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ARTICLES

“THIRTY PIECES OF SILVER” FOR THE RIGHTS OF YOUR PEOPLE: IRRESISTIBLE OFFERS RECONSIDERED AS A MATTER OF STATE CONSTITUTIONAL LAW

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I.

In recent decades there has arisen a renewed interest in state constitutional law provisions that parallel the provisions in the Bill of Rights and the Fourteenth Amendment. Most typically this interest has been pressed by parties who have discovered the usefulness of state bills of rights that may be more protective than the equivalent provisions in the federal Constitution—provisions on which they would otherwise be forced, unsuccessfully, to rely.

Examples of this renewed interest abound in many areas of law. In criminal procedure, for example, search and seizure practices found not to offend the Fourteenth Amendment’s incorporation of the Fourth Amendment search and seizure provision have nevertheless been successfully impugned pursuant to some state constitutional clauses.¹ Under its recently expanded “open fields” exception, the Supreme Court may not regard deliberate searches by police acting without warrants to be barred by the Fourth Amendment; but a state court may not regard the matter similarly when applying the relevant state constitutional provision to the same case.² So, too, state and

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1. Compare *Nelson v. Lane*, 743 P.2d 692 (Or. 1986) (holding that sobriety roadblock to obtain evidence for criminal prosecution, absent warrant or probable cause, violates state constitution as illegal seizure) with *Michigan Dep’t of State Police v. Stitz*, 110 S. Ct. 2481 (1990) (sustaining such procedures against Fourth and Fourteenth Amendment objections).

2. See *State v. Scott*, 593 N.E.2d 1328 (N.Y. 1992) (applying art. I, § 12 of the New York Constitution to protect private lands, clearly fenced and posted against trespassers, against searches despite the Supreme Court view in *Oliver v. United States*, 466 U.S. 170 (1984), that neither the Fourth nor Fourteenth Amendment affords such protection under the “open fields” doctrine). The 4-3 majority in *Scott* notes that the texts of the state provision and the comparable federal constitutional provision differ. *Id.* at

local laws deemed not to offend the First Amendment have been found invalid in a number of states simply because these states have stronger constitutional clauses protecting freedom of speech³ and freedom of the press.⁴ And some state constitutional church and state separation clauses are also framed more sweepingly than the equivalent clause in the First Amendment.⁵ It is not surprising that certain state forms of assistance to religion not deemed unconstitutional under the First Amendment by a majority of the U.S. Supreme Court are nonetheless disallowed under more broadly worded parallel provi-

1335. So, too, in a concurring opinion, Justice (now Chief Justice) Kaye suggests it is appropriate to rely on stronger state constitutional interpretations when the U.S. Supreme Court appears to have curtailed the scope of the corresponding federal constitutional provision. *Id.* at 1347. ("[W]here we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution [by abiding with a stronger view]."). See also *California v. Greenwood*, 486 U.S. 35, 43 (1988)(White, J., concurring)("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.")

3. See *City of Portland v. Tidyman*, 759 P.2d 242 (Or. 1988)(invalidating an "adult book store" zoning ordinance under the state constitutional free speech clause, even though the ordinance was permissible under the First and Fourteenth Amendments); *Wheeler v. Green*, 593 P.2d 777, 789 (Or. 1979)(construing the Oregon free speech clause to disallow punitive damages in libel cases, even when the First and Fourteenth Amendments would not bar such an award); see also *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975)(precluding punitive damages in libel actions in Massachusetts); cf. *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

4. Compare *Westside SANE/Freeze v. Ernest W. Hahn, Inc.*, 274 Cal. Rptr. 51 (Cal. Ct. App. 1990)(applying CAL. CONST. art. I, §§ 2-3 on free speech, assembly, and petition signing by third parties inside privately-owned mall) with *Hudgens v. NLRB*, 424 U.S. 507 (1976)(holding that neither the First nor the Fourteenth Amendments secures a right to leaflet or seek petition signatures on corporate shopping mall premises). For references to cases in other states, see Gerald E. Weis, *Stepping into the Breach: State Constitutional Protection of Expressive Rights in Private Owned Commercial Establishments*, 4 EMERGING ISSUES IN ST. CONST. L. 159 (1991).

5. A number of these state constitutional clauses are modeled on the ill-fated Blaine Amendment, H.R. 1, 44th Cong., 1st Sess. (1875), proposed by President Grant in 1875 and introduced in Congress by Representative James Blaine. It passed the House by a vote of 180 to 7, but failed to receive the requisite two-thirds approval in the Senate. The Blaine Amendment copied the language of the First Amendment's religion clauses verbatim, but added substantial language:

No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and, no money raised by taxation for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

See RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 163-69, 261-65 (1987); Alfred W. Meyer, Comment, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

sions in state constitutions.⁶

In any event, as these illustrations demonstrate, there is good reason for the renewed interest in the independent efficacy of state constitutional law as a set of restrictions on what state and local government may presume to do. The matter is being increasingly noticed.⁷ Certain Supreme Court justices (most notably Justice Brennan⁸) have expressly urged lawyers and state judges to take a greater interest in this subject to offset what they regard as a retrograde tendency in the Supreme Court's majority decisions.⁹ Moreover, Hans Linde of the Ore-

6. See, e.g., *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1959) (invalidating school bus transportation to parochial schools under the broader nonestablishment provision in the Alaska Constitution, notwithstanding the U.S. Supreme Court's upholding of such transportation when challenged under the First Amendment in *Everson v. Board of Education*, 330 U.S. 1 (1947)); *id.* at 943 ("[W]e propose to follow the reasoning of the Courts of Washington, Missouri, Delaware, Wisconsin and Oklahoma and hold that transportation of school children to nonpublic schools at public expense would be in contravention of our state constitution.").

For a different kind of example, compare *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991) (relying on the clearer "no preference" language in art. I, § 4 of the California Constitution to uphold a challenge to the use of a Latin cross in a city insignia—as well as in public buildings or parks—without reference to whether the challenge would succeed if examined under the First and Fourteenth Amendments) with *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668 (1984). For additional cases and references, see CHESTER J. ANTIEAU ET AL., *RELIGION UNDER THE STATE CONSTITUTIONS* (1965).

7. See, e.g., Yale Kamisar, *Constitutional Law Conference*, 61 U.S.L.W. 2237, 2244 (Oct. 27, 1992) ("Turning his attention away from the past Supreme Court term, [University of Michigan Law Professor Yale] Kamisar said he has been struck in recent years with the number of state appellate courts that have invoked their own constitutions to grant criminal defendants more rights than they enjoy under the federal Constitution.").

8. See William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

9. Without doubt, part of the new fashionability of state constitutional law is driven principally by ideological interests identified to Warren Court-era decisions, decisions that successor justices on the Court have had doubts about (and assuredly have been unwilling to extend even further). The vast majority of state constitutional decisions within the past fifteen years reflect this bias. As a result, many of these decisions exhibit more social zeal than professional craft, confirming Professor Maltz's justified criticism of how state constitutional analysis tends to get used in actual practice. See Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233 (1989) [hereinafter Maltz, *Political Dynamic*]; see also Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988) [hereinafter Maltz, *False Prophet*]. Still, that much being allowed for, it is yet worth observing that there is nothing in the nature of state constitutional law that requires any such bias. Some state supreme courts work at the task with greater detachment. For example, state constitutional clauses on economic liberty are sometimes also taken seriously, even though the corresponding clauses in the federal Constitution tend not to receive their due at all. See, e.g., *Lincoln Dairy Co. v. Finigan*, 104 N.W.2d 227, 233-34 (Neb. 1960) (striking down a state law restricting competition for no discernible public good); see also James C. Kirby, *Expansive Judicial Review of Economic Regulation under State Constitutions*, 48 TENN. L. REV. 241 (1981); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1463-93 (1982). The

gon Supreme Court wrote persuasively more than a decade ago in a series of law review articles and judicial opinions that state judges have a duty to require counsel to brief and present state constitutional questions (indeed, that they must do so, *prior* to raising any federal claim in the same case).¹⁰

But by now, of course, all of the preceding summary review is quite familiar stuff. It has been addressed in law review articles a great deal during the last fifteen years, beginning most notably with A.E. Dick Howard.¹¹ And the topic I think may be newly interesting, because not so well-explored, is *not* this topic as such, interesting and important as this topic has been and

Supreme Court's virtual abdication in this large area was ably reviewed thirty years ago in Robert G. McCloskey, *Economic Due Process and The Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. See also FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS: SENSE AND NONSENSE* (1986).

10. Judge Linde's position is that one cannot sensibly object to state practices on Fourteenth Amendment grounds until a state court has first determined that the practices do not violate the state's own constitution. If the objected-to practice is forbidden by state constitutional law and state law provides ample relief, then it cannot be said that "the state" is acting to violate the litigant's Fourteenth Amendment rights. Thus, the state court must first address state constitutional grounds for relief, and only in the event that state law contains no effective relief does it become appropriate to examine whether the Fourteenth Amendment may apply. See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Hans A. Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Hans A. Linde, Book Review, 52 OR. L. REV. 325 (1973).

In *Sterling v. Cupp*, 625 P.2d 1213 (1981), Judge Linde explained: "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law." *Id.* at 1216; see also *Salem College & Academy, Inc. v. Employment Div.*, 695 P.2d 25, 34 (Or. 1985). For Judge Linde's most recent reflections on ways of treating state constitutional law, see Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992).

11. See A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1 (1988); A.E. Dick Howard, *The States and the Supreme Court*, 31 CATH. U. L. REV. 375 (1982); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); see also Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Ronald K. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Peter J. Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals Search for a Role*, 4 EMERGING ISSUES IN ST. CONST. L. 225; Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFF. L. REV. 157 (1979). But see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Maltz, *False Prophet*, *supra* note 9, at 429; Maltz, *Political Dynamic*, *supra* note 9, at 233 (arguing that while in theory state court activism need not have a political bias, in design and practice the so-called "new federalism" is often a device for advancing the liberal political agenda); Steven J. Twist & Mark E. Hessinger, *New Judicial Federalism: Where Law Ends and Tyranny Begins*, 3 EMERGING ISSUES IN ST. CONST. L. 174 (1990); Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. L. REV. 1005 (1989).

still is.¹² Rather, it is another—but one crucially tied to this topic along a different axis of federalism. I will argue that state and local governments may not accept federal funds when, were they to do so, they would at once put at risk such rights as they are forbidden by state constitutional law to abridge. The implications of this suggestion—as a hedge against tendencies in Congress and the ways it tends to do business to secure a flattening out of differences among states that take a different view of “rights” than Congress wants them to take—are significant. At least I believe this may be so, if the following thoughts are right.

II

Valid acts of Congress supersede any contrary state laws and any state constitutional provisions. They do so by the express terms of the Supremacy Clause in Article VI of the U.S. Constitution.¹³ As to all such ordinary acts of Congress, it is a matter of no consequence that they may affect private rights the state itself could not affect in the same way because forbidden to do so pursuant to some restriction the state constitution imposes upon the state. And nothing in this brief article means to raise

12. See Hans A. Linde, *Does the "New Federalism" Have a Future?*, 4 EMERGING ISSUES IN ST. CONST. L. 251, 251 (1991) (“Commentators have counted more than 500 . . . decisions [ruling in favor of individual rights claims under a state constitution rather than the U.S. Constitution] in the past dozen years”); see also Linda Matarese, *Other Voices: The Role of Justices Durham, Kaye, and Abrahamson in Shaping The "New Judicial Federalism"*, 2 EMERGING ISSUES IN ST. CONST. L. 239, 246 (1989) (“[B]etween 1970 and 1989, state courts handed down almost 600 decisions in which they relied on their state constitutions to provide individual rights protections now lacking under the federal Constitution.”). The continued submission of certiorari petitions from state court rulings that contained mixed references to state constitution clauses and the Fourteenth Amendment undoubtedly was a major factor behind the Supreme Court’s decision to clarify these matters with the standards announced in *Michigan v. Long*, 463 U.S. 1032 (1983). If there could still be any doubt about the pertinence of considering separate, state constitutional law grounds to be researched and argued alternatively or additionally to Fourteenth Amendment constitutional objections, such doubts have been dispelled in the past year. The first commercial looseleaf encyclopedic treatise devoted solely to this subject, canvassing all fifty states, has now been published. It is certain to sell very well. See Ronald K. Collins, *The New Federalism*, 78 A.B.A. J. 92 (1992) (reviewing JENNIFER FREISEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* (1992)) (“The attorney who fails to investigate and raise available state claims is probably skating close to the edge of malpractice.”).

13. U.S. CONST. art. VI, § 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

any question challenging the correctness or sturdiness of these truths.

So, for example, if Congress, pursuant to the Commerce Clause,¹⁴ presumes to forbid any employment of persons for more than a prescribed maximum number of hours per week, it is of no consequence that a state constitution's "substantive due process" or "freedom of contract" clause might have been construed by a state supreme court to invalidate an act of the state legislature similarly restricting the contractual liberties of employees and employers in that state.¹⁵ Such state constitutional clauses may limit what the state may do, but obviously they are not binding on Congress. Accordingly, Congress may override a "liberty" interest in a way that would be impermissible if done by an equivalent *state* statute. Assuming only that the act of Congress does not contravene anything in the Bill of Rights, it will set the terms controlling the rights and liabilities of those to whom it applies directly as a matter of national law.¹⁶ All of this is perfectly well-settled pursuant to the Supremacy Clause itself.

But while all this is true, there are many acts of Congress (probably the greater number) that do *not* operate in this fashion, that is, they do not operate by enacting some uniform, nationwide rule at once binding across state lines, irrespective of state law. Rather, Congress will sometimes offer a carrot to each state merely by inviting each state or local government to apply for certain federally controlled funds, with strings attached. These congressional acts rely on the wider power of Congress to "spend" instead of its power to "regulate." Under formal conceptions, each state is entirely free to decide whether or not to apply for the federal funds and subsequently submit to the federally-prescribed standards that are attached.¹⁷ If the state "decides" not to enroll in the program,

14. U.S. CONST. art. I, § 8, cl. 3.

15. *E.g.*, a state supreme court interpreting and applying a state constitutional due process clause more in keeping with the manner of *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a state law restricting the number of hours one may agree to permit another to work in an ordinary business unreasonably interferes with personal contractual liberty and violates the Due Process Clause of the Fourteenth Amendment).

16. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *United States v. Darby*, 312 U.S. 100 (1941).

17. *See, e.g., Massachusetts v. Mellon*, 262 U.S. 447, 480-83 (1923) ("[T]he statute imposes no obligation but simply extends an option which the State is free to accept or reject [N]othing is to be done without [the state's] consent."); *see also Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

the law of the state will remain unchanged.¹⁸

Beginning in the 1930s as a result of its frustration over the U.S. Supreme Court's narrowing interpretation of the congressional commerce power, in countless cases Congress turned to its spending power to enforce its will on the states.¹⁹ A modern example is furnished by the provision of federal law that any state or local school receiving funds under a grant from the U.S. Department of Education must, in order to maintain its eligibility, continue to make special accommodation and expenditures for handicapped students.²⁰ The school must take the "bitter" (of assuming the costs of making such special accommodation) only if it also wants the "sweet" (the federal grant). If the state board of education or state legislature feels that the costs of meeting the new burdens imposed on it (if it

18. "Decides" is put in quotations, however, in recognition that in fact Congress doesn't want any state to decline—and nearly always takes due care to make refusal of participation very costly (usually so costly it need not fear a state will act on its power to refuse). The classic illustration of this principle is *Steward Machine*, 301 U.S. at 548; see also *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2367 (1990) (noting that while "the [federal] Act applies only to public secondary schools that receive federal financial assistance," and thus "a school district seeking to escape the statute's obligations could simply forgo federal funding," the Court did "not doubt that in some cases this may be an unrealistic option"); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947); *Salem College & Academy, Inc. v. Employment Div.*, 695 P.2d 25, 29 (Or. 1985) ("[T]he chosen device was a federal payroll tax on employers, 90 percent of which could be offset by any payments a state might exact for a state unemployment compensation program that met prescribed federal standards [C]onstitutionally, compliance [was] voluntary on the part of the state, though not practically or politically so.").

For several well-taken criticisms of the Supreme Court's uncritical standards of federalism review of Congressional spending-with-strings-attached, see Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Hans A. Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4 (1964); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUPREME CT. REV. 85. See also Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129, 130-31 (1993) ("The Sixteenth Amendment, establishing the income tax, effectively gave the national government unlimited control of the nation's wealth and, consequently, a virtually unlimited spending power. . . . By extracting money from the now-defenseless states and offering to return it with strings attached, the national government is able to control by promises of reward—some would say bribery—whatever it might be unable or unwilling to control by threat of punishment.").

19. See *supra* notes 17-18.

20. For example, in *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107 (N.D. Cal. 1992) the trial court ruled that states receiving federal grants-in-aid under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (1988), must provide all handicapped children a suitable, free, public education and that pursuant to implementing federal regulations, a local school district may have to bear the entire cost of room, board, care, and other expenses for disturbed children that could not be put in regular schools, but could only be educated in an institutional-residential setting. The effect of the law was that the seemingly modest obligation to provide a "suitable education" became, in fact, an obligation to provide the total costs for the total care of each handicapped child.

seeks aid from the Department of Education) are, in its view, greater than the net benefit it would realize by receiving funds from the federal government, it can save itself the costs of those burdens simply by abstaining from participating in the federal program. Or so, at least, the general theory holds.

And the theory is sound at least to the extent that it is assuredly true that nothing in the act of Congress itself presumes to force any state to apply for such aid. We may assume for now that if it were not participating in the federal program, the mere failure of a local school to make special provision for some kinds of handicapped students would not be deemed to violate any right of those students, either under the Fourteenth Amendment or under any state statutory or state constitutional clause. Rather, the whole idea of the Act of Congress is to create private rights²¹ against the state when Congress is otherwise doubtful of its power to do so directly or otherwise meets too much opposition when it tries to do so directly. It does so indirectly, by nominally respecting "federalism," but by using the spending power-with-strings-attached instead. But note, again, that of course the federal statute does not compel any state agency to apply for the funds in the first instance (rather, Congress relies on the practical inability of states and of local governments to withhold their participation in the federal spending program). Only if the state agency or state legislature opts for participation, does the provision attached to the federal program govern under the Supremacy Clause of Article VI.

Consider another example. Suppose that in state X the law of criminal procedure²² forbids the state courts to admit any evi-

21. One would think that, absent an express Congressional provision creating a private right, a failure by the state or other recipient to comply with the federal conditions tied to the assistance it receives would merely mean that the federal assistance would be subject to termination (with or without restitution of prior monies received during such times as the conditions were not being observed). Counterintuitively, however, this turns out not to be the case. Increasingly, even absent any provision made by Congress, courts have allowed private causes of action to be brought against the state defendant (or other recipient, for example, a private university), both for injunctive relief and also for full tort-like money damages as well. See *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (holding that a damages remedy is available in an implied private action brought to enforce Title IX of Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1988)). So, a recipient's "acceptance" of federal program assistance may impose obligations and expenses of a considerably greater magnitude than the recipient either supposed (or had reason to suppose) when weighing the decision to apply.

22. For the moment, we need not say whether "the law of criminal procedure" re-

dence "obtained by means of police trickery or deceit."²³ Congress, however, believes that the realities of fighting crime make it imperative that police and prosecutors can bring serious felons to justice without such niceties as avoiding all trickery and deceit. To be sure, the act of Congress does not condone any violation of the Fourth Amendment. Rather, it "merely" provides for the admission of evidence, consistent with the Fourth Amendment whether or not, however, obtained by trickery or deceit. Congress wants thus to fight crime more effectively. Moreover, it wants the states to be able to fight crime "more effectively" as well. Here, it seeks to do so by the additional technique of spending with strings attached. It provides that \$250 million be appropriated and thereby be made available for such states as may seek some share of that appropriation to help fund their courts and their law enforcement services by applying for a block grant; it then further provides that "in any state receiving such funds, all otherwise probative and constitutionally admissible evidence is to be deemed admissible in state criminal proceedings, any state law or provision to the contrary notwithstanding." State X understands the bargain. It applies for and receives funds pursuant to this Congressional act. Presumably, just as the state understands, the federal rule locks in. Objections by defense counsel to the admissibility of evidence obtained merely by trickery or deceit are not now valid. Rather, the prosecutor may invoke and rely upon the provision of the federal, not the state, law.

ferred to is something found merely in the state statutory code, as distinct from something found in the state constitution bill of rights. Here, it would seem to make no difference. Later, I suggest that perhaps it may make a difference after all.

23. Such a rule may strike many as naive (that is, as unrealistic). Perhaps it is. Assuredly the common practice of government is massively to the contrary. Yet, some fairly well-regarded judges, including Holmes and Brandeis, have thought that a standard not too far different from this one is not naive, rather, it is what one might want after thinking the matter through on one's own. See *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928) (Brandeis, J., dissenting) (dissenting to the Court's decision upholding a federal criminal conviction based on evidence secured by wiretapping forbidden by state law but the use of which in federal court was nonetheless not deemed by the majority to be forbidden by the Fourth Amendment or by any suitable federal rule; "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * To declare that in the administration of the criminal law the end justifies the means [is] a pernicious doctrine [against which] this Court should resolutely set its face."); see also *id.* at 469, 470 (Holmes, J., dissenting) ("It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. * * * We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.").

Under the Supremacy Clause of Article VI, state law is displaced just as much in this instance as in the preceding case.

The power of spending-with-strings-attached is also evident in an example involving religious interests. Suppose State Y provides textbooks free of any charge or fee as a normal incident of its public school system. It does not, however, provide them to nonpublic schools. An Act of Congress provides that state school boards applying for and receiving grants from the Department of Education are obliged during the period of any such grant to provide free textbooks to nonprofit schools otherwise accredited by the state, including parochial schools. Though state Y has recently applied for such aid, and now currently receives it, it has taken no steps to comply with the free textbook-loan requirement as just described. Understandably outraged by this failure on the state's part, parents of students enrolled in eligible nonprofit private schools sue in federal court, invoking the provision of the federal statute as the source of their claim for relief. Whether or not some state law might otherwise have forbidden the giving of textbooks purchased with state taxes to students enrolled in private schools, the plaintiffs nevertheless will likely prevail.²⁴ Of course, the example assumes that the textbook loan arrangement is one that the Establishment Clause of the First Amendment does not itself forbid a state from embarking on if it chose to do so, but we correctly assume that is true here.²⁵ So the case does work out as clearly in this instance as in the others we have already suggested. Each example ostensibly merely illustrates how federal provisions in "spending-subject-to-federal-conditions" may override state statutory or state constitutional provisions of any contrary sort.

But I now want to return to our earlier point—on state constitutional provisions and their independent usefulness as a strong source of protecting certain civil liberties beyond the

24. *Cf. Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990)(sustaining a private suit for declaratory and injunctive relief that public schools receiving federal assistance and permitting a "noncurriculum related student group" to use school facilities may not exclude any other group, including religious activity groups).

25. *See Board of Educ. v. Allen*, 392 U.S. 236 (1968)(holding that state "lending" of publicly purchased school textbooks for use in parochial schools is not a forbidden fiscal subsidy in aid of religion under the Fourteenth Amendment). *But see Wolman v. Walter*, 433 U.S. 229 (1977)(distinguishing *Allen* and holding that seemingly indistinguishable state lending of publicly purchased projectors, tape recorders, record players, maps and globes, or science kits is a forbidden subsidy).

protection furnished by the Fourteenth Amendment and the Bill of Rights. And I want to return to state constitutions in order to raise a question respecting their possible usefulness as a means of circumscribing the efforts or efficacy of congressional schemes of this kind. Namely, I will question whether a state constitution may forbid a state to engage in *any* conduct that would abridge the rights guaranteed to each citizen or person in the state. If so, that gives state constitutions a usefulness related to the kinds of programs (with strings attached) we have just now reviewed. What might that usefulness be?

III.

Consider the following opinion issued by the Supreme Court of State X interpreting and applying Article N of the state constitution, an article addressed to the right of the people to be free of police or prosecutorial practices involving no Fourth Amendment violation, but nonetheless involving "trickery and deceit" by prosecutors and by police. The opinion reads quite straightforwardly in just the following way:

*In the framing of the bill of rights of this state, duplicity by government in law enforcement was expressly addressed—and expressly forbidden. And the courts of the state were expressly forbidden (by Section 2 of Article N) to permit any prosecution to proceed upon admission or proof that the prosecution had in any manner been party to, or benefited from, police or prosecutorial activity violative of Section 1. These provisions in this state's bill of rights are well known, they are unequivocal, and they have been part of this state's fundamental law from the beginning.*²⁶

Every provision in the state constitution's bill of rights constitutes a specific disempowerment of the legislature. The very purpose of a Bill of Rights, even as Justice Robert Jackson noted, is to disempower majorities from being able to act on behalf of one kind of preference over another, (for example, a greater preference for tranquility than for free speech).²⁷ The purpose of a bill of rights, in short, is to disallow democratic majori-

26. That no other state may have a provision of the same rigor is merely interesting. That the Fourteenth Amendment may contain no such provision is merely interesting as well. That much may be true on any other matter; for example, the extent to which Article M in the bill of rights of this state guarantees a breadth of freedom of speech and of the press is also more generous than is reported in the Fourteenth Amendment or in the free speech clause of any other state constitution of our sister states. That other states differ, or that the Fourteenth Amendment differs, is simply confirming evidence of federalism and of its vitality even today [footnote by the Court].

27. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly,

tarianism its ordinary due, by disabling the legislature from acting in a particular way with regard to a particular matter. If one means to grant back to the legislature some power to strike its own balance, presumably a balance reflecting majority will, it can be done. But so doing requires that one meet the rigor of the amendment process itself as the condition of bringing that result about. In the meantime, the constitution controls the legislature, rather than the other way round.

In the case now before us, the legislature may be assumed to have concluded that the practical imperatives of fighting crime have rendered obsolete such assumptions as the legislature thinks must have been entertained at the time Article N was made part of this state's bill of rights. In this instance, too, others may suppose that at least if those of us holding office in the judiciary agree with the legislature in that respect, then, agreeing with the legislature, we will deem the bar on the use of evidence acquired by trickery and deceit as inapplicable. Wrong again. It is the tendency of every age to find itself a different age. It is the tendency of every age, that is, to impute to an earlier age some set of errant assumptions or, if not errant originally, at least assumptions today's circumstances have made utterly obsolete. Of such reasoning is the death of constitutional guarantees. So, here, we are invited to "reason" about the no-trickery-or-deceit clause in Article N, that is, to assume that when it was enacted, it was enacted on a belief that its enactment would not be inconsistent with some minimally effective capacity to fight crime—that those acting on this assumption would themselves indeed not want it applied in circumstances like those faced "today"—and so, even in keeping with their own (alleged) understanding, we should accordingly hold the guarantee inapplicable under circumstances where its own authors presumably never meant to put the society at such terrible risk.

The Supreme Court of the United States has sometimes itself adopted just this position. But we shall not. Our view is that the bill of rights of this state is amendable by suitable statewide majorities. Until it is altered, however, the courts of this state should not do less than apply it now even as it was applied in the past. If the cost of maintaining Article N is felt to be "too high" (a matter with which we do not think it is any of our business to agree or disagree), still the constitutional requirement is that that point of view must itself carry the requisite sentiment necessary to produce an amendment to the clause—an amendment changing the clause, so as to be effective in court. Until Article N is repealed or altered in some way, the courts of this state will not do less than apply it now, as

and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.") [footnote by the Court].

always, straightforwardly and according to its own unequivocal terms

This opinion seems to have been issued in response to some kind of legislative act. We are not told enough to know just what was in this law. But we know enough to understand what it must have been about, because we know that it was deemed to be forbidden to the legislature given the court’s understanding of Article N. What is equally clear is that had that act been conceded to be within the proper authority of the state legislature, presumably it would not have been struck down. The court treats Article N as a “specific disempowerment of the legislature.” It speaks also of Article N as “disabling” the legislature of authority to treat the constitutional right of the people to be free of police trickery and deceit as an expendable freedom, that is, as something within the authority of the legislature to trade away whether because the state legislature itself places no great value on this right or because it feels itself confronted with a hard choice. It says, rather, that Article N forbids *any* action by the state which would abrogate the guarantees of Article N.

Of course, in all of these ways the opinion is still pretty ordinary. One might suppose it is simply a stock opinion (with a few rhetorical flourishes) invalidating a state law that presumed to authorize police trickery and deceit and make all evidence acquired by such means admissible in state court. And, to be sure, an opinion of this kind might be addressed to such a law. But it might also be addressed to *this* kind of law: a law adopted by the state authorizing the state or some agency or subdivision of the state to qualify for \$5 million assistance under an act of Congress providing that “the police in any state receiving a grant are to engage in all law enforcement strategies as mandated by the disbursing agency from whom the state receives its grant” and further providing that “the state courts of any federally assisted state shall admit such evidence as may be described as admissible evidence in federally prescribed guidelines issued by the X federal agency acting under the authority of this act.” The preceding opinion of the state supreme court, that is, could have been issued as a declaratory judgment upon submission of an original question presented on petition of the

state attorney general²⁸ seeking a determination of the following question: *whether anything in the state constitution precludes the state from participating in this federally sponsored program?* And the court's answer, fully reflected in the opinion we have just been reading, is "yes," that its participation is precluded—it is precluded as a matter of state constitutional law. Its holding is that if it is true (as, here, it is true) that the right of the people guaranteed by Article N would be compromised by the state's participation in the federal program, then the state's participation is foreclosed as a matter of state constitutional law. The attorney general's inquiry was entirely timely and proper. Equally so is the state supreme court's response. Its view is that the state may make no law permitting or authorizing any participation in any program operated under standards prejudicial to any right provided by Article N.

The essence of the court's opinion is in its utterly unremarkable application of Article N as a limit forbidding the state to act in any manner subverting Article N rights. That some or that many in the legislature are eager to sign the state up (indeed, that some are eager to do so because in their view it would at once make the state better in two ways off than it is currently²⁹), gives them no leverage on that account to proceed. The court rightly reads Article N as blocking their designs. That other states are not similarly constrained by any similarly strong "anti-trickery-or-deceit police practice" guarantee in their own constitutions may be true. But that, as the court observed, makes no difference at all. The state constitutional rights of citizens in different states differ. Here, the court took care simply to address only those rights guaranteed in the fundamental law of *this* state, leaving the courts of each other state to speak to the condition of constitutional rights in their own.

The textbook loan case, reprised in just the same fashion, is analytically identical. At step one, it merely concerns a state constitutional Bill of Rights clause framed somewhat more

28. See, e.g., Opinion of the Justices, 372 Mass. 874 (1977)(discussing in an advisory opinion the constitutionality of state legislation mandating teachers in public school to lead daily recitation of Pledge of Allegiance).

29. First, because the state will get \$5 million to spend it wouldn't otherwise get to spend (so, "better off" in this way); and second, because its police and prosecutors, once liberated from the restrictions of Article N, will be able more effectively to fight crime (so the people will also be "better off" in this way as well).

sweepingly than the Supreme Court has been willing to construe from the First or the Fourteenth Amendment. It is a state constitutional clause that more stolidly enacted James Madison's view that even the appropriation of "three pence" of money people involuntarily are made to pay in state or in local taxes in support of any religious establishment is an impermissible use of their funds.³⁰ Many state constitutions have such a provision, as we already have twice noticed.³¹ The U.S. Supreme Court has acknowledged that there are such clauses, and state supreme courts have in some measure enforced them—to disallow some "church-state" arrangements (subsidies) not otherwise disallowed by the First or Fourteenth Amendments as construed by a majority in the Supreme Court.³² Where the terms of a proffered federal program would submit a participating state to a federal regulation requiring that state to devote some fraction of its tax monies to "assist" a religious establishment, then the program is one in which participation by this state is precluded by a restriction disabling it from participation on these particular terms.

In the setting of the discussion we have been holding, the "federalism effect" of such a (Blaine Amendment-type) clause in the state constitution should merely be the same as in our understanding of the federalism effect of the Article N clause in the preceding case: the clause disables any state agency from participating in any federal program that grants authority to any federal agency to require any participating school board providing any free textbooks acquired with the aid of state or local taxes to supply them equally to any nonprofit schools, including parochial schools requesting their free loan for the useful life of such books. The state constitutional provision (that is, the "Blaine Amendment" in its Constitution) forecloses the availability of this program to the school districts of this state.

No doubt the preceding example is jarring.³³ Here is a closing example, however, to try to make one interested in investigating this subject a bit more. Suppose, as is true in California,

30. See *Everson v. Board of Educ.*, 330 U.S. 1, 40, 41, 45, 47 (1947) (Rutledge, J., dissenting for himself, Jackson, Frankfurter, and Burton, JJ.) (quoting from Madison's *Memorial and Remonstrance*, which is reprinted in full as an Appendix, *id.* at 63-72).

31. See *supra* nn.5, 6.

32. *Id.*

33. As it is meant to be, all the better to show what unexpected kinds of provisions one may find in a state constitution and its bill of rights, and why one might care about such matters more than one has been inclined to do.

the state supreme court has interpreted and applied the "privacy" rights clause in the state constitution to hold that it is a denial of equal protection for a public health facility to offer outpatient services generally, but deny any abortion service at all. So, in this way, the state constitution has been construed *not* to leave women dependent solely on private clinics (as the U.S. Supreme Court has ruled a state may do insofar as the Fourteenth Amendment is concerned).³⁴ Now, following up on this U.S. Supreme Court ruling—that states need not permit non-emergency abortions to be performed in public health facilities—suppose that a majority in Congress were strongly of the same view as the legislatures of those states that do not permit nontherapeutic abortions in any public health facility. Were Congress strongly of this view, it might well want to carry that view into effect not merely in regard to any federal health facility subject to its control but, quite naturally, in regard to any state health facility also within its means to influence decisively in just the same way.

Were Congress in fact of this disposition, it might very well provide two statutory changes. The first would provide that "in no federal health facility shall any nontherapeutic abortion be provided"; and the second would provide similarly, that "in no state or local health facility receiving funds under any program administered by the Department of Health and Human Services shall any nontherapeutic abortion be provided."³⁵ May not a class action be suitably brought in state court so to secure an appropriate declaratory judgment that in this circumstance, the state's public health facilities are foreclosed from taking any HHS assistance as long as this restriction continues to apply to any such facility receiving such assistance? I can think of no good reason for questioning the validity or merit of such a suit as this. It stands on the same excellent footing as our original case reviewing and applying Article N. And it should produce the same result.

To date, I am unaware of any such suits like those discussed

34. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). Compare *Committee to Defend Reproductive Rights v. Myers*, 626 P.2d 779 (Cal. 1981) with *Harris v. McRae*, 448 U.S. 197 (1980).

35. Cf. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (sustaining a broad restriction of this sort, disallowing any reference to abortion in furnishing advice in a "family planning" Title X project financed in whole or in part with federal dollars, and forbidding any inclusion of any agency providing such a service in a Title X project's list of referral agencies).

above having been brought in any state court,³⁶ just as I am unaware of any state governor or attorney general intervening in the manner I suggest their own oaths of office (to act consistently with the state's constitution, when so acting would not violate any superior obligation to act consistently with the national constitution) would require. But I believe the reason goes not to any obvious infirmity in the theory, but simply to the possibility that the theory has not been seriously considered or tried out. To be sure, there may be some fatal flaw in it, but if so, it is not obvious. Moreover, if such a theory is sound, it would have interesting implications beyond the matters we have already noted in the random examples selected here just to try it out.

IV.

The national spending power with strings attached, it has been observed, evidently puts federalism under the discretion of Congress in the form of the usual newer way these things are done,³⁷ instructed that it should feel free to do so by the Supreme Court itself.³⁸ Congress sets the terms of its offers

36. Though no such case yet exists, the Supreme Court of Oregon has recognized the relevance of such a suit and has virtually assumed that the suit would be appropriate. *See Salem College & Academy, Inc. v. Employment Division*, 695 P.2d 25, 30, 34 (Or. 1985) ("[A] legislature cannot violate the state's constitution in order to qualify for a benefit that Congress leaves optional . . . [T]he state cannot violate its own constitution in order to satisfy a federal program that Congress has not made obligatory under the Supremacy Clause.").

37. Writing for the Op-Ed page of the New York Times, John Perry Barlow, lyricist for the Grateful Dead, has recently republished *The Bill of Rights* as "revised by the state and Federal judiciary," catching the point quite perfectly. His restatement of the Tenth Amendment is deadly. According to lyricist Barlow, this is our Tenth Amendment (courtesy of the U.S. Supreme Court): "The powers not delegated to the United States by the Constitution are reserved to the Departments of Justice and Treasury, except when the states are willing to forsake Federal financing." John Perry Barlow, *Bill O'Rights Lite*, N.Y. TIMES, Jan. 27, 1993, at A23.

38. *See supra* note 37 and cases and critical law journal discussions, *supra* nn.16-17. Ironically, the opportunity for congressional exploitation of the power to spend-with-strings-attached was provided by Justice Roberts's dicta for the Supreme Court in *United States v. Butler*, 297 U.S. 1 (1936). Rejecting Madison's interpretation that the power to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States" amounted, in the latter clause, "to no more than a reference to the other powers enumerated in the subsequent clauses of the same section," the Court sided with the view that the clause empowers Congress to levy taxes in contemplation of sustaining a more general spending power (that is, to spend for any purpose Congress might deem consistent with the general welfare as such). Thus construed, the power then proved to be strong enough to brush aside what, until then, had been regarded as a limiting principle applicable to the clause: that "what Congress cannot do directly (because given no authority to do it), neither can it presume to do indirectly (for example, by manipulating the terms of its largesse to

quite knowingly—at just the “right” level—to make them “irresistible” and, accordingly, no state tends very long to resist.³⁹ Historically, social liberals overall have applauded this development, generally seeing no great danger to things they may most care about (“personal rights” and certainly not “state rights”), and much preferring what they see as the progressivism so long associated with Congress and hardly at all with the states.

Even so, such an attitude ought not make one wholly hostile to this brief review. There is more than a single value in federalism, as Justice Brandeis noted quite a long time ago.⁴⁰ The quality of difference from one state to another is not always strained. Just because the prevailing constitutional perspective of what it means to have a certain kind of right in a given state may not be of a piece with the prevailing perspective elsewhere, it frankly provides no support for the manner in which Congress routinely hunts about for ways and means to flatten things out. Experimentalism at the edges of civil liberties is

secure regulatory outcomes it was given no constitutional authority to try to achieve). The “answer” to the objection was that what Congress might indeed not have been authorized to do under any other power, still it may proceed to do under this clause instead. Moreover, if it is up to Congress to determine whether one’s interest in participating in federal expenditures is or is not consistent with “the general welfare” (as the Court was subsequently to suggest), then one’s complaint, insofar as one might be deemed ineligible, is principally just with Congress; it is not a complaint to bring into the courts. To be sure, the latter proposition was not itself embraced by *Butler*, which actually held the form of spending-with-strings-attached was void under the Tenth Amendment. Nevertheless, subsequent decisions have upheld it. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976), for the proposition that “[t]he level of [judicial] deference to the congressional decision is such that the Court has more recently [since *Butler*] questioned whether “general welfare” is a judicially enforceable restriction at all.”).

There was in fact nothing in the dicta of *Butler* or any other case that need have led to the Court’s virtual abrogation of federalism review under the “spending clause” any more than the meager dicta used to abandon federalism review under the “commerce clause.” Cf. *Steward Machine Co. v. Davis*, 302 U.S. 548, 590 (1937) (Cardozo, J.) (stating that a tax is not valid “when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power.”); see also William W. Van Alstyne, *Federalism, Congress, The States and The Tenth Amendment: Adrift in The Cellophane Sea*, 1987 DUKE L.J. 769.

39. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (finding that unless a state legislature discriminates against its own eighteen-to-twenty-one year old adults by criminalizing alcoholic beverages for them though for no one else in its adult-age population, the state will be deemed to be less suitable than other states as a recipient of federal highway assistance funds paid from national taxes (albeit taxes to which its own residents have contributed in the same measure as the residents of the other states), sustained, per opinion by Rehnquist, C.J., with but two dissents.)

40. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .”).

even now not an obsolete notion in this country. Differences in the cultures of America are not an altogether undesirable thing. Where federal constitutional rights tend to fail us, moreover, perhaps it may be useful to consider this subject at least one time again.

For example, no state constitution that I am aware of has even now been applied to forbid the state from requiring people to register by race. As yet, no state constitution exists that even protects one from being made an unwilling party under law to racial schemes or to racial plans others may propose, requiring one to register others by race and submit them to discrimination by race at one's own hands. Since there is not now any state whose constitution is construed in this way, we are left at the rusting hinge of this century and of this millennium without a single example in this country of a truly color-blind constitution.⁴¹ Professionally, I regret that this is the case. I believe we might all learn a great deal from the example of such a state. Perhaps this state would not long endure. Still, it is an experiment in federalism one might, finally, want at least someone to try.

If the thesis ventured in this brief essay were followed, moreover, in any such state as I have envisioned it here, and there existed federal programs that offered money or other assistance to other states on the now-ordinary condition that they—these other states, their agencies, their businesses, their colleges, schools, highway agencies—should engage in such racial registering, racial indexing, racial ordering, and racial discrimination as the program required, then it would be routine to expect that participation in such programs would *not* be an option in this state. For in any such state, under *no* circumstances

41. Some state judges have tried to have their own state constitutions understood in this way, even as some Supreme Court Justices sought to do so during their tenure on the Supreme Court. See *DeRonde v. Regents of Univ. of California*, 625 P.2d 220, 229 (Cal. 1981)(Mosk, J., dissenting); *Price v. Civil Serv. Comm'n of Sacramento County*, 604 P.2d 1365, 1383 (Cal. 1980)(Mosk, J., dissenting); see also *Fullilove v. Klutznick*, 448 U.S. 448, 522, 532 (1980)(Stewart, J., dissenting); *DeFunis v. Odegaard*, 416 U.S. 312, 320, 343-44 (1974)(Douglas, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896)(Harlan, J., dissenting). See generally ALEXANDER BICKEL, *THE MORALITY OF CONSENT* (1975); TERRY EASTLAND & WILLIAM J. BENNETT, *COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER* (1979); ANDREW KULL, *THE COLORBLIND CONSTITUTION* (1992); THOMAS SOWELL, *DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY* (1982); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990); J. HARVEY WILKINSON, *FROM BROWN TO BAKKE* (1979); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 CHI. L. REV. 775 (1979).

could the state "consent" to any such terms or conditions as these. Some might regard this with regret. But others might not be similarly inclined. Somewhere within the possibilities of federalism itself, such a place might still someday be found.

A BRIEF POSTSCRIPT NOTE ON THE MECHANICS OF ENFORCING STATE CONSTITUTIONAL RIGHTS

In examining the manner in which Congress exercises its "spending power," one may notice that Congress generally elects between two quite different techniques. The first is to disqualify a state (or its political subdivisions or agencies) from participation unless the state itself makes some alteration in its own laws and thereafter maintains its laws as may be required to maintain its eligibility. The second does not require such a change, but rather provides that where the state (or state subdivision) applies for federal assistance of a certain kind, a rule supplied by Congress or by some agency acting under its direction then becomes substantively applicable to the operations of that agency or subdivision simply as a matter of federal law.

*South Dakota v. Dole*⁴² is an example of the first sort. *Board of Education v. Mergens*⁴³ is an example of the second sort. In *Dole*, Congress had reduced highway financing assistance to states that did not raise the lawful minimum drinking age from eighteen to twenty-one. In *Mergens*-type situations, on the other hand, the state is not required to adopt any new or different substantive law. Rather, a school system that receives federal assistance is simply prohibited—by federal law—from barring any voluntary student group from using school facilities in off hours, assuming only that it (the school) otherwise permits any such group the use of school premises. So, in all *Mergens*-type cases, the subordinating applicable federal rule overriding any contrary local rule simply comes along with the money, that is, it is made applicable and controlling as a function of the acceptance or receipt of the federal funds. In the first kind of case, it is the state law enacted by the state legislature that operates as the immediate new and sole source of legal restriction, albeit a state law that (by hypothesis) may well be one the state legislature did not approve but adopted to avert the con-

42. 483 U.S. 203 (1987).

43. 496 U.S. 226 (1990).

gressional threat. In the second kind of case, there is no state law that operates as the source of the legal regime—it is the federal rule made applicable because of the presence of the federal funds.

Now, suppose that in South Dakota, the state constitution itself had previously been amended so to establish the age of eighteen as the general age of adulthood.⁴⁴ And suppose, too, that the state constitution has a "strong" equal protection clause.⁴⁵ Suppose the South Dakota legislature, despite these provisions, yields to the federal scheme and enacts a general criminal prohibition on any adult possessing or consuming any alcoholic beverage unless he or she is at least twenty-one years of age. In this instance, bringing the matter to a quick resolution is simple. Assuming the state law would be deemed not to comply with the equal protection clause of the state constitution,⁴⁶ it cannot matter that, once the state supreme court so decides, it may adversely affect the state's eligibility for the same measure of federal highway assistance as other states, that have no similarly robust equal protection clause, may receive. It may not be unconstitutional for Congress to condition its highway funding program as it has presumed to do. But that is without consequence so far as the equal protection rights of South Dakota residents (not to be discriminated against by their own legislature in setting the drinking age) are concerned. Presumably a mere retail dispenser of beer may have suitable standing to seek a declaratory judgment, invoking the state equal protection claim of appropriate eighteen-to-twenty-one year old customers.⁴⁷ The case is easy. The manner in which the state constitution can be successfully invoked is straightforward. But the case is also atypical. Most of the coer-

44. *E.g.*, a change it made around the time the Twenty-Sixth Amendment was ratified (extending the same right to vote to those eighteen-and-over as was previously available to those twenty-one-and over). So, the state constitution was also amended at the same time in a more general way as well—fixing eighteen as a constitutional definition of "adulthood" for all age-related equal protection claims under the law.

45. Construed in light of the amendment (defining "adults" as all persons eighteen and over), the state's equal protection clause thus will be read generally to disallow legislative bodies to reserve any general civil liberty, right, or privilege solely to persons twenty-one or older. The two constitutional clauses thus operate to protect young adults from being treated as a class as in any way less "mature" or less "capable" than others simply because they are not as old as others—the state constitution establishes their "adulthood" for general purposes of the law.

46. The case would be reasoned according to n.44 *supra*.

47. *Cf. Craig v. Boren*, 429 U.S. 190 (1976).

cive spending-with-strings-attached acts of Congress do not work in this way. What then of the other—the more usual—kind?

In the *Mergens* setting, the case is more complicated to be sure. For in this setting, there is no obvious state law for an objecting party to attack. There is no state law that says anything about religious groups being privileged to conduct religious voluntary exercises on public school premises (a rule that would be subject to challenge, by hypothesis, under the state constitutional “no establishment” clause). Rather, it is simply a federal rule that does so—a rule at once applicable and binding on the school authorities insofar as they do participate in the federal funding program itself. Nevertheless, the applicability of state constitutional law remains unaltered. The difference is simply in the nature of the remedy required in the case. Here the case is more like the one first posed in the essay on Article N, and virtually like the one on lending publicly-purchased schoolbooks to parochial schools.

If the state constitution had a “no establishment” clause of the extended “Blaine Amendment” sort, assuming only that that clause is not itself validly subject to objection under the Fourteenth Amendment,⁴⁸ though it would be harder to find a suitable entry into the problem, the clause might still appropriately be brought to bear. The clause forbids the state to act in any way inconsistent with its guarantee that no taxpayer’s coerced taxes shall be utilized to subsidize an establishment of religion. And, accordingly, the state may not act contrary to that guarantee. Where, then, does the proper responsibility lie to see that it will not act contrary to that guarantee?

At one level, there is a useful comparison to be made in these matters with a more familiar understanding we already have in our constitutional law. It is familiar constitutional law that, whatever kind of treaty the United States may make with a foreign nation, no provision in any treaty inconsistent with the Bill of Rights is enforceable in any state court or federal court of the United States. The treaty power, in short, is bounded by the Bill of Rights.⁴⁹ What is interesting in this comparison is

48. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978).

49. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (holding that the Sixth Amendment precludes applying provisions of the Uniform Code of Military Justice extending court-

just this, however. The familiar understanding we have noted regarding the limitation on the treaty power is controlling in our domestic courts. Only they, and not other courts, are bound to enforce no law—including the law of a treaty—inconsistent with our Bill of Rights. In theory, and perhaps in practice, the fact that the United States thus proves to have been unable to discharge its treaty obligation (because, bound by the Bill of Rights, its national courts may not permit that obligation to be fulfilled in fact) may not by itself relieve the United States of liability in an international court insofar as it is in breach of whatever was the obligation it assumed pursuant to the treaty it made. That other court—an international court—need not deem the United States excused by the failure of its courts to give the treaty full effect (unless the treaty itself so provided). And, indeed, the international court may be quite right in this position from its point of view. The distinction, however, is also obvious as well. In the case we are now discussing, even given that the United States may be liable in some measure to the other treaty power in an international court, that liability does nothing as such to work any violation of any U.S. citizen's personal constitutional right. Neither the international court nor any domestic court will act to deny the domestic constitutional right of any person in the United States.

In our case, the equivalent to the treaty provision is the substantive federal rule superimposed on the federal funds—a rule that is apparently binding (under article VI) if the state takes the funds subject to the rule, requiring the state judge (under article VI) then to ignore the state constitutional rights the state had guaranteed to its own citizens. Vindication of those constitutional rights can best be secured by timely action so to prevent the state from entering into the program—to prevent it from entering into a "treaty" as it were, whose "superior" law would then announce itself as controlling even in the state's own courts. The best remedy in this circumstances is to seek an opinion from the state attorney general (and perhaps from a suitable state court) that the proposed terms of the federal program (that is, the terms provided by Congress) may be within Congress's power to propose, but, however that may be, not within the power of the state to accept. If, as may well be the

martial jurisdiction to overseas civilian wife accused of homicide of service personnel spouse).

case, the terms are nonnegotiable and nonwaivable so far as Congress is concerned, then so be it. That merely means that this state cannot, consistent with its own constitution, participate in the federal scheme. And that seems to me to be not the least bit peculiar; rather, merely sound and quite right.⁵⁰

50. Still, it will be obvious that the rules regarding standing, ripeness, etc., under the constitution, state statutes, and practices of the fifty states, and the procedures for securing advisory opinions, class actions, taxpayer suits, or declaratory judgments defy a uniformity of description enabling one to manage much more than we have already reviewed here in a preliminary way. A more workmanlike examination of these (important) details remains to be done.