Explainer: State-Created Damages Remedies Against Federal Officials

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Introduction & Summary

What recourse do people have if federal agents violate their constitutional rights? In recent months, this question has taken on new urgency. Across an array of contexts, individuals and institutions are encountering what they see as unconstitutional abuses of federal power, from excessive uses of force to property destruction to discrimination to speech suppression. And with the federal government deploying record-numbers of immigration agents to cities across the country, high-stakes encounters with federal law enforcement may become even more commonplace.

This Explainer discusses a potential remedial pathway that is receiving increased attention: state-created causes of action authorizing money damages against federal officials who violate federal constitutional rights. This idea has long percolated in legal scholarship. Professor Akhil Amar first wrote about the concept nearly four decades ago, dubbing it "converse 1983."[1] But the idea is only beginning to garner broader interest from litigants, policymakers, and courts.

Today, victims of unconstitutional federal action have limited remedial options. When individuals experience a rights violation that is ongoing, they can go to court and seek declaratory or injunctive relief—that is, a court order telling the government to stop. There have already been hundreds of such lawsuits filed against the Trump administration, and similar lawsuits challenged the actions and policies of previous administrations. But because injunctive remedies aim to address injuries prospectively, they are frequently useless—or unavailable—to individuals who suffered government misconduct in the past. In the quintessential Supreme Court case exemplifying this point, a victim of a police chokehold was denied injunctive or declaratory relief because he couldn't show that he was likely to be put in a similar chokehold again.[2]

Instead, to redress harms already inflicted—like when people are injured or property is damaged— the standard civil remedy is money damages. By compensating the victim (and perhaps punishing the perpetrator), damages can help provide justice and accountability. But existing federal law significantly constrains the ability of individuals to recover damages from federal officials who act unconstitutionally.

The landmark federal statute that individuals might turn to in, say, a typical police brutality case, is 42 U.S.C. § 1983. But it offers no relief for federal action; it provides a cause of action for damages against state and local actors, and there is no statutory analogue authorizing suits against *federal* officials. Recognizing that, the U.S. Supreme Court held over fifty years ago in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[3] that plaintiffs should nonetheless be able to sue for damages when federal officials commit constitutional violations. However, more recent precedent has largely closed the door on these so-called *Bivens* actions by limiting them to highly specific circumstances and repudiating *Bivens*'s core logic—making the remedy, in one scholar's recent assessment, "essentially nonexistent," especially when coupled with the Court's robust official immunity doctrine.[4]

Historically, plaintiffs were also able to use common-law tort suits available under state law to recover damages from federal officials whose actions transgressed statutory or constitutional bounds. [5] But today, such claims are largely preempted by the Federal Tort Claims Act, or FTCA, which establishes the exclusive remedy for victims to seek damages directly from the federal government for most state-law torts.[6] From a practical perspective, while the FTCA does sometimes provide an avenue for people to recover damages against the federal government when federal employees commit torts[7]—and individuals might increasingly pursue FTCA suits[8]—it comes with "significant exceptions and limitations" that can make recovery difficult or impossible, even when federal officials have violated constitutional rights.[9]

Taking all of these hurdles together, the bottom line is that today's remedial landscape can leave injured individuals without meaningful recourse and federal actors without sufficient incentives to respect an individual's constitutional rights.[10] With no Section 1983 equivalent for federal actors, the rollback of *Bivens*, and the constraints of the FTCA, recovering damages from federal officials for unconstitutional acts may be more difficult today than at any time in the nation's history.

This is where "converse 1983" comes in. It offers a potential pathway for pursuing damages against federal officials who act unconstitutionally. In contrast to Section 1983, which is a federal cause of action for damages against state and local officials who violate federal constitutional rights, "converse 1983" is a state-created cause of action for damages against federal officials who violate federal constitutional rights.

A few states—including California, Maine, Massachusetts, and New Jersey—have long had laws on the books that, as written, appear to authorize damages actions against federal officials for federal constitutional violations. Illinois recently enacted a version, and in roughly a dozen more states, legislation has been introduced that would do the same. It also may be possible for state courts, which have common-law authorities that federal courts lack, to recognize such actions judicially.

Part I of this Explainer offers more detail on existing and proposed state converse 1983 laws, and it identifies some considerations for states contemplating such laws. Part I also sketches out how converse 1983 litigation might proceed in practice. In particular, it notes that, while converse 1983 is a state-created cause of action, most converse 1983 lawsuits are likely to end up in federal rather than state court because federal law gives federal officers a right to remove lawsuits to a federal forum.

Any attempt to pursue converse 1983 lawsuits will likely be met with several types of counterarguments. Drawing from and building on existing legal scholarship, Parts II–IV identify and address these anticipated sources of pushback.

First, as Part II explains, defendants will likely contend that federal statutory law—in particular, the Westfall Act—preempts state-created converse 1983 actions. The Westfall Act does preclude litigants from bringing many common-law state tort claims against federal officials. But the Westfall Act includes a carveout for "a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States."[11] That plain text appears to leave the door open to converse 1983 claims. Nevertheless, one federal circuit court recently concluded (with limited analysis) that the Westfall Act preempted a converse 1983 claim brought under New Jersey law. Anyone who seeks to pursue converse 1983 suits in New Jersey (as well as Delaware and Pennsylvania) will have to overcome that adverse precedent.

Second, defendants may raise federal constitutional objections to converse 1983 actions, asserting that such state-created claims (or at least some such claims) run counter to principles of federal supremacy. Part III identifies potential variations of such an argument and sets out some of the strongest legal responses. Conceptually, converse 1983 actions do not seek to make state law supreme over federal law; instead, they *further* the federal Constitution by helping people vindicate their fundamental federal constitutional rights. Historically, there is a longstanding tradition of litigants using state-law causes of action to seek civil damages against wrongdoing federal officials. There is even a longstanding tradition of states enforcing their criminal laws against federal officials who overstep the bounds of their authority. And precedentially, converse 1983 actions fit comfortably within the bounds of existing Supreme Court case law on the Supremacy Clause.

Third, defendants will presumably contend that, even if converse 1983 actions are permissible, the doctrine of qualified immunity should provide at least a partial shield against liability. Part IV considers whether and how official immunity defenses might apply in converse 1983 cases. In Section 1983 and *Bivens* actions, government officials can indeed invoke qualified immunity, which bars plaintiffs from recovering damages unless the defendant's conduct violated "clearly established" law, such that any reasonable official would have known the unconstitutionality of their particular actions. This effectively allows for damages liability only in fairly egregious cases of official misconduct. Courts may well conclude that converse 1983 defendants should have the same opportunities as Section 1983 and *Bivens* defendants to assert qualified immunity defenses, but there are cogent arguments that the doctrinal rationales for qualified immunity in Section 1983 and *Bivens* cases do not carry over to converse 1983 cases. There are also questions about whether the analysis might change if a state's converse 1983 law expressly forecloses qualified immunity defenses.

In short, converse 1983 actions may have untapped potential to assure meaningful relief to those harmed by unconstitutional abuses of federal power. Although the permissibility of converse 1983 actions will no doubt be vigorously contested, forceful legal arguments can be made in their favor.

I. The Promise of Converse 1983

Nearly four decades ago, Professor Akhil Amar first proposed what he dubbed "Converse 1983" — a *state*-law damages remedy against federal officials for violating the federal constitution.[12] Numerous scholars and commentators have explored the idea since.[13] Today, converse 1983 could fill critical gaps, potentially offering recourse for a panoply of federal constitutional injuries committed by a range of federal actors.

How exactly does converse 1983 work? It provides a private right of action—that is, authorization to sue—against federal officials (and anyone else) for violating someone's federal constitutional rights, making clear that damages are available as a remedy. A few states already have such laws, and converse 1983 bills have recently been introduced in roughly a dozen state legislatures. While the language of these laws and bills differs somewhat, they all share common elements. Namely, they (1) explicitly empower any person to; (2) bring a civil damages claim against; (3) government actors at any level (and sometimes nongovernmental actors) who; (4) have violated or interfered with their federal constitutional rights.

By way of illustration, California's Tom Bane Civil Rights Act (colloquially known as the Bane Act) has long allowed "any individual" to sue another person for interfering, or attempting to interfere, with their rights by threat, intimidation, or coercion.[14] Massachusetts[15] and Maine[16] have similar provisions to California's existing law on the books. The New Jersey Civil Rights Act is also a potential model for other states.[17] And, recently, Illinois enacted a version as part of a larger package related to immigration policy.[18]

Numerous states are currently considering additional converse 1983 mechanisms. In New York, for example, a pending bill provides:

> **Any person** who, under color of any law, statute, ordinance, regulation, custom, or usage, **subjects, or causes to be subjected**, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights**, privileges, or immunities **secured by the Constitution of the United States**, **shall be liable** to the party injured in **an action at law**, suit in equity, or other proper proceeding for redress . . . .[19]

Virginia, too, has introduced a converse 1983 proposal. That law would provide that:

> **Any individual** who has been deprived of **any rights**, privileges, or immunities granted to such individual under the **constitutions or laws of the United States** and the Commonwealth by a person acting under color of law has a **civil cause of action** against such person for compensatory damages, punitive damages, and equitable relief.[20]

Likewise, although California already has the Bane Act on the books, pending legislation would authorize actions without the hurdle of demonstrating a threat, intimidation, or coercion. The new language would state:

> **Every person** who, under color of **any law**, statute, ordinance, regulation, custom, or usage, subjects, or causes to be subjected, any citizen of this state or **any 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 . . . .[21]

Other states including Colorado,[22] Lawmakers in Hawai'i,[23] Maryland, [24] Rhode Island, [25] Washington, [26] and Wisconsin[27] have also introduced legislation to provide a state damages remedy that would cover federal officials who violate constitutional rights.

In other states, like Arkansas or New Mexico, existing statutes that provide private rights of action could easily be amended to add federal officials and/or violations of the federal Constitution.[28] For states looking to introduce legislation on a blank slate, the organization "Protect Democracy" has proposed a model bill.[29] Alexander Reinert, Joanna C. Schwartz, and James E. Pfander have also drafted a comprehensive model state statute creating a cause of action for constitutional violations; although their template is directed at state actors, it could cover federal officials with only a minor tweak.[30]

There are some meaningful differences between states' approaches, especially when considering how courts have interpreted and applied existing provisions. For example, courts have concluded that qualified immunity is available to defendants under Maine's[31] and Massachusetts's[32] statutes; conversely, qualified immunity is no defense to Bane Act suits in California.[33] Courts in California and Massachusetts have also diverged on how to read statutory language requiring constitutional violations to involve "threat, intimidation, or coercion." California courts, for example, have given that requirement a loose reading, concluding that the mere "[u]se of law enforcement authority to effectuate a stop, detention (including use of handcuffs), and search can constitute interference by 'threat[ ], intimidation, or coercion' if the officer lacks probable cause to initiate the stop, maintain the detention, and continue a search."[34] In contrast, Massachusetts requires threat, coercion, or intimidation as a separate element for liability—even in cases where officers *actually* violate someone's constitutional rights.[35] (To be clear, converse 1983 laws need not use concepts like intimidation, coercion, or threats, and most of the pending bills—including California's proposed Bane Act revision—do not).

There are also differences in whether and when prevailing plaintiffs are entitled to attorneys' fees[36] and what sorts of damages are available.[37] Recent converse 1983 proposals also diverge on the scope of their coverage. Illinois' recently enacted statute, for example, provides a cause of action against "any person who, **while conducting civil immigration enforcement**," violates constitutional rights.[38] Colorado[39] and Washington[40] have introduced similar bills that cabin the cause of action to injuries sustained during "civil immigration enforcement." A bill in Rhode Island, meanwhile, applies only to federal actors, unlike proposals elsewhere that also cover state and local actors.[41] Proposals also diverge on whether to abrogate or retain immunity,[42] and the timing of any covered injury—California's proposed statute, for instance, would apply retroactively to March 2025.[43] These are all important details for policymakers to consider as they seek to strike what they regard as an appropriate balance of fee-incentives, immunities, and defenses—and as they evaluate the litigation risk to enacting a statute that may treat federal officials differently from other actors.[44]

State legislation is just one of multiple pathways for establishing a converse 1983 cause of action.[45] A state could create a damages remedy through an initiative, referendum, or other popular lawmaking mechanism. Alternatively, state courts could fashion a remedy using their common-law power. The authority of state courts to create remedies is deeply rooted; numerous state courts have established a damages remedy for *state* constitutional violations.[46] At least in theory, they could similarly recognize a cause of action for violations of the federal Constitution.

Regardless of how states create converse 1983 causes of actions, two practical aspects of converse 1983 litigation bear noting. First, most converse 1983 suits against federal officials would proceed in federal court, even if initially filed in state court. A federal statute, 28 U.S.C. § 1442, allows federal officers acting in the course of their employment to remove actions from state to federal court, so long as they can assert a "colorable federal defense."[47] As explained in more detail below, there are a number of defenses or immunities that federal officials could potentially assert; while none would necessarily succeed, they will often be "colorable." If they choose, converse 1983 plaintiffs might also be able to initiate their suits in federal court, rather than state court. Although converse 1983 is a state cause of action, it may qualify for federal question jurisdiction since it requires a federal constitutional violation.[48]

Second, although converse 1983 suits would be brought against federal officers in their individual capacities, those officers would likely be defended by government attorneys and indemnified by the government such that they would not personally pay any damages award. Depending on the circumstances, the government could conceivably disclaim any responsibility to represent or indemnify the defendant, but in the related context of *Bivens* litigation, that happens only rarely.[49]

II. Addressing Likely Federal Statutory Objections: the FTCA and Westfall Act

Because there are few real-world examples of individuals using converse 1983 statutes to sue federal officials for violations of their federal constitutional rights, it is uncertain how litigation might unfold. However, the federal government would likely contest strenuously the validity of state-created damages actions against federal officials. An initial objection will likely be statutory—namely, that the Federal Tort Claims Act (FTCA) and the Westfall Act preempt state damages actions against federal officials. Converse 1983 proponents, however, have strong arguments that even if Congress has preempted most *common-law torts* against federal officials, states remain able to provide *constitutional* tort remedies.

The Westfall Act was Congress's response to a 1988 Supreme Court decision, *Westfall v. Erwin*.[50] The *Westfall* plaintiffs brought a common-law state tort suit against a federal employee, and the Court rejected the government's argument that federal employees are absolutely immune from such actions.[51] *Westfall* essentially confirmed that individuals injured by federal employees had multiple potential ways to seek compensation: common-law state tort suits, FTCA suits, and *Bivens* actions. In response, through the Westfall Act, Congress effectively gave federal officials the shield from state tort liability that the government had unsuccessfully sought from the Supreme Court.[52]

The Westfall Act generally makes the FTCA the "exclusive" remedial option "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[53] Under the Act, "any other civil action or proceeding for money damages" against the government employee "is precluded."[54]

The Westfall Act, however, includes an important carve out to its preemption provision: It "does not extend or apply to a civil action against an employee of the Government . . . brought for a violation of the Constitution of the United States."[55] There is some debate about the scope of this exception, but, as explained below and as several commentators have suggested, its plain text appears to allow converse 1983 suits since such suits seek relief for federal constitutional violations.

The government might argue that the Westfall Act's reference to actions "brought for a violation of the U.S. Constitution" should be narrowly construed to allow only for federal *Bivens* actions— that is, to the vanishingly narrow categories of constitutional damages suits against federal officials that the Supreme Court has itself recognized.[56] On several occasions, the Supreme Court has in fact referred to this statutory provision as a "*Bivens*" exception. Thus, in one case, the Court described the provision as "preserving employee liability for *Bivens* actions."[57] Similarly, in another, the Court referred to § 2679(b)(2)(A) as "[t]he Westfall Act's explicit exception for *Bivens* claims."[58] Lower courts and commentators have repeated similar language.[59] But none of these cases actually addressed whether the Westfall Act's text excepts *Bivens* actions alone. Only one federal appellate court, the Third Circuit, has directly rejected a converse 1983 claim on the grounds that "[t]he Westfall

Act only offers two exceptions to its exclusivity—one for *Bivens* actions, and the other for actions under federal statutes."[60] The court offered little analysis beyond observing that the plaintiff had "offered no counterargument in her papers or at oral argument" regarding Westfall Act preemption.[61]

There are reasons to doubt this *Bivens*-only reading of the Westfall Act. While some Supreme Court cases have casually referred to § 2679(b)(2)(A) as a *Bivens* exception, the Court has elsewhere described the provision in more expansive terms. Recently, for example, the Court explained that "the Westfall Act foreclosed common-law claims for damages against federal officials, but it left open claims for constitutional violations."[62] Relying on the Westfall Act's plain language and legislative history, several commentators have contended that the Westfall Act indeed allows for state actions that seek relief for federal constitutional violations. As Judge Justin Walker of the U.S. Court of Appeals for the D.C. Circuit detailed in a comprehensive 2023 concurrence, "that reading finds support in the text of the statute" and "accords with Founding-era principles of officer accountability."[63]

In the most in-depth recent academic article on converse 1983, Thomas A. Koenig and Christopher D. Moore, too, have reached a similar conclusion.[64] They identify several supportive canons of statutory construction and explain that the legislative history likewise suggests that Congress did not seek to foreclose state causes of actions for constitutional violations.[65]

Professors Carlos M. Vázquez and Stephen I. Vladeck have made similar arguments. They note, for example, that the House Report accompanying the Westfall Act asserted that the bill "would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights."[66][54] Like Koenig and Moore, they conclude that the exemption broadly covers constitutional torts: "even under the narrowest plausible construction," they write, "a converse-1983 action of the sort advocated by Professor Amar would . . . survive."[67]

To be sure, not all scholars agree. In a response to Vázquez and Vladeck, Professors James E. Pfander and David P. Baltmanis have argued that "the only claims against federal officials saved by the Westfall Act were those based on federal rights of action, including constitutional tort claims under *Bivens* and federal statutory claims otherwise authorized."[68] But their discussion focuses overwhelmingly on Westfall Act's displacement of state *common law* causes of action and gives limited consideration of whether the Act allows a *constitutional* cause of action like converse 1983. Additionally, in more recent work, Professor Pfander has reconsidered some of his earlier analysis of the Westfall Act and suggested that "the Westfall Act's saving provision for suits against federal officers for violation of the Constitution" may indeed allow for "state enactment of converse-1983 statutes."[69]

The overall point is that any litigant suing a federal officer under an existing or future converse 1983 statute will likely confront the argument that the Westfall Act forecloses the claim. Although there is little judicial precedent squarely on point, it is notable that scholars and jurists with an array of jurisprudential views see no federal statutory barrier to converse 1983 actions.

III. Federal Supremacy Objections

Defendants may also raise federal constitutional objections to converse 1983 actions, arguing that such remedies run counter to principles of federal supremacy. The Supremacy Clause, of course, dictates that, when in conflict, federal law wins out over state law. Arguments based on the Supremacy Clause may have some intuitive appeal—after all, can states *really* police the actions of federal actors? The simple answer is yes. Particularly given the long history of state common-law suits against federal officers (as well as state criminal prosecutions of such officers), there is no evident constitutional barrier to states creating a cause of action against federal officials for violating the Constitution.

Although Supremacy-based objections to converse 1983 actions could take multiple forms, the basic conceptual defense of such actions largely boils down to this: Converse 1983 does not seek to make state law supreme over federal law. Instead, it furthers the ultimate supremacy of the federal Constitution by helping people vindicate their fundamental federal constitutional rights. And because converse 1983 only targets unconstitutional action—which, by definition, doesn't further legitimate federal objectives—it does not impede the lawful functioning of the federal government.

As a matter of tradition and precedent, federal actors (except perhaps the President) have never enjoyed blanket immunity from state efforts to address federal wrongdoing.[70] To the contrary, a long line of cases establish that "[a]n employee of the United States does not secure a general immunity from state law while acting in the course of his employment."[71] Indeed, as noted earlier, for much of American history, state damages suits against federal officials were considered the norm.[72]

Although based in the common law, these traditional tort suits often included adjudication of constitutional rights.[73] As E. Garrett West summarizes: a plaintiff would allege "that the official violated some common-law duty he owed; the officer would respond that his actions were justified because of his official position or function; and the plaintiff would reply that the official's justification defense failed because the Constitution prohibited that defense."[74] As late as the 1960s, the Supreme Court observed that "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal law, however, supplies the defense."[75]

That unbroken practice was taken for granted as constitutionally unproblematic; at no point in U.S. history has the Supremacy Clause posed a barrier to state tort liability for federal officials.[76] Indeed, in *Bivens* itself, the majority, the dissent, and the U.S. Government all agreed that individuals had a valid remedy for unconstitutional federal actions through state tort law.[77] As the Supreme Court recounted in 2020, "we recognized the continuing viability of state-law tort suits against federal officials as recently as *Westfall v. Erwin* [in 1988]."[78] Moreover, as described in a companion publication, states have also long pursued *criminal* prosecutions of federal officials, and Supreme Court precedent indicates that there is no categorical constitutional barrier to such actions.[79] If the Constitution leaves the door open for states to prosecute federal officials, it is difficult to see how it closes the door to converse 1983 actions.

Some have suggested that federal courts might bar a state-created cause of action like converse 1983 through what is known as "Supremacy Clause immunity."[80] As our companion piece notes, Supremacy Clause immunity generally shields federal officials from state liability if (1) the federal official was doing something that was authorized by federal law, and (2) the official's actions were "necessary and proper" in fulfilling their federal duties.[81] For example, in the foundational case on Supremacy Clause immunity, *In re Neagle*, a U.S. Marshal assigned to protect a U.S. Supreme Court justice shot and killed an attacker in California.[82] The state charged the marshal with murder, but the U.S. Supreme Court concluded that the marshal could not be prosecuted because he was carrying out his official duties and was justified in killing the attacker as part of those duties.[83]

But Supremacy Clause immunity likely applies to criminal matters alone. Just this past term, the U.S. Supreme Court reversed a circuit court's extension of Supremacy Clause immunity to FTCA suits, explaining that, "[t]o date at least, this Court has also generally understood In re Neagle as providing federal officers a shield against only state criminal prosecution, not (as here) state tort liability."[84] The Court favorably quoted a nineteenth century case "holding that the defense would permit 'a civil action for damages,' even where it barred 'a criminal prosecution' because a damages action, unlike a prosecution, would not bring the 'federal and state governments into conflict.'"[85] Again, that conclusion makes sense given the history—Supremacy Clause immunity simply has not appeared in the myriad common-law suits against federal officials.[86]

A defendant might also raise what is known as "intergovernmental immunity." This doctrine grows out of the famous case McCulloch v. Maryland, where the Supreme Court held that the Supremacy Clause prohibited Maryland's attempt to tax the Bank of the United States.[87] As Chief Justice John Marshall's opinion declared, the Supremacy Clause means that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[88] Today, the doctrine bars state laws that "*either* 'regulat[e] the United States directly *or* discriminat[e] against the Federal Government or those with whom it deals.'"[89]

But as others have argued, this principle should not prohibit a converse 1983 action—which, after all, furthers the federal Constitution.[90] Rather than imposing additional state-based obligations on federal officials, converse 1983 simply enforces the federal Constitution against individuals already duty-bound to follow it. In addition, Chief Justice Marshall refers to the operation of "*constitutional* laws." Unconstitutional actions, in contrast, cannot further the legitimate "powers vested in the general government," and providing a remedy when such actions occur thus does not impede lawful federal operations of the kind the Supremacy Clause protects.

Nor should most converse 1983 laws run afoul of the "anti-discrimination" principle of intergovernmental immunity. As noted, the Supremacy Clause bars states from singling out federal actors for special disfavored treatment. So, in an illustrative recent case, the Ninth Circuit struck down a County executive order that sought to bar local airfields from servicing ICE flights; as the panel explained, "[b]y burden[ing] federal operations, and *only* federal operations, the [County] Executive Order violates the anti-discrimination principle of the intergovernmental immunity doctrine."[91] But converse 1983 remedies need not—and probably should not—single out federal officials alone. As several of the laws discussed in Part I reflect, state remedies can address constitutional injuries perpetrated by any official, whether federal, state or local—or indeed "any person."[92] The Supreme Court has made clear that a state law does not implicate the Supremacy Clause "just because it indirectly increases costs for the Federal Government, so long as the law imposes those costs in a neutral, nondiscriminatory way."[93] Many converse 1983 regimes seem to do just that.

In this regard, it is difficult to predict how a court might approach recent proposals or enactments that limit liability to particular contexts like "civil immigration enforcement." The federal government has already sued Illinois over its converse 1983 approach, arguing that the statute violates the anti-discrimination principle of intergovernmental immunity since the Act "expressly singles out for disfavored treatment officers who conduct 'civil immigration enforcement,' an area of law enforcement largely reserved to federal officers."[94] States will no doubt respond that these laws apply to "any" person—not simply federal actors—and as such are facially neutral, even if they are limited to a particular context.[95] They may also argue that, especially when paired alongside liability for state and local officials under Section 1983, these laws do not expose federal actors to liability above and beyond what comparable state employees already face—and so simply implement parity between state and federal actors, not discriminatory differential treatment. That said, some federal courts have taken a more functional approach to the doctrine, invalidating policies that appear to single out "federal immigration operations, based on the [jurisdiction's] disagreement with federal policy."[96]

These kinds of intergovernmental immunity disputes will largely turn on specific drafting choices, and states may wish to sidestep these questions through more universal language. But—as a category—converse 1983 causes of action fit comfortably within a rich tradition of state suits against federal officials and—properly conceived—do not improperly target the lawful operations of the federal government. Accordingly, converse 1983 appears to be fully consistent with the Constitution's Supremacy Clause.

IV. What About Qualified Immunity?

Federal defendants will probably also contend that, even if converse 1983 causes of action are valid, the doctrine of qualified immunity should provide at least a partial shield against liability. After all, in Section 1983 and *Bivens* actions, government officials can invoke qualified immunity, which bars plaintiffs from recovering damages unless the defendant's conduct violated "clearly established" law.[97] There are cogent reasons, however, to believe that qualified immunity should not automatically carry over to a converse 1983 cause of action. That is particularly true if a state statute expressly disclaims such immunity.

As an initial matter, it is not obvious where qualified immunity would "come from" in the context of converse 1983. In the *Bivens* context, the U.S. Supreme Court has suggested that qualified immunity––like the *Bivens* cause of action itself—originally arose "under general principles of federal jurisdiction."[98] More recently, however, the Court has rejected the premise that the power to create constitutional causes of action (and to define defenses to those actions) "is inherent in the grant of federal question jurisdiction."[99] Instead, the Court has said that establishing causes of action and immunities "is a legislative endeavor," rather than the job of the federal judiciary.[100] Consistent with these statements, a converse 1983 plaintiff could argue that federal courts lack the authority to extend qualified immunity to a state-created converse 1983 action. *Bivens* qualified immunity, moreover, is a federal judicial limitation on a federal judicial creation. As scholars have explained, "where the judiciary finds an implied right of action, as it did in *Bivens*, precedent says that the judiciary has greater discretion to create defenses to that cause of action."[101] The same is not true for state-created causes of action.

Similarly, the justifications for qualified immunity in the federal Section 1983 context also do not clearly carry over to converse 1983 actions. The availability of qualified immunity as a defense in Section 1983 actions follows from the Court's reading of the statute. According to the Court, when Congress originally enacted Section 1983, it meant to retain the common-law immunity defenses that existed at the time.[102] The same cannot necessarily

be said of state-created converse 1983 laws. Of course, a court *could* reach the same conclusion when interpreting a particular state converse 1983 statute—as the Supreme Judicial Court of Massachusetts has with respect to its civil rights statute.[103] But any conclusions about legislative intent would depend on the context of the specific statute.

To head off questions about whether they meant to allow for a qualified immunity defense, one option for states is to make their intent clear by expressly disclaiming such immunity. For example, Koenig and Moore suggest the following language: "As far as permissible under the federal Constitution, this statute abrogates any and all immunities otherwise available."[104] Rhode Island's H. 7202 contains similar language,[105] and Colorado's bill likewise disclaims immunity.[106]

It is difficult to predict exactly how a federal court might respond to such a statutory disclaimer. Although the legal basis for disregarding it is not apparent, a court might be uncomfortable denying an official a qualified immunity defense in a converse 1983 suit given the longstanding availability of that defense in *Bivens* and Section 1983 actions.

Some have suggested that the Supreme Court might feel compelled to recognize a new federal common law of officer liability that would extend an immunity shield to converse 1983 actions. Perhaps the closest analogy on this score is the 1988 case *Boyle v. United Technologies Corporation*.[107] There, the parent of a deceased army helicopter pilot sued the contractor that manufactured the helicopter, alleging negligent design under Viriginia tort law. Even though the suit was not an FTCA action, the Court looked to the FTCA's protection of government employees, and observed that "state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption."[108] According to the Court, a context "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."[109] Thus, the Court reasoned, "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."[110] One scholar, John F. Preis, reads *Boyle* as demonstrating "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."[111]

Such arguments, however, are in considerable tension with recent Supreme Court pronouncements on common lawmaking. The Court has declared that "[t]he cases in which federal courts may engage in common lawmaking are few and far between," going so far as to note that they granted *certiorari* in a case "only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking."[112] The Court may therefore be disinclined to expand on *Boyle*'s line of reasoning. Relatedly, the Court's recent criticism of *Bivens* is grounded in the idea that "the Judiciary is comparatively ill suited to decide whether a damages remedy against any [federal] agent is appropriate"[113] and that "absent utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power.'"[114] Thus, even if the Court were skeptical of a state creating a cause of action for damages against federal officials, the Court should, in theory, be reluctant to craft a new federal common law defense and instead leave the matter to Congress.[115]

It is of course entirely possible that federal courts would ultimately choose to apply qualified immunity in converse 1983 actions even over a state's express objection. But such a move is by no means required by current doctrine and is, in fact, in some tension with recent jurisprudential trends. It also bears noting that, even if federal officials can assert qualified immunity in converse 1983 actions, plaintiffs should still be able to prevail and recover damages at least in cases of egregious misconduct.

Conclusion

Over the past several decades, statutory and doctrinal changes at the federal level have increasingly left individuals unable to obtain meaningful relief when federal officials violate their constitutional rights.

States can offer an option to help fill this void. Under our federal system, states and the federal government *both* are responsible for ensuring the supremacy of federal law and the federal Constitution. For much of American history, states played a central role in helping individuals obtain redress when federal actors violated their rights, and states retain authority to do so today. A state-law damages remedy against federal officials for violating the federal Constitution— converse 1983—offers a pathway to check federal overreach.

[1] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1428 n.15 (1987).

[2] City of Los Angeles v. Lyons, 461 U.S. 95, 108–11 (1983).

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

[4] E. Garrett West, *Refining Constitutional Torts*, 134 Yale L.J. 858, 862–63 (2025).

[5] *See, e.g.*, Hernandez v. Mesa, 589 U.S. 93, 115–16 (2020) (Thomas, J., concurring) (explaining that "[f]rom the ratification of the Bill of Rights until 1971," when the Court established the *Bivens* cause of action, "[s]uits to recover such damages were generally brought under state tort law"); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 531 (2013) ("From the beginning of the nation's history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding.").

[6] *See* 28 U.S.C. § 2671 *et seq*.

[7] *See, e.g.*, Martin v. United States, 145 S. Ct. 1689, 1695 (2025) (explaining that "[t]he FTCA allows those injured by federal employees to sue the United States for damages . . . by waiving . . . the federal government's sovereign immunity for certain torts committed by federal employees acting within the scope of their employment" (internal quotation marks omitted)).

[8] *See, e.g.*, Lauren Bonds, *When ICE Agents Break the Law, Can Victims Sue? The Supreme Court Hints Yes. Will the Eleventh Circuit Listen?*, Am. Const. Soc'y: Expert F. (July 8, 2025), https://www.acslaw.org/expertforum/when-ice-agents-break-the-law-can-victims-sue-the-supreme (https://www.acslaw.org/expertforum/when-ice-agents-break-the-law-can-victims-sue-the-supreme-court-hints-yes-will-the-eleventh-circuit-listen/)court-hints-yes-will-the-eleventh-circuit-listen/ (https://www.acslaw.org/expertforum/when-ice-agents-break-the-law-can-victims-sue-the-supreme-court-hints-yes-will-the-eleventh-circuit-listen/) (anticipating that "the FTCA will be the litigation vehicle for people injured by ICE as well as the federal militarized response to protests opposing immigration raids"). In a high-profile example, Columbia University activist Mahmoud Khalil filed a notice of claim under the FTCA seeking $20 million in damages related to his immigration detention. *See* Ctr. for Const. Rights, *Notice of Claim for Damages Under the Federal Tort Claims Act* (July 10, 2025), https://ccrjustice.org/sites/default/files/attach/2025/06/7-10-25_Khalil%20FTCA_w.pdf (https://ccrjustice.org/sites/default/files/attach/2025/06/7-10-25_Khalil%20FTCA_w.pdf). (https://ccrjustice.org/sites/default/files/attach/2025/06/7-10-25_Khalil%20FTCA_w.pdf)

[9] William Baude, Jack Goldsmith, John F. Manning, James E. Pfander & Amanda L. Tyler, Hart and Wechsler's The Federal Courts and the Federal System 1345 (8th ed. 2025). Among other things, the FTCA excludes relief for some types of intentional torts and for claims based on an officer's performance of a "discretionary function." *See, e.g.*, *Martin*, 145 S. Ct. at 1695–96 (describing these limitations). It also requires individuals to make a timely application for administrative settlement before suing, precludes punitive damages, and does not allow for jury trials.

[10] *See, e.g.*, James E. Pfander & Rex N. Alley, *Federal Tort Liability After* Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law*, 138 Harv. L. Rev. 985, 997 (2025) (noting broad scholarly agreement that the existing "body of remedial law . . . no longer offers effective remedies for many government wrongs").

[11] 28 U.S.C. § 2679(b)(2).

[12] Amar first coined the term in *Of Sovereignty and Federalism*, *supra* note 1. He then developed the concept further in several companion pieces. *See* 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) [hereinafter Amar, *Questions and Answers*]; Akhil Reed Amar, *Five Views of Federalism: Converse1983 in Context,* 47 Vand. L. Rev. 1229, 1230 (1994).

[13] See Thomas A. Koenig & Christopher D. Moore, *Of State Remedies and Federal Rights*, 75 Cath. U. L. Rev. (forthcoming 2025); Vázquez & Vladeck, *supra* note 5, at 537; John F. Preis, *The False Promise of the Converse-1983 Action*, 87 Ind. L.J. 1697 (2012); Vikram D. Amar, *Converse § 1983 Suits in Which States Police Federal Agents*, 69 Brook. L. Rev. 1369 (2004); 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).

[14] See Cal. Civ. Code § 52.1(c) ("Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with [by threat, intimidation, or coercion] may institute and prosecute in their own name and on their own behalf a civil action for damages"). Litigants have sometimes tried to fold Bane Act claims into suits against the United States under the Federal Tort Claims Act. District courts have generally rejected such attempts, concluding that the FTCA's waiver of the government's sovereign immunity does not extend to asserted violations of federal constitutional rights. *See, e.g.*, Romero v. United States, 771 F. Supp. 3d 1137, 1144 (S.D. Cal. 2025). Those rulings, however, do not call into question the distinct approach of using the Bane Act as a converse 1983 cause of action: In a converse 1983 suit, the plaintiffs do not sue the United States itself (which can pose sovereign immunity problems). Instead, as in *Bivens* actions and conventional Section 1983 actions, the plaintiffs sue government officials for damages in their individual capacities (which does not similarly implicate sovereign immunity).

[15] See Mass. Gen. Laws ch. 12, § 11I ("Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with [by threats, intimidation, or coercion] may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages").

[16] See Me. Stat. tit. 5, § 4682.1-A ("A person whose exercise or enjoyment of the rights secured by the United States Constitution or the laws of the United States or of the rights secured by the Constitution of Maine or the laws of the State has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief whenever any person, whether or not acting under color of law.").

[17] See N.J. Stat. Ann. § 10:6-2(c) ("Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief."). As explained below, Third Circuit precedent currently poses an obstacle to pursuing converse 1983 claims through the New Jersey Civil Rights Act. See *infra* Part II. No other federal circuit court has endorsed that conclusion, however.

[18] Ill. Public Act 104-0440, formerly H.B. 1312. The federal government has sued to enjoin Illinois's law, though did not seek any preliminary relief. See Press Release, U.S. Dep't of Just., *Justice Department Sues J.B. Pritzker, Kwame Raoul Over the Illinois Bivens Act* (Dec. 22, 2025), https://www.justice.gov/opa/pr/justice-department-sues-jb-pritzker-kwame-raoul-over-illinois-bivens-act (https://www.justice.gov/opa/pr/justice-department-sues-jb-pritzker-kwame-raoul-over-illinois-bivens-act). As a result, at the time of writing, Illinois's cause of action remains fully in effect.

[19] S.B. 8500A, 2025–26 Leg., Reg. Sess. (N.Y. 2025) (emphasis added). Several similar bills have also been introduced in New York. See S.B. 3280, 2025–26 Leg., Reg. Sess. (N.Y. 2025) ("Any person who, under the color of law, subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the federal or state constitution or laws, or whose exercise or enjoyment of those rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under the color of law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."); S.B. 176, 2025– 26 Leg., Reg. Sess. (N.Y. 2025) ("A person or public entity acting under color of law that subjects or causes to be subjected any other person to the deprivation of any rights, privileges, or immunities secured by the federal or state Constitution or laws, is liable to the injured party for legal or equitable relief or any other appropriate relief.").

[20] H.B. 1314, 2026 Leg., Reg. Sess. (Va. 2026) (emphasis added).

[21] S.B. 747, 2025-26 Leg., Reg. Sess. (Cal. 2025) (emphasis added). An action at "law," as opposed to "equity," typically means an entitlement to damages. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) ("We have recognized the 'general rule' that monetary relief is legal . . . ." (quoting Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558, 570 (1990)).

[22] *See* S.B. 26-005, 75th Gen. Ass., Second Reg. Sess. (Colo. 2026).

[23] *See* S.B. 2438, 2026 Leg., Reg. Sess. (Haw. 2026).

[24] S.B. 346, 2026 Leg., Reg. Sess. (Md. 2026).

[25] H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026).

[26] *See* H.B. 2597, 69th Leg., Reg. Sess. (Wash. 2026).

[27] *See* A.B. 331, 2025–26 Gen. Assem., 107th Sess. (Wis. 2025).

[28] *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737 app. A at 809–13 (2021) (listing states with statutory causes of action, and noting that Arkansas and New Mexico, among others, are limited to either specific state actors or violations of state constitutional rights).

[29] *See* Protect Democracy, *The Universal Constitutional Remedies Act, explained* (Jan. 6, 2026), https://protectdemocracy.org/work/universal-constitutional-remedies-act-explained/ (https://protectdemocracy.org/work/universal-constitutional-remedies-act-explained/).

[30] *See* Reinert, Schwartz, & Pfander, *supra* note 28, app. B at 814–16. A converse 1983 version simply supplement section a.1 by adding: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of the [State, County, or City] of [], **or of the United States…**"

[31] See Clifford v. Maine General Med. Ctr., 91 A.3d 567, 583 n.17 (Me. 2014) ("Claims of qualified immunity raised under the MCRA are analyzed similarly to qualified immunity claims raised in federal civil rights actions."); Brown v. Dickey, 117 F.4th 1, 3 n.1 (1st Cir. 2024) ("[T]he protections provided by the Maine Civil Rights Act, including immunities, are coextensive with those afforded by 42 U.S.C. § 1983." (citation omitted)).

[32] *See* Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989) ("We presume that the Legislature was aware of [qualified immunity] case law when it chose to pattern the Massachusetts Civil Rights Act after § 1983.")

[33] *See* Venegas v. Cnty. of Los Angeles, 63 Cal. Rptr. 3d 741, 753 (Ct. App. 2007) ("[Q]ualified immunity of the kind applied to actions brought under 42 United States Code Section 1983 does not apply to actions brought under section 52.1."). That said, to prevail on a Bane Act claim, plaintiffs typically must show that the defendant acted with specific intent, which may be functionally similar to overcoming qualified immunity. Specifically, Bane Act plaintiffs are expected to establish that (1) "the right at issue [was] clearly delineated and plainly applicable under the circumstances of the case," and (2) the defendant acted "with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that right." Sandoval v. Cnty. of Sonoma, 912 F.3d 509, 520 (9th Cir. 2018) (quoting Cornell v. City & Cnty. of San Francisco, 225 Cal. Rptr. 3d 356, 386 (Ct. App. 2017)). This standard can be met when a defendant "acted in 'reckless disregard' of the constitutional right," "even if the defendant did not in fact recognize the unlawfulness of his act." *Id.* (quoting *Cornell*, 225 Cal. Rptr. 3d at 386).

[34] Cole v. Doe 1 Thru 2 Officers of City of Emeryville Police Dep't, 387 F. Supp. 2d 1084, 1103 (N.D. Cal. 2005) (citing California cases).

[35] *See* Longval v. Comm'r of Corr., 535 N.E.2d 588, 593 (Mass. 1989) ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the [MCRA]."). As one commentator has observed, this means that, paradoxically, "[s]omeone victimized by police misconduct will have

a viable MCRA claim if the officer *threatened* to use excessive force, but not if the officer simply hauled off and *used* excessive force without threatening to do so beforehand." Matthew R. Segal, *The Promise and Perils of State Civil Rights Legislation*, 54 N.M. L. Rev. 355, 359 (2024).

[36] Massachusetts's statute, for example, provides that courts "shall" award attorneys' fees; New Jersey's says courts "may." *Compare* Mass. Gen. Laws ch. 12, § 11I *with* N.J. Stat. Ann. § 10:6-2(f).

[37] For example, "[Bane Act] damages include actual damages, treble damages and exemplary damages."

Bolbol v. City of Daly City, 754 F. Supp. 2d 1095, 1117 (N.D. Cal. 2010)) (internal quotations omitted). The New Jersey Civil Rights Act, in contrast, does not expressly authorize treble damages—even though other New Jersey statutes do. *See, e.g.*, N.J. Stat. Ann. § 56:9-12 (authorizing a "[t]reble damages suit" for anticompetitive practices). Virginia's recent proposal expressly authorizes punitive damages. *See* H.B. 1314, 2026 Leg., Reg. Sess. (Va. 2026).

[38] Ill. Public Act 104-0440, formerly H.B. 1312.

[39] *See* S.B. 26-005, 75th Gen. Ass., Second Reg. Sess. (Colo. 2026).

[40] *See* H.B. 2597, 69th Leg., Reg. Sess. (Wash. 2026).

[41] H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026).

[42] *Compare, e.g.,* S.B. 747, 2025-26 Leg., Reg. Sess. (Cal. 2025) (providing qualified immunity commensurate with federal Section 1983) *with* H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026) ("As far as permissible under the Federal Constitution, any existing immunity provided against liability, damages, or attorneys' fees under federal law shall not apply.").

[43] S.B. 747, 2025-26 Leg., Reg. Sess. (Cal. 2025).

[44] *See infra* Part III (discussing intergovernmental immunity).

[45] Amar, *Questions and Answers*, *supra* note 12, at 161–62. Any converse 1983 remedy, through any mechanism, would fill an existing gap in the remedial landscape. There are reasons to suspect, however, that a legislatively created regime may raise fewer eyebrows with the U.S. Supreme Court than a judicially created remedy. The U.S. Supreme Court has repeatedly emphasized that "creating a cause of action is a legislative endeavor." *Egbert v. Boule,* 596 U.S. 482, 491 (2022). Of course, state courts differ from their Article III counterparts: Their authority to craft common law is deeply rooted and the elected nature of many state judges cut against any democratic accountability concerns animating the Supreme Court's hostility to *Bivens*. But the U.S. Supreme Court appears to view the exercise of remedy-creation as one uniquely suited to legislative balancing. *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 133–34, 136 (2017) (emphasizing "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide"). A precisely crafted statutory converse 1983 regime, backed by legislative factfinding, might therefore carry more presumptive legitimacy with the current Court.

[46] *See, e.g.*, Strauss v. State, 330 A.2d. 646 (N.J. Super. Ct. Law Div. 1974); Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984); Brown v. State, 674 N.E.2d 1129 (N.Y. 1996); Binette v. Sabo, 710 A.2d 688 (Conn. 1998); Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002); Zullo v. State, 205 A.3d 466 (Vt. 2019); Mack v. Williams, 522 P.3d 434 (Nev. 2022).

[47] Mesa v. California, 489 U.S. 121, 129 (1989).

[48] *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (explaining that federal jurisdiction is proper where a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities").

[49] *See, e.g.*, James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561, 566 (2020) (finding that the government paid damages awards in more than 95 percent of *Bivens* cases brought against Federal Bureau of Prisons employees).

[50] 484 U.S. 292 (1988).

[51] The Court's decision in *Westfall* was in line with a long tradition of state common-claim damages actions against federal officials. As Justice Thomas has written, "[f]rom the ratification of the Bill of Rights until 1971," when the Court established the *Bivens* cause of action, "[s]uits to recover such damages were generally brought under state tort law." *Hernandez,* 589 U.S. at 115–16 (Thomas, J., concurring).

[52] Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100694, 102 Stat. 4563.

[53] 28 U.S.C. § 2679(b)(1).

[54] *Id.*; *see also Mesa*, 589 U.S. at 111 (explaining that the Westfall Act "makes the Federal Tort Claims Act (FTCA) 'the exclusive remedy for most claims against Government employees arising out of their official conduct'" (quoting *Hui v. Castaneda*, 559 U.S. 799, 806 (2010)). *But see* Pfander & Alley, *supra* note 10 (arguing that the Westfall Act allows for a wider range of common-law remedies than has typically understood).

[55] 28 U.S.C. § 2679(b)(2)(A).

[56] *See Egbert*, 596 U.S. at 491 (noting that *Bivens* actions are available for specific Fourth Amendment violations; "a former congressional staffer's Fifth Amendment sex-discrimination claim," and "a federal prisoner's inadequate-care claim under the Eighth Amendment"—but that any other scenario constitutes a new "context" where a damages remedy is disfavored).

[57] United States v. Smith, 499 U.S. 160, 173 (1991).

[58] Hui v. Castaneda, 559 U.S. 799, 807 (2010).

[59] *See, e.g.*, Meshal v. Higgenbotham, 804 F.3d 417, 428 (D.C. Cir. 2015); Vanderklok v. United States, 868 F.3d 189, 201 (3d Cir. 2017); Rodriguez v. Swartz, 899 F.3d 719, 740 (9th Cir. 2018); Koenig & Moore, *supra* note 13, at 46 n.362; *see also* Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019 Cato Sup. Ct. Rev. 263, 279 ("[C]ourts and commentators have generally assumed that this language only preserves *Bivens* suits . . . .").

[60] Henry v. Essex Cnty., 113 F.4th 355, 364 (3d Cir. 2024).

[61] *Id*. Nevertheless, this ruling stands as a barrier to any converse 1983 action brought in the Third Circuit (Delaware, New Jersey, and Pennsylvania) unless litigants can convince another panel to distinguish the case or the court agrees to take the question en banc. Notably, Judge Porter specifically declined to join this paragraph of the opinion. *See id.* at 364 n.7. In nonprecedential rulings, a few trial courts have similarly applied the Westfall Act, again with limited analysis. *See, e.g.*, Pearsons v. United States, 723 F. Supp. 3d 825, 832–33 (C.D. Cal. 2024); Quiñonez v. United States, No. 22-cv-03195, 2023 WL 5663156, at *2–3 (N.D. Cal. Aug. 30, 2023).

[62] Tanzin v. Tanvir, 592 U.S. 43, 49 (2020) (citation omitted). In an earlier case, *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007), the Court rejected a *Bivens* claim in part because the Court observed that the victim ''had a civil remedy in damages for trespass'' under state law to address the violation––an observation that makes sense only if that state cause of action remained available. *See* Vázquez & Vladeck, *supra* note 5, at 570–71; *Buchanan v. Barr*, 71 F.4th 1003, 1017 n.5 (D.C. Cir. 2023) (Walker, J. concurring). *But see* James E. Pfander & David P. Baltmanis, *W(h)ither* Bivens*?*, 161 U. Pa. L. Rev. Online 231, 244 n.68 (2013) (suggesting that "the *Wilkie* Court simply misunderstood the statutory framework" and made a mistaken "assumption about the viability of state tort remedies").

[63] *Buchanan*, 71 F.4th at 1017 (Walker, J., concurring). In particular, pointing to "the ordinary meaning of the phrase 'brought for'" and explaining how "[c]ourts have long used it to describe the goal of a suit, not the cause of action," Judge Walker noted that "[i]f Congress had meant to limit that exception to *Bivens* suits, it might have said 'suits *arising under* the Constitution,' not suits '*brought for*' constitutional violations"— observing that the former tracks the Supreme Court's own description of *Bivens*. *Id.* at 1016–17 (Walker, J., concurring).

[64] *See* Koenig & Moore, *supra* note 13, at 30–47.

[65] *Id.* at 35–43. They note that lawmakers described the Westfall Act as "'a status quo ante bill' designed to bring the law back to where it was prior to *Westfall v. Erwin*," and that one of legislative leaders involved in the bill, Representative Barney Frank, insisted that the legislation had no impact on the viability of constitutional claims: "We make special provisions here to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill does not affect it." *Id*. at 44 (quoting 134 Cong. Rec. 15963) (emphasis omitted).

[66] Vázquez & Vladeck, *supra* note 5, at 571 (quoting H.R. Rep. No. 100-700, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950).

[67] *Id.* at 573. In fact, based on the rich common law history of officer suits pre-dating *Bivens* and the role the Constitution played as a federal *defense*—a history explored more fully below—Vázquez and Vladeck argue for an even more expansive reading of the exemption than Koenig and Moore, contending that § 2679(b)(2)(A) seems to "encompass common law claims in cases where the defendant has violated the Constitution," not simply constitutional causes of action. *Id.* at 572. *But see* Koenig & Moore, *supra* note 13, at 47. By expressly providing a cause of action for violations of the constitution, converse 1983 regimes need not test Vázquez and Vladeck's more expansive theory.

[68] Pfander & Baltmanis, *supra* note 62, at 233. Pfander and Baltmanis emphasized the interplay between the Westfall Act and the FTCA's exclusivity, substitution, and preclusion provisions, contending that "the constitutional tort exception was written into the preclusion language of the Westfall Act, but it was not written into the FTCA exclusivity provisions that transform state common law claims into suits against the government." *Id*. at 245. Accordingly, they argued, the "ultimate substitution of the federal government as a defendant" limits the ability of plaintiffs to pursue "state common law actions seeking to vindicate constitutional rights" against federal officials. *Id*. at 240.

[69] Pfander & Alley, *supra* note 10, at 1054; *see also id.* at 1038–39 n. 349.

[70] *Cf.* Trump v. United States, 603 U.S. 593 (2024) (holding that the President enjoys absolute immunity from criminal prosecution at least with respect to core official acts).

[71] Johnson v. Maryland, 254 U.S. 51 (1920); *see also* Colorado v. Symes, 286 U.S. 510, 518 (1932) ("Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law.")

[72] *See supra* Part I; *see also* Vázquez & Vladeck, *supra* note 5, at 531.

[73] Individuals could also bring what was known as "action on the statute"—a challenge to the actions of a public official "resulting from activity in violation of a legislatively created duty or standard." Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1, 18 (1968); *see also* Vázquez and Vladeck, *supra* note 13, at 538–39.

[74] West, *supra* note 4, at 363.

[75] Wheeldin v. Wheeler*,* 373 U.S. 647, 652 (1963).

[76] For prominent examples of common-law suits against federal officials, *see, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 176 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 115 (1804); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 150 (1836); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 128 (1851); Smith v. Shaw, 12 Johns. 257 (N.Y. 1815); *see also* Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1128 n.89 (1969)

(collecting additional examples of common law actions encompassing constitutional torts); West, *supra* note 4, at 864 n.11 (same). As scholars have noted, "[p]erhaps because many of the cases in which officer liability was recognized were decided before *Erie*, the Court did not always expressly situate them in state law, referring to the officer as being liable in '"tort," or under the "general law" or "common law."'" Brief of Carlos M. Vázquez & Anya Bernstein as *Amici Curiae* in Support of Petitioners at 20 n.4, Hernandez v. Mesa, 589 U.S. 93 (2020) (No. 17-1678), 2019 WL 3854461, at *20 n.4 (quoting Hill, *supra*, at 1124); *see also* Ann Woolhandler and Michael G. Collins, *Was* Bivens *Necessary?*, 96 Notre Dame L. Rev. 1893, 1901 (2021) (describing some of these suits as "garden-variety common-law actions that could be traced to either general or state law"). In any event, these causes of action were decidedly not federal. *See* Koenig & Moore, *supra* note 13, at 7 n.28.

[77] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 (1971) (observing that ordinarily a "petitioner may obtain money damages to redress [an] invasion of [constitutional] rights only by an action in tort, under state law, in the state courts."); *id*. at 429 (Black, J., dissenting) (arguing that "[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and *the legislatures of the States*" (emphasis added)); Brief for the Respondents at 10, 38, *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301), 1970 WL 122211, at *10, *38 (contending that a federal damages remedy was unnecessary because federal officials were "subject to the same common-law actions for damages as those applicable to private persons," and this "a body of state law" provided "substantial recovery" when a federal officer's actions violated the Fourth Amendment). Indeed, even after *Bivens* authorized plaintiffs to pursue claims against federal officials under the federal Constitution directly, state common-law claims also remained available, at least initially. Koenig & Moore, *supra* note 13, at 15–16.

[78] *Hernandez*, 589 U.S. at 110.

[79] See Bryna Godar, State Democracy Rsch. Initiative, Explainer: Can States Prosecute Federal Officials? (2025), https://statedemocracy.law.wisc.edu/featured/2025/explainer-can-states-prosecute-federalofficials/ (https://statedemocracy.law.wisc.edu/featured/2025/explainer-can-states-prosecute-federalofficials/).

[80] Waxman and Morrison, *supra* note 13, at 2237; Preis, *supra* note 13, at 1713.

[81] Godar, *supra* note 79. In re Neagle, 135 U.S. 1 (1890); Waxman & Morrison, *supra* note 13, at 2237; Rebecca E. Hatch, Annotation, *Construction and Application of United States Supreme Court Decisions in* Cunningham v. Neagle, *135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), Establishing Standard for Supremacy Clause Immunity as to Actions of Federal Officers or Agents Alleged to Be in Violation of State Law*, 53 A.L.R. Fed. 2d 269, 280–81 (2011).

[82] In re Neagle, 135 U.S. 1 (1890).

[83] *Id.* at 75–76.

[84] Martin v. United States, 145 S. Ct. 1689, 1702 n.2 (2025).

[85] *Id.* (quoting In re Waite, 81 F. 359, 363–64 (N.D. Iowa 1897)).

[86] *See* Koenig & Moore, *supra* note 13, at 53–54 (arguing, even before *Martin*, that "the history of common law suits brought against federal officials for actions taken in violation of federal constitutional rights further proves the irrelevance of Supremacy Clause immunity to converse-1983," since "[i]n the mine-run of cases, no Supremacy Clause immunity attached"). Even in criminal cases, moreover, the immunity is a layer of protection for officials, not a complete bar on state enforcement. As our companion piece explains, there have been numerous state prosecutions of federal officials, including at least one successful conviction. *See* Godar, *supra* note 79.

[87] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[88] *Id.* at 436.

[89] United States v. Washington, 596 U.S. 832, 838 (2022) (quoting North Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality opinion)).

[90] *See, e.g.*, Amar, *Questions and Answers*, *supra* note 12, at 170–71.

[91] United States v. King Cnty., Washington, 122 F.4th 740, 757 (9th Cir. 2024) (internal citations and quotations omitted).

[92] *See supra* Part I.

[93] *Washington*, 596 U.S. at 839.

[94] *See* Compl. ¶ 90, United States v. State of Illinois et al., 25-cv-2220 (S.D. Ill. Dec. 22, 2025).

[95] *See, e.g.*, McHenry Cnty. v. Kwame Raoul, 44 F.4th 581, 594 (7th Cir. 2022)

("The mere fact that the Act touches on an exclusively federal sphere is not enough to establish discrimination."); United States v. California, 921 F.3d 865, 881 (9th Cir. 2019) (explaining that intergovernmental immunity is "not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment.").

[96] *King Cnty., Washington*, 122 F.4th at 757–58.

[97] Per the Supreme Court's famous articulation of the qualified immunity standard in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Qualified immunity has generated substantial debate and criticism, which is largely beyond the scope of this explainer. *See, e.g.*, Joanna Schwartz, Shielded: How The Police Became Untouchable (2023); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405, 1415–21 (2019) (surveying qualified immunity literature); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851 (2010).

[98] *Hernandez*, 589 U.S. at 101. As noted, converse 1983 suits—being premised on federal constitutional violations—would likely qualify as federal questions for purposes of 28 U.S.C. § 1331. *See supra* Part I.

[99] *Hernandez*, 589 U.S. at 101.

[100] Egbert v. Boule, 596 U.S. 482, 491 (2022).

[101] Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1855 (2018); *see also id*. at 1863 n.68; *cf. Hernandez*, 589 U.S. at 101.

[102] See Pierson v. Ray, 386 U.S. 547, 554 (1967); Nielson & Walker, *supra* note 101, at 1862. For criticism of this account of the common law and the Court's conclusion regarding Congress's intent in passing Section 1983, *see, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023); *see also* James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. Online 148 (2021); Baude, *Is Qualified Immunity Unlawful?*, *supra* note 97; William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115 (2022).

[103] *See Duarte*, 537 N.E.2d at 1232. If a converse 1983 action is heard in federal court and a question arises as to whether the state law is best read to incorporate an immunity defense, the federal court could potentially certify that question to the state supreme court for a definitive interpretation of state law.

[104] Koening & Moore, *supra* note 13, at 47–48.

[105] *See* H. 7202, 2026 Gen. Ass., Reg. Sess. (R.I. 2026) ("As far as permissible under the Federal Constitution, any existing immunity provided against liability, damages, or attorneys' fees under federal law shall not apply.").

[106] See S.B. 26-005, 75th Gen. Ass., Second Reg. Sess. (Colo. 2026) ("To the maximum extent permissible under the United States Constitution, a grant of immunity to a defendant, including, but not limited to, sovereign immunity; official immunity; intergovernmental immunity; qualified immunity; supremacy clause immunity; statutory immunity, including the 'Colorado Governmental Immunity Act', Article 10 of Title 24; or common law immunity, does not apply in an action brought pursuant to this section.")

[107] 487 U.S. 500 (1988).

[108] *Id.* at 511.

[109] *Id.* at 505.

[110] *Id.* at 512.

[111] Preis, *supra* note 13, at 1715. While not relying on *Boyle*, Seth P. Waxman & Trevor W. Morrison relatedly suggest a uniform standard for adjudicating the civil and criminal liability of federal officials that would effectively encompass both Supremacy Clause immunity and qualified immunity and provide protection for "good-faith, discretionary decisions . . . ma[d]e in the course of enforcing federal law." Waxman & Morrison, *supra* note 13, at 2249.

[112] Rodriguez v. FDIC, 589 U.S. 132, 133, 138 (2020).

[113] *Boul*e, 596 U.S. at 495.

[114] *Id.* at 492 (quoting Hernandez v. Mesa, 589 U.S. 93, 100 (2020)).

[115] Congress plainly has authority to legislate on matters of federal officer liability and immunity if it chooses to do so. *See* Amar, *Of Sovereignty and Federalism*, *supra* note 1, at 1518; Koenig & Moore, *supra* note 13, at 61–63; Preis, *supra* note 13, at 1721–25; Waxman & Morrison, *supra* note 13, at 2248–49. Professor Amar, however, has suggested that "if Congress seeks to oust state law here, Congress must itself provide a federal remedy at least as generous as the most generous state remedy Congress seeks to preempt." Amar, *Questions and Answers*, *supra* note 12, at 179. Most other commentators disagree. *See* Waxman & Morrison, *supra* note 13, at 2248 (arguing that "a State that decides to enact a converse-1983 statute without providing for qualified immunity does not implement a constitutional requirement"—it is instead a "policy preference, not constitutional command"); Preis, *supra* note 13, at 1721–25; Koenig & Moore, *supra* note 13, at 61–63 (reaching similar conclusions).

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