appeal is to be taken; and intended to give to the Supreme Court of the United States appellate jurisdiction in all the cases of federal cognizance. But this argument proves too much, and what is utterly inadmissible. It would give appellate jurisdiction, as well over the courts of England or France, as over the State courts; for, although I do not think the State Courts are foreign Courts in relation to the Federal Courts, yet I consider them not less independent than foreign Courts.

Hunter v. Martin, Devisee of Fairfax, 18 Va. (4 Munf.) 14 (1814).

27 14 U.S. (1 Wheat.) 304 (1816).

States and a foreign nation. Imagine, Justice Stevens wrote in *Long*, "that . . . this case had arisen in another country, perhaps the Republic of Finland."[28] Suppose an American citizen is arrested by Finnish authorities and later released. In those circumstances, Stevens reasons,

> we might have been concerned about the arrest but we surely could not have complained about the acquittal, even if the Finnish Court had based its decision on its understanding of the United States Constitution. We would only be motivated to intervene if an American citizen were unfairly arrested, tried, and convicted by the foreign tribunal.[29]

As the Justice's remarks suggest, adherents of the classical model take as their starting point the premise that the relationship between federal and state courts is "the relationship between two sovereigns."[30]

The interstitial model presumes the primacy of federal law, and thereby diminishes the role of state civil liberties guarantees. In contrast, classical model adherents contend that, just as Finnish law is the first authority for a Finnish Court, state law provides the primary source for state courts to resolve civil liberties disputes. By emphasizing the role of state law,[31] the classical model envisions state judges considering a litigant's federal claims only if state law provides no remedy. Hence, in cases such as *Long*, where the Michigan Supreme Court expressly cited both state and federal sources,[32] the classical model presumes that the state judgment is independently based.

The classical model's presumption of independent state civil liberties judgments derives not from an anachronistic adherence to the idea of "States Rights," but rather from the priority the Constitution imposes upon state and federal claims. In contrast to the interstitial model's "say-so" approach, the classical model accords state judges only limited authority to invoke the federal Bill of Rights. Because of their limited authorization, state judges may not reach a party's federal claims until all outstanding state claims have been addressed. Oregon Supreme Court Justice Hans Linde explains the constitutional logic underlying this approach: "When the state court holds

28 103 S. Ct. at 3490 (Stevens, J., dissenting).

29 *Id.*

30 *Id.* at 3489.

31 For the proposition that state court should consult state law first, see Linde, *supra* note 1.

32 As Justice Stevens pointed out in dissent: "The Supreme Court of the State of Michigan expressly held 'that the deputies' search of the vehicle was proscribed by the Fourth Amendment of the United States Constitution and *art. I, § 11 of the Michigan Constitution.*' " 103 S. Ct. at 3489 (quoting Pet. for Cert. 19) (emphasis added).

that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment."[33] And granting relief under state law eliminates any outstanding federal claim.

Therefore, state judges are constitutionally obligated to enforce federal standards only if the state law remedy violates federal due process requirements. If the state court could have granted relief under state law, as in *Michigan v. Long*,[34] the classical model considers the judgment to be independently grounded.

II. Puzzling About the Interstitial Model

The classical model's seemingly antiquated approach to federal-state relations is its chief liability. Making state law the primary source of civil rights protection and thereby limiting the role of federal constitutional law recalls the era before the fourteenth amendment. Arguably, the classical division of federal and state authority cannot adapt to the massive changes that the fourteenth amendment's incorporation of the Bill of Rights has wrought in the federal structure. Therefore, explaining contemporary federal-state relations in terms of the classical model would allegedly produce undesirable results.

However, it is not only the classical model which raises jurisdictional questions; the interstitial model produces its own dilemmas. The following discussion focuses on two dilemmas created by the interstitial model: the unreviewable state judgment and the vanishing state constitution.

A. *The Unreviewable State Judgment*

According to the interstitial model, state judges have the option of resting their civil liberties decisions on three grounds: (1) exclusively in federal law; (2) exclusively in state law; or (3) in both state and federal law. The last option concerns both the Supreme Court and state officials because it creates the possibility of unreviewable state civil liberties decisions.

Suppose, for example, that a state supreme court declares that the fifth amendment's ban against compulsory self-incrimination and the state constitution's corresponding guarantee prohibit certain police interrogation techniques. While discussing the state self-incrimi-

33 Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133-34 (1970).

34 103 S. Ct. 3469 (1983).

nation guarantee, the state court expressly disclaims any reliance on federal precedents. Under the *Long* Court's analysis, federal judicial review would be foreclosed. In *Long*, Justice O'Connor assured state judges that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."[35]

With petition to the Supreme Court barred by the independent state ground doctrine, amending the state constitution is the only remaining avenue to overturn the state judgment. But the state court's interpretation of federal constitutional requirements may diminish the viability of this option. Obviously, states may not escape federal obligations by amending their state constitution. Thus, uncertainty about the accuracy of the state supreme court's interpretation of federal law may deter state constitutional amendment. Therefore, a state supreme court's decision could be practically unreviewable. This understandably troubles state officials. California Governor George Deukmejian's criticism of the California Supreme Court's use of the state constitution is illustrative:

> Easily the most troubling and the least justifiable feature of the California Supreme Court's mode of state constitutional interpretation is its "dual reliance" technique. By invoking the state constitution the court insulates its decisions from federal judicial review; by simultaneously invoking the Federal Constitution, the court effectively blocks popular review through the initiative process. In a sense, this dual reliance makes the people of California the prisoners of the privileges conferred by their own state constitution.[36]

The fear that state courts could indeed make state citizens "prisoners of their privileges" has prompted some scholars to propose that "principled criteria" be developed to limit reliance on the state constitution.[37] As one commentator observes, "the [state] court must convince the legal community and the citizenry at large that it was justified in its disagreements with the Supreme Court and that the state constitution supports different outcomes."[38] Developing criteria for invoking the state constitution or proposing other solutions to

35 103 S. Ct. at 3476.

36 Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HAST. CONST. L.Q. 975, 996-08 (1979).

37 *See, e.g.*, Deukmejian & Thompson, *supra* note 36, at 987; *Developments in the Law*, *supra* note 14, at 1359; Note, *The New Federalism: Toward A Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

38 Note, *supra* note 37, at 318 (footnote omitted).

limit the power of state judges, however, cannot eliminate the problem of unreviewable state court decisions. This problem does not originate with capricious or unprincipled state judges, but rather with the interstitial model's presupposition that state courts may simultaneously ground their decisions in state and federal law.

The problem can be resolved by adopting the classical model's hierarchy of claims, thus rejecting the possibility of simultaneous invocation of state and federal laws. Under this view, state civil liberties decisions can never be unreviewable because state courts must address state and federal issues successively, not simultaneously. Federal claims, therefore, may only be addressed after all outstanding state claims have been resolved. And once the claim has been vindicated under state law, no federal issues remain. Thus, by eliminating reliance on both state and federal law, the classical model avoids one drawback created by the interstitial model's underlying premises.[39]

B. *The Vanishing State Constitution*

Resolution of the interstitial model's second problem, the vanishing state constitution, also requires reconsidering the model's initial premises. State constitutional law enjoys a dual existence under the interstitial model. On the one hand, the state constitution can sometimes override competing federal interpretations. For instance, a state's highest court declares the death penalty unconstitutional under the state's equivalent of the eighth amendment. On the other hand, the state constitution seems at times to have no legal significance. For example, if a state constitutional interpretation depends upon federal standards, on review of the state judgment, the Supreme Court would treat such a "dependent" state constitution tantamount to no state constitution at all.[40]

Delaware v. Prouse[41] illustrates the Supreme Court's treatment of

39 While the classical model resolves the problem of the unreviewable state judgment, it admittedly does not eliminate all ambiguity surrounding the content of federal constitutional restrictions. When a state court vindicates a controversial civil liberties claim under the state constitution alone, state officials may refrain from initiating the amendment process because of doubt about whether the state judgment would be required also under the federal constitution. This is a separate problem. The obstacle is no longer the unreviewability of state court decisions, but the uncertainty surrounding the meaning of federal constitutional doctrine. The appropriate solution is, therefore, to urge the Justices to speak more clearly.

40 Most discussions of the independent state ground doctrine never pause to consider the implications of declaring state law to be "dependent" on federal law. *See, e.g.*, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.33 (5th ed. 1978). What is dependent state law? Where did state courts derive the power to render state law dependent?

41 440 U.S. 648 (1979).

a dependent state constitution. In *Prouse*, state officials appealed a state supreme court's decision declaring random automobile stops to check drivers' licenses and vehicle registrations unconstitutional. The state court concluded that the constitutional ban against unreasonable searches and seizures required that stops be justified by at least articulable and reasonable suspicion. Accordingly, the court held that random automobile searches violated the fourth amendment as well as the search and seizure provision of the state constitution.[42] On review, the Supreme Court acknowledged that the state court had invoked the state constitution. Nonetheless, the Court ruled that the state ground was not sufficiently independent of federal law to insulate the decision from review.

Explaining the Court's conclusion, Justice White quoted a passage from a 1963 Delaware Supreme Court opinion[43] which declared that the state search and seizure guarantee " 'is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former.' "[44] The courts interpreted this passage to mean that the state guarantee depended completely on federal law. Hence, "[t]his is one of those cases where, 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' "[45]

It is difficult to believe that the Delaware Supreme Court intended such a drastic result. Why would state judges who are sworn to uphold and defend the state constitution deliberately adopt an interpretation of the state bill of rights that would render its protections nugatory? Even more puzzling, why would the Supreme Court, which professes to respect the independence of state courts, adhere to a version of federal/state relations which treats certain invocations of state constitutional guarantees jurisdictionally insignificant acts? After all, a declaration by the Supreme Court that the state ground lacks independence is tantamount to saying that there is no state law on the subject.

One may be tempted to attribute this result to disingenuousness or hypocrisy. The Court does not adhere to a principled conception of federalism and hence is only willing to tolerate "state experimenta-

42 State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978).

43 State v. Moore, 55 Del. 356, 187 A.2d 897 (1963).

44 440 U.S. at 652 n.4 (quoting State v. Prouse, 382 A.2d at 1362, citing State v. Moore, 55 Del. 356, 187 A.2d 897 (1963)).

45 440 U.S. at 653 (quoting Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977)).

tion" where outcomes complement the Justices' own policy orientations.[46] If hypocrisy explains part of the paradox, confusion accounts for the rest. The Court has succumbed to a conceptual muddle which is responsible for making it proceed so contrarily to its well-known solicitude for state judicial independence.

The Court has assumed that doctrinal influence is the same as constitutional dependence, which is not so. Consider the following example: In an opinion interpreting a provision of the state constitution, the Oregon Supreme Court declares that it is "going to follow the rule announced by the New York Court of Appeals."[47] Let us call this an instance of doctrinal influence or interpretive dependence. Oregon law becomes interpretively dependent on New York law because in subsequent cases enforcing this provision of the state constitution, Oregon judges will not create their own "Oregon rule" on the subject—but will instead attempt to faithfully apply the New York rule.

Such *interpretive* dependence or doctrinal influence, however, is not *constitutional* dependence. Were the relationship one of constitutional dependence, then in *Prouse*-type cases the effect would render the Oregon provision either redundant or virtually non-existent. But to say that Oregon law is interpretively dependent upon New York law does not mean that Oregon law has no independent standing. Suppose, to continue our hypothetical, that a case arises in a third state court, California, which hinges upon an interpretation of Oregon law. Suppose further that the California court concludes that the Oregon Supreme Court has arrived at an interpretation different from that which the New York Court of Appeals would itself impose. Regardless of whether the Oregon high court correctly interpreted the New York rule, the California court is bound to apply Oregon law as it finds it and cannot modify the law in favor of its own reading of the New York rule.

When the Oregon Supreme Court followed the New York rule, it did not drain its constitution of independent meaning. State courts do not render state constitutions meaningless by following rulings announced by other jurisdictions. Thus, Oregon constitutional

46 For one expression of this view, see Welsh, *supra* note 3, at 338. Justice Stevens also seems to share this perspective, warning his colleagues that they have "created the unfortunate impression that the Court is more interested in upholding the power of the State than vindicating individual rights." Idaho Dep't of Employment v. Smith, 434 U.S. 100, 105 (1977) (Stevens, J., dissenting).

47 This example is drawn from State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).

law survived because the Oregon Supreme Court's interpretation of the New York rule becomes the law of Oregon. It is irrelevant whether the New York Court of Appeals shares that interpretation. The same conclusion should apply if the Oregon Supreme Court had instead elected to follow the "federal rule" in interpreting its state constitution. So long as the state court decision does not transgress federal requirements, the Supreme Court would err in equating the Oregon court's doctrinal influence with constitutional dependence. The response that the Court is merely safeguarding the federal Constitution's meaning begs the question. The Oregon Supreme Court is not creating federal law.[48] Instead the Supreme Court uses its own rulings to create *state law*—an area over which the Supreme Court has no jurisdiction.

There is no small irony to this puzzle created by the interstitial model. On the one hand, the Court simply asserts that when state judges employ federal reasoning they are making federal law. On the other hand, the alleged federal basis of the decision is used to justify federal review on the ground that the Court must have the final say over the interpretation of federal law. The point often overlooked is that the status of the state judgment is entirely in the hands, not of state judges, but of the Justices themselves.

Just as the Court can rule that bare references to the state constitution subject the decision to review, the Court may also conclude that any citation to the state constitution makes the decision nonreviewable. As the Court has acknowledged, broadening the scope of independent constitutional decisionmaking would not threaten overriding federal interests. The states retain the "sovereign right to adopt in [their] own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[49] Consequently, if expanding rights under the state constitution does not threaten federal interests, then declaring the state judgment to be independently grounded protects all interests. This solution preserves the state judgment without sacrificing federal concerns.

The problem of the vanishing state constitution, like the problem of the unreviewable state judgment, is a creation of the interstitial model itself. Both problems stem from the belief that state judges can freely manipulate state and federal law. In contrast, the

48 *See* Michigan v. Long, 103 S. Ct. at 3477 n.8.

49 PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (citing Cooper v. California, 386 U.S. 58, 62 (1967)).

classical model avoids these problems by establishing a constitutional hierarchy for considering state and federal claims.

III. A Constitutional Appraisal of the Interstitial and Classical Models

The debate over the interstitial and classical models illuminates the complexity and subtlety of the present relationship between the Supreme Court and state courts. In turn, exploring each model's jurisdictional presuppositions clarifies the constitutional implications of the debate. The model that the Supreme Court adopts can significantly affect the development of state constitutional law.

Given the stakes involved, the Constitution should provide guidance about the appropriate model of Supreme Court-state court relations. However, each model's claim of constitutional authenticity has thus far been simply assumed rather than demonstrated. Indeed, the necessity for traditional constitutional justification is questioned. For example, some adherents of the interstitial model concede that the classical model is historically correct.[50] It is the classical model's contemporary relevance, not its authenticity, that is questioned. The classical model, it is argued, cannot be accommodated to "the broad expansion of the federal role in recent decades [which] has extensively entangled the two levels of government and their two bodies of law."[51] Moreover, "the questions asked by the classical model have proven too simple and too insensitive to substantive concerns to generate consistent and reasonable boundaries for independent state constitutional law."[52]

In contrast to the classical model's difficulty with adjusting to constitutional expansion, the interstitial model cannot be reconciled with constitutional history. The historical evidence of the framing of the Constitution and the establishment of federal courts under the First Judiciary Act undercuts the interstitial model's broad interpretation of state judicial authority under the federal Charter.

Two separate constitutional inquiries may be framed. The first inquiry concerns the constitutional source of a state court's authority to "create federal law."[53] Did the Framers intend state courts to exercise such power? What role was envisioned for state courts? The

50 The editors of the *Harvard Law Review* acknowledge that "[s]uch a compartmentalized model informed the classical vision of federalism. *Developments in the Law, supra* note 14, at 1336 n.28.

51 *Id.*

52 *Id.*

53 *See* Michigan v. Long, 103 S. Ct. at 3477 n.8.

second constitutional inquiry addresses more recent events, namely the constitutional significance of the incorporation of the Bill of Rights. Can the classical model adapt to the changes caused by incorporation? Or is the interstitial model the only model capable of explaining the contemporary relationship between the Supreme Court and state courts?

A. *The Constitutional Debate Over the Role of State Courts*

A central premise of the interstitial model is that the constitutional authority vested in state courts makes them the functional equivalents of federal courts.[54] The historical argument supporting this broad interpretation of state court authority rests on two decisions resulting from the Constitutional Convention. The first was the decision to include the supremacy clause, which bound "the Judges in every State" to follow the federal charter, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[55] This language has been interpreted to authorize state courts to entertain and enforce federal claims. The second decision was the exclusion of inferior federal tribunals from the judicial structure established under article III. Rather than mandate the creation of inferior federal courts, the Framers deferred to a legislative determination and gave Congress the power to "from time to time ordain and establish"[56] additional federal tribunals.

The Convention's ambivalence over the establishment of lower federal courts has been used to suggest that the Framers possibly intended the state courts to serve as inferior federal tribunals. Professor Redish offers an illustrative analysis:

> [S]ince the Constitution's framers specifically chose to make the creation of lower federal courts optional, it must have been their assumption that, had Congress decided not to exercise that option, state courts could and would act as the forum for the adjudication of federal causes of action. It is therefore not surprising that, as a general rule, state courts are thought to have jurisdiction concurrent with that of the lower federal courts to hear suits arising directly under federal law."[57]

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54 *See, e.g.*, M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 116 (1980): "Except in the comparatively rare instance where Congress has explicitly or by implication provided that jurisdiction is exclusively federal, state courts stand equal with their federal counterparts as enforcers of federal rights."

55 U S. CONST. art. VI.

56 U.S. CONST. art. III, § 1.

57 M. REDISH, *supra* note 54, at 109.

The historical record, skimpy and contradictory as it sometimes is, offers scant support for such a broad interpretation of state court authority under the federal Constitution. The Constitutional Convention debate over inferior federal tribunals is more complex than Professor Redish's account suggests. Actually, there appears to have been at least two debates occurring simultaneously: (1) whether state courts or an independent set of federal courts should hear federal cases; and (2) whether inferior federal tribunals should be created outright by the Constitution or left for future congressional determination.

Initially, the Committee of the Whole adopted the provision in Randolph's plan which called for the creation of "one supreme tribunal and . . . one or more inferior tribunals."[58] Then, Rutledge brought the issue up for reconsideration, arguing that

> the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights uniformity of Judgments: that it was unnecessary encroachment on the jurisdiction [of the states] and creating unnecessary obstacles to the adoption of the new system.[59]

Madison strongly opposed reliance on state courts. He declared that "unless inferior federal tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases appeals would be multiplied to a most oppressive degree."[60] Moreover, "an appeal would not in many cases be a remedy . . . , [and] what was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?"[61] The absence of effective remedies for state court abuses provided an argument against entrusting federal law to such uncertain hands:

> An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.[62]

Wilson and Sherman also spoke in opposition to using state courts as

58 M. FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 104-05 (1937).

59 *Id.* at 124.

60 *Id.* (emphasis in original).

61 *Id.*

62 *Id.*

lower federal courts.[63]

Rutledge's motion to strike the provision for inferior tribunals carried—five states to four, with two divided. But probably the most persuasive argument was not Rutledge's contention that state courts should handle federal trial responsibilities, but rather his observation that creating a complete set of federal courts would "mak[e] unnecessary obstacles to the adoption of the new system."[64]

Immediately after Rutledge's motion passed, Madison offered his own amendment which stated that "the national Legislature be empowered to appoint inferior Tribunals."[65] Madison argued that "there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them."[66] Madison's proposal carried by a wide margin—eight states to two, with one divided.[67] However, ambiguity about the meaning of "appoint" led to further revision. According to Professor Julius Goebel, Jr., the convention delegates changed "appoint" to "ordain and establish," article III's present language, to prevent Congress from appointing state courts as inferior federal tribunals.[68] The Continental Congress "had used its power of 'appointing courts' for the trial of piracies and felonies on the high seas by designating state judges commissioned by the state. . . . To delegates familiar with this history, the motion . . . may have seemed to leave the door open to an 'appointment' of state courts."[69]

The Convention foreclosed that possibility when it limited the tribunals that could exercise federal judicial power to those "ordain[ed] and establish[ed]" by Congress. This definition excluded state courts which were already established under state law. Thus, because state courts were constitutionally ineligible to serve as lower federal courts, Congress could either create independent federal tribunals or leave federal enforcement to the state judicial process. Congress did not have the option, as Professor Redish suggests, to vest "the Judicial power of the United States" in state courts.

The First Congress' debate over the creation of lower federal

63 *Id.* at 124-25.

64 *Id.* at 124.

65 M. FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (1937).

66 M. FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (1937).

67 *Id.*

68 J. GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 215 (1971).

69 *Id.* at 212.

courts reaffirms this conclusion. In both the House and the Senate, several motions were made to strike the provisions in the Judiciary Act relating to district and circuit Courts. These motions were consistently defeated.[70]

The familiar arguments appeared again. The anti-Federalists contended that an independent federal judiciary threatened state autonomy. The Federalists countered that state courts could not be trusted to vindicate national interests. Ellsworth warned that " 'it might not be safe for the General Government to put the trial and punishment of [federal offenses] entirely out of its own hands.' "[71] Similarly, Madison urged his colleagues to consider the actual performance of state tribunals, a record which

> [w]ill satisfy us that they cannot be trusted with the execution of the Federal law . . . . In some, they are so dependent on State Legislatures that to make the Federal laws dependent on them would throw us back into all the embarassments which characterized our former situation.[72]

In addition, a new argument arose during the Congressional debates: that "the Constitution granted no authority to Congress to vest Judicial power in State Courts."[73] In the Senate, William Maclay spoke against Richard Lee's motion to allow state courts to enforce federal laws. Maclay stated that "the Constitution placed the judicial power of the Union in one Supreme Court and such inferior courts as should be appointed; and, of course, the *State judges*, in virtue of their oaths, would abstain from every judicial act under the Federal laws, and would refer all such business to the Federal courts."[74] Maclay then records that "[n]o reply was made, the question was soon taken, and [Lee's] motion was rejected."[75] Even Elbridge Gerry, an otherwise vocal critic of federal power, conceded that the Constitution limited Congress' power to the creation of new federal tribunals.[76]

Nevertheless, the decision to establish inferior federal courts was only a partial victory for those favoring a strong national govern-

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70 *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65-68, 119-25 (1924).

71 *Id.* at 66 (quoting Ellsworth to Law, Aug. 4, 1789, WHARTON'S STATE TRIALS, 38).

72 *Id.* at 124.

73 *Id.* at 123. Warren reports that this argument was put forward by William Smith of South Carolina.

74 W. MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES 87 (1880).

75 *Id.*

76 Warren, *supra* note 70, at 124.

ment. As Charles Warren observes, the Judiciary Act "was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdictions."[77] That compromise included the adoption of provisions recognizing that state courts could exercise "jurisdiction concurrent with"[78] federal district and circuit courts over certain types of federal questions.

The provision for concurrent jurisdiction, however, does not support the interstitial model's thesis of state and federal court equivalence. The First Congress never claimed the power to alter or enlarge the jurisdiction of state tribunals. Instead, these jurisdictional provisions only indicated that federal law did not preclude state courts from hearing federal claims if state law granted jurisdiction over such claims. As Charles Warren concisely states: "While Congress has no power to *force* jurisdiction upon a State Court, it has the power to *leave* jurisdiction to a State Court."[79] Thus, the First Congress realized that determining the actual scope of state court jurisdiction was ultimately a matter of state rather than federal law.

Two points emerge from the historical records of the federal judiciary's development. First, there is little evidence to support Professor Redish's contention that the Constitution vested state courts with jurisdiction concurrent with that of the lower federal courts to hear suits arising directly under federal law.[80] Although some delegates in the Convention and in the first Congress advocated this position, they never convinced a majority of their colleagues. Indeed, much of the evidence suggests that article III was written to *preclude* reliance on state courts altogether. Second, even assuming that the Constitution allowed a limited role for state courts, Professor Redish's thesis remains unsubstantiated. Using this assumption, Con-

77 *Id.* at 53.

78 Section 9(b) of the Act stated that district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." 1 Stat. 77 (1789). Section 11 provided:

> [T]he circuit courts shall have original congnizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of the costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Id. at 78.

79 Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 546 (1925).

80 *See* M. REDISH, *supra* note 54, at 109.

gress could permit state courts to hear federal claims. Yet such authority would not suggest that the Constitution or Congress could empower state tribunals to exercise "the Judicial power of the United States."[81]

Differing conceptions of the state court's role within the federal system underlie the debate between adherents of the classical and interstitial models. Adherents of the interestitial model presuppose that state court authority under the federal Constitution rivals that of the federal courts. Proponents of the classical model reject this proposition, arguing instead that state courts are merely obligated to prevent the use of state judicial power to violate federal rights.

The debate over the role of state courts extends to disagreement about the significance of several early Supreme Court decisions. Most commonly cited are *Martin v. Hunter's Lessee*[82] and its progeny.[83] Critics charge that the classical model conflicts with *Martin's* principle of federal review of state court decisions. However, the classical model's tenets are not incompatible with *Martin's* holding or rationale. The classical model originates not from the Virginia Supreme Court's opinion in *Martin*,[84] but from Chief Justice Taney's majority opinion in *Abelman v. Booth*,[85] a case which also broadly interpreted federal review of state decisions.

In short, the focus of the disagreement is misplaced. The classical model can easily be reconciled with *Martin v. Hunter's Lessee*.[86] But the interstitial model cannot be reconciled with *Abelman v. Booth*.[87] Although the Supreme Court has never questioned Taney's analysis in *Booth*, interstitial model theorists have challenged its soundness.[88] For example, Professor Redish argues that the decision rejects traditionally accepted notions of federalism, under which state and federal courts have been considered "largely fungible."[89] Professor Redish furthermore reasons that:

If state and federal courts are, in fact, interchangeable, there

81 U.S. CONST. art. III, cl. 1.

82 14 U.S. (1 Wheat.) 304 (1816).

83 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

84 Hunter v. Fairfax's Devisee, 15 Va. (1 Munf.) 218 (1810).

85 62 U.S. (21 How.) 506 (1858).

86 14 U.S. (1 Wheat.) 304 (1816).

87 62 U. S. (21 How.) 506 (1858).

88 *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 357 n.48 (2d ed. 1972); Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1397-98 (1964).

89 M. REDISH, *supra* note 54, at 116.

> should be no question that whenever a federal court may regulate or control the actions of federal officers because their actions have transgressed statutory constitutional limits, absent direct congressional prohibition state courts should have similar power. Those who believe in the current vitality of the traditional view generally reach this conclusion.[90]

Regardless of what "traditionally accepted notions of federalism" require, Professor Redish's argument seems faultless. If state and federal courts have virtually identical authority, then state judges must have control over federal officers.

Although Professor Redish's inference may be sound, his premise is faulty. As Taney argued persuasively in *Booth*, state and federal courts are not "interchangeable." Reviewing the events preceding the *Booth* case reveals the soundness of Taney's analysis.[91] Northern opposition to federal enforcement of the fugitive slave laws flared when the Wisconsin Supreme Court ordered the release of Sherman S. Booth. Federal marshals had arrested Booth for assisting in a runaway slave's escape. When Booth petitioned for a writ of habeas corpus, the Wisconsin Supreme Court held that the Fugitive Slave Law of 1850 was unconstitutional and ordered Booth's release. Abelman, the U.S. Marshal, appealed to the United States Supreme Court.

Writing for a unanimous Court, Chief Justice Taney denied that a state court could control federal officers performing their official duties. Conceding such power to state judges, Taney declared, would "subvert the very foundations of the Government."[92] Essentially, the Chief Justice reasoned that:

> The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim they must derive it either from the United States or the State. *It certainly has not been conferred on them by the United States*; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and

90 *Id.*

91 For accounts of the background of the *Booth* case, see C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64 653-75 (1974); C. WARREN, THE SUPREME COURT OF THE UNITED STATES HISTORY 320-57 (1922); W. LEWIS, WITHOUT FEAR OR FAVOR 433-45 (1965).

92 62 U.S. (21 How.) at 525 (1858).

independent Government.[93]

In language remarkably similar to Justice Stevens' dissent in *Michigan v. Long*,[94] Taney declared that, "the State of Wisconsin had no power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned."[95]

Taney did not base his argument entirely on the Supreme Court's authority to review state court decisions. Although the Wisconsin Supreme Court had questioned the consitutionality of section 25 of the Judiciary Act of 1789,[96] the Chief Justice realized that *Booth* differed significantly from *Martin v. Hunter's Lessee*.[97] Unlike *Martin*, *Booth* did not involve the Court's authority to review state judgments. Instead, *Booth* challenged the authority of state courts to control federal officials.

Taney believed that the federal structure precluded state judicial interference with federal law enforcement. In Taney's view, American federalism was based on the theory of "divided sovereignty."[98] This theory posited that the state and national governments operated within separate spheres. If each remained within its own sphere, neither government would interfere with the other. In *Booth*, Taney explained his conception of the relationship between these sovereignties:

> [A]lthough the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated by the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks

93 *Id.* at 515-16.

94 103 S. Ct. 3469 (1983).

95 62 U.S. (21 How.) at 516 (1858).

96 Denying the Court's authority to exercise review, the state supreme court refused to send up the case upon receipt of the Supreme Court's writ of error—an act of defiance for which U.S. Attorney General Black considered citing the defiant state court for contempt, "but said that the Government would magnanimously refrain from doing so.' " C. SWISHER, *supra* note 91, at 662 (quoting New York Trib., Jan. 20, 1859).

97 14 U.S. (1 Wheat.) 304 (1816).

98 C. SMITH, ROGER B. TANEY: JACKSONIAN JURIST 83 (1936).

and monuments visible to the eye.[99]

The classical model rests on Chief Justice Taney's theory of divided sovereignties. As *Booth* demonstrates, this theory justifies the Supreme Court's proscription of state interference with federal activities. This theory also protects state courts from unnecessary federal interference, as Justice Stevens' dissent in *Michigan v. Long* illustrates.[100]

B. *When the Floor Goes Through the Ceiling: Considering the Incorporation Doctrine*

Although the classical model's historical authenticity seems well established, critics question its contemporary relevance. The incorporation of the Bill of Rights arguably erased any definite boundary between state and federal constitutional spheres and thus rendered the classical model obsolete.[101] This prevalent belief confuses incorporation's "interpretive" impact with its purported "jurisdictional" effects.

At the interpretive level, incorporation truly revolutionized American civil liberties law. The Warren Court's liberal interpretation of federal civil rights mandates collapsed the federal constitutional "floor" through the state "ceiling."[102] Minimum federal guarantees suddenly eclipsed the entire civil rights field. Interpretively less generous than their federal counterparts, state bills of rights lost their constitutional significance.

Revolutionary as incorporation's interpretive effects were, incorporation left the underlying state and federal jurisdictional relationship intact. The Warren Court's substantive interpretation of federal civil liberties guarantees—not the fourteenth amendment's incorpo-

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99 62 U.S. (21 How.) at 516 (1858).

100 103 S. Ct. 3469 (1983).

101 Typical is the critique offered by the *Harvard Law Review*:

> The classical model delineates the scope of state constitutional independence in a highly mechanical way . . . . Such a wooden approach could function adequately if the respective spheres of authority of federal and state governments were clearly demarcated and mutually exclusive. But as the broad expansion of the federal role in recent decades has extensively entangled the two levels of government and their two bodies of law, the questions asked by the classical model have proven too simple and too insensitive to substantive concerns to generate consistent and reasonable boundaries for independent state constitutional law.

Developments in the Law, *supra* note 14, at 1336 (footnote omitted).

102 It has become standard to speak of the relationship between state and federal constitutional guarantees in terms of floors and ceilings. *See id.* at 1334-35.

ration of the Bill of Rights—produced the "revolutionary" results.[103] Incorporation did not impose new federal obligations upon state judges or give them additional authority. Rather, incorporation merely made the state judges' existing obligation under the fourteenth amendment more exacting.[104]

State courts, to be sure, are obligated to ensure that state proceedings conform to the Bill of Rights guarantees. But the scope of state court enforcement differs from that of the federal courts. Justice O'Connor implicitly acknowledged this difference in *Long* by placing quotation marks around the " 'federal law' "[105] she contended state courts were creating by their expansive civil liberties decisions. Presumably, Justice O'Connor would not argue that state courts create the kind of federal law that federal officials must obey. *Abelman v. Booth*,[106] in other words, survives *Michigan v. Long*.[107]

No article of the Constitution confers general enforcement authority upon state courts, including the fourteenth amendment. A constitutional provision beginning with the words "No State shall . . ."[108] is a peculiar way to confer new authority on state courts. As section five of the fourteenth amendment illustrates,[109] its drafters knew how to establish new authority explicitly.

The classical model, recall, does not relieve state courts of their obligation to comply with federal civil liberties requirements. State courts must satisfy those requirements because the Constitution demands that they afford litigants federal due process guarantees. However, that is the extent of the constitutional obligation imposed upon state courts. If state decisions satisfy "minimum" federal requirements, state judges need not apply federal constitutional standards, much less apply them as would the Supreme Court.

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103 There is another way in which incorporation revolutionized the constitutional obligations of state courts. Under the traditional fundamental test, the Court would often determine whether due process had been violated by examining what the state had *finally* done in terms of its treatment of the federal rights claimant. Following incorporation, individuals could claim a federal rights violation when a state official transgressed Bill of Rights guarantees.

104 The fourteenth amendment obligates state judges not to deprive persons of due process, equal protection, or "the privileges and immunities of citizens of the United States." U.S. CONST. amend. XIV.

105 103 S. Ct. at 3477 n.8 (1983).

106 62 U.S. (21 How.) 506 (1858).

107 103 S. Ct. 3469 (1983).

108 U.S. CONST. amend. XIV.

109 Section 5 explicitly conferred enforcement authority upon Congess: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

In contrast, the Constitution imposes a more exacting obligation on federal courts. Because federal courts "create . . . 'federal law,' "[110] their judgments must apply Supreme Court decisions accurately. The Court has the final say over the meaning of federal law.

When a state court declares that state law falls below federal standards, however, the court is admittedly acting under the federal Constitution. But the court is not exercising *federal judicial power.* The state court is only fulfilling its obligation under the supremacy clause not to permit the exercise of state judicial power to fall below federal standards. Nevertheless, when state courts exercise their limited authority to declare state action unconstitutional, the Supreme Court may review that exercise of authority.

The Supreme Court may not exercise review if the state judge merely interpreted state law to conform with federal requirements. According to the classical model, a state judge may apply federal law only if a decision under state law would not satisfy federal requirements. Hence, within the context of state judgments vindicating rights, the mere presence of a state ground suffices to constitutionally insulate the decision from federal judicial review.

Although incorporation revolutionized state judges' understanding of substantive civil liberties requirements, it did not disturb the classical model's basic framework. The model remains intact because, regardless of the due process standards set by the Supreme Court, the fourteenth amendment only requires state judges to interpret state law in conformity with federal requirements. State judges are not obligated, and are even forbidden by article III, to assume the powers of federal courts.

IV. Conclusion

The constitutional differences between state and federal courts affect the allocation of authority over the protection of civil liberties. As the exchange between Justices O'Connor and Stevens vividly illustrates, Supreme Court review of state judgments vindicating civil liberties claims raises fundamental questions about judicial federalism. Until recently, the answers to these questions have simply been presumed rather than openly debated. *Michigan v. Long*[111] may stimulate that much-needed debate.

Examining the interstitial and classical conceptions of federal and state relations is a prerequisite to developing a renewed appreci-

110 103 S. Ct. at 3477 n.8 (1983).
111 103 S. Ct. 3469 (1983).

ation of the role of state courts and state law in the protection of civil liberties. Whether state courts will become "frontier agents of American reform,"[112] and thus fulfill Justice Harlan's hope, remains to be seen.

Nonetheless, after the incorporation of the Bill of Rights, independent state civil liberties decision-making must be innovative. Innovation will occur only if state judges remain free from unwarranted federal review. Undoubtedly, protecting state court autonomy from federal oversight cannot jeopardize the Supreme Court's role as the final arbiter of federal law. But the Court must distinguish state court decisions based on state law from those resting on federal law. Making that distinction requires a reconsideration of the basic principles underlying the relationship between state and federal courts.

112 Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1199 (1971).