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# The False Promise of the Converse-1983 Action

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# The False Promise of the Converse-1983 Action

JOHN F. PREIS\*

*The federal government is out of control. At least that’s what many states will tell you. Not only is the federal government passing patently unconstitutional legislation, but its street-level officers are ignoring citizens’ constitutional rights. How can states stop this federal juggernaut? Many are advocating a “repeal amendment,” whereby two-thirds of the states could vote to repeal federal legislation. But the repeal amendment will only address unconstitutional legislation, not unconstitutional actions. States can’t repeal a stop-and-frisk that occurred last Thursday. States might, however, enact a so-called “converse-1983” action. The idea for converse-1983 laws has been around for some time but until now has escaped academic treatment.*

*A converse-1983 action would operate similarly to the popular § 1983 action in that it would provide a cause of action for damages where federal constitutional rights have been violated. Unlike § 1983, however, a converse-1983 would be enacted by a state (rather than Congress) and provide a cause of action against a federal officer (rather than a state officer). By enacting converse-1983 laws, states could thus punish the federal government when its officers disregard the Constitution.*

*The problem with converse-1983 laws, however, is that they just won’t work. In this Article, I explain that converse-1983 laws will always be subject to limitations imposed by Congress or the federal courts. It can hardly be said that converse-1983 laws are a valuable opportunity for states to rein in the federal government if those laws can only be enforced at the pleasure of the federal government. In making this argument, I take the reader on a tour of a variety of topics in the field of constitutional enforcement, including officer immunity, federal common law, the nature of Bivens actions, the constitutional right to a remedy, and Founding-era practices through which states imposed their views on the federal government. Together, these discussions make clear that the converse-1983 action, which has been often cited but rarely questioned, is a cause of action without any legal value.*

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#### INTRODUCTION

The states have had it up to *here* with the federal government. While the states are trying to fill potholes and keep the schools open, the Feds are trying to get everybody to quit smoking pot<sup>1</sup> and buy health insurance.<sup>2</sup> It's worse than that, of course. The FBI is infiltrating local houses of worship,<sup>3</sup> the CIA is making people disappear,<sup>4</sup> the NSA is tapping phones,<sup>5</sup> and the TSA is demanding grandmas pose in the nude.<sup>6</sup> Next thing you know, we'll all be forced to drive Chevy trucks.<sup>7</sup>

What's a state to do? Secession is probably too radical,<sup>8</sup> and an armed revolt can be messy.<sup>9</sup> A somewhat more realistic option is a constitutional amendment giving two-thirds of the states the option of repealing federal legislation—the so-called “repeal amendment.”<sup>10</sup> But constitutional amendments are long shots, and the repeal amendment would only provide states with the power to nullify unconstitutional *legislation*. Most constitutional violations committed by the

1. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the federal bar on marijuana use for medical purposes was constitutional).

2. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–44 (2010) (requiring nearly every U.S. citizen to maintain a minimum level of health insurance starting in 2014).

3. See, e.g., Jerry Markon, *Tension Grows Between Calif. Muslims, FBI After Informant Infiltrates Mosque*, WASH. POST (Dec. 5, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710_pf.html).

4. See e.g., David Johnston, *Rendition to Continue, but with Better Oversight, U.S. Says*, N.Y. TIMES, Aug. 25, 2009, at A8.

5. See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

6. See, e.g., Jeffrey Rosen, *The TSA Is Invasive, Annoying - and Unconstitutional*, WASH. POST, Nov. 28, 2010, at B1.

7. See *Florida ex rel. Bondi v. U.S. Dept. of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011) (explaining that, if Congress can make Americans buy health insurance, Congress could also “require that everyone above a certain income threshold buy a General Motors automobile”).

8. See Hilary Hylton, *What's All That Secession Ruckus in Texas?*, TIME, Apr. 18, 2009, at 32 (“While crowds yelled ‘Secede! Secede!’, [Texas Governor Rick] Perry . . . thought out loud that secession might be the outcome if Washington does not mend its ‘oppressive’ high-spending, dictatorial ways.”).

9. See Greg Sargent, *Sharron Angle Floated Possibility of Armed Insurrection*, WASH. POST (June 15, 2010, 1:32 PM), [http://voices.washingtonpost.com/plum-line/2010/06/sharron\\_angle\\_floated\\_possibil.html](http://voices.washingtonpost.com/plum-line/2010/06/sharron_angle_floated_possibil.html) (reporting U.S. Senate candidate Sharron Angle’s exhortation that citizens “look[] toward those Second Amendment remedies” to fight the expansion of federal power).

10. See Randy E. Barnett & William J. Howell, *The Case for a ‘Repeal Amendment,’* WALL ST. J., Sept. 16, 2010, at A23.

federal government are not products of the bicameral process.<sup>11</sup> They are simply products of everyday interactions between citizens and federal law enforcement officers. Persons are searched, seized, and beaten. They are denied equality and due process. If states want to protect their citizens from *these* harms, the repeal amendment will be useless. You can't repeal a stop-and-frisk that occurred last Thursday. So again, what's a state to do?

Perhaps the states should take a cue from the federal government itself. In the aftermath of the Civil War, the federal government faced the same sort of problem. Southern states were failing to enforce the constitutional rights of their new citizens, the former slaves, and most of the violations were not in the form of statutes that were unconstitutional, but rather in the form of discretionary officer action.<sup>12</sup> In response to this nonstatutory disobedience, the federal government enacted the Ku Klux Act, now codified at 42 U.S.C. § 1983.<sup>13</sup> The statute did not provide southern citizens with new rights; it simply provided them with a cause of action for enforcing the constitutional rights they already possessed. Under § 1983, if a local sheriff violates your constitutional rights, you can sue him for damages.

Given the modern success of § 1983 in state-level reform,<sup>14</sup> the states might enact a “converse-1983” law to achieve federal-level reform. Just as the current § 1983 provides a federal cause of action against state officers, a converse-1983 law would provide a *state* cause of action against *federal* officers who have violated the federal Constitution. Under these laws, federal officers who tap phones or whisk citizens away to secret locations could be sued for constitutional damages—regardless of whether the federal government has provided a cause of action.

The idea is not new. Professor Akhil Reed Amar proposed such a law many years ago<sup>15</sup> and modern commentators continue to cite the idea with only occasional skepticism.<sup>16</sup> Professor Amar's argument in favor of converse-1983

11. See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 427 (1997) (explaining that the bulk of judicial review in the federal courts is of decisions by “administrative agencies and street-level bureaucrats,” not of congressional statutes).

12. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 425–44 (1988).

13. Civil Rights Act of 1871, ch. 22, 17 Stat. 13.

14. See SHELDON H. NAHMOD, MICHAEL L. WELLS, & THOMAS A. EATON, *CONSTITUTIONAL TORTS 1* (3d ed. 2010) (explaining the “considerable practical significance” of § 1983 suits).

15. Professor Amar originally proposed the idea in Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512–19 (1987) [hereinafter Amar, *Sovereignty and Federalism*]. Thereafter, he defended the idea in Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994) [hereinafter Amar, *Five Views*] and in Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159 (1993) [hereinafter Amar, *Questions and Answers*]. He has also advanced the idea in passing in Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 117 (2000) (defending the “the right of states to arm citizens with remedies against the federal government when the feds violate the Constitution”).

16. See, e.g., Vikram David Amar, *Converse § 1983 Suits in Which States Police*

actions is largely built on a conception of federalism he traces to the *Federalist Papers*.<sup>17</sup> There, James Madison explained that, under the new Constitution, the “rights of the people” will be guarded by *two* governments, not just one.<sup>18</sup> The state and federal governments “will controul each other.”<sup>19</sup> Converse-1983 laws would seem to be the perfect expression of the state prerogative to control the federal government.

Another argument in favor of converse-1983 suits is their similarity to early American legal practices.<sup>20</sup> From the Founding through much of the nineteenth century, a person aggrieved by the unconstitutional actions of a federal officer would sue the officer using a *common law cause of action*—whether for damages or relief through habeas corpus.<sup>21</sup> These common law actions suggest that state law—and by extension, states themselves—were to play a significant role in checking constitutional overreaching by federal officers. This evidence, combined with Madison’s belief that the state and federal governments “will controul each other” suggests that converse-1983 laws are “a dramatic set of progressive actions that states may take in the service of federal constitutional rights.”<sup>22</sup>

This Article disagrees. Although states have the constitutional power to enact converse-1983 laws, the federal government possesses a superior power through which it can limit or even abrogate these laws whenever it pleases. Because converse-1983 laws can therefore exist only at the pleasure of the federal government, it can hardly be said that these laws are a way for states to control the federal government.

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*Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369, 1371 (2004) (arguing that “state governments may use the Constitution as more than a shield for themselves; they may use it to affirmatively shield the citizens from federal laws that trample . . . on individuals’ rights”); Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2274 (1999) (referring to Professor Amar’s converse-1983 work as a “very important scholarly contribution[] to our understanding of the law of federal jurisdiction”); John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 110–11 (2004) (citing converse-1983 suits as a way in which “state governments can sometimes use their powers to block or mitigate federal violations of fundamental individual rights”); Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How To Fix Them*, 96 VA. L. REV. 1509, 1576 (2010) (stating that it is “not clear that [arguments against converse-1983 laws] would be persuasive”); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1458 (1999) (expressing support for the “thrust” of Professor Amar’s argument); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2246–49 (2003) (supporting the converse-1983 in part, but disagreeing with Professor Amar’s claim that states may control the scope of federal immunity); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 125 n.244 (1997) (briefly noting the converse-1983 action and expressing concern about its viability).

17. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1504–06.

18. THE FEDERALIST NO. 51, at 282 (James Madison) (J.R. Pole ed., 2005).

19. *Id.*

20. See Amar, *Sovereignty and Federalism*, *supra* note 15, at 1506–09.

21. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

22. Amar, *Questions and Answers*, *supra* note 15, at 159.

My analysis of converse-1983 laws has two halves. In the first half, I consider the fate of a converse-1983 law under the current law of federal supremacy and offer four reasons why the converse-1983 action will not allow states to punish constitutional violations by federal officers. First, federal officers sued in a converse-1983 action would be entitled to a robust defense of immunity provided by the Supremacy Clause.<sup>23</sup> This defense, which will immunize officers for all reasonable and nonmalicious violations, will take much of the bite out of a converse-1983 action. Second, converse-1983 suits will always be subject to the creation of, and preemption by, federal common law. Using its federal common law-making power, the Supreme Court has gutted state causes of action in this way before, and there is good reason to think it would do just that when presented with a converse-1983 action. Third, the success of a converse-1983 action could be affected by the Supreme Court's current *Bivens* jurisprudence—a body of federal law allowing damages suits to be brought against federal officers.<sup>24</sup> Although the exact effect of the *Bivens* doctrine is difficult to predict under the current cases, there can be little doubt that the Supreme Court's authority over *Bivens* actions implicitly endows it with the authority to preempt converse-1983 actions. Fourth and finally, converse-1983 actions will be vulnerable to Congress's authority to partially or fully preempt the causes of action. Congress's authority to abrogate constitutional remedies is not absolute, but given the remedies currently available other than a converse-1983 action, Congress most surely enjoys the authority to nullify a converse-1983 action. In sum, this half of the Article shows that converse-1983 actions present little hope to a state desiring to punish constitutional violations committed by federal officers.

In the second half of my analysis, I turn back the clock and consider whether converse-1983 suits would have been any more helpful at the Founding. My conclusion is no different, however: at the Founding, the converse-1983 action would have been just as vulnerable to preemption (and thus useless in controlling the federal government) as it would be in modern times. In reaching this conclusion, I address three pieces of Founding-era evidence cited as support for converse-1983 laws. First, I consider the claim—allegedly evidenced in the *Federalist Papers*—that the Founders believed states to have a *legal* power to punish federal constitutional violations. This view is flawed, I explain. The *Federalist Papers* spoke of state power to check the federal government in *political*, not legal, terms. State governments were to secure the rights of citizens by “sound[ing] the alarm to the people,” not by enacting new laws.<sup>25</sup>

Second, I consider the nineteenth-century practice of suing federal officers under the common law for their constitutional violations. Although these suits might seem to support states' unilateral power to hold federal officers liable under state law, a close reading of the cases actually suggests otherwise. Though ostensibly “common law” actions, the law applied in these suits was a general common law of officer liability that was largely disconnected with state law.

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23. U.S. CONST. art. VI, cl. 2.

24. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

25. THE FEDERALIST NO. 26, at 141 (Alexander Hamilton) (J.R. Pole ed., 2005).

Indeed, the federal courts appeared to enjoy near total control over this body of “common law.”

Third, I finish this half of the Article by briefly addressing the alleged availability of state habeas actions against federal wardens in the early nineteenth century. These actions might be read to support a state power to maintain converse-1983 actions, but the evidence suggests otherwise. To the extent these habeas actions were even available, they were available only at the *pleasure* of the Congress. Thus, even if habeas petitions could be filed against federal officers, these petitions do not prove that states had the *unilateral power* to enact them, they simply prove that states had *permission* to enact them.

Together, this Article’s two halves show that the converse-1983 action is a flawed vehicle for checking constitutional violations committed by federal officers. But why should anyone care? The fate of converse-1983 laws matters because the country and the academy are focused now more than ever on how states can rein in the federal government. States are experimenting in ways unheard of in modern times, including suing the federal government,<sup>26</sup> instructing state officers not to enforce federal law,<sup>27</sup> and even enacting laws that attempt to nullify federal regulations.<sup>28</sup> At the same time, the academy has turned with renewed vigor to the federal-state relationship. Recent articles have explored state power to resist federal commandeering,<sup>29</sup> state discretion in enforcing federal law,<sup>30</sup> the role of state law

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26. See, e.g., Florida *ex rel.* McCollum v. U.S. Dept. of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (constitutional challenge by over twenty states to the Patient Protection and Affordable Care Act); Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 602–07 (E.D. Va. 2010) (constitutional challenge by Virginia against same legislation).

27. Most commonly, states have resisted the enforcement of federal immigration laws as well as antiterror laws such as the USA PATRIOT Act. For examples of such laws, see Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1253–57 (2004); Huyen Pham, *The Constitutional Right Not To Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–84 (2006) (assessing state or local “sanctuary laws” intended to preclude providing assistance to the federal government in the enforcement of federal immigration laws).

28. As of this writing, the National Conference of State Legislatures reports that at least forty states have enacted or are considering legislation aimed at overriding the Patient Protection and Affordable Care Act. See *State Legislation and Actions Challenging Certain Health Reforms, 2011*, NCSL (Dec. 28, 2011), <http://www.ncsl.org/?tabid=18906>. For a discussion of other state initiatives, see Kirk Johnson, *States’ Rights Is Rallying Cry of Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1. A newly formed organization, the Tenth Amendment Center, maintains updated lists of state efforts to oppose or nullify federal law. See *The 10th Amendment Nullification Movement*, TENTH AMENDMENT CTR., <http://www.tenthamendmentcenter.com/the-10th-amendment-movement>.

29. See, e.g., Althouse, *supra* note 27, at 1232 (addressing state or local efforts to refuse assistance to the federal government in the “war on terrorism”); Pham, *supra* note 27, at 1374, 1382–84 (assessing state or local “sanctuary laws” intended to preclude providing assistance to the federal government in the enforcement of federal immigration laws).

30. See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 534 (2011) (arguing “that state implementation of federal law plays many different roles, and that those differences should affect both how statutes are interpreted and how they are conceived from a federalism perspective”); Margaret H. Lemos, *State Enforcement of Federal Law*, 86

in reforming federal agencies,<sup>31</sup> and state political resistance to federal law.<sup>32</sup> An assessment of converse-1983 laws thus sits at the confluence of popular and academic interest.

This Article unfolds as follows: In Part I, I explain the conception of federalism in which converse-1983 laws would find traction, and then explain in detail that nature of the causes of action. Then, in Part II, I evaluate the fate of converse-1983 laws according to current understanding of federal power. In Part III, I evaluate the Founding-era evidence supporting converse-1983 actions and then briefly conclude.

## I. PROFESSOR AMAR ON FEDERALISM AND CONVERSE-1983

In this Part, I lay a foundation for the analysis in Parts II and III. I first explain Professor Amar's understanding of American federalism and, in particular, his view on the states' role in checking the federal government. Then, I explain in detail the content and operation of converse-1983 laws. Together, these two sections convey Amar's view that converse-1983 laws are entirely ordinary causes of action that fit comfortably within the assumptions underlying our constitutional design.

### A. Federalism

The supposed benefits of federalism have been well rehearsed in the courts and the academy. Robust local power is preferable, it is argued, because (1) states can more easily experiment in public administration, (2) states can compete with other states for citizens' affections, (3) liberty is best protected by diffusing power, and (4) public involvement is higher at the local level.<sup>33</sup>

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N.Y.U. L. REV. 698 (2011) (arguing that states can affect the force of federal law through their control over various channels of enforcement).

31. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011) (considering the role of state law in recent Supreme Court decisions involving preemption); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009) (comparing state efforts to impact federal law at agency and congressional level).

32. See, e.g., JOHN D. NUGENT, SAFEGUARDING FEDERALISM, HOW STATES PROTECT THEIR INTEREST IN NATIONAL POLICYMAKING 14 (2009) (focusing on how "state officials—[including] governors, state legislators, heads of state agencies, and staff members working on their behalf—attempt to influence federal policymaking and when, how, and why they succeed"); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (explaining that states can often frustrate federal regulatory efforts by formally expressing disapproval or implementing federal law in ways contrary to federal goals); Barak Y. Orbach, Kathleen S. Callahan & Lisa M. Lindemenn, *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1163 (2010) (explaining how lobbyists opposed to federal policy "harness states and localities in order to challenge federal policies").

33. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991); FERC v. Mississippi, 456 U.S. 742, 788–89 (1982) (O'Connor, J., concurring); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 75–106 (1995); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 136–39 (2001); Steven G. Calabresi, "A



Professor Amar is familiar with these models, but believes they are incomplete. The Founding generation expected the states to be more than simply an *alternative* to the federal government, he believes; it expected states to actually *check* the federal government's operations. This check is suggested in *Federalist 51*, where James Madison assures those fearful of federal power that "[t]he different governments will controul each other."<sup>34</sup> States might "controul" the federal government in several ways. The most predictable is through political persuasion, a mechanism that Professor Amar acknowledges.<sup>35</sup> But Amar believes that states also possess a *legal* power to control the federal government.

Amar discerns this legal power from a symmetry he deems present in the constitutional design.<sup>36</sup> If the federal and state governments are supposed to control each other, and if the federal government possesses the *legal* power to punish state constitutional violations, then states must possess that same power. This is the "beauty of constitutional federalism," Amar explains.<sup>37</sup> Where one government fails to keep up its end of the bargain, the other can—and likely will—step in to protect citizens' rights. "[F]ederalism abhors a remedial vacuum," according to Amar.<sup>38</sup> When state power is so understood, the "Tenth Amendment appears as the symmetrical counterpart of the enforcement clauses of the Civil War Amendments."<sup>39</sup> That is, just as Congress derives its power to check the states from the enforcement clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments, the states derive their power to check the federal government from the Tenth Amendment.<sup>40</sup> Each government has the legal—not just political—power to check the other.

One towering case seems to stand in the way of Professor Amar's views on federalism: *McCulloch v. Maryland*.<sup>41</sup> In *McCulloch*, the Supreme Court held that the state of Maryland was constitutionally prohibited from imposing a tax on a federal bank—a bank Maryland believed was unconstitutional.<sup>42</sup> *McCulloch* would thus seem to bar states from punishing the federal government for alleged constitutional violations. Yet Amar contends that *McCulloch* can be easily misread.

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*Government of Limited and Enumerated Powers*: In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 774–79 (1995); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004).

34. THE FEDERALIST No. 51, at 282 (James Madison) (J.R. Pole ed., 2005).

35. See Amar, *Sovereignty and Federalism*, *supra* note 15, at 1503–04.

36. *Id.*

37. *Id.* at 1504.

38. *Id.* at 1505.

39. *Id.* at 1506.

40. The Tenth Amendment reserves to the states all law-making powers not specifically granted to the federal government. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

41. 17 U.S. (4 Wheat.) 316 (1819).

42. *Id.* at 400.

The key to understanding the case for converse-1983 purposes, he explains, lies in “how the Supreme Court structured its analysis.”<sup>43</sup> To wit:

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 opinion 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.<sup>44</sup>

Thus, for Professor Amar, our constitutional federalism only endows states with power to regulate the federal government’s *unlawful* activities. Where an action is lawful, states must stand down. Where an action is *unlawful*, however, states are free to punish the misbehavior. The federal government can hardly claim the protection of the Supremacy Clause when it is flouting the Constitution to begin with.

In sum, for Professor Amar, the structure of our Constitution presupposes a state power to legally punish constitutional transgressions committed by federal officers. With this brief introduction, I turn now to the converse-1983 laws that Amar finds permissible under this structure.

### B. Converse-1983

In many respects, converse-1983 laws are similar to the thousands of other laws enacted by states each year. They represent a government response to a perceived ill suffered by state citizens. In other respects, however, the laws’ application to federal officers makes them quite distinctive. Below, I explain Professor Amar’s description of the laws, including their necessity, creation, adjudication, remedies, and susceptibility to preemption.

#### 1. Necessity

In considering the propriety of converse-1983 actions, it is first important to ask why they are even necessary. True, the federal government commits its share of constitutional violations, but the current law already provides victims with a means of redress. Under *Bivens v. Six Unknown Named Agents*,<sup>45</sup> victims of constitutional violations can sue the offending federal officer for damages. In addition, if the constitutional violation would be actionable as a tort (e.g., an exercise of excessive force in violation of the Fourth Amendment will usually give rise to a claim of

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43. Amar, *Questions and Answers*, *supra* note 15, at 168.

44. *Id.* (emphasis in original).

45. 403 U.S. 388 (1971).

common law battery), victims could make use of the Federal Tort Claims Act (FTCA).<sup>46</sup>

In Professor Amar's view, these remedies are weak alternatives to the converse-1983 action. For one, "*Bivens* could in theory be overruled tomorrow."<sup>47</sup> This was a reasonable possibility when Professor Amar wrote that in 1993 and it remains a possibility today.<sup>48</sup> With *Bivens* gone or on life support, the only remedy available would be under the FTCA. Yet, according to Amar, the FTCA "may well not apply" because tort law is an imperfect replacement for constitutional interests.<sup>49</sup> Some constitutional violations will amount to private law torts, but others will not.<sup>50</sup> Thus, it is likely that the "various margins of the Fourth Amendment and other constitutional rights will be unenforced or underenforced."<sup>51</sup> In Professor Amar's view, therefore, converse-1983 actions are necessary to fill current or future remedial gaps.

## 2. Creation and Adjudication

If a state felt a converse-1983 action was appropriate, how could it create one? A state could promulgate a converse-1983 cause of action in one of two ways: through legislative enactment or judicial creation.<sup>52</sup> The legislative route would perhaps be the most ordinary route, as legislatures routinely enact statutes that provide a cause of action to someone who has been harmed by a breach of some duty. Using Professor Amar's formulation, the statute might look nearly identical to the current § 1983—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.<sup>53</sup>

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46. 28 U.S.C. § 1346(b)(1) (2006) (permitting suit against the federal government where the harm suffered would be cognizable under the law of the state where the harm occurred).

47. Amar, *Questions and Answers*, *supra* note 15, at 172.

48. See James E. Pfander, Iqbal, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN. ST. L. REV. 1387 (2010) (reviewing the *Bivens* doctrine and the Court's hostility to it since the 1980s).

49. Amar, *Questions and Answers*, *supra* note 15, at 150, 175.

50. For example, a Fourth Amendment excessive force claim could often be recast as the tort of battery, but an equal protection violation will rarely have a tort analog. For a discussion of the overlap between tort and constitutional law, see John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723 (2008).

51. Amar, *Questions and Answers*, *supra* note 15, at 173.

52. Professor Amar notes a third way: through amendment of the state constitution. See *id.* at 161. The distinction between statutory and constitutional creation is unimportant for the purposes of this Article.

53. *Id.* at 160 (emphasis in original).

If a state judiciary were so inclined, it too could create a converse-1983 action. State courts have long had the discretion to create or abolish causes of action. Sometimes the cause of action provides a standard of care as well as the right to sue, such as with the judicial creation of a claim for intentional infliction of emotional distress.<sup>54</sup> Other times, however, the cause of action does not contain any standard of care but simply creates a “right to sue” to enforce a statute containing a standard of care. Courts essentially do this when they create negligence per se actions, which are tort actions that incorporate a statutory duty as the appropriate standard of care. Indeed, state negligence per se actions occasionally involve *federal law*,<sup>55</sup> though no state appears to have attempted to impose liability against a federal officer.

Though created by state institutions, converse-1983 suits would almost always be litigated in federal court. Some plaintiffs might choose to file in federal court as an original matter,<sup>56</sup> but even cases begun in state court would almost certainly end up in federal court under the federal officer removal statute.<sup>57</sup> Despite being litigated in federal court, federal judges would still be bound to apply the state cause of action—just as they are required in standard diversity cases. As Professor Amar explains, “Under the Rules of Decision Act 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.”<sup>58</sup>

### 3. Damages and Immunity

Being free to create a cause of action, a state would also be free to specify the appropriate damages for a constitutional violation. Thus, if it desired, a state could set a standard damages judgment for every violation—say \$25,000. States could not, according to Professor Amar, “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.”<sup>59</sup> In that situation, the law would exceed the state role in preserving liberty and simply amount to a “punitive” measure.<sup>60</sup>

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54. See, e.g., *Harris v. Jones*, 380 A.2d 611 (Md. 1977) (creating the tort of intentional infliction of emotional distress); *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974) (same).

55. See Pauline E. Calande, *State Incorporation of Federal Law: A Response to the Demise of the Implied Federal Rights of Action*, 94 YALE L.J. 1144 (1985) (identifying negligence per se actions using federal law).

56. Federal jurisdiction may be based on the diversity of the parties, see 28 U.S.C. § 1332 (2006), or based on the presence of a federal question, 28 U.S.C. § 1331 (2006); *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005) (holding that federal courts have federal question jurisdiction over state law causes of action that involve “substantial” federal questions).

57. 28 U.S.C. § 1442(a) (2006). As a practical matter, federal officers sued in state court almost always remove the case to federal court.

58. Amar, *Questions and Answers*, *supra* note 15, at 166–67 (footnote omitted).

59. *Id.* at 168.

60. *Id.*

Closely related to the issue of damages is immunity. Professor Amar argues that states need *not* provide immunity to federal officers. This is significant because the current law of federal immunity bars recovery in a large number of civil rights actions.<sup>61</sup> Amar acknowledges that the Court has “creat[ed] various zones of immunity for government officials” in civil rights cases but argues that 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.”<sup>62</sup> Thus, in Amar’s view, the scope of immunity in a converse-1983 action, if any, would be within the control of the states.

#### 4. Interaction with Federal Law

How would converse-1983 suits be impacted by federal law? Professor Amar does not consider how judicially created law—such as *Bivens*—would impact converse-1983 suits. But he apparently believes that federal courts would be obligated to give effect to the state actions regardless of judge-made law like *Bivens*.<sup>63</sup>

The preemptive impact of a federal statute, however, is a different matter. According to Amar, Congress’s interest in “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” justifies the creation of a *federal* cause of action against federal officers.<sup>64</sup> If Congress creates such a cause of action, the converse-1983 action must yield. Yet Professor Amar holds that Congress cannot simply replace converse-1983 actions with some anemic federal version of a converse-1983 suit. That is, “if Congress seeks to oust [a converse-1983 law], Congress must itself provide a federal remedy at least as generous as the most generous state remedy Congress seeks to preempt.”<sup>65</sup> If Congress had the “plenary power to nullify any state remedy it disliked,” Amar explains, the “careful constitutional balance of federalism [would be disturbed], and would ultimately imperil individual constitutional liberty by weakening an important check against federal abuse.”<sup>66</sup>

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61. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 65–66, 79–80 (1999) (explaining that *Bivens* suits rarely result in an assessment of damages and that “[q]ualified immunity is undoubtedly the most significant bar” to recovery). Even with the defense of immunity, however, there is evidence that *Bivens* actions will lead to a monetary settlement in a significant number of cases. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (“*Bivens* cases are much more successful than has been assumed by the legal community, and . . . in some respects they are nearly as successful as other kinds of challenges to governmental misconduct.”).

62. Amar, *Questions and Answers*, *supra* note 15, at 174 (emphasis in original).

63. *Id.* at 166–67 (explaining that “federal courts must enforce” a converse-1983 law “unless it somehow violates the federal Constitution or a constitutional federal statute”).

64. *Id.* at 179.

65. *Id.*

66. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1518.

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In sum, Professor Amar views our Constitution as endowing states with the legal power to check federal constitutional transgressions. This power is important because existing remedies—whether under the Federal Tort Claims Act or *Bivens*—are tenuous and limited. States could improve upon such remedies by creating a cause of action that is not burdened by the ubiquitous defenses of immunity. Although Congress possesses the power to override converse-1983 laws, it cannot nullify them without providing an equally powerful replacement.

If Professor Amar is correct on these points, converse-1983 laws would give states a powerful way to fight the federal government. The question is, however, is Professor Amar correct?

## II. THE VALUE OF THE CONVERSE-1983 ACTION TODAY

In this Part, I argue that the converse-1983 action will be of little help to states currently wishing to rein in the federal government. The impotency of the cause of action derives not from its patent unconstitutionality, but from its vulnerability to nullification by the federal government. Converse-1983 laws are relatively useless if the federal government is free to ignore them at its pleasure.

The current vulnerability of converse-1983 laws to federal supremacy is four-fold. First, federal officers sued in a converse-1983 action would have access to a powerful immunity defense arising from the Supremacy Clause; second, the federal courts could override converse-1983 laws through the creation of federal common law; third, converse-1983 suits would possibly (though not certainly) be preempted by the Supreme Court's *Bivens* jurisprudence; and fourth, Congress could preempt such laws *without* providing a remedial replacement.

### A. Officer Immunity Under the Supremacy Clause

One reason that converse-1983 actions can “make a big difference,” argues Professor Amar, is because they need not grant federal defendants the generous immunity defenses that are normally provided in *Bivens* actions.<sup>67</sup> This claim, however, ignores “Supremacy Clause immunity,” an immunity defense that shields federal officers from liability under state law. As explained below, Supremacy Clause immunity insulates federal officers from liability under state law for actions taken within the general scope of their employment.

The concept of federal immunity under the Supremacy Clause can be traced to *McCulloch v. Maryland*.<sup>68</sup> *McCulloch* arose from Maryland's attempt to tax the Bank of the United States, which established a branch in Baltimore.<sup>69</sup> The case is

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67. Amar, *Questions and Answers*, *supra* note 15, at 174. Professor Vikram Amar makes this same point in a later article. Amar, *supra* note 16, at 1379 (“Moreover, and more important, a converse-1983 cause of action need not be saddled with the ‘qualified immunity’ doctrines that courts have read into § 1983 and the *Bivens* creation.”).

68. 17 U.S. (4 Wheat.) 316 (1819).

69. *Id.* at 400–01.

typically cited for the scope of Congress' power under the Necessary and Proper Clause, but it also contains an important statement on the force of the Supremacy Clause. The Court held that Maryland's tax was inapplicable to the Bank because a state has no power to interfere with "the legitimate operations of a supreme government."<sup>70</sup> Put differently, *McCulloch* holds that where the federal government is engaged in "legitimate operations," it is immune from state interference.<sup>71</sup>

Under *McCulloch*, for example, a state cannot require a federal mail carrier to obtain a state driver's license<sup>72</sup> because the delivery of the mail is undoubtedly a legitimate operation of the federal government.<sup>73</sup> A federal mail carrier prosecuted for driving without a license could raise as a defense her lawful execution of a legitimate government operation. In contrast, if the carrier was charged with the same infraction while driving off-duty, no such defense would exist.

Sometimes the line between legitimacy and illegitimacy is much harder to draw. What if a mail carrier, in the middle of her daily route, mistakenly perceives a threat from a dog and kills the dog with a Taser? Was this death caused during a legitimate government operation? On the one hand, the interference of dogs with the delivery of mail is so routine that efforts to address that interference would appear to be a legitimate governmental operation.<sup>74</sup> On the other hand, it seems anomalous to conclude that the *unjustified* taking of an animal is a *legitimate* governmental operation. The line between a legitimate and illegitimate governmental activity is thus not an easy line to draw.

Enter the Supreme Court in 1890, which drew this line in *In re Neagle*.<sup>75</sup> *Neagle* is a dramatic case on its facts alone. While Supreme Court Justice Stephen Field was on a train riding circuit in 1889, a disgruntled litigant stormed the Justice's dining car.<sup>76</sup> A deputy marshal guarding Justice Field intercepted the intruder with

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70. *Id.* at 427.

71. Chief Justice Marshall made this same point five years later in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 865–66 (1824), stating:

An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control . . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone . . . .

72. *Johnson v. Maryland*, 254 U.S. 51 (1920).

73. U.S. CONST. art. I, § 8 (granting Congress authority "[t]o establish Post Offices and post Roads").

74. As it turns out, the problem is so ubiquitous that the United States Postal Service has even published a pamphlet instructing mail carriers on the proper ways to avoid dog bites. See UNITED STATES POSTAL SERVICE, HOW TO AVOID DOG BITES: DOGS AND DOG REPELLANT (2000), <http://uspspublications.lettercarrier.network.info/pub174.pdf>.

75. 135 U.S. 1 (1890).

76. *Id.* at 52–53.

a gunshot, taking his life.<sup>77</sup> The marshal believed—mistakenly, it turned out—that the assailant was armed with a knife.<sup>78</sup> The local district attorney charged the marshal with murder.<sup>79</sup> The marshal’s vulnerability to the force of state law eventually came before the U.S. Supreme Court. The Supreme Court held the marshal immune. In the Court’s view,

[I]f the [marshal] is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California.<sup>80</sup>

Though the Court did not explain its conclusion in terms of Supremacy Clause immunity, it is clear that the concepts of supremacy and preemption undergird the Court’s reasoning. When pressed with the argument that preemption was inapt here because there was “no statute authorizing any such protection as that which *Neagle*” provided to Justice Field,<sup>81</sup> the Court responded by clothing the marshal’s behavior with the mantle of federal “law”:

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the *general scope of his duties* under the laws of the United States, is “a law.”<sup>82</sup>

The upshot of *Neagle* is that a federal officer is immune from liability under state law if he is acting within the “general scope of his duties.” Because this rule of immunity has its roots in the Supremacy Clause, it is commonly referred to as “Supremacy Clause immunity.”<sup>83</sup>

In the decades after *Neagle*, the Supreme Court affirmed the principle of Supremacy Clause immunity in several cases.<sup>84</sup> Yet the key principle of the case—that an officer is immune for actions taken within the “general scope of his duties”—remained hazy. About the only guidance one could draw from the cases was that the federal officer’s action must have been “necessary and proper” to the

77. *Id.* at 53.

78. *Id.*

79. *Id.* at 5–6.

80. *Id.* at 75 (emphasis in original).

81. *Id.* at 58 (“It is not supposed that any special act of the Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons.”).

82. *Id.* at 59 (emphasis added).

83. *See, e.g.*, *Hunter v. Tanella*, 374 F.3d 141, 142 (2d Cir. 2004).

84. *See, e.g.*, *Hunter v. Wood*, 209 U.S. 205 (1908); *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906); *Boske v. Comingore*, 177 U.S. 459 (1900); *Ohio v. Thomas*, 173 U.S. 276 (1899).



fulfillment of his duties.<sup>85</sup> As recent debates over the meaning of the Necessary and Proper Clause show,<sup>86</sup> the meaning of these words are far from exact.

In 1977, the Ninth Circuit articulated a more workable standard in *Clifton v. Cox*.<sup>87</sup> The case involved movie-like drama: two federal agents used a helicopter to land in a suspect's back yard. Just after exiting the helicopter, one agent heard what he believed to be a gunshot and, at that same moment, saw his partner fall to the ground. There had been no gunshot, however, and the agent's partner had simply tripped. As the suspect retreated into his house and later into the nearby woods, the FBI agent gave chase, ordering him several times to stop. The suspect never stopped and the agent shot him, taking his life.<sup>88</sup> The state prosecuted the agent for murder and the agent sought relief through a federal habeas corpus action. The Ninth Circuit was therefore called on to determine whether the agent could, under the facts alleged in the indictment, be guilty under state law. If the officer was immune, the habeas petition must be granted.

The Ninth Circuit granted the agent's petition, holding that the agent's discharge of his federal duties immunized him from state liability. In doing so, the Court offered a more specific definition of Supremacy Clause immunity:

The significant question of whether the conduct [of the agent] was necessary and proper under the circumstances must still be answered. Essential to this determination, assuming the truth of the state's evidence, is whether the [agent] employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent.<sup>89</sup>

Thus, under the Ninth Circuit's formulation, the relevant inquiry has two prongs: (1) whether the officer's actions were reasonable under the circumstances, and (2) whether the officer acted with malice. Where an officer's action is *either* unreasonable or malicious, immunity is forfeited. In the years since *Clifton*, the Ninth Circuit's formulation has become the standard for Supremacy Clause immunity.<sup>90</sup>

The scope of Supremacy Clause immunity will undoubtedly bar the converse-1983 action—at least insofar as the action withholds immunity from the officer as Professor Amar advocates.<sup>91</sup> Under Supremacy Clause immunity, a state may not impose liability on officers who acted reasonably and in good faith. This means, of course, that states *can* impose liability on an officer who acted *unreasonably* or in *bad* faith. This may appear attractive to a state, since federal

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85. *Neagle*, 135 U.S. at 75.

86. *See* *United States v. Comstock*, 130 S. Ct. 1949 (2010).

87. 549 F.2d 722 (9th Cir. 1977).

88. *Id.* at 724.

89. *Id.* at 728.

90. *See, e.g.*, *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006); *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004); *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988); *Maryland v. DeShields*, 829 F.2d 1121, 1121 (4th Cir. 1987); *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

91. *See supra* notes 49–52 and accompanying text.

officers often act unreasonably or in bad faith. In reality, however, a converse-1983 suit saddled with Supremacy Clause immunity improves only slightly, if at all, on the options currently available to state citizens, namely, suits pursuant to *Bivens v. Six Unknown Named Agents*.<sup>92</sup>

In *Bivens*, the Supreme Court held that a federal officer could be sued for damages caused by “his unconstitutional conduct.”<sup>93</sup> Despite the existence of this cause of action, officers nonetheless possess the powerful defense of “qualified immunity.”<sup>94</sup> Similar to Supremacy Clause immunity, this standard immunizes federal officers for any action that was reasonable under the circumstances.<sup>95</sup> The only difference between Supremacy Clause immunity and qualified immunity is that the former withholds immunity where the officer acted in bad faith, where the latter has no concern with the officer’s bad faith.<sup>96</sup>

This means that the *only* advantage of a converse-1983 action over a *Bivens* action would be that a converse-1983 defendant would forfeit her immunity when acting with malice. But this advantage is likely to be of miniscule value to the states. There can be no doubt that some officers in the federal government periodically act with malice, but when a constitutional violation results from such behavior, there is a very good chance that the behavior, viewed objectively, will fall outside the boundaries of reasonableness. If so, the behavior, viewed under the current qualified immunity doctrine, will give rise to liability *regardless of any malice*.<sup>97</sup> Thus, it is only the set of cases that involve malice but fall within the realm of reasonableness that will be subject to liability under a converse-1983 action. This set of cases is likely to be vanishingly small.<sup>98</sup>

In sum, the doctrine of Supremacy Clause immunity takes much wind out of the sails of Professor Amar’s proposed converse-1983 action. The doctrine will not prevent states from imposing liability on federal officials, but it will prevent states from overcoming the immunity rules that so often stand in the way of recovery. In this sense, the converse-1983 action is most certainly *not* a significant opportunity for states to “make a big difference” in constitutional enforcement against federal officers.<sup>99</sup>

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92. 403 U.S. 388 (1971).

93. *Id.* at 389.

94. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

95. *Id.* at 818.

96. *Id.*

97. Moreover, malice is exceedingly difficult to prove. *See id.* at 816. At least one circuit court has considered dropping the malice prong to Supremacy Clause immunity, thus making the immunity identical to that of qualified immunity. *See Wyoming v. Livingston*, 443 F.3d 1211 (10th Cir. 2006).

98. My argument here is only that the converse-1983’s value added over a *Bivens* action is slight. If *Bivens* were overruled, then the comparative value of converse-1983 actions would significantly increase. As explained in the remainder of Part II, however, there are numerous other impediments to a successful converse-1983 action.

99. *See Amar, Questions and Answers, supra* note 15, at 174.

*B. Abrogation by Federal Common Law*

Supremacy Clause immunity is only one barrier to the converse-1983 action. Another is the federal common law. Federal common law is “law” within the meaning of the Supremacy Clause and thus has the power to nullify any contrary state law.<sup>100</sup> In this section, I explain that federal courts have the power to create federal common law with the specific goal of nullifying converse-1983 actions. As such, converse-1983 actions cannot be regarded as a useful tool for checking federal officers who commit constitutional violations.

Federal courts create common law, both consciously and unconsciously, in a multitude of settings.<sup>101</sup> In some instances, such as the field of Supremacy Clause immunity, the Court does not acknowledge that its decisions amount to common law, although if pressed the Court would likely explain them that way.<sup>102</sup> In other instances, however, federal courts self-consciously engage in common-law making when necessary “to protect uniquely federal interests.”<sup>103</sup>

For example, in cases involving obligations on commercial paper, the Court has created a multitude of laws to protect the federal government’s interest as a commercial entity. *Clearfield Trust Co. v. United States*<sup>104</sup> is a classic example. In that case, a Pennsylvania bank improperly cashed a check issued by the federal government. After federal monies were drawn to reimburse the bank, the federal government sued the bank for the wrongfully withdrawn funds. Under Pennsylvania commercial paper law, however, the federal government was out of luck. Yet the Supreme Court held that state law did not apply to the case.<sup>105</sup> What applied instead was a new law—created by the Supreme Court in *Clearfield Trust* itself. Under this new “common law” rule, the federal government would prevail. Indeed, the Court designed the new common law rule with the *specific intention* that the federal government prevail. It would be anomalous, thought the Court, if the “rights and duties of the United States” in its issuance of millions of federal checks were “dependent on the laws of Pennsylvania or of any other state.”<sup>106</sup> Under the authority of *Clearfield Trust*, state laws addressing commercial paper are subject to revision or outright abrogation by the Supreme Court.

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100. *See Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 314 (1955) (“States can no more override such judicial rules [i.e., federal common law] . . . than they can override Acts of Congress.”).

101. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (stating that “federal common law” “refer[s] to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional” (emphasis in original) (footnote omitted)).

102. *See Wilkie v. Robbins*, 551 U.S. 537, 538 (2007) (stating that “federal courts [in *Bivens* actions] must make the kind of remedial determination that is appropriate for a common-law tribunal”).

103. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

104. 318 U.S. 363 (1943).

105. *Id.* at 366–67.

106. *Id.*

In addition to the field of commercial paper, the Supreme Court has displaced state law in favor of federal common law in other areas, such as contracts and property.<sup>107</sup> Of particular relevance to the converse-1983 action, one area of “peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty.”<sup>108</sup> Thus, in *Westfall v. Erwin*, a suit involving the liability of a federal officer for negligent acts, the Court explained that “the scope of absolute official immunity afforded federal employees is a matter of federal law, ‘to be formulated by the courts in the absence of legislative action by Congress.’”<sup>109</sup> Although the Court speaks of “immunity” in *Westfall*, it is clear that the law-making power of the federal courts extends far beyond the discrete issue of immunity. In fact, the federal courts have broad authority to override state law through all sorts of doctrinal creations.

*Boyle v. United Technologies* is particularly illustrative of this point.<sup>110</sup> In *Boyle*, a father claimed that United Technologies was responsible for his son’s death. The son was killed in an army helicopter manufactured by United Technologies, a helicopter that Boyle alleged was negligently designed under Virginia tort law. The Supreme Court, however, displaced Virginia tort law with a law of its own design. Now denominated the “government contractor defense,” the Supreme Court’s creation allowed the contractor to escape liability if it could show that (1) the government approved the helicopter’s specifications, (2) the helicopter in fact complied with those specifications, and (3) the manufacturer warned the government of any specifications that created a risk of injury.<sup>111</sup> What is significant about *Boyle* is that the federal government was not even a party to the case; yet the Supreme Court held that the case nonetheless touched on an area of important federal concern—the costs that contractors must bear in supplying goods to the federal government. It makes no sense, maintained the Court, for the cost of our national security to be based in part on the whims of state tort law.

*Boyle* impacts the viability of converse-1983 suits in two ways. First, the case makes clear that the liability of federal officers will undoubtedly be seen as an area subject to the creation of federal common law. If federal common law is justified in cases involving federal contractors, it is certainly justified in cases involving federal officers themselves. Second, the case shows that converse-1983 actions will be subject to revision by a Court that sees itself as having wide-ranging common law powers in the field of federal officer liability.

On this second point, suppose that a state-created converse-1983 action did not run afoul of Supremacy Clause immunity. Even after overcoming this barrier, however, the cause of action would still be subject to revision by the Court in a number of ways. The Court could modify the statute of limitations, cap the available damages, create evidentiary presumptions, impose burdens of proof, or simply create a blanket defense where liability would not be in the federal

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107. See, e.g., *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

108. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 505 (1988).

109. *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (internal quotation marks omitted); see also *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Barr v. Matteo*, 360 U.S. 564 (1959).

110. *Boyle*, 487 U.S. at 500.

111. *Id.* at 512.

interest.<sup>112</sup> Any of these are within the realm of federal common law-making and any of them, if designed in a particular way, could essentially gut the converse-1983 action. It is not beyond the power of the federal courts to abrogate a state cause of action in its creation of federal common law.<sup>113</sup>

It is impossible to know at this point whether the Court would use federal common law in this way. And I do not mean to suggest that the Court *should* use its common law powers to revise a converse-1983 action if one ever came before the Court. I mean only to note that the Court possesses—and has exercised—significant authority to craft law in the field of federal officer liability. This stands in stark contrast to Professor Amar’s optimism for converse-1983 actions. He describes the laws as “a dramatic set of progressive actions that the states may take in the service of federal constitutional rights.”<sup>114</sup> Yet if these actions are subject to veto by a Supreme Court that is willing to insulate even government *contractors* from liability, it can hardly be said that the states have any meaningful options. In short, if the federal government is determined to violate constitutional rights, converse-1983 actions will not stand in the way.

### C. *The Force of Bivens*

In the previous section, I explained that the federal courts, by virtue of their power to create federal common law, possess the power to strip the converse-1983 action of all or some of its force. In this section, I address a field of federal common law *currently in existence* that may defeat converse-1983 laws. The *Bivens* action is a species of federal common law and is essentially the federal counterpart to the proposed converse-1983 action. Both causes of action offer the successful plaintiff damages, and both rely on the Constitution for the standard of

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112. See, e.g., *Little Lake Misere Land Co.*, 412 U.S. 580 (replacing Louisiana state statute addressing mineral rights with federal common law favorable to federal interests); *Howard*, 360 U.S. at 597 (holding that in state law defamation suit against federal officers, federal officer’s “claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress”); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (creating federal common law privilege for radio stations sued in state defamation action, where station was attempting to comply with federal broadcasting requirements); *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the “[federal] Government is not liable . . . for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service,” even though the Federal Tort Claims Act, on its face, applies to servicemen); *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) (holding that in tort suit by the federal government against a private company, the “creation or negation of such a liability is not a matter to be determined by state law”).

113. For recent examples of state law actions foiled by federal common law, see *Al Shimari v. CACI Intern., Inc.*, 658 F.3d 413, 417 (4th Cir. 2011) (holding that detainee’s claims of torture in violation of state law “are preempted and displaced under the reasoning articulated in *Boyle v. United Technologies Corp.*”) and *Saleh v. Titan Corp.*, 580 F.3d 1, 5 (D.C. Cir. 2009) (holding that detainee’s state law claims of torture were “preempted . . . [according to] the Supreme Court’s decision in *Boyle*”).

114. Amar, *Questions and Answers*, *supra* note 15, at 159.

care. The key difference<sup>115</sup> is that the converse-1983 cause of action is created by state law, whereas *Bivens* is created by federal law. Given these similarities, it is appropriate to consider whether a converse-1983 action would be preempted by the *Bivens* doctrine as it currently stands.

The Supreme Court has never addressed this precise question, but guidance can be gleaned from the cases. Unfortunately, the guidance points in different directions. As explained below, some *Bivens* opinions suggest that Congress *alone* possesses the authority over federal officer suits, while others suggest that states can in fact participate in enforcement efforts.

### 1. *Bivens* as Barring the Converse-1983 Action

One of the most persistent themes in *Bivens* jurisprudence over the past thirty years is that creating a cause of action is a *legislative* task, not a judicial one.<sup>116</sup> Take, for example, the Court's reasoning in *Bush v. Lucas*.<sup>117</sup> In *Bush*, a federal employee alleged that he was demoted for criticizing the federal government. He thus brought a *Bivens* action claiming a First Amendment violation. The Supreme Court rejected the suit because Congress had created a remedial scheme—adjudication under the Civil Service Reform Act—specially designed to deal with federal employment disputes. As the Court explained, “it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy.”<sup>118</sup> Although Congress's remedial scheme might not afford the plaintiff complete relief, and a *Bivens* action presumably would, the Court believed that “Congress [was] in a better position to decide whether or not the public interest would be served by creating [a *Bivens*-like action].”<sup>119</sup>

*Schweiker v. Chilicky*<sup>120</sup> tells a similar story. In *Chilicky*, the Supreme Court held that a *Bivens* action was unavailable to social security claimants denied their disability payments in violation of due process. Like *Bush*, the Court's decision

115. Another difference, though minor, is the immunity that would apply to these suits. For an explanation of the limited nature of this difference, see *supra* notes 67–90 and accompanying text.

116. Indeed, this theme dominated *Bivens* itself. The majority claimed that courts have long had the power to “adjust their remedies so as to grant the necessary relief” and that “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.” *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392, 395 (1971) (quotation marks omitted). The dissent saw it differently, believing that “it is the Congress and not this Court that should” create a cause of action. *Id.* at 430 (Blackmun, J., dissenting). See also *id.* at 411–12 (Burger, C.J., dissenting) (“I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. . . . Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.”); *id.* at 427–28 (Black, J., dissenting) (“If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties. . . . For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.”).

117. 462 U.S. 367 (1983).

118. *Id.* at 368.

119. *Id.* at 390.

120. 487 U.S. 412, 423 (1988).

rested entirely on a remedial scheme that Congress created to deal with wrongfully withheld payments. “When the design of a Government program,” Justice O’Connor explained, “suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.”<sup>121</sup> In other words, Congress was entitled to “appropriate judicial deference.”<sup>122</sup>

As *Bush* and *Chilicky* make clear, when the Court declines to create a *Bivens* action, it often does so out of respect for congressional prerogatives. It is the place of Congress, not the Court, to choose how federal law shall be enforced, the Court seems to be saying. What does this portend for the converse-1983 action? At first blush, one might find the separation of powers rationale underlying *Bivens* to be supportive of converse-1983 actions. That is, if the Court believes that it should not “assume[] common-law powers to create causes of action,”<sup>123</sup> one might naturally conclude that an institution that *does* wield common law powers—like state courts—could create a constitutional cause of action. And just as legislatures have always been understood to possess the “powers to create causes of action,” a state legislature could enact a converse-1983 law without overreaching its authority.

Though creative, this argument misses the point of much—but as explained in the following section, not all—of the *Bivens* case law. True, the Court often assumes a diminutive stance when declining to recognize a *Bivens* action, but this diminutive stance is simply another way of pointing out the superior position of Congress when it comes to regulating the liability of federal officials. It could hardly be the case that Congress is entitled to special deference from the Court in crafting damages actions, but that no constitutional principle entitles Congress to deference from a state.

Consider an example based on *Chappell v. Wallace*.<sup>124</sup> In *Chappell*, several navy seamen brought a *Bivens* action alleging unconstitutional racial discrimination. The men had no remedy against the government itself,<sup>125</sup> so their only hope of obtaining relief was through a *Bivens* action against the responsible officers. The Court rejected the suit, explaining:

Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress’ authority in this field.<sup>126</sup>

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121. *Id.*

122. *Id.*

123. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

124. 462 U.S. 296 (1983).

125. Relief against the government would be barred by *Feres v. United States*, 340 U.S. 135 (1950), which holds that the federal government is immune from liability for injuries incident to military service.

126. *Chappell*, 462 U.S. at 304.

Suppose that the day after the Court issued its opinion in *Chappell*, the state of Texas created a converse-1983 action to deal with the mistreatment of army reservists in Texas. If a case was filed under this statute, it would almost certainly be removed to federal court. The federal court would thus be presented with the viability of a converse-1983 suit in light of the Supreme Court's rejection of a *Bivens* action in the exact same context.

Given the reasoning in *Chappell*, it is clear that Texas's converse-1983 suit would fail. The court would not find the law legitimate simply because it was created by a government body with common law or legislative powers. The law would be null and void because it would interfere with Congress's "constitutionally authorized . . . authority over the military system of justice."<sup>127</sup> Put differently, when the Court denied a *Bivens* action in *Chappell*, it did not simply decline to act as a common law or legislative body. It held that Congress, having superior authority on a matter of significant federal interest, was the institution that should decide whether to create a cause of action or not.

It is important to acknowledge that context undoubtedly matters in these cases. It is not at all surprising that the Court would hold that Congress possesses exclusive power over the military and that common law causes of action (whether according to *Bivens* or under state law) should not be permitted. In a different context, however, it might be arguable that Congress *and* the states possess a legitimate regulatory interest in the activity involved. If the alleged constitutional violation related to food safety, for example, the Court might be less willing to proclaim Congress the *sole* enforcer of constitutional rights. In the end, however, the precise scope of Congress's exclusive power in any particular case is unimportant. The point here is simply that one theme underlying the Court's *Bivens* jurisprudence is that it is *Congress's* place to choose the methods of constitutional enforcement against federal officers. In many instances, this will necessarily foreclose the states from creating converse-1983 actions.

## 2. *Bivens* as Permitting the Converse-1983 Action

In 2001, the Court's *Bivens* jurisprudence took a subtle turn that might nonetheless be quite consequential to the viability of converse-1983 actions. In that year, the Court decided *Correctional Services Corporation v. Malesko*, a case involving a federal prisoner's Eighth Amendment claims of insufficient medical care.<sup>128</sup> Like many previous *Bivens* cases, this one also hinged on the existence of alternative remedies. Thus, in rejecting a *Bivens* action, the opinion notes that the prisoner had "full access to remedial mechanisms established by the . . . [federal Bureau of Prisons'] Administrative Remedy Program."<sup>129</sup> Interestingly, however, the Court also cited a new type of alternative remedy—a *state* remedy. The prisoner in this case did not need a *Bivens* remedy, the Court explained, because he had access to a tort remedy under state law.<sup>130</sup> That is, the prisoner could sue the

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127. *Id.*

128. 534 U.S. at 61.

129. *Id.* at 74.

130. *Id.* at 72–73.



misbehaving officers for negligence in failing to provide him the proper care. Indeed, it is far easier to prevail in a negligence action than in an Eighth Amendment *Bivens* action, the Court noted.<sup>131</sup>

*Malesko* was the first time the Court cited a state remedy as an alternative, but it was not the last. In the 2007 case of *Wilkie v. Robbins*, the Court also “assess[ed] the significance of any alternative remedies” available to a *Bivens* plaintiff.<sup>132</sup> Citing *Malesko* for the proposition that the “availability of state tort remedies” is sufficient to preclude a *Bivens* action, the Court pointed to trespass and malicious prosecution claims available to the plaintiff in that case.<sup>133</sup> Most recently, the Court, in *Minnecci v. Pollard*, refused a *Bivens* action to an inmate in a privately run prison because the misconduct alleged by the prisoner “typically falls within the scope of traditional state tort law.”<sup>134</sup>

The ascendancy of state remedies in the Court’s recent *Bivens* jurisprudence suggests a type of judicial humility not found in the cases discussed in the previous section. In those earlier cases, the Court assumed a deferential position *vis-à-vis Congress*. In these newer cases, however, the Court seems to believe that state remedies can sometimes stand in the shoes of *Bivens* remedies. Seen in this way, *Malesko*, *Wilkie*, and *Minnecci* appear to open the door to the converse-1983 action—at least as far as *Bivens* is concerned.

To understand this further, consider the following hypothetical. Recall that in *Malesko*, the Court held that a federal prisoner in a privately run facility could not bring a *Bivens* action, in part because of the existence of state remedies. Suppose that a state created a converse-1983 action that applied only to federal prisoners incarcerated in the state. Using this cause of action, the prisoner sued the misbehaving prison guards. If the case arrived at the Supreme Court, the Court would appear to be duty-bound to approve the cause of action. How could a state law tort action take the place of *Bivens* (as approved in *Malesko* and *Wilkie*) but a converse-1983 action offend *Bivens*?

One has to be careful not to overread these cases. Just as in the previous section, context undoubtedly affects the Court’s views on these issues. Moreover, even though the Court has allowed state remedies to replace *Bivens* in some instances, it has signaled that state remedies may not *always* be sufficient to replace *Bivens*.<sup>135</sup> But given that *Malesko*, *Wilkie*, and *Minnecci* are the Court’s most recent pronouncements on the state remedy issue, it appears more likely than not that *Bivens* would not stand in the way of a converse-1983 action.

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The above analysis of *Bivens* cases does not yield a simple answer to the fate of converse-1983 laws. It suggests that, in some cases, converse-1983 laws would be impermissible, while in others, the laws would be a welcome addition to the

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131. *Id.* at 73.

132. 551 U.S. 537, 551 (2007).

133. *Id.*

134. 132 S. Ct. 617, 623 (2012).

135. *Id.* at 626 (admitting that the Court cannot be “totally certain that the features of state tort law” in a different case will preclude the recognition of a *Bivens* action).

constitutional enforcement mechanisms already in use. At the very least, however, it is clear that the Court's *Bivens* jurisprudence will play a role in the viability of converse-1983 laws, and that at least in some cases, the *Bivens* doctrine could—either today or in the future—impose obstacles that effectively bar the state cause of action.

#### *D. Abrogation by Congress*

Even if converse-1983 laws could survive the effect of Supremacy Clause immunity, federal common law, and *Bivens*, they might still falter when subjected to the preemptive power of federal legislation. When it comes to congressional power, Professor Amar and I agree that Congress has the power to enact federal causes of action that explicitly or impliedly preempt converse-1983 laws.<sup>136</sup> Where we disagree, however, is on the extent of federal power. Professor Amar believes that “if Congress seeks to oust [a converse-1983 action], Congress must itself provide a federal remedy at least as generous as the most generous state remedy Congress seeks to preempt.”<sup>137</sup> As explained below, this is incorrect.

Professor Amar's view of Congress's obligations stems from his belief in the “remedial imperative.”<sup>138</sup> If “the Constitution draws its life from postulates that limit and control lawless governments,” he contends, then the Constitution necessarily contemplates “full redress whenever [constitutional] rights are violated.”<sup>139</sup> As noted by Professor Amar, remedies must be more than generally available; a remedy must exist for *every* constitutional violation. As he puts it, “[f]ew propositions of law are as basic today—and were as basic and universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy.”<sup>140</sup> If the Constitution requires every right to have a remedy, then Congress most certainly does not have the power to bar converse-1983 suits without supplying a replacement.<sup>141</sup> Or so the argument goes.

136. Congress's power to bar converse-1983 actions is enumerated in § 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5 (granting Congress the power to “enforce, by appropriate legislation, the provisions of [Sections 1–4 of the Fourteenth Amendment]”). Under that clause, Congress may choose the mechanisms through with the substantive rights contained in the Fourteenth Amendment (including those rights incorporated into the Amendment) shall be enforced. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (referring to Congress's § 5 power as a “power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”). If Congress dictates that federal officers shall only be sued in tort (thus barring constitutional tort actions against federal officers), that law will necessarily preempt any contrary state law.

137. Amar, *Questions and Answers*, *supra* note 15, at 179.

138. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1484.

139. *Id.* at 1485.

140. *Id.* at 1485–86.

141. It is unclear here whether Professor Amar's view as to congressional preemption assumes the nonexistence of the *Bivens* action. If a vigorous *Bivens* were available to remedy every violation of right, then the remedial imperative would be honored and converse-1983 suits could be abrogated without violating any constitutional norm. For this reason, I assume

Few can quibble with Amar's remedial imperative as an aspirational matter. Its foundation in law is a different issue, however. Remedies in constitutional tort actions are routinely—if not typically—barred by immunity laws. A judge who orders a young woman sterilized without her knowledge is immune from suit, notwithstanding the fact that the order was patently unconstitutional.<sup>142</sup> A prosecutor who fails to disclose exculpatory evidence is immune from suit, even though an innocent man might go to jail.<sup>143</sup> A warden who orders routine strip searches of low-level prisoners need not pay a dime in damages, even though the searches were all unconstitutional.<sup>144</sup> These examples are not aberrations in the field of constitutional torts; they are routine. Because of the law of official immunity, enormous numbers of constitutional violations go without remedies.<sup>145</sup> This is not to say that the current levels of immunity are properly calibrated as a normative matter.<sup>146</sup> It is simply to say that the immunization of officers from liability does not offend the Constitution. It follows therefore that Congress can bar converse-1983 suits without offending the Constitution.

Professor Amar is aware of these immunity doctrines but counters that the “Court has never said that the Constitution requires these zones of immunity.”<sup>147</sup> That is true enough, but it misses the relevant point. The key issue here is not whether the Constitution *requires* immunity, but simply whether it *permits* the federal government (via statute or precedent) to create zones of immunity for federal officers. On this point, there can be little dispute. The federal government quite clearly has such authority.<sup>148</sup> As Richard Fallon and Daniel J. Meltzer have observed, “the structure of substantive, jurisdictional, and remedial doctrines that existed at the time of the Constitution’s framing and that evolved through the nineteenth century by no means guaranteed effective redress for all invasions of legally protected rights and interests.”<sup>149</sup> To suggest otherwise would contradict not only the enormous weight of current practices, but also a body of historical practices reaching back to the Founding.

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throughout this section that Professor Amar is speaking to congressional authority in the absence of the *Bivens* action.

142. *Stump v. Sparkman*, 435 U.S. 349 (1978).

143. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

144. *Savard v. Rhode Island*, 338 F.3d 23, 28–32 (1st Cir. 2003).

145. One could of course argue that modern law has departed from Founding-era principles. There is significant evidence, however, that even at the Founding, Amar's remedial imperative was aspirational rather than mandatory. See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784 (2004) (stating that, at the time of the Founding, “[U]bi jus, ibi remedium was not a black letter legal doctrine; it was merely a platitude.”); see also Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 422 (1987) (showing that officer immunity has frustrated constitutional remedies since at least 1840).

146. See John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010) (critiquing current official immunity law).

147. Amar, *Questions and Answers*, *supra* note 15, at 174.

148. See Waxman & Morrison, *supra* note 16, at 2248 (“[A]s we have observed, qualified immunity is not constitutionally *required*. But neither is it constitutionally *prohibited*.” (emphasis in original) (footnotes omitted)).

149. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1780 (1991) (footnote omitted).

There is, however, an important caveat to this conclusion. To say that Congress can bar remedies is not to say that Congress could bar *all* remedies *all* of the time. It is well accepted that “the Founders . . . positioned the judiciary to keep the political branches within the bounds of their lawful authority.”<sup>150</sup> It is similarly clear that the central way through which the judiciary discharges this role is through issuing remedies. Thus, lest the federal judiciary be shorn of its constitutional role, Congress may not bar *every* remedy.<sup>151</sup>

If Congress can bar some remedies (e.g., the converse-1983 suit) but cannot bar every remedy, which, or how many, remedies may it bar? There is no universally accepted answer to this question, but there is significant agreement that “Congress necessarily has a wide choice in the selection of remedies”<sup>152</sup> subject to the requirement that the chosen remedies be sufficient to “keep government, overall and on average, tolerably within the bounds of law.”<sup>153</sup>

This means that Congress could bar the converse-1983 suit as long as there existed some other remedy or remedies that would keep federal officers more or less within the bounds of law. One remedy that currently serves this goal is the

150. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1283 (2002).

151. I leave to the side here the issue of whether state courts (rather than state laws) are competent to check federal legislative or executive overreaching. To the extent that state courts lack the power to enjoin or otherwise sanction a federal defendant, the constriction of the lower federal courts’ jurisdiction would compromise the constitutional checks thought to be maintained by judicial review. See Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (considering state judicial power in examining the scope of congressional authority to modify federal jurisdiction); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975) (considering the same).

152. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953) (“Congress necessarily has a wide choice in the selection of remedies, and . . . a complaint [that one remedy rather than another is available] can rarely be of constitutional dimension.”); see also John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000) (highlighting the importance of alternative remedies in the Court’s constitutional remedies calculus).

153. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993). Congressional control over remedies can also be viewed in jurisdictional terms. See, e.g., *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938) (applying jurisdiction-stripping analysis to statute that prohibited federal courts from granting injunctions in certain labor cases). In this respect, the claim that federal courts must possess remedial power sufficient to “keep government, overall and on average, tolerably within the bounds of law” bears kinship with the essential functions thesis common in the jurisdiction-stripping arena. Fallon, *supra*, at 311; see also Hart, *supra* note 152, at 1364–65 (arguing that Congress may not restrict federal jurisdiction if doing so would compromise the “essential functions” of the federal courts); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (same).

*Bivens* action. The *Bivens* action has its limitations,<sup>154</sup> of course, but there is evidence that it serves its purpose sufficiently well.<sup>155</sup> Even if *Bivens* were deemed insufficient (or overruled), however, there would still exist other remedies.

Take, for example, the Federal Tort Claims Act (FTCA). Under the FTCA, an individual harmed by a federal employee's tortious behavior can sue the federal government for relief.<sup>156</sup> Thus, if a federal prison guard beats an inmate without cause, the inmate will be able to bring a battery claim against the federal government to obtain compensation. A battery claim is not, in name at least, the same as a Fourth or Eighth Amendment claim. But it will provide the plaintiff with compensation<sup>157</sup> and, in that sense, mimic *Bivens* and converse-1983 actions in "keep[ing] government, overall and on average, tolerably within the bounds of law."<sup>158</sup>

The FTCA action is not a perfect substitute for the *Bivens* or converse-1983 action. In some ways, it will be superior<sup>159</sup> and in other ways it will be inferior.<sup>160</sup>

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154. The cause of action is unavailable where "alternative remedies" or "special factors" are present. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). For a summary of the doctrine, see Pfander, *supra* note 48.

155. Reinert, *supra* note 61, at 813 (arguing that "*Bivens* cases are much more successful than has been assumed by the legal community, and that in some respects they are nearly as successful as other kinds of challenges to governmental misconduct").

156. 28 U.S.C. § 1346(b)(1) (2006). Whether an officer's behavior qualifies as tortious is determined according to the "law of the place" where the allegedly wrongful behavior occurred. *Id.*

157. For a defense of the role of subconstitutional law in enforcing constitutional norms, see John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663 (2009).

158. Fallon, *supra* note 149, at 311. It should go without saying that this is an empirical question. If, for example, private contractors were routinely committing constitutional violations, and state law had immunized the contractors from liability, one could quite easily conclude that the remedial apparatus necessary to keep government within bounds was constitutionally deficient.

159. Unlike constitutional tort actions, FTCA actions are not saddled with the defense of qualified immunity. If a federal officer violates state tort law, compensation may issue, regardless of whether the tort law was "clearly established." *See* 28 U.S.C. § 1346(b)(1) (2006) (imposing liability on the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [negligent or wrongful] act or omission occurred"); *United States v. Olson*, 546 U.S. 43, 44 (2005) (stating that, because "the United States waives sovereign immunity 'under circumstances' where local law would make a 'private person' liable in tort," any official or municipal immunity created by state law is not applicable in FTCA suits against the federal government (emphasis in original)).

160. *See* 28 U.S.C. § 2680(h) (2006) (barring claims of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" committed by non-law enforcement officers). One common bar to recovery under the FTCA—the "discretionary function exception"—is of questionable application in the constitutional enforcement setting. Under that exception, relief is unavailable where the harm alleged occurred during the officer's discharge of a discretionary function. Plaintiffs often argue that behavior in violation of the Constitution cannot be regarded as "discretionary" within the meaning of the FTCA. Four circuits have agreed with this view, *see Raz v. United States*, 343 F.3d 945 (8th

The FTCA is not the only possible substitute, however. Other federal statutes often protect citizens from behavior that would be unlawful if measured against the Constitution. For example, federal officers are *statutorily* barred from discriminating against federal employees and are liable for damages if they do so.<sup>161</sup> Indeed, this cause of action effectively replaced a *Bivens* action in the federal employment context.<sup>162</sup> This phenomenon can be seen in other cases as well.<sup>163</sup>

This is not to say that the current framework of remedies is superior to remedies that might be provided by a converse-1983 law. But that issue is of no constitutional relevance. The constitutional enforcement question presented here is *not* whether the converse-1983 action is better or worse than various alternatives; it is simply whether the remedies available in a world without converse-1983 are sufficient in and of themselves to uphold the rule of law. If they are, then Congress is free to prefer that the Constitution be enforced through those mechanisms rather than the converse-1983 mechanism.

It is perhaps impossible in the space of this Article to conclusively show that the currently available remedies are sufficient to “keep [the federal] government, overall and on average, tolerably within the bounds of law.” Although there might be general agreement that the current availability of remedies is sufficient to this task, there will undoubtedly be areas where constitutionally intolerable remedial gaps can be found. It is unnecessary to canvass the entire spectrum of remedies, however, to argue that the susceptibility of converse-1983 laws to congressional preemption is significant in light of the remedies currently available through *Bivens*, the FTCA, and other federal statutes. There may exist one or another situation in which no alternative to converse-1983 can be found, but that hardly supports Professor Amar’s blanket claim that “if Congress seeks to oust [a converse-1983 action], Congress must itself provide a federal remedy at least as generous as the most generous state remedy Congress seeks to preempt.”<sup>164</sup>

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In sum, Part II demonstrates that converse-1983 laws are not a reliable way for states to rein in federal officers who violate the Constitution. Such laws would be

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Cir. 2003); *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *Nurse v. United States*, 226 F.3d 996 (9th Cir. 2000); *Prisco v. Talty*, 993 F.2d 21 (3d Cir. 1993), while two have disagreed, *see Castro v. United States*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011); *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972).

161. *See, e.g.*, 42 U.S.C. § 2000e-16(a) (2000) (prohibiting discrimination “based on race, color, religion, sex, or national origin” by the federal government).

162. *See Davis v. Passman*, 442 U.S. 228 (1979) (holding that federal employee dismissed from job because she was a woman could bring a *Bivens* action to assert her equal protection rights).

163. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (suggesting that the “remedial mechanisms established by the . . . [Federal Bureau of Prisons’] Administrative Remedy Program” would provide federal prisoners with opportunities to vindicate their Eighth Amendment rights); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (holding that the procedural due process violation alleged in *Bivens* action could be adequately addressed through administrative procedures supplied by the Social Security Act).

164. Amar, *Questions and Answers*, *supra* note 15, at 179.

saddled with generous immunity defenses, subject to override by federal common law or *Bivens* actions, and vulnerable to abrogation by congressional statute. Although this is an accurate statement of the current law, it does not address Founding-era conceptions of state power relied upon by Professor Amar. It is to that topic that I now turn.

### III. THE VALUE OF THE CONVERSE-1983 ACTION AT THE FOUNDING

Under current doctrine, converse-1983 laws are a nonstarter. But perhaps our modern conception of federal supremacy has broken free of its original moorings. Perhaps, at the time of the Founding, it was understood that states would have the power to impose liability on a federal officer for disobeying the federal Constitution. In defending converse-1983 laws, Professor Amar draws on a conception of state power articulated by James Madison in *Federalist 51*. In that paper, Madison argued that states would play a vital role in checking federal misbehavior:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments [the federal and the state], 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 controul each other*; at the same time that each will be controuled by itself.<sup>165</sup>

Madison's view of state power would seem to embrace converse-1983 laws. Such laws quite plainly seek to protect the "rights of the people" by "controul[ing]" the federal government.

In addition to the *theory* of state power, however, Professor Amar also invokes the apparent *practice* of state power at the Founding. His first example of this practice is the nineteenth-century tort action brought against federal officers for unconstitutional acts. If a federal officer searched your home without a warrant, for example, the officer was not sued in a *Bivens*-style action at the Founding; instead, the officer was simply sued for trespass under the common law—a suit that suggests that states *did* have the unilateral power to render federal officers liable for damages. Professor Amar's second example of this practice is state habeas proceedings against federal officers. According to Amar, "[s]tate habeas [during the first half of the nineteenth century] offered a way for those imprisoned by federal officers in violation of their federal constitutional rights to win their freedom."<sup>166</sup> Although providing injunctive relief rather than damages, these suits too would seem to lend support to a Founding-era converse-1983 action.

In this Part, I argue that Professor Amar is incorrect about the theory and practice of state power at the Founding. I first explain that the theory of state power expressed in the *Federalist Papers* does not support a power to impose liability on the federal government, even for the federal government's unlawful behavior. The

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165. THE FEDERALIST NO. 51, at 282 (James Madison) (J.R. Pole ed., 2005) (emphasis added).

166. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1509.

state role in checking the federal government expressed there was *political, not legal*. Second, I explain that the state practices that Amar cites are not in fact evidence of a power to enact converse-1983 laws. The officer actions to which Amar refers were controlled by a common law theory of officer liability that was at best loosely connected with state law. Nor do the state habeas laws cited by Amar prove the existence of any autonomous state legal power. These laws existed only at the pleasure of Congress and thus could not have been a way for states to protect their citizens from constitutional violations by federal officers.

To be sure, my arguments in this section are aimed only at disproving Professor Amar's claims. Disproving his claims does not conclusively prove what the Founders *did* think about state power, or what power states *did* have. There thus exists the possibility that, as a theoretical or practical matter, state legal power could be located at the Founding. This Part suggests, however, that that possibility is unlikely and that Professor Amar has failed to adduce sufficient evidence proving otherwise.

#### A. State Power in Theory

To understand the idea of state power contemplated by the Founding generation, one must first understand the circumstances that produced the Constitution itself. Though generalizations are always dangerous, historians tend to agree that the robust and irresponsible use of power by the states was the chief impetus for the Constitutional Convention in 1787.<sup>167</sup> During the 1780s, “[t]he states had become increasingly jealous of their power and in fact through their handling of public lands and public debts were fast moving to absorb the major political and economic groups, creating a vested interest in state sovereignty.”<sup>168</sup> This jealousy impoverished national power and “left the United States at the mercy of other nations,” particularly in matters of international trade.<sup>169</sup>

A robust state power could perhaps be defended if states were models of local government. They were anything but, however. Having freed themselves of British oversight after the Revolution, states quickly descended into an era of legis-mania. The solution to every problem, real or imagined, was legislation. “[I]ncompetent legislators were passing too many laws, and these poorly drawn acts were being repealed or revised before anyone could discover how well they were actually working. Such proceedings brought the very concept of law into contempt.”<sup>170</sup> The multiplicity of laws was not the only problem, however; another problem was that

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167. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 467 (1998).

168. *Id.* at 361.

169. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 12 (2010) (“One incident after another demonstrated that Congress’s sorry financial state left the United States at the mercy of other nations.”).

170. JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 47 (1990).



the laws themselves were often fundamentally unjust.<sup>171</sup> “By the 1780s, it seemed as if the majorities of the popular legislatures had become just as dangerous to individual liberties as the detested royal governors had been.”<sup>172</sup>

Members of the Constitutional Convention were thus determined to rein in the state governments. One idea for accomplishing this goal was put forward by James Madison. He proposed that Congress be given the power to veto “all [state] laws which . . . shall appear improper,” regardless of whether the law was fundamentally just or not.<sup>173</sup> The “corner stone of an efficient national Govt,” required federal power to nullify state laws that “destroy[ed] the order & harmony of the political system.”<sup>174</sup> But alas, the national veto proved too much for the Convention to swallow.<sup>175</sup> It was not the *idea* of federal supremacy, however, that was scrapped, only the *mechanism*. In its place, the Convention adopted what we know today as the Supremacy Clause. The Supremacy Clause retained the absolute supremacy of federal law, but referred the task of superintending state law to the courts rather than Congress.<sup>176</sup>

In considering state power in our federalist system, therefore, one must keep first and foremost in mind two fundamental truths. First, the Constitutional Convention was called in 1787 chiefly to rein in the “evils operating in the states.”<sup>177</sup> Second, the Convention reined in the states in large part through the Supremacy Clause, a provision that subordinated the states’ legal—but not political—power to that of the national government. With these two truths in mind, the stage is set for a consideration of Founding-era thoughts on the scope of state power. As explained below, these writings suggest—not surprisingly—that states were understood to possess political, not legal, power to check the federal government.

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171. *Id.*; see also THE FEDERALIST NO. 62, at 334 (James Madison) (J.R. Pole ed., 2005) (blaming the “embarrassments of America” on the state governments who were continually “repealing, explaining and amending laws”).

172. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 19 (2009); see also WOOD, *supra* note 167, at 467 (“It was ‘the vile State governments,’ rather than simply the feebleness of the Confederation, that were the real ‘sources of pollution,’ preventing America from ‘being a nation.’ It was ‘the corruption and mutability of the Legislative Councils of the States,’ the ‘evils operating in the States,’ that actually led to the overhauling of the federal government in 1787.”).

173. James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 719 (1998) (quoting statements of Convention participants).

174. *Id.*

175. See *id.* at 730 (“Madison’s arguments notwithstanding, the negative fell, seven states to three.”)

176. *Id.* at 730 (explaining that the Supremacy Clause “delegate[d] to judges (state and federal) what previously had been the [national] veto’s function of voiding state law contrary to federal law”); see also Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO L.J. 1061, 1068–69 (2007) (“The significance of the Supremacy Clause cannot be overstated. It not only confirmed the status of the Constitution as fundamental law, but it also made the enforcement of its essential division of power between the Union and the States an inherently judicial function.”).

177. WOOD, *supra* note 167, at 467 (quotation marks omitted).

Madison's assertion that state governments "will controul" the federal government appeared in the *Federalist Papers*, so it is sensible to explore those writings further to better understand the assertion. One must be cautious in relying on the *Federalist Papers*, of course, for they were explicitly partisan. Yet on the issue of using state power to check the federal government, their views are quite representative of the thinking at the time.<sup>178</sup> With that in mind, the first Paper to consider is *Federalist 46*. There, James Madison rendered the idea of state power more concrete by articulating the states' "means of defeating [federal] encroachments."<sup>179</sup>

[S]hould an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people, their repugnance and perhaps refusal to co-operate with the officers of the union, the frowns of the executive magistracy of the state, the embarrassments created by legislative devices, which would often be added on such occasions, would oppose in any state, difficulties not to be despised; would form in a large state very serious impediments, and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.<sup>180</sup>

To Madison, therefore, it was the spirit of the polity that would turn federal encroachments away, not the force of state law. The "disquietude of the people," the "frowns of the executive magistracy," and embarrassing "legislative devices" (which were almost certainly nonbinding resolutions<sup>181</sup>) would all "present obstructions" to an overbearing federal government.

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178. As Larry Kramer has put it,

Using *The Federalist* to gauge the perceptions of other participants in the Founding can be problematic, and it is sometimes misleading to rely too heavily on this one source. . . . But not on the question of federalism. On this issue, what Publius had to say was no different from what everyone else was saying; just more clearly and fully articulated.

Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 257 (2000).

179. THE FEDERALIST NO. 46, at 257–58 (James Madison) (J.R. Pole ed., 2005).

180. *Id.*

181. There are two reasons this is so. First, Madison makes clear that these legislative devices would be used to oppose both unconstitutional ("unwarranted") and constitutional ("warranted") federal laws. Even if one accepts that states might regulate unconstitutional federal behavior, it is virtually unthinkable that Madison (who himself proposed the national veto) was suggesting that states could oppose *lawful* federal action through the enactment of binding state law. Instead, he was almost certainly referring to nonbinding resolutions. Second, there is prominent evidence that states engaged in this exact form of shaming in response to federal constitutional transgressions. For instance, in response to the Alien and Sedition Acts enacted in 1798, the legislatures of Virginia and Kentucky both passed resolutions denouncing the Acts as unconstitutional. See KENTUCKY RESOLUTIONS (Nov. 10, 1798, Nov. 14, 1799), reprinted in 5 THE FOUNDERS' CONSTITUTION 131–35 (Philip B.

Alexander Hamilton strikes the same chord in *Federalist* 28. He begins first with a description of local resistance to *state* authority—which he deems rather spare. “In a single state,” he explains, “if the persons entrusted with supreme power become usurpers, [the citizens] can take no regular measures for defence. [They] must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.”<sup>182</sup> But if the “usurper” is the *federal* government, citizens have significantly more power because they can rely on the local “organs of civil power,” *that is*, the state governments. State governments are centralized and organized; they possess “all the resources of the community.” They thus “can readily communicate with each other in the different states . . . and [can] unite their common forces for the protection of their common liberty.”<sup>183</sup>

In Hamilton’s view, therefore, states are not legal bullies; instead, they are public relations agents. State governments aggregate popular opinion and then join “forces” with like-minded states in an effort to protect the “common liberty.” This is not a picture of legal regulation; it is a picture of grassroots political activism.

Further evidence that states were to check the federal government through political—as opposed to legal—means can be found in Hamilton’s classic explanation of competition between the state and federal governments:

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.<sup>184</sup>

Hamilton thus sees protection for the people in the “prepondera[nce]” of popular will, not in a legal mechanism enacted by a state legislature. Further evidence of this perspective abounds in the *Federalist Papers*. Both *Federalist* 26 and 46 explain that federal encroachments need not be feared because state legislatures will undoubtedly “sound the alarm” to warn the citizens.<sup>185</sup> Federal encroachments,

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Kurland & Ralph Lerner eds., 1987); JAMES MADISON, VIRGINIA RESOLUTIONS (Dec. 21, 1798), *reprinted in id.* at 135–36. These resolutions were self-consciously nonbinding, amounting merely to “expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection.” JAMES MADISON, REPORT ON THE RESOLUTIONS (Jan. 1800), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 402 (Gaillard Hunt ed., 1906). Neither state attempted to legally bind the federal government to obey the First Amendment. Nor did any victim of prosecution under the Acts apparently sue federal officers in a common law action.

182. THE FEDERALIST NO. 28, at 150 (James Madison) (J.R. Pole ed., 2005).

183. *Id.* at 150–51.

184. *Id.* at 150.

185. THE FEDERALIST NOS. 26, at 141, 46 (James Madison) (J.R. Pole ed., 2005) (“Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.”) (“But ambitious

explains Madison, would be a battle of political wills: “one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.”<sup>186</sup>

This view of states as political—rather than legal—challengers to the federal government is confirmed by Larry Kramer’s study of constitutional enforcement during the Founding era. State power to control the federal government, he explains, existed primarily in “real politics, popular politics: the messy, ticklish stuff that was (and is) the essence of republicanism.”<sup>187</sup>

Let Congress try to misuse its powers, [the Federalists] said over and over again, and federal lawmakers would find themselves facing formidable resistance from local leaders—leaders who could, and would, drum up outrage and opposition among the people, establish committees of correspondence with like-minded leaders in other states, and force federal lawmakers to back down through protest and remonstrance or by actively campaigning to oust unsatisfactory representatives.<sup>188</sup>

Kramer finds the Founders’ reliance on politics unsurprising because “[t]heir history, their political theory, and their actual experience all taught that popular pressure was the only sure way to bring an unruly authority to heel.”<sup>189</sup> In contrast to modern reliance on positive law and judicial review, the “Founding generation had a different paradigm in mind, and the idea of depending on courts to stop a legislature that abused its power simply never occurred to the vast majority of participants in the [Founding] debates.”<sup>190</sup>

In light of this discussion, Professor Amar’s assertion that states possessed some measure of legal power over the federal government at the Founding is without sufficient evidence. He appears to be aware of much of the evidence discussed above and agrees that state political power was a major component of state power to control the federal government.<sup>191</sup> His arguments in favor of legal power, however, cite no additional evidence. Instead, he simply invokes a principle of symmetry: if the federal government can control the states by creating a damages cause of action, then states can control the federal government by creating the same

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encroachments of the federal government, on the authority of the state governments, would not excite the opposition of a single state or of a few states only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.”).

186. THE FEDERALIST NO. 46, at 256 (James Madison) (J.R. Pole ed., 2005) (“If therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the state governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . .”).

187. Kramer, *supra* note 178, at 257.

188. *Id.*

189. *Id.* at 266.

190. *Id.*

191. See Amar, *Sovereignty and Federalism*, *supra* note 15, at 1500–03.

cause of action.<sup>192</sup> The Tenth Amendment, Amar explains, “appears as the symmetrical counterpart of the enforcement clauses of the Civil War Amendments.”<sup>193</sup>

The problem with this, however, is that the Tenth Amendment did *not* endow states with powers symmetrical to the federal government. It simply endowed states with “powers not delegated to the United States by the Constitution.”<sup>194</sup> Where the federal government has the power to act, the Supremacy Clause conclusively elevates federal law above any law enacted by the states. The federal government quite clearly had the power at the Founding to enact its own cause of action against federal officers. It follows, therefore, that states possessed no unilateral power to enact converse-1983 laws.

I now consider state power from a different perspective. Unlike in this section, where I considered how the Founders *conceived* of state power, I now turn to the *practices* cited by Professor Amar as proof of state legal power.

### B. State Power in Practice

In defending state power to enact converse-1983 laws, Professor Amar has pointed to two historical practices: state common law tort suits against federal officers and state habeas corpus actions filed by federal prisoners. At first glance, the existence of these actions during the early nineteenth century would seem to confirm state power to enact converse-1983 laws. Upon close inspection, however, this view does not hold up. In this section, I first explain that the tort suits cited by Amar were based not on state law but rather on a general common law of officer liability detached from state law. Then, I explain that state habeas actions, to the extent they were used against federal officers in the early Republic, only existed at the pleasure of the federal government.

#### 1. Officer Suits

The civil rights actions we know today are modern inventions. In past times, constitutional enforcement worked quite differently. During the nineteenth century, for example, constitutional rights were often enforced through ordinary tort actions. The 1806 case of *Wise v. Withers*<sup>195</sup> is a good example. In that case, a federal militia officer by the name of Withers believed that Wise, a resident of Alexandria, Virginia, had dodged his military obligations and was thus obliged to pay a fine. Desiring to collect the fine, Withers, with the approval of a federal court, entered Wise’s home and seized his personal property. There was only one problem with this plan, however: Wise was actually exempt from military service. After these events unfolded, Wise brought a common law trespass action against Withers and the federal judicial officer. Finding that Wise was exempt from military service, the Court held that the officers’ conduct was unjustified. Without this justification, the

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192. *See id.* at 1504.

193. *Id.* at 1506.

194. U.S. CONST. amend. X.

195. 7 U.S. (3 Cranch) 331 (1806).

Supreme Court wrote, “[t]he court and the officer [were] all trespassers” in violation of state law.<sup>196</sup> Or put differently, the Court held that the federal actors who violated the Constitution were subject to liability for trespass.<sup>197</sup>

The case reporters<sup>198</sup> and law reviews<sup>199</sup> confirm that *Wise* is not an aberration. Where citizens suffered a constitutional violation, “[t]he predominant method of suing officers in the early nineteenth century was [through] an allegation of common law harm, particularly a physical trespass.”<sup>200</sup> Yet cases like *Wise* do not, on their own, show that states had the unilateral *power* to impose liability on misbehaving federal officers. A close reading of these cases reveals that state law played a small role, or even no role at all. Instead, these cases were controlled by a “general common law” under the control of the federal courts.

The concept of “general common law” (sometimes called simply “general law”) does not easily square with our modern sensibilities about adjudication. In modern times, courts are quite concerned with the source of law—that is, whether a law is

196. *Id.* at 337.

197. In these suits, the Constitution would often arise in connection with the officer’s defense. The officer would defend his behavior by arguing that it was justified under his general police power, whereupon the plaintiff would argue that the Constitution (usually the Fourth Amendment) prohibits the exercise of such police power. The court would then be called upon to determine the scope of the plaintiff’s constitutional rights. See Woolhandler, *supra* note 145, at 399.

198. See, e.g., *Leroux v. Hudson*, 109 U.S. 468, 474–77 (1883) (trespass action brought against federal marshal for improper attachment); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865) (trespass against federal official for unjustified attachment of property); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (tort action against post officer for improper assessment of postage); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that navy captain was personally liable under the common law for improperly seizing a Danish vessel); *Freeman v. Robinson*, 7 Ind. 321 (1855) (assault and battery suit brought against federal marshal); *Sandford v. Nichols*, 13 Mass. 285 (1816) (trespass action brought against revenue officer for entering dwelling and seizing goods without cause); *Wilson v. Mackenzie*, 7 Hill 95 (N.Y. 1845) (assault and battery suit brought against naval officer); *Ward v. Henry*, 19 Wis. 87 (1865) (trespass action brought against federal marshal for improper attachment).

199. See, e.g., Michael G. Collins, “*Economic Rights, Implied Constitutional Acts, and the Scope of Section 1983*,” 77 GEO. L.J. 1493, 1510 (1989) (explaining that government officers “were liable at common law for injuries inflicted in the course of their employment,” including constitutional injuries); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1122–23 (1969) (noting that, in the nineteenth century, “the view developed that the governmental officer acting under a void statute, or outside the bounds of a valid statute, may be regarded as stripped of his official character, and answerable, like any private citizen, for conduct which, when attributable to a private citizen, would be an offense against person or property”); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1400 (2007) (stating that, in early America, “there was no distinctively federal cause of action to remedy constitutional violations,” so “[a]ctions against officers typically alleged a common law harm”).

200. Woolhandler, *supra* note 145, at 399. Although the complaint often spoke in common law terms, “[t]he issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of defense and reply when the officer pleaded justification.” *Id.*

state or federal, or common law or statutory, and so on. Adjudication worked quite differently at the Founding, however. “No jurist in the early nineteenth century, for example, seriously questioned . . . that in declaring the law judges could look to a variety of sources, some written and some unwritten, some foreign and some indigenous, some specific and some general in their nature.”<sup>201</sup> When a rule of law was constructed from these multifarious sources, it was impossible to say that the rule was “attached to any particular sovereign.”<sup>202</sup> Instead, the rule was simply understood as a general law over which the federal courts, having created the law, enjoyed authority over its application and development.

General law played a prominent role in federal adjudication at the Founding. It applied in maritime disputes,<sup>203</sup> commercial disputes,<sup>204</sup> disputes involving foreign diplomats,<sup>205</sup> and so on.<sup>206</sup> This is not to say that state law never applied; it certainly did.<sup>207</sup> But where a dispute concerned peculiarly federal interests, general law often played a significant role.

One subject of particular interest to the federal government was the liability of federal officers for actions taken in the scope of their employment. Despite Professor Amar’s assertions that these suits were controlled by state law, I explain below that these suits were often controlled by general law beyond the reach of states. The general law in these cases manifested itself in two ways: (a) in the Court’s creation of immunities for federal officers; and (b) in the Court’s control over the merits of officer actions.

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201. 3–4 G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, in *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 112–13 (Paul A. Freund & Stanley N. Katz eds., 1988).

202. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984); see also Hill, *supra* note 199, at 1133 (“The fact is that the common law in its substantive aspect has always consisted of an admixture of federal and state law, applicable alike in the state and federal courts (apart from the aberration of *Swift v. Tyson*).”).

203. See Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 718 (1963) (“From the beginning admiralty judges have retained the inventiveness and initiative characteristic of common law courts in private law areas.”).

204. See Edwin Dewitt Dickinson, *The Law of Nations as Part of the National Law of the United States, II*, 101 U. PA. L. REV. 792, 796–97 (1953).

205. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1311–21 (1996).

206. For an excellent historical account of common law created by federal courts sitting in equity, see Kristin A. Collins, “A Considerable Surgical Operation”: *Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE. L.J. 249, 272–91 (2010) (describing a body of equitable procedure, remedies, and rights created by the federal courts in the early nineteenth century).

207. Fletcher, *supra* note 202, at 1532 (explaining that federal courts applied state law “when the subject matter was of peculiarly local concern,” and where the “existence and meaning [of state law] were clearly established”).

## a. General Law in Officer Actions: Immunity

Just as federal immunity law currently plays a significant, if not dominant, role in civil rights actions against federal officers,<sup>208</sup> so too did it affect officer actions in the decades following the Founding. Although the scope of immunity varied over time, there can be no doubt that the immunity doctrine was under the control of the Supreme Court and played a crucial role in officer actions.

To understand federal immunity law, a useful place to start is with *Marbury v. Madison*.<sup>209</sup> Although famous for its jurisdictional holding, the case nonetheless provides insight into standard immunity law in the early nineteenth century. The facts of *Marbury* are familiar. William Marbury, believing himself to be entitled to a commission as a justice of the peace, sought a mandamus compelling Secretary of State James Madison to deliver the commission. One issue in the case was whether the remedy of a mandamus was the proper remedy for Marbury's harm. The availability of the remedy, according to the Court, depended on whether the delivery of the commission was a "ministerial" or "discretionary" act. Ministerial acts were acts imposed by law. If a statute ordered a federal officer to take some specific act, and the officer failed to perform that act, a mandamus would be available to compel the officer to do so. In contrast, discretionary acts were simply "political acts" such as the "power of nominating to the Senate."<sup>210</sup> Political acts, being inherently discretionary, were not subject to a mandamus.

In *Marbury*, the Court held that Marbury's entitlement to his commission had already "vested," thus providing him with a legal right, as opposed to a mere political interest.<sup>211</sup> Being legally entitled to the commission, a mandamus was an appropriate remedy (provided, of course, the Court had jurisdiction to issue a mandamus). The test in *Marbury* was thus one of discretion: if an officer breaches a legal (i.e., nondiscretionary) duty, he is subject to suit. If the officer disappoints another through the exercise of discretion, however, the officer is "immune" from judicial interference.

Discretion was thus the touchstone of immunity, and the existence of such discretion could be declared by Congress or by the Court. An early example of congressionally declared discretion involved the Embargo Act of 1808, a federal statute that authorized "the [federal] collectors of the customs . . . to detain any vessel . . . whenever in their opinions the intention [of the vessel's captain] is to violate or evade any of the provisions of the [embargo] acts."<sup>212</sup> Just as with any police seizure, vessel owners would occasionally argue that the seizure was unjustified and pursue a common law officer action for relief.

Several of these cases came before the Supreme Court in the second decade of the nineteenth century.<sup>213</sup> Time and again, the Court held that the collectors could not be sued under the common law, *even if* the seizure was unjustified. This was

208. See *supra* notes 123–27 and accompanying text.

209. 5 U.S. (1 Cranch) 137 (1803).

210. *Id.* at 166–67.

211. *Id.* at 167.

212. § 11, 2 Stat. 501.

213. See, e.g., *Otis v. Walter*, 15 U.S. (2 Wheat.) 18, 21 (1817); *Otis v. Watkins*, 13 U.S. (9 Cranch) 339, 344–45 (1815); *Crowell v. M'Fadon*, 12 U.S. (8 Cranch) 94, 98 (1814).



because the statute endowed the officers with discretion. That is, officers were authorized to seize ships when, in their opinion, a violation of the embargo occurred, regardless of whether a violation actually occurred. In the Supreme Court's view, so long as the collector "honestly entertained the opinion under which he acted," he was immune from suit. This was true, *even if* the collector's opinion was "incorrect and formed hastily or without sufficient grounds."<sup>214</sup> "The law places a confidence in the opinion of the officer," the Court explained.<sup>215</sup> So long as the officer "honestly exercises" his opinion, "he cannot be punished for it."<sup>216</sup>

Where discretion was not specifically authorized by statute, the Supreme Court was called on to determine the scope of an officer's discretion by virtue of his office. As noted above in the discussion of *Marbury*, the early Court applied a narrow definition of discretion that amounted almost to a "legality" test. That is, if the behavior of the officer was beyond the bounds of federal law, the federal officer could not claim immunity from suit. The Court applied this same rule the year after *Marbury* in *Little v. Barreme*.<sup>217</sup> In that case, a federal officer seized a ship based on the order of the president. The president, however, did not have authority to order the seizure, and the owner of the ship sued the federal officer who effectuated the seizure. The defendant argued that, although the seizure was unjustified, he should escape liability because he relied in good faith upon the instructions of the president. Chief Justice Marshall, joined by the remainder of the Court, rejected this argument. The bottom line was that the seizure was unlawful, and the president's "instructions cannot change th[at] nature."<sup>218</sup>

*Marbury*, *Little*, and other cases thus held that federal officers only possessed discretion—and thus immunity—when they were acting within the confines of federal law. That is, obedience to a valid federal law immunized the officer from

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214. *Watkins*, 13 U.S. at 355–56.

215. *Crowell*, 12 U.S. (8 Cranch) at 98.

216. *Id.* One must be careful not to overstate the importance of these cases, for it appears quite possible that the Court would have taken a different view in the 1860s. In 1863, Congress enacted a statute that immunized federal officers from personal liability for wrongs committed while fighting for the North in the Civil War. Act of March 3, 1863, § 4, 12 Stat. 756. When federal officers were sued for battery or false imprisonment, they often asserted this statute as a defense. Two courts considered the constitutionality of the statute and both—a federal circuit court and the Indiana Supreme Court—found it unconstitutional. See *Milligan v. Hovey*, 17 F. Cas. 380 (C.C. Ind. 1871); *Griffin v. Wilcox*, 21 Ind. 370, 372–373 (1863). Although the United States Supreme Court never had the opportunity to rule on the statute, dicta in an 1884 opinion suggests that the Court would have found the statute unconstitutional. See *Mitchell v. Clark*, 110 U.S. 633, 640 (1889); see also David Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 50 (1972) (discussing *Mitchell*).

Despite the reasoning in these cases, it should be remembered that they came fifty to seventy-five years *after* the embargo cases discussed in the text. Thus, even if the reasoning in the embargo cases would not have survived in the second half of the nineteenth century, they are still powerful evidence of the Supreme Court's view of officer immunity at the Founding.

217. 6 U.S. (2 Cranch) 170 (1804).

218. *Id.* at 179.

state law liability. It is tempting to conclude that this rule actually *supports* Professor Amar's claims, for the rule seems to suggest that federal unconstitutional behavior rendered the misbehaving officer subject to a state law suit. This is true in a sense, but it ignores a crucial fact implicit in the decisions: immunity was a question of federal law over which the federal courts had exclusive control. The immunity law applied in *Marbury*, for example, bore no connection with state law. The Supreme Court was simply applying a general rule of immunity not "attached to any particular sovereign."<sup>219</sup>

Federal control over the law of officer immunity is proven more clearly by the Supreme Court's gradual expansion of immunity during the nineteenth century. *Decatur v. Paulding*<sup>220</sup> was an important step in this process.<sup>221</sup> Susan Decatur, widow of navy hero Stephen Decatur, sought to collect two pensions after her husband's death—one provided in a general pension statute and the other provided in specific legislation. The Secretary of the Navy, based on his own interpretation of the legislation, refused to issue both pensions. Mrs. Decatur sought a writ of mandamus ordering him to do so, but the Supreme Court refused it. As to the existence of a legal duty to pay both pensions, the Court explained:

The duty required by the resolution [to pay an additional pension] was to be performed by [the secretary] as the head of one of the executive departments of government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties.<sup>222</sup>

In the Court's view, therefore, the secretary's position, "as the head of one of the executive departments of government," possessed an inherent discretion to decide whether Mrs. Decatur should receive the second pension.<sup>223</sup> In this sense, *Decatur* was an expansion of immunity for high-ranking federal officers.<sup>224</sup> Immunity was no longer controlled by the exact contours of the law but rather by an undefined penumbra of authority extending beyond the law itself.

Although *Decatur* was a mandamus action, the Court applied the same rule in a damages action several years later.<sup>225</sup> In *Kendall v. Stokes*, the Supreme Court was asked to determine whether the Postmaster General was personally liable for the

219. Fletcher, *supra* note 202, at 1517.

220. 39 U.S. (14 Pet.) 497 (1840).

221. *See id.*

222. *Id.* at 515.

223. *Id.*

224. *See* *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 351 (1868) (reaffirming the doctrine of official discretion recognized in *Decatur v. Paulding*, which barred the remedy of mandamus, even when it was "clear" that the plaintiff "had no other legal remedy"); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291–92 (1850) (denying a mandamus remedy even though the plaintiff's only other available "remedy" for an alleged rights violation was a petition to Congress).

225. *See* *Woolhandler*, *supra* note 145, at 425 (noting that, throughout the Marshall and Taney Courts, the "theories for availability of damages and coercive remedies were consistent").

value of services rendered to the post office.<sup>226</sup> In prior litigation, a court ordered the then-postmaster to credit the plaintiff's account for money owed, but the postmaster had failed to do so. When the new Postmaster General, Amos Kendall, took office, he also failed to credit the plaintiffs' account. The plaintiffs thus sued Kendall personally for the amount of the credits. Writing for the Court, Chief Justice Taney explained the immunity rule as such:

We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment. . . . Sometimes erroneous constructions of law may lead to the final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable [for a decision] . . . in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake.<sup>227</sup>

Viewing the facts of the case, the Court held that the postmaster "committed an error in supposing that he had the right to set aside allowances for services rendered . . . . But as the case admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him."<sup>228</sup>

*Kendall v. Stokes* largely presages the immunity doctrine that is still in use today,<sup>229</sup> though it would take the Court a half-century or more to definitively choose that model. *Spaulding v. Vilas*,<sup>230</sup> decided in 1896, reiterates the *Kendall* rule,<sup>231</sup> and the twentieth century cases *Gregoire v. Biddle*<sup>232</sup> and *Butz v. Economou*<sup>233</sup> carried the rule into the modern era. The precise scope of immunity, however, is unimportant here. It is only important for the present purposes to point out that the immunity of federal officers, whatever its scope, was controlled by the federal government, either through statute or judicial decision. There is no indication in the case law that the federal government was without authority to craft

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226. 44 U.S. (How.) 87 (1845).

227. *Id.* at 97–98.

228. *Id.* at 98–99.

229. See Woolhandler, *supra* note 145, at 429 (“*Decatur* and *Kendall* [] showed that error of law had ceased to be the prevailing standard for high level officials’ amenability to both coercive relief and damages.”).

230. 161 U.S. 483 (1896).

231. *Id.* at 499 (holding that when an agency head “acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals”).

232. 177 F.2d 579, 580–81 (2d Cir. 1949) (Hand, J.,) (finding officers immune, despite their acting with “full[] aware[ness] that they had no legal warrant,” because the officers acted with the “scope of [their] powers”).

233. 438 U.S. 478 (1978) (granting federal officers qualified immunity for actions taken within the scope of their employment).

immunity doctrine, whether it be crafted narrowly (as it was soon after the Founding) or more broadly (as it was in later decades).

Against this backdrop, it cannot be maintained that nineteenth-century officer suits prove state power to hold federal officers liable for unconstitutional wrongs. To the extent federal officers were held liable under state law, this liability was imposed at the pleasure of the federal government. If the federal government withheld such permission through statute or case law, states could not have held federal officers liable for federal constitutional violations.

#### b. General Law in Officer Actions: Merits

Other officer actions display general law outside the immunity context. In these suits, the federal courts appear to be taking control of the *merits* of the applicable law and deciding the cases without regard for the content of state law.<sup>234</sup> Take, for instance, *Elliot v. Swartwout*.<sup>235</sup> There, a taxpayer in New York sued a federal tax collector in assumpsit for taxes collected in excess of the lawful rate. The collector defended himself by arguing that, even if the taxes exceeded the lawful rate, the plaintiff had paid the taxes voluntarily and without objection.<sup>236</sup> If suits against federal officers were controlled by state law, one would expect the Court to measure this defense against New York state law. The Court, however, did anything but this. Instead, it searched the opinions of English courts, locating a “doctrine” that was “peculiarly applicable” to the case.<sup>237</sup> The doctrine held that taxpayers may not sue a tax collector for “voluntary payments made by mistake.”<sup>238</sup> English law did not merely dominate the discussion; it was the only law cited.<sup>239</sup> State law was nowhere to be found. This suggests that at least some of the officer actions relied upon by Professor Amar were *not* controlled by state law but rather by a species of general common law.

*Elliot* is by no means an outlier. In *Bend v. Hoyt*,<sup>240</sup> a case involving similar facts, Justice Story, again, turned to English law to resolve the issue.<sup>241</sup> After adducing from English law the principle that one who pays a tax without objection may not thereafter challenge the tax as unlawful, Story concluded: “[w]e think the principle a sound one, and should not hesitate to adopt it, even if there were no

234. I recognize that “merits” is a term of many meanings and that questions of immunity could just as easily be cataloged as merits questions. Yet the cases in this subsection make no mention of immunity, and, for ease of organization, I present them separately.

235. 35 U.S. (10 Pet.) 137 (1836).

236. *Id.* at 153.

237. *Id.* at 154–55 (explaining, for example, that Lord Eldon “approves the doctrine”).

238. *Id.* at 155–56.

239. *See, e.g., id.* at 154–55 (citing *Morgan v. Palmer*, (1824) 107 Eng. Rep. 554 (K.B.); *Brisbane v. Dacres*, (1813) 128 Eng. Rep. 641, 645–46 (C.P.); *Bromley v. Holland*, (1802) 32 Eng. Rep. 2, 10 (Ch.); *Buller v. Harrison*, (1777) 98 Eng. Rep. 1243, 1244–45 (K.B.); *Townson v. Wilson*, (1808) 170 Eng. Rep. 997, 997–98 (K.B.); *Sadler v. Evans*, (1766) 98 Eng. Rep. 34, 35–36 (K.B.)).

240. 38 U.S. (13 Pet.) 263 (1839).

241. *See id.*

authority to support it.”<sup>242</sup> These are not the words of a Court that sees state law as authoritative; the Court quite clearly believes it has the power to adopt a particular rule of decision regardless of the “authority to support it.”

What these cases illustrate is that the liability of federal officers was, in some cases at least, controlled completely by a body of law discovered and crafted by the federal courts. Although they appeared to involve routine causes of action like trespass or assumpsit, the dispositions of the cases did not turn on the ordinary common law rules connected with a particular state. Instead, these cases were resolved according to an undefined, but quite real, law of officer liability.

Admittedly, *Elliot* and *Bend* are just two examples. But the analysis employed in the cases is entirely consistent with the views of other scholars who have studied officer actions. These actions were not “merely a reflection of the private law” affecting debts but rather evidence of a “law of government remedies” created and controlled by the U.S. Supreme Court.<sup>243</sup> When these observations are combined with the robust evidence of federal immunity law explained in the previous section, there can be little doubt that federal law played a significant role in the liability of federal officers and that state law, if it was even involved, was subject to the superior force of this federal law.

## 2. Habeas Corpus Actions

In addition to citing common law officer actions as evidence of state legal power at the Founding, Professor Amar also cites state power to issue writs of habeas corpus against federal officers. “The ability of states to vindicate constitutional values through injunctive relief,” Amar states, “was perhaps nowhere more dramatic than in early state habeas corpus cases: State habeas offered a way for those imprisoned by federal officers in violation of their federal constitutional rights to win their freedom.”<sup>244</sup>

In making this claim, Professor Amar is forced to acknowledge the nineteenth-century cases of *Ableman v. Booth*<sup>245</sup> and *Tarble’s Case*,<sup>246</sup> both of which hold that state courts may not issue state law writs of habeas corpus against federal officers. He admits that these cases refute his claims about state power, but argues that “the Court’s analysis in these cases was shaky, and its language quite sloppy.”<sup>247</sup> Professor Amar is far from alone in his criticism of these cases.<sup>248</sup> The

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242. *Id.* at 270.

243. Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919, 922 n.18 (2000); *see also* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2554 (1998) (“There is no doubt that many nineteenth century suits against officers relied on forms of action (for example, trespass) developed and commonly found in suits against private defendants. However, within the forms of action recognized by the general law in the nineteenth century were distinctive kinds of proceedings that were largely if not exclusively directed against official action so as to keep government within the bounds of law.”).

244. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1509.

245. 62 U.S. (21 How.) 506 (1859).

246. 80 U.S. (13 Wall.) 397 (1871).

247. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1509.

central criticism seems to be that the cases ignore the import of the Madisonian Compromise. If Congress is free not to create lower federal courts (a principle at the heart of the Compromise), then the only way habeas relief could be obtained against the federal government would be through *state* courts.<sup>249</sup> But if state courts lack the power to issue habeas relief, and some type of habeas relief must arguably be available simply as a matter of due process,<sup>250</sup> troubling questions of constitutional law would be presented.

Just because *Ableman* and *Tarble's Case* cannot be reconciled with the Madisonian Compromise, however, does not mean that the Constitution guarantees to states the power to issue writs against federal officers. There is nothing to stop Congress from creating federal courts and endowing them with exclusive jurisdiction over matters of federal law.<sup>251</sup> Congress has done this with issues of intellectual property and securities law, for example, and it is certainly free to do the same with habeas actions against federal officers.<sup>252</sup> Congress's power to do so was clear at the Founding,<sup>253</sup> and many commentators today believe that *Ableman*

248. See, e.g., LARRY W. YACKLE, *FEDERAL COURTS* 135–36 (2d ed. 2003) (“[The *Tarble* Court] neglected the conventional understanding that Congress might never have created the lower federal courts and might have relied, instead, on state courts to police the system, subject to appellate review by the Supreme Court.”); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 101–02 (claiming that, if *Tarble's Case* is based on an interpretation of the Constitution, it “runs headlong into the traditional understanding that Congress was under no obligation to create lower federal courts”); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1205 (1988) (“*Tarble's Case*, if read literally as founded on propositions of constitutional law, strikes directly at one of the foundation stones of the Federalist model: the proposition that state courts enjoy constitutional parity with federal courts.”); Waxman & Morrison, *supra* note 16, at 2225–26 (explaining that, if *Tarble's Case* holds “that the Constitution prohibits the States from subjecting federal officials to habeas corpus jurisdiction, . . . [then the case] seems inconsistent with the Madisonian Compromise during the framing of the Constitution, which produced the Article III provision that authorizes, but does not require, Congress to establish lower federal courts”).

249. Recent scholarship suggests that habeas relief might be available from individual justices as an original, rather than appellate, matter. As a practical matter, however, the justices' capacity to superintend unlawful detentions on a nationwide basis is “necessarily limited.” See Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 539 (2010).

250. See Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361 (2010) (arguing that the Due Process Clause restricts Congress's authority to suspend habeas corpus).

251. See *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding that Congress can vest the federal courts with exclusive jurisdiction in any matter it deems appropriate).

252. See 15 U.S.C. § 78aa (2000) (securities actions); 28 U.S.C. § 1338(a) (2006) (intellectual property).

253. In *Federalist* 82, Alexander Hamilton explained that “the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.” THE FEDERALIST NO. 82, at 438 (Alexander Hamilton) (J.R. Pole ed., 2005) (emphasis added). Similarly, when the first Congress enacted the statute that created the lower federal courts, it explicitly endowed them with exclusive jurisdiction over several different subjects. See Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

and *Tarble's Case* can be justified *only if* the federal habeas statute enacted in 1789 is read to endow federal courts with exclusive habeas jurisdiction over federal officials.<sup>254</sup> Whether that reading of the statute is in fact correct is unimportant here,<sup>255</sup> for there is no dissent on the view that Congress, if it desired, *could have* divested state courts of their habeas jurisdiction over federal officers. Thus, state courts at the Founding did not possess a unilateral power to “vindicate constitutional values through injunctive relief.”<sup>256</sup> Their power to vindicate federal rights against federal officers was subject to revision by Congress.

Professor Amar agrees with much of this, but certainly not all of it. He agrees that *Ableman* and *Tarble's Case* “can be justified only if” they are based on Congress’s power to vest federal courts with exclusive jurisdiction.<sup>257</sup> Exclusive jurisdiction, according to Amar, will not displace the state habeas remedies against federal officers, however, for “federal courts would be obliged to enforce the vertically-pendent state law habeas remedy.”<sup>258</sup> This assumes, however, that Congress lacks the power to preempt a state cause of action against a federal officer with a federal cause of action—something that, as discussed in Part II.D, is untrue. As noted above, were Congress to bar state remedies but fail to provide some other avenue for the vindication of constitutional rights, a constitutional problem might well arise.<sup>259</sup> But there is no rule of constitutional law that prohibits Congress from ever touching state remedies against federal officers.

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254. See, e.g., Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1074 n.31 (1998) (stating that, while the Court in *Tarble's Case* appeared to perceive a constitutional basis for its holding, the holding “can be rationalized more plausibly on the ground that federal statutes” implicitly created an exclusive federal remedy for federal prisoners); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1174–75 n.114 (1984) (“*Tarble's Case* should be read to rest upon an implied congressional intent that habeas actions to release enlisted soldiers from the military be restricted to federal court.”); Redish & Woods, *supra* note 151, at 101 (stating that *Tarble's Case* establishes a presumption against state-court jurisdiction in habeas cases involving federal prisoners—a presumption that “can be overcome only by a carefully considered, conscious decision by Congress”); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 400 (2006) (“[T]he most defensible reading of *Tarble's Case* is that the Court interpreted Congress's provision for federal court habeas jurisdiction with respect to federal petitioners as impliedly exclusive of state courts.”); Waxman & Morrison, *supra* note 16, at 2227 (arguing that *Tarble's Case* is best understood as resting upon a determination that “the pertinent statutes reflected an implicit congressional determination that state jurisdiction was not appropriate”).

255. Professor Todd Pettys has argued that, although Congress certainly had the authority to divest state courts of habeas jurisdiction in the Judiciary Act of 1789, Congress did not, in fact, do so. See Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 297–307 (2007).

256. Amar, *Sovereignty and Federalism*, *supra* note 15, at 1509.

257. *Id.* at 1510.

258. *Id.*

259. See *supra* notes 131–145 and accompanying text.

## CONCLUSION

The converse-1983 action is not a promising way for the states to check constitutional abuses by federal officers. The force of the action would be severely limited by the doctrine of Supremacy Clause immunity, and the very existence of the action would be contingent upon the creation of federal common law, the *Bivens* doctrine, and congressional acquiescence with the cause of action. Moreover, these doctrines are not misadventures of a modern Court infatuated with federal supremacy. Professor Amar's arguments that the Founding generation not only believed that states had legal power over the federal government, but practiced that belief as well, are unavailing. The Federalist's discussions of state power relied on by Amar pertain only to state political power, not state legal power. And the state causes of action he cites were either subject to general law controlled by the federal courts or subject to congressional override through changes in jurisdiction or substantive law.

In sum, states dissatisfied with federal officers who violate the Constitution would be unwise to rely on a converse-1983 action. Although the action might not be immediately abrogated, it would always be subject to federal disapproval. This is hardly a reliable way to check federal constitutional abuses.