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COMMENTARY

In Praise of State Courts: Confessions of a Federal Judge*

By J. Skelly Wright**

“Confession is good for the soul—and good for the sentence.” Such is the wisdom of the criminal courts. In the hope of like treatment, I, too, wish to make a confession: until recently, I have failed to appreciate fully the contributions state courts and state judges have made, are making, and can yet make in vindicating our liberties, assuring equality of treatment to all our people, and combatting unfairness. For years, I credited all such achievements to the federal courts. State judges, as I saw them, were at best faithful followers; at worst, obstructionists. Seldom were state judges looked to for leadership in constitutional law.

The time is overdue to make amends. And there can be no more appropriate occasion than today, when we inaugurate a series of lectures in honor of a truly great state judge, Mathew Tobriner. Twenty years a member of the California Supreme Court, Justice Tobriner has been described as “the nation’s most outstanding state court judge.”1 The Justice long ago announced his belief that the courts offer “[t]he last recourse of the individual against oppression . . . .”2 And he meant it. As a judge, Tobriner did not hesitate to implement his faith in “the importance of individuality and the need to defend it against the organizational imperatives of both government and private institutions,” even when sustaining this claim meant giving wide latitude “to

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** Judge, United States Court of Appeals for the District of Columbia Circuit. I am indebted to Louis Fenner Claiborne for his research and writing in preparation of this lecture.
eccentrics, to deviants, to the profane, to the incorrigible."\textsuperscript{3} Moreover, Justice Tobriner required no lead from the Supreme Court of the United States: though seldom acknowledged, the influence was often in the opposite direction.\textsuperscript{4}

Yet, I confess that I was almost unaware at the time that Justice Tobriner, as well as other state judges—his contemporaries and those of an earlier day—could be our mentors. Of course, I put aside the whole field of private law, where state courts, at least since \textit{Erie v. Tompkins};\textsuperscript{5} have had the first and the last word, and where distinguished state judges, Justice Tobriner among them,\textsuperscript{6} have made almost all the significant contributions. Nor am I concerned today with that large body of public law cases which is the exclusive grist of one court system or the other. My focus is restricted to issues which equally concern—or should concern—both state and federal courts: shielding citizens from the abuses of governmental power, whether attributable to malice, excessive zeal, or mere convenience, and assuring equal treatment for all. In the convenient shorthand, I speak of civil liberties and civil rights.

In partial atonement for my previous default in failing to recognize the past and present role of state courts as guardians of our freedoms, I have re-examined my own experience, asking myself why I was so blind to the contributions of the state judiciary. My own story is no doubt extreme, but it is not wholly without a lesson for all those who sit on the federal bench—and perhaps also for state judges. I have also read some judicial history, rediscovering the fact—that, on the whole, for the first \textit{century} of our existence as a nation, the state courts, not the federal courts, stood \textit{alone} as the champions of our individual liberties. And, finally, I have force-fed myself much of the voluminous material on the current debate among judges and professors about “parity,” “comity,” and “federalism.” This has led me to some conclusions about the future—mainly optimism concerning the increasingly important contribution state judges are making and will be making in protecting the individual rights of all our people.

None of this has come easily for me. I want you to know how much of a wrench it is for an old federal judge to look beyond the federal court reports for precedents, or for the materials out of which

\textsuperscript{3} Balabanian, \textit{Justice Was More Than His Title}, 70 CALIF. L. REV. 878, 879 (1982).
\textsuperscript{5} 304 U.S. 64 (1938).
\textsuperscript{6} See the articles cited in Balabanian, \textit{supra} note 3, at 878 n.1.
judgments are made. Now your punishment is that you must listen to my confession, my rehearsal of familiar history, and my ruminations about the course we should set in the years to come.

I

My bias was no doubt influenced by time and place, and an unusually long service on the federal payroll. I have been a federal judge for thirty-four years. Before that I was a United States Attorney in New Orleans. Still earlier, I was a federal prosecutor; during the War, a United States military advocate in London, and then again a federal prosecutor. Afterwards, for a very brief interlude, I practiced as a private lawyer, in Washington, D.C., when the federal courts there handled all but the most trivial cases. As United States Attorney and federal district judge in New Orleans, I had little occasion to look to state courts for guidance, except in private law cases when I was bound to accept from them state law rules of property, tort, and contract. That is even more true of the last twenty-one years I spent on the federal court of appeals in Washington, D.C.

Obviously, my own geography helped to insulate me from any awareness of the role state courts can play. Home rule in the District of Columbia is too recent and too limited to have spawned any independent judicial tradition. My other duty station was Louisiana, where I was born and raised, a place with a unique legal history and no lack of litigating spirit. But, in my time at least, the Louisiana courts were not on the cutting edge of public law. Louisiana was not California.

I came to the practice of public law soon after the assassination of Huey Long in September, 1935. As virtual ruler of Louisiana, first as Governor and then as United States Senator with a puppet as Governor, Long had deliberately gained control, not only of both houses of the Louisiana legislature, but of a majority of the state supreme court as well. The result, a court composed of judges chosen for political loyalty rather than judicial impartiality, was hardly calculated to imbue respect for the state judiciary in a young lawyer—especially one whose new job was to aid in the federal prosecution of some of the frauds, including vote fraud, committed by Long’s associates. Some of those

8. See, e.g., Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941) (use of mails to defraud board of levee commissioners in bond refunding plan); Leche v. United States, 118 F.2d 246 (5th Cir.), cert. denied, 314 U.S. 617 (1941) (use of mails to defraud state highway department in its purchase of motor trucks). See also United States v. Leche, 34 F. Supp. 982 (W.D. La. 1940).
cases the state itself had declined to bring, and we believed, would in no event survive review by the Louisiana Supreme Court.

In those days, the Louisiana Supreme Court was not merely political to an unusual degree. It was an enthusiastic partner in the then prevailing regime of race discrimination. A few decades earlier, the Supreme Court of Louisiana had written *Plessy v. Ferguson*, a decision affirmed, as we all know, by the Supreme Court of the United States. Until at least the late 1960's, the Louisiana courts persisted in sustaining segregation and discrimination long after such actions had been authoritatively condemned as unconstitutional. Thus, exclusion of blacks from grand and petit juries, a federal crime since 1875 and declared illegal by the United States Supreme Court in a series of cases in 1880, continued to be excused by the Louisiana high court, despite repeated reminders from the United States Supreme Court. Similarly, several years after racial zoning ordinances had been held unconstitutional in *Buchanan v. Warley*, the Louisiana Supreme Court refused to acquiesce. It was left to the federal courts to strike down the state's discriminatory voting laws and practices and those laws segregating public places. And, as I have good reason to remember, the Louisiana courts offered no assistance in desegregating higher edu-

12. *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879).
14. 245 U.S. 60 (1917).
cation or implementing Brown v. Board of Education in state primary and secondary schools. On the contrary, the state courts approved efforts to destroy the NAACP and sustained criminal convictions against individuals engaged in peaceful efforts to end the regime of racial separation.

Nor has the insensitivity of the Louisiana Supreme Court been restricted to race cases. It has approved violations of the First,


22. Brown v. Louisiana, 383 U.S. 131 (1966) (state breach of peace statute used to convict five demonstrators for sitting quietly and refusing to leave public library held unconstitutionally overbroad); Cox v. Louisiana, 379 U.S. 559 (1965) (once police designate a proper area to demonstrate, protesters cannot be convicted under a valid ordinance prohibiting demonstrations "near" a court house); Cox v. Louisiana, 379 U.S. 536 (1965) (city officials cannot exercise unfettered discretion to prohibit peaceful parades and meetings); Lombard v. Louisiana, 373 U.S. 267 (1963) (conviction of black students under state criminal mischief statute for conducting peaceful sit-in at segregated lunch counter violates the Equal Protection Clause of the Fourteenth Amendment); Garner v. Louisiana, 368 U.S. 157 (1961) (convictions of blacks for disturbing the peace by conducting peaceful sit-in at segregated lunch counter violated due process guarantee).

23. See Lewis v. City of New Orleans, 415 U.S. 130 (1974) (Louisiana Supreme Court's construction of ordinance prohibiting the use of "obscene or approbrious language toward or with reference to" a police officer held susceptible of application to protected speech and, therefore, overbroad); St. Amant v. Thompson, 390 U.S. 727 (1968) (Louisiana Supreme Court's reinstatement of trial court's finding of defamation of a public official reversed and remanded because of insufficient evidence demonstrating that petitioner acted in reckless disregard of the truth or falsity of his statements); Garrison v. Louisiana, 379 U.S. 64 (1964) (state criminal defamation statute, as interpreted by the Louisiana Supreme Court, incorpo-
Fourth,\(^{24}\) Sixth,\(^{25}\) and Eighth\(^{26}\) Amendments, as well as the Due Process Clause.\(^{27}\) It has condoned unconstitutional abridgement of the rights of women\(^{28}\) and illegitimate children.\(^{29}\) And equally important, the highest court of my state, while I was there, never broke new ground to vindicate civil liberties or to promote equality of rights. It did not, for instance, take the occasion in the *Willie Francis* case\(^{30}\) to rule unlawful on state law grounds the second attempted electrocution of a condemned seventeen-year-old black youth. The court's failure to act cost Willie Francis his life—and, incidentally, lost me my first case before the United States Supreme Court.\(^{31}\)

Finally, I should add that the Louisiana courts in my day did not always observe the limitations on their jurisdiction or respect the principles of comity toward the federal courts. There were brief attempts to interfere with the implementation of desegregation decrees issued by a

\(^{24}\) See *Vale v. Louisiana*, 399 U.S. 30 (1970) (warrantless search of house subsequent to defendant's arrest outside the house held invalid).

\(^{25}\) See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (Louisiana statute's categorical exclusion of women from jury lists held unconstitutional); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (despite contrary provisions in the Louisiana Constitution, the right to jury trial attaches to any crime punishable by six or more months imprisonment); *Turner v. Louisiana*, 379 U.S. 466 (1965) (in a criminal proceeding, the close and continuous association of key prosecution witness and the jury deprived defendant of right to trial by an impartial jury).

\(^{26}\) See *Roberts v. Louisiana*, 431 U.S. 633 (1977) (Louisiana statute imposing mandatory death sentence for first degree murder conviction without allowing consideration of mitigating factors held unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (Louisiana's attempt to limit the scope of capital murder by adopting narrower definition of first degree murder is inadequate response to mandatory death sentence statute).

\(^{27}\) See *Jenkins v. McKeithen*, 395 U.S. 411 (1969) (labor-management inquiry board's failure to provide accused with procedural safeguards held unconstitutional); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (refusal of defendant's request for change of venue following television broadcast of taped confession held to be a denial of due process); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (conviction of blacks under breach-of-the-peace statute, for waiting at customarily segregated bus depot, reversed).


\(^{31}\) For a fascinating account of the *Willie Francis* case in and out of court, see Miller & Bowman, "Slow Dance on the Killing Ground": The Willie Francis Case Revisited, 32 De *Paul L. Rev.* 1 (1983).
United States district court.\textsuperscript{32} Equally questionable was the reluctance of some state judges to defer to the federal courts when the title of the United States to valuable oil lands was at stake. At one point, the Supreme Court of the United States, having assumed original jurisdiction to decide the boundary between federal and state offshore submerged lands, had to enjoin like proceedings in a Louisiana court.\textsuperscript{33} And, later, I found myself, as United States district judge, required to restrain a state court action that would have adjudicated federal title to onshore oil lands behind the back of the federal government.\textsuperscript{34}

So much for special pleading. I have thus far turned a straightforward admission of guilt into a plea of "confession and avoidance" by claiming as a unique defense my Louisiana perspective. But I wonder if my outlook would have been markedly different had I been located in a more "progressive" state—say California. Would the judgments of the California Supreme Court have led me to appreciate more quickly the important role of state courts in constitutional adjudication? Alas, a cursory look at what that court was doing in the 1930's, 1940's, and 1950's makes me doubt it.

In California, too, there was a long history of government-authorized race discrimination sustained by the state courts. There, of course, the victims had yellow, not black, skins. For three-quarters of a century, with mixed results in the United States Supreme Court, the California Supreme Court sustained a full range of laws and ordinances discriminating against Chinese\textsuperscript{35} and Japanese.\textsuperscript{36} And the California


\textsuperscript{33} United States v. Louisiana, 351 U.S. 978 (1956).

\textsuperscript{34} See Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

\textsuperscript{35} See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco municipal ordinance requiring licenses for laundries and limiting operation to laundries within brick or stone buildings held invalid because it was used to arbitrarily discriminate against Chinese laundries); Soon Hing v. Crowley, 113 U.S. 703 (1885) (upholding San Francisco ordinance requiring licenses for laundries and limiting operation to daytime hours since nothing in language of ordinance supported allegation of arbitrary discrimination against Chinese); Barbier v. Connoly, 113 U.S. 27 (1885) (upholding San Francisco ordinance similar to ordinance upheld in \textit{Soon Hing} on ground that ordinance promoted public health and safety); Chy Lung v. Freeman, 92 U.S. 275 (1876) (reversing California Supreme Court by striking down statute requiring payment of a bond by certain classes of foreign immigrants arriving in California by ship).

\textsuperscript{36} See Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (reversing California Supreme Court by finding unconstitutional a statute barring issuance of commercial fishing licenses to persons "ineligible for citizenship" as discriminatory against Japanese); Oyama v. California, 332 U.S. 633 (1948) (reversing California Supreme Court and finding Alien Land Law unconstitutional as applied to a minor American citizen and his Japanese father); Morrison v. California, 291 U.S. 82 (1934) (reversing the California Supreme Court, which had
court was no more hospitable to "undesirable" immigrants from within the United States.\textsuperscript{37} Nor would I have been able to applaud the California Supreme Court's record in vindicating First Amendment rights if I had been a federal judge there instead of in Louisiana.\textsuperscript{38} Much less would I have seen anything to emulate in many of that court's criminal law rulings in the 1940's, 1950's, and early 1960's, especially those condoning stomach-pumping\textsuperscript{39} or unconfined searches incident to arrest to gather evidence,\textsuperscript{40} and those prejudicing the procedural rights of indigents.\textsuperscript{41}

upheld a conviction for conspiracy to violate the Alien Land Law); Cockrill v. California, 268 U.S. 258 (1925) (upholding California's Alien Land Law under which Japanese subjects were not permitted to acquire agricultural lands in the state).

37. See Edwards v. California, 314 U.S. 160 (1941) (reversing a California Supreme Court decision that had upheld a state statute making it unlawful to knowingly bring into the state an indigent person.

38. See, e.g., Talley v. California, 362 U.S. 60 (1960) (finding unconstitutional a Los Angeles ordinance making it a misdemeanor to distribute handbills that did not include the name and address of the person sponsoring their distribution); Smith v. California, 361 U.S. 147 (1959) (finding unconstitutional a Los Angeles ordinance making mere possession of obscene writings unlawful regardless of scienter); First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958) (reversing California Supreme Court by finding unconstitutional a California statute requiring applicants for religious tax-exempt status to sign an oath declaring that they did not advocate overthrow of state or federal government); Speiser v. Randall, 357 U.S. 513 (1958) (reversing California Supreme Court by finding unconstitutional a statute requiring applicants for veterans' tax exemption to sign an oath declaring that they did not advocate overthrow of state or federal government); Bridges v. California, 314 U.S. 252 (1941) (overturning California Supreme Court decision affirming the contempt convictions of a newspaper publisher and editor for the publication of editorials commenting on cases pending in a state court); Carlson v. California, 310 U.S. 106 (1939) (reversing a conviction under a California statute making it unlawful for picketers to display banners in the vicinity of any place of business); Stromberg v. California, 283 U.S. 589 (1931) (striking down as void for vagueness part of a California statute condemning the display of a red flag in a public place or a meeting place); Whitney v. California, 274 U.S. 357 (1927) (upholding conviction of communists under Syndicalism Act as not violative of the First Amendment).


40. See Shipley v. California, 395 U.S. 818 (1969) (finding unconstitutional a warrantless search of defendant's house where defendant was arrested outside of the house); Chimel v. California, 395 U.S. 752 (1969) (reversing California Supreme Court and holding that a warrantless search of defendant's house could not be constitutionally justified as incident to arrest even where officers had an arrest warrant); Stoner v. California, 376 U.S. 483 (1964) (reversing conviction based upon admission of evidence illegally obtained through warrantless search of defendant's hotel room); Ker v. California, 374 U.S. 23 (1963) (upholding as incident to arrest a warrantless search); Irvine v. California, 347 U.S. 128 (1954) (sustaining conviction based upon admission of illegally obtained evidence); Adamson v. California, 332 U.S. 46 (1947) (affirming California Supreme Court decision holding the constitutionality of provisions of the California Penal Code and state constitution that permit the failure of a defendant to explain or deny evidence against him to be commented upon by court and counsel and to be considered by court and jury).

The lesson of this digression, I suggest, is that my dismissive attitude toward state courts was not quite so insular as it might seem. It was not so much a matter of place as a result of the times. I suspect that if one examined the judgments of state courts anywhere during the first half of this century, and even a little beyond, the trumpet of liberty would seldom be heard, especially on behalf of the poor, the unpopular, and the unconventional. The courts of Massachusetts, New York, Illinois, Virginia, Arizona, or Montana would probably fare no better than those of Louisiana and California. I cannot suppose that Cardozo was less sensitive than his fellow state judges when, as Chief Judge of the New York Court of Appeals, he dismissed the suggestion that New York should follow the federal rule excluding illegally seized evidence from criminal trials with the comment that this would require "the criminal . . . to go free because the constable has blundered." Why is this so? It is, in some measure, because the Bill of Rights and the post-Civil War Amendments were then in eclipse, even in the federal courts, except as they protected private property. After all, before Earl Warren became Chief Justice, the Supreme Court of the United States had only occasionally, and hesitantly, spoken for personal freedom and equality of treatment. Lawyers and judges were still mainly concerned with protecting corporate money, not the fate of ordinary people.

Of course, state courts were free to strike a blow for liberty or equality on their own, invoking state constitutional provisions to that end. But this was not, for the state judiciary, a period characterized by boldness. One senses that most state judges were quite content to leave

(1963) (reversing convictions of indigent defendants denied appointment of counsel on appeal as of right). For other questionable California Supreme Court judgments, see those reversed in Gilbert v. California, 388 U.S. 263 (1967) (reversing convictions of indigent defendants denied appointment of counsel on appeal); Robinson v. California, 370 U.S. 660 (1962) (finding unconstitutional a California statute making it a misdemeanor punishable by imprisonment for any person to be addicted to narcotics); Lambert v. California, 355 U.S. 225 (1957) (finding unconstitutional a municipal ordinance making it an offense for convicted felons to remain in Los Angeles without registering with the Chief of Police, when applied to persons without knowledge of the ordinance).

42. In fairness, I must note that the California Supreme Court, at least occasionally, anticipated the Supreme Court of the United States in announcing more protective criminal procedure rules (e.g., People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (exclusionary rule)), or striking down blatant racial discrimination (Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948)).


it to the federal courts to deal with claims of liberty abridged or equality denied, especially when the victim was a criminal or a dissident challenging the status quo. The cause and cure for this reticence is what we should investigate.

By now, you will have concluded that my purported confession is wholly exculpatory and that my announced intention to speak in praise of state courts has turned sour. Not so. My suspicion is that the comparative passivity of the state judiciary until relatively recent days is, in large measure, attributable to the dismissive attitude of federal judges, an attitude prevailing for almost a century and continuing in some degree today. For too long, state judges have been treated with insufficient respect by their colleagues on the federal bench. I believe that in consequence, some lost their self-respect, others dug in their heels, and still others simply passed the buck. It was not always so, and it need not continue to be so.

II

Let us go back two centuries to the heyday of the state courts. Indeed, for more than a dozen years between the Declaration of Independence and the ratification of the Constitution of the United States, there were only state courts. On the whole, the judges of that time were stalwart defenders of liberty, invoking the newly promulgated constitutions of their states or simply the fundamental principles of the English common law or Magna Carta to defeat high-handed governmental action. They did not hesitate to void legislation which transgressed constitutional guarantees. They were not waiting for any lead from the Supreme Court of the United States. Twenty years before Marbury v. Madison, state courts had established the principle of judicial review.

More important for my theme, the ratification of the Constitution and the establishment of federal courts in 1789 did not alter the preeminence of the state courts as the guarantors of liberty for many decades thereafter. In this respect, they remained by far the most important courts for some time to come, often bolder than the Supreme

45. The only exception was the national Prize Court of Appeals established under the Articles of Confederation. See Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 61-62, 85-86, 95-96 (1795). Several decisions of that court are reported in 2 U.S. (2 Dall.) 1-42 (1781-1787).


47. 5 U.S. (1 Cranch) 137 (1803).

IN PRAISE OF STATE COURTS

Court of the United States in vindicating the rights of the citizen against his government. To be sure, many of the reasons are historical and of little relevance today. But there may yet be a message for us.

First, until Reconstruction, the only government that touched most people was that of their state and, until the Fourteenth and Fifteenth Amendments were adopted, state action was uncontrolled by the federal Bill of Rights and largely beyond the reach of federal courts. Moreover, until the 1870's, the lower federal courts had no significant federal question jurisdiction. It was not until 1816 that the Supreme Court firmly asserted its power to revise state court judgments in civil cases and not until 1821 for criminal cases. And, even after that authority was declared, it remained precarious for some time.

The result was that state judges, applying state constitutional law, knew themselves to be the final guardians of liberty, and acted accordingly. They might, of course, have defaulted with impunity—and, occasionally, they did. But, to a surprising degree for the time, state judges, especially those sitting on appellate courts, were courageous men, faithful to their oaths. During this period, ultimate responsibility was taken seriously.

It is also true—whether this was cause or effect—that the state judiciary of the pre-Civil War era attracted the most distinguished lawyers. It is familiar history that Presidents Washington and Adams, at least, had some difficulty persuading the leading lawyers or judges to serve on the Supreme Court of the United States. Some judges promptly deserted the federal court in favor of the more prestigious, and then more important, state appellate courts. Indeed, until the Civil War, it is perhaps safe to say that the only United States Supreme Court Justices who deserve a place in the judicial Hall of Fame are Marshall, Story, and Taney. Even a superficial reading of judicial his-

49. See generally E. CORWIN, LIBERTY AGAINST GOVERNMENT 58-115 (1948).
53. In the dozen years before John Marshall became Chief Justice of the United States Supreme Court, more than half of the twelve nominees to the Court who were actually confirmed declined the office or resigned after brief service—sometimes more than once. See 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 757-58 (1935). Several other judges and lawyers approached by Washington and Adams declined appointment and were never submitted for confirmation. See 1 id. at 42, 57, 124-25, 139-40, 141, 153-55, 171-73. Of those who preferred high position on their own state courts, I note Robert Harrison, who, immediately after being confirmed by the Senate in 1790, declined a Supreme Court seat to become Chancellor of Maryland, id. at 42, and John Rutledge, who resigned his place on the United States Supreme Court in 1791 to become Chief Justice of South Carolina, id. at 56-57.
tory for that period leaves one with the conviction that this number compares unfavorably with the state judiciary, where we had, among many others, Chancellor Whyte, Judge Roane, and Chief Justice Tucker of Virginia; Chancellors Livingston and Kent of New York; and Chief Justices Parker and Shaw of Massachusetts.

This is not to say that the relative prestige of the United States Supreme Court, and the federal courts generally, did not gradually increase. Chief Justice Marshall almost singlehandedly established the federal Constitution as the supreme law of the land and the Supreme Court as the final arbiter of the Constitution. His successor, Taney—until the dreadful *Dred Scott* decision in 1857—brought the Court to its position of unquestioned authority. But the state courts lost little thereby. There were, to be sure, tense moments of conflict. Yet, on the whole, the national Court rarely interfered with state court decisions, and its celebrated judgments were almost all concerned with property rights under the Contract Clause or the Commerce Clause. The personal rights of ordinary citizens remained in the keeping of the state judiciary.

I pass in silence the years of the Civil War, a period during which courts, state and federal, were largely impotent in the face of military authority. Reconstruction, of course, revolutionized the relations between the national government and state governments, and between their court systems. Under the authority of the Thirteenth, Fourteenth,

56. *See*, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859) (reversing the Supreme Court of Wisconsin and holding the federal "fugitive slave law" constitutional); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (striking down a Pennsylvania law punishing those who "kidnapped" fugitive slaves in that state for return to their owners as repugnant to "the slave clause" of Art. IV of the Constitution—since rendered obsolete by the Thirteenth Amendment); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that the Cherokee nation is a distinct and sovereign nation upon which the laws of the states can have no force); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (overruling Maryland Court of Appeals by holding that state legislation that interferes with constitutionally enacted legislation is invalid); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Supreme Court of the United States has the jurisdiction and authority to review all state court decisions arising under the Constitution, laws, or treaties of the United States); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (holding that the legislature of Georgia in 1795 had the power to dispose of unappropriated land within its own limits, and an attempt by a subsequent legislature to annul that act was an impairment of the right to contract); *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809) (holding that state legislatures cannot annihilate the judgments or determine the jurisdiction of the federal courts); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (holding that the Supreme Court of the United States has jurisdiction over a suit by a citizen against a state). For instances of stubborn resistance to the authority of the United States Supreme Court by the courts of Ohio and California, *see* 2 C. Warren, *supra* note 53, at 254-58.
and Fifteenth Amendments, Congress invested the federal courts with extraordinary new responsibilities. Although primarily designed to secure equal rights for the new freedmen against the recalcitrance of the defeated Confederacy, these statutes, for the most part, had no geographical or racial limitations and eventually came to have as much importance outside the South as within it.

The Reconstruction Amendments and their implementing legislation had three related effects on the state courts. First, new federal rights and remedies were established, thereby modifying or overriding state law, including in many respects the established practices of state courts. Second, by opening the lower federal courts directly to civil rights claims, and by 1875 to all cases founded on federal law, the state courts henceforth could be bypassed in such cases. And finally, the lower federal courts—as opposed to only the Supreme Court—were authorized to supervise or supersede the state courts in their implementation of federal law by habeas corpus, removal, and injunction. Many would say that these laws were the beginning of the end of the independence of the state courts and the cause of their decline. For my part, I doubt it.

Unquestionably, for a very brief time, federal courts in the conquered South to an important degree supplanted the state court systems in the enforcement of constitutional rights. At first, albeit with some lapses, the United States Supreme Court resolutely applied the Reconstruction legislation, sustaining the jurisdiction of the federal courts to entertain original enforcement actions and to vindicate federal rights


58. See, e.g., United States v. Cruikshank, 92 U.S. 542 (1876) (holding that the right of assembly operates only upon the national government and was not intended to limit the action of state governments with respect to their own citizens; that the Second Amendment right to bear arms restricts only the power of the national, not the state, governments; and that indictments under the Civil Rights Acts were unconstitutional as applied to persons who had no connection with state governments and were not interfering with federal rights); United States v. Reese, 92 U.S. 214 (1876) (finding unconstitutional as beyond the authorization of the Fifteenth Amendment an act of Congress that authorized punishment of election inspectors for discriminating on account of race).
by habeas corpus, removal, and injunction. But, very soon, the brakes were firmly applied. The Court itself narrowly construed the new constitutional amendments and struck down many of the Reconstruction statutes; the Congress repealed several of the surviving provisions, and the Executive Branch stopped its enforcement efforts. By the mid-1880's, the state courts were largely left alone.

Although short-lived and ambiguous, the experience of Reconstruction stirred an illiberal reaction in the affected states and their courts that continues in some measure to this day. It may well be that Reconstruction lasted just long enough to instill hostility in states to national "interference," including that of the federal courts, yet was aborted too soon to educate the South and its judges to respect constitutional rights—at least the rights of blacks. But if reaction to Recon-

59. See, e.g., the jury discrimination cases cited supra note 12; Ex parte Yarborough, 110 U.S. 651 (1884); United States v. Gale, 109 U.S. 65 (1883); Neal v. Delaware, 103 U.S. (1881); Ex parte Clarke, 100 U.S. 399 (1880); Ex parte Siebold, 100 U.S. 371 (1880); Tennessee v. Davis, 100 U.S. 257 (1880).

60. Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding a Kentucky statute requiring corporations to provide separate but equal schools); Hodges v. United States, 203 U.S. 1 (1906) (holding that the Court did not have jurisdiction under the Thirteenth Amendment to hear a charge of conspiracy, made and carried out in a state, to prevent citizens, on account of their race, from making contracts to labor); Giles v. Teasley, 193 U.S. 146 (1904) (holding that the Court did not have jurisdiction to review an Alabama state court's dismissal of a black citizen's complaint in which he alleged that he had arbitrarily been denied the right to vote on account of his race); James v. Bowman, 190 U.S. 127 (1903) (holding that section 5507, Revised Statutes, which prohibited interferences with the right of suffrage guaranteed by the Fifteenth Amendment, was an invalid exercise of power granted under that amendment); Giles v. Harris, 189 U.S. 475 (1903) (holding that a U.S. circuit court in Alabama did not have jurisdiction over a suit brought by a black Alabama resident on behalf of himself and others to compel enrollment of their names on county voting lists); Cumming v. Board of Educ., 175 U.S. 528 (1899) (upholding a Georgia state court decision that allowed a school district to close a black high school for lack of funds while still maintaining a white high school); Williams v. Mississippi, 170 U.S. 213 (1898) (upholding Mississippi statutes imposing literacy requirements as a qualification to vote); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana statute requiring separate but equal train accommodations for white and black passengers); Baldwin v. Franks, 120 U.S. 678 (1887) (ruling unconstitutional, as applied to Chinese subjects, sections 5519, 5508, and 5336 of the Revised Statutes—section 5519 relating to conspiracy to deprive of equal protection, section 5508 relating to injury or threats for exercise or attempted exercise of rights, and section 5336 relating to conspiracy to overthrow the government); Civil Rights Cases, 109 U.S. 3 (1883) (holding unconstitutional sections 1 and 2 of the Civil Rights Act of March 1, 1875, which provided for full and equal enjoyment of public accommodations and amusements because they were not authorized by the 13th or 14th Amendments); United States v. Harris, 106 U.S. 629 (1883) (holding unconstitutional section 5519 of the Revised Statutes, which made it a crime for two or more individuals to deprive any persons or class of persons equal protection of the law).

struction, followed by the "hands off" policy of the federal judiciary for many years thereafter, in part accounts for the poor civil liberties record of Southern courts, it cannot explain the abdication of state courts in California, New York, or Arizona. The blame must lie elsewhere.

Although I cannot prove the charge, I suggest there is probable cause to attribute the default of the state judiciary in vindicating civil liberties for several decades to the high-handedness—and wrong-headedness—of the Supreme Court of the United States between 1890 and 1937. By narrow majorities, the Court for a time held back the concerted attempt of business interests to invoke the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment as a basis for invalidating state economic and social legislation. But then the dam broke, and the Supreme Court began to void state rate regulation as "confiscation" and labor legislation as a deprivation of the "liberty of contract."

For the moment, I am not focusing on the consequences of this half-century of extraordinary arrogance by the Supreme Court insofar as it dangerously divided American society, imperilling our democratic system, or even insofar as it caused lasting injury to federal-state relations generally. Rather, my concern is how the Court's total disregard for the judgment of the state courts affected the state judiciary. It will be noted that, in almost all of the cases during this period, the highest court of the state had sustained the local statute or agency action against constitutional challenge. On review, the Supreme court in Washington rarely noticed the opinion below, even when affirming the judgment. And all too often, of course, the state court ruling was cavalierly reversed.

Such repeated chastisement, or dismissive snubbing, was not calculated to enhance the prestige or self-respect of the state courts. This was especially true at a time when, despite its undemocratic stance, the Supreme Court of the United States enjoyed unparalleled standing—so much so that even Franklin Roosevelt could not persuade the Congress to curb the Court's power. What is more, to the extent that state courts


64. See, e.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).
were grudgingly taking their cue from the Court in Washington, what they learned was that the Fourteenth Amendment protected the property of the privileged, not the personal liberty of the underclass.

And so we come to the undistinguished late 1930's, 1940's, and early 1950's, during which both state and federal courts frequently looked the other way when civil liberties were at stake. Of course, there were, even then, a few exceptions among the judges of both systems and they occasionally persuaded a majority on their courts. The United States Supreme Court did not often speak out in defense of liberty or equality, and thus no clear message emerged. Then, before most state courts had entirely become used to their recaptured independence and accepted the responsibility that goes with it, the status quo gradually changed once again. This newest change culminated in the bold constitutional rulings of the Warren Court.

It is little wonder that, on the whole, the state courts were unprepared. Compared to the excruciatingly slow and hesitant pace of previous decades, the single decade of the 1960's seemed a whirlwind. Now, suddenly, most of the provisions of the Bill of Rights were made fully applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Equal Protection Clause was invigorated in ways that were unthinkable a few years earlier. Even the Thirteenth and Fifteenth Amendments were implemented. Long forget-

66. See id. at 491-92.
67. See, e.g., Griffin v. Breckenridge, 403 U.S. 88, 104-05 (1971) (holding that provisions of the Voting Rights Act Amendments of 1970 regarding literacy, minimum age in national elections, and residency were constitutionally valid); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968) (holding 42 U.S.C. § 1982 is applicable to all racial discrimination in the sale or rental of property under power granted to Congress by the Thirteenth Amendment).
68. Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that the ban on state literacy tests is constitutional and that Congress has broad powers to regulate federal elections and maintain a national government); Gaston County v. United States, 395 U.S. 285 (1969) (upholding district court's decision that use of literacy test, coupled with inferior schools for blacks, was discriminatory); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (holding challenged sections of the Voting Rights Act of 1965 valid in order to effectuate the constitutional prohibition of racial voting discrimination); United States v. Alabama, 362 U.S. 602 (1960) (holding that the Civil Rights Act of 1957 expressly authorizes actions against a state for racially discriminatory practices); United States v. Thomas, 362 U.S. 58 (1960) (relying on United States v. Raines, 362 U.S. 17 (1960), the Court affirmed a stay of injunction prohibiting respondent from challenging the right of black citizens to remain on the registrar roles of a Louisiana parish); United States v. Raines, 362 U.S. 17 (1960) (the Fifteenth Amendment prohibits discrimination by public officials in voter registration on the basis of race).
ten Reconstruction statutes were resurrected.69 And, once again, lower federal courts were encouraged to intervene in state court proceedings through the use of injunction,70 removal, and habeas corpus.71

All this was too much to absorb. As the Chief Justice of Minnesota recently testified, "The initial reaction of State judges to the 1960-1970 extension of the authority of the federal courts was hostile and defensive."72 Many state judges simply took the stance of letting the federal courts do the unpopular work of vindicating the new rights applied to those accused of crimes and to those victimized by discrimination. But soon, most state courts caught up, and, indeed, a few got ahead of the nation's high court.73 By then, of course, the United States Supreme Court was in partial retreat—as it still is. The upshot is that, for the last few years, state appellate courts often have been reversed for reading too much into the Bill of Rights or the Equal Protection Clause, especially in the area of criminal procedure.

III

What does this history suggest? One lesson is clear: if left alone, state courts are fully capable of vindicating the rights of most citizens against governmental oppression when the ultimate responsibility is theirs. But they tend to default when their judgments are too often reviewed and revised by federal courts.74 In that climate, the state courts tend to become weak—first angry, then apathetic—and inclined to pass the buck in cases involving unpopular causes. It follows, I think, that the federal courts, including the Supreme Court, must get off the backs of the state courts. To this extent, I share the perceptions


73. As early as 1977, Justice Brennan was able to give many examples. See Brennan, supra note 65, at 498-502. See also the grudging concession by Professor Neuborne in the same year. Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1116 n.45, 1121 n.59 (1977). Subsequent developments are sufficiently revealed in the increasing number of cases in which the Supreme Court of the United States faults a state court for reading the Bill of Rights too expansively. See infra notes 83-89 and accompanying text.

of the conservatives in the Congress and in legal academe. But when we come to the means to that end, I part company very quickly.

Indeed, I am not sure we all have the same end in view. Once upon a time, some of our great judges—Cardozo, Frankfurter, Jackson, and John Harlan the Second—argued that the Bill of Rights ought not be made fully applicable to the states on the ground that states and their courts ought to be free to "experiment" with less rigorous standards of governmental and judicial conduct. I utterly reject that proposition, which, put crudely, amounts to saying that states may treat their citizens with less due process than the Constitution requires of the national government. Of course, the Supreme Court has now firmly established that there are not two Bills of Rights—a "full" version for the United States and a "watered down" version for the states. And there is no real prospect of turning back the clock on this point.

Two alternative strategies remain for those who believe the Warren Court extended constitutional rights too far, imposing an intolerable "straitjacket" on state governmental conduct. The first is to "water down" the Bill of Rights—as well as the Equal Protection Clause—in all cases, state and federal. There has been a good deal of that recently. The other approach is to restrict federal court review of state court judgments, mainly by narrowing habeas corpus, by expanding the doctrine of Younger v. Harris, and, finally, by withholding Supreme Court review. These methods have all been used in the name


of the "new federalism," returning to the states and their courts a substantial part of their historic independence. But, whether intended or not, the effect of this "new federalism" may be to dilute the force of the Bill of Rights where it matters most—in restraining local government—when such a result is prohibited in a federal case. Indeed, Professor Neuborne has written that much of the talk about "federalism," "deference," and "comity" is merely "a pretext for funneling federal constitutional decisionmaking into state courts precisely because they [are thought] less likely to be receptive to vigorous enforcement of federal constitutional doctrine." 82

While I do not subscribe to the Professor's suspicion, it is true that the Court has undertaken to review and reverse state courts when they have construed the Bill of Rights too generously. As early as 1975, Justice Thurgood Marshall noted and questioned the Court's "increasingly common practice of reviewing state court decisions upholding constitutional claims in criminal cases." 83 Except for Justice Brennan, who joined Marshall's dissent, the Court dismissed Marshall's concern as an intolerable new heresy. 84 Undeterred, the High Court has continued on its course with added momentum. For instance, in five cases last Term, the Court concluded that state courts in Texas, Illinois, and Michigan read the Fourth Amendment more broadly than was necessary. 85 Likewise, it reversed a ruling of the California Supreme Court setting aside the death penalty, 86 as well as a ruling in another Eighth

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82. Neuborne, supra note 73, at 1105-06.
83. Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting). Justice Marshall also stated, "I can see absolutely no reason for departing from the usual course of remanding the case to permit the state court to consider any other claims, including the possible applicability of state law to the issue treated here." Id. at 729 (citing Michigan v. Payne, 412 U.S. 47, 57 (1973); California v. Byers, 402 U.S. 424, 434 (1971); California v. Green, 399 U.S. 149, 168-70 (1979)).
85. Michigan v. Long, 103 S. Ct. 3469 (1983) (holding that protective search of an automobile's passenger compartment during an investigatory stop was "reasonable" where defendant had been driving at excessive speed and appeared to be under the influence); Illinois v. Andreas, 103 S. Ct. 3319 (1983) (holding the reopening of a sealed container, without a warrant but after a prior legal search, did not violate the Fourth Amendment); Illinois v. Lafayette, 103 S. Ct. 2605 (1983) (holding police inventory of arrestee's personal effects, without a warrant, was consistent with Fourth Amendment); Illinois v. Gates, 103 S. Ct. 2317 (1983) (changing test for probable cause to a common sense determination of the "totality of the circumstances"); Texas v. Brown, 103 S. Ct. 1535 (1983) (under "plain view" doctrine, there was no violation of Fourth Amendment rights when officer seized a balloon containing heroin without being certain of its contents).
86. California v. Ramos, 103 S. Ct. 3446 (1983) (holding California statute mandating that a capital sentencing jury be instructed regarding the Governor's power to commute a life sentence is constitutional).
Amendment case, this time from the Supreme Judicial Court of Massachusetts, and a Fifth Amendment case from the Oregon Court of Appeals.

The current activity of the Supreme Court in the area of individual rights tends to deprive state judges of the insulation from local pressure they might derive from invoking the federal Bill of Rights in protecting individual rights. It is, however, still possible for state appellate courts to avoid Supreme Court review. As Justice Brennan has urged state judges for some years, the way out is expressly and unambiguously to rest decisions on independent state law grounds—i.e. a provision of the state constitution.

Contrary to what some imply, this is in no sense “cheating,” even if the state constitutional provision and the comparable provision of the federal Bill of Rights are identically worded. For the most part, of course, the national Bill of Rights is a derivation from earlier state declarations. Thus, no one dares tell the courts of Pennsylvania that they read too much into the guarantee of “freedom of speech” or Virginia courts that they give too much scope to “freedom of religion.” Nor is there any reason for later-admitted states to concede that they were copying the federal Bill of Rights, rather than emulating their older sister states. Besides, if the national courts are not bound to look to earlier state precedents in construing words borrowed from a pre-1791 state constitution—as they surely do not think they are—there is no reason state courts must follow the United States Supreme Court in giving meaning to like language in state constitutions.

There remain, of course, those cases in which state courts are called upon to vindicate specific federal rights, usually by way of defense. I cannot here rehearse all the arguments for and against increased or decreased exclusive jurisdiction in the federal courts, a more or less expansive right of removal, greater or lesser discretion to enjoin state court proceedings, wider or more restrictive review by habeas corpus, and more or less frequent and searching Supreme Court re-

87. Revere v. Massachusetts Gen. Hosp., 103 S. Ct. 2979 (1983) (holding that the constitutional duty of a municipality to obtain necessary medical care for a person injured by the police force does not include a duty to compensate the medical care provider).
88. Oregon v. Bradshaw, 103 S. Ct. 2830 (1983) (accused man who initiated talk with policeman, waived Miranda rights, and took polygraph test, held to have waived right to counsel during interrogation).
90. See, e.g., Bator, supra note 75, at 605-06 n.1.
91. For a complete catalog of the state antecedents to the federal Bill of Rights, see B. Schwartz, The Great Rights of Mankind 53-91, 87-90 (1977).
view. Generally, I believe the state courts today are both more willing and more able to respect and apply the Bill of Rights than some of us in the federal judiciary have been ready to concede. If “parity” between the two judicial systems is not a fact everywhere, I believe it is well on the way to being achieved.

Accordingly, I do not resist the idea that state courts should enjoy concurrent jurisdiction over most federal issues and that the intrusive devices of removal, injunction, and collateral review ought to be reserved for rare cases. But I would not eliminate these remedies. For me, justice is not amenable to cost-benefit analysis. Whatever the price, I would not disarm the lower federal courts from righting the plain deprivation of a right guaranteed by federal law. The Supreme Court simply cannot perform that task alone. In my view, the solution lies in greater self-restraint by the federal courts and increased respect for the competence of the state judiciary. I am sanguine that even if federal judges retain the power to intercede, but exercise that power with more prudence and better manners, the state courts will resume their historic place as guardians of our liberties. Indeed, as I have noted, state courts today are often more generous in protecting citizens, especially in their procedural rights, than the Supreme Court in Washington. In this exercise of states' rights they ought to be left alone.

IV

My optimism is almost unbounded. I even indulge the hope that State courts will also rise to the most difficult challenge of all: to insist that local governments accord equal protection to those who belong to a traditionally victimized racial or ethnic group. But I am too old and too cautious to rely on faith alone. If history suggests that state courts usually respond well when they believe that they enjoy ultimate responsibility, there remain especially difficult problems in areas where state courts may still need the backing of federal courts.

Historically, many state courts have been unable to free themselves from local pressures and prejudice when adjudicating cases that involved race. The Georgia courts defied the United States Supreme Court in the Cherokee cases. More recently, the courts of several Western states have likewise failed to respect the rights of Indian

92. Worcester v. Georgia, 10 U.S. (6 Pet.) 214 (1832) (holding that federal jurisdiction over the Cherokees was exclusive and state had no power to pass laws affecting them or their territory); Cherokee Nation v. Georgia, 9 U.S. (5 Pet.) 178 (1831) (holding that the Cherokee nation was not a foreign nation). See generally 1 C. Warren, The Supreme Court in United States History 733-34, 768-69 (1935).
The courts of California have not always been alert to protect Orientals from discrimination. In the Southwest, Hispanics have sometimes received less than equal treatment in local courts. And, of course, there is the sad spectacle of Southern courts joining in the massive resistance to the Brown decision.

In this area, the federal courts, more insulated from local influence, remain an indispensable safeguard. But it ought not be taken for granted that state courts cannot vindicate the rights of unpopular minorities within their jurisdiction. Indeed, there are ample illustrations, old and new, of courageous state judges resisting the tide of local prejudice running against red, yellow, black, or brown men and

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94. See supra notes 33-34 and the cases cited therein. An earlier California example is People v. Hall, 4 Cal. 399, 404-05 (1854). See also In re Woman's North Pac. Presby. Bd. of Missions v. Ah Won, 18 Or. 339, 22 P. 1105 (1890).

95. See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954) (holding that persons of Mexican descent were a separate class, distinct from whites, who have a right to be indicted and tried by juries from which all members of their class are not systematically excluded), and the cases cited therein at 478 n.5.

96. For the most part, the southern state courts were spared a direct role in school desegregation. But, when called upon, they all too often lent their "loyal" aid in attempting to disrupt the process. See, e.g., Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 43, 46 (E.D. La. 1960) (holding unconstitutional Louisiana statutes providing for 1) integration to be implemented solely by the Legislature, 2) the Governor's assumption of school board duties or the right to close schools, and 3) withholding supplies and funds from integrated schools). One such contribution was in sustaining official persecution of the NAACP and its members. The most notoriously persistent in this endeavor was the Alabama Supreme Court, whose orders against the organization four times reached the Supreme Court of the United States and finally provoked the impatient anger of that most temperate of judges, Justice Harlan. See NAACP v. Alabama, 377 U.S. 288 (1964).

97. See, e.g., State v. Tinno, 97 Idaho 759, 497 P.2d 1386 (1972) (treaty granting Indians hunting rights should be read to include fishing rights because the Indian language did not distinguish them with separate verbs); State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953) (holding that under a treaty between the United States and the Nez Perce Indians, which reserves right to such Indians to hunt upon open and unclaimed lands, such Indians are entitled to hunt at any time on any lands ceded to the federal government); State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893) (holding that Indians are not subject to criminal laws.
women. Today, when the state judiciary is far less vulnerable to direct control by the electorate and federal law is more clearly declared, we have reason to hope that such exceptions will become the rule.

Nevertheless, the federal courts must be ready to stand in the breach if there is default. Federal judges ought to accord generous support when the state courts stir local hostility by faithfully following federal law. Mixed signals should be avoided. But, even in this troublesome arena of race relations, state courts are not out of bounds. On the contrary, local officials will naturally be more receptive to the teachings of their own judiciary, who are, of course, bound by oath to uphold the Constitution and laws of the United States. So far as possible, federal courts ought to encourage their brethren of the state courts to assume a duty which is no less theirs.

Let me be clear as I conclude. Whether the officials involved wear federal, state, or municipal uniforms, I do not for a moment advocate relaxing the command of the Bill of Rights as it protects the citizen of the state for acts committed by them on their reservation; criminal state laws do extend to all crimes committed on a reservation by persons other than tribal Indians; Ex parte Cross, 20 Neb. 417, 30 N.W. 428 (1886) (holding that state courts have no jurisdiction to prosecute a crime committed by one Indian against another Indian as long as they maintain their tribal relations). See also the decision of then Superior Court Judge Sandra Day O'Connor, Superior Ct., Maricopa Cty., Cause No. 297870 reversed by the Arizona Supreme Court, 121 Ariz. 183, 589 P.2d 426 (1978), but vindicated by the United States Supreme Court in Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) (holding that Central Machinery Co. was not licensed as an Indian trader and therefore imposition of a privileged tax on sale to Indian community was not pre-empted by any congressional enactments passed to protect Indian wards).

98. See, e.g., People v. Fujita, 215 Cal. 166, 8 P.2d 1011 (1932) (alleviating rigors of Alien Land Law); In re Yano's Estate, 188 Cal. 645, 206 P. 995 (1922) (law forbidding Japanese from becoming guardian of minor citizen's agricultural land held invalid); Ex parte Terui, 187 Cal. 20, 200 P. 954 (1921) (alien poll tax law held unconstitutional); Ex parte Sing Lee, 96 Cal. 354, 31 P. 245 (1892) (striking down ordinance conditioning right to maintain a laundry on consent of neighbors).


100. See, e.g., Clifton v. Puente, 218 S.W.2d 272 (Tex. 1948) (holding unenforceable a restrictive covenant against the sale of land to persons of Mexican descent).
against governmental oppression or inconvenient short cuts. Even less would I dilute the force of the Equal Protection Clause as it forbids discriminatory treatment by any government. Nor would I strip federal courts of the power to insure that these constitutional promises are carried through. Even an enthusiastic new convert to "federalism" cannot quite yet assert that all state judges today have the courage, the heart, and the wisdom of a Mathew Tobriner. But I applaud state judges who have resumed their historic role as the primary defenders of civil liberties and equal rights. It is cause for celebration that so many have been so bold. I invite those of my colleagues in the federal judiciary who, like me, have tended to deprecate the state courts, to embark on a fresh approach—in which arrogant distrust gives way to respectful appreciation of how much state judges have done and can do to vindicate liberty and equality for all our people. As for myself, I confess past error and throw myself on the mercy of this audience.