NOTE

HARMONIZING FEDERAL IMMUNITIES

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When a federal employee is charged with a state crime based on conduct that was within their official responsibilities, the United States Constitution protects them from prosecution through Supremacy Clause immunity. This immunity was developed by the Supreme Court in a small set of cases from around the turn of the twentieth century, but no Supreme Court cases have mentioned it since. Generally, as lower courts have construed it, it is a highly protective standard. This Note questions that standard by attempting to re-align Supremacy Clause immunity with another federal immunity that also derives from the Supremacy Clause: federal tax immunity. Until the mid-twentieth century, federal tax immunity cases protected the federal government from almost any state-tax-related burdens, even indirect ones. But in 1937, the Supreme Court abruptly changed course and overruled a century of its previous precedents. As a result, federal tax immunity today has only a shadow of its previous force. In relating these two immunities to each other, this Note aims to shine light on Supremacy Clause immunity as a doctrine based on an outdated conception of the role of federal courts in our federalist system. It ties the Court's shift in federal tax immunity to a broader philosophical transformation that also appeared in other doctrines, like those governing the application of the Tenth Amendment and preemption. And it shows that Supremacy Clause immunity as it currently stands is the sour note in an otherwise consistent harmony of federalist relationships.

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INTRODUCTION

In two disconnected and hypothetical[1] locations, two government officers in performance of their duties run afoul of a state criminal law. One is an FBI sniper who takes an arguably unjustified shot at a fleeing man and kills an innocent bystander. The other is a state police officer who, facing the same situation, makes the same tragic error. Both officers are charged with a crime: involuntary manslaughter. Assuming all relevant facts are parallel between the two scenarios, does the law dictate that the state police officer should stand trial while the federal officer is held to be immune from prosecution? More generally, given the structure of our federalist system and the text, purpose, and history of the United States Constitution, how often should it be the case that a federal officer is immune from state criminal prosecution despite the fact that a state officer would be held to be culpable for doing the very same thing?

[1] Only partially hypothetical, one is in Idaho. See Idaho v. Horiuchi, 253 F.3d 359, 363–64 (9th Cir. 2001).

Courts tell us that this question is answered by the Constitution's Supremacy Clause.[2] But the Supreme Court has not been generous with its guidance. The concept of federal officer immunity from state criminal prosecution was first explored in *In re Neagle*,[3] but although that case is memorable for its remarkably dramatic set of facts,[4] it is well over a century old and offers little in the way of specifics. After an initially rapid development, Supremacy Clause immunity has remained entirely untouched by the Supreme Court since 1920, and it has arisen in lower federal courts only sporadically during that intervening century. Though no clear legal standard has emerged, the doctrine has generally been construed to offer sweeping immunity to federal employees who commit state crimes, as long as their actions bore some relationship to their federal duties.[5]

Despite its infrequent appearance in federal courts, Supremacy Clause immunity may have unexpected contemporary significance. Scholars have pointed out that the historical periods when it is most likely to arise are times when there are strong political tensions between state and federal governments.[6] In areas as disparate as electoral policy,[7] public

[2] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[3] 135 U.S. 1, 62 (1890).

[4] See id. at 45 ("As [the former Chief Justice] was about leaving the room, . . . he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle.").

[5] The standard that has developed in lower courts is discussed in Subsection I.B, *infra*.

[6] 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, 2232 (2003) (stating that Supremacy Clause immunity tends to arise "around historical moments of significant friction between the federal government and the States").

[7] Nick Corasaniti & Reid J. Epstein, A Voting Rights Push, as States Make Voting Harder, N.Y. Times (Jan. 11, 2022), https://www.nytimes.com/2022/01/11/us/politics/biden-voting-rights-state-laws.html [https://perma.cc/39MC-2PR7] (describing that eighteen states are passing laws containing "a host of new voting restrictions" while Democrats in Congress try to pass a bill prohibiting state laws with those very types of restrictions).

health,[8] immigration,[9] and law enforcement,[10] now is such a time. It is thus unsurprising that a federal circuit court was recently presented with a Supremacy Clause immunity claim in a case that evokes the broader public debate about immunity from suit for law enforcement officers.[11] And any abstract conjecture about the doctrine's relevance is cemented by ongoing conversations about Georgia's potential prosecution of former President Trump for attempting to illegally influence vote counts in the aftermath of the 2020 election, and the possibility that he will invoke Supremacy Clause immunity.[12] That prosecution, were it to occur, would also provide the most likely avenue for Supremacy Clause immunity to finally reappear in the Supreme Court.

This Note approaches Supremacy Clause immunity from a novel perspective. Others have compared it to qualified immunity and preemption,[13] but no one has attempted to untangle the relationship between Supremacy Clause immunity and federal tax immunity, a doctrine based on the same clause of the Constitution and which serves the same purpose: protecting the functioning of the federal government from state obstruction. Since the seminal case *McCulloch v. Maryland*,[14]

[8] See Nancy J. Knauer, The COVID-19 Pandemic and Federalism: Who Decides?, 23 N.Y.U. J. Legis. & Pub. Pol'y 1, 8 (2020) (arguing that the current federal-state collaborative approach to pandemic response "left the federal government ill-prepared to respond to the COVID-19 pandemic because of conflicting priorities"); James G. Hodge, Jr., Federal vs. State Powers in Rush to Reopen Amid Coronavirus Pandemic, Just Sec. (Apr. 27, 2020), https://www.justsecurity.org/69880/federal-vs-state-powers-in-rush-to-reopen-amid-corona virus-pandemic/ [https://perma.cc/62LX-4B2G] ("[T]he novel coronavirus is exposing a deep rift in American federalism as federal and state governments vie for primacy in remedying the nation's ills.").

[9] See Arizona v. United States, 567 U.S. 387, 416 (2012) (holding, in a suit filed by the United States seeking an injunction against the enforcement of Arizona law, that the law providing for state enforcement of federal immigration policy was preempted).

[10] Compare H.R. 1280, 117th Cong. § 102 (2021) (limiting defense of qualified immunity in suits against law enforcement officers), with Iowa Code § 670.4A (2023) (reinforcing defense of qualified immunity as a matter of Iowa state law).

[11] See Virginia v. Amaya, No. 1:21-cr-91, 2021 WL 4942808 (E.D. Va. Oct. 22, 2021), *appeal dismissed*, 2022 WL 1259877 (4th Cir. Apr. 25, 2022). The Fourth Circuit dismissed the case after a newly elected attorney general ceased pursuing the appeal. Tom Jackman, Va. Attorney General Miyares Ends Prosecution of U.S. Park Police Officers in Ghaisar Case, Wash. Post (Apr. 22, 2022, 7:51 PM), https://www.washingtonpost.com/dc-md-va/2022/04/ 22/ghaisar-case-dismissed/ [https://perma.cc/89CT-6YD2].

[12] See Norman Eisen et al., Fulton County, Georgia's Trump Investigation: An Analysis of the Reported Facts and Applicable Law 216–52 (2022).

[13] Waxman & Morrison, supra note 6, at 2241.

[14] 17 U.S. (4 Wheat.) 316, 395 (1819).

the Court has spoken relatively frequently about federal tax immunity,[15] and the doctrine it has expounded provides helpful illumination for contemporary attempts to understand the scope of Supremacy Clause immunity. The comparison yields a surprising conclusion: viewed in light of federal tax immunity, the approach that lower courts have been taking to Supremacy Clause immunity appears decidedly anachronistic. In fact, Supremacy Clause immunity as it currently exists is entirely inconsistent with the understanding of the Supremacy Clause that underlies every related constitutional doctrine. *Neagle* arose at a time when the Court's perception of its own power to override state laws was at its zenith.[16] But in the last century, that has changed. As a result, the Court's analysis of federal tax immunity has shifted dramatically, as has the doctrine of preemption.

These concurrent shifts demonstrate the Supreme Court's adoption of a theory of government called "process federalism,"[17] which was proposed by Professor Herbert Wechsler in a highly influential mid-century Article.[18] Wechsler's analysis focused on the judiciary's role in protecting states from the federal government, for example by invalidating federal actions as infringing on the powers of the states.[19] He argued that the judiciary's role in this area was limited.[20] In his view, if the matter were left to Congress, states' interests would naturally be accommodated based on their role in Congress's structure and composition.[21] Other scholars later related Wechsler's theory to doctrines that pointed in the other direction, and concluded that courts should also decline to invalidate state action as obstructing the federal government

[15] See, e.g., Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 477 (1939) (stating that federal immunity from state taxation extends to corporations owned and controlled by the government).

[16] See Stephen A. Gardbaum, The Nature of Preemption, 79 Cornell L. Rev. 767, 801 (1994) (characterizing the turn of the century as a "double shift in the direction of enhanced federal power" based on the Court's overturning state laws as either preempted or unconstitutional under the Dormant Commerce Clause).

[17] See William Marshall, American Political Culture and the Failures of Process Federalism, 22 Harv. J.L. & Pub. Pol'y 139, 147–48 (1998); Ernest A. Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1350 (2001).

[18] Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 546 (1954).

[19] Id. at 558–60.

[20] Id. at 560.

[21] Id. at 547.

without explicit congressional direction.[22] Otherwise the judiciary is inclined to be overprotective of the federal government and deaf to states' concerns.

Jurisprudential shifts in both federal tax immunity and preemption reveal the Supreme Court's wholesale embrace of this state-protective spin on process federalism. In each of these areas the Court previously nullified state action on a constitutional basis whenever it perceived a conflict between federal and state interests. But it now only invalidates the state law if it perceives congressional intent to do so.[23] Supremacy Clause immunity has escaped this treatment, and as it currently stands, it remains irreconcilable with the theoretical underpinnings of other Supremacy Clause-derived doctrines. In cases where federal officers claim Supremacy Clause immunity, federal judges still routinely refuse to enforce state criminal law based only on their own perceptions of conflict between federal and state interests, and without any reference to congressional intent. The legal standard these cases apply is no longer consistent with the Supreme Court's understanding of the Supremacy Clause generally, even if it is reasonably derived from the scarce text of the Court's century-old Supremacy Clause immunity cases.

This Note proceeds in four parts to propose a new approach to evaluating claims of Supremacy Clause immunity. Part I charts the origin of Supremacy Clause immunity in a string of turn-of-the-century Supreme Court cases and its subsequent development in circuit courts. Part II rejects an approach to Supremacy Clause immunity that has grown in influence in more recent cases and which has engendered some scholarly support: defining Supremacy Clause immunity through analogy to qualified immunity. Part III argues that a more appropriate comparison can be made to a closely analogous doctrine, federal tax immunity, and it describes the development of that doctrine and establishes its relationship to process federalism. Finally, Part IV applies the analysis to Supremacy Clause immunity and explores some of its implications.

[22] Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 695, 712–13 (1976).

[23] See discussion infra Section III.B.

I. SUPREMACY CLAUSE IMMUNITY

Concerns about federal officers being protected by federal courts when they violate the rights of citizens are nothing new. In the debates surrounding Virginia's ratification of the Constitution, George Mason attacked Article III's grant of jurisdiction to federal courts, warning of the possibility that a "Federal Sheriff . . . will go into a poor man's house, and beat him, or abuse his family, and the Federal Court will protect him."[24] John Marshall rejected his position, responding that courts would protect state citizens, adding that "[w]ere a law made to authorise [such actions], it would be void" and federal judges would prevent its operation.[25]

These concerns were front-and-center in a small cluster of cases that were decided at the turn of the twentieth century, from which the doctrine of Supremacy Clause immunity originates. The first, best known, and still most-often-referenced is *In re Neagle*, from 1890.[26] Its language provides the framework from which more modern Supremacy Clause immunity cases have built their analysis. The few Supreme Court cases that followed it get less notice, potentially because they provide little clarification.

A. Early Development in the Supreme Court

In re Neagle is a rare case in that a sitting Supreme Court Justice, Stephen Field, played a significant role in its factual background. The story centers around David S. Terry, a notable nineteenth century California jurist.[27] Before he died at the age of sixty-six in 1889,[28] he spent two years as an associate justice on the Supreme Court of California[29] and two more as its chief justice.[30] Those accomplishments would sufficiently fill most biographies, but they only scratch the surface of Terry's eventful life. Outside of his time on the bench, he secretly served as an officer in the Confederate Army,[31] stabbed a man in 1856

[24] George Mason, Remarks During Convention Debates at the Virginia Convention (June 20, 1788), *reprinted in* 10 The Documentary History of the Ratification of the Constitution 1412, 1432 (John P. Kaminski et al. eds., 1993).
[25] Id.
[26] 135 U.S. 1, 76 (1890).
[27] 1 J. Edward Johnson, History of the Supreme Court Justices of California 53 (1963).
[28] Id. at 52, 61.
[29] Id. at 55.
[30] Id.
[31] Alexander E. Wagstaff, Life of David S. Terry 225–28 (Alexander E. Wagstaff ed., 1892).

during an insurrection in San Francisco,[32] and famously killed U.S. Senator David Broderick by gunshot during a duel.[33]

Although most of Terry's history would be worth recounting, the events that led up to *Neagle* center on two very dramatic incidents. In the first, Terry was representing his new wife, Sarah Althea Hill, in a suit in which she was trying to establish the validity of her past marriage to the multimillionaire William Sharon, the former United States senator from Nevada.[34] Hill and Sharon were no longer on good terms, and her goal was to cement her right to a portion of Sharon's estate. At a tumultuous hearing presided over by Supreme Court Justice Stephen Field, who was riding circuit in California, Terry and his wife started a full-scale brawl in which he brandished a bowie knife at federal marshals and, according to some accounts, Hill drew and discharged a revolver while shouting insults at Justice Field.[35] After marshals subdued and restrained them, they were each sentenced to several months in prison for their unruly behavior.[36]

Neagle's conclusion begins with an unlikely coincidence. Not long after Terry and Hill were released from prison, Justice Field was traveling through California by train under the protection of a United States Marshal: David Neagle.[37] The Terrys happened to board the same train as it passed through Fresno and encountered Justice Field in the dining car.[38] Terry approached Justice Field from behind and struck him in the head.[39] Neagle drew his pistol and ordered him to desist.[40] When Terry appeared to reach into his coat, Neagle assumed he was reaching for his famous bowie knife, and he shot and killed Terry.[41] It was quickly discovered that Terry was unarmed.[42] After a local sheriff arrested Neagle for murder,[43] Neagle claimed immunity from any prosecution based on the fact that he

[32] Id. at 103–04.
[33] Id. at 203–04.
[34] Id. at 310–11.
[35] Id. at 324–26.
[36] Id. at 326–28.
[37] Neagle had been present at the earlier courtroom scene as well, and by some accounts played a prominent role in restraining and disarming Terry. See In re Neagle, 135 U.S. 1, 45 (1890) ("The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court.").
[38] See Wagstaff, supra note 31, at 407–08.
[39] *Neagle*, 135 U.S. at 52–53.
[40] Id. at 53.
[41] Id.
[42] A. Russell Buchanan, David S. Terry of California: Dueling Judge 222 (1956).
[43] Wagstaff, supra note 31, at 412.

was executing the laws of the United States by protecting Justice Field.[44] Eventually, the case made its way to the Supreme Court.[45]

The Court held that the Supremacy Clause rendered Neagle immune from California's prosecution.[46] As the Court explained it, Neagle's immunity was contingent only on the relationship of his actions to his federal authority. Regardless of the content of the California law under which he was being prosecuted, if Neagle committed "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 could not be prosecuted.[47] The open questions after *Neagle* were, of course, what it means to be "authorized . . . by the law of the United States," and what exactly to infer from the requirement that the federal officer do only what is "necessary and proper."[48] A string of subsequent cases did little to shed light on these issues.

The first was *Ohio v. Thomas*, the first in an arguably separate line of cases dealing with fundamental limits on states' legislative power.[49] There, the federal officer was the manager of a veterans' home who had refused to comply with a state requirement that establishments serving oleomargarine post certain signs to inform their customers.[50] Once again, the Court found that the federal employee was immune from prosecution under the state law, this time because he was "engaged in the internal administration of a Federal institution."[51] Because Congress had appropriated funds for the purchase of oleomargarine, the manager could not be prosecuted for making and utilizing those purchases as directed by Congress.[52] *Thomas* framed the officer's immunity broadly because the posting of a sign would have been a de minimis burden. But it can also be understood as limiting the powers of states to regulate some areas of exclusive federal authority, like the operation of federal institutions.

[44] *Neagle*, 135 U.S. at 40.

[45] The panel was, for obvious reasons, composed of eight Justices with one recused. Id. at 99 ("Mr. Justice Field did not sit at the hearing of this case, and took no part in its decision.").

[46] Id. at 61, 75.

[47] Id. at 75.

[48] Id.

[49] 173 U.S. 276 (1899).

[50] Id. at 276–78.

[51] Id. at 282.

[52] Id.

Boske v. Comingore,[53] decided just a few years later, allowed for the easiest application of the *Neagle* doctrine. A Treasury Department regulation expressly prohibited tax collectors from disclosing tax records even if ordered to do so by a state court.[54] The regulation stated explicitly that if a tax collector were subject to such an order, they should "appear in court . . . and respectfully decline to produce the records called for."[55] When a tax collector did so and was subsequently imprisoned, he sought his release as justified by his compliance with the federal mandate.[56] The Court reasoned that the only question raised was whether the regulation at issue was a valid law passed under the federal government's enumerated powers.[57] Because it was, it clearly superseded any state law or order that so directly conflicted with it.[58]

The next case, in 1906, was the first pivot in the other direction, and it showed the first hints of the problematic aspects of taking *Neagle*'s approach to its logical conclusion. In *United States ex rel. Drury v. Lewis*, two soldiers were accused of shooting a man who had been allegedly trying to steal building materials from a military base.[59] The events of the shooting itself were debated: the officers claimed that they shouted a warning to the thief and only fired when he continued to flee, but other witnesses testified that no warning was given and that the thief had in fact surrendered before the shot was fired.[60] Because there was an outstanding question of fact, the Court found it proper that the state court prosecution be allowed to continue.[61] It is possible that the facts of *Drury* gave the Court some misgivings about the scope of the doctrine it had previously laid out. At the very least, the Court felt compelled to cabin the *Neagle* immunity somewhat, as it cited it as a case where "the reason[] for the interference of the Federal court . . . [was] extraordinary, and presented what [the] court regarded as such exceptional facts as to justify . . . interference."[62]

[53] 177 U.S. 459 (1900).
[54] Id. at 460–61.
[55] Id. at 461.
[56] Id. at 464–65.
[57] Id. at 467–68.
[58] Id. at 470.
[59] 200 U.S. 1, 2–3 (1906).
[60] Id. at 4.
[61] Id. at 8.
[62] Id. at 7.

The Supreme Court last encountered Supremacy Clause immunity in 1920 with *Johnson v. Maryland*, which hews close to the issue in *Thomas*: whether to limit states' powers to directly regulate the federal government.[63] *Johnson* held that a federal postal worker could not be fined by a state for driving without a state driver's license.[64] Its language is a far cry from the "extraordinary reasons" that the *Drury* Court required to justify federal interference. Rather, Justice Holmes cited *Neagle* for the proposition that "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States."[65] Significantly, he partially based his reasoning on *McCulloch v. Maryland*[66] and subsequent federal tax immunity cases.[67] Despite *Johnson*'s broad language, it is best understood as an extension of the principle from *Thomas*. In both cases, the State sought to introduce a condition precedent to a federal employee performing their basic job responsibilities. The Court's holding implies not that the federal employee was immune from state law, but rather that the State lacked the authority to directly condition or prohibit core federal action.

The above cases also have a convolution that further complicates their contemporary application. All of them (except *Johnson*, which involved a fine[68]) were decided in the same posture: a federal officer charged with a state crime filed a writ of habeas corpus in a federal court asking it to order his release and prohibit his prosecution.[69] There were thus two separate issues of federalism that were raised: whether the federal court should prevent the operation of state criminal law, and whether it should halt a proceeding in a state court.

To illuminate the distinction, consider that the federal officers could have raised their Supremacy Clause immunity as a defense in the state court proceeding as well. In the Courts' analyses, the two issues were never given separate treatment, and in fact the focus was generally on the

[63] 254 U.S. 51 (1920).
[64] Id. at 57.
[65] Id. at 56–57.
[66] 17 U.S. (4 Wheat.) 316 (1819).
[67] See *Johnson*, 254 U.S. at 55–56 (citing Farmers & Mechs. Sav. Bank v. Minnesota, 232 U.S. 516 (1914)).
[68] Id. at 55.
[69] See, e.g., Boske v. Comingore, 177 U.S. 459, 465 (1900).

interference with state courts.[70] But this issue is obviated today by the existence of 42 U.S.C. § 1442, which allows federal officers to remove any suits brought against them to federal court.[71] To the extent that some of the Court's concerns would have been different had the only issue been the operation of state criminal law, it is not clear how far the analysis from these cases goes today.[72]

B. Modern Supremacy Clause Immunity

The Court's silence post-*Johnson* left Supremacy Clause immunity in a decidedly unsettled place. The language in *Neagle*, which lower courts have treated as the guidepost for subsequent analysis,[73] is general enough to afford lower courts a great deal of discretion. As some have noted,[74] giving the phrase "necessary and proper" the same construction that was famously extended to it in *McCulloch*[75] would give federal officers an immunity of startling breadth. Although some of the Supreme Court's cases can be read to provide great leniency to federal officers *vis-à-vis* state law, even the most protective ones insist that they do not "secure [federal officers] a general immunity from state law while acting in the course of [their] employment."[76]

[70] See, e.g., United States ex rel. Drury v. Lewis, 200 U.S. 1, 7 (1906) ("[W]e ought not to encourage the interference of the Federal court below with the regular course of justice in the state court." (internal quotation marks omitted) (citation omitted)).

[71] 42 U.S.C. § 1442(a)(1). The scope of § 1442 was narrowed somewhat in *Mesa v. California*, where the Supreme Court held that it could only apply when the federal officer raised a "colorable defense under federal law." 489 U.S. 121, 129 (1989). But Supremacy Clause immunity provides such a defense and is therefore invoked to justify that removal. See, e.g., New York v. Tanella, 374 F.3d 141, 146 (2d Cir. 2004). At that point, the defendant typically files a 12(b) motion to dismiss the case based on their immunity. See id.

[72] But see *Tanella*, 374 F.3d at 149 n.1 (discussing relationship between Supremacy Clause immunity asserted in a habeas petition and in a 12(b) motion after removal to federal court and stating that the two are "much the same" (internal quotation marks omitted) (citation omitted)).

[73] See, e.g., Wyoming v. Livingston, 443 F.3d 1211, 1217 (10th Cir. 2006) (citing *Neagle* as "[t]he Supreme Court's leading case on Supremacy Clause immunity").

[74] See id. at 1220 n.4 (stating that the exposition of "necessary and proper" in *McCulloch* "cannot be the definition of Supremacy Clause immunity because it would imply that federal officers are virtually unlimited in their choice of appropriate means . . . to carry out federal policy").

[75] 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[76] Johnson v. Maryland, 254 U.S. 51, 56 (1920).

Consequently, lower courts have struggled with many questions regarding the application of Supremacy Clause immunity, both substantive and procedural.[77] But the most significant question remains the liability standard that is demanded by the *Neagle* test. The general mode of analysis has been to divide the inquiry into two steps. First, the court determines whether the act was within the defendant's authority as an officer of the United States.[78] Then it asks whether their actions were necessary and proper.[79] Both steps clearly require greater precision, but few courts have been willing to put pen to paper and strictly define them. Rather, they have walked through the analysis without acknowledging the discretion that pervades it.[80]

The most exhaustive defense of a particular liability standard for Supremacy Clause immunity is supplied in an article by former Solicitor General Seth Waxman and Professor Trevor Morrison.[81] The article draws from Waxman's experience representing the United States in the leading, controversial, but ultimately anticlimactic Ninth Circuit case, *Idaho v. Horiuchi*.[82] *Horiuchi* arose when an FBI sniper accidentally killed an unarmed woman during a standoff with a militant group.[83] Waxman and Morrison defend the liability standard that the United States and Horiuchi proposed in the litigation: the federal officer is immune unless "*no reasonable officer* could have concluded that the actions were necessary and proper to the performance of his federal functions."[84] They describe this heightened reasonableness standard as coextensive with qualified immunity,[85] and spend much of their article defending the relationship they draw between the two doctrines.[86]

[77] See, e.g., *Livingston*, 443 F.3d at 1221 (questioning whether there should be a subjective element to the Supremacy Clause immunity analysis); Idaho v. Horiuchi, 253 F.3d 359, 374 (9th Cir. 2001) (questioning whether disputed questions of fact that arise regarding Supremacy Clause immunity should be resolved by a judge or a jury).

[78] See, e.g., Clifton v. Cox, 549 F.2d 722, 726 (9th Cir. 1977).

[79] Id. at 728.

[80] See, e.g., New York v. Tanella, 374 F.3d 141, 147–52 (2d Cir. 2004) ("No one disputes that Tanella was acting in his capacity as a federal DEA Agent when he shot Dewgard.").

[81] See Waxman & Morrison, supra note 6, at 2197.

[82] 215 F.3d 986 (9th Cir. 2000), *rev'd en banc*, 253 F.3d 359, 360–61 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

[83] Id. at 988.

[84] See Waxman & Morrison, supra note 6, at 2239–40.

[85] Id.

[86] See, e.g., id. at 2239–42.

Waxman and Morrison are not alone in contextualizing Supremacy Clause immunity with the doctrine of qualified immunity. Reference to qualified immunity is perhaps the most consistent, and growing, trend in contemporary cases in federal circuits that have shaped the doctrine of Supremacy Clause immunity.[87] And it is not difficult to understand why one would think to look to qualified immunity to fill in the details of what is at least a superficially parallel doctrine. Both regard the immunity of government officers from liability for their actions in an official capacity.[88] As the Tenth Circuit somewhat convolutedly put it, "Although qualified immunity and Supremacy Clause immunity have different sources and functions, there is a functional similarity between [the] two doctrines."[89] But there are also significant differences. For example, Supremacy Clause immunity arises in criminal prosecutions, while qualified immunity applies only to civil suits. Furthermore, Supremacy Clause immunity has a constitutional root, while qualified immunity's origins are less clear. The next Part argues that, in light of these differences, the two doctrines' similarities are less significant than they initially seem.

II. QUALIFIED IMMUNITY

The reasons for rejecting a qualified immunity-based approach to understanding Supremacy Clause immunity fall into two general buckets. First, the most prominent affirmative arguments that have been made to support the comparison are based on flawed reasoning and an outdated understanding of other constitutional doctrines. Second, the principles underlying the two doctrines are fundamentally different in ways that outweigh their superficial similarities. To explain these points, it is helpful to first provide a brief background of qualified immunity, before addressing each vector of argument in turn.

[87] See, e.g., Wyoming v. Livingston, 443 F.3d 1211, 1221 (10th Cir. 2006); Idaho v. Horiuchi, 253 F.3d 359, 366 n.11 (9th Cir. 2001) (en banc); Kentucky v. Long, 837 F.2d 727, 752 (6th Cir. 1988). But see James Wallace, Note, Supremacy Clause Immunity: Deriving a Willfulness Standard from Sovereign Immunity, 41 Am. Crim. L. Rev. 1499, 1525 (2004) (describing the two doctrines as "vastly different").

[88] See *Livingston*, 443 F.3d at 1221.

[89] Id.

A. The Development of Qualified Immunity

Qualified immunity protects government officers from civil liability in suits brought under particular causes of action, most significantly 28 U.S.C. § 1983 and *Bivens*.[90] Its origins are somewhat obscure. While it has its basis in the common law, its details are sometimes described as pure judicial invention.[91] It is tempting to view it as a matter of statutory interpretation,[92] but problems quickly arise in the equivalence that is drawn between the doctrine's application in suits under § 1983 and those under *Bivens*.[93] The latter have no statutory root. And although the Court initially did imply that qualified immunity was statutory in origin,[94] subsequent qualified immunity cases became increasingly explicit about the policy considerations that have inspired its many evolutions.[95]

Still, the principles that have driven the adoption and development of qualified immunity are relatively well understood. The immunity is intended to protect officials from the harassment of citizen lawsuits.[96] This in turn protects the government from the danger that threatened liability would deter public employees from doing their jobs with "decisiveness."[97] More recent developments have had more complex procedural concerns underlying them, such as the availability of broad civil discovery in federal courts.[98]

To accommodate these concerns, the Supreme Court has incrementally tightened the belt around federal civil rights suits.[99] Although the doctrine

[90] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[91] See William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 48–49 (2018).

[92] See Waxman & Morrison, supra note 6, at 2210 ("Thus, the availability of qualified immunity from § 1983 liability is simply a matter of statutory interpretation against the backdrop of certain common-law principles.").

[93] See id. at 2210 n.50 ("In the *Bivens* context, obviously qualified immunity cannot be inferred as a matter of statutory interpretation.").

[94] See Scheuer v. Rhodes, 416 U.S. 232, 243 (1974).

[95] See Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("[Q]ualified immunity . . . reflect[s] an attempt to . . . protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.").

[96] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[97] *Scheuer*, 416 U.S. at 240. For an explanation of why these concerns have particular force for government employees, see John C. Jeffries, Jr., The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 244–46 (2013).

[98] See *Scheuer*, 416 U.S. at 250.

[99] See Baude, supra note 91, at 85 (describing summary reversal of a court's denial of qualified immunity as one of the most common uses of the Supreme Court's "shadow docket").

used to demand both subjective and objective analyses, the subjective element was famously wiped out in *Harlow v. Fitzgerald*.[100] More recently, the operative standard has become that immunity applies unless there is factually specific precedent on point that *necessarily* disposes of the case in question.[101] The intended end result: "immunity protects all but the plainly incompetent or those who knowingly violate the law."[102]

B. Analogizing Qualified Immunity and Supremacy Clause Immunity

Waxman and Morrison vigorously defend the importation of qualified immunity doctrine into Supremacy Clause immunity.[103] But there are a few reasons to question their position. First, it is not clear how much of their argument survives qualified immunity's most recent evolution. The qualified immunity that Waxman and Morrison were proposing was in significant ways quite different from the state of the doctrine today. Although their 2003 article post-dates *Harlow* and the cases that subsequently developed its purely objective standard,[104] the Court had not yet walked down the road of requiring extremely fact-specific analogy to "clearly establish" a right, as seen in more recent cases.[105]

There are also problems specific to the affirmative arguments that Waxman and Morrison raise to support the collapse of Supremacy Clause immunity into qualified immunity. They base their conclusion that Supremacy Clause immunity should mirror the boundaries of qualified

[100] 457 U.S. 800, 815–16 (1982).

[101] See Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("[E]xisting precedent must have placed the . . . question beyond debate." (internal quotation marks omitted) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam))).

[102] Id. Many view this standard as overprotective. See, e.g., John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115, 117 (stating that the procedural rules governing qualified immunity "degrade existing rights to a least-common-denominator understanding of their meaning").

[103] Waxman & Morrison, supra note 6, at 2239–42.

[104] See, e.g., Anderson v. Creighton, 483 U.S. 635, 640–41 (1987).

[105] See Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted) (citations omitted) ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate . . . . This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality."). In fact, a case upon which Waxman and Morrison centrally rely for their Due Process Clause argument explicitly rejected a standard that appears closely related to what was applied in *Kisela*. See United States v. Lanier, 520 U.S. 259, 268 (1997) ("[Nothing] persuade[s] us that either a decision of this Court or the extreme level of factual specificity envisioned by the Court of Appeals is necessary in every instance to give fair warning.").

immunity on two "converging rationales."[106] The first is based on the fair warning requirement that has been implied from the Due Process Clause. The second is derived from principles of preemption. Both are questionable.

1. Fair Warning

For their due process argument, Waxman and Morrison begin by explaining that, in suits brought under 18 U.S.C. § 242, the federal criminal analog to 42 U.S.C. § 1983-based civil suits, the Supreme Court held in *United States v. Lanier*[107] that a standard basically equivalent to qualified immunity applies based on the Due Process Clause.[108] Their argument on this point is a complicated one, so it is worth carefully unpacking.

First, the line they draw is not direct: they do not (overtly[109]) claim that because *Lanier* held a standard equivalent to qualified immunity to apply to § 242, it similarly must apply to all other criminal statutes when applied to federal officers. This argument would have an obvious flaw: although the Due Process Clause[110] of course applies to state governments and state criminal laws as well as federal ones, that does not imply that the qualified immunity-like protection that exists against § 242 would extend to state criminal law. In fact, it does not even extend to *federal* criminal law outside of § 242. The reason why § 1983 and § 242 have a similar liability standard is that the statutes themselves are very similar: they both penalize the violation of a broad set of rights without being explicit about what those rights are. Section 1983 creates a cause of action for a person deprived of "any rights, privileges, or immunities secured by the Constitution and law[s]" of the federal government by a state actor.[111] Section 242 creates criminal penalties for a state actor who "subjects any

[106] Waxman & Morrison, supra note 6, at 2240.

[107] 520 U.S. 259 (1997). As Solicitor General, Waxman also presented oral argument in *Lanier*. See Waxman & Morrison, supra note 6, at 2195 n.†.

[108] Waxman & Morrison, supra note 6, at 2240.

[109] While they do disavow this argument, they also seem to tangentially incorporate it, at least by implication. For example, they offer a final syllogism that seems to frame the issue in these terms: "[F]air warning is constitutionally mandated. Under *Lanier*, fair warning is coextensive with qualified immunity. Hence, equating Supremacy Clause immunity with qualified immunity satisfies the Constitution's demand for fair warning." Id. at 2241.

[110] More appropriately, "a" Due Process Clause. See U.S. Const. amend. XIV, § 1. But see U.S. Const. amend. V.

[111] 42 U.S.C. § 1983.

person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[112] Because neither statute specifies what sorts of actions will subject a state actor to liability, there is a requirement that the right at issue be well-defined before someone can be penalized for violating it.[113] But when a federal official is charged with a crime, like bribery, that is outside of the scope of § 242, no similar standard applies.[114]

Instead of claiming that *Lanier* speaks directly to the liability standard for Supremacy Clause immunity, Waxman and Morrison instead argue that the Due Process Clause requires a qualified immunity-like standard for federal officers because there is no fair warning of *what law applies* to the officer, rather than an ambiguity as to what the law requires.[115] But this argument has an evident circularity that makes it at least as questionable as the direct *Lanier* analogy that they reject. The analytical steps necessary to their conclusion are: (1) Supremacy Clause immunity turns solely on whether an officer acted within the bounds of their federal authority, (2) therefore fair warning requires clarity as to whether the officer was exceeding their authority, so that they can assess their own culpability, (3) actions that violate federal law or the Constitution are by definition outside of a federal officer's authority, and (4) therefore an officer has fair warning that they will not have the benefit of Supremacy Clause immunity only when they are violating clearly established federal law.

The first assertion in their chain of reasoning, that the content of state law is irrelevant to a determination of Supremacy Clause immunity, is evaluated below.[116] More generally, their argument suffers from some questionable logic. First, the above sequence only seems to prove that an officer *does* have fair warning when the qualified immunity standard is met, not that they don't when it is not.[117] Second, the argument is vitiated

[112] 18 U.S.C. § 242.

[113] See United States v. Lanier, 520 U.S. 259, 267 (1997) ("[Section] 242 . . . 'place[s] the accused . . . on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning.'" (quoting Screws v. United States, 325 U.S. 91, 101 (1945))).

[114] See, e.g., United States v. Jefferson, 562 F. Supp. 2d 687, 690–93 (E.D. Va. 2008) (describing elements required for conviction of bribery in suit against former member of the United States House of Representatives).

[115] Waxman & Morrison, supra note 6, at 2214.

[116] See discussion infra Part IV.

[117] They conclude that if *A* (the officer violates clearly established federal law), then *B* (Supremacy Clause immunity does not apply). That does not imply that if not *A*, then not *B*.

if the scope of Supremacy Clause immunity is previously, and differently, defined. If the Supreme Court were to declare that no Supremacy Clause immunity exists and state criminal law is fully applicable to federal officers, that clear definition of the immunity (or lack of it) would itself give any federal officer fair warning. In fact, Waxman and Morrison concede almost this exact point as it relates to potential congressional action to define federal officer liability.[118]

None of this demonstrates that qualified immunity should not be the liability standard for federal officers who claim Supremacy Clause immunity to state prosecution. But it does demonstrate that Waxman and Morrison's reasoning supporting that application, and their citation to cases like *Lanier*, is ultimately unpersuasive.

2. Preemption

The second argument raised by Waxman and Morrison in favor of equating Supremacy Clause immunity and qualified immunity is based on preemption. The doctrine of preemption generally requires that when state and federal laws conflict, the state law yields.[119] As they put it, "the general rule in cases where a State attempts to regulate the federal government directly is that state law is preempted to the extent it conflicts with the effectuation of federal interests and policy. This principle can explain the law of qualified immunity."[120] It would be difficult to dispute the relationship between Supremacy Clause immunity and preemption. Most Supremacy Clause-based doctrines, whether this immunity or federal tax immunity, could be framed as special instances of preemption.[121] But there is some question as to whether the particular vision of preemption proposed by Waxman and Morrison is descriptively accurate.

Their analysis proceeds as follows. First, the federal government has an interest in protecting itself from "the risk that fear of personal monetary liability and harassing litigation [would] unduly inhibit officials in the

[118] See Waxman & Morrison, supra note 6, at 2214 ("[W]e think Congress could expressly answer this question either way by passing legislation explicitly subjecting federal officers to, or immunizing them from, state law for acts taken in discharge of their federal duties. Such an express statement would effectively dictate the outcome of the fair warning analysis.").

[119] See Kansas v. Garcia, 140 S. Ct. 791, 801 (2020); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 228 (2000).

[120] Waxman & Morrison, supra note 6, at 2241.

[121] See Laurence H. Tribe, American Constitutional Law 1220 (3d ed. 2000) (describing federal tax immunity as "an issue essentially of federal preemption").

discharge of their duties."[122] Second, "States may not intrude on that interest."[123] Third, "[q]ualified immunity prevents them from doing so."[124] Ergo, the law of preemption counsels in favor of importing qualified immunity into Supremacy Clause immunity.[125] In their view, qualified immunity is demanded by the "implied conflict preemption" of the state criminal statute.[126] They also address a possible objection: that the presumption against preemption requires clearer indication of congressional intent to invalidate a state law.[127] But in their view, the presumption against preemption does not apply to Supremacy Clause immunity cases because it is not implicated in cases with a "significant federal presence."[128]

Their discussion of the presumption against preemption cannot be conclusively rebutted because, although the presumption has both age and pedigree,[129] it does not have clear doctrinal definition.[130] Generally, the presumption operates by requiring clear language from Congress to establish that state law should be nullified,[131] but cases vary in their statements about when it should or should not apply.[132] Preemption is discussed further in the discussion of federal tax immunity below,[133] but it suffices to note a few points here. First, even narrow conceptions of the presumption against preemption allow for it in areas that the states have

[122] Waxman & Morrison, supra note 6, at 2241 (internal quotation marks omitted) (citation omitted).

[123] Id.

[124] Id.

[125] Id.

[126] Id.

[127] Id. at 2221.

[128] Id. at 2217 (quoting United States v. Locke, 529 U.S. 89, 108 (2000)).

[129] See Mintz v. Baldwin, 289 U.S. 346, 350 (1933) ("The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention to do so must definitely and clearly appear.").

[130] See John F. Manning, Lessons from a Nondelegation Canon, 83 Notre Dame L. Rev. 1541, 1557 (2008) ("[T]he presumption-against-preemption cases are all over the map.").

[131] See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

[132] See Caleb Nelson, Statutory Interpretation 814–15 (2010).

[133] See discussion infra Section III.B.

traditionally occupied.[134] Criminal law is such an area.[135] Second, the area of "significant federal presence" identified by Waxman and Morrison is a broad one: they cite the "special federal interest in protecting federal institutions and implementing federal policy."[136] Presuming preemption whenever the "special federal interest" in "implementing federal policy" is implicated would functionally replicate an expansive version of implied conflict preemption: one in which any perceived inconsistency between a broad federal objective and a specific state law leads to the invalidation of the state law. The same is true for the broad presumption for preemption that they attribute to the "principle, implicit in the constitutional order itself, of state noninterference with federal institutions and prerogatives."[137] The problem with both of these assertions is that they reflect a far outdated view of preemption and closely parallel arguments that were rejected by the Supreme Court in the context of federal tax immunity in the mid-twentieth century. Both points are fully developed in Part III, below.

C. Distinguishing Qualified Immunity and Supremacy Clause Immunity

Stepping away from Waxman and Morrison's defense of qualified immunity as the standard for Supremacy Clause immunity, there are also inherent differences between the two doctrines that counsel against merging them simply in pursuit of parallelism. Three points stand out as particularly salient in rejecting the comparison: the joint federal-state interest in the rule of law, the historical absence of federal criminal law, and the ordinary assumption that states will not act contrary to the Constitution.

1. The Rule of Law

The principle of the rule of law does not have precise definition, but it is generally accepted to mean that all actors should be bound by the law,

[134] See Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (stating that the presumption applies in "areas of traditional state regulation"); Cipollone v. Liggett Grp., 505 U.S. 504, 516–18 (1992) (stating the same principle for "state police power regulations").

[135] Kansas v. Garcia, 140 S. Ct. 791, 806 (2020) ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today.").

[136] Waxman & Morrison, supra note 6, at 2218.

[137] Id. at 2221.

especially the government.[138] Rule of law concerns play an inconsequential role in the normative background for qualified immunity. In the mine run of cases, they will be entirely irrelevant to the analysis, as when a government official whose responsibilities have nothing to do with law enforcement is sued under § 1983 or in a *Bivens* suit.[139] But if those *Bivens* suits are replicated as state criminal indictments to implicate Supremacy Clause immunity, the societal interest in the rule of law immediately occupies center stage. That is because in every Supremacy Clause immunity case, a criminal law is being momentarily nullified. This is never the case with qualified immunity.

Another way to frame this point is that the state interest being balanced against the federal interest in Supremacy Clause immunity cases is weightier than the individual interest being balanced in qualified immunity cases. As the Supreme Court has noted, "there is a lesser public interest in actions for civil damages than . . . in criminal prosecutions."[140] In fact, the Court has undertaken a similar balancing in other areas, and it has fairly consistently come down on the side of enabling the functioning of criminal law.

Three well-known cases illuminate the principle. First, in *United States v. Nixon*, the Court held that the President could be made to comply with a federal subpoena because rule of law concerns outweighed the President's general interest in confidential communications.[141] Second, in *Trump v. Vance*, the Court held that the President could also be made to comply with a state criminal subpoena because the public interest in the evenhanded application of criminal process outweighed concerns about potential harassment from state prosecutors.[142] And finally, in its decisions that created the various doctrines of abstention, the Court held that federal courts should be especially hesitant to exercise jurisdiction over suits that would impede state criminal prosecutions.[143] The latter two

[138] Joseph Raz, The Rule of Law and its Virtue, 93 L.Q. Rev. 195 (1977), *reprinted in* The Authority of Law 210, 212 (1979).

[139] See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (suit challenging unlawful discharge from employment).

[140] See Nixon v. Fitzgerald, 457 U.S. 731, 754 n.37 (1982).

[141] 418 U.S. 683, 713 (1974).

[142] 140 S. Ct. 2412, 2430–31 (2020).

[143] See, e.g., Younger v. Harris, 401 U.S. 37, 46 (1971); see also Stefanelli v. Minard, 342 U.S. 117, 121–23 (1951) (declining to exercise equitable powers where they interfere with "the proper sphere of the States in enforcing their criminal law," "even where an important countervailing federal interest [is] involved").

examples additionally tackle issues of federalism head-on. In *Vance*, for example, the Court addresses many of the normative arguments that are raised in support of an expansive view of Supremacy Clause immunity, and rejects some of the arguments that were raised in the Supremacy Clause immunity context by Waxman and Morrison.[144]

2. The Primacy of State Criminal Law

Rule of law concerns are especially prominent in considering Supremacy Clause immunity because a successful assertion of the immunity leads to the nullification of state, rather than federal, criminal law. Historically, criminal law has been the near-sole responsibility of state governments.[145] Partially, this is because of the federal government's limitation to its enumerated powers.[146] Especially prior to the Civil War Amendments and the development of a robustly national interstate economy, it is likely that the federal government lacked the power to criminalize most types of harmful activity.[147] Those limitations, though weaker today,[148] still have some force.[149]

If a robust Supremacy Clause immunity is mandated by Article VI, then it was equally so prior to the Civil War, in a legal environment where the vast majority of criminal activity was only proscribed at the state level.[150] Until that point, the only significant function of federal criminal

[144] Compare *Vance*, 140 S. Ct. at 2427–30 (acknowledging the potential for harassing lawsuits by states but holding that possibility insufficient to impose heightened requirements for subpoenas directed at the President), with Waxman & Morrison, supra note 6, at 2251 (describing federal interest in avoiding "harassing litigation" as justification for a qualified immunity standard in Supremacy Clause immunity cases).

[145] See Kansas v. Garcia, 140 S. Ct. 791, 806 (2020) ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today.").

[146] See William J. Stuntz, The Collapse of American Criminal Justice 99–100 (2011) (describing the limited role that the Constitution's structure implies the Necessary and Proper Clause plays in enabling federal criminalization).

[147] Alexander Tsesis, Enforcement of the Reconstruction Amendments, 78 Wash. & Lee L. Rev. 849, 918 (2021); Stuntz, supra note 146, at 100.

[148] See *Garcia*, 140 S. Ct. at 806 ("In recent times, the reach of federal criminal law has expanded, and there are now many instances in which a prosecution . . . could be brought by either federal or state prosecutors.").

[149] See Stuntz, supra note 146, at 100 ("The federal government is a significant player in this field, but still a small one.").

[150] L.B. Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law & Contemp. Probs. 64, 64–65 (1948).

law was prohibiting acts "directly injurious to the central government."[151] Outside of laws that were restricted to uniquely federal jurisdictions,[152] the earliest federal laws that protected private individuals from other private individuals were not passed until the 1870s.[153] The implication, then, is that if federal officers had broad immunity from state criminal prosecution, they effectively had immunity from all criminal prosecution, even for crimes as serious as murder. Even if the federal government itself viewed the actions of a particular federal officer as egregious and worthy of prosecution, historically it could not have done anything about it.

This approach to federal officer immunity appears particularly radical when considered in light of statements on related matters by the Framers of the Constitution. In his defense of the powers of the President in Federalist No. 69, for example, Alexander Hamilton noted the President's subjection to ordinary law as a critical limitation:

> The President of the United States would be liable to be impeached . . . [and] removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is . . . no punishment to which he can be subjected without involving the crisis of a national revolution.[154]

Given that official overreach was a primary consideration of the Constitution's Framers and a motivating factor for the Revolution generally,[155] a reading of the Supremacy Clause that granted a blanketing immunity for unreasonably committed serious crimes to every federal employee acting within the scope of their employment would likely have surprised them.

[151] Id.

[152] Shon Hopwood, Clarity in Criminal Law, 54 Am. Crim. L. Rev. 695, 715 (2017) ("[T]he Crimes Act of 1790 . . . prohibited crimes such as murder committed upon the 'high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state.'" (quoting Crimes Act of 1790 § 8, 1 Stat. 112, 113 (1790))).

[153] Schwartz, supra note 150, at 65.

[154] The Federalist No. 69, at 348–49 (Alexander Hamilton) (Garry Wills ed., 1982).

[155] See O.M. Dickerson, Writs of Assistance as a Cause of the Revolution, *in* The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene 40, 44–48 (Richard B. Morris ed., 1939).

3. Respect for State Adherence to the Constitution

Finally, a basic purpose of qualified immunity, protecting the government from the interference of frivolous and meritless lawsuits,[156] is incompatible with the assumption that states will adhere to their constitutional obligations. Courts are instructed to generally assume that the state criminal justice system will be respectful of its own limitations.[157] This presumption of good-faith behavior by states was partially responsible for the adoption of abstention doctrines in the twentieth century.[158] Obviously this principle has limits,[159] but those limitations have previously been the result of considered congressional action,[160] not constitutional interpretation by the judiciary. As the next section demonstrates, this distinction is a significant one: especially when questions of federalism have arisen that involve the invalidation of one sovereign's actions to protect the interests of the other, the Court has generally held that the decision to do so rests with Congress, and not with federal courts.

III. FEDERAL TAX IMMUNITY

Although qualified immunity may not be a useful benchmark for the doctrine of Supremacy Clause immunity, there is a closer parallel that provides an apt analogy. The doctrine of federal tax immunity governs the ability of states to levy taxes that directly or indirectly affect the federal government.[161] In many ways, federal tax immunity seems clearly analogous to Supremacy Clause immunity: it both derives from the Supremacy Clause[162] and deals with a restriction on a state's exercise of a core sovereign power. Given that it shares both basis and purpose with Supremacy Clause immunity, any disconnect between them would itself need robust justification.

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[156] See Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

[157] See Trump v. Vance, 140 S. Ct. 2412, 2428 (2020).

[158] See Dombrowski v. Pfister, 380 U.S. 479, 484–85 (1965).

[159] See Monroe v. Pape, 365 U.S. 167, 174–75 (1961) (citing the "failure of certain States to enforce the laws with an equal hand" as underlying the passage of the Ku Klux Klan Act).

[160] Id.

[161] See United States v. New Mexico, 455 U.S. 720, 730–33 (1982) (summarizing history of federal tax immunity).

[162] See Richard A. Paschal, Congressional Power to Change Constitutional Law: Three Lacunae, 77 U. Cin. L. Rev. 1053, 1090 (2009) ("The Supremacy Clause obviously does not refer to federal tax immunity, but the Court has repeatedly said that this immunity is 'implied' from the Supremacy Clause.").

Waxman and Morrison do not ignore this relationship. In fact, much of their reasoning builds off of *McCulloch v. Maryland*,[163] a seminal case in many respects but also the progenitor of federal tax immunity.[164] In *McCulloch*, the Court invalidated a state tax that was levied on a federally chartered bank.[165] In addition to relying directly on *McCulloch*, Waxman and Morrison also gesture towards the string of cases that follow it, but they sidestep those cases' implications.[166] Although they are right that the history of federal tax immunity is by no means straightforward, the development of the doctrine in the twentieth century has direct and obvious implications for Supremacy Clause immunity. In fact, much of Waxman and Morrison's usage of *McCulloch* is called pointedly into question by language in the Court's more contemporary federal tax immunity cases. Those cases themselves were emblematic of an even broader shift, one that also defines transformations in preemption and the Tenth Amendment.[167]

In the middle of the twentieth century, the Court's perception of the judicial role in policing the relationships between states and the federal government transformed dramatically. This shift occurred decades after the Court's last treatment of Supremacy Clause immunity. Nowhere is this philosophical pivot more evident than in the dramatic about-face in the Court's federal tax immunity jurisprudence, beginning in the late 1930s. While lower courts' subsequent Supremacy Clause immunity decisions rigidly shielding federal officers from prosecution may be consistent with the Court's approach to the Supremacy Clause in the 1920s, they cannot be reconciled with language in cases beginning in this later period, which in some cases explicitly overruled its earlier cases.

A. Development of the Doctrine

The Supreme Court's federal tax immunity doctrine from the time of *Neagle* was highly protective. In a string of cases, the Court had found

[163] 17 U.S. (4 Wheat.) 316 (1819).

[164] See *New Mexico*, 455 U.S. at 730; see, e.g., Waxman & Morrison, supra note 6, at 2250 ("*McCulloch* and later cases provide for the constitutional preemption of state law that unduly impairs federal functions." (internal quotation marks omitted)).

[165] 17 U.S. at 327–29.

[166] Waxman & Morrison, supra note 6, at 2220 n.101 ("These and other cases concerning intergovernmental tax immunity constitute a rather tortured jurisprudence the contours of which are formed by a number of factors not immediately relevant here.").

[167] See discussion infra Section III.B.

that states were unable to levy taxes on everything from the income of federal officers[168] to private enterprises that were contracting with the federal government.[169] *Neagle* was decided right in the middle of this near-century of expanding federal tax immunity that extended from 1842 to 1937.[170]

An early example is *Dobbins v. Commissioners of Erie County*,[171] which was decided about fifty years before *Neagle*. There, the Court held that a county income tax levied on a federal officer was invalid.[172] Acknowledging that states had a sovereign right to levy taxes, the Court held that that right was limited when it conflicted with the power of the federal government.[173] For example, states could not tax the "instruments, emoluments, and persons, which the United States may use and employ as necessary and proper means to execute their sovereign powers."[174] In the Court's view, taxing a federal officer was taxing the means through which the federal government accomplished its objectives. The Court anticipated that Congress would have to adjust the officer's pay by "graduat[ing] its amount, with reference to its reduction by tax."[175] This economic impact on the federal government was enough to doom the state tax.

The conclusion in *Dobbins* was generally that state action that indirectly affects the federal government's ability to carry out its objectives was as impermissible as direct taxation of the federal government. To the Court, the tax levied on the employee's income was "as strong interference as was presented by the tax imposed" in *McCulloch*,[176] which had been levied on an arm of the government itself.

Dobbins was followed by nearly a hundred years of cases where the Court confirmed its adherence to this broad principle of federal immunity. During that time, the Court categorically shielded, among others, the operations of federally chartered corporations[177] and private companies

[168] See Dobbins v. Comm'rs of Erie Cnty., 41 U.S. (16 Pet.) 435, 449–50 (1842).
[169] See Gillespie v. Oklahoma, 257 U.S. 501, 505–06 (1922).
[170] 1 Paul J. Hartman & Charles A. Trost, Federal Limitations on State and Local Taxation § 6.6 (2d ed. 2003).
[171] 41 U.S. (16 Pet.) 435 (1842).
[172] Id. at 449–50.
[173] Id. at 447.
[174] Id.
[175] Id. at 448.
[176] Id. at 449.
[177] R.R. Co. v. Peniston, 85 U.S. (18 Wall.) 5, 50 (1873) (Bradley & Field, JJ., dissenting).

contracting with the federal government.[178] As a bookend to this era, the Court in 1937 decided *Rogers v. Graves*,[179] reiterating *Dobbins* and holding that a lawyer working for the Panama Rail Road Company was immune from a state income tax on the grounds that his employer had become a wholly-owned instrumentality of the United States government.[180]

But the tide of federal tax immunity cases turned sharply in *James v. Dravo Contracting Co.*,[181] decided later in the same year as *Rogers*. The *Dravo* Court held that an occupational tax could be levied on a federal contractor regardless of its effect of "increas[ing] the cost to the Government."[182] The change in the Court's reasoning from its earlier tax immunity cases was stark. Previous cases had drawn largely categorical lines to determine where the immunity extended, but the Court's new analysis was practical. The applicability of immunity turned on "whether the tax . . . deprive[d] [the officer] of power to serve the government as they were intended to serve it, or . . . hinder[ed] the efficient exercise of their power."[183] Just increasing the costs to the federal government was, for the first time, insufficient.

The Court also introduced a new consideration into its analysis: Congress' ability to enact statutes that achieved the same effect as the Court could through constitutional interpretation.[184] Because Congress clearly had the power to statutorily preempt any offensive tax that affected the functioning of the federal government, congressional inaction to that effect was near-conclusive that the tax could be levied.[185]

Change came fast after *Dravo*. Whereas that Court had to some extent implied that its decision there was consistent with precedent,[186] the decisions that followed were both more expansive and more explicit. In short order, in *Graves v. New York ex rel. O'Keefe*, the Court directly overruled the *Dobbins* line of cases and allowed a state income tax to be

[178] Gillespie v. Oklahoma, 257 U.S. 501, 505–06 (1922).
[179] 299 U.S. 401 (1937).
[180] Id. at 408–09.
[181] 302 U.S. 134 (1937).
[182] Id. at 160.
[183] Id. at 154–55.
[184] Id. at 161.
[185] Id.
[186] But see id. (Roberts, J., dissenting) ("The judgment seems to me to overrule, *sub silentio*, a century of precedents . . . .").

applied to a federal officer.[187] The Court acknowledged that it could be reasonably argued that the tax "impose[d] a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."[188] But it rejected the contention that such a burden was enough to justify the nullification of a non-discriminatory tax.[189]

The *O'Keefe* Court leaned again on the possibility of congressional action to directly invalidate the application of state taxes to federal-adjacent entities.[190] But because "Congress ha[d] not sought . . . to exercise such power," it held that a constitutional federal immunity was irrelevant to the question at hand.[191] Whereas the Court had previously been willing to apply such a constitutional immunity based on the mere *possibility* of interference with federal objectives,[192] the Court's new approach required *actual* interference or obstruction unless the tax in some way discriminated against the federal government.[193]

Finally, in a series of cases in 1958, federal tax immunity largely completed its twentieth-century maturation.[194] These cases dealt with taxation of property used by federal contractors. The 1958 cases are characterized by a crystallization of the generalized policies implicit in *James* and its immediate progeny. For one, the Court fleshed out its discrimination exception to its new, narrower conception of federal tax immunity.[195] The principle of nondiscrimination was directly implicated because the United States had claimed in one of the suits that a state law was designed to specifically target the federal government and circumvent the immunity that the federal government enjoyed from direct taxation.[196] The Court also reiterated that the correct venue for considering generalized obstruction of federal interests was Congress, and not the courts.[197]

[187] 306 U.S. 466, 486 (1939).
[188] Id. at 481.
[189] Id. at 487.
[190] Id. at 485.
[191] Id.
[192] Id. at 485–86.
[193] Id. at 487.
[194] See United States v. Muskegon, 355 U.S. 484 (1958); United States v. City of Detroit, 355 U.S. 466 (1958); City of Detroit v. Murray Corp., 355 U.S. 489 (1958).
[195] *Murray Corp.*, 355 U.S. at 495.
[196] *Detroit*, 355 U.S. at 470.
[197] Id. at 474.

B. Process Federalism as a Guiding Principle

The post-*Dravo* cases are not just inconsistent with *Dobbins* and its progeny in their results, they directly refute its reasoning and principles. While the earlier Court positioned itself as the federal government's protector, in *Dravo* and subsequent cases, it communicated a fundamental discomfort with assuming that responsibility as part of the federalist schema. As Professor Laurence Tribe has explained it, the Court's pivot in federal tax immunity reflected a new understanding of its own institutional role.[198] Tribe's characterization ties the Court's reasoning[199] to a theory of federalism that was most famously described by Professor Herbert Wechsler in a classic mid-century article.[200] Later scholars have referred to it as "process federalism."[201]

Wechsler's article argued that courts should hesitate to exercise judicial review to resolve federalism conflicts between federal and state governments.[202] In his view, the primary structural protection for the rights of the states in the federal system is Congress. Because of the critical role that the states play in constituting Congress, it will naturally be attuned to their needs and priorities. Congress's healthy awareness of the positions of both parties to the conflict makes judicial review to constrain its lawmaking in pursuit of a federalist balance less necessary.[203] Wechsler supported his position both empirically[204] and with reference to statements by the Framers of the Constitution.[205] The principles he put forward were explicitly endorsed by the Supreme Court in the Tenth Amendment context in *Garcia v. San Antonio Metropolitan Transit Authority*.[206]

Tribe and other scholars[207] explore the implications of Wechsler's argument to judicial protection of federal, rather than state, interests. They

[198] Tribe, supra note 22, at 711.
[199] Id. at 695 n.71.
[200] Wechsler, supra note 18, at 546.
[201] See Marshall, supra note 17, at 147–48; Young, supra note 17, at 1350.
[202] Wechsler, supra note 18, at 558–60.
[203] Id. at 560.
[204] Id. at 547–48.
[205] Id. at 558–59.
[206] 469 U.S. 528, 550–51 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."); see also id. at 565 n.9 (Powell, J., dissenting) ("Professor Wechsler['s] . . . seminal article in 1954 proposed the view adopted by the Court today.").
[207] See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1429 (2001); Young, supra note 17, at 1350.

explain that the same reasoning suggests that courts should be reluctant to invalidate state action when they perceive a conflict with vague federal objectives.[208] The argument goes that because the states are well-represented in Congress, it is more likely that their concerns will be fairly represented in that body, in contrast to the federal courts or the executive. In short, entrusting courts with protecting the federal government from the states is likely to yield a standard that is overprotective of the federal government and under-receptive to the needs of the states.

This incarnation of process federalism provides a useful explanation for the Court's post-*Dravo* federal tax immunity jurisprudence. In the *Dobbins* line of cases, the Court assumed the burden of determining whether there was an impermissible conflict between a state tax and the federal government. By creating a constitutional mandate to invalidate any "conflicting" state laws, the Court empowered the federal judiciary to define the scope of permissible conflict. The post-*Dravo* cases shifted the burden from the courts to Congress. By setting a low constitutional floor for impermissible state taxation, the Court gave maximum discretion to Congress to determine by an explicit enactment how far such taxation could go. What remained of the constitutional constraint was a prohibition on taxes directly on the federal government,[209] and taxes that facially discriminated against the federal government.[210] Even this latter restriction has had surprisingly limited force.[211]

1. Process Federalism and Preemption

Similar principles underly the evolution of the Court's approach to preemption. Like federal tax immunity, preemption too has obvious relevance to Supremacy Clause immunity. It is also based on the Supremacy Clause,[212] and most would agree that federal tax immunity and Supremacy Clause immunity are both little more than special applications of preemption.[213] The shift towards process federalism that Tribe identifies in federal tax immunity is parallel to a transition identified

[208] Tribe, supra note 22, at 711–13.

[209] United States v. New Mexico, 455 U.S. 720, 735 (1982).

[210] Id. at 733.

[211] See United States v. County of Fresno, 429 U.S. 452, 464–68 (1977) (allowing state property tax that applied to federal employees but was "not imposed on the vast majority of renters of real property" because its effect was to equalize the tax burden on federal employees and other parties).

[212] See Nelson, supra note 119, at 231.

[213] See Tribe, supra note 121; Waxman & Morrison, supra note 6, at 2206.

by various scholars in different aspects of preemption doctrine. Once again, the common thread is that where the Court previously gave itself discretion to identify impermissible conflict between federal and state governments, it transitioned to requiring Congress to evaluate those conflicts and to clearly communicate its determination about what level of state interference with federal objectives is acceptable.

Professor Caleb Nelson identifies such a transition between a constitutional analysis of preemption and a statutory one in the area of conflict preemption.[214] Conflict preemption describes situations where state law is invalidated because its application would obstruct the purpose of a federal statute.[215] Waxman and Morrison find conflict preemption to be the mode of preemption most relevant to Supremacy Clause immunity, citing language from the canonical case *Hines v. Davidowitz*: "[T]he Supreme Court has long held that state laws or actions are also displaced to the extent they 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[216] But as Professor Nelson explains, although the Court has continued to quote *Hines*, its application of the *Hines* test has changed. Though the Court initially applied the *Hines* formula as a function of the Supremacy Clause, it has recast it as a matter of statutory interpretation, rather than constitutional law.[217] In short, the Court's current approach is to invalidate state laws only when a federal statute evinces congressional intent to displace any obstacles. Contrary to Waxman and Morrison's view, conflict no longer means necessary invalidation, instead it signals the need to decipher congressional intent.[218]

Professor Stephen Gardbaum finds a similar transition much earlier in the context of field preemption. Field preemption occurs when a state law is nullified because it intrudes on an area entirely controlled by federal law.[219] As he describes, preemption decisions from the early twentieth century held that when Congress had acted at all in an area, a state law that purported to apply concurrently was necessarily void, even in the absence of conflict between the two laws.[220] But in the 1930s, nearly

[214] Nelson, supra note 132, at 854.
[215] Id. at 853–54.
[216] Waxman & Morrison, supra note 6, at 2215 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000)).
[217] Nelson, supra note 132, at 854.
[218] Id. at 860.
[219] Nelson, supra note 119, at 227.
[220] Stephen A. Gardbaum, The Nature of Preemption, 79 Cornell L. Rev. 767, 805 (1994).

concurrently with the Court's revision of its federal tax immunity jurisprudence, it also shifted its position on field preemption, again restructuring the analysis to focus on congressional intent.[221] Both transitions confirm that the Court's embrace of the principles underlying process federalism was not confined to its explicit adoption in *Garcia* and implicit alignment in *Dravo*.

The language in the Court's post-transitional preemption cases also raises doubts about the expansive view of preemption that Waxman and Morrison adopt to justify their proposed standard for Supremacy Clause immunity. Although it may once have been true that if a state "threatens to interfere with . . . federal policy, the state regulation is presumed preempted,"[222] it is difficult to justify that assertion using case law from the past half-century. In fact, while Waxman and Morrison's statement to that effect could be written almost directly into *Dobbins*, it would entirely contradict *Dravo*. The broad federal interests that Waxman and Morrison identify as having preemptive force are also likely insufficient to satisfy the current Court's preemption analysis. As Professor Tribe explains:

> As a corollary of the principle that state action will not lightly be found inconsistent with federal policy, not only are federal goals defined at a high level of . . . generality given scant preemptive effect, but even congressional goals that are tightly stated [are] interpreted narrowly when testing traditional forms of state action for conflict with those goals.[223]

If anything, Tribe's position has only grown stronger with more recent preemption cases, which have used increasingly strong language to cut off arguments for preemption based on anything but the most precisely stated congressional objectives.[224]

Although Waxman and Morrison do not acknowledge that principles of process federalism have long undergirded other Supremacy Clause doctrines like federal tax immunity and preemption, they do note the

[221] Id. at 806–07 ("The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred." (quoting Mintz v. Baldwin, 289 U.S. 346, 350 (1933)).

[222] Waxman & Morrison, supra note 6, at 2220.

[223] Tribe, supra note 121, at 1189.

[224] See Kansas v. Garcia, 140 S. Ct. 791, 801 (2020) ("[P]reemption cannot be based on a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." (internal quotation marks omitted)); id. at 807 (Thomas, J., concurring) ("I write separately to reiterate my view that we should explicitly abandon our 'purposes and objectives' pre-emption jurisprudence.").

existence of process federalism arguments against their position.[225] As they put it, one could argue that "federalism-protecting considerations . . . dictate that Congress, not the courts, should decide what . . . immunity federal officers enjoy from state law."[226] But they reject the argument, surprisingly, based on analogy to federal tax immunity.[227] Their analysis of that doctrine, however, begins and ends with *McCulloch*.[228] As the analysis above shows, *McCulloch* was the beginning, not the end, of federal tax immunity jurisprudence, and they would find much less support in contemporary cases.

IV. A NEW VIEW OF SUPREMACY CLAUSE IMMUNITY

In considering the scope of Supremacy Clause immunity, it is worthwhile to remember what the doctrine fundamentally represents. Although it is tempting to view it as normatively connected to other government-officer-protective immunities, that approach is, at its core, misguided. As the Ninth Circuit has noted, state law immunities, defenses, and justifications that would be available to any *state* officer are already available to any federal officer:

> Even if the district court decides against immunity, the officer may argue . . . that his conduct was justified under state law. For instance, under Idaho law, a homicide is justified when it is "necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed." Thus, if Horiuchi is unable to convince the district court that he is entitled to immunity, he may nonetheless escape criminal liability.[229]

The Supreme Court in *Trump v. Vance* also laid out more avenues for federal officer protection. While rejecting a per se rule providing extra protection to presidents against state criminal subpoenas, the Court noted that courts could still "interven[e] in those cases where [they] properly find[] that . . . state proceeding[s] [are] motivated by a desire to harass or [are] conducted in bad faith," and that the President could "argue that

[225] Waxman & Morrison, supra note 6, at 2249.
[226] Id. at 2250.
[227] Id. (relying on "*McCulloch* and its progeny").
[228] Id. at 2250 n.241 (citing, as support, earlier discussions of *McCulloch* and *Neagle*).
[229] Idaho v. Horiuchi, 253 F.3d 359, 375 n.27 (9th Cir. 2001) (en banc) (citations omitted) (quoting Idaho Code § 18-4009(4) (2001) (current version at Idaho Code § 18-4009(1)(d) (2023))).

compliance with a particular subpoena would impede his constitutional duties."[230]

The question, then, is what additional immunity from prosecution federal officers should always be entitled to that state officers totally lack. Framing the question this way re-illuminates that Supremacy Clause immunity is first, foremost, and solely a doctrine of federalism, not a generic doctrine of government officer protection. And under this framing, even the basic normative questions may have different intuitive answers. If one federal and one state officer, both acting under official authority, commit the same crime, how often should it be the case that only one of them stands trial? One could reasonably be in favor of a robust and officer-protective immunity doctrine and still answer that question fairly conservatively. With that in mind, the current doctrine of Supremacy Clause immunity begins to reveal a particular and potentially outdated view, not of legal immunities, but of the relationship between the federal and state governments in our federalist system.

There is also an evident problem with Supremacy Clause immunity that at least one court has noted but none has yet had to wrestle with. As Waxman and Morrison acknowledge (and endorse),[231] the current analysis excludes any consideration of the content of state law: it focuses solely on whether the federal officer reasonably pursued their federal objective. But what if, as the Tenth Circuit mentions in passing, an officer "commit[s] a grievous state offense for the purpose of enforcing a trivial federal policy[?]"[232] The issue is conceptually related to the Court's analysis in *Mesa v. California*,[233] in which a postal worker was charged with reckless driving in an incident where she hit and killed a bicyclist. The case's holding is limited to requiring a colorable federal defense to allow removal to federal court; it does not address immunity.[234] But the language of the opinion does not imply a very officer-protective standard, or one in alignment with the Court's most protective Supremacy Clause immunity cases.[235] Waxman and Morrison attempt to reconcile *Mesa* with

[230] Trump v. Vance, 140 S. Ct. 2412, 2428, 2430 (2020) (internal quotation marks omitted) (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975)).

[231] Waxman & Morrison, supra note 6, at 2234.

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

[233] 489 U.S. 121, 123 (1989).

[234] Id. at 139.

[235] Id. at 138 ("We are . . . unwilling to credit the Government's ominous intimations of hostile state prosecutors and . . . state courts interfering with federal officers.").

their position,[236] but in truth, it is nearly irreconcilable. Although they argue that the conduct at issue had "nothing to do with . . . job-related responsibilities,"[237] that is simply untrue: the postal worker was driving to deliver the mail.[238] And if, as they say, the only federal interest implicated was "in confirming to federal employees that they may *not* drive recklessly,"[239] it is not clear why the same would not hold true regarding recklessly shooting unarmed civilians.[240]

Comparing *Mesa* to *Horiuchi*, where an FBI sniper was charged with such a reckless shooting,[241] shows how process federalism can influence Supremacy Clause immunity. Waxman and Morrison seem to believe that an appropriate immunity would shield the sniper in *Horiuchi* but not the mail truck driver in *Mesa*.[242] But that is a very fine line to draw, and there is no clear way for the Constitution to do it. There are simply no obvious constitutional implications to the difference between recklessly firing a service weapon and recklessly driving a service vehicle. In the past, the Court may have responded with a vague standard that left the decision up to the discretion of federal judges. But as the Court has more recently seemed to acknowledge, this simply may not be an area for the Constitution to play much of a role at all.[243]

The common thread binding the process federalism-informed versions of federal tax immunity and preemption together is a shift from a constitutional analysis that puts the weight of discretion in the hands of federal courts to a statutory analysis that defers to congressional direction regarding permissible conflict.[244] The most reasonable application of those principles to Supremacy Clause immunity would require a similar transition. The result would be a low constitutional floor of immunity that allows Congress to define the immunity as it sees fit. In closely related areas, Congress has revealed an apparent willingness to legislate to protect federal officers while balancing competing interests.[245] In this

[236] Waxman & Morrison, supra note 6, at 2231.
[237] Id.
[238] *Mesa*, 489 U.S. at 123.
[239] Waxman & Morrison, supra note 6, at 2231.
[240] See Idaho v. Horiuchi, 253 F.3d 359, 363–64 (9th Cir. 2001).
[241] Id. at 364.
[242] See Waxman & Morrison, supra note 6, at 2231, 2239.
[243] See discussion supra Section III.A.
[244] Id.
[245] See Federal Tort Claims Act, 28 U.S.C. § 2674 (allowing civil suits for injuries caused by federal employees but limiting damages and substituting the United States as the

case as well, it should be allowed to do so. Even Waxman and Morrison partially acknowledge that Congress is the proper body to determine the scope of immunity.[246] But they backtrack from that conclusion by asserting that congressional silence on the issue should imply a highly protective standard.[247] That conclusion is contrary to the path the Court has charted for itself in other parallel areas of the law.

So, what would be left of the constitutional requirement of Supremacy Clause immunity in this new incarnation? In *Dravo* and subsequent cases, the Court moved from a categorical analysis of tax immunity to a functional one.[248] The same is true in preemption, especially field preemption.[249] In that light, it appears that no court has asked the relevant question when it comes to Supremacy Clause immunity: Would adhering to the state's criminal law in the particular case at issue actually prevent the federal officer from performing their official duties? In some cases, the answer is clearly yes, such as *Boske v. Comingore*, where federal law required one course of action and state law directly contradicted it.[250] But cases like *Horiuchi* will continue to provide the hardest questions. However, if the Court adheres to its federal tax immunity and preemption cases, the presumption will be that such insurmountable conflict will not easily be inferred.

CONCLUSION

This Note suggests a novel lens for courts and scholars to use in evaluating and applying the doctrine of Supremacy Clause immunity. Supremacy Clause immunity is the lone Supremacy Clause-based doctrine that has been left uninfluenced by principles of process federalism, and those principles have both a clear relevance to it and a straightforward application in this context. Supremacy Clause immunity has remained untouched by the Supreme Court for over a century, but much has changed in the intervening years. However, in the absence of

defendant); see also Westfall Act, 28 U.S.C. § 2679(b)(1) (making Federal Tort Claims Act the exclusive remedy available when it applies).

[246] See Waxman & Morrison, supra note 6, at 2203 ("[T]he precise scope . . . is ultimately more a matter of congressional discretion than constitutional command."); id. ("[T]he elected branches . . . are often in a better position to strike the federalist balance.").

[247] Id. at 2221.

[248] James v. Dravo Contracting Co., 302 U.S. 134, 155 (1937).

[249] See discussion supra Subsection III.B.1.

[250] 177 U.S. 459, 460–61 (1900).

new Supreme Court precedent, lower courts still have some flexibility. The uncertain boundaries drawn by the Supreme Court's cases give them some license to define their own approaches without skirting precedent. This Note suggests that the approach some have taken, while fairly derived from the pertinent cases, fails to seriously consider the implications of other relevant strands of jurisprudence that have followed.