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Converse § 1983 Suits in Which States Police Federal Agents

AN IDEA WHOSE TIME HAS ARRIVED*

Vikram David Amar[†]

I. INTRODUCTION: THE RANGE OF LOCAL OPPOSITION TO FEDERAL ACTIONS

A key question for the country today is: What role, if any, can state and local governments play in shaping the way America prosecutes its war on terror and its wars against those countries – like Iraq – that are alleged to be breeding grounds for terrorists? This fundamental question lies at the core of a movement that has swept across America in recent months.

State and local governmental opposition to the federal government's decisions in the war on international terror has taken many forms. Often, state and local entities simply disagree with the policy advisability of the international course pursued by the federal government, and want to register their dissent. For example, last spring, the Los Angeles City Council voted to "oppose unilateral war in Iraq." Although Los Angeles was the biggest city to take such a stance, it was far from alone. Close to one hundred other American cities and towns, including San Francisco, Chicago, Detroit, and Philadelphia, had already passed similar resolutions condemning any U.S.

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invasion unsupported by the United Nations and most large allies.¹

In other instances, local governments have questioned the wisdom of domestic legislative enactments and executive rules. For example, a huge number of local governments have denounced the U.S.A. PATRIOT Act – the law Congress passed in the wake of 9-11 to enhance anti-terrorism law enforcement. Towns like Oakland, Berkeley, and Boulder, Colorado, in addition to the larger cities of San Francisco and Detroit, have approved such measures.² Most of these resolutions harshly criticize the policies of Congress and the Bush Administration.³

But local entities seem concerned with *more* than just whether federal decisions are wise and effective; many cities and states have registered concerns that federal decisions have violated or will inevitably violate the constitutionally-guaranteed liberties of Americans and those non-Americans who may be affected by the exercise of American power.⁴ It is for this reason that many local proposals go so far as to call upon local agencies to *decline to provide any aid* to federal authorities in investigations and enforcement actions that might jeopardize civil liberties.⁵ All of these measures have had to overcome, among other things, the deep-seated notion that state and local lawmakers have no business meddling in national and international affairs. On this view, locals should stick to the truly day-to-day narrow issues on which they campaigned and were put in office.

On the surface, at least, this intuition – that state and local government should stick to state and regional affairs – appears to have its roots in our Constitution itself. As commentators have observed, “it may [at first] seem incongruous that states [and their subdivisions] would enjoy any role in foreign affairs. The Constitution, after all, was designed to ensure that the federal government had sufficient

¹ See Vikram David Amar, *Is It Appropriate, Under the Constitution, for State and Local Governments to Weigh in on the War on Terror and a Possible War with Iraq?*, FIND LAW’S WRIT, Mar. 7, 2003, at <http://writ.news.findlaw.com/amar/20030307.html>.

² See *id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* Perhaps the best-known illustration of a local community’s reluctance, at least until its concerns were addressed, to assist the federal government involved the city of Detroit, Michigan. See, e.g., Fox Butterfield, *A Nation Challenged: The Interviews; A Police Force rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7; Jodi Wilgoren, *University of Michigan Won’t Cooperate in Federal Canvass*, N.Y. TIMES, Dec. 1, 2001, at B6.

authority to check state foreign relations activities.”⁶ That is why many people welcome Supreme Court rulings that “help put an end to state and local efforts to make foreign policy.”⁷

It is true that federal law – both the Constitution itself and laws Congress enacts under it – does impose some limits on what states can do in the international realm, even as globalization has drawn the local and international spheres much closer together. But, federal law does not, and cannot, cut state and local government out of the picture altogether. States certainly have the power – and perhaps the duty – to speak out on international matters, and to regulate their own citizenries in ways the federal government may disfavor, so long as state regulation is not preempted by valid federal laws. The Constitution itself sometimes shields state authority from federal interference. And, as we shall see, 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 not on states’ rights, but rather on individuals’ rights. The converse § 1983 device I discuss at length in the second half of this essay provides one useful example of how states can act offensively to counter federal abuses.

II. DEFENSIVE FEDERALISM – THE DOCTRINES AS THEY EXIST TODAY

A. *Preemption*

Before we turn to proactive steps states can take against federal overreaching, let us first consider some doctrines that are supposed to – but do not always – insulate state governments from federal interference. First let us look briefly at preemption, a topic Professor Erwin Chemerinsky takes up in earnest in this issue.⁸ An example of federal preemption in this area – and perhaps a good illustration of interpreting the powers of states more narrowly than is appropriate – can be found in an important Supreme Court

⁶ See Jack Goldsmith, *State Foreign Policies After the Burma Case*, FIND LAW’S WRIT, June 26, 2000, at http://writ.news.findlaw.com/commentary/20000626_goldsmith.html (last visited July 8, 2004).

⁷ *Id.*

⁸ Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004).

case from a few years back, *Crosby v. National Foreign Trade Council*.⁹ In that case, the Court invalidated a Massachusetts statute that had directed state agencies not to purchase goods and services from any companies doing business in Burma, a nation with a notoriously bad human rights record.

In support of its result, the Supreme Court reasoned that Congress's own sanctions imposed on Burma through a federal statute represented Congress's considered choice about how much, and in what ways, Burma should be induced to change its evil ways. The federal government, the Court pointed out, had acted affirmatively in this area by imposing particular sanctions. And, the Court believed, commercial activity by Massachusetts might have interfered with the commercial system of incentives Congress sought to establish.¹⁰

I think the Court may well have decided *Crosby* wrongly. It ought to be clear that the people of a state, acting collectively through their state legislature, can speak their consciences, even as to matters of foreign affairs. One can plausibly argue that declining to spend money is simply one form of collective local expression. But even assuming that Congress does have the power to regulate the choices that a state makes when it acts – as Massachusetts did there – in its capacity as a conscientious consumer (as opposed to its capacity as a sovereign regulator of private consumers), I think the evidence is fairly thin that the Massachusetts policy frustrated congressional will.

After all, the federal law implemented by President Clinton in 1997 was itself anti-Burma – sending a message that America wanted the human rights violations to end.¹¹ Because the Massachusetts policy reinforced rather than undermined this overall American goal, I do not see the clear conflict that the Court did. In the preemption realm states typically have the power to go further than federal law, but in the same direction; for instance, their antidiscrimination laws can be more protective than federal ones.¹² Had Massachusetts

⁹ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

¹⁰ *Id.* at 373-87.

¹¹ See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, 104 Pub. L. No. 208, § 570, 110 Stat. 3009-121, 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act of 1997, 104 Pub. L. No. 208, § 101(c), 110 Stat. 3009).

¹² California's Fair Employment and Housing Act in some respects goes farther than does the federal Title VII or Title VIII, dealing, respectively, with employment and housing. Compare Fair Employment and Housing Act, CAL. GOV'T.

in its purchasing policies *avored* companies that did business in Burma, a finding of conflict would have been more plausible. But since Congress did not provide any clear statement in its law that the judiciary should infer preemption, I think respect for federalism should have counseled the Court to come out the other way.

Additionally, it bears noting that the Massachusetts law existed when Congress acted (and indeed might have helped put the issue on Congress's agenda).¹³ But Congress did not say anything negative about the Massachusetts law when it enacted the federal measures; no member of Congress voiced opposition to what Massachusetts had done. Moreover, the federal policy in effect when Massachusetts acted – a policy that had been formed during the 1980s when cities like Berkeley wanted to divest of holdings in companies operating in South Africa – clearly allowed states and cities to vote with their dollars. Indeed, President Clinton and Secretary of State Albright had publicly lauded such local policies in the years before the Court decided *Crosby*. It was against this backdrop that the U.S. Solicitor General's office under Seth Waxman seemed to change the rules without clear guidance from Congress and against the settled expectations of the states. Given these circumstances, the Court's invalidation of the Massachusetts law seems somewhat dubious.

Some of the same criticisms apply to the Court's decision to strike down, by a five-to-four vote, a California law that regulated insurance companies doing business within the state in an attempt to force them to disclose information about the industry's treatment of Holocaust victims over fifty years ago.¹⁴ The Court held that California's attempt conflicted with the policy the President had been pursuing, which was less coercive. Reading presidential actions broadly, the Court reasoned that because the Constitution gives to the federal government, and in particular the President, the power (which

CODE §§ 12900-12940 (West 1992 & Supp. 2004), with Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII"), and Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 ("Title VIII").

¹³ See *Crosby*, 530 U.S. at 367.

¹⁴ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The *Garamendi* case may be less susceptible to my criticism here than *Crosby* because in *Garamendi*, California was not deciding how to spend its own money, but rather deciding how to regulate private insurance companies. Constitutional preemption doctrine has always given states more leeway when they are deciding how their monies should be spent, as, for example, in the so-called "market participant exception" to dormant Commerce Clause principles.

he had exercised) to negotiate with foreign countries and foreign companies, California's law could not stand.¹⁵

Regardless of whether these two preemption decisions were right, they do not resolve the issue of the states and localities expressing their views on Iraq and the war on terrorism. That is because in these rulings the Court stopped short of holding that state regulation of foreign affairs is invalid *even in the absence of some affirmative preemptive action by Congress or the President*. This is not to say, of course, that the Constitution itself would never impose limits on state and local attempts to affect international affairs. For example, suppose New Jersey enacted a statute saying that "any company that makes arms that the U.S. government may use in any upcoming war cannot incorporate or sell to any customers in our state." Such a law would clearly burden interstate and international commerce, not to mention Congress's ability to raise and support troops, and would thus be preempted by the Constitution itself. The Constitution gives Congress the authority to regulate such commerce and the military,¹⁶ and in doing so, displaces much state legislation on the topic.

B. *Anti-Commandeering*

What about those local resolutions recently passed, like San Francisco's, that direct local agencies not to assist the federal government? Do states and localities have latitude to opt out of cooperation with federal agencies? I think they do – at least to some extent.

As Professor Ann Althouse discusses in much more detail,¹⁷ the Supreme Court, in a series of cases from the mid-1990s, has made clear that state and local governments cannot be required to implement a federal law or program on behalf of the national government if they do not want to. For example, the Court ruled that Congress could not simply direct local sheriffs to conduct the pre-purchase background checks called for in the Brady Act gun control law.¹⁸

¹⁵ *Id.* at 413-28.

¹⁶ See U.S. CONST. art. I, § 8.

¹⁷ Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004).

¹⁸ *Printz v. United States*, 521 U.S. 898 (1997).

If Congress wants such background checks performed, the Court opined, it can certainly employ federal personnel to conduct them, or it can induce states to cooperate by threatening to preempt states from the field or providing them generous federal funding conditioned upon their help. But the federal government cannot simply *tell* unwilling state personnel to enforce federal law. The idea that the federal government cannot “commandeer” or “conscript” states to do federal bidding, the Court said, is central to the structure of our system of federalism.¹⁹

How that plays out in the context of laws like the U.S.A. PATRIOT Act and related executive decisions could get interesting. I think the federal government cannot require (although it can effectively bribe) state and local authorities to help surveil persons suspected of violating federal immigration and other laws. But other questions remain: Can Congress require a locality to provide to the federal government information already in the locality’s control that concerns people within its jurisdiction? Can it require local agencies to compile and gather information that might not yet exist? These may be another matter.

C. *The Bigger Federalism Picture*

Much of the ambiguity described in the preceding section stems from a very basic but unresolved question: What is the vision of federalism that leads us to prevent the federal government from commandeering the states really all about? *Why*, exactly, is commandeering bad? Justices O’Connor and Scalia – the authors of the major opinions in the area – have talked about “accountability” problems that arise when the federal government coerces the states.²⁰ Suppose, for instance, that federal legislation forces states to implement a federal policy of tracking down and interrogating aliens from Middle Eastern countries. Suppose further that the public does not like such policies. The accountability concern arises because the populace may blame the state implementers, rather than the federal policy makers who, after all, are really the ones who should take the heat.

¹⁹ *Id.* at 919-22.

²⁰ See *Printz*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

I have never entirely agreed with this reasoning. In the end, I think American federalism – with its marbled layers of government, from fire districts to water boards, to cities, to counties, to states, to federal agencies – is not really designed to make it easy for people to figure who is to blame for bad policy decisions. So being a stickler on the accountability issue in this one instance, when accountability is largely ignored in the constitutional framework, seems to me somewhat odd.

For example, the Supreme Court allows Congress easily to condition federal funds on state assistance in the enforcement of federal programs.²¹ When states administer such federal programs, are people really aware that the only reason states are doing what they are doing may be the desire or need for federal funding for other projects? I doubt it. If we really wanted to facilitate clear accountability to voters, we probably would not have as many overlapping levels of government as we do. Indeed, we might not have a federal system, in which federal and state activities and jurisdictions inevitably coincide, in the first place.

Nevertheless, I think federal commandeering – and overly broad preemption, for that matter – may be bad for other reasons, ones that have little to do with accountability. For instance, in the worst case, federal commandeering of state legislatures may allow the federal government to highjack state governmental agendas. If the state lawmaking bodies have to spend *all* their time administering federal programs (on the theory that if Congress can commandeer a little, presumably it could commandeer a lot), theoretically states may never have the time or opportunity to define their own messages and legislative identities. That is a problem because the value of federalism lies, to my mind, largely in making sure that there are multiple legislative philosophies and identities out there to help the American people figure out what is best.²²

In this sense, then, our federal system sets up a healthy competition – between one state and another, and between states and the federal government – to win over American hearts and minds on what is the best way to administer democratic self-governance. It hardly seems like a fair match if one participant in a competition (the federal government) can

²¹ See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (allowing Congress to deny funding to states that had a minimum drinking age below twenty-one).

²² See generally Todd Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

consume all the resources of its competitors (the states). The vision of federalism I suggest values states not just for the particular policies they may adopt, but also more generally for the alternative vision of good government that they may define and advance. In a real sense, a state government – through its legislative decisions and agenda – expresses a philosophical message that is different from the messages that other states and the federal government may express.²³

Fine and good, some may say – but not when it comes to foreign affairs, which is precisely the arena where we cannot tolerate multiple messages. In that arena, the argument would run, we need to “speak in one voice.” I do not think that is true. As others have pointed out,

[t]aken literally, [the one voice argument] offends the very basis of our system of government. Americans emphatically do not speak with one voice. Individual Americans are free to [speak out on foreign affairs]. States, too, must be free to speak out. This vital point was established early in American history, when the Virginia and Kentucky legislatures famously spoke out [in words written by James Madison and Thomas Jefferson, respectively] in 1798 against federal policies penalizing France.²⁴

The Alien and Sedition Acts of the late eighteenth century to which the Virginia and Kentucky Resolutions were responses are prime examples in which state and local government served as the point of organization for those critical of federal policies. But these are far from the only instances. Before the Civil War, abolitionist forces used local governmental bodies to voice their criticisms of southern states, as well as of federal laws that helped support the institution of slavery.

In some ways, state and local governments are natural places for dissidents to organize and speak. Individual protestors, acting alone, often face societal pressure and ostracism. For precisely this reason, the Constitution goes out of its way to create and protect institutions where individuals who may not be able to act by themselves can come together with others to associate, organize and have their voices be heard. These “mediating” institutions – so called because they stand between the federal government and the People – include

²³ See *id.*

²⁴ See Akhil Reed Amar, *A State's Right, A Government's Wrong*, WASH. POST, Mar. 19, 2000, at B1.

juries, churches, the militia, civic associations, and perhaps most importantly, state and local governments.²⁵

I thus believe states can speak out, refuse to cooperate, and regulate private people unless preempted by a valid and clear federal law. But what about the local fears that the federal government will, in executing its policies, violate the constitutional rights of the citizens of the several states? Besides declining to participate in such injustice and railing and lobbying against it, is there anything states can do? I think there is. In particular, states can affirmatively and offensively develop legal vehicles to redress and deter such transgressions. I shall take up that idea next.

III. FROM HERE, WHERE? CONVERSE § 1983 SUITS

The specific legal vehicle that I use is one my older brother Akhil first floated fifteen years ago – the notion of “converse § 1983” laws.²⁶ I was a law student at Yale when my brother first ran the idea by me in a draft of an article. I remember vividly spending countless hours discussing with him the possibilities the notion raised. I was excited then and fifteen years later the concept intrigues me even more.

The term “converse-1983” describes a proposed type of state law designed to provide a remedy or cause of action for violations of federal constitutional rights committed by federal officials:

Whereas 42 U.S.C. § 1983 provides a *federal* law remedy/cause of action for federal constitutional violations perpetrated by *state* officials, a converse-1983 law would provide a *state* law remedy/cause of action for federal constitutional violations perpetrated by *federal* officials. Such a converse-1983 law would both invoke and invert the logic and language of § 1983, and might read something like this:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the *United States*, subjects or causes to be subjected, any citizen of *this state* or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution, shall be

²⁵ See generally Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

²⁶ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512-19 (1987).

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁷

Practically speaking, a new state converse-1983 norm could emerge in any of three ways. First, it could become part of the state constitution via initiative, referendum, convention or special legislative action. Second, a state legislature by a simple majority could enact converse-1983 language as an ordinary state statute. Third, state judges have power to fashion legal norms – such as converse-1983 – as part of the common law process. Such common law norms, like the norm against trespass developed by state courts and invoked in the nineteenth century against federal agents who violated privacy rights,²⁸ can be, and for over two hundred years have been, invoked against federal officials. In essence, the converse-1983 idea builds upon the tradition of state courts policing Fourth Amendment privacy violations by federal officials using state tort law until the 1970s,²⁹ and extends that tradition to cover federal violations of all federal constitutional rights, not just those under the Fourth Amendment.

Valid congressional removal statutes might allow many federal officials, if they so choose, to remove damage actions from state court to a lower federal court. Thus, as a practical matter, a very high percentage of converse-1983 causes of action may end up being tried in federal district courts.³⁰ But whether pursued in state or federal court, a converse-1983 action, unlike a *Bivens*³¹ claim created by the federal courts, cannot be abolished by the federal courts if their attitude about inferring causes of action changes. 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.³² And as I will explain below, Congress has no power to require courts to afford qualified immunity if states have decided not to provide it.

²⁷ Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 160 (1993) (emphasis in original).

²⁸ See *id.* at 161-63; see also Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994).

²⁹ See Amar, *supra* note 27, at 161-62.

³⁰ *Id.* at 165.

³¹ See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

³² See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The time has never been as ripe as it is today for one or more states to enact such a converse-1983 device. First, as already noted, states and localities are concerned about federal lawlessness as never before in recent memory. These changes in the political environment make experimentation very timely and potentially politically feasible. Second, the Supreme Court over the past decade and a half has confirmed (or established, depending upon how one views things) the essential soundness of the intellectual foundations upon which the converse-1983 idea rests. Third, academics are beginning to see the light as well – but they (apparently) still need a bit more guidance. The following subsections address the latter two points.

A. *Friendly Legal Developments*

1. The Importance of the Theory of Vertical Competition

As important as changes in the political environment described above are, changes in the legal environment – particularly the evolution of the Supreme Court's attitudes – may be even more helpful. In short, the doctrinal habitat created by the high Court seems as hospitable today as it has in generations to the development and survival of the converse-1983 animal.

To begin with, let us look at the larger landscape that has emerged over the past ten to fifteen years. The point to be made here is not simply that the Court today takes seriously the concept of federalism and the idea that state institutions and state law deserve to be treated with respect – although surely it does that. Instead, the key notion is that *the particular results* the Court has reached in the “new federalism” arena are completely compatible with, indeed perhaps best explained by, the theory of vertical competition I adverted to earlier – Madison's notion that a “double security arises to the rights of the people . . . [when] different governments will control each other, at the same time that each is controlled by itself.”³³ And it is this theory of vertical competition that gives rise to the converse-1983 vision.

Consider, in this regard, the two most important recent cases construing Congress's powers under the Commerce

³³ THE FEDERALIST NO. 51 (James Madison).

Clause: *United States v. Lopez*³⁴ and *United States v. Morrison*.³⁵ In each case, the Court invalidated a congressional enactment – in *Lopez* the Gun Free Schools Zone Act and in *Morrison* the Violence Against Women Act – on the key ground that the activity regulated by the statute was not “economic” or “commercial” in nature at all.

Critics, both on and off the Court, have questioned this line between economic activity and non-economic activity as artificial, if not completely arbitrary. For instance, in his dissent in *Morrison*, Justice Breyer asks: “[W]hy should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause*? If chemical emanations through indirect environmental change cause identical, severe, commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?”³⁶ Justice Souter echoes this critique: “What difference should it make whether the causes of effects are themselves commercial? . . . The [majority’s] answer is that it makes a difference to federalism, and the legitimacy of the Court’s new judicially derived federalism is the crux of our disagreement.”³⁷

There is clearly something to this criticism. The Court never does explain *why* the economic nature of the activity matters, only that it *does* matter. In response to Justice Souter’s implicit charge of activism (by his use of the term “judicially derived”), the majority could, I suppose, point to the text of the Constitution. The language of Article I, after all, does give Congress power to regulate not “activities” or “things” generically, but rather “commerce” itself.³⁸ As a matter of text, then, “commercial” things that affect commerce may be more naturally regulable than non-commercial things that affect commerce to an equal degree.

But I think the Court’s *real* response to Breyer and Souter is not textual but rather practical – the majority clings to an arbitrary line because *some* line is needed. If the dissent’s view were correct, Congress could *always* point to the Commerce Clause as a basis for its actions, and the notion of limited, enumerated, federal powers would be gutted entirely.

³⁴ *United States v. Lopez*, 514 U.S. 549 (1995).

³⁵ *United States v. Morrison*, 529 U.S. 598 (2000).

³⁶ *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting) (emphasis in original).

³⁷ *Id.* at 643 n.13 (Souter, J., dissenting).

³⁸ U.S. CONST., art. I, § 8, cl. 3.

That raises the crucial, if underexplored, questions: Why do we need a line? And what would be so bad about gutting the notion of limited, enumerated, federal powers? Among the possible answers, I think the most attractive and the most plausible is the one that focuses on vertical competition, and the resulting requirement that states have available to them some space in which to operate. If there were no line circumscribing federal power, then the federal government could preempt everything a state may want to do to create its own competitive identity. There would be, in other words, no guarantee of any room for states to stake out a competing vision, an alternative agenda. Competition is meaningless if one competitor can, theoretically, prevent the other from ever leaving the locker room to get out onto the field. This is why, I think, Justice Kennedy, who provides the crucial fifth vote in *Lopez*, writes an important, if cryptic, explanation in his concurring opinion where he observes that the two sovereigns "hold each other in check by competing for the affections of the people."³⁹

The other most prominent line of recent federalism cases is also best understood to be about facilitating vertically competitive agendas. I am speaking here of the so-called anti-commandeering cases mentioned earlier. In *New York v. United States*,⁴⁰ and then again in *Printz v. United States*,⁴¹ the Court held that Congress could not directly commandeer state legislatures or state executive officials to administer federal policies and programs. But in reaching these results, the Court acknowledged that Congress could preempt state action in these areas and induce states to cooperate by threatening to preempt all state regulation in the field. When I think and teach about these cases, the difficult questions have always come down to the distinction between preemption and commandeering. If Congress can keep states out of a field, why can't Congress make them toil in it?

The Court, as noted above, tried to explain the anti-commandeering rule in accountability terms. But wouldn't field preemption (or bribing the states through the spending power, for that matter) create even more accountability problems? If states are not dealing with the nuclear waste problem (at issue in *New York*) because Congress has prevented them from

³⁹ *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

⁴⁰ 505 U.S. 144 (1992).

⁴¹ 521 U.S. 898 (1997).

entering the area, or because Congress has conditioned needed federal funds on a promise to stay out, and if people are disappointed by the lack of regulation, how many voters would know to blame Congress and not the locals? To be blunt, accountability is, I think, a very weak rationale for justifying the *New York v. United States* rule.

But vertical competition is a fair explanation. If the federal government can commandeer a little, then it can commandeer a lot. And if the state lawmaking bodies have to spend all their resources administering federal programs, they never have the time or opportunity to define their own message and legislative identity. Unlike preemption, which we know – after *Lopez* and *Morrison* – has theoretical limits, commandeering, if permitted, is a federal power that has no logical limits or stopping points. And again, if one competitor can prevent the other from ever beginning its warm-ups, let alone its routine, there is not much real competition.

2. More Specific Things the Justices Have Said Bearing on Converse-1983 Actions

Let us move beyond the general backdrop of the recent cases to more specific things the Justices have said and done. What one sees here is a renewed receptivity to a crucial premise of the converse-1983 device: *the notion that state laws regulating federal activities are not preempted when the federal activities themselves are beyond the bounds of the Constitution*. This is the central doctrinal point my brother made when discussing the most obvious criticism of the converse-1983 device – that it would run afoul of the Supremacy Clause as understood in the seminal case of *McCulloch v. Maryland*.⁴²

In *McCulloch*, Maryland believed that the Second Federal Bank was unconstitutional; that Congress had no enumerated power to create such a bank; and that the bank's federal charter was thus unlawful. Maryland therefore attempted to impose upon the bank a tax, and when the bank officials refused to pay, Maryland brought suit in its own state courts against a bank official, asking for a fine against him for his failure to comply with the Maryland law. On appeal, the U.S. Supreme Court reversed. As Akhil observed,

⁴² 17 U.S. (4 Wheat.) 316 (1819). See also Amar, *supra* note 26, at 1513-14.

[T]he Supreme Court nowhere denied the legitimacy of the jurisdiction exercised by the state court below in an action for damages, of sorts, against a federal official alleged to be part of an unconstitutional federal operation. Note also how the Supreme Court structured its analysis in *McCulloch*. The first question, said the Court, was whether the bank was in fact constitutional. Only after assuring itself that the bank was indeed consistent with the federal Constitution – “necessary and proper” – did the Court address what it labeled 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.

Of course, if a state converse-1983 law were to provide for liability far in excess of making a plaintiff whole, and far in excess of the quantum of damages for other state causes of action, this punitive converse-1983 law might offend the spirit of *McCulloch*. Imagine, for example, a converse-1983 law that provided for one million dollars of presumed damages for any Fourth Amendment violation by federal officials, however technical the violation and however minimal the actual harm to Fourth Amendment values of property, personhood, and privacy. This presumed damage rule could well be seen as a tax masquerading as a remedy, and thus violative of *McCulloch*’s spirit.⁴³

This centrality of the first part of *McCulloch* – that the bank is constitutional – in reaching the result in the second part – that the tax is unconstitutional – has itself been realized and commented upon by members of the Court over the last decade. Most directly, in *U.S. Term Limits, Inc. v. Thornton*,⁴⁴ Justice Thomas, in arguing in favor of a state’s ability to regulate federal officials – in that case the power of a state to prescribe qualifications for persons from the state to be elected to Congress – observed that the “structure” of *McCulloch*’s analysis was set up such that

[t]he question before the Court was whether the State of Maryland could tax the Bank of the United States, *which Congress had created in an effort to accomplish objects entrusted to it by the Constitution*. Chief Justice Marshall’s opinion *began* by upholding the federal statute incorporating the bank. It *then* held that the Constitution affirmatively prohibited Maryland’s tax on the bank created by this statute. The Court relied principally on concepts deemed inherent in the Supremacy Clause of Article VI, which declares that “this

⁴³ Amar, *supra* note 27, at 168.

⁴⁴ 514 U.S. 779 (1995).

Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be supreme Law of the Land. . . .”⁴⁵

As Justice Thomas went on to explain, it was the *McCulloch* Court’s view that “when a power has been ‘delegated to the United States by the Constitution,’ . . . the Supremacy Clause forbids a State to ‘retard, impede, burden, or in any manner control, the operations of constitutional laws enacted by Congress.’”⁴⁶ Thus, according to Justice Thomas, Maryland’s lack of power turned on the existence of federal power to enact the policy in question.

This seemingly simple point has not been deeply enough appreciated, even though it underlies *all* of federal preemption doctrine, not just the cases dealing with so-called intergovernmental immunity – that is, cases involving laws by one governmental entity regulating another. For example, when we decide whether federal policy preempts a state law regulating private businesses or private citizens, we ask first whether the federal policy is constitutional. If not, then there is no federal policy to do any preempting. Even in the field of foreign affairs preemption, where the Court wrongly thinks states have little role to play, the Court first asks in each case whether the allegedly preempting federal decision to regulate is itself a valid exercise of the federal government’s powers.⁴⁷

Indeed, in *Thornton* Justice Thomas indicates that his reading of *McCulloch* – as a species of preemption doctrine more generally – has been embraced by the Court for over 175 years. For instance, he describes the *Osborn*⁴⁸ case with the following parenthetical reference to *McCulloch*: “reaffirming *McCulloch*’s conclusion that by operation of the Supremacy Clause, the federal statute incorporating the bank impliedly pre-empted state laws attempting to tax the bank’s operations.”⁴⁹

And it makes perfect sense to think of *McCulloch* as just one example of preemption more broadly. Most of the time

⁴⁵ *Id.* at 853-54 (Thomas, J., dissenting) (emphasis added) (citations omitted).

⁴⁶ *Id.* at 854 (emphasis added) (quoting U.S. CONST. amend. X, and *McCulloch*, 17 U.S. at 436).

⁴⁷ See, e.g., *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 413-14 (2003). Note that under the theory of inherent federal powers in some areas, the federal power need only be valid, not necessarily enumerated. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁴⁸ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 783, 859-68 (1824).

⁴⁹ *Thornton*, 514 U.S. at 854 (Thomas, J., dissenting).

federal preemption is asserted, the question presented is whether state laws are regulating private persons in a way different than that preferred by Congress. But whether states regulate private persons in a way that the federal government does not like, or whether the states regulate the federal regulators themselves in a way that bothers the federal government, federal objectives are equally frustrated in both settings. Federal instrumentalities – be they statutes, banks, legislators, or executive officers – exist under our democratic theory only to pursue federal policies on behalf of the national populace; they are means to various ends, not ends in themselves. If we do not preempt state regulation of private parties that is inconsistent with congressional desires except when those congressional desires are themselves constitutionally permissible – and we do not – then we should not preempt state regulation of federal entities when those entities are engaged in constitutionally impermissible activities. Since it is the “operations of the constitutional laws enacted by Congress”⁶⁰ (the phrase *McCulloch* uses) that is the thing to be protected, the rules should be the same whether the state frustrates that “operation” by interfering with the “operators” (the federal agents), or by interfering with those on whom the federal law purports to “operate” (the citizens).

For example, in *Lopez*, if, prior to the Supreme Court’s ruling, a state had told citizens that they were *obliged* to possess guns near schools – indeed, if a state had written its laws to provide explicitly that “those persons who are subject to the federal Gun Free School Zone Act’s prohibitions, as they are written in the United States Code, are *required* to possess guns near schools” – we would not find the state law preempted. Because the federal policy that the state legislation frustrated would itself have been unconstitutional, there would be no preemption, as there would be no valid preempting federal action. States remain free to frustrate the federal government’s objectives – by regulating the federal government or by targeting the citizens the federal government is trying to regulate – when the federal objectives themselves are not within federal power.

One may assert a couple of possible responses against the foregoing analysis. First is the observation that Justice

⁶⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (emphasis added).

Thomas' analysis in *Thornton* commanded the support of only four dissenting Justices, suggesting that the majority must have a different conception in mind. Second is the related idea that there *is* a difference between regulating the regulator and regulating the regulated, and the Court's opinions in *New York* and *Printz* demonstrate this. I shall address each of these suggestions in turn.

3. Justice Stevens' Opinion in *Thornton*

As for the majority analysis in *Thornton*, it is true that Justice Stevens does purport to rest the Court's holding that Arkansas could not impose qualifications on members of Congress on two "independent" ideas:⁵¹ first, that states lack that power in the first place because no power over federal institutions is "reserved" within the meaning of the Tenth Amendment; and second, the Constitution affirmatively divests states of any power over the newly-created congressional offices.

There are a number of observations that need be made about this, only some of which – remarkably enough – were made in the opinions in the case itself or commentary since. To begin, even Justice Stevens concedes that his first holding is not necessary to the case. In Justice Stevens's mind, the second "divesting" theory is "independent" enough to sustain on its own the result in the case.

In fact, this second (and quite correct, I might add)⁵² "divesting" theory must do *all* the work, because the first reason Stevens advances is quite weak. Justice Stevens tries to argue that states cannot regulate congresspersons because power to regulate them is not "reserved" to states within the meaning of the Tenth Amendment⁵³ for the simple reason that the federal institutions did not predate the Constitution and you cannot "reserve" what you never had. As Stevens, quoting

⁵¹ *Thornton*, 514 U.S. at 800.

⁵² I think it quite clear that the people of each State, were affirmatively deprived of any control over federal legislators. See generally Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1049-53, 1090-91 (2000).

⁵³ U.S. CONST. amend. X.

Joseph Story, writes: "No state can say that it has reserved, what it never possessed."⁵⁴

This (to my mind somewhat facile) argument clearly fails. For starters, as Justice Thomas points out, the word "reserved" does not necessarily mean "preexisting."⁵⁵ Thomas's textual argument would have been even stronger had he contrasted the word "reserved" in the Tenth Amendment with the word "preserved" in the Seventh Amendment.⁵⁶ "Preserved" does tend to focus on that which existed before, much more so than "reserved."

Moreover, and more important as a textual matter, there is no text in the Constitution that says: "States have only those powers that were 'reserved' within the meaning of the Tenth Amendment and that were not taken away by the Constitution." Justice Stevens' first argument in *Thornton*, which he says is "independent" of the second divesting theory, reads such a clause into the Constitution, even though there is no reason to, and even though it would not make sense under founding theory. Thus, whether the power to regulate federal entities is "reserved" does not answer the only question that matters, namely, whether such a power exists.⁵⁷

Imagine, for example that at the time of the founding, most state constitutions gave state governments no power over, say, the raising of horses. Indeed, assume that most state constitutions explicitly said: "The state shall have no power over raising horses." Assume that the federal Constitution contains no provision to regulate horse raising that could be read to displace any state power that *might* exist. Can't the people of each state, after 1787, give their governments the power to regulate horse raising? No one would say that state laws concerning horse raising today violate the federal Constitution simply because state power over horses did not exist in 1787 and thus was not "reserved." Instead, the only *federal* question we would ask (and the Supreme Court gets to

⁵⁴ *Thornton*, 514 U.S. at 802 (quoting J. STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)).

⁵⁵ *Thornton*, 514 U.S. at 851 (Thomas, J., concurring).

⁵⁶ U.S. CONST. amend. VII.

⁵⁷ To say that Stevens is wrong in styling his first argument as "independent" is not to say that the question of whether states had "reserved" powers to regulate federal entities is irrelevant to the case. If such powers were assumed to exist in 1787, then such assumptions may bear on the second (and to my mind, key) question — whether any such powers are foreclosed by the Constitution's words, structure, and history.

ask only federal questions) is: Is there anything in the text or structure of the federal Constitution that *prevents* states from regulating horses? This more precise question is akin to the second “divesting” question Stevens asks in *Thornton*.

Even the language from John Marshall that Justice Stevens quotes in *Thornton* illustrates this. Marshall points out that the exercise of power by state government, where it has not been affirmatively foreclosed by the federal constitution, is not a federal concern, but rather a matter between the state government and the people of that state – the source of all legitimate power in that state, save what has been given up to the federal government or the federal populace: “These [state] powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.”⁵⁸ But what “they were before” is subject to *expansion* by the people of the states themselves.

Indeed, even Justice Stevens must realize this. He does not want to call into question the application of *all* state law to any federal institution, even though the federal institution by definition did not predate 1787. For instance, states have power to require federal officials to obey some local traffic rules,⁵⁹ and I doubt Justice Stevens would want to call that into question. And if Justice Stevens’ response were to invoke the principle of generality – if he were to argue that states had power in 1787 to regulate traffic more generally and that is what gives them the power to regulate, say, federal postal vehicles – then I would say, with regard to converse-1983s, states have all along had the power to regulate “illegality” more generally.

In a similar vein, in *Adarand Constructors v. Pena*⁶⁰ the Supreme Court – in rejecting the notion that Section Five of the Fourteenth Amendment gives Congress a remedial power

⁵⁸ *Thornton*, 514 U.S. at 801 (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)).

⁵⁹ See, e.g., *Johnson v. Maryland*, 254 U.S. 51 (1920).

[A]n employee of the United States does not secure a general immunity from state law while acting in the course of his employment. . . . [W]hen the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment – as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets.

Id. at 56.

⁶⁰ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

that states lack altogether – effectively realized that states have authority to remedy Thirteenth and Fourteenth Amendment violations on terms similar to those enjoyed by the federal government, even though the Thirteenth and Fourteenth Amendments post-date the “reserved powers.”⁶¹ Regardless of whether states enjoy the power to remedy constitutional violations because it was delegated to them in the Supremacy Clause itself – which tells states as well as the federal government to “support” the Constitution⁶² – or simply because states are free to exercise this power so long as the people of a state want to, that such power did or did not exist before 1787 seems to be of no moment.

If there is any lingering question whether Justice Stevens’s temporal argument applies to the realm of unconstitutional federal conduct, let me point out that in *Thornton* the Court did not address a situation where Arkansas was regulating congresspersons to try to keep them *in compliance with the Constitution*. No matter how laudable Arkansas’ goals may have been, not even Arkansas argued that term limits were *required* under the federal Constitution. Justice Stevens’s observations, then, do not have much force at all in a context, like converse-1983s, where states regulate not federal *policy*, but federal *unconstitutionality*. Indeed, Justice Kennedy’s concurrence in *Thornton* limits Justice Stevens’s majority opinion, and Justice Kennedy explicitly and carefully addresses Justice Stevens’s temporal argument and the meaning of *McCulloch*, in the following terms: “The states have no power, reserved or otherwise, over the exercise of *federal authority within its proper sphere*.”⁶³ In a converse-1983 setting,

⁶¹ There may be other good reasons to cut the federal government more latitude to use race-conscious laws, but the mere existence of Section 5 is not necessarily one of them.

⁶² See U.S. CONST., art. VI, § 3. As David Currie has pointed out, Congress itself relied on the Supremacy Clause to enact oath laws and fugitive slave laws. See, e.g., David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 UNIV. CHI. L. SCH. ROUNDTABLE 161, 171 (1995). If the Supremacy Clause is itself a delegation of authority to the federal government to make appropriate laws to enforce the Constitution, its language would indicate that states – who are equally bound to support the Constitution – would have the same power. If this is true, though, one might ask, why were Section Two of the Thirteenth Amendment and Section Five of the Fourteenth Amendment needed? Perhaps to remove all doubt on the question. See generally Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

⁶³ *Thornton*, 514 U.S. at 841 (Kennedy, J., concurring) (emphasis added). Indeed, Kennedy argues in his next breath that Arkansas must be kept from interfering with valid federal policies for the same reason that *the federal government*

by definition, federal authority has exceeded its proper scope. Also, Joseph Story, on whose words Justice Stevens builds his argument, says explicitly in a part of his Commentaries not mentioned by Justice Stevens that the rightly-decided *McCulloch* ruling (and a similar ruling that held invalid state efforts to interfere with federal bonds) “turn upon the point that no state can have the authority to tax an instrument of the United States, or thereby to diminish the means of the United States, *used in the exercise of powers confided to it.*”⁶⁴

4. Intergovernmental Respect and Immunity

It seems clear, then, that state remedies against federal lawlessness are not prohibited merely on the ground that states as a general matter lack such remedial power. If there is a problem with such a remedy, it must be because the Constitution’s structure affirmatively forbids the states from exercising remedial power against federal agents. As indicated above, *McCulloch* does not support that position. But *McCulloch* is not, of course, the Court’s last word on the limits that the Constitution places on the ability of one level of government to directly regulate another. There are many decisions of the last decade or so that address this issue.

In particular, some may read *New York* and *Printz* to say that one participant in this vertical competition cannot target and discriminate against the other. I do not understand these cases to stand for such a broad principle at all. Instead, as I noted earlier, they are cases about accountability or more plausibly the dangers of one government highjacking the agenda of the other. Needless to say, because converse-1983 actions would target only behavior unlawful under a federal standard, there are no accountability or agenda-highjacking concerns in a converse-1983 setting.⁶⁵

Indeed, even as nothing in *Printz*’s general rule and its justification call into question converse-1983, an *exception* to

must be kept within its bounds, making clear his overarching concern with policing the Constitution’s substantive limits.

⁶⁴ J. STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 503 (1833) (emphasis added).

⁶⁵ Moreover, a converse-1983 law that a state enacted that applied to *state* officers as well as federal officers would not “discriminate” against the federal government in any event. Such laws may, however, be less likely to pass than ones that target federal misdeeds, and I, like my brother, do not think such a non-discrimination requirement exists in this setting.

the *Printz* rule supports the converse-1983 idea. In *Printz* itself, Justice Scalia's opinion for the Court noted that an early Congress *had* conscripted state executive officials in one particular setting – to comply with the Constitution's extradition requirements. Justice Scalia explained away this episode as not inconsistent with the rest of his opinion on the ground that this early federal statute was "in direct implementation . . . of the Extradition Clause of the Constitution itself."⁶⁶ Thus, unlike the Brady Act, the Extradition Act was a *permissible* kind commandeering because it was designed to enforce the Constitution itself rather than simply some statutory goal. Whatever the scope of the anti-commandeering principle protecting states, then, it does not apply when the Constitution itself is being enforced. Converse-1983 statutes, of course, are "a direct implementation of the *entire* Constitution itself."

This distinction between federal statutory enforcement and federal constitutional enforcement also explains why, under the Court's jurisprudence concerning Section Five of the Fourteenth Amendment, the federal government can regulate the states directly and indeed impose upon them monetary liability that may interfere with their ability to structure their own identities and agendas. In cases like the recently decided *Nevada Dept. of Human Resources v. Hibbs*,⁶⁷ Congress is allowed, under the new federalism, to discriminate against states and even subject them to unique monetary liability, when states have been violating federal constitutional rights,⁶⁸ even though Congress cannot impose such liability on states merely for violating ordinary federal statutes.⁶⁹

⁶⁶ *Printz v. United States*, 521 U.S. 898, 909 (1997).

⁶⁷ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁶⁸ *See id.* Indeed, Congress can even act prophylactically. Perhaps under a converse-1983, a state could try to be prophylactic too – targeting not just unconstitutional federal conduct but rather conduct that includes, yet extends beyond, unconstitutional actions by federal officials. Query whether states should enjoy the same license to be prophylactic that Congress enjoys, even assuming the state remedy in question were "congruent and proportional" to federal violations.

⁶⁹ *Cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (distinguishing between constitutional violations by states and violations of federal laws that do not enforce the Constitution but rather simply are consistent with Congress' enumerated powers).

B. *Academic Developments*

In addition to these political and doctrinal developments, constitutional scholars seem more interested in and somewhat more receptive to the idea of a converse-1983 device than they were a decade ago. To begin with, the “vertical competition” premise behind the idea is at least part of the mainstream federalism dialogue now in a way that it was not ten years back.⁷⁰ Second, the particular idea of a converse-1983 device is at least being acknowledged much more in the literature. During the first six years after Akhil first floated the idea, not a single citation to the device was made in any law review article picked up by Westlaw or Lexis. In last six years, the idea has at least been cited, if not discussed, over thirty times.

And some people are devoting a lot of thought to the idea, and internalizing its basics – *sort of*. The most important, prominent, and recent academic treatment of the converse-1983 device comes in a recent essay by former Solicitor General Seth Waxman and Trevor Morrison (who worked for Solicitor General Waxman and who now teaches law) on federal immunities from state law recently published in the *Yale Law Journal*.⁷¹

First, the good news: Solicitor General Waxman and Professor Morrison say they are “inclined to agree that at least some kinds of converse-1983 laws are constitutional” and not barred entirely by federal Supremacy principles because Akhil “convincingly points out that converse-1983 statutes in fact would enforce the Supremacy Clause by ensuring that federal action complies with the Constitution.”⁷² (Supremacy of the federal Constitution over inconsistent federal governmental action is, after all, the basis of *Marbury*.) They also apparently find quite important the fact – documented by my brother – that in the nineteenth century, the Supreme Court applied and thus implicitly upheld state law causes of action brought against federal officials to redress conduct that violated the federal Constitution.⁷³

⁷⁰ See, e.g., Pettys, *supra* note 22.

⁷¹ Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003).

⁷² *Id.* at 2246-47.

⁷³ *Id.*

Now the bad news: I do not think Solicitor General Waxman and Professor Morrison completely understand the converse-1983 theory. I say this because they part company with the converse-1983 device at a most crucial point – whether such a device can strip federal officials of the qualified immunity they now enjoy under *Bivens* actions.⁷⁴ I think it is helpful to explain exactly how and why they – to my mind – get it wrong, because I fear that their instincts are all too common.

At the outset, they make what I view as a bit of a false start. They begin with the question of whether a remedy that contains qualified immunity itself violates the Constitution, and they conclude (quite sensibly) that it cannot, else *Bivens* and § 1983 would themselves be unconstitutional. But in a converse-1983 case, the question is not whether a federal court or Congress *must* abolish immunity in remedies that it creates, but rather whether federal law necessarily forecloses a *state's decision to abolish* immunity in a remedy that the state creates. That a federal court or Congress could rationally choose to include immunities in remedies that it fashions does not mean that the federal government can override a state's decision not to include immunities in its own causes of action.⁷⁵ So, the only question is whether the Constitution or a congressional statute can operate to preempt a state's decision in this regard. General Waxman and Professor Morrison ultimately see this as the \$64,000 question, but their detour concerning whether the Constitution requires all remedies to remove immunity takes us away from the central inquiry.

⁷⁴ *Id.* at 2248.

⁷⁵ Congress didn't have to provide a § 1983 remedy at all, so Congress can be underinclusive if it wants to. And certainly judicial caution could lead a federal court to move incrementally in the remedies it creates. As Akhil has put the point:

Why might the Supreme Court allow state law to be more generous towards citizen victims (on either the immunity issue, or possibly on the issue of quantum of damages) than the Court itself has been under *Bivens*? Perhaps because the Court itself has been dubious of the legitimacy of *Bivens* and has chosen to tread very carefully and gingerly. Even though *Bivens* is not a species of the *Swift v. Tyson* type of "general" federal common law condemned in *Erie*, but is rather a prime example of what Judge Friendly labeled the "new" federal common law, it was condemned as illegitimate by several dissenters in *Bivens*, including Justice Black. But however controversial federal common law – "new" or old – fashioned by federal judges may be, no one disputes the common law role of state judges. Thus, Justice Black went out of his way in his *Bivens* dissent to concede that he would cheerfully enforce a cause of action against lawless federal officials if either "Congress [] or the State of New York" had created such a cause of action.

Amar, *supra* note 27, at 174-75.

Moreover, their reasoning on the key question of whether Congress could pass a law reinstating immunity – they say Congress could – is to my mind underexplanatory and unpersuasive.⁷⁶ They assert that Congress could validly pass a law reinstating qualified immunity in order to vindicate the interest in vigorous federal law enforcement. The idea – commonly invoked in immunity circles – is that if the agents know they are personally liable for crossing a line, they may not approach the line at all, to the detriment of vigorous enforcement. The need for “breathing room” in law enforcement, they suggest, is a valid federal concern.⁷⁷ I have some problems with that.

First, they never explain why, if (as they suggest) the existing broad array of federal statutes reflect this interest in breathing room, the Supreme Court declined in the nineteenth century to displace state causes of action that lacked immunity. They acknowledge cases in which state causes of action unencumbered by immunity doctrines imposed liability on federal agents for federal constitutional misdeeds. Indeed, Waxman and Morrison cite to such cases to explain why they are “inclined to agree” that converse-1983s are not impermissible *per se*. And yet they do not explain how those cases could exist – or where the opposing cases are – if existing federal interests reflected in existing federal statutes are preemptive.

Second, and more crucially, they never ask or explain why such federal interests – and the statutes that implement them – would be “proper” within the meaning of the Sweeping Clause.⁷⁸ Again, their argument on behalf of Congress would proceed along the following lines: “We need to violate the Constitution so that we can enforce the laws that don’t violate the Constitution.” But that is another way of arguing that the

⁷⁶ If a state passed a converse-1983 law, and Congress had to explain why it was preempting part of it, at least there would be political costs to pay.

⁷⁷ General Waxman and Professor Morrison note that:

[The federal government’s] interest is not just in keeping the letter of federal law free from state interference, but also in affording federal officers enough leeway to implement federal law and policy effectively. The integrity of federal law depends on its sound execution, which, in turn, depends on the actions of federal officers. Thus, as we have explained, the policy aim of qualified immunity – protecting against the “risk that fear of personal . . . liability and harassing litigation will unduly inhibit officials in the discharge of their duties” – also describes the federal interest at stake in Supremacy Clause immunity.

Waxman & Morrison, *supra* note 71, at 2251.

⁷⁸ U.S. CONST., art. I, § 8, cl. 18.

constitutionally permissible ends justify some unconstitutional means. That is exactly what Justice Marshall in the first part of *McCulloch* said Congress could not do: “Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution*, are constitutional.”⁷⁹

The Constitution itself draws lines – identifies impermissible means – so that the federal government cannot argue, for instance, we need to deny persons “due process” in order to better and more efficiently regulate immigration. There are many things a government might have a sincere and laudable reason for wanting to do; the Constitution tells us not only what the federal government can want to do, but also how the government can go about doing it.

Of course, many constitutional provisions take account of exigencies of the day. For instance, what constitutes an “unreasonable” search may depend upon whether there is a war. And whether the federal government has a valid claim to operate in an area may also depend upon the foreign affairs context – the theory of delegated enumerated powers may not be as applicable in the arena of federal control of foreign relations as it is in the domestic affairs realm.⁸⁰ But even in the area of international affairs, federal power is not absolute, and is limited by particular provisions of the Constitution, including some that create individual rights⁸¹ enforceable under a converse-1983 statute. Once we say something is unconstitutional – and converse-1983s impose liability only if there is a substantive violation of the Constitution – then the federal government has no “proper” or valid interest in using an impermissible means.

My point may also be seen, I think, by imagining an injunctive action rather than a damage claim against a federal officer. Damages and injunctive relief are designed to do the same thing – to restore or maintain the position plaintiff would be in if there were no illegal action by the defendant⁸² – and the only reason we cannot get an injunction for everything is there

⁷⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

⁸⁰ *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321 (1936).

⁸¹ *See, e.g., Reid v. Covert*, 354 U.S. 1, 6 (1957).

⁸² *See generally* DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* (3d ed. 2002).

is never a court around at the instant you need one.⁸³ Imagine we knew that federal agents were about to violate the Fourth Amendment, say, by impermissibly taking into account the race of the searched persons. Suppose further that we were about to go to a court to seek an injunction against the impermissible use of race in the minds of the INS agents deciding whom to search. Now imagine that Congress had passed a law saying: "Courts can issue no injunctions against the use of race by INS agents, because even if the use of race is unconstitutional, when INS agents are worried about whether they can have race on the mind, they may worry too much and forget about other relevant and permissible things. In other words, any injunction, no matter how narrowly drafted, may induce, because of the fear of a contempt citation, a timidity that we think would hinder aggressive enforcement of valid laws."⁸⁴

Could this concern over federal "gun-shyness" be genuine by Congress? Sure. Is it rational for Congress to think that agents would more vigorously enforce laws if there were no injunctions and thus no possibility of contempt? Yes.⁸⁵ Would a court still issue the injunction? I think so. And the only basis on which a court could and would disregard the congressional statute would be that it is not constitutional, because not constitutionally "proper." Unless the court were to find Congress's law unconstitutional, it could not prefer the Fourth and Fifth Amendments to the congressional statute; unless constitutionally improper, the federal statute would be entitled to supremacy under *Marbury* just as much as the Constitution would. Indeed, it is the constitutional supremacy ideal that Solicitor General Waxman and Professor Morrison acknowledge that makes the converse-1983 device defensible in the first place. And yet they seem to forget their own premises when they say that a congressional law designed to facilitate violations of the constitution – albeit with a good motive – is supreme and thus can displace state law.

⁸³ This timing problem drives the mootness and ripeness doctrines. See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

⁸⁴ Such a law would not strip courts of jurisdiction. Cf. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Nor would it direct who wins or loses on the merits. Cf. *U.S. v. Klein*, 80 U.S. 128, 146 (1871). Rather, it would simply regulate remedies the courts could give. Cf. *FED. R. CIV. P.* 65.

⁸⁵ That is why, if converse-1983s came into being, Congress would naturally indemnify its agents.

Waxman and Morrison themselves seem to intuit that their reasoning is a bit shaky, so they say that in situations where the officer “by any reasonable standard . . . clearly act[ed] *ultra vires*,” then perhaps congressional immunity would be unavailable.⁸⁶ Where does that standard come from? It is literally made up. The Constitution itself tells us what is “*ultra vires*” – namely, those things done in violation of the Constitution. By definition an action is not within lawful power if unconstitutional, as would be the case for any conduct targeted by a converse-1983 law. There are no degrees of “*ultra vires*” – that concept is digital; either something is “beyond the powers” (the Latin translation of “*ultra vires*”) or it is not. For my part, I will stay with the lines the Constitution draws.

IV. CONCLUSION: WILL STATE LEGISLATURES, STATE COURTS, AND FEDERAL COURTS LISTEN?

Who knows whether state legislatures or courts will seize the current opportunity. States may understandably fear federal reprisals in funding and other areas if they were to act aggressively to rein in federal abuses. Funding to cities will likely remain a key point of contention in the war on terror. As for the reaction of the federal judiciary, there remains a persistent asymmetrical federalism instinct out there. No one, for instance, targets federal sovereign immunity even though some Justices argue that state sovereign immunity under the Eleventh Amendment makes no sense and runs counter to our founding ideals. Courage and consistency are not always easy to come by. But the time is as ripe as ever for states to test the soul of this new federalism.

⁸⁶ Waxman & Morrison, *supra* note 71, at 2255.