NOTES

JETTISONING "JURISDICTIONAL": ASSERTING THE SUBSTANTIVE NATURE OF SUPREMACY CLAUSE IMMUNITY

Stephen A. Cobb[*]

Under the doctrine of Supremacy Clause immunity, federal officers generally cannot be prosecuted for state crimes committed while carrying out their duties. This much is well established. What has escaped the notice of the courts, however, is the nature of the immunity. Though they refer to it as "jurisdictional," it is in fact substantive.

This is no small error. There is a difference between substantive and jurisdictional immunities, yet the current characterization of Supremacy Clause immunity glosses over it. And this distinction runs even deeper: Substantive immunities go to the merits of a case, which in turn relate to the legislature's power to enact laws. Jurisdictional immunities, by contrast, implicate only a court's power to rule on the merits.

The extent of this mischaracterization has been missed because it is so deeply seated. There are three contributors to this problem: the Supreme Court's once-expansive conception of jurisdiction, the lack of a unifying theory of immunities, and the nature of Supremacy Clause immunity's founding cases.

This mischaracterization presents fundamental semantic difficulties, as well as four practical risks of harm to the parties. First, a court may incorrectly raise the immunity sua sponte. Second, a court may improperly refuse to consider matters of equity or fairness in determining whether the immunity applies. Third, a court may unduly revisit a state judgment on the immunity's applicability. Finally, double

[*] Law Clerk to the Honorable Pamela L. Reeves, United States District Judge for the Eastern District of Tennessee. J.D. 2016, University of Virginia School of Law; B.S. 2013, Belmont University. I thank Professor Caleb Nelson for his invaluable guidance throughout the writing of this Note. Thanks also to Alyson Sandler, Elizabeth Douglas, and the rest of the staff at the *Virginia Law Review* for their careful editing and thoughtful suggestions.

jeopardy would not protect the officer should a court dismiss the prosecution based on Supremacy Clause immunity.

INTRODUCTION

IN 1889, a man bent on vengeance tried to kill a U.S. Supreme Court Justice, only to be shot dead by the Justice's marshal.[1] In 1977, an FBI agent raiding a drug-manufacturing ranch in Humboldt County, California, gunned down a fleeing suspect.[2] And in 2013, a city police detective, deputized by the FBI and the U.S. Marshals Service, accidentally shot and killed a bank robber while wrestling him to the ground.[3] All three men were indicted in state court for the homicides.[4] But when fed-

[1] Cunningham v. Neagle (In re Neagle), 135 U.S. 1, 52–53 (1890).
[2] Clifton v. Cox, 549 F.2d 722, 724 (9th Cir. 1977).
[3] Texas v. Kleinert, 143 F. Supp. 3d 551, 555 (W.D. Tex. 2015).
[4] See *Neagle*, 135 U.S. at 3 (murder); *Clifton*, 549 F.2d at 724 (second-degree murder and involuntary manslaughter); *Kleinert*, 143 F. Supp. 3d at 555 (manslaughter).

eral courts took up each case, they all held that these men could not be prosecuted.[5]

The dispositive facts in each case were that the defendant was a federal officer, and that during the charged crime he was carrying out his duties as a federal officer. As a result, each defendant was immune from prosecution via the doctrine of Supremacy Clause immunity.[6] The foundation of this doctrine is the U.S. Constitution's Supremacy Clause, which reads,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[7]

This Clause is the basis for the doctrine of preemption, under which federal law trumps state law where the two conflict.[8] Generally, when a person commits a crime under state law while carrying out the duties placed on him by federal law, the state criminal law is preempted by the federal law, and the person cannot be prosecuted.[9] This is the doctrine of Supremacy Clause immunity.

The doctrine has two parts. First, the court looks to whether the officer was acting pursuant to her duties under federal law.[10] If so, the court then considers whether the officer's actions were necessary and proper to the execution of her duties.[11] If both prongs are satisfied, then

[5] See *Neagle*, 135 U.S. at 76; *Clifton*, 549 F.2d at 730; *Kleinert*, 143 F. Supp. 3d at 569.

[6] See, e.g., *Clifton*, 549 F.2d at 730; *Kleinert*, 143 F. Supp. 3d at 555 ("This defense to state prosecution for acts committed by federal officers in pursuance of federal duties is now generally referred to as Supremacy Clause immunity . . . .").

[7] U.S. Const. art. VI, cl. 2.

[8] See, e.g., Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594–95 (2015).

[9] See Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195, 2214–23 (2003) (discussing how preemption operates in the context of state prosecution of federal officers).

[10] E.g., Arizona v. Files, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014).

[11] Id. Note that the federal circuits differ over what must be shown to satisfy each prong. For example, the Ninth Circuit reads the first prong broadly, to include even acts of "questionable legality." Id. at 877–78 (citing *Clifton*, 549 F.2d at 727). To meet the the second prong of the immunity analysis, the Ninth Circuit requires officers to show: (1) a subjective belief that their actions were reasonable; and (2) that this belief was objectively reasonable under the circumstances. Id. at 878; see Wyoming v. Livingston, 443 F.3d 1211, 1220–22

the officer cannot be prosecuted under state law for the charged offense.[12] This much is well established and uncontroversial. Yet there is one aspect of Supremacy Clause immunity which, despite its great potential for bringing harm to litigants and undermining federal-state relations and even the separation of powers, has gone overlooked since the doctrine's inception in 1880[13]: how courts have characterized the immunity. Lower federal courts have made a habit of referring to Supremacy Clause immunity as "jurisdictional," while in fact it is substantive.[14] One cannot put too much blame on the federal courts for this mischaracterization, however, as it has deep-seated origins that are both systematic and historical.[15]

The importance of using the right words in legal analysis cannot be overstated, and is so obvious that it need not be belabored.[16] In the words of Justice Antonin Scalia: "Terminology is destiny."[17] Because legal terms carry legal baggage, the importance of using proper terminology in legal reasoning is more critical than using even proper syntax or grammar.[18] This is especially so in judicial opinions: They "are going to be used for lawyers, for other judges—to tell them what the law is. It's an explanation of what the law is."[19] Most of all, appellate opinions define legal terms for courts and litigants, and in doing so decide which terms are "right."

(10th Cir. 2006) (recognizing a circuit split over the second prong's subjective-belief requirement and voicing concern with it).

[12] *Livingston*, 443 F.3d at 1230.

[13] See Tennessee v. Davis, 100 U.S. 257, 266 (1879).

[14] See infra notes 99–100 and accompanying text.

[15] See infra Section II.B.

[16] See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 124 (1982) (Burger, C.J., dissenting) (noting the "specificity and precision that might be expected of a written opinion or statute"); Nye & Nissen v. United States, 336 U.S. 613, 629 (1949) (Murphy, J., dissenting) ("Precise use of words is part of the lawyer's craft."); Bryan A. Garner, Interview with Chief Justice John G. Roberts Jr., 13 Scribes J. Legal Writing 5, 5 (2010) ("Language is the central tool of our trade. . . . [Words] are the building blocks of the law."); Lawrence J. Block et al., The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy, 137 U. Pa. L. Rev. 1481, 1482 (1989) ("The precise use of words is always important in legal analysis . . . ."); Charles E. Wyzanski, Jr., Note, The Trend of the Law and Its Impact on Legal Education, 57 Harv. L. Rev. 558, 562 (1944) (citing as one of the advantages of the case-study method in law school its ability to train students "in the precise use of words").

[17] Gonzalez v. Thayer, 132 S. Ct. 641, 664 (2012) (Scalia, J., dissenting).

[18] See, e.g., Lawrence B. Solum, Intellectual History as Constitutional Theory, 101 Va. L. Rev. 1111, 1125 n.27 (2015) ("Sentence fragments. Verbs is not in agreement with subjects. Rule breaking, yes. Meaningless, no.").

[19] Garner, supra note 16, at 8 (quoting Chief Justice Roberts).

In some instances where terms carry special weight, there may be only one "right" term.[20] For example, there is very specific language that, when inserted into a treaty with an Indian tribe, gives rise to an "almost insurmountable" presumption of terminating reservation status.[21] Similarly, there is a sharp difference between "clear error," "manifest error," and "clearly wrong."[22] When legal terms carry unique implications, small semantic differences can have major legal differences.[23] The implications of this principle on the characterization of Supremacy Clause immunity are discussed in Section III.A.

The semantic distinction at the heart of this Note is not as fine as that between "clear error" and "manifest error." Rather, the focus of this Note is the fundamental chasm between "substance" and "jurisdiction." This distinction entails structural differences. Substance concerns the merits of a case; jurisdiction, the court's power to hear the merits.[24] And at bottom, the substance of a case corresponds to the legislature's power to enact the law forming a cause of action.[25] Conflating these two, therefore, concerns not only the fundamental judicial division between substance and jurisdiction, but also the foundational distinction in our federal system between judicial and legislative authority. Precision of language—and the clarity of ideas it entails—is paramount here, as discussed further in Section II.A.

But while individual Justices have long acknowledged the importance of linguistic precision, it was not until 1998 that a majority of the Justices aligned on this importance as to jurisdiction.[26] Since then, clarity has been the driving force for a revolutionary line of decisions.[27] As the

[20] Cf. Edward H. Cooper, Restyling the Civil Rules: Clarity Without Change, 79 Notre Dame L. Rev. 1761, 1765 (2004) ("Never mind what the dictionary may say. No two words are precise synonyms. That's why we have so many.").

[21] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344 (1998) (internal quotation marks omitted).

[22] Dickinson v. Zurko, 527 U.S. 150, 158 (1999) (noting that only the first is a term of art "signaling court/court review").

[23] See Solum, supra note 18, at 1116–18 (describing this as the distinction between "communicative content" and "legal content").

[24] See infra Section II.A.

[25] See infra Section II.A.

[26] See Scott Dodson, The Complexity of Jurisdictional Clarity, 97 Va. L. Rev. 1, 9–10 (2011) (recognizing that individual Justices have long urged clarity when it comes to jurisdiction).

[27] See generally Erin Morrow Hawley, The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction, 56 Wm. & Mary L. Rev. 2027, 2033–48 (2015) (tracing the

Court emphasized in 2004, "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' . . . only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[28] Adhering to this conviction, in October Term 2009, eight of the Court's jurisdiction decisions centered on the value of clarity.[29] These developments, along with other reasons for the ongoing mischaracterization of Supremacy Clause immunity, are the subject of Section II.B.

The Court's special attention to linguistic precision in these cases makes good sense. Clarity is especially critical in reasoning about jurisdiction.[30] It allows courts to reach a holding "early, easily, and cheaply, and to avoid the potential waste of litigant and court resources."[31] And in reaching an early, easy, and cheap holding, mindfulness of the substance-jurisdiction divide "may not change outcomes or make hard cases any easier, but it will assist deliberation and will provide a more convincing rationale once a conclusion is reached."[32] These benefits are amplified in the high-stakes cases involving Supremacy Clause immunity, where a sovereign state has decided to bring criminal charges against an officer of the federal government.

These linguistic considerations are crucial here because there is only one "right" term to describe Supremacy Clause immunity: "substantive." Proper characterization of the immunity is "not merely semantic" or structural, "but one of considerable practical importance for judges and litigants."[33] The baggage behind words as loaded as "jurisdictional" and

Court's conception of jurisdiction from 1796 to the present).This post-1998 line of cases is discussed in Subsection II.B.1.

[28] Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

[29] Dodson, supra note 26, at 2–3.

[30] See Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1225 (2004) ("One ought not to make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction.").

[31] Dodson, supra note 26, at 9; see also Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) ("Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants.").

[32] Peter W. Low & Joel S. Johnson, Changing the Vocabulary of the Vagueness Doctrine, 101 Va. L. Rev. 2051, 2115–16 (2015).

[33] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011).

"substantive" poses problems when a court uses one in place of the other.[34]

There are four practical harms that this poses. First, a court may improperly raise the immunity sua sponte[35] presenting the risk that the court unexpectedly dismisses a case late in the litigation.[36] Second, a court may categorically refuse to invoke considerations of equity and fairness in deciding whether Supremacy Clause immunity applies, working harm on the losing party. Third, a federal court might find that a prior state ruling on the immunity has no preclusive effect, and ignore that case in deciding a subsequent case. This has immense implications for federal-state relations. Finally, a holding that "jurisdictional" Supremacy Clause immunity applies would entail a dismissal for lack of jurisdiction[37]—meaning that double jeopardy would not prevent retrial of the federal officer.[38] Section III.B elaborates on these.

There are thus semantic, structural, and practical issues that arise because courts characterize Supremacy Clause immunity as jurisdictional, and these issues cut deep into our constitutional structure. But this is not just a problem that cuts deep—it is also occurring with increasing frequency. Federal and state courts have had to address the immunity in 59 cases since this nation's founding.[39] But of this count, 23 of them (or 40%) have occurred since 1987, including at least one nearly every year since 2001.[40] This will only increase with time. The years 2002–2004 saw a 13% increase in the number of domestic federal officers with ar-

[34] See Hawley, supra note 27, at 2080 ("Given the drastic consequences that attach to a jurisdictional provision, precision as to jurisdiction is critically important."); Alex Lees, Note, The Jurisdictional Label: Use and Misuse, 58 Stan. L. Rev. 1457, 1462 (2006) ("When a court calls something 'jurisdictional,' therefore, it uses a word loaded with legal meaning, a word with serious implications for the parties of a case."); cf. Low & Johnson, supra note 32, at 2053 (highlighting the importance of using correct terminology, even if no change in outcome results).

[35] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

[36] See, e.g., *Henderson*, 562 U.S. at 435 ("And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.").

[37] See, e.g., Arizona v. Files, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014) (holding that, where the immunity applies, "it is not left to a federal or state jury to acquit the defendant . . . the federal or state court is instead stripped of any jurisdiction over the defendant").

[38] Cf. Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

[39] See infra Appendices A & B.

[40] See infra Appendices A & B.

rest and firearm authority,[41] and 2004–2008 saw a 12% jump.[42] Accompanying this growth in the ranks of federal law enforcers is a rise in federal law for them to enforce.[43] These trends explain the ever-increasing need for courts to address Supremacy Clause immunity as well as reveal, as it stands right now, the ever-greater risk that its mislabeling will create problems.[44]

In light of these risks and their recent increase, it is especially disconcerting that there is a "paucity of case law and scholarly commentary on Supremacy Clause immunity."[45] This paucity means that the immunity has not been properly considered in light of recent developments. As mentioned above, the Court has been busy since 1998 applying princi-

[41] Brian A. Reaves, Federal Law Enforcement Officers, 2004, U.S. Dep't of Justice, Bureau of Justice Statistics 1 (2006), http://www.bjs.gov/content/pub/pdf/fleo04.pdf [https://perma.cc/FZJ3-BZGJ].

[42] Brian A. Reaves, Federal Law Enforcement Officers, 2008, U.S. Dep't of Justice, Bureau of Justice Statistics 6 (2012), http://www.bjs.gov/content/pub/pdf/fleo08.pdf [https://perma.cc/5YVE-J3UY]. See generally Louise Radnofsky et al., Federal Police Ranks Swell to Enforce a Widening Array of Criminal Laws, Wall Street J., Dec. 17, 2011, at A1 (providing historical survey of the rise of federal law enforcement officers).

[43] See, e.g., Marin K. Levy, Judging Justice on Appeal, 123 Yale L.J. 2386, 2394 (2014) (reviewing William M. Richman & William L. Reynolds, Injustice on Appeal: The United States Courts of Appeals in Crisis (2012)) (discussing the rise in appellate caseloads from 1960–2010 as a partial function of the increase in federal laws during that time); see also Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 13 (1997) ("We live in an age of legislation, and most new law is statutory law.").

[44] Conflicts that have the potential to involve Supremacy Clause immunity continue to crop up with some frequency. For example, on March 17, 2016, a U.S. postman was arrested by officers of the New York Police Department while on his mail route. When an unmarked police car nearly sideswiped the postman, he shouted at the driver. The driver stopped the car and four plainclothes officers stepped out. They arrested the postman and charged him with disorderly conduct. Ginia Bellafante, A Mailman Handcuffed in Brooklyn, Caught on Video, N.Y. Times (Mar. 25, 2016) http://www.nytimes.com/2016/03/27/nyregion/glen-grays-the-mailman-cuffed-in-brooklyn.html?_r=0 [https://perma.cc/Y6LG-95LQ]. Compare this to *Johnson v. Maryland*, 254 U.S. 51 (1920), in which the Supreme Court invoked Supremacy Clause immunity to overturn a U.S. postman's state conviction for driving on his postal route without a state-issued license. Id. at 57.

[45] Waxman & Morrison, supra note 9, at 2200; see also Wyoming v. Livingston, 443 F.3d 1211, 1213 (10th Cir. 2006) ("This case involves a seldom-litigated corner of the constitutional law of federalism known as Supremacy Clause immunity."); Arizona v. Files, 36 F. Supp. 3d 873, 875 (D. Ariz. 2014) (noting that the defendant "urge[d] this Court to apply a seldom-litigated principle of federal constitutional law—federal Supremacy Clause immunity"); Austin Raynor, The New State Sovereignty Movement, 90 Ind. L.J. 613, 634 (2015) ("The precedents and scholarship on the scope of Supremacy Clause immunity, however, are notoriously sparse.").

ples of clarity to overhaul what constitutes jurisdiction. Scholarship accompanying this development has "warmly approve[d]" of it.[46]

Supremacy Clause immunity has so far evaded this line of cases and commentary clarifying the nature of jurisdiction. The leading piece on the immunity, a 2003 article by former Solicitor General Seth Waxman and Professor Trevor Morrison, recognizes the immunity's substantive nature.[47] But it does so only in passing. Even still, this is more attention than the courts have paid to the nature of Supremacy Clause immunity. They have nearly universally characterized it as jurisdictional.[48]

Thus, there is a gap: On the one hand, there is a burgeoning line of Supreme Court decisions clarifying what "jurisdiction" means, with corresponding scholarship lauding it. On the other hand, there is a line of case law stretching back to the 1800s that mislabels Supremacy Clause immunity, with little accompanying scholarship. The Waxman and Morrison piece hints at bridging this gap, but ultimately it does not develop this point.[49]

This Note seeks to do just that. Continuing the project started by Waxman and Morrison,[50] it seeks to connect courts' mischaracterization of Supremacy Clause immunity with Supreme Court case law and scholarship concerning what constitutes jurisdiction. By folding the immunity

[46] Hawley, supra note 27, at 2048–49; see also id. at 2030 n.5 (collecting articles discussing this development).

[47] See Waxman & Morrison, supra note 9, at 2223 ("If protecting against state judicial or prosecutorial bias were the only federal interest in play, then there would be no need for a substantive immunity doctrine."); id. at 2230 ("Equally pressing is the substantive immunity question itself.").

[48] The lone exception here is *Denson v. United States*, 574 F.3d 1318 (11th Cir. 2009), which noted that the federal officer asserted "an affirmative defense under the Supremacy Clause." Id. at 1344–45. As argued below, "affirmative defense" indicates a substantive immunity. See infra note 126.

[49] Indeed, the Waxman and Morrison article does not even cite any of the Supreme Court cases concerning jurisdiction. This is probably for two reasons. First, the article was concerned with the shape of the immunity, rather than its character. Second, the article was published in 2003. By that point, the Court's line of jurisdiction decisions was only two cases long. See United States v. Cotton, 535 U.S. 625, 629–31 (2002); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88–93 (1998).

[50] As they state in their article,

> The decision to pursue state criminal charges against a federal agent for actions taken in the course of discharging his official duties raises difficult questions of public policy and law going to the core of our constitutional system. Those questions deserve much more careful and rigorous treatment than they have thus far been given.

Waxman & Morrison, supra note 9, at 2197. Their article was concerned with the actual content of the immunity. I seek to add to their work by discussing the character of this content.

into this line of jurisprudence, this Note will show that Supremacy Clause immunity—despite what courts have said time and time again—is substantive.

I. BACKGROUND: EARLY FORMATION AND MODERN FORMULATION

Supremacy Clause immunity is rooted in the supremacy of federal law and concomitant preemption principles.[51] Its founding and formative cases evince these underpinnings, beginning with *Tennessee v. Davis*.[52] In *Davis*, the Court had to decide whether a newly enacted federal statute permitted removal of a murder prosecution against a federal revenue agent.[53] The Court upheld the statute[54] and took a practical approach in its reasoning, opining that if states could hamstring federal officers through prosecution, then there would be no one to carry out federal policy, leaving the federal government powerless.[55]

The Court built on this a decade later, in the case widely regarded as the progenitor of an explicit Supremacy Clause immunity: *In re Neagle*.[56] In this case, the Court heard a habeas petition brought by U.S. Marshal David Neagle, who had been assigned to protect Justice Stephen Field while he rode circuit in California.[57] Prior to Neagle's assignment, Justice Field had been involved in a tumultuous case in California federal court over the validity of a marriage license.[58] When Justice Field, acting as Circuit Justice, read his opinion in open court before the parties, the losing husband David Terry attacked the marshals with a bowie knife, while his wife goaded him on and tried to pull a pistol out of her purse. They were sentenced to six months and one month in prison, respectively.[59] From this point on, the Terrys made continual

[51] Id. at 2214–23.

[52] Idaho v. Horiuchi, 253 F.3d 359, 381 (9th Cir. 2001) (en banc) (Hawkins, J., dissenting), vacated as moot, 266 F.3d 979 (9th Cir. 2001) ("The origins of an explicit Supremacy Clause immunity defense can be traced to *Tennessee v. Davis*."). See Tennessee v. Davis, 100 U.S. 257 (1879).

[53] 100 U.S. at 257–59.

[54] Id. at 260, 271. The modern version of this statute is 28 U.S.C. § 1442 (2012).

[55] *Davis*, 100 U.S. at 263.

[56] Cunningham v. Neagle (In re Neagle), 135 U.S. 1(1890); see Waxman & Morrison, supra note 9, at 2197 n.1 (describing *Neagle* as the "leading case" in this field); see also *Horiuchi*, 253 F.3d at 381 ("Although *Davis* did not explicitly recognize a Supremacy Clause immunity defense, the Court relied heavily on *Davis* in the landmark case of *In re Neagle*.").

[57] *Neagle*, 135 U.S. at 3–4.

[58] Id. at 42–46.

[59] Id. at 45–46.

threats against Justice Field.[60] Eventually it became common knowledge that, once Mr. Terry was free, he would try to kill the Justice.[61]

The U.S. Attorney General subsequently assigned extra protection to Justice Field, ordering U.S. Marshal David Neagle to accompany him both in court and while travelling between courts.[62] This move by the Attorney General proved wise: While the Justice and Neagle were on a Los Angeles train bound for San Francisco, the Terrys boarded at Fresno.[63] Justice Field, Neagle, and Mr. Terry ended up in the dining car together, at which point Mr. Terry punched Justice Field twice and moved for a third.[64] Mr. Terry then realized that Neagle—a U.S. Marshal—was also in the car, and he made a motion as if reaching for a knife.[65] Neagle shot Mr. Terry twice, killing him.[66] The San Joaquin County sheriff arrested Neagle and charged him with murder.[67]

The Court, after holding that Neagle was properly appointed and was carrying out federal law when he killed Mr. Terry,[68] turned to the question most relevant to this Note: whether the federal government had the power to completely shield Neagle from prosecution in state court.[69] The Court answered the question in the affirmative, using the now-oft-quoted language which has become a staple of Supremacy Clause immunity cases:

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

[60] Id. at 46 ("Terry said that after he got out of jail he would horsewhip Judge Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him . . . .").
[61] Id. at 47.
[62] Id. at 51–52.
[63] Id. at 52.
[64] Id. at 52–53.
[65] Id. at 53.
[66] Id.
[67] Id. at 3.
[68] Id. at 54–69.
[69] Id. at 69.

> any crime against the laws of the State, or of any other authority whatever.[70]

This is the origin of the "necessary and proper" test, which has become the foundation for all tests of Supremacy Clause immunity.[71] It looks to (1) whether the officer acted within the scope of her authority, as determined by federal law; and (2) whether she did no more than was necessary and proper to carry out that authority.[72]

Subsequent decisions by the Court expanded and refined this doctrine. *Ohio v. Thomas* addressed a state law requiring all eateries using oleomargarine to conspicuously display that fact by posting a placard.[73] Thomas was the head of an Ohio regional branch of the National Home for Disabled Volunteer Soldiers, a program authorized by federal statute.[74] Though the National Home fed its patrons oleomargarine (as provided by federal statute), Thomas refused to follow the Ohio law.[75] He was indicted and convicted in state court, and appealed to the U.S. Supreme Court.[76]

The Court overturned Thomas's conviction, bluntly finding that he was "engaged in the internal administration of a Federal institution" and that "a state legislature has no constitutional power to interfere with such management as is provided by Congress. . . . Under such circumstances the police power of the State has no application."[77] Critically for our purposes, the Court noted that a federal officer in Thomas's position is "not subject to the jurisdiction of the State" and that he is "exempt from the state law."[78]

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[70] Id. at 75.

[71] See, e.g., Wyoming v. Livingston, 443 F.3d 1211, 1228–30 (10th Cir. 2006); New York v. Tanella, 374 F.3d 141, 147 (2d Cir. 2004); Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988); Clifton v. Cox, 549 F.2d 722, 728–29 (9th Cir. 1977).

[72] The "necessary and proper" consideration provides a sort of buffer zone for federal officers: They need not have been acting in accordance with an express federal authorization, but rather merely must have been doing that which was necessary and proper to carry out some federally authorized end. See *Livingston*, 443 F.3d at 1227–28 ("The question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary for the performance of his duties.").

[73] 173 U.S. 276, 278 (1899).

[74] Id. at 277, 279.

[75] Id. at 278. Oleomargarine was among the rations furnished to patrons through federal appropriations. Id. at 282.

[76] Id. at 280–81.

[77] Id. at 282–83.

[78] Id. at 283.

In both *Neagle* and *Thomas*, it was clear that the officers were reasonably discharging their federal duties when they violated state law. The final formative case of Supremacy Clause immunity, *United States ex rel. Drury v. Lewis*,[79] addressed the alternative: Does the immunity apply if it is unclear whether the federal officer was reasonably discharging his duties?[80]

In *Drury*, the defendants were soldiers stationed in Pennsylvania.[81] Someone was vandalizing the base and stealing copper from it, so Drury implemented patrols of the premises.[82] When they received word that people were stealing copper from one of their buildings, Drury and Dowd, a soldier under his command, pursued and caught up with a group of young men, including one William Crowley.[83] When the men noticed Drury and Dowd, they took off in different directions.[84] Dowd fired at Crowley, killing him.[85]

When Crowley was killed, the soldiers were off base and on county land, so the county charged Drury and Dowd with murder and manslaughter.[86] When their pretrial habeas petition reached the Supreme Court, the Court noted at the outset a conflict of evidence that could lead to opposing conclusions of fact: Dowd testified that Drury had not ordered him to fire and that he had warned Crowley before shooting, while two witnesses claimed that Drury had ordered Dowd to fire after Crowley had surrendered.[87] Because of this conflict, the Court rejected the government's argument that Drury and Dowd, in killing Crowley, were simply carrying out federal laws against stealing base property.[88] This consideration, coupled with the principle that pretrial habeas should be granted only in "exceptional" cases of "peculiar urgency," compelled the Court to deny relief to Drury and Dowd.[89] Thus the *Drury* Court placed a constraint on Supremacy Clause immunity, holding that it does not

[79] 200 U.S. 1 (1906).
[80] Wyoming v. Livingston, 443 F.3d 1211, 1219 (10th Cir. 2006).
[81] 200 U.S. at 2.
[82] Id.
[83] Id. at 2–3.
[84] Id. at 3.
[85] Id. "At the time, killing a fleeing suspect was lawful." Idaho v. Horiuchi, 253 F.3d 359, 365 n.8 (9th Cir. 2001) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001).
[86] *Drury*, 200 U.S. at 2–3.
[87] Id. at 3–4.
[88] Id. at 8.
[89] Id. at 6–7.

justify pretrial habeas when it is unclear whether the officer acted "reasonably," that is, pursuant to federal law.[90]

The shape of Supremacy Clause immunity as molded by these three decisions has remained largely unchanged, even though the most recent case is from 1906.[91] Typically, a court will determine first whether the federal officer was acting within the scope of her authority, harking back to the distinction between *Neagle* and *Thomas*, on one hand, and *Drury*, on the other. Only if it finds that she was acting within her authority will the court then proceed to determine if her actions were "necessary and proper"—a clear callback to *Neagle*.[92]

Illustrative as an example of modern Supremacy Clause immunity analysis is *Arizona v. Files*, a federal district case from July 2014.[93] In

[90] See Wyoming v. Livingston, 443 F.3d 1211, 1219 (10th Cir. 2006). *Thomas* and *Drury* are distinguishable from each other on this point. In *Thomas*, federal law plainly did not require the officer to post an oleomargarine notice; in *Drury*, it was unclear whether the officers followed the law of the day in chasing down and shooting Crowley.

[91] See Clifton v. Cox, 549 F.2d 722, 725 (9th Cir. 1977) ("The Supreme Court has not reviewed the *Neagle* rule in the 70 years since *Drury*. The last reported circuit court opinion was in 1929." (footnote omitted)); Connecticut v. Marra, 528 F. Supp. 381, 385 (D. Conn. 1981) ("The law as enunciated in *Neagle* . . . has remained undisturbed."). Though courts have since gone into more detail on the origins and nature of the immunity and have refined its requirements, see, e.g., *Livingston*, 443 F.3d at 1217–22, the doctrine's broad strokes remain unchanged.

The Court has decided three other Supremacy Clause immunity cases, but they do not affect the broad outlines of the test. In *Boske v. Comingore*, 177 U.S. 459 (1900), the Court summarily held that a federal tax collector could not be imprisoned for refusing to turn over tax records in accordance with state law, when doing so would violate federal law. Id. at 470. In *Hunter v. Wood*, 209 U.S. 205 (1908), the Court extended the immunity to a private railroad ticketman who, though he sold tickets at prices exceeding a state price ceiling, acted pursuant to a federal injunction on that price ceiling. Id. at 210. Finally, the Court held in *Johnson v. Maryland*, 254 U.S. 51 (1920), that *Thomas* controlled and granted postconviction habeas to a U.S. postman convicted for driving without a state-issued license. Id. at 55–57.

[92] See, e.g., Denson v. United States, 574 F.3d 1318, 1347 (11th Cir. 2009); *Livingston*, 443 F.3d at 1220; New York v. Tanella, 374 F.3d 141, 147 (2d Cir. 2004); Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988); *Clifton*, 549 F.2d at 726–29; Isaac v. Googe, 284 F. 269, 270 (5th Cir. 1922); New Jersey v. Bazin, 912 F. Supp. 106, 116 (D.N.J. 1995); Puerto Rico v. Torres Chaparro, 738 F. Supp. 620, 622 (D.P.R. 1990). There are some minor linguistic differences among the actual tests adopted by each circuit, but these are immaterial to this Note. See Waxman & Morrison, supra note 9, at 2237–38 (discussing indeterminacies within each prong). Compare *Denson*, 574 F.3d at 1347 (retaining the "necessary and proper" language), with *Livingston*, 443 F.3d at 1222 (changing the "necessary and proper" language to whether the officer "had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties," simply to avoid confusion with the language of the Necessary and Proper Clause).

[93] 36 F. Supp. 3d 873 (D. Ariz. 2014).

Files, Arizona charged the defendant, a former Federal Wildlife Service employee, with animal cruelty after he trapped and severely injured his neighbor's dog.[94] In ultimately holding that the officer was not entitled to Supremacy Clause immunity,[95] the court took a two-prong approach. First, it noted, "the action which forms the basis of the state prosecution must have been within the scope of the federal officer's authority."[96] Second, the court must determine "whether the federal officer's actions, now the basis of a state-court indictment, were 'necessary and proper to the execution of his responsibilities.'"[97]

But, possibly because Supremacy Clause immunity cases are so rare,[98] the *Files* court did not limit its exposition of the immunity to mere statement of doctrine and application. Rather, it also discussed the nature of Supremacy Clause immunity generally. In no uncertain terms, the court stated,

> Supremacy Clause immunity does not simply provide, as in the case of a defense of justification or excuse, "a mere shield against liability" but rather "immunity from suit." Once a Supremacy Clause immunity defense is established, it is not left to a federal or state jury to acquit the defendant of state-law criminal charges, or to a federal or state judge to direct a verdict in the defendant's favor; *the federal or state court is instead stripped of any jurisdiction over the defendant.*[99]

[94] Id. at 875–76.

[95] Id. at 884.

[96] Id. at 877. Notably, while this relates back to the *Neagle-Thomas* versus *Drury* distinction of law, the facts of *Files* are more akin to those in *Thomas* than to those in *Neagle*, as the officer could have both complied with Wildlife Service-prescribed procedures for trapping the dog and trapped it in a way that did not amount to animal cruelty under state law. See id. at 880–82. But despite these similarities to *Thomas*, the *Files* court held that the officer was not entitled to Supremacy Clause immunity. Id. at 884. The reason for this divergence was also factual: The officer violated federal trapping procedures, and so his conduct was not within the scope of his authority. Id. at 882–83. And, on the basis of his conduct in violating these procedures, the court found that the trapping was not necessary or proper. Id. at 883–84.

[97] Id. at 878 (quoting Morgan v. California, 743 F.2d 728, 731 (9th Cir. 1984)).

[98] See id. at 875 (stating that the defendant "urges this Court to apply a seldom-litigated principle of federal constitutional law—federal Supremacy Clause immunity"); see also Wyoming v. Livingston, 443 F.3d 1211, 1213 (10th Cir. 2006) ("This case involves a seldom-litigated corner of the constitutional law of federalism known as Supremacy Clause immunity.").

[99] *Files*, 36 F. Supp. 3d at 877 (emphasis added) (citations omitted); see also Texas v. Kleinert, 143 F. Supp. 3d 551, 556–57 (W.D. Tex. 2015) (describing the immunity in almost

This characterization of Supremacy Clause immunity as jurisdictional is common,[100] yet imprecise and problematic. As the next Part of this Note will show, this jurisdictional framing conflates jurisdiction and merits and, in doing so, conflates judicial and legislative powers. This is a side effect of decisional history about jurisdiction generally, immunities generally, and Supremacy Clause immunity in particular.

II. THE MISCHARACTERIZATION

A. The Structure of the Mischaracterization: A Taxonomy

As mentioned above, the *Arizona v. Files* court's conception of Supremacy Clause immunity as jurisdictional is far from a fluke—it is actually the norm.[101] Yet this terminology is inaccurate. What it overlooks is the distinction between a *jurisdictional* immunity and a *substantive* immunity, which are strikingly different. This distinction goes to the very difference between the court's power to decide the merits and the merits themselves. And even more fundamentally, it cuts down to the difference between judicial and legislative authority.

Jurisdiction concerns the court's power to hear a case, while the merits concern whether the plaintiff is entitled to relief.[102] Important for our purposes, one merits question is what conduct the underlying cause of

identical terms and dismissing the state indictment against a state police officer deputized as a federal officer).

[100] This is especially so with cases decided since 1988. In that year, the U.S. Court of Appeals for the Sixth Circuit decided *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988) (citing *Neagle*, 135 U.S. at 75, for the proposition that Supremacy Clause immunity is jurisdictional), and many other courts have simply quoted the relevant language outright. See, e.g., *Livingston*, 443 F.3d at 1220; Whitehead v. Senkowski, 943 F.2d 230, 234 (2d Cir. 1991); Colorado v. Nord, 377 F. Supp. 2d 945, 948–49 (D. Colo. 2005); Texas v. Carley, 885 F. Supp. 940, 945 (W.D. Tex. 1994). But see Denson v. United States, 574 F.3d 1318, 1345 (11th Cir. 2009) (noting that the federal government asserted "an affirmative defense under the Supremacy Clause"). *Denson* did not involve state prosecution of a federal officer, but the court nevertheless applied the standard two-prong test. Id. at 1347. It did so because the plaintiff had sued the federal government under the Federal Tort Claims Act, which allows the United States to be held liable under state law for tortious conduct of its officers. Id.

[101] See supra note 100; *Files*, 36 F. Supp. 3d, at 877.

[102] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253–54 (2010); Howard M. Wasserman, Essay, Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy, 102 Nw. U. L. Rev. 1547, 1550 (2008) ("This is the essence of merits analysis—who can be sued for what conduct to recover what remedy."). See generally Dodson, supra note 26 (discussing the problems with what is "jurisdictional" and the Court's recent efforts at clarification); Hawley, supra note 27 (same).

action "reaches" or "prohibits."[103] With this in mind, we turn to the distinction between jurisdictional and substantive immunities—the distinction that courts have overlooked when considering Supremacy Clause immunity—and see just how deep this mischaracterization runs.

A jurisdictional immunity deprives a court of jurisdiction to hear a case, with the effect that a defendant cannot be sued in that forum.[104] Jurisdictional immunities thus relate not to the merits of the case, but to a court's power to hear the case in the first place.[105] By contrast, a substantive immunity gives the defendant a defense on the merits to the cause of action against him.[106] When a substantive immunity applies, a court of competent jurisdiction can hear the case, but the defendant should win.[107] And barring any choice-of-law issues, this should be true in all forums.[108]

[103] *Morrison*, 561 U.S. at 254 (discussing SEC Rule 10b–5); see also Petschonek v. Catholic Diocese of Memphis, No. W2011-02216-COA-R9-CV, 2012 WL 1868212, at *6 (Tenn. Ct. App. May 23, 2012) (citing this part of *Morrison* in a case involving a common law retaliatory discharge claim).

[104] See *Morrison*, 561 U.S. at 254; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 102–03, 103 n.2 (1996) (Souter, J., dissenting) (drawing a distinction between freedom from the law and freedom from suit); Stroud v. McIntosh, 722 F.3d 1294, 1303 n.3 (11th Cir. 2013) ("Forum immunity is a jurisdictional immunity that shields a state from suit in federal court."). For example, U.S. servicemen who are discharged obtain jurisdictional immunity from being haled before military tribunals. United States ex rel. Toth v. Quarles, 350 U.S. 11, 14–15, 23 (1955) (ordering release of ex-serviceman on basis that military tribunals lack jurisdiction over discharged servicemen); In re Burt, 737 F.2d 1477, 1481 n.6 (7th Cir. 1984) ("Under the law of the United States, it is well established that discharge from military service confers on former servicemen jurisdictional immunity from the exercise of military authority." (citing *United States ex rel. Toth*, 350 U.S. 11)).

[105] Sometimes it may be that *no* court has power to hear the case. For example, no court has subject matter jurisdiction over immigration decisions by the Attorney General or Secretary of Homeland Security when those decisions involve their discretion. See, e.g., Robinson v. Napolitano, 554 F.3d 358, 360 (3d Cir. 2009) (discussing 8 U.S.C. § 1252(a)(2)(B) (2012)).

[106] See, e.g., New Hampshire v. Ramsey, 366 F.3d 1, 15 (1st Cir. 2004) (distinguishing between "two independent aspects of immunity from suit: immunity from suit in a federal forum (judicial or administrative) and substantive immunity from liability."); David S. Schwartz, The Federal Arbitration Act and the Power of Congress over State Courts, 83 Or. L. Rev. 541, 623 (2004) ("A substantive immunity from suit is a rule shielding the defendant from liability.").

[107] See, e.g., Pearson v. Callahan, 555 U.S. 223, 231–32 (2009). *Pearson* concerned § 1983 qualified immunity. As argued below, this is a species of substantive immunity. See infra notes 123–27 and accompanying text.

[108] See Robidoux v. Muholland, 642 F.3d 20, 25 (1st Cir. 2011) (noting that a state immunity governed in that case only if that state's substantive law controlled under applicable choice-of-law principles).

One clear way this merits-jurisdiction distinction manifests is in the doctrine of preclusion, which in criminal cases operates through the Double Jeopardy Clause.[109] When a court reaches a substantive decision, or a decision on the merits, that decision has preclusive effect on future cases.[110] By contrast, a jurisdiction-based decision generally entails no preclusion.[111]

This dichotomy extends to immunities: Dismissal on the basis of a substantive immunity entails dismissal with prejudice (and so with preclusive effect),[112] while a case dismissed based on a jurisdictional immunity is dismissed without prejudice (and thus without preclusive effect).[113] Dismissals on the basis of Supremacy Clause immunity are with prejudice.[114] From this effects-focused perspective, then, one can see that Supremacy Clause immunity is substantive.

This effects-based approach aside, another structural way to think of the distinction between jurisdictional and substantive immunities is by drawing a triangle among the defendant, the forum, and the cause of ac-

[109] See, e.g., Yeager v. United States, 557 U.S. 110, 119–20 (2009) (discussing Ashe v. Swenson, 397 U.S. 436 (1970)); see also United States ex rel. Young v. Lane, 768 F.2d 834, 839 (7th Cir. 1985) ("[O]ne plausible reading of the Double Jeopardy Clause is as a constitutional requirement of issue and claim preclusion in criminal cases."). The double jeopardy implications of this mischaracterization are discussed below in Subsection III.B.4.

[110] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502 (2001).

[111] See Brereton v. Bountiful City Corp., 434 F.3d 1213, 1216–18 (10th Cir. 2006) (citing Costello v. United States, 365 U.S. 265 (1961), for the proposition that dismissal on jurisdictional grounds must be without prejudice); Wheeler v. Dayton Police Dep't, 807 F.3d 764, 767 (6th Cir. 2015) ("[D]ismissals without prejudice generally are not judgments on the merits for claim-preclusion purposes." (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990))); see also Fed. R. Civ. P. 41(b) (providing that a dismissal for lack of jurisdiction is not an adjudication on the merits). As for rules that are not substantive or jurisdictional but rather procedural, the Double Jeopardy Clause does not prevent retrial of a criminal defendant whose conviction is vacated due to a procedural error. United States v. Tateo, 377 U.S. 463, 465 (1964).

[112] See, e.g., Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 26 (1st Cir. 1996) (upholding dismissal of civil rights claims with prejudice on basis that defendants were entitled to legislative immunity). Legislative immunity is a species of absolute immunities, id., which are substantive in nature; see infra notes 123–127 and accompanying text.

[113] See Stroud v. McIntosh, 722 F.3d 1294, 1303 n.3 (11th Cir. 2013) ("Forum immunity is a jurisdictional immunity that shields a state from suit in federal court."); Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996) (noting that dismissals for lack of jurisdiction must be without prejudice).

[114] See, e.g., Texas v. Kleinert, 143 F. Supp. 3d 551, 570 (W.D. Tex. 2015); New York v. Tanella, 281 F. Supp. 2d 606, 625 (E.D.N.Y. 2003), aff'd, 374 F.3d 141 (2d Cir. 2004).

tion.[115] Jurisdictional immunities protect the defendant by depriving certain forums of their adjudicatory power, with no regard to the content of the cause of action.[116] By contrast, substantive immunities protect the defendant by depriving the plaintiff of the power to win on account of the content of his cause of action, regardless of the forum.

Viewed from this perspective, Supremacy Clause immunity is substantive. The immunity has the effect of precluding a state from prosecuting a federal officer, on the basis that federal law covers his actions—that is, Supremacy Clause immunity works through preemption.[117] Preemption is concerned with the content of conflicting laws, whether that content be substantive[118] or jurisdictional.[119] When preemption operates through an individual defendant in the form of a substantive immunity, the preemption at issue is between substantive laws.[120] In other words, it is concerned with the nature of the plaintiff's claim, which can be discerned from the cause of action brought by the plaintiff. This gives us the following: The Supremacy Clause forms the foundation of preemption,[121] which looks at the content of conflicting federal and state laws, whether those conflicting laws be substantive or jurisdictional. And substantive immunities operate through the defendant. Thus, when the Supremacy Clause acting through preemption takes the form of an immunity, it is concerned only with the defendant and the cause of action enshrined in the substantive state law, with no concern for the fo-

[115] Cf. Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (defining "the central concern of the inquiry into personal jurisdiction" as "the relationship among the defendant, the forum, and the litigation"). Possibly because personal jurisdiction covers all three points of this triangle, it does not fit well into either "jurisdictionality" or "nonjurisdictionality." Scott Dodson, Hybridizing Jurisdiction, 99 Calif. L. Rev. 1439, 1443 (2011).

[116] That is not to say that jurisdiction does not depend on the *type* of claim. For example, a federal court may entertain a state cause of action if it comes before the court via its diversity or supplemental jurisdiction. See 28 U.S.C. § 1332 (2012) (diversity); id. § 1367 (supplemental). As another example, state courts lack jurisdiction over claims of patent infringement. Id. § 1338(a). But at most, jurisdictional immunities look at the type of claim (such as a patent-infringement claim) rather than the content of the claim itself (such as the elements of a patent-infringement claim).

[117] Waxman & Morrison, supra note 9, at 2214–15.

[118] See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2497–98 (2012) (immigration law).

[119] See, e.g., 28 U.S.C. § 1338(a) (2012) (depriving state courts of jurisdiction over patent claims).

[120] See Waxman & Morrison, supra note 9, at 2218.

[121] Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 232–35 (2000).

rum—meaning that, in the tripartite framework above,[122] this is a substantive immunity.

Further, this framework is built upon more fundamental considerations that reveal just how deep the ongoing mischaracterization of Supremacy Clause immunity runs. As this framework shows, immunities focused on the defendant vis-à-vis the cause of action "may be characterized as substantive."[123] We see this in the doctrines of absolute and qualified immunities.[124] Both of these are concerned only with the defendant when she faces a certain kind of claim, and not with the forum where the case is brought.[125] This is rooted in the policy underpinning absolute and qualified immunities, namely, to shield officials "from undue interference with their duties and from potentially disabling threats of liability."[126] Were a plaintiff able to circumvent the substantive immunity by bringing suit in a different forum (as might be possible if the immunity were defined in terms of the forum), then the immunity would be negated.[127] On this basis, substantive immunities go to the merits of a

[122] See supra note 115 and accompanying text.

[123] William S. Dodge, Alien Tort Litigation: The Road Not Taken, 89 Notre Dame L. Rev. 1577, 1587 n.83 (2014); see also Edwards v. Cass County, 919 F.2d 273, 277 (5th Cir. 1990) ("The concept of qualified immunity has two elements: the substantive immunity itself and freedom from standing trial where that substantive immunity has been found to exist.").

[124] See Nevada v. Hicks, 533 U.S. 353, 373 (2001) ("There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction . . . ."). The Court has placed these under the umbrella of "personal immunity defenses." Kentucky v. Graham, 473 U.S. 159, 166–67 (1985).

[125] See, e.g., Nasuti v. Scannell, 906 F.2d 802, 808 (1st Cir. 1990) (discussing absolute immunities), abrogated on other grounds by Osborn v. Haley, 549 U.S. 225 (2007).

[126] Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982) (discussing both immunities). It is telling that courts have no trouble keeping qualified immunity issues separate from issues of jurisdiction. See, e.g., Adkins v. Fed. Bureau of Prisons, No. 4:05-0108-HFF-TER, 2007 WL 904795, at *1 (D.S.C. Mar. 22, 2007) (approving magistrate's separate treatment of arguments concerning subject matter jurisdiction, personal jurisdiction, and qualified immunity); Stadt v. Univ. of Rochester, 921 F. Supp. 1023, 1025–28 (W.D.N.Y. 1996) (treating the personal jurisdiction and qualified immunity issues as analytically distinct). Of relevance, one can discern this different treatment though the vocabulary courts use to describe qualified immunity. See, e.g., Pasco ex rel. Pasco v. Knoblauch, 566 F.3d 572, 577 (5th Cir. 2009) (affirmative defense); Ahmad v. Furlong, 435 F.3d 1196, 1201 (10th Cir. 2006) (same); *Edwards*, 919 F.2d at 277 (substantive immunity).

[127] See Waxman & Morrison, supra note 9, at 2223 ("If protecting against state judicial or prosecutorial bias were the only federal interest in play, then there would be no need for a substantive immunity doctrine.").

case, rather than a court's jurisdiction over that case.[128] This is because they pare back the ambit of a cause of action that otherwise might reach or prohibit the defendant's conduct.[129] Therefore, substantive immunities go to the merits of a case, while jurisdictional immunities go to a court's jurisdiction to decide the merits.[130]

Having established that absolute and qualified immunities are substantive, we come to the next level of distinction: that between absolute and qualified immunities themselves.[131] First, they have key procedural

[128] See Wasserman, supra note 102, at 1550 (noting that, despite the government-official "immunity" label and treatment as a threshold issue, "courts nevertheless treat them as defenses to the merits").

[129] See, e.g., Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (finding qualified immunity to be "an entitlement not to stand trial or face the other burdens of litigation" (internal quotation marks omitted) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))).

[130] Some immunities seem to bridge these two, implicating both jurisdiction and merits. Take for example a state long-arm statute that limits its courts' power to hear contract disputes involving foreign defendants to those instances where substantial negotiations occurred within the state. See Perry Dane, Jurisdictionality, Time, and the Legal Imagination, 23 Hofstra L. Rev. 1, 44–45 (1994). When an in-state plaintiff brings a breach-of-contract claim against a foreign defendant, the state court must determine whether there was a contract that resulted from substantial negotiations within the state—thus elevating the existence of a contract from an element of the breach claim to an element of specific jurisdiction. In other words, the foreign defendant's jurisdictional immunity from suit within the state turns on an element of the plaintiff's claim. This immunity would seem to bring together the defendant, the forum, and the cause of action, making it a hybrid substantive-jurisdictional immunity.

At bottom, however, an immunity like this remains jurisdictional. The statute defines where a plaintiff can bring a case, rather than against whom the plaintiff can bring a case. That is, it does not define who a foreign defendant is, but rather when that foreign defendant may be sued in that state's courts. As a result, the immunity a foreign defendant obtains through this statute is jurisdictional. See al-Kidd v. Ashcroft, 580 F.3d 949, 980 (9th Cir. 2009) (considering it wholly a matter of personal jurisdiction whether, to satisfy test for specific jurisdiction, an element of plaintiff's claim applied to defendant), rev'd on other grounds, Ashcroft v. al-Kidd, 563 U.S. 731 (2011); see also Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16, 516 n.11 (2006) (noting that Congress could have made Title VII's substantive employee-numerosity requirement a jurisdictional threshold by placing it within a jurisdictional provision, as with the amount-in-controversy requirement in 28 U.S.C. § 1332). Moreover, dismissal for failure to satisfy this long-arm statute would be a dismissal without prejudice. See, e.g., Kroger Co. v. Malease Foods Corp., 437 F.3d 506, 507 (6th Cir. 2006) (ordering lower court to dismiss case without prejudice for plaintiff's failure to satisfy Ohio's long-arm statute); Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 651 (8th Cir. 2003) (affirming dismissal without prejudice for failure to satisfy Arkansas's long-arm statute). As argued above, this dismissal without prejudice implies that the dismissal is for jurisdictional reasons. See supra notes 112–14 and accompanying text.

[131] For purposes of this Note, the singular "qualified immunity" without an article denotes § 1983 or *Bivens* qualified immunity. See Wilson v. Layne, 526 U.S. 603, 609 (1999) (expressly stating that qualified immunity analysis is identical for § 1983 claims brought against state officials and *Bivens* actions brought against federal officials).

differences: "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."[132]

This distinction informs the differing standards that the Court has articulated for each. With absolute immunity, which is given to judges[133] and prosecutors,[134] the only question for the court is whether the official's conduct was within the scope of his duties.[135] By contrast, qualified immunity depends on: (1) whether the plaintiff has alleged a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of the alleged misconduct.[136] When evaluating the "clearly established" prong, "entitlement to immunity is determined by examining the reasonableness of [the officer's] actions in light of his federal powers and duties"[137]—a much more fact-based inquiry than that employed for absolute immunities.

This doctrinal difference, in turn, is reflected in their end results: An absolute immunity completely protects the official from liability under all circumstances, while the protections afforded by a qualified immunity may depend on the official's motives or the circumstances surrounding his conduct.[138] Unlike absolute immunities, qualified immunities might not defeat a suit at the outset; they depend on the surrounding cir-

[132] Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

[133] Pierson v. Ray, 386 U.S. 547, 553–54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . . This immunity applies even when the judge is accused of acting maliciously or corruptly . . . .").

[134] *Imbler*, 424 U.S. at 424 (holding that common law absolute immunity for prosecutors also applies in § 1983 actions).

[135] See, e.g., Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (noting that the focus is on "the nature of the act, rather than on the motive or intent of the official performing it").

[136] Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted); see also *Wilson*, 526 U.S. at 609 (noting how a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right . . . and if so, proceed to determine whether that right was clearly established." (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)) (internal quotation marks omitted)).

[137] Waxman & Morrison, supra note 9, at 2202; see also Pearson v. Callahan, 555 U.S. 223, 243–44 (2009) (holding that qualified immunity turns on the circumstances of an official's act).

[138] Richard M. Fallon, Jr., et al., Hart and Weschler's The Federal Courts and the Federal System 995 (6th ed. 2009).

cumstances and the official's mindset, and they may not completely shield her from liability.

Viewed in this way as well, Supremacy Clause immunity is qualified.[139] One can see this in how the Courts of Appeals have formulated the "necessary and proper" prong of their Supremacy Clause–immunity analyses. For example, the U.S. Court of Appeals for the Second Circuit asks whether the officer's conduct was "objectively reasonable";[140] the Sixth Circuit requires the officer to have "had an honest and reasonable belief that what he did was necessary";[141] the Ninth Circuit looks at both the officer's subjective belief and the "objective finding" that the officer's actions "may be said to be reasonable under the existing circumstances";[142] and the Tenth Circuit requires that "the agent had an objectively reasonable and well-founded basis to believe that his actions were necessary. . . ."[143] Thus whether the immunity applies depends on the officer's motives and the circumstances surrounding her conduct, and, depending on the outcome of this prong, it might not defeat the suit at its outset or completely protect her from liability.

Supremacy Clause immunity, then, is a qualified immunity, which itself is a species of substantive immunity, which goes to a case's merits. On the other hand, jurisdictional immunities, which stand in contradistinction to substantive immunities, do not implicate the merits but rather the court's power to rule on those merits. The mischaracterization of this immunity cuts to the basic structure of the judiciary.

The distinction between these types of immunities is visible in the legislature as well, and it has implications for maintaining the appropriate separation of powers. Merits concern *legislative* or *prescriptive* ju-

[139] See Waxman & Morrison, supra note 9, at 2239–42. Despite this, "no judicial decision has ever equated the two forms of immunity." Idaho v. Horiuchi, 253 F.3d 359, 389 (9th Cir. 2001) (en banc) (Hawkins, J., dissenting), vacated as moot, 266 F.3d 979 (2001). But, while not acknowledging this equivalence, courts have recognized a similarity. See Wyoming v. Livingston, 443 F.3d 1211, 1221 (10th Cir. 2006) (acknowledging their "functional similarity"); State v. White, 988 N.E.2d 595, 621 (Ohio Ct. App. 2013) (citing *Horiuchi*, 253 F.3d at 366–67 and noting that "immunities of the kind resembling qualified immunity might also protect police officers from criminal prosecution for using deadly force").

[140] New York v. Tanella, 374 F.3d 141, 147 (2d Cir. 2004).

[141] Kentucky v. Long, 837 F.2d 727, 745 (6th Cir. 1988) (quoting In re McShane (Pet. of McShane), 235 F. Supp. 262, 274 (N.D. Miss. 1964)) (internal quotation marks omitted).

[142] Clifton v. Cox, 549 F.2d 722, 728 (9th Cir. 1977).

[143] *Livingston*, 443 F.3d at 1222. Thus, there are two species of qualified immunities: civil qualified immunity in § 1983 or *Bivens* actions; and criminal qualified immunity or Supremacy Clause immunity.

risdiction, while "jurisdiction," as we are thinking of it here, is actually a matter of *adjudicative* or *judicial* jurisdiction.[144] Legislative jurisdiction is a matter of "the authority of a state to make its laws applicable to persons or activities,"[145] that is, how far a statute may reach. Thus, the substance of any given case—which may concern whether the statute reaches the defendant's conduct—implicates both legislative jurisdiction in the legislature and, once that statute is applied in court, the merits of the case. One can see this correspondence between legislative jurisdiction and judicial merits in how cases decided on the merits come out: If legislative jurisdiction is missing (the legislature enacted a law it had no power to enact) or the legislature has not exercised its jurisdiction to reach the case, the court does not dismiss for lack of jurisdiction. Instead, "it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute."[146]

By contrast, when one hears "jurisdiction" they usually think of adjudicative jurisdiction, or subject-matter and personal jurisdiction.[147] Even if the plaintiff pleads facts showing that he should win on the merits (and that legislative jurisdiction exists for the statute to reach the defendant's conduct), the court may still dismiss the action for lack of subject-matter or personal jurisdiction.[148] Thus, as far as separation of powers is concerned, there is a distinction between legislative jurisdiction (how far the statute can reach and does reach) and judicial jurisdiction

[144] For a concise yet thorough rundown of the difference between legislative and adjudicative jurisdiction, see Howard M. Wasserman, Essay, Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption, 160 U. Pa. L. Rev. PENNumbra 289, 298–303 (2012).

[145] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, O'Connor, Kennedy & Thomas, JJ., dissenting) (quoting Restatement (Third) of Foreign Relations Law of the United States 231 (Am. Law Inst. 1987) (internal quotation marks omitted)).

[146] Id. To see just how much the jurisdictional conception of Supremacy Clause immunity flies in the face of this practice, compare it to the *Files* court's pronouncement that, when the immunity applies, "it is not left to a federal or state jury to acquit the defendant of state-law criminal charges, or to a federal or state judge to direct a verdict in the defendant's favor; the federal or state court is instead stripped of any jurisdiction over the defendant." Files, 36 F. Supp. 3d at 877. On the contrary, it is the court's duty to acquit the defendant.

[147] *Hartford Fire*, 509 U.S. at 812 (Scalia, O'Connor, Kennedy & Thomas, JJ., dissenting). These are the only two species of adjudicative jurisdiction. See Kontrick v. Ryan, 540 U.S. 443, 454–55 (2004).

[148] See *Hartford Fire*, 509 U.S. at 812 (Scalia, O'Connor, Kennedy & Thomas, JJ., dissenting).

(whether the court may take up the case based on that statute).[149] Mischaracterizing Supremacy Clause immunity as jurisdictional rather than substantive ignores this cornerstone distinction in our federal system.

This gives us the following taxonomy: Supremacy Clause immunity is a qualified immunity, which is itself a type of substantive immunity, which goes to the merits of a case, which is the judicial manifestation of legislative jurisdiction. By contrast, jurisdictional immunities concern not the merits of the case but the court's authority to decide the merits, or adjudicative jurisdiction. Mislabeling Supremacy Clause immunity, therefore, cuts to the deepest distinctions in our constitutional structure.

B. The Causes of the Mischaracterization: Global and Local

So what is the origin of this mischaracterization? There appear to be three underlying causes, one general, one more specific, and one very specific: the once-expansive definition of "jurisdiction," the confused nature of immunities, and the context of Supremacy Clause immunity's founding and formative cases.

1. The Supreme Court's Conception of Jurisdiction

Early in this nation's history, the term "jurisdiction" was a "legal trope" which signified "only consequences without also signifying justifications for those consequences, thus leading to courts using the jurisdictional label as an unhelpful shorthand."[150] The Court used it to refer to "everything from the elements of a cause of action, to the various procedural steps litigants were required to fulfill," to requirements that went to a court's power to hear a case.[151] Against this backdrop, dozens of

[149] This distinction is most often discussed in cases involving Native American tribes. See, e.g., Plains Commerce Bank v. Long Island Family Land & Cattle Co., 554 U.S. 316, 330 (2008) ("We . . . hold that the Tribal Court lacks [judicial] jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the [legislative] civil authority to regulate the Bank's sale of its fee land."); Strate v. A-1 Contractors, 520 U.S. 438, 448–53 (1997) (discussing tribal court jurisdiction and authority over non-Native Americans). See generally M. Gatsby Miller, Note, The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases, 114 Colum. L. Rev. 1825 (2014) (discussing Native American tribes' shrinking judicial jurisdiction as a function of their legislative jurisdiction).

[150] Lees, supra note 34, at 1458, 1463.

[151] Hawley, supra note 27, at 2078; see also id. at 2041 (noting that in the early to mid-twentieth century, the Court "used the term jurisdiction frequently, and even applied it to conditions more readily described as elements of a particular cause of action."). For example, the Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S.

Supremacy Clause immunity cases were decided, including seven by the Supreme Court.[152]

The Court has since reined in its conception of jurisdiction,[153] finally acknowledging that it was using the term as a legal trope in 1998. In *Steel Co. v. Citizens for a Better Environment*, the Court recognized that the term was "a word of many, too many, meanings"[154] and criticized its own various "drive-by jurisdictional rulings."[155] From this realization, the Court fashioned a clear-statement rule that remains the standard for determining whether a rule is jurisdictional.[156] Since then, the Court has remained mindful of its former laxity in its conception of jurisdiction, admitting that it had been "less than meticulous"[157] and even "profli-

49, 52–53 (1987), characterized as jurisdictional the elements of the cause of action in that case. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90–91 (1998) (discussing this).

[152] See infra notes 212–13.

[153] See generally Hawley, supra note 27 (providing an in-depth discussion of this development).

[154] 523 U.S. at 90 (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)) (internal quotation marks omitted).

[155] Id. at 91 (holding that the citizen-suit provision of the Emergency Planning and Community Right-to-Know Act of 1996 was not jurisdictional in nature).

[156] See Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006). To determine whether Congress has clearly made the provision at issue jurisdictional, courts must look to the text, structure, and context of the statute, in that order. See Hawley, supra note 27, at 2047–48 (citing Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 436 (2011)); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 163 (2010)). If a clear statement of jurisdictionality cannot be found in any of these, then the Court ordinarily finds the provision to be nonjurisdictional. Id. at 2048.

Under this rule, Supremacy Clause immunity is nonjurisdictional. First, the text of the Supremacy Clause is nonjurisdictional, as it pertains only to the supremacy of federal law over state law. See U.S. Const. art. VI, cl. 2. Second, the final clause in the provision is a "non obstante" clause, which instructs courts against applying the substantive presumption against implied repeals where a state statute conflicts with federal law. See Nelson, supra note 121, at 237–44, 254–60. Finally, the clause's history reveals a concern not with jurisdiction but with the supremacy of substantive federal law. See, e.g., Bradford R. Clark, Unitary Judicial Review, 72 Geo. Wash. L. Rev. 319, 325–31 (2003) (discussing how the Supremacy Clause confirmed priority of federal law over state law); Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1648–49 (2002) (explaining how modern Court jurisprudence recognizes superiority of Congressional statutes over state statutes in many capacities); Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 2020–22 (1993) (discussing how supremacy of federal law and ability of the federal government to commandeer state institutions has been considered since negotiations about adoption of the U.S. Constitution).

[157] Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

gate"[158] in its use of the term. But despite this—and because of the momentum of prior cases—courts continue to deem Supremacy Clause immunity jurisdictional.[159]

2. The Problem of Characterizing Immunities

But there may be a more specific problem at work here. The taxonomy above notwithstanding,[160] courts have been inconsistent with their characterization of immunities generally, clouding consideration of whether specific immunities are jurisdictional or substantive. Take for example the Court's fraught sovereign immunity jurisprudence: It has described the immunity as a limit on subject matter jurisdiction, a nulli-

[158] Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009).

[159] It is true that, during the era of Supremacy Clause immunity's founding, the Court deliberately adopted a broad notion of jurisdiction for habeas cases. See United States v. Cotton, 535 U.S. 625, 629–30 (2002) (discussing Ex parte Bain, 121 U.S. 1 (1887)). See generally Ann Woolhandler, Demodeling Habeas, 45 Stan. L. Rev. 575 (1993) (tracing the rise and fall of various explanatory models of habeas corpus, including the "jurisdictional" model). This expansion of "jurisdiction," however, did not touch cases involving state detainment and imprisonment of federal officers. For one thing, this phenomenon was limited to post-conviction relief, and at first only for federal prisoners. See *Cotton*, 525 U.S. at 629–30 (federal prisoner); Wright v. West, 505 U.S. 277, 285 (1992) (plurality opinion) (state prisoners); Developments in the Law: Federal Habeas Corpus, I. Issues Cognizable, 83 Harv. L. Rev. 1042, 1048–49 (1970) (noting that the Court at first imposed additional requirements that state prisoners needed to satisfy before obtaining federal post-conviction relief).

More important, however, was the fact that a special federal statute existed to provide federal officers with habeas relief when they were detained or imprisoned by state officials. This provision, currently codified at 28 U.S.C. § 2241(c)(2) (2012), was enacted as part of the Force Bill of 1833, in response to the Nullification Crisis. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 374 n.11 (2006); Developments in the Law: Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 872 n.292 (1957). And not only was there a separate provision, but it also had its own interpretive history. Following the Force Bill's enactment, "the lower federal judiciary, often acting through Supreme Court Justices on circuit, repeatedly interpreted the 1833 habeas corpus provisions to permit review *de novo*—*after* conviction as well as before—of the officials'" ability to invoke the statute. James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2062 (1992) (footnotes omitted); see also Woolhandler, supra, at 594 n.120 ("Federal courts granted plenary review on habeas when federal officers acting under color of federal authority were charged with violating state law." (citing Michael G. Collins, The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings, 66 N.C. L. Rev. 49, 86 (1987))). The *Neagle* Court upheld this broad reading. Liebman, supra, at 2063 n.375 (citing *Neagle*, 135 U.S. at 42, 53, 69–74). Thus, while the Court did adopt a deliberately broad notion of "jurisdiction" in some habeas contexts, the habeas cases underpinning Supremacy Clause immunity were outside this.

[160] See supra Section II.A.

fication of personal jurisdiction, an immunity from suit, an affirmative defense, and a right.[161]

This lack of coherence is understandable, for immunities run the gamut from substantive, touching on the merits and implicating the defendant and the cause of action; to jurisdictional, touching on both merits and jurisdiction and implicating the defendant, the forum, and the cause of action; to "even more" jurisdictional, touching on the court's power to hear the case and implicating the defendant and the forum.[162] This is aggravated by the fact that, in practice, "the line between jurisdictional and nonjurisdictional issues seems, at least partly, a product of specific doctrinal, historical, and political contingencies."[163]

3. Supremacy Clause Immunity's Founding and Formative Cases

The final reason that courts view Supremacy Clause immunity as jurisdictional is that the doctrine's founding and formative cases were largely habeas cases. From 1890 to 1906, the time period of the three foundational cases, courts considered habeas to be a matter of the adjudicating court's jurisdiction.[164] For example, in 1889 the Court stated that "if the court which renders a judgment has not jurisdiction to render it, . . . the judgment is void . . . and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*."[165] And in 1906—during the same Term the Court decided *United States ex rel. Drury v. Lewis*[166]—the Court remarked that, in habeas cases, "upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial and if it continued all through, then the application for the writ was properly denied . . . ."[167]

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[161] Matthew McDermott, Note, The Better Course in the Post-*Lapides* Circuit Split: Eschewing the Waiver-by-Removal Rule in State Sovereignty Jurisprudence, 64 Wash. & Lee L. Rev. 753, 760 (2007).

[162] See supra note 130 and text accompanying notes 115–30. Professor Dane observed this phenomenon in the context of, respectively, state and foreign sovereign immunity, federal sovereign immunity, and non-sovereign forms of immunity. Dane, supra note 130, at 45 n.128.

[163] Dane, supra note 130, at 49 n.142.

[164] See generally Henry M. Hart, Jr., Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 103–07 (1959) (providing historical background).

[165] Ex parte Nielsen, 131 U.S. 176, 182 (1889).

[166] 200 U.S. 1 (1906).

[167] Felts v. Murphy, 201 U.S. 123, 129 (1906).

Against this backdrop the Court decided *Neagle*, *Ohio v. Thomas*,[168] and *Drury*. In *Neagle*, a habeas case, the Court had to decide whether the Supremacy Clause stripped the California court of jurisdiction to prosecute Neagle for killing Mr. Terry.[169] Similarly, the *Drury* Court had to decide whether to grant habeas relief to the codefendants.[170] In doing so, the Court laid bare the jurisdictional focus of the era: "The Circuit Court was not called on to determine the guilt or innocence of the accused. That was for the state court *if it had jurisdiction* . . . ."[171] Finally, *Thomas* came up to the Court via the defendant's motion for postconviction habeas.[172] Even as late as 1948, Justice Reed commented that cases using habeas to prevent state interference with the federal government "represents the largest group of situations in which federal courts exercise habeas corpus jurisdiction without the exhaustion of state remedies."[173] Supremacy Clause immunity, then, was developed through habeas cases. It is thus no surprise that modern courts—which frequently quote these cases outright[174]—call it jurisdictional.

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Courts have described the substantive Supremacy Clause immunity in terms of jurisdiction. They have done so primarily because they have failed to recognize the distinction between substantive and jurisdictional immunities. This linguistic imprecision is amplified by the fact that the former relates to the merits of the case, while the latter relates to the court's power to entertain the merits. And, in turn, merits relate to what conduct a law reaches, which is a matter of legislative jurisdiction. This mischaracterization is troubling, yet it is understandable for three reasons. First, the Court has in the past taken a broad conception of jurisdiction. Second, the Court has been scattered in its description and characterization of immunities in general. Finally, the three cases forming the basis of Supremacy Clause immunity were habeas cases, and modern

[168] 173 U.S. 276 (1899).

[169] *Neagle*, 135 U.S. at 40–42; see also supra notes 56–71 and accompanying text.

[170] *Drury*, 200 U.S. at 2.

[171] Id. at 8 (emphasis added).

[172] 173 U.S. at 280; see also id. at 284 ("[T]his is one of the cases where it is proper to issue a writ of *habeas corpus* from the Federal court . . . .").

[173] Wade v. Mayo, 334 U.S. 672, 692–93 & nn.20–22 (1948) (Reed, J., dissenting).

[174] For a sampling of cases citing *Neagle*'s "necessary and proper" passage, see supra note 71.

courts quoting and relying on these cases have imported their jurisdictional frame and language. Although this mistake is understandable, it is not without harm.

III. THE HARM

Obviously it is important to use the right words in the right places, especially in the law. This Part, however, will emphasize this point, because courts have not heeded it when considering Supremacy Clause immunity. As briefly discussed in the Introduction, there are three aspects to linguistic precision in the law: semantic, structural, and practical.[175] The structural considerations will not be considered here, as they were discussed at length in Section II.A. This Part instead focuses on the mischaracterization's semantic and practical aspects.

A. Semantic Differences and Communicative Content

At a very general level, there are three layers to every word. First is the *frame message*, or the signal conveyed by a series of letters that tells the reader that there is a message contained within those letters.[176] For example, throwing ABC magnets at the refrigerator until some of them stick lacks a frame message, because the resulting permutation of letters does not signal a need for interpretation; the thrower knows that there is no message. Second is the *outer message*, another set of triggers which tells the reader how to decode the message.[177] For an English speaker reading an English word, the outer message is simple: "Read the word in English." If a reader sees the word "tuna" and understands this outer message, she will read the word in English and think of a type of fish. If she does not understand this outer message, she might read the word in Spanish and think of a prickly pear cactus.

The third layer to any given word is the *inner message*, or its "meaning."[178] The reader who sees the word "tuna" and understands that she should read it in English will take it to mean a type of fish. This inner meaning is crucial to all uses of language, but especially in the law. Take for example the word "jurisdiction." If judges in a majority opinion take this to mean "adjudicative jurisdiction," while the dissent reads it as

[175] See supra notes 16–38 and accompanying text.
[176] Douglas R. Hofstadter, Gödel, Escher, Bach: An Eternal Golden Braid 166 (1979).
[177] Id.
[178] Id.

"legislative jurisdiction,"[179] and neither realizes the other is reading it differently, then they are talking past each other, not debating a legal point.[180] Failure to agree on the inner message entails failure to discuss the meaning.

In the law, however, there is a fourth layer to the meaning of words: their legal import. To use Professor Lawrence Solum's terminology, a word's inner message is its "communicative content," while its legal import is its "legal content."[181] Consider, for example, the Due Process Clause of the Fourteenth Amendment: The Clause itself speaks only in terms of process,[182] yet the Supreme Court has read a substantive component into it.[183] To a nonlawyer, there is a confusing gap between the Clause's communicative content and its legal content.

The gap between legal terms, on the one hand, and communicative and legal content, on the other, goes to the heart of Supremacy Clause immunity. In looking at this gap, it is clear that Supremacy Clause immunity has nothing to do with jurisdiction.

According to the Court, the definition of "jurisdiction"—or its communicative content—"properly refers to a court's power to hear a case."[184] The first thread concerns when the word actually entails the definition. For example, the Emergency Planning and Community Right-to-Know Act of 1986 contains various provisions requiring that toxic-chemical users file annual inventory forms with the appropriate federal agency.[185] The Act's citizen-suit and state-suit provision, 42 U.S.C. § 11046(a), permits individuals, localities, and states to enforce it.[186] This provision's companion, Section 11046(c), provides, "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section . . . to enforce the requirement concerned and to impose any civil penalty provided for a violation of that requirement."[187] Despite

[179] See supra notes 144–46 and accompanying text.
[180] See Ronald Dworkin, Law's Empire 43–44 (1986).
[181] Solum, supra note 18, at 1116–17.
[182] U.S. Const. amend. XIV, § 1, cl. 3.
[183] See, e.g., McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity even for the most casual user of words.").
[184] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 165 n.5 (2010) (citing United States v. Cotton, 535 U.S. 625, 630 (2002)).
[185] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86–87 (1998).
[186] 42 U.S.C. § 11046(a) (2012); see also *Steel Co.*, 523 U.S. at 87.
[187] 42 U.S.C. § 11046(c); see also *Steel Co.*, 523 U.S. at 90.

invoking the word "jurisdiction," the Supreme Court in its pioneering jurisdiction case deemed this provision nonjurisdictional.[188] Instead, it was "merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties."[189] In this seminal case, the communicative content did not accompany the legal content.

In the second thread, a provision that does not use "jurisdiction" is taken to be jurisdictional. It centers on instances when the definition exists without the word. In *Bowles v. Russell*,[190] the Court looked at Federal Rule of Appellate Procedure 4(a)(6), which states that when certain conditions are met, "[t]he district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered . . . ."[191] Despite not using the term "jurisdiction," the Court held that the rule was jurisdictional, citing the Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional."[192] In other words, Rule 4(a)(6) spoke in terms of a court's power to hear a case, invoking the communicative content of "jurisdiction" without using the word itself. In this case, the legal content did not accompany the communicative content.

These two threads make clear that, under the Supreme Court's burgeoning line of case law, sometimes "jurisdiction" does not mean "jurisdiction," and sometimes other words used in certain ways mean "jurisdiction."[193] The use of the word has no logically necessary relationship to the use of its meaning. Hence there is a gap between the term and its communicative content; between "jurisdiction" as a collection of letters and as a word with meaning.

If we look at this gap in relation to Supremacy Clause immunity, we can see that it has no connection to a court's power to hear a case. First, despite its "jurisdictional" label, the immunity lacks the requisite com-

[188] *Steel Co.*, 523 U.S. at 90.
[189] Id.
[190] 551 U.S. 205 (2007).
[191] Fed. R. App. P. 4(a)(6); see also *Bowles*, 551 U.S. at 208.
[192] *Bowles*, 551 U.S. at 210.
[193] At the same time, *Bowles* has been subjected to substantial criticism. See, e.g., William Baude, The Judgment Power, 96 Geo. L.J. 1807, 1851 (2008) (suggesting that *Bowles* could represent "backsliding" in confusing the difference between jurisdictional rules and mandatory nonjurisdictional ones); Scott Dodson, The Failure of *Bowles v. Russell*, 43 Tulsa L. Rev. 631, 632 (2008) (arguing that *Bowles* undermined "an important recent movement to clarify when a rule is jurisdictional and when it is not"); Hawley, supra note 27, at 2052 (using *Bowles* as an example of the "unpredictability of the Supreme Court's clear statement approach" to jurisdiction).

municative content. The communicative content of "jurisdiction" is the court's power to hear a case. This stands in contradistinction to parties' rights and obligations,[194] which lie at the heart of the immunity.

In Supremacy Clause-immunity cases, the question is not whether the court may hear the case. Indeed, in these cases jurisdiction is generally clear. "Jurisdiction" consists of and only of subject-matter and personal jurisdiction.[195] If the prosecution occurs in state court, then subject matter jurisdiction is founded on the state's power to prosecute its own criminal offenses,[196] and personal jurisdiction is based on a concomitant statute[197] (limited by the U.S. Constitution's Due Process Clause of the Fourteenth Amendment[198]). If the prosecution is removed to federal court, then subject matter jurisdiction is based on the federal-officer-removal statute,[199] and personal jurisdiction is typically based on the law of the forum state.[200]

Supremacy Clause immunity has almost no bearing on any of these jurisdictional bases. In fact, the sole relation between a jurisdictional basis and the immunity actually shows its substantive nature: When the officer raises a colorable claim that the immunity *applies* to his actions, this *grants* a federal court jurisdiction over the removed action.[201] Thus, the "jurisdictional" label here does not carry the term's communicative content.

To determine the actual communicative content of "Supremacy Clause immunity," we must see what courts have said about immunities. They have said that, in federal-officer-immunity cases, the proper question is whether the officer has a right not to be prosecuted.[202] This flows

[194] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994)) (stating that "jurisdictional" encompasses only subject-matter and personal jurisdiction).

[195] Id. at 160–61.

[196] See, e.g., Va. Code Ann. § 19.2-239 (West 2012).

[197] See, e.g., Slaughter v. Commonwealth, 284 S.E.2d 824, 826 (Va. 1981) (holding that personal jurisdiction cannot be obtained over a criminal defendant in Virginia "until process is served in a manner provided by statute").

[198] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289–91 (1980).

[199] 28 U.S.C. § 1442(a) (2012).

[200] See, e.g., Brown v. Lockheed Martin Corp., 814 F.3d 619, 624 (2d Cir. 2016). Personal jurisdiction is not based in state law if there is a federal statute directing otherwise, or if the state statute violates the U.S. Constitution. Id.

[201] Wyoming v. Livingston, 443 F.3d 1211, 1224 (10th Cir. 2006).

[202] See, e.g., New York v. Tanella, 374 F.3d 141, 147 (2d Cir. 2004).

from the fact that the immunity is a form of qualified immunity.[203] In other words, the communicative content of "Supremacy Clause immunity" is not the same as the communicative content of "jurisdiction." Instead, as established above, the immunity's content sounds in substance. "Substance" semantically denotes "whether the allegations the plaintiff makes entitle him to relief," which at bottom is a matter of whether the cause of action reaches the defendant's conduct.[204] This is precisely the question that "Supremacy Clause immunity" invokes: whether the immunity applies, preventing the state's criminal laws from reaching the officer's conduct.[205] Thus, while courts addressing the immunity do not use the word "substantive," they do invoke its communicative content. The gap between the use of "jurisdictional" and actually invoking jurisdiction means that, while Supremacy Clause immunity is labeled as such, it is actually substantive.

B. Practical Differences and Legal Content

Because of this gap between "jurisdiction" as a term and as a legal concept (its communicative content), the mislabeling of Supremacy Clause immunity makes a semantic difference. This semantic confusion is not mere harmless error: "To say that jurisdiction matters is a dramatic understatement. The power to hear cases—or not—goes to the very heart of what courts are and what they do."[206] This is reflected in the potential consequences of this imprecision—in Professor Solum's terminology, the "legal content" of the terms "jurisdictional" and "substantive."[207] Because the terms have different communicative content, they have different legal content. Because they have different meanings, they have different effects. Using "jurisdiction" imprecisely, therefore, presents not only a risk of improper legal reasoning, but also a risk of improper legal effects.

In the context of Supremacy Clause immunity, this difference of legal content entails four practical effects, which become relevant only if a court deems it jurisdictional:

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[203] See supra notes 131–43 and accompanying text.

[204] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010).

[205] See supra notes 139–43 and accompanying text.

[206] Hawley, supra note 27, at 2032; see also id. at 2048 ("Jurisdiction is an area, like so many others, in which clarity is a virtue.").

[207] See id. at 2080 ("Given the drastic consequences that attach to a jurisdictional provision, precision as to jurisdiction is critically important.").

> (1) Federal courts have an affirmative duty to look out for jurisdictional defects, and must raise jurisdictional issues sua sponte if they find any;[208]
>
> (2) Courts "will interpret and apply [jurisdictional rules] rigidly, literally, and mercilessly," and failure to follow a jurisdictional rule cannot be cured through equitable considerations;[209]
>
> (3) Federal courts may ignore the preclusive effect of a state-court judgment where the state court lacked jurisdiction over the case;[210] and
>
> (4) The Double Jeopardy Clause is not invoked in a second prosecution where the first ended in a dismissal for lack of jurisdiction.[211]

Improperly invoking these considerations in any case could harm the parties—who, in Supremacy Clause immunity cases, happen to be a sovereign state and an officer of the federal government.

In looking at these harms, one must keep in mind two things. First, it is wholly possible that all of these factors could occur within a single litigation. There is nothing that necessarily prevents them from coexisting. Second, while not all of these harms have occurred in a case involving Supremacy Clause immunity, this is more an accident of the dearth of cases than anything else.[212] What's more, since the late 1980s there has been a conspicuous uptick in cases involving the immunity, and nearly every year since 2001 has seen a Supremacy Clause-immunity case in federal court.[213] Paralleling this is an increase in the number of federal

[208] Michael G. Collins, Jurisdictional Exceptionalism, 93 Va. L. Rev. 1829, 1831 (2007). To be sure, this applies only to issues of subject matter jurisdiction, and not to matters of personal jurisdiction. But there is no evidence as to whether courts have even (mistakenly) considered whether Supremacy Clause immunity is an offshoot of subject matter or personal jurisdiction. And, given the nature of the immunity's formative cases and courts' frequent quotation of these cases, it is likely that courts have never given thought to this issue at all. See supra Subsection II.B.3.

[209] Lees, supra note 34, at 1458 (quoting Dane, supra note 130, at 5) (bringing up these considerations among others also addressed by Professor Michael Collins).

[210] Johnson v. De Grandy, 512 U.S. 997, 1005–06 (1994).

[211] Illinois v. Somerville, 410 U.S. 458, 459, 468 (1973).

[212] My research has turned up fifty-nine cases on Westlaw, covering the entirety of this nation's history, in which a court passed on the immunity's applicability. See infra note 213. In all but a few cases, the court summarily found the immunity applicable and entered a judgment to that effect.

[213] I have found thirty-six Supremacy Clause immunity cases preceding 1987. For a list of these cases, see Appendix A. By comparison, my research has uncovered twenty-three Su-

laws and the number of officers to enforce those laws.[214] It follows that, unless courts address their mischaracterization soon, one of the errors discussed below may actually occur, much to the detriment of one of the parties involved, federal-state relations, or even separation of powers, in what are almost always contentious and controversial cases.

1. Raising the Immunity Sua Sponte

The jurisdictional characterization of Supremacy Clause immunity may cause a court to incorrectly raise the immunity sua sponte. It is unclear whether a court would consider "jurisdictional" Supremacy Clause immunity to be an offshoot of subject matter or personal jurisdiction,[215] but federal courts have in the past considered some immunities to be matters of subject matter jurisdiction. For example, prior to the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[216] lower courts were split on whether the ministerial exemption to federal litigation was a matter of merits or subject matter jurisdiction.[217] Courts who considered the exemption jurisdictional sometimes raised the immunity sua sponte to dismiss causes of action against clergy.[218] This risk exists for Supremacy Clause immunity.

premacy Clause immunity cases spanning 1987 to the writing of this Note. For a list of these cases, see Appendix B. See also Denson v. United States, 574 F.3d 1318, 1345–49 (11th Cir. 2009) (discussing the immunity); Puerto Rico v. United States, 490 F.3d 50, 67–68 (1st Cir. 2007) (same). The district court in *United States v. Ferrara*, 847 F. Supp. 964, 968 (D.D.C. 1993), referred to Supremacy Clause immunity as "the doctrine of intergovernmental immunities," but a separate doctrine of federal immunity to state taxes more commonly goes by this name. See, e.g., Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 173–76 (1989); South Carolina v. Baker, 485 U.S. 505, 515–27 (1988). The appellate decision does not use this phrasing, instead framing the immunity clearly in terms of the Supremacy Clause. See United States v. Ferrara, 54 F.3d 825, 827–28 (D.C. Cir. 1995).

[214] See supra notes 39–44 and accompanying text.

[215] See supra note 208.

[216] 132 S. Ct. 694 (2012).

[217] See Wasserman, supra note 144, at 292–94. The Supreme Court resolved this split in *Hosanna-Tabor* by deeming it a defense on the merits. See 132 S. Ct. at 709 n.4 (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010)).

There is a convergence here in potential harms resulting from conflating legislative and judicial jurisdiction, on the one hand, and merits and judicial jurisdiction, on the other. This is because when a statute leaves the legislature and enters the court, the statute defines the merits of the case; judicial jurisdiction remains common to both distinctions. Thus, while the distinction between legislative jurisdiction and merits may make a difference elsewhere, in the context of this Note it has no such effect.

[218] See, e.g., Rockwell v. Roman Catholic Archdiocese of Bos., No. 02-239-M, 2002 WL 31432673, at *3 (D.N.H. Oct. 30, 2002).

Another source of confusion comes not from the fact that an immunity is at issue, but from the policies which Supremacy Clause immunity serves. Confusion here arises from the Court's recent treatment of statutes of limitations, which has actually been part of its jurisdiction cases: "[T]he law typically treats a limitations defense as an affirmative defense,"[219] but there are some statutes of limitations that the post-*Steel Co.* Court has deemed to be a manifestation of subject matter jurisdiction. One such example occurred in *John R. Sand & Gravel Co. v. United States*, where the Court found jurisdictional the statute of limitations for actions brought before the U.S. Court of Federal Claims.[220] Crucial to the Court's holding was the fact that, while most statutes of limitations aim to protect "a defendant's case-specific interest in timeliness," a crucial few—the jurisdictional statutes of limitations—seek "to achieve a broader system-related goal."[221] That is, the Court's analysis turned on whether the defense at issue served the defendant or a broader systematic purpose. If the former, then the statute of limitations was a nonjurisdictional claims-processing rule and need not be considered sua sponte; if the latter, then the statute was a jurisdictional rule and must be raised sua sponte if there was a suspected issue.[222]

This dichotomy poses problems in the Supremacy Clause immunity context because the immunity serves both defendant and system-based interests. It prohibits federal officers from being prosecuted under state law, but it does so in order to preserve the supremacy of federal law.[223] Thus, under the Court's recent distinction, a court could feasibly reason that, because Supremacy Clause immunity is not a claims-processing rule but rather jurisdictional, it must raise the immunity sua sponte if it suspects that the immunity requires dismissing the case.

[219] John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008).

[220] Id. at 132–34.

[221] Id. at 133 (citing as examples of these broader goals facilitation of administering claims, limitation on the scope of waivers of sovereign immunity, and promotion of judicial efficiency).

[222] See Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012).

[223] See, e.g., Tennessee v. Davis, 100 U.S. 257, 263 (1879) (describing the purpose of the immunity as preventing states from using prosecutions to hinder the federal government's ability to further its own interests); see also Burt v. Titlow, 134 S. Ct. 10, 15 (2013) (noting that the Supremacy Clause preserves the federal government's narrow primacy within the system of dual sovereignty); Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 369 n.16 (1990) (describing the duty this dual sovereignty imposes on state courts to enforce federal law).

2. Inability to Invoke Equitable Considerations

While the (in)applicability of Supremacy Clause immunity could be tempered through equity, a court would never do so if it viewed Supremacy Clause immunity as jurisdictional. Jurisdictional rules are construed rigidly and adhered to strictly.[224] Because courts may not minimize jurisdictional defects through equity,[225] a finding of jurisdictional defect can in some cases result in greater finality than would a defect in either a substantive or a procedural rule.[226]

For example, Federal Rule of Criminal Procedure 33 permits courts to grant a defendant's motion for a new trial "if the interest of justice so requires."[227] The defendant must file this motion within three years post-verdict if based upon newly discovered evidence, or else within fourteen days after the verdict.[228] In the 1947 case of *United States v. Smith*, the Court remarked that "the power of a court over its judgments at common law expired with the term of court," with a "three-day limitation on the right to move for a new trial."[229] Noting that Rule 33 simply extended this three-day deadline and permitted the judge to extend it further, the Court held that courts lack jurisdiction to entertain motions for a new trial once the deadline has expired.[230] As a result, judges were completely without power to order a new trial beyond Rule 33's deadline.[231]

Courts took this jurisdictional construction to heart. For example, in 2004, the Third Circuit flatly held, "[a]lthough the District Court acted within its discretion to consider the newly discovered evidence as part of a Rule 33 motion for a new trial, it correctly recognized that the limitations period on such a motion is jurisdictional, and therefore not subject to equitable tolling."[232]

[224] See, e.g., Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (holding that Court lacked power to extend filing period where the statutory filing requirement was jurisdictional); Hardin v. City Title & Escrow, 797 F.2d 1037, 1040–41 (D.C. Cir. 1986) ("Where a time limitation is jurisdictional, it must be strictly construed and will not be tolled or extended on account of fraud.").

[225] See, e.g., Bowles v. Russell, 551 U.S. 205, 214 (2007).

[226] Cf. Wasserman, supra note 102, at 1548 (drawing a trichotomy among jurisdiction, merits, and procedure).

[227] Fed. R. Crim. P. 33(a).

[228] Id. 33(b).

[229] 331 U.S. 469, 473 (1947).

[230] Id. at 473–74 & n.2.

[231] Id.

[232] United States v. McArthur, 107 F. App'x 275, 277 (3d Cir. 2004).

This has begun to change. In 2005, the Court—well into its reform of the term "jurisdiction"[233]—downplayed *Smith* and held, in *Eberhart v. United States*, that Rule 33 is not a jurisdictional rule but rather a claims-processing rule.[234] Since then, courts have at least been willing to entertain equitable tolling arguments against Rule 33's time limitations. For example, in the 2014 case of *United States v. Addison*, the Eleventh Circuit cited *Eberhart* and held that Rule 33 was not categorically resistant to equitable tolling.[235]

The implications for Supremacy Clause immunity are apparent. If a court deems the immunity to be jurisdictional, then the court has no power to invoke flexible considerations of fairness—whether to uphold or defeat the immunity. By contrast, if a court recognizes that Supremacy Clause immunity is substantive, then it may resort to considerations of fairness and equity to either reject the immunity where it would apply or grant the immunity where it would not.

This problem may be more imminent than one would think: As the Tenth Circuit has acknowledged, it remains an open question whether federal officials may claim the immunity "where their state law violation was disproportionate to the federal policy they were carrying out."[236] A question like this appears amenable to flexible considerations of fairness. Indeed, preemption analysis takes into account the state interest embodied in the challenged state law. In *San Diego Building Trades Council v. Garmon*, the Court cited "due regard for the presuppositions of our embracing federal system" to recognize that, "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility," preemption might not apply.[237] And separate from *Garmon*, lower federal courts have proved willing to consider the state interest in

[233] See supra text accompanying notes 153–58.

[234] 546 U.S. 12, 16 (2005). To be sure, Rule 33 is procedural in nature under *Eberhart*, while Supremacy Clause immunity is substantive. But procedural and substantive rules share a long history together and are highly intertwined. See Wasserman, supra note 102, at 1555–59.

[235] United States v. Addison, 569 F. App'x 774, 776 (11th Cir. 2014) (per curiam); see also United States v. Caisano, No. 3:05cr195(MRK), 2008 WL 1766576, at *2 (D. Conn. Apr. 11, 2008) (rejecting equitable tolling argument to Rule 33 time bar not on the basis of Rule 33 itself but rather on the ground that other remedies remained available to defendant).

[236] Wyoming v. Livingston, 443 F.3d 1211, 1222 n.5 (10th Cir. 2006).

[237] 359 U.S. 236, 243–44 (1959); see also Kaufman v. Allied Pilots Ass'n, 274 F.3d 197, 201 (5th Cir. 2001) (noting that the Supreme Court "has explicitly rejected a formalistic implementation of *Garmon*, and invited a balancing of state interests and federal regulatory interests in analyzing the preemption question").

their preemption analysis.[238] Thus a Supremacy Clause-immunity court could feasibly consider the state's interest in enforcing its own criminal laws—an interest which goes to the heart of state sovereignty.[239]

Finally, this likelihood of looking to fairness and equity is amplified by the fact that cases in which Supremacy Clause immunity is raised often present the very type of "extraordinary" circumstances that attend the resort to equitable considerations.[240] But as long as courts consider Supremacy Clause immunity to be jurisdictional, they cannot apply any considerations of flexibility or fairness. Such potential unfairness to the litigants raises serious concerns not only for the litigants themselves, but also for federal-state relations more broadly.

3. Federal Disregard of Supremacy Clause Immunity Decisions by State Courts

Construing Supremacy Clause immunity as jurisdictional invites federal courts to second-guess state-court decisions despite federalism concerns. The *Rooker-Feldman* doctrine states that "a party losing in state

[238] See, e.g., TFWS, Inc. v. Franchot, 572 F.3d 186, 195 (4th Cir. 2009) (noting that the district court had balanced the federal interest in promoting competition against the state interest in regulating competition); Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1113 (9th Cir. 1997) ("In the Indian law context, state law is preempted if the balance of tribal, federal, and state interests tips in favor of preemption.").

[239] See, e.g., Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens."); Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) ("The States possess primary authority for defining and enforcing the criminal law." (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982))).

[240] See, e.g., Christeson v. Roper, 135 S. Ct. 891, 895–96 (2015) (noting that only extraordinary circumstances justify reopening a case under Federal Rule of Civil Procedure 60(b)); Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1967 (2014) ("As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff."); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362 (1995) (holding that, in determining the proper remedy for ADEA violations, "the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party"); Younger v. Harris, 401 U.S. 37, 53 (1971) (noting the extraordinary circumstances that must exist to justify a federal injunction against a state prosecution). This correlation between extraordinary circumstances and Supremacy Clause immunity cases can be seen in the fact that the Court has granted pretrial habeas in two of three decisions, even though pretrial habeas may be granted only in exceptional cases and upon a showing of exigent circumstances. United States ex rel. Drury v. Lewis, 200 U.S. 1, 2, 8 (1906) (denying pretrial habeas on basis of factual dispute going to applicability of immunity); Boske v. Comingore, 177 U.S. 459, 460, 470 (1900) (granting pretrial habeas); *Neagle*, 135 U.S. at 76 (same); see supra note 159.

court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violated the loser's federal rights."[241] A federal court, however, may refuse to recognize the preclusive effect of a state-court decision if the state court lacked jurisdiction.[242]

This distinction is not without a difference. For example, in *Jenkins v. Duffy Crane & Hauling*, the plaintiff argued that the Minnesota court erred in granting summary judgment for the defendant after it had determined that it lacked personal jurisdiction.[243] The federal court did not mince words. Citing the Supreme Court case *Johnson v. De Grandy* and noting that the *Rooker-Feldman* doctrine does not apply where the state court lacked jurisdiction,[244] it said: "This Court does not endorse the Minnesota trial court's methodology of ruling on the merits of Jenkins's claims after it had determined it did not have personal jurisdiction over Duffy."[245]

Conversely, the plaintiff in *Satriano v. Countrywide Home Loans* sued in state court to quiet title, and the defendant removed to federal court based on diversity.[246] At issue was a state court's prior ruling that a foreclosure on the contested property was valid: The plaintiff, who purchased the property from the foreclosure buyers, asserted its validity; the defendant, the pre-foreclosure owners' successor, argued that the judgment was erroneous.[247] The court began by drawing the same distinction made in *Jenkins*: While it may review state-court decisions that lacked jurisdiction, it may not review judgments "contrary to the law."[248] Be-

[241] Johnson v. De Grandy, 512 U.S. 997, 1005–06 (1994); see Rooker v. Fidelity Tr. Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[242] Daniels v. Thomas, 225 F.2d 795, 797 (10th Cir. 1955); see also Satriano v. Countrywide Home Loans, No. 14-cv-02216-KLM, 2015 WL 847456, at *4 (D. Colo. Feb. 25, 2015) (citing and quoting *Daniels* with approval); Jenkins v. Duffy Crane & Hauling, No. 13-cv-00327-CMA-KLM, 2013 WL 6728892, at *2 (D. Colo. Dec. 20, 2013) (citing *Daniels* with approval).

[243] 2013 WL 6728892, at *2.

[244] Id. at *3 & n.3.

[245] Id. at *2.

[246] 2015 WL 847456, at *1.

[247] Id.

[248] Id. at *3–4 (citing Davidson Chevrolet v. City & County of Denver, 330 P.2d 1116, 1118 (Colo. 1958) (en banc)).

cause the defendant conceded that the state court had jurisdiction to adjudicate the prior proceeding, the federal court refused to revisit it.[249]

Through the *Rooker-Feldman* doctrine, a court's characterization of Supremacy Clause immunity has implications for federal-state relations.[250] If the federal officer is convicted in state court,[251] he may bring an action under 28 U.S.C. § 1983, claiming that his constitutional rights were violated in some way in the course of his apprehension and prosecution. In this claim, the officer may ask the federal court to find the state judgment nonpreclusive. Alternatively, the federal court might raise the issue sua sponte,[252] presenting the types of problems discussed above.[253] Either way, if the court took the conventional view of Supremacy Clause immunity, then it would view the issue as whether the immunity had stripped the state court of jurisdiction.[254] As this issue would be plainly jurisdictional, the federal court would find an exception to the *Rooker-Feldman* doctrine and revisit the conviction. This would not be the case if the federal court correctly realized that Supremacy Clause immunity is substantive.[255] This decision, then, implicates not only the

[249] Id. at *6 (citing Daniels v. Thomas, 225 F.2d 795, 797 (10th Cir. 1955)).

[250] In fact, the *Rooker-Feldman* doctrine may be partially based in the Supremacy Clause itself. See Silverman v. Silverman, 338 F.3d 886, 893 (8th Cir. 2003) ("According to several commentators, *Rooker-Feldman* analysis is influenced, in part, by the supremacy clause, full faith and credit concepts and congressional concerns for comity with and respect for the rights of the sovereign states.").

[251] This may happen where the officer does not remove the prosecution to federal court under 28 U.S.C. § 1442(a) (providing removal to federal officers sued for actions taken in their official capacities).

[252] See, e.g., Crawford v. Countrywide Home Loans, Inc., 647 F.3d 642, 646 (7th Cir. 2011) ("The district court correctly considered the *Rooker-Feldman* doctrine *sua sponte* . . . ."). Lower federal courts may do so because the *Rooker-Feldman* doctrine is rooted in lower federal courts' subject matter jurisdiction. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005) (reaching this conclusion via negative inference from the text of 28 U.S.C. § 1257).

[253] See supra Section III.A.

[254] See, e.g., Texas v. Kleinert, 143 F. Supp. 3d 551, 556 (W.D. Tex. 2015); Arizona v. Files, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014).

[255] See, e.g., V.S. v. Muhammad, 595 F.3d 426, 430–31 (2d Cir. 2010) (treating the *Rooker-Feldman* argument as distinct from and antecedent to the qualified immunity argument); Silvan W. v. Briggs, 309 F. App'x 216, 221 (10th Cir. 2009) ("The district court further ruled that even if *Rooker-Feldman* did not apply, the defendants were entitled to qualified immunity."). This is because *Rooker-Feldman* generally bars federal reconsideration of issues that are "inextricably intertwined" with the state court judgment. See, e.g., Jones v. Alabama, 644 F. App'x 950, 951 (11th Cir. 2016) (per curiam) (internal quotation marks and citation omitted). An issue is inextricably intertwined when either: (1) the success of the federal claim would nullify the state judgment; or (2) the federal claim would succeed only in-

federal officer and the state qua litigant, but also federal-state relations generally.

4. Lack of Protection Against Double Jeopardy

If Supremacy Clause immunity is jurisdictional, then dismissals based on it do not invoke the Double Jeopardy Clause. As discussed above, deeming Supremacy Clause immunity as jurisdictional cuts to the very notions of judicial authority and separation of powers.[256] It also implicates one of the most fundamental protections enshrined in the Constitution: the right against double jeopardy. Under the Double Jeopardy Clause, a criminal defendant cannot "be subject for the same offence to be twice put in jeopardy of life or limb."[257] But a second proceeding amounts to double jeopardy only if the prior prosecution actually ended in a final decision. Otherwise, the second proceeding is simply a continuation of the first.[258]

What constitutes a "final decision" is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."[259] This includes substantive defenses. For example, in *United States v. Gustavson*, the en banc Seventh Circuit held that the government could not appeal a dismissed prosecution.[260] The defendant, who had been drafted for service in the Vietnam War, claimed that he was a conscientious objector.[261] His claim was rejected, but the defendant nevertheless refused to report for service, and he was indicted.[262] The district court dismissed the prosecution on the basis that the board had im-

sofar as the state court wrongly decided the issue. Id. (citing Alvarez v. Attorney Gen., 679 F.3d 1257, 1262–63 (11th Cir. 2012)). This situation would not arise if the officer sought federal habeas relief for the state conviction. This is because postconviction habeas is an exception to *Rooker-Feldman*, even if the petitioner is not making a jurisdictional argument. See, e.g., In re Gruntz, 202 F.3d 1074, 1079 (9th Cir. 2000) (en banc) ("It is well-settled that the Rooker-Feldman doctrine does not touch the writ of habeas corpus.").

[256] See supra notes 144–49 and accompanying text.

[257] U.S. Const. amend. V, cl. 2.

[258] See Evans v. Michigan, 133 S. Ct. 1069, 1075 (2013) (holding that termination of proceedings against a defendant where there is no expectation of finality does not pose the same double jeopardy concerns as a final, substantive decision).

[259] Id.

[260] 454 F.2d 677, 678 (7th Cir. 1971) (en banc).

[261] Id.

[262] Id.

properly considered certain information in the defendant's file in reaching its decision.[263] The government appealed.[264]

In rejecting the appeal and upholding the dismissal, the Seventh Circuit found that the defendant's defense was a "defense which could have been raised at trial."[265] Accordingly, the district court's acceptance of this defense amounted to a "ruling on the merits," implicating double jeopardy and preventing the government from appealing.[266] Thus, where a court dismisses a case on the basis of a defense that goes to the merits—a substantive defense—the defendant is protected from future prosecution by the Double Jeopardy Clause.[267] Since Supremacy Clause immunity is a substantive defense,[268] dismissal based on it protects the federal officer from future prosecution.

This is not the case, however, for dismissals for lack of jurisdiction: "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.'"[269] As a result, where a prosecution is dismissed for a jurisdictional defect, a subsequent prosecution does not violate the Double Jeopardy Clause. For example, in *Illinois v. Somerville*, the Court held that double jeopardy did not bar retrial of the defendant whose first prosecution ended in a mistrial.[270] The basis of the state court's mistrial ruling was that the indictment failed to charge an element of the crime, and that this failure was jurisdictional.[271] The *Somerville* majority did

[263] Id.

[264] Id.

[265] Id.

[266] Id.; see also United States v. Walker, 489 F.2d 1353, 1355 (7th Cir. 1973) (recognizing that in *Gustavson* and its companion cases, "each of the dismissals sustained the merits of an affirmative defense").

[267] See United States v. Kashamu, 656 F.3d 679, 682 (7th Cir. 2011) (Posner, J.) (drawing a direct analogy, for interlocutory-appeal purposes, between denied claims of official immunity and denied claims of double jeopardy).

[268] See supra Section II.A.

[269] Serfass v. United States, 420 U.S. 377, 391 (1975) (quoting Kepner v. United States, 195 U.S. 100, 133 (1904)). To be sure, the Court in *Martinez v. Illinois*, 134 S. Ct. 2070 (2014), stated that it had never considered the actual double-jeopardy effect of a trial court's lack of jurisdiction over a case. Id. at 2075 n.3. But this concerned when jeopardy attaches, rather than when it ends (and hence when a second prosecution would constitute double jeopardy). Id. at 2075.

[270] 410 U.S. 458, 459 (1973).

[271] Id. at 458–59, 468.

not second-guess this characterization,[272] and Justice Marshall in dissent even argued that this defect amounted to an invasion by the petit jury into the jurisdiction of the grand jury.[273] The Court thus found no double jeopardy violation in retrying the defendant.[274]

In this same vein, courts today have declared that, where Supremacy Clause immunity applies, "it is not left to a federal or state jury to acquit the defendant."[275] In other words, a ruling that the immunity applies is not an acquittal—and it is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence" that an acquittal cannot be reviewed without violating double jeopardy.[276] In broader terms, if Supremacy Clause immunity is jurisdictional, then a ruling that it applies is not a "ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."[277] Instead, it is a ruling that the court cannot hear the case, whatever the prosecution's proof may be. Thus, were a court to dismiss a prosecution because of Supremacy Clause immunity, another court could take up the case and retry the federal officer.

This scenario is not infeasible. The Pennsylvania county court in *United States ex rel. Drury v. Lewis* was able to try the soldiers only because the shooting occurred on county land rather than on the military base.[278] But what if it was unclear whether the soldiers were in County *X* or County *Y*?[279] Suppose that the soldiers are prosecuted in County *X*, but the court dismisses the case for lack of jurisdiction on the basis of

[272] Id. at 468.

[273] Id. at 481–82 (Marshall, J., dissenting). At the time, the Court's conception of jurisdiction was in flux: *Ex parte Bain*, 121 U.S. 1 (1887), supposedly defined what jurisdiction was in this field of law, but several Supreme Court decisions had pared it back. See United States v. Cotton, 535 U.S. 625, 629–31 (2002) (surveying this history and overruling *Bain*).

[274] *Somerville*, 410 U.S. at 471 (majority opinion).

[275] Arizona v. Files, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014).

[276] Martinez v. Illinois, 134 S. Ct. 2070, 2075 (2014) (internal quotation marks omitted) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

[277] Evans v. Michigan, 133 S. Ct. 1069, 1075 (2013).

[278] United States ex rel. Drury v. Lewis, 200 U.S. 1, 3 (1906).

[279] The Double Jeopardy Clause bars successive prosecutions in different state subdivisions. Waller v. Florida, 397 U.S. 387, 392 (1970). It does not, however, bar successive prosecutions for the same incident by separate sovereigns, whether multiple states or a state and the federal government. See Heath v. Alabama, 474 U.S. 82, 87–88 (1985) (multiple states); United States v. Lanza, 260 U.S. 377, 382 (1922) (state and federal government). Further, a *Drury* counterfactual like the one raised here is most likely to occur at the county level because of the greater number of county and subdivision lines than state lines.

Supremacy Clause immunity. This leaves the courts of County *Y* free to prosecute the federal officer.[280]

On the other hand, no such problems arise if courts recognize the substantive nature of Supremacy Clause immunity. Dismissal based on the substantive immunity in County *X* would invoke double jeopardy throughout the state, preventing successive prosecution in County *Y*.[281] Federal officers, therefore, can receive the Double Jeopardy Clause's protection only if courts recognize the substantive nature of Supremacy Clause immunity.

CONCLUSION

Supremacy Clause immunity has roots in the Constitution's text and Supreme Court decisions dating back over a century. Though seldom litigated until recently, the doctrine is invoked in cases that often are controversial, are highly charged, and pit the core of state sovereignty against the heart of federal sovereignty. Yet Supremacy Clause immunity has not received the judicial or scholarly attention that such an important doctrine would seem to merit.

One aspect of the immunity that has suffered from this dearth of discussion is its very nature. Though it is in fact substantive, courts time and time again have referred to it as jurisdictional. This mischaracterization is largely an accident of the Supreme Court's prior case law on jurisdiction, a lack of unifying characterization of immunities generally, and the context of Supremacy Clause immunity's founding and formative cases.

Though a difference of only one word, the weight of these two terms brings immense implications. "Jurisdiction" goes to a court's very power to hear the case, while "substance" goes to the merits themselves, which in turn relate to the legislature's power to enact the law at issue. As a result, this ongoing mischaracterization of Supremacy Clause immunity

[280] See, e.g., Va. Code Ann. § 19.2-239 (West 2012) ("The circuit courts, except where otherwise provided, shall have exclusive original jurisdiction for the trial of all presentments, indictments and informations for offenses committed within their respective circuits."); Porter v. Commonwealth, 661 S.E.2d 415, 429 (Va. 2008) (holding that judgments rendered outside the authority of this statute are voidable); Romero v. Commonwealth, No. 0050-13-4, 2014 WL 1227696, at *11 n.13 (Va. Ct. App. Mar. 25, 2014) (noting that a dismissal based upon failure to satisfy § 19.2-239 "does not prejudice the Commonwealth's ability to retry a criminal defendant in the appropriate forum").

[281] See supra note 109 and accompanying text.

poses risks of harm to the states, the federal government as a single sovereign and as three coordinate branches, state citizens harmed by federal conduct, federal officers, state and federal courts, and federal-state relations in general. A newfound attentiveness to how courts describe Supremacy Clause immunity will quell these risks and ensure that the immunity is applied correctly in cases where even the smallest details can have the largest consequences.

APPENDIX A: SUPREMACY CLAUSE IMMUNITY CASES 1787-1987

Morgan v. California, 743 F.2d 728 (9th Cir. 1984)
Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982)
Connecticut v. Marra, 528 F. Supp. 381 (D. Conn. 1981)
Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977)
Arizona v. Manypenny, 445 F. Supp. 1123 (D. Ariz. 1977)
Massachusetts v. Hills, 437 F. Supp. 351 (D. Mass. 1977)
Montana v. Christopher, 345 F. Supp. 60 (D. Mont. 1972)
Pennsylvania v. Johnson, 297 F. Supp. 877 (W.D. Pa. 1969)
In re McShane (Pet. of McShane), 235 F. Supp. 262 (N.D. Miss. 1964)
Puerto Rico v. Fitzpatrick, 140 F. Supp. 398 (D.P.R. 1956)
Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945)
Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944)
In re Mendenhall, 10 F. Supp. 122 (D. Mont. 1935)
Birsch v. Tumbleson, 31 F.2d 811 (4th Cir. 1929)
Isaac v. Googe, 284 F. 269 (5th Cir. 1922)
Johnson v. Maryland, 254 U.S. 51 (1920)
Ex parte Beach, 259 F. 956 (S.D. Cal. 1919)
Castle v. Lewis, 254 F. 917 (8th Cir. 1918)
In re Wulzen, 235 F. 362 (S.D. Ohio 1916)
Stegall v. Thurman, 175 F. 813 (N.D. Ga. 1910)
Hunter v. Wood, 209 U.S. 205 (1908)
United States v. Lipsett, 156 F. 65 (W.D. Mich. 1907)
United States ex rel. Drury v. Lewis, 200 U.S. 1 (1906)
West Virginia v. Laing, 133 F. 887 (4th Cir. 1904)
In re Turner, 119 F. 231 (C.C.S.D. Iowa 1902)
United States ex rel. Flynn v. Fuellhart, 106 F. 911 (C.C.W.D. Pa. 1901)
Boske v. Comingore, 177 U.S. 459 (1900)
In re Fair, 100 F. 149 (C.C.D. Neb. 1900)
Ohio v. Thomas, 173 U.S. 276, 284 (1899)
In re Lewis, 83 F. 159 (D. Wash. 1897)
In re Weeks, 82 F. 729 (D. Vt. 1897)
In re Waite, 81 F. 359 (N.D. Iowa 1897), aff'd sub nom. Campbell v. Waite, 88 F. 102 (8th Cir. 1898)
Ex parte Conway, 48 F. 77 (C.C.D.S.C. 1891)
United States ex rel. McSweeney v. Fullhart, 47 F. 802 (C.C.W.D. Pa. 1891)
Cunningham v. Neagle (In re Neagle), 135 U.S. 1 (1890)
Tennessee v. Davis, 100 U.S. 257 (1879)

APPENDIX B: SUPREMACY CLAUSE IMMUNITY CASES 1987-2015

Texas v. Kleinert, 143 F. Supp. 3d 551 (W.D. Tex. 2015)
Arizona v. Files, 36 F. Supp. 3d 873 (D. Ariz. 2014)
Arion v. Sato, No.13-00464 JMS/KSC, 2014 WL 495423 (D. Haw. Feb. 6, 2014)
Hawaii v. Broughton, No. Cr. 13-00415 HG, 2013 WL 3288381 (D. Haw. June 28, 2013)
California v. Dotson, No. 12cr0917 AJB, 2012 WL 1904467 (S.D. Cal. May 25, 2012)
Virgin Islands v. Clark, 53 V.I. 183 (2010)
Tennessee v. Dodd, No. 1:08-cr-10100, 2009 WL 32886 (W.D. Tenn. Jan. 6, 2009)
Puerto Rico v. United States, 490 F.3d 50 (1st Cir. 2007)
New York v. De Vecchio, 468 F. Supp. 2d 448 (E.D.N.Y. 2007)
Wyoming v. Livingston, 443 F.3d 1211 (10th Cir. 2006)
Colorado v. Nord, 377 F. Supp. 2d 945 (D. Colo. 2005)
New York v. Tanella, 374 F.3d 141 (2d Cir. 2004)
City of Jackson v. Jackson, 235 F. Supp. 2d 532 (S.D. Miss. 2002)
Idaho v. Horiuchi, 253 F.3d 359 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (2001)
New Mexico v. Dwyer, 105 F.3d 670 (10th Cir. 1997) (unpublished opinion)
United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995)
New Jersey v. Bazin, 912 F. Supp. 106 (D.N.J. 1995)
Texas v. Carley, 885 F. Supp. 940 (W.D. Tex. 1994)
Whitehead v. Senkowski, 943 F.2d 230 (2d Cir. 1991)
North Carolina v. Ivory, 906 F.2d 999 (4th Cir. 1990)
Puerto Rico v. Torres Chaparro, 738 F. Supp. 620 (D.P.R. 1990)
Kentucky v. Long, 837 F.2d 727 (6th Cir. 1988)
Maryland v. DeShields, 829 F.2d 1121 (4th Cir. 1987) (unpublished opinion)