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USING STATE LAW TO PROTECT FEDERAL CONSTITUTIONAL RIGHTS: SOME QUESTIONS AND ANSWERS ABOUT CONVERSE-1983

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Several years ago, I published an overly long article entitled “*Of Sovereignty and Federalism.*”¹ The article touched on many issues—nullification, secession, the Tenth Amendment, and sovereign immunity, to name a few. Some of the issues raised in the article have been rather widely discussed—among Supreme Court Justices, on various federal courts of appeals, and in the general law review literature. Although participants in these discussions may not always agree with my ideas, they at least seem aware of them. Yet in regard to what I considered the most interesting section of the article, involving what I labelled “converse-1983” laws, the judicial, legislative, and academic response has been almost complete silence. Perhaps this is because my analysis of converse-1983 laws was so obvious—or alternatively, so obviously wrong—that no response seemed necessary. However, on the off chance that my initial approach was neither obvious nor obviously wrong, I now propose to reexamine converse-1983 laws. At the very least, this reexamination can help clarify various issues of federalism and jurisdiction, of right and remedy. But more ambitiously, I hope this reexamination will make the legal community more aware of a dramatic set of progressive actions that states may take in the service of federal constitutional rights.

In keeping with the socratic tradition of law teaching and federal jurisdiction scholarship,² I shall conduct this reexamination through the device of questions and answers.

* Professor of Law, Yale Law School. This essay derives from the Coen Lecture, delivered on September 14, 1992, at the University of Colorado School of Law. An earlier version was delivered on July 25, 1992 to the Roscoe Pound Foundation/Yale Law School Forum For State Court Judges.

1. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

2. See, e.g., PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3rd ed. 1988); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). For a nice discussion of this dialectic tradition, see PHILIP BOBBITT, CONSTITUTIONAL FATE 57 (1982).

1. What are converse-1983 laws?

Converse-1983 is the label I gave to a proposed type of state law designed to provide a remedy or cause of action for violations of federal constitutional rights committed by federal officials. Whereas 42 U.S.C. § 1983 provides a *federal* law remedy/cause of action for federal constitutional violations perpetrated by *state* officials, a converse-1983 law would provide a *state* law remedy/cause of action for federal constitutional violations perpetrated by *federal* officials. Such a converse-1983 law would both invoke and invert the logic and language of § 1983, and might read something like this:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of *the United States*, subjects or causes to be subjected, any citizen of *this state* or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Let me be clear: no state has (yet) adopted such a converse-1983 law. But I believe states can and should adopt these laws. If properly framed and applied, these laws are deeply in keeping with the letter and spirit of the United States Constitution, and should be upheld by the United States Supreme Court. What's more, although states have never adopted such a *self-conscious* state law remedy for federal constitutional violations committed by federal officials, state law has, ever since the Founding, provided a rich set of *unselfconscious* remedies against unconstitutional conduct by federal officials. For example, prior to the 1971 case of *Bivens v. Six Unknown Federal Agents*,³ the state law of trespass provided virtually the only civil remedy against Fourth Amendment violations perpetrated by federal officials. This line of trespass cases, along with many other historical examples of state law remedies against federal lawlessness, strongly supports the constitutionality of the more systematic and self-conscious converse-1983 laws I am proposing here.

2. *How could a converse-1983 law come into existence?*

The federal Constitution does not specify in great detail the precise mechanisms by which states may create legal norms; in-

3. 403 U.S. 388 (1971).

stead, the allocation of lawmaking is largely governed by state constitutions (constrained at the margins, of course, by federal norms such as due process, equal protection, and republican government). Typically, a new state converse-1983 norm could emerge in any of three ways. First, it could become part of the state constitution via initiative, referendum, convention or special legislative action. Second, a state legislature by a simple majority could enact converse-1983 language as an ordinary state statute. Third, state judges have power to fashion legal norms—such as converse-1983—as part of the common law process. Such common law norms, like the norm against trespass already mentioned, can be, and for over 200 years have been, invoked against federal officials.

The role of judge-made common law in the enforcement of federal constitutional rights is highlighted by the *Bivens* case mentioned earlier. As *Bivens* reminds us, courts—state courts no less than federal courts—can, pursuant to their common law function, infer private causes of action for violations of legal rules laid down in statutes and constitutions. We need look no further than *Marbury v. Madison*⁴ to see the deep roots of this tradition. Following the ancient maxim *ubi jus, ibi remedium*—where there is a right, there should be a remedy—Chief Justice Marshall in effect inferred a private right of action for William Marbury to sue for an alleged violation of a congressional statute vesting him with a commission to serve as a justice of the peace. This statute did not say in so many words that if a commission were unlawfully withheld, its holder would have a right to sue for it; the statute, in modern parlance, did not create an express cause of action.⁵ But the court in effect fashioned such a private cause of action by treating a commission as a kind of property right, akin to a deed to a piece of land.⁶ Put another way, Marshall assimilated the statute into the more general set of common law norms of property law—common law norms that permit a property owner to sue to protect his property.

State courts have used the common law of torts in a similar fashion over the last two centuries. If a legislature passes a safety statute, without providing an explicit cause of action, the tradi-

4. 5 U.S. (1 Cranch) 137 (1803).

5. *Id.* at 172. For further discussion of this aspect of *Marbury*, see Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 447-48 (1989).

6. 5 U.S. (1 Cranch) at 155, 165, 171.

tional approach of state courts has been to allow parties whom the statute was designed to protect to sue under the general common law of negligence. But instead of being required to prove negligence under all the particular facts and circumstances, the plaintiff is allowed to point to the defendant's violation of the safety statute as negligence per se.⁷ In effect, the common law has thereby inferred a private cause of action for the statutory violation.

State courts have done this not only for *state* safety (and other) statutes, but also for violations of *federal* statutes, as in the classic case of *Moore v. Chesapeake & Ohio Railway*.⁸ And as *Bivens* reminds us, the same common law remedy-fashioning process is also appropriate when the federal Constitution, rather than a federal statute, is at stake.

Indeed, in two respects the argument for inferring state causes of action for violation of the federal Constitution is even stronger than for fashioning similar causes of action for violation of federal statutes. First, statutes can and often do expressly provide for private causes of action. By the logic of *expressio unius*, a statute that does not so provide could perhaps plausibly be read as intentionally rejecting private causes of action as enforcement mechanisms. By contrast, the federal Constitution nowhere *explicitly* creates such a cause of action. (And how could it, without deteriorating into the kind of "prolix legal code" disparaged in *McCulloch v. Maryland*?⁹) Therefore, its failure to do so in, say, the Fourth Amendment offers no good *expressio unius* argument against private enforcement via state common law trespass causes of action. Second, as we shall see in more detail below, state causes of action for violations of federal *statutes* are subject to much more serious preemption problems than state causes of action under the federal *Constitution*.

7. RESTATEMENT OF TORTS § 286 (1934). The classic English case here is *Gorris v. Scott*, L.R. 9 Ex. 125 (1874). See also *California v. Sierra Club*, 451 U.S. 287, 298-301 (1981) (Stevens, J., concurring) (collecting cases and other materials).

8. 291 U.S. 205 (1934). In *Moore*, the United States Supreme Court discussed how state tort law could incorporate federal safety standards set out in a federal statute. See also HART AND WECHSLER, *supra* note 2, at 561, 945 & n.3 (discussing *Moore* and other cases). For further discussion and analysis of state law-created private causes of action for violation of federal statutes, see Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144 (1985).

9. 17 U.S. (4 Wheat.) 316 (1819).

3. *Must states act in concert in adopting converse-1983 rules?*

No. Even a single state, acting alone, could adopt a converse-1983 rule. But once a single state did adopt such a rule, other states might have strong incentives to follow suit, for reasons I shall elaborate below. Of course, unless all states adopted identical rules, questions would arise as to the appropriate scope of any given state's converse-1983 rule. For example, should the converse-1983 law of state *X* apply only if the constitutional violation occurred in state *X*? Only if the constitutional violation injured a citizen of state *X*? Only if the case is adjudicated in state *X*? Only under some combination? But these questions are in no way unique to converse-1983 norms; they are simply aspects of general choice of law questions applicable to all state law.

4. *Doesn't converse-1983 violate basic principles of federalism?*

On the contrary, converse-1983 is an expression—a celebration, really—of the American ideal of federalism, properly understood. Let's consider various possible federalism-based objections.

a. *The Article VI Supremacy Clause*

Converse-1983 laws do not violate the Supremacy Clause; they enforce it. The Supremacy Clause does not make federal statutes or federal executive policy supreme; it makes the federal *Constitution* supreme, and only federal laws and federal policies that are in conformity with—"in pursuance of"—the federal Constitution are legitimate norms that may legitimately override state law. When federal officials violate the federal Constitution, the conduct of these officials is not supreme. State law and state courts may play a role in enforcing the true supreme norm—the Constitution—against those officials. Indeed, the Supremacy Clause, after emphatically asserting the supremacy of the Constitution, explicitly charges state courts with both the right and the duty to enforce the Constitution as supreme law. And this is exactly what a state court creating a converse-1983 cause of action would be doing: enforcing the Constitution's rights by fashioning legal remedies.

b. *Article III and Federal Court Supremacy*

Of course, the analysis thus far may seem to have begged the question of *who decides* whether the Constitution has in fact been

violated. For if federal officials were not in fact violating the Constitution, state-created liability would be an impermissible tax on *lawful* federal activity, a de facto nullification of *legitimate* federal law. Although the Article VI Supremacy Clause charges state judges with the right and duty to interpret and enforce the federal Constitution in cases properly before them, Article VI nowhere says that state courts shall, or even may, stand as the last word on the proper interpretation of the federal Constitution. On the contrary, as I and others have argued in great detail elsewhere,¹⁰ Article III requires that the last word on "all cases arising under the Constitution of the United States" be vested in the *federal* judiciary. And every converse-1983 case would be a true "arising under" case, for each case would invariably raise the question of whether the federal officials had indeed violated the federal Constitution. Thus, although state judges have a right and a duty to make this determination in cases properly before them, Article III mandates that these state court pronouncements may not stand as the last word; any state adjudication must be appealable to some Article III court.

For most federal question cases, Congress has implemented this Article III mandate by providing for U.S. Supreme Court review, via certiorari, of state high court rulings on federal law.¹¹ In a few situations, however, Congress has gone even further, and vested exclusive jurisdiction in lower federal courts, or provided for removal from state trial courts to federal district courts. Congress clearly has authority to provide for such exclusive and removal jurisdiction under the language of Article III and the Necessary and Proper Clause, as the Supreme Court suggested in *Martin v. Hunter's Lessee*¹² and affirmed in *The Moses Taylor*.¹³ In a case roughly contemporaneous to *Moses Taylor*, the Supreme

10. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). See generally *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

11. 28 U.S.C. § 1257 (1988).

12. 14 U.S. (1 Wheat.) 304, 336-37 (1816).

13. 71 U.S. (4 Wall.) 411, 428-31 (1866).

Court in *Tarble's Case*¹⁴ in effect construed jurisdictional rules to require exclusive federal jurisdiction in habeas actions against federal officials. Many scholars today question the correctness of both the language and the holding of *Tarble's Case*,¹⁵ and of course, Congress could overrule this holding anytime it wanted by providing for concurrent or exclusive state court jurisdiction over habeas trials. But unless and until overturned by Congress, *Tarble's Case* would prevent any state court from entertaining a converse-1983 action seeking habeas or habeas-like relief against a federal official. It is still an open question in the Supreme Court whether *Tarble's Case* should be expanded to encompass all state court injunctions against federal officials.¹⁶ But it is clear that in any event, *Tarble's Case* does *not* extend to state court *damage* actions against federal officials¹⁷—the heart of converse-1983. For two centuries, state courts have had jurisdiction over these damage cases. But even here, there is a critical wrinkle, for congressional removal statutes allow many federal officials, if they so choose, to remove damage actions from state court to a lower federal court.¹⁸ Thus, as a practical matter, a very high percentage of converse-1983 causes of action may end up being tried in federal district courts.

Certification back to state courts for clarification of state converse-1983 rules, however, may well be appropriate in certain cases. But how, it might be asked, will a federal court know that a state does indeed recognize converse-1983 liability, so that the federal court will know that certification may be appropriate? Will not every case be whisked away from state courts via removal, before state courts can even consider the issue? Clearly, where converse-1983 liability is created by a state statute, federal courts can easily be made aware of the statute's existence. If instead, state courts wish to recognize converse-1983 liability via the common law process, they need only drop a footnote in some other, nonremovable case—say, a case inferring a state law cause of action against a private party for violation of a federal statute. The footnote need only say that the state judiciary *might* well be willing to infer a similar cause of action against federal officials

14. 80 U.S. (13 Wall.) 397 (1871).

15. See, e.g., HART AND WECHSLER, *supra* note 2, at 420 n.49, 488-92.

16. See *id.* at 490 (citing conflicting cases among lower courts).

17. *Id.* at 489. A recent federal statute makes the Federal Tort Claims Act the exclusive remedy for various wrongs committed by federal officials, but expressly exempts suits for federal constitutional violations, 28 U.S.C. § 2679(b)(2)(A) (1988).

18. 28 U.S.C. §§ 1442-43 (1988).

for federal constitutional violations. Alternatively, the footnote could appear in a case discussing the liability of state officials for constitutional misdeeds, or in a dozen other situations. This footnote should suffice to alert both lawyers and federal courts of the need to get a definitive ruling on state converse-1983 rules from state judges. Of course, some might call the footnote "dicta"—but then, most of *Marbury v. Madison* is dicta. And the purpose of the dicta I am proposing here to state judges is the same as Chief Justice Marshall's purpose in *Marbury*: to alert courts that do have trial jurisdiction how another court with norm-declaring authority might rule if it had jurisdiction.

Once again, however, after certification, it would remain for the federal courts to take jurisdiction over the case to decide finally the legal issues raised. It might at first seem as if my observations about Supreme Court appellate review, *Tarble's Case*, and federal officer removal take all the "punch" out of the converse-1983 idea. Have I not, in conceding federal judicial supremacy in interpreting the federal Constitution, undercut the whole point of converse-1983?

Absolutely not. At its core, converse-1983 is not about state court judicial jurisdiction; it is about state *law* as a remedy applicable in all courts, state and federal. Without a converse-1983 cause of action, many victims of federal lawlessness would simply have no way of getting into any court, state or federal—just as before *Bivens*, the only remedy for federal Fourth Amendment violations was furnished by state trespass law. Even if state courts do not stand as the last or even the first word on cases involving state law remedies for federal constitutional violations, these state law remedies provide the substantive rules of decision in federal courts. Even after *Tarble's Case*, state law remedies of habeas corpus were enforceable in federal court.¹⁹ And before *Bivens*, state trespass law was applied in federal trial courts after federal officers removed their cases from state courts.

Likewise, converse-1983 causes of action can, and indeed must, be followed by federal judges, whether sitting in appellate review of state courts via Supreme Court certiorari or sitting in district courts via *Tarble's Case* or federal officer removal. Under the

19. Indeed, the Constitution's nonsuspension of habeas clause was clearly designed to protect the *state* law remedy of habeas even if adjudication took place in federal courts. In 1787, no federal habeas law existed, so the clause can only refer to the preexisting state common law habeas. For extensive historical support, see WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-80 (1980).

Rules of Decision Act²⁰ and the Tenth Amendment, a state statutory cause of action (unless it somehow violates the federal Constitution or a constitutional federal statute) is a substantive law that federal courts must enforce. Thus, if a state statute created a converse-1983 cause of action, that statute would furnish a remedy applicable in federal court. And if the converse-1983 norm were instead promulgated by state common law courts, the result would be the same. That is the basic teaching of *Erie Railroad v. Tompkins*²¹ (which of course, as an interpretation of the Rules of Decision Act, applies in all federal court adjudication, not just diversity cases).²² Indeed, *Erie* explicitly places on an equal footing state common law made by state judges and state statutes made by state legislatures: "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."²³ To repeat then: the converse-1983 idea focuses on state judges not in their role as "ultimate interpreters" of federal constitutional norms, for the federal Constitution does not give them any such role,²⁴ but rather in their *Erie* role as state lawmakers, coordinate to state legislatures in their ability to fashion substantive legal norms applicable even in federal court.

c. McCulloch and the Spirit of Federalism

"But," it might be said, "let's put all the technicalities about Article VI, Article III, the Rules of Decision Act, and federal jurisdictional statutes to one side. Doesn't converse-1983 violate the basic spirit of American federalism, as embodied in cases like *McCulloch v. Maryland*?²⁵ What right does a state have to impose a de facto tax on federal officers qua federal officers? And why should *state* law concern itself with whether the *federal* Constitution has been violated by the *federal* government and how that violation should be remedied?"

These questions, though superficially forceful, miss the mark. Recall the precise facts of *McCulloch*: Maryland believed that the

20. 28 U.S.C. § 1652 (1988).

21. 304 U.S. 64 (1938).

22. HART AND WECHSLER, *supra* note 2, at 858 n.2.

23. 304 U.S. at 78. See also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 (1954) (describing this as *Erie's* "essential rationale").

24. *But see* Hart, *supra* note 2, at 1401. Hart's view is criticized in the works cited *supra* note 10.

25. 17 U.S. (4 Wheat.) 316 (1819).

Second Federal Bank was unconstitutional; that Congress had no enumerated power to create such a bank; and that the bank's federal charter was thus null and void. Maryland therefore imposed a tax on the bank, and when the bank officials refused to pay, Maryland brought suit in its own state courts against bank official McCulloch, fining him for his failure to comply with the Maryland law. On appeal, the U.S. Supreme Court reversed. But note that the Supreme Court nowhere denied the legitimacy of the jurisdiction exercised by the state court below in an action for damages, of sorts, against a federal official alleged to be part of an unconstitutional federal operation. Note also how the Supreme Court structured its analysis in *McCulloch*. The *first* question, said the Court, was whether the bank was in fact constitutional. Only after assuring itself that the bank was indeed consistent with the federal Constitution—"necessary and proper"—did the Court address what it labelled as the *second* question in the case: whether the state of Maryland could *nonetheless* impose its tax. The structure of the Court's analysis and several passages in the opinion²⁶ plainly imply that if the bank had indeed been unconstitutional, perhaps state law could impose liability on the bank official, Mr. McCulloch. If anything, all this suggests that when federal officials are acting in violation of the federal Constitution, state law-created liability may well be appropriate at times.

Of course, if a state converse-1983 law were to provide for liability far in excess of making a plaintiff whole, and far in excess of the quantum of damages for other state causes of action, this punitive converse-1983 law might offend the spirit of *McCulloch*. Imagine, for example, a converse-1983 law that provided for one million dollars of presumed damages for any Fourth Amendment violation by federal officials, however technical the violation and however minimal the actual harm to Fourth Amendment values of property, personhood, and privacy. This presumed damage rule could well be seen as a tax masquerading as a remedy, and thus violative of *McCulloch's* spirit.

McCulloch might also be thought to disfavor any state law that "discriminated against" federal officials. Unlike a general trespass law applicable to all persons within a state, public and

26. *Id.* at 425-30 (speaking of "constitutional laws of the Union," "laws made in pursuance of the constitution," "legitimate operations of a supreme government," and of a federal "right . . . to preserve" the bank) (emphasis added). See also *id.* at 427 ("[t]he power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.").

private, a converse-1983 law does indeed specially target federal officers. But there are good reasons for this special targeting. Federal officials wield special powers not enjoyed by ordinary citizens, and are thus subject to various constitutional norms, such as the Fourth Amendment, that do not apply to private actors.

Consider once again the facts of a typical Fourth Amendment case. When federal officials brandishing badges, uniforms, guns, and other trappings of the authority of Leviathan bang on the door of an ordinary citizen and demand entrance, the citizen may well “voluntarily” let them in. (“What choice do I have?,” she may well ask herself.) Under general rules of trespass “[a] private citizen, asserting no authority . . . will not normally be liable in trespass if he demands, and is granted, admission to another’s house.”²⁷ But these general rules of trespass make much less sense for federal officers, and if unsupplemented by additional safeguards, will result in many “unreasonable” searches within the meaning of the Fourth Amendment, even if no general trespass occurred. Thus, as the *Bivens* Court noted, “one who demands admission under a claim of federal authority stands in a far different position.”²⁸ As a result, the Court acknowledged in passing, “state law may take into account the different status of one clothed with the authority of the Federal Government”²⁹—that is, state law may specifically target federal officials to protect Fourth Amendment values.

So far, we have been focusing on why states may create a special cause of action against federal officials as opposed to ordinary citizens. But converse-1983 raises a second, distinct “discrimination” issue. Why should states be able to impose rules on federal officials that do not apply equally to *state* officials? (Of course, a state could avoid this second issue altogether by playing it safe and drafting its converse-1983 rules to apply to unconstitutional conduct under color of *either* state or federal law. The interesting question, however, is what if a state chooses *not* to “play it safe”—that is, chooses to provide a cause of action against only federal officials.)

Although the question is, I admit, a close one, I would argue that this discrimination is nevertheless acceptable, and indeed

27. *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, 394 (1971) (citing torts treatises).

28. *Id.*

29. *Id.* at 395. The Court, however, refused to allow the possibility of state law remedies to block the creation of a federal common law remedy.

healthy. Remember of course that we are by definition talking about "discriminating against" (I would probably prefer the more neutral language of "targeting") *unconstitutional*, ultra vires, federal conduct. And remember also that we have already seen that any excessively punitive liability on federal officials should be struck down as a "tax masquerading as a remedy."

With those limitations in place, what is to be gained by adding a further "nontargeting" limitation? If states are obliged to police their own officials as vigorously as they police federal officials, they may police *neither* well. If forced to extend converse-1983 against state officials or abandon it altogether, states may well choose the latter. And citizens victimized by unconstitutional government conduct will be even worse off. To borrow from Thomas Jefferson's response to James Madison's concern that perhaps a federal Bill of Rights would fail to fully protect all important rights, "half a loaf is better than no bread."³⁰ Remedies against the federal half of government misconduct are better than no remedies at all.

This belief that targeting is permissible if it leads to greater citizen protection against government unconstitutionality is not merely a personal view. Rather, this belief underlies the American Constitution's theory of federalism. Like separation of powers, federalism is rooted in the idea that citizens must conquer government power by dividing it. At bottom, this system is driven by a basic intuition about human nature and organizational behavior: without external checks, an actor or institution cannot be relied upon to restrain its *own* misconduct; however, actors and institutions can be relied on to restrain the misconduct of *other* actors or institutions. Thus, separation of powers encourages different branches to restrain—to check and balance—each *other's* conduct. Federal courts, for example, police Congress and the Executive via judicial review, and these branches in turn check federal courts via the appointments and impeachment processes, jurisdictional statutes, and so on.

A similar dynamic drives federalism. Congress can often be counted on to police state misconduct (witness section 5 of the Fourteenth Amendment) but may often do a much more dubious job of policing those officials carrying out its *own* laws. There is no more dramatic illustration of this than 42 U.S.C. § 1983 itself,

30. Letter of March 15, 1789, *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 620-23 (Bernard Schwartz ed., 1971).

which of course provides a general cause of action against state unconstitutionality, but not an equivalent general cause of action against federal unconstitutionality. The beauty of federalism is that citizens may use the laws—even the targeted laws—of another government (the state) to protect them against federal lawlessness. What Congress has “targeted out” through § 1983 (namely unconstitutional conduct perpetrated by *federal* officials), states may “target in.” You may call this using state discrimination to supplement congressional discrimination if you like, but I prefer the language of *The Federalist* No. 51: “Ambition must be made to counteract ambition” so as to protect “the rights of the people.”³¹ And make no mistake, Publius is quite clear that the federal system allows—indeed invites and even depends upon—state remedies jealously protecting citizen rights against federal officials. As Madison wrote in *The Federalist* No. 51: “The different governments will control *each other*.”³² Or as Hamilton stated even more pointedly in an earlier Federalist Paper:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the people’s] *rights* are invaded by either, they can make use of *the other* as the instrument of *redress*. . . .

It may safely be received as an axiom in our political system that the *State governments* will, in *all possible contingencies*, afford *complete security* against invasions of the public liberty by the *national authority*.³³

31. THE FEDERALIST No. 51, at 322-23 (James Madison) (Clinton Rossiter ed., 1961).

32. *Id.* at 323 (emphasis added).

33. THE FEDERALIST No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). I discuss these quotations, and the underlying vision of federalism they represent in much greater detail in my original converse-1983 article. Amar, *supra* note 1, at 1425-29, 1441-43, 1492-1520. Further support for and elaboration of this vision appears in Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

When I first discussed the above-quoted excerpt from THE FEDERALIST No. 28, *supra*, I described it as a set of “key words” that was nonetheless “seldom-quoted.” Since then, the Supreme Court, per Justice O’Connor, has quoted this passage in its entirety as a cornerstone of the American theory of federalism. See *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991). I applaud this recognition, and the Court’s placement of this key passage alongside the more familiar words of THE FEDERALIST No. 51. Only last Term, the Court—once again, per Justice O’Connor—relied on the vision laid out in *Gregory* to invalidate an act of Congress on federalism grounds, for the first time in 50 years (not counting the *National League of Cities* case, later reversed in *Garcia*). *New York v. United States*, 112 S. Ct. 2408 (1992).

The entire history of America in the late eighteenth century embodied this ideal, with colonial governments championing their citizens' rights against imperial oppression in the momentous years between 1763 and 1776; and with the Virginia and Kentucky legislatures closing out the century by leading the charge against a new form of "imperial" oppression and unconstitutionality in the garb of the now infamous Alien and Sedition Acts. And when we carefully examine the original Constitution and Bill of Rights, we see over and over the theme of state law protection of interests against federal oppression. For example, the nonsuspension of habeas clause, the Constitution's most pointed allusion to remedies, was designed to protect the pre-existing—that is, *state law*-based—habeas remedy against possible federal abrogation.³⁴ The Fifth Amendment protects property against *federal* deprivation without due process and without just compensation. However, *state law* typically defined whether a property right even existed to trigger this protection. The Fourth Amendment protects the right of persons to be secure in "their" houses, papers, effects and so on against federal intrusion. But again, *state law* typically defined whether a given "effect" or "house" belonged to a given individual.

The overall architecture of constitutional federalism is thus designed to encourage states to use state law to vindicate federal constitutional rights against the federal government. And this is why I began my answer to the federalism questions raised by converse-1983 by claiming that "converse-1983 is an expression—a celebration, really—of the American ideal of federalism, properly understood."

5. *Assuming converse-1983 is proper, why is it necessary? What would it add that is not already protected by Bivens and other general state laws?*

Bivens could in theory be overruled tomorrow. The theoretical point is not wholly fanciful. As Dean Nichol and other astute commentators have noted, the Supreme Court has demonstrated its reluctance in recent years to follow *Bivens* by not applying its precepts beyond the few situations, most importantly the Fourth Amendment and the takings clause, where the Supreme Court has already approved implied causes of action under the Constitution.³⁵

34. See *supra* note 19.

35. In the academic literature, see Gene Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989). In the case law, see *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983).

What's more, one of the two main doctrinal props underlying *Bivens* was the line of cases, exemplified by *J.I. Case Co. v. Borak*,³⁶ authorizing a federal common law inferring private rights of action under federal statutes.³⁷ *Borak* and its progeny were later abandoned by the Supreme Court,³⁸ raising the spectre that *Bivens* may be next. (We should, however, recall our earlier observation that the differences between the federal Constitution, on the one hand, and federal statutes—the “prolix legal code”—on the other, could well justify inferring causes of action only under the Constitution and not statutes.)

If *Bivens* were overruled tomorrow, how would citizens be able to gain redress when federal officers violate citizens' rights under the Fourth Amendment and other constitutional provisions? By now, the answer should be clear: by using state remedial law—just as, before *Bivens*, state law was the only remedial game in town. But as *Bivens* itself made clear, the Fourth Amendment protects interests that may go beyond those covered by ordinary state trespass law—as when the citizen “voluntarily” admits an officer into her house; or when “unreasonable” electronic eavesdropping occurs without any physical trespass.³⁹ What's more, perhaps the general damage rules for ordinary trespass may overlook, and thus fail to compensate for, the special dignitary and other injuries created when government officials act unconstitutionally.⁴⁰ Thus if the only state law remedy available is that of the general common law and general state statutes, various margins of the Fourth Amendment and other constitutional rights will be unenforced or underenforced. To take another example: a federal law granting certain government largesse only to whites might not violate any traditional common law liberty or property right of blacks, but it surely would violate their equal protection rights. But how could blacks get this case to court, and get damages for past constitutional wrongs above and beyond an injunction against future unconstitutionality? And how does one get

36. 377 U.S. 426 (1964).

37. If under *Borak*, federal courts could infer private causes of action for violations of federal statutes, why not also for constitutional violations? The other main line of cases undergirding *Bivens* grew out of *Ex Parte Young*, 209 U.S. 123 (1908). If federal courts could entertain injunctive actions directly under the Constitution, why not damage actions, too? Both *Borak* and *Young* have deep roots in *Marbury*, as I show in Amar, *supra* note 5, at 447-48.

38. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979). For a good general discussion, see Calande, *supra* note 8; HART AND WECHSLER, *supra* note 2, at 945-50.

39. See *Katz v. United States*, 389 U.S. 347 (1967).

40. Cf. *Carey v. Phipus*, 435 U.S. 247, 258-59 (1978).

to court other cases involving constitutional violations that may not precisely track traditional common law wrongs? A converse-1983 statute, almost by definition, is perfectly tailored—targeted, if you will—to fill these gaps so that state remedial law is absolutely coextensive with the precise scope of its citizens' federal constitutional rights; and as fully compensatory as the Supreme Court will allow.

But even if *Bivens* is not overruled, state converse-1983 can make a big difference. What the Supreme Court gave with one hand in *Bivens*, it largely took away in later cases creating various zones of immunity for government officials.⁴¹ The Court has never said that the Constitution requires these zones of immunity. Nor, to my knowledge, has the Court ever applied these zones of immunity where a cause of action for unconstitutional federal conduct was created by *state* law, such as trespass law. Thus it remains quite possible that state converse-1983 laws might not need to allow "good faith" defenses for various federal officers. Disallowing these defenses is in no way unfair to the individual officer defendants, who will invariably be reimbursed by their government employer.⁴² By contrast, to create such a defense is in effect to make the citizen victim liable, even though she is by hypothesis utterly faultless, and the government official violated the Constitution. For this reason, throughout the entire eighteenth and nineteenth centuries, government officials generally enjoyed no immunity whatsoever if they were deemed to have engaged in unconstitutional conduct, even where a *federal* official was being sued under a *state* law cause of action.⁴³

Why might the Supreme Court allow state law to be more generous towards citizen victims (on either the immunity issue, or possibly on the issue of quantum of damages) than the Court itself has been under *Bivens*? Perhaps because the Court itself has been dubious of the legitimacy of *Bivens* and has chosen to tread very carefully and gingerly. Even though *Bivens* is not a species of the *Swift v. Tyson*⁴⁴ type of "general" federal common law condemned

41. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

42. On the uniform practice of government indemnification, see Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 *CORNELL L. REV.* 641, 686 (1987); Lant B. Davis et al., Project, *Suing the Police in Federal Court*, 88 *YALE L.J.* 781, 811 (1979).

43. See generally David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 *U. COLO. L. REV.* 1 (1972); HART AND WECHSLER, *supra* note 2, at 1292.

44. 41 U.S. (16 Pet.) 1 (1842).

in *Erie*, but is rather a prime example of what Judge Friendly labelled the “new” federal common law,⁴⁵ it was condemned as illegitimate by several dissenters in *Bivens*, including Justice Black. But however controversial federal common law—“new” or old—fashioned by *federal judges* may be, no one disputes the common law role of *state judges*. Thus, Justice Black went out of his way in his *Bivens* dissent to concede that he would cheerfully enforce a cause of action against lawless federal officials if either “Congress [] or the State of New York” had created such a cause of action.⁴⁶ And as we have already noted, under *Erie* and the Rules of Decision Act, such a cause of action could be created by either a statute passed by the New York legislature or a common law norm fashioned by New York courts.

To put the point doctrinally and defensively: the *Bivens* line of cases limited recovery (by creating immunities and restricting the quantum of damages) for reasons that may well not apply to converse-1983 laws. If the Supreme Court wants to limit *Bivens*, it can do so with minimal justification: what it created, it can destroy. But if the Supreme Court wants to limit *state* law causes of action, it must, under the Rules of Decision Act and the Tenth Amendment, explain why the state’s more generous compensation is somehow unconstitutional. At least where the issue is whether federal officials *must* enjoy immunity for unconstitutional conduct, the Supreme Court will find it hard to distinguish away scores of cases from the eighteenth and nineteenth centuries enforcing state law without recognizing any immunity.⁴⁷

To put the point structurally and affirmatively: where, as in *Bivens*, the federal judiciary is taking on the federal Executive all alone, it is wont to act very cautiously. But if given encouragement from state statutory or common law, the federal judiciary may be emboldened to go further and provide *full remedies* for violations of constitutional rights. Converse-1983 is exactly this kind of legal/moral/political encouragement, especially if a state explicitly states that it intends to authorize “the maximum amount of recovery that

45. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

46. 403 U.S. at 428 (Black, J., dissenting) (emphasis added).

47. For a recognition that federal judicial power to create immunities for constitutional wrongs is limited where a legislature has expressly decided otherwise, see *Burns v. Reed*, 111 S. Ct. 1934, 1945-46 & n.1 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). And it is of course well understood that various immunities recognized by *Bivens* are not constitutionally required. See, e.g., Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1173 (1986).

is permissible under the federal Constitution”—in the same way that some state long arm jurisdiction statutes explicitly seek to authorize the “maximum amount of personal jurisdiction that is permissible under the federal Constitution.”

6. *Why would states have an incentive to adopt converse-1983?*

Two sets of rather different incentives are at work here. Consider first the baser set: money. Converse-1983 laws provide compensation for a state’s citizens who have been victimized by federal lawlessness, thereby bringing money into the state. Of course, the individual defendants may also be state residents, but as noted earlier, the almost invariable practice is for the federal government to indemnify such officials, presumably out of general revenue derived from all the states. Benefits are localized, yet costs are largely externalized.

Three qualifications must be noted about this base motivation. First, we should recall that any state incentive to plunder is of course constrained by my earlier rule that converse-1983 recovery must not be so excessive that it is merely a “tax masquerading as a remedy.” Second, base motivation is not inconsistent with a constitutional scheme designed to harness human nature—even base motivations like “jealousy,” “ambition” and “love of power”—through structural mechanisms such as federalism and separation of powers so as to protect rights. Third, I doubt that money will in fact be a strong positive motivation. But at least states need not fear becoming the analogue of a “welfare magnet” if they do the right thing and enact converse-1983 laws.

This brings me to the real, loftier set of incentives for converse-1983. States should enact converse-1983 laws because doing so is in the highest tradition of supporting the federal Constitution and vindicating its implicit remedial scheme, which so heavily depends on each government policing *the other* to vindicate citizen rights.

The world around us is awash in constitutional reform. Suppose a friend from Eastern Europe or the former Soviet Union were to ask an American, “why federalism, why states?” The first answer at the Founding of our Constitution, and the first answer in the Federalist Papers, is also my answer:⁴⁸ we have states, first and foremost, so that they can help protect us when the central govern-

48. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 497-506 (1991).

ment violates our constitutional rights (and we have a central government so that *it* can help protect us when *states* violate our constitutional rights). This answer, it seems to me, is much stronger than one associated with Justice Brennan's famous celebration of state constitutions in a now classic article, *State Constitutions and the Protection of Individual Rights*.⁴⁹ In that article, Justice Brennan talked about how wonderful it was that under a system of federalism, state constitutions could provide additional rights *against states*, above and beyond those required by the federal Constitution. If Justice Brennan were to offer this reason to our hypothetical visitor from Europe, I could well imagine the following response:

I do not understand, my friend. If states did not exist, did not have great power over me, I of course would not need any rights *against* states. Why am I better off with two sets of governments that can bully me, rather than one? Are you saying anything more than the following: states need not be as abusive towards their citizens as the federal government allows them to be?

What's more, in providing additional protection against themselves, á la Justice Brennan, states are not, strictly speaking, enforcing *federal* constitutional rights as such. If a state court provides additional safeguards against state police searches and seizures, above and beyond what is required by the Fourth Amendment (as applied to states via the Fourteenth Amendment), it can and will be reversed by the Supreme Court unless it makes clear that its action is rooted not in the federal Constitution, but *solely* in state law.⁵⁰ By contrast, converse-1983 enables state courts to use state law to vindicate *federal* constitutional rights *as such*.

Justice Brennan's thesis might also seem applicable when state constitutions furnish citizens with additional rights against private parties. In *Pruneyard Shopping Center v. Robins*,⁵¹ for example, the U.S. Supreme Court upheld the validity of the California Supreme Court's use of state law to compel a shopping center owner to provide access to leafletters. Under the California Constitution, "state action" was defined more expansively than in the federal First and Fourteenth Amendments, thus allowing the leafletters to

49. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

50. See *Michigan v. Long*, 463 U.S. 1032 (1983); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State may not impose . . . greater restrictions [on its police] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.") (emphasis in original).

51. 447 U.S. 74 (1980).

succeed in their suit against a private property owner. Yet once again, any celebration of federalism here can only be half-hearted. To say that the state has the power to reach private conduct not addressed by the federal Constitution is to say nothing of the way in which it will exercise that power. *Pruneyard* identifies no structural reason to believe that the state will systematically exercise its powers in ways that promote federal constitutional values like free speech or life, liberty, and property. Any argument praising dual federalism for giving citizens a second chance at the state level to get additional rights against others is distinctly double-edged: such dual federalism also creates a second risk for citizens that additional duties on them towards others will be imposed (as the shopping center owner in *Pruneyard* can painfully attest to).

Put another way, precisely because ex hypothesis no federal constitutional rights are at stake when state courts decide whether to go "beyond" a federal constitutional right, it is hard to see how doing so promotes federal constitutional values *as such*. Justice Brennan's argument seems to trade on unspoken intuitions that a "real" federal constitutional interest resides on one side of a state law dispute (for example, with a citizen challenging a police search or with the leafletters in *Pruneyard*), but that real interest has been too narrowly construed by the Burger and Rehnquist Courts (for example, by expanding the category of permissible searches, or stiffening the First and Fourteenth Amendments' state action requirements). In such cases, the argument runs, state judges can use state constitutions to enforce the "shadow" federal constitutional rights underenforced by federal courts. But the validity of disposition under state constitutional law in no way depends on whether the state constitution is invoked on behalf of the real federal rights-holder. In *Pruneyard*, for example, the state constitution might well have permissibly *prohibited* municipalities from enacting ordinances requiring special access for leafletters. In short, we have no structural account of why state constitutions and state judges can be expected to systematically promote "underenforced" federal constitutional norms. Converse-1983, by contrast, attempts to highlight how and why states might indeed be able to promote federal constitutional norms underenforced by *Bivens*.

7. *Does converse-1983 violate federal sovereign immunity?*

No, so long as suit lies only against individual officers. As a matter of legal doctrine, there is no sovereign immunity bar even

where it is clear that the "immune" government will undoubtedly indemnify the "nonimmune" official.⁵²

8. *Does converse-1983 apply when federal officials violate federal statutes?*

No. Unlike the words of § 1983, which apply to state action in violation of either the federal Constitution or federal laws,⁵³ I propose that converse-1983 be limited to federal action in violation of the federal Constitution. The reason for this limitation is simple. Congress, as the source of a federal statute, is generally free to qualify or condition that statute. If Congress chooses to impose statutory limits on a federal official, yet decides *not* to allow private suits for damages in the event that the official violates the statute, states must respect this congressional choice. The situation is very different, however, where a federal official violates a federal *constitutional* right. Congress has no power to authorize this official's unconstitutional conduct; and the prohibition is not simply one of Congress's creation. Since Congress has no "greater power" to eliminate the restriction on federal action, it has considerably less power to thwart states from enforcing this restriction via private causes of action.

9. *Does this mean that Congress could never preempt a state converse-1983 law?*

No. There is a legitimate federal interest in uniformity, eliminating a patchwork of state law remedies so that a federal officer's liability will not wildly fluctuate as he moves from state to state (say, in pursuing drug traffic). But for reasons I explained in more detail in my original article,⁵⁴ if Congress seeks to oust state law here, Congress must itself provide a federal remedy at least as generous as the most generous state remedy Congress seeks to preempt (assuming, of course, that the state law remedy was not independently unconstitutional—i.e., so punitive so as to amount to a "tax masquerading as a remedy").

52. Elsewhere, I have spelled out at length my views that where the government violates the Constitution, it is neither "sovereign" nor "immune," and that direct liability of the government itself is often appropriate. See generally Amar, *supra* note 1.

Since the Supreme Court has historically rejected this view, and for now shows little sign of movement, I shall not press the point here—especially given that as a practical matter, individual officer liability is a pretty good second-best approximation.

53. See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

54. Amar, *supra* note 1, at 1518-19.

10. *What is stopping us? Why aren't states jumping on the converse-1983 bandwagon?*

Perhaps because lawyers and lawmakers—state peoples, state legislatures, state courts—have not been aware of states' dramatic options concerning converse-1983. If that is indeed even part of the problem, I hope this lecture, and all of us gathered here today, will be part of the solution.