

Converse-1983 at the Forty-Year Mark

By Akhil Reed Amar^{*}

I. INTRODUCTION

Back in 1984, as a 3L at Yale Law School, I conceived a thing and coined a name: Converse-1983. Just as Congress, via section 1983, had long ago properly created a *federal* remedy for violations of the US Constitution committed by *state* officials, I argued that states, via what I called converse-1983 laws, could properly create *state* remedies for violations of the U.S. Constitution by *federal* officials.¹

The following year, I went on the law-teaching market. In informal interviews and formal job talks at many of America's best law schools, I discussed a couple of pieces that I had already published.² I also circulated an early draft of the first article that I hoped to publish as a law professor—my 3L paper featuring the converse-1983 idea. Partly on the basis of this unpublished draft, several law schools offered to hire me. I chose Yale.

In my first year on the Yale faculty, I beefed up my converse-1983 draft and fit it into a long shaggy piece about various first principles of American constitutional law. The piece

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¹42 USC section 1983 reads as follows: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of *any State or Territory or the District of Columbia*, subjects, or causes to be subjected, any citizen of *the United States* or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

My envisioned converse-1983 law invoked and inverted this language as follows:

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 *Constitution*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

² Cite to YLJ Note on Lottery Voting and BU L Rev article on Two Tiers

appeared in the *Yale Law Journal* in the Constitution's bicentennial year, 1987, under the title, *Of Sovereignty and Federalism*.³

This piece has experienced some notable ups and downs in its first four decades. On the upside: In embryonic form, it helped me land a job at Yale Law School at the virtually unprecedented age of 26.⁴ Five years later, it helped me win tenure at Yale, also at a virtually unprecedented age.⁵ Justices of the Supreme Court have cited this piece in seven cases⁶—placing it comfortably (by this metric) in the top twenty law review articles published in the last forty years. In the law review literature, the piece has been cited by more than a thousand articles—also placing it (by this distinct forty-year metric) in the modern top twenty.⁷ Apart from a pair of articles written by Justice Scalia and Justice Kagan,⁸ *Of Sovereignty and Federalism* is, I believe, the only article that ranks in the top twenty under both metrics—a reflection, perhaps, of the fact that the modern Court leans right and the modern academy leans left.

On the downside: One of the article's main arguments—championing a narrow reading of the eleventh amendment and related ideas of state sovereign immunity—has never won more than four votes at any given moment on the modern Court.⁹ Also, over the years several distinguished commentators have contested my analysis of the amendment and governmental immunity, as well as my ideas about the constitutional propriety of converse-1983 laws.¹⁰ And

³ Cite

⁴ I have been told by the Dean who hired me, Guido Calabresi, that the only person in the last century hired at a comparably young age by YLS was Guido himself.

⁵ In the last century, Guido Calabresi and Stephen Carter were also tenured by YLS at about the same age.

⁶ Full cites to *Union Gas*, *Acevedo*, *NY v. US*, *Hess*, *Term Limits*, *Seminole Tribe*, and *Boumediene*.

⁷ <https://access.heinonline.com/HOL/scholarly-impact-ranking-in/comprehensive-articles>

⁸ Full cite to Scalia, *The Rule of Law as a Law of Rules*; Kagan, *Presidential Administration*.

⁹ See, e.g., *Seminole Tribe*, pincites to dissent.

¹⁰ See eg, Waxman and Morrison, *YLJ*

until recently, states have paid the piece no heed. No state legislature or state court prior to 2025 enacted or promulgated a cause of action closely resembling my converse-1983 proposal.¹¹

Then came Trump 2.0 and the new ICE. My ideas about the need for robust state remedies against unconstitutional behavior by federal officials gained political and legal traction. At least six states in 2026 alone have enacted converse-1983 laws of some sort.¹² Thanks to action earlier this week in Sacramento, that list now includes America's largest state.

Today, I shall ask and then answer ten questions to supplement what I wrote back in 1987 and in follow-up pieces that I presented in an endowed lecture at the University of Colorado in 1993 and in symposium remarks at Vanderbilt Law School in 1994.¹³ Here are my ten questions:

1. *Do converse-1983 laws have strong Founding-era precursors? Put differently, what are the simplest and oldest forms of converse-1983 laws?*
2. *Isn't it problematic that Amar-style converse-1983 laws target federal officials as such above and beyond private tortfeasors?*
3. *Could converse-1983 laws properly target the federal government as such, beyond federal officials?*
4. *Could converse-1983 laws properly go beyond compensatory damages? Relatedly, could converse-1983 laws properly do away with the qualified immunity that state officials currently enjoy under 1983?*

¹¹ On my view, converse-1983 remedies/causes of action may properly be crafted by either state judges fashioning common law or state legislators enacting statutes, see 97 YLJ at 1511-12 n. 339.

¹² <https://en.wikipedia.org/wiki/Converse-1983>

¹³ Cites.

5. *Could converse-1983 laws properly provide stronger remedies against federal officials than against state officials? In other words, may states essentially discriminate against federal officials as such?*
6. *What about the Westfall Act, enacted by Congress more than a decade after the Of Sovereignty and Federalism was published?*
7. *What about the post-Westfall Act Pollard case?*
8. *What about the general repudiation of Bivens in recent years?*
9. *Could Congress pre-empt state-coverse-1983 laws?*
10. *Would today's Court actually uphold converse-1983 laws?*

II. ANALYSIS

1. *Do converse-1983 laws have strong Founding-era precursors? Put differently, what are the simplest and oldest forms of converse-1983 laws?*

The Philadelphia Constitution of 1787-88 and its early amendments—what we today call the Bill of Rights—routinely incorporated state law in defining America's basic rights. For example, the Fifth Amendment prohibits the federal government from taking “private property” without just compensation.

Here's the key point: From the Founding era until today, *state law* has often defined and still typically defines the basic contours of “private property.”¹⁴ In other words, *state-law*

¹⁴ See generally Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

properly furnished at the Founding, and today properly continues to furnish, a cause of action whenever *federal officials* tried back then, or try today, to grab land unconstitutionally.

Likewise under the Fourth Amendment: If *federal* officials tried back then or try today to unreasonably seize the body of a “person” or a given person’s “effects,” *state tort law* and *state property law* have historically given, and today continue to give, a right to sue the offending *federal* officials in a wide range of situations.

2. *Isn't it problematic that Amar-style converse-1983 laws target federal officials as such, above and beyond private tortfeasors?*

No. Granted, Amar-style converse-1983 laws go beyond private-law rules of property and tort that protect private persons against each other. Amar-style converse-1983 laws pointedly target misconduct under color of federal law *as such*.

This is a virtue, not a vice. Private-law remedies and causes of action are insufficient to protect against the full range of possible federal unconstitutional behavior.

Put differently, federal officials are prohibited by the Constitution from doing things that private persons may lawfully do. A private employer is constitutionally free to discriminate against Blacks; a federal government employer is not. A private person is free to proclaim that Jesus is the Way, the Truth, and the Light; federal officials *as such* may not do this.

The Founders wanted and expected states to push back hard against unconstitutional federal conduct. *Of Sovereignty and Federalism* made this key point clear by quoting back-to-back two crucial passages from Publius that had never before (so far as I was then and am now aware) been brought together by a modern scholar.

First, listen carefully to the key language of *The Federalist* Number 28: “[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. 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. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.”

Second, consider the companion language of *The Federalist* No. 51: “[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be sentinel over the public rights. . . . In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

3. *Could converse-1983 laws properly target the federal government as such, beyond federal officials?*

I believe it could, but the Supreme Court might well say otherwise in the name of federal sovereign immunity. On my view—and the Founders’ view, too—the people are sovereign, not government officials. When a government, state or federal, violates the Constitution, that government is not truly sovereign, and thus should enjoy no “sovereign” immunity. For every

right, there should be a remedy. Blackstone; *Marbury*.¹⁵ Given that the Constitution creates rights against government itself, remedies may properly be created against government itself.

This aspect of my analysis is not a bug, but a feature. Some of Americans' most basic constitutional rights run against the government itself, and not quite against any governmental official as such. If the federal government unconstitutionally proclaims that America's Motto shall henceforth be "White Supremacy" or declares that all Americans must accept the divinity of Jesus, it seems most natural to say that the government itself, and not any government official as such, has violated the Constitution.

That said, the recent spate of state converse-1983 laws generally do not go this far. They typically target federal government officials, not the federal government as such. The very modesty of these new statutes along this dimension may well make it more likely that they will survive constitutional scrutiny when challenged in court.

4. *Could converse-1983 laws properly go beyond compensatory damages?*

Relatedly, could converse-1983 laws properly do away with the qualified immunity that state officials currently enjoy under 1983?

The recently enacted state converse-1983 laws generally do not go this far. In 1987, I argued that states should provide nominal and punitive damages, and should also do away with various immunities that drive troubling wedges between constitutional rights and constitutional remedies. I believed this back in 1987 and I believe it even more strongly now, because I now know more about the Founding vision that I did back then.

¹⁵ Cites.

Not all judges and scholars who are skeptical of my converse-1983 ideas have likewise steeped themselves in Founding ideology. (Here are a couple of fair questions to ask any modern judge or scholar who seeks to weigh in on converse-1983: How many times have you read Publius’s *Federalist* essays, in their entirety? How many months or years have you spent poring over the various ratification-era pamphlets and transcripts of the state-convention debates held in 1787-88?)

Consider for example the following passage in a landmark essay published in 1787 during the Constitution’s ratification process. “[If a federal constable searching] for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource; *heavy damages* would at once *punish* the offender and *deter others* from committing the same.”¹⁶ Here is a similar quotation from another ratification-era essay: “[N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give *ruinous damages* whenever an officer had deviated from *the rigid letter* of the law.”¹⁷

Consider also forceful language from a trio of widely celebrated English cases presided over by Lord Camden, whom the Founders adored. In the most famous of this trio, the 1763 case of *Wilkes v. Wood*, Camden declared that “a jury have it in their power to give *damages for more than the injury received*. Damages are designed not only as a satisfaction to the injured person, but likewise as a *punishment to the guilty*, to *deter* from any such proceeding for the future, and as a *proof of the detestation* of the jury to the action itself.”¹⁸ In a companion case, Camden proclaimed that “if the jury had been confined by their oath to consider the mere personal injury

¹⁶ Cite

¹⁷ Cite

¹⁸ Cite

only, perhaps 20 [pounds] damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, *exercising arbitrary power*, violating Magna Charta, and *attempting to destroy the liberty of the kingdom*, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant *in a tyrannical and severe manner*. These are the ideas which struck the jury on the trial; and *I think they have done right in giving exemplary damages* [of 300 pounds].”¹⁹ The following year, 1764, Camden stressed the point yet again: “Can any body say that a guinea per diem is sufficient damages in *this extraordinary case, which concerns the liberty of every one of the king's subjects*? We cannot say the damages of 1,000 [pounds] are enormous [that is, legally excessive].”²⁰

5. *Could converse-1983 laws properly provide stronger remedies against federal officials than against state officials? In other words, may states essentially discriminate against federal officials as such?*

Some of the recently proposed and recently enacted converse-1983 laws—most notably California's—apply equally to all government officials, state and federal. Such evenhandedness enhances the likelihood that the Supreme Court will ultimately uphold such laws.

But I believe that states could go even further, and could target federal officialdom as such. True, from one angle such laws would discriminate against the feds. *But this*

¹⁹ Cite

²⁰ Cite

“discrimination” occurs only when the feds are doing things the feds are not constitutionally allowed to do. The founders hoped and expected that states would push back hard against the feds in such situations, precisely because the federal government wielded uniquely great power in America and posed a uniquely great threat to American liberty if allowed to violate the Constitution with impunity or with only a slap on the wrist. Discrimination here is a constitutional virtue, not a vice. This sort of discrimination is ambition checking ambition in classic *Federalist* 51 style.

6. *What about the Westfall Act, enacted by Congress more than a decade after Of Sovereignty and Federalism was published?*

This 1988 Congressional enactment, 28 USC 2679, displaces and preempts certain state-law based lawsuits against federal officials. But under the very clear language of subsection (b) (2) (A) of this enactment, this act “does not extend or apply to a civil action against an employee of the [federal] government which is brought for a violation of the Constitution of the United States”

7. *What about the post-Westfall Act Pollard case?*

In the 2012 case of *Minneeci v. Pollard*, the Supreme Court twice mentioned the Westfall Act in passing.²¹ The Court’s paragraph-long discussion was confused and confusing, and the opinion nowhere even mentioned, much less quoted, the very clear language of subsection (b) (2) (A) of the Act. Nor did the *Pollard* Court explicitly call into question the very clear language of the Court’s 2010 opinion in *Hui v. Castaneda*: “The Westfall Act amended the FTCA to make its

²¹ Cite

remedy against the United States the exclusive remedy for most claims. . . . Notably, Congress also provided an exception for constitutional violations.”²² Unlike the later *Pollard* case, *Casteneda* did expressly cite section (b)(2)(A). In contrast to *Pollard*’s two brisk mentions of “the Westfall Act,” these words appeared nine times in *Casteneda*, which represents the Court’s more careful engagement with this Act.

8. *What about the general repudiation of Bivens in recent years?*

In the 1971 case of *Bivens v. Six Unknown Named Agents*,²³ the Supreme Court aimed to add a federal remedy for certain violations of the U.S. Constitution, above and beyond longstanding and traditional state-law remedies based on state property law and state tort law. Now that the Court is quite obviously cutting back on *Bivens*,²⁴ the need for robust and comprehensive state-law remedies has become more urgent than ever.

As previously discussed, mere state private law will not suffice. Private law of property and tort will not protect against various federal actions that violate the Constitution but that do not constitute traditional torts or property infractions—as when, for example, federal officials conduct high-tech searches that do not involve physical trespasses; or when federal officials discriminate against Jews or Blacks by denying them benefits available to Gentiles or White.

9. *Could Congress pre-empt state-law remedies?*

Yes, Congress could in certain situations eliminate state-law remedies for federal violations of the US Constitution. But in order for such ousters of state law to be constitutionally

²² Cite

²³ Cite

²⁴ See, e.g., cites.

proper, Congress must provide in exchange adequate federal remedies.²⁵ Pre-emption of an entirely proper state remedial law in the absence of a comparable federal remedial substitute would be constitutionally *improper*, violative of the Constitution’s “letter” and “spirit” as the Court explained these terms in its landmark *McCulloch* decision.²⁶

We must remember that Chief Justice Marshall in *McCulloch* struck down a punitive state tax on a congressionally created federal bank only after he repeatedly and painstakingly reminded his readers that this bank was entirely legitimate, constitutionally.²⁷ But *unconstitutional* federal conduct is of course the very definition of illegitimate action by the federal government. Thus states can indeed punish such federal conduct in keeping with the vision of *The Federalist* Nos. 28 and 51, subject to legitimate congressional pre-emption—which, to repeat, will need to offset the ouster of proper state remedies with federal remedies that are at least as robust as the proper state laws being erased.

10. *Would today’s Court actually uphold converse-1983 laws?*

There are no guarantees. Prediction is a difficult business—especially, as the wags say, about the future. That said, I am cautiously optimistic for at least three reasons.

First, as I explained four decades ago, and have explained again today, there are very strong originalist arguments in favor of converse-1983. Today’s Supreme Court is more originalist than the Supreme Court was forty years ago when I conceived and coined converse-1983 in emphatically originalist terms.

²⁵ An entirely different analysis would apply if federal officials have violated only federal laws and not the federal Constitution. Here, Congress by hypothesis need not have limited federal officials at all; and this greater congressional power would ordinarily subsume a lesser congressional power to limit federal officials while also severely restricting or eliminating judicial remedies for any violation of these congressionally created limits.

²⁶ Pincites

²⁷ Pincites

Second, in an important line of federalism cases, the modern Court has built squarely, and at times quite explicitly, on *Of Sovereignty and Federalism*, expressly quoting back-to-back, in Amarian fashion, the key language of the *Federalist* Nos. 28 and 51 in articulating first principles of federalism.

This important line of case law began in 1991, with Justice O'Connor's eye-opening opinion for the Court in *Gregory v. Ashcroft*. Her opinion featured Amar-style back-to-back quotations of these two crucial *Federalist* essays, whose vision she distilled as follows: "Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."²⁸

Just so, as the Court has repeatedly made clear in a string of subsequent cases quoting this *Ashcroft* passage verbatim—*New York v. United States* in 1992, *United States v. Lopez* in 1995, and *Printz v. United States* in 1997.²⁹ Converse-1983 laws perfectly embody this inspiring vision of federalism.

²⁸ Pincite.

²⁹ Pincites.

My third and final point: Recent events across America in the Second Trump Administration—including dramatic events of late in this great city—dramatize anew the need to check grossly and grotesquely unconstitutional actions by abusive federal officials.

Leading states in recent months have begun to move in precisely the right direction. Let's hope that the Supreme Court in the months and years ahead does the same.