2002

Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge

Seth P. Waxman

Georgetown University Law Center, waxman@law.georgetown.edu

51 U. Kan. L. Rev. 141-153 (2002)

March 2010

Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge

51 U. Kan. L. Rev. 141-153 (2002)

Seth P. Waxman
Distinguished Visitor from Practice
Georgetown University Law Center
waxman@law.georgetown.edu

Lecture

Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge

Seth P. Waxman[*]

Late one August afternoon in 1992, in remote northern Idaho, a man squeezed the trigger of a sniper's rifle and put a bullet through the temple of a mother standing at the threshold of her home with her infant in her arms. She died instantly.

On the facts I've given you, it's hardly a surprise that the confessed shooter was indicted by the county prosecutor. But in fact it was shocking, and it set off a controversy that raged for years, in public debate and in the courts of the United States. That is because the shooter, Lon Horiuchi, was a member of the FBI's elite Hostage Rescue Team, which had been rushed to Ruby Ridge, Idaho, in response to an armed stand-off between law enforcement officers and white separatists—a stand-off in which a U.S. Marshal and a teenage boy had already been killed.

Idaho's attempted prosecution of an FBI agent for conduct that concededly arose from the discharge of his official responsibilities raised difficult questions of public policy and law that go to the core of our constitutional system. The extent to which local and state governments can sanction the conduct of federal officials implicates a bedrock structural principle—federalism. And yet, as old as our Republic is, and as often as important federalism cases have been decided recently, this corner of the debate—the interrelationship of governmental authorities in the area of law enforcement—is decidedly underdeveloped.

"Federalism" refers, of course, to the principle that sovereign power should not vest in a single potentate or government, but rather

---

* Distinguished Visitor from Practice, Georgetown University Law Center, and Partner, Wilmer, Cutler & Pickering, Washington, D.C. This is the text of the Stephenson Lecture in Law and Government delivered at the University of Kansas School of Law on January 28, 2002. The author gratefully acknowledges the assistance of Trevor W. Morrison.

should be dispersed across all levels of government. "[S]plit[ting] the atom of sovereignty,"[1] as Justice Kennedy aptly put it, is perhaps the most innovative contribution our Founding Fathers made to the principles of democratic governance.

There is no "federalism clause" in the Constitution, and the case law ranges over a number of different provisions—the Commerce and General Welfare Clauses, and the Eleventh and Fourteenth Amendments, for example. But the two provisions that most directly implicate the doctrine are the Supremacy Clause and the Tenth Amendment. The former states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."[2] The latter provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3] Together, these provisions describe a straightforward principle: where Congress and the President act within the powers expressly afforded them by the Constitution, their laws and acts prevail; in all other respects, power and authority reside with the States, or with the people themselves.

In practice, of course, life rarely divides cleanly into hermetic categories. And it is therefore somewhat curious that there is so little case law addressing the long doctrinal border between the Supremacy Clause and the Tenth Amendment. For much of our constitutional history, the latter was thought to constrain the federal government from telling a state where it could locate its capital,[4] and not much else.

Over the last decade, however, as issues of federalism crowded to the forefront of the Supreme Court's attention, the Court began to inject vitality in the Tenth Amendment. In *New York v. United States*, the Court held that even when Congress pursues a goal as important as the safe disposal of the nation's hazardous waste, it lacks the constitutional authority to coerce states to enact legislation to assist that

1. United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

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

3. U.S. CONST. amend. X.

4. *See* Coyle v. Smith, 221 U.S. 559, 565 (1911) (stating "[t]he power to locate its own seat of government and to determine when and how it shall be changed from one place to another and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers.").

goal.[5] *Printz v. United States* struck down a provision of the Brady Act that required local officials to conduct background checks on prospective handgun buyers.[6] These cases reflect a new "anti-commandeering" principle that constrains the federal government from enlisting state and local enforcement officials, even in safety programs of plainly national significance.

There is a flip side to this constitutional coin. It concerns the extent to which *state* governments can constrain *federal* officials in the conduct of their federal duties. Here the law is even less developed, and the academic literature is nonexistent. That's why the case of Lon Horiuchi is so interesting. So let's get down to the facts.

For over a year, U.S. Marshals had attempted, without success, to arrest Randall Weaver for his refusal to answer gun trafficking charges. Weaver was a separatist; he despised the federal government; and he had made it clear that he would not surrender. Instead, he hunkered down on his remote property with his wife Vicki and their children, all heavily armed and prepared to use force. One day, marshals scouting the area were confronted by Weaver, his son, and a family friend named Kevin Harris. A firefight erupted, leaving one deputy and Weaver's son dead.

The FBI's Hostage Rescue Team was rushed in. They were briefed and advised that their mission would be extremely dangerous: Weaver and Harris were believed to have retreated into the Weaver cabin where they could use the Weaver children as shields; the property contained caches of weapons; Weaver was a Special Forces veteran; and sympathetic neighbors were reportedly gathering to support the besieged family.

Agent Horiuchi, a trained sniper, was deployed about 200 yards from the Weaver cabin. When an FBI helicopter approached to conduct surveillance, Weaver, Harris, and Weaver's teenage daughter ran from the cabin, armed with rifles. When Weaver began to point his rifle to the sky, appearing to aim at the helicopter, Horiuchi fired a shot, striking him in the shoulder.

---

5. *See* New York v. United States, 505 U.S. 144, 149 (1992) (discussing the constitutionality of the congressional act compelling states to handle the disposal of radioactive waste generated within the states' borders).

6. *See* Printz v. United States, 521 U.S. 898, 933–34 (1997) (extinguishing the obligation of local law enforcement officers to make a "reasonable effort" to determine whether possession of a handgun for a potential purchaser would be illegal).

Weaver and his companions retreated to the cabin. But before the last armed male disappeared inside, Horiuchi aimed at him and shot. Unbeknownst to Horiuchi, Vicki Weaver was standing behind the opened cabin door. The bullet's trajectory took it through the outer edge of the door, and then through Vicki Weaver's skull, before hitting its intended target, Kevin Harris.

The events of that day—and especially the shot that killed Vicki Weaver—spawned repeated and exhaustive federal investigations. All of the reports were highly critical of the FBI's conduct. But with respect to Agent Horiuchi, the Attorney General accepted the near-consensus recommendation that criminal charges were unwarranted. Federal law proscribes the "willful[]" deprivation of constitutional rights,[7] and the facts did not support a finding that Horiuchi had *willfully* used unreasonable force when firing the shot that killed Vicki Weaver.

Things proceeded differently in Idaho. Five days after the Justice Department announced it would not prosecute Agent Horiuchi, the local prosecutor charged him with involuntary manslaughter. The criminal complaint did not allege that Horiuchi had acted with malice; instead, it alleged that he had been reckless and negligent in firing through the front door of the Weaver cabin without knowing whether anyone was behind it. Horiuchi removed the case to federal court and moved to dismiss the prosecution on the ground that he had acted properly in the discharge of his duties as a federal law enforcement officer.

I'll discuss the court proceedings in a moment, but first let's pause to examine the constitutional question the case presented: When, if ever, and to what extent, may a state hold a federal officer accountable for violating the state's criminal law, where the officer's actions were undertaken in the course of performing his federal duties? On one side of this question is the state's unquestioned authority under the Tenth Amendment to enforce its own criminal laws within its territory. On the other side is the Supremacy Clause.

We can begin on reasonably common ground. Among other things, the Supremacy Clause prevents states from enforcing their laws in a way that interferes with federal law and policy, even if such enforcement does not directly conflict with the dictates of a particular

7. 18 U.S.C. § 242 (2000).

federal statute. As a general proposition, this principle makes complete sense. As the Supreme Court has explained:

> "[T]he general government" . . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection . . . the operations of the general government may at any time be arrested at the will of one of its members.[8]

In short, subjecting federal officers to state criminal sanctions for acts that carry out their federally appointed duties would make it impossible for the federal government to function. Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it could mean prison time in the state penitentiary.

On the other hand, the mere fact of federal employment surely does not confer blanket immunity from state law. Why, for example, should a postal worker be able to escape state liability for a death caused while driving under the influence, simply because he was delivering mail? Where the effectuation of legitimate federal policy is not compromised, states ought to retain the prerogative to enforce their laws as they see fit. The "etiquette of federalism"[9] must leave states free to adopt and enforce their laws unless they conflict with legitimate federal law or policy.

The difficulty, of course, lies in knowing where to draw the line. Where does a state's police function leave off and the effectuation of federal law and policy begin? And when the effectuation of federal law is left to the split-second judgments of an FBI agent deployed on a remote ridge to apprehend a heavily armed fugitive, what standard should courts apply in determining *ex post* whether the officer crossed that line?

As difficult as this question is, it is hardly new. The potential for this sort of conflict is intrinsic in our federal system. Therefore, it is markedly surprising just how very few reported cases address the issue of Supremacy Clause immunity. The leading Supreme Court case

8. Tennessee v. Davis, 100 U.S. 257, 262–63 (1879).
9. United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

dates from the nineteenth century, and there has been little development of the doctrine since then.

What few cases there are tend to be clustered around historical periods of friction between the federal government and the states. In periods such as Reconstruction,[10] Prohibition,[11] and the Civil Rights Movement,[12] federal officers enforcing certain aspects of federal law were particularly unpopular in some states. Supremacy Clause immunity is an issue that tends to erupt into litigation only at those historical moments when local disaffection with federal policies and their intervention into local life collide with particular force. Ruby Ridge certainly qualified as such a moment.

The leading Supreme Court precedent is *In re Neagle*,[13] a fascinating 1890 case in which California sought to prosecute a Deputy U.S. Marshal who had been assigned to protect Supreme Court Justice Stephen Field during his annual circuit assignment in California. When an unhappy litigant stormed the Justice's dining car, the Deputy (mistakenly believing he was armed) shot him dead. The Supreme Court invoked the Supremacy Clause to immunize him from state prosecution, explaining:

> [I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California.[14]

Courts have generally regarded *Neagle* as establishing a two-prong test. First, was the officer performing an act that federal law authorized him to perform? Second, were his actions necessary and proper to fulfilling his federal duties?[15]

---

10. *See, e.g.*, Tennessee v. Davis, 100 U.S. 257 (1879) (holding that a state criminal case could be removed to federal court).

11. *See, e.g.*, Maryland v. Soper, 270 U.S. 9 (1926) (compelling the federal district court to remand an indictment against federal prohibition agents to state court).

12. *See, e.g.*, *In re* McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964) (holding that a federal marshal was not answerable to the state court for using tear gas when an angry crowd obstructed his ability to carry out orders).

13. 135 U.S. 1 (1890).

14. *In re* Neagle, 135 U.S. 1, 75 (1890).

15. *See, e.g.*, Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988) (stating that the two-prong test from Neagle is "well settled").

But this test is much easier to recite than to apply. The first prong, for example, might demand that the federal officer have authority to perform the *specific* act in question, or it might require only that the officer's actions fall within the *general* scope of his duties. And the second prong might be read to mean that the officer's actions must *actually* have been necessary and proper to fulfilling his federal duties, or it might be satisfied so long as the federal officer *reasonably believed* he was doing what was necessary and proper, even if his actions were in fact improper.

Neagle did not address these questions, and the Court has not resolved them since. While various lower courts have adopted different variations of the *Neagle* framework, none has engaged in much analysis. As noted, legal scholars seem completely to have overlooked this segment of the Tenth Amendment–Supremacy Clause border.

The *Horiuchi* case resolved none of the difficult questions it raised. The district court dismissed the charges, and a divided appeals panel affirmed, applying a rather lenient version of the *Neagle* test: the court required only that the act in question be within the *general* scope of the officer's authority, and that the officer honestly and *reasonably believed* that the act was necessary and proper under the circumstances.[16]

The key inquiry in Horiuchi's case concerned the reasonableness of his belief that shooting Kevin Harris was indeed necessary and proper. The majority held that, under the circumstances, Horiuchi satisfied that standard. Judge Kozinski wrote an angry dissent, contending that the facts, which he described as "largely not in dispute," impeached the majority's conclusion.[17]

Then things got even more interesting. The Ninth Circuit voted to rehear the case before an en banc panel of eleven judges. At oral argument, the line-up of counsel was bewildering. No one from Idaho even appeared for the state, which was represented by a plaintiffs' attorney from Venice Beach, California, and former U.S. Attorney General Ramsey Clark. Agent Horiuchi (accustomed, of course, to siding with the prosecution) was represented by a criminal defense

16. *See* Idaho v. Horiuchi, 215 F.3d 986, 993 (9th Cir. 2000) (applying the standards to the officer's actions in the present case), *rev'd en banc*, 253 F.3d 359 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

17. *Id.* at 997–98 & n.2 (Kozinski, J., dissenting).

lawyer. And the United States, appearing as amicus curiae in support of the alleged criminal, was represented by the Solicitor General, in a rare appearance outside the Supreme Court. By a vote of 6-5 the en banc court reversed the panel in an opinion written by Judge Kozinski who, having previously characterized the facts as largely undisputed, now reversed on the grounds that too many facts were in dispute.[18]

And matters did not end there. In an extraordinary step, the Ninth Circuit invited briefing on whether the case should be reheard yet again, this time before the court's entire complement of twenty-four active judges. But instead of responding, Idaho announced that it was dropping the charges altogether. As a result, the court of appeals vacated the en banc opinion, the panel opinion, and the opinion of the district court.[19] In the universe of American jurisprudence, *Idaho v. Horiuchi* became a black hole.

But the issues spotlighted in *Horiuchi* must some day be resolved. To what extent can and will the standard of Supremacy Clause immunity be set by reference to the current evolution of the federalism doctrine? Let's start with the available competing views on the appropriate scope of immunity. The briefs filed in *Horiuchi* illustrate those views quite nicely.

On one end of the spectrum was Idaho, whose brief, long on colorful metaphor, characterized the assertion of immunity as a claim that the United States "is the king and [Horiuchi] is its Sheriff of Nottingham, who may do no wrong when he does its bidding."[20] Idaho's curious legal team argued that the very idea of immunity in this context is "an archaic anomaly" unfit for American democracy.[21] Alternatively, they contended, to the extent Supremacy Clause immunity exists at all, it does not shield federal officers whose actions were objectively unreasonable.[22] And Horiuchi, they argued, had not acted reasonably in firing the second shot.[23]

At the opposite end of the spectrum was a group of former United

18. *See* Idaho v. Horiuchi, 253 F.3d 359, 374 (9th Cir. 2001) (stating that the disputed facts must be resolved in Horiuchi's favor to avoid "strip[ing] him of [his] Supremacy Clause immunity"), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

19. Idaho v. Horiuchi, 266 F.3d 979, 979 (9th Cir. 2001).

20. Brief for Plaintiff-Appellant at 58, Idaho v. Horiuchi, 266 F.3d 979 (9th Cir. 2001) (No. 98-30149).

21. *Id.*

22. *Id.* at 44–45.

23. *Id.* at 54–55.

States Attorneys General who filed a brief amici curiae.[24] They took the position that federal officers should be entitled to complete immunity for any and all acts within the scope of their federal authority.[25] On this view, while a federal officer might be subject to *federal* criminal or civil penalties for his actions, he should be immune from *state* prosecution provided he was acting within the broad scope of his federal employment. And because Horiuchi was unquestionably doing so, he should be immune.

Interestingly, the United States, and Horiuchi himself, took a middle position. They contended that federal officers acting within the scope of their employment are immune from state prosecution for any action they *reasonably* believe is *necessary* and *proper* to the performance of their federal functions.[26] On the one hand, that standard affords considerable deference to the federal officer: it provides immunity unless *no reasonable officer* could have concluded that the actions were necessary and proper to the performance of his federal functions. At the same time, this position certainly leaves room for state prosecution when federal officers either act outside the scope of their employment or take measures so extreme that no reasonable officer could have deemed them appropriate.

In Agent Horiuchi's case, the United States argued that even if a court were to determine *ex post* that he should not have fired the second shot, nothing in the record suggested that he could not have reasonably—even if incorrectly—concluded that, in light of the extreme danger of the situation and the lightning pace of events, the shot was warranted.[27] In those circumstances, prosecuting Horiuchi for his actions would risk chilling the important discretionary judgments that federal officers must sometimes make in the course of discharging their federal duties.

So there you have the possible scope of Supremacy Clause immunity: from virtually non-existent to so broad as to preempt all state

24. The brief was filed on behalf of William Barr, Griffin Bell, Benjamin Civiletti, Richard Thornburgh, and William Webster. *See, e.g.*, Brief of Amici Curiae Hon. William P. Barr *et al.*, Idaho v. Horiuchi, 266 F.3d 979 (9th Cir. 2001) (No. 98-30149).

25. *See, e.g.*, *id.* at 3 n.3.

26. Brief for Appellee at 18–19, Idaho v. Horiuchi, 266 F.3d 979 (9th Cir. 2001) (No. 98-30149); Brief of the United States of America as *Amicus Curiae* for Appellee at 24–29, Idaho v. Horiuchi, 266 F.3d 979 (9th Cir. 2001) (No. 98-30149).

27. Brief of the United States of America as *Amicus Curiae* for Appellee at 29–33, Idaho v. Horiuchi, 266 F.3d 979 (9th Cir. 2001) (No. 98-30149).

prosecutions of federal officers for conduct in the course of duty. Deciding which formulation is best is partly a matter of determining which formulation best comports with the account of Supremacy Clause immunity in *Neagle* and its progeny. But it is also worth thinking about the issue in a broader context. To understand better the role of Supremacy Clause immunity in the constitutional design, we should ask how it is related to other, more well-defined doctrines describing the federal–state balance. I propose to conclude by raising some questions along these lines; questions that I have not yet answered for myself, but that I hope you will find worth contemplating.

Perhaps the most vexing question is how Supremacy Clause immunity should relate to the qualified civil immunity accorded state and federal officials when they are sued under Section 1983[28] or *Bivens*[29] for alleged constitutional violations. As a general matter, officials are immune from federal civil liability for conduct that a reasonable officer could have believed was lawful, even if the conduct was in fact unlawful. Interestingly, Agent Horiuchi himself attempted to assert qualified immunity in a *Bivens* action filed against him by Kevin Harris. The courts found that, construing all pleaded facts in Harris's favor for purposes of a motion to dismiss, Horiuchi could not avoid trial.[30] Assuming those decisions were correct, what follows for purposes of Horiuchi's claim of Supremacy Clause immunity from state *criminal* charges?

One response might be that nothing necessarily follows. The two doctrines derive from different sources and serve different purposes, and therefore they need not have the same scope. Qualified immunity is a judge-made doctrine designed to insure that government officials are not unduly chilled in the performance of their duties. In contrast, Supremacy Clause immunity, while also protecting against such chill, is principally concerned with the textually-mandated primacy of federal law over state law, and the unconstitutionality of assigning adverse state-law consequences to actions that are mandated or authorized by federal law.

---

28. 42 U.S.C. § 1983 (2000).

29. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 394 (1971) (finding that the Fourth Amendment is "an independent limitation upon the exercise of federal power" and recognizing a federal cause of action against narcotics agents for an unconstitutional search and seizure).

30. *See* Harris v. Roderick, 126 F.3d 1189, 1205 (9th Cir. 1997) (denying dismissal on grounds of qualified immunity).

Yet obviously there are important similarities, especially if one accepts the formulation of Supremacy Clause immunity advocated by the United States in Horiuchi. On that formulation, federal officers acting within the scope of their employment are immune from state prosecution for any action they reasonably believe is necessary and proper to the performance of their federal functions. As to those actions, there can also be no civil liability because, under settled qualified immunity doctrine, the officer's reasonable belief in the propriety of his actions makes him immune. The opposite is true as well: an officer is civilly liable if he could not reasonably have thought he was justified in his actions, and in that case he would also not be immune under the above-described test for Supremacy Clause immunity.

Moreover, treating Supremacy Clause immunity as no broader than qualified immunity arguably reinforces the idea that immunity—including the immunity afforded by the Supremacy Clause—is a mechanism by which federal law trumps state law only insofar as the two are in conflict. If certain conduct is subject to federal civil liability under *Bivens*, it follows a fortiori that the conduct could not reasonably have been thought to be authorized by federal law. In that circumstance, it is difficult to conceive what federal interest there could be in prohibiting a state from imposing liability on the same conduct.

Another guidepost for fixing the standard of Supremacy Clause immunity in the federalism spectrum may be the doctrine of intergovernmental immunity. That doctrine generally prohibits states from either regulating the United States directly or discriminating against the federal government or those with whom it deals. On one hand, this doctrine would seem to argue for a robust formulation of Supremacy Clause immunity, for to subject a federal officer to criminal sanctions for any conduct undertaken within the scope of his employment—no matter how reasonable or unreasonable—might be understood to constitute direct regulation of the United States.

On the other hand, modern formulations of intergovernmental immunity aim, as the Supreme Court has explained, to "accommodat[e] . . . the full range of each sovereign's legislative authority," and recognize that "burdens . . . imposed on the Federal Government by a neutral state law . . . 'are but normal incidents of the organization

within the same territory of two governments.'"[31] Perhaps subjecting federal officers to the criminal laws of the state within which they operate is simply a "normal incident" of having two sovereigns operate within the same territory.

We might also ask how Supremacy Clause immunity fits with the view, expressed most prominently by Justice Kennedy in his *Lopez* concurrence, that there are certain areas of "traditional state concern" in which the federal government may not meddle.[32] The police power is certainly an area of traditional state concern: could this mean that federal laws granting law enforcement authority to federal officers should be construed sufficiently narrowly so that the exercise of that authority does not interfere with the enforcement of state criminal law? To be sure, it seems inconceivable that the Court would hold that *federal* law enforcement actions aimed at arresting an individual on a *federal* warrant arising out of *federal* firearms charges somehow constitute an impermissible intrusion into areas of traditional *state* concern. But it would also be foolish to deny any room whatsoever in this area for Justice Kennedy's conception of the federalism balance.

Finally, let's look again at the Court's anti-commandeering precedents—*New York*[33] and *Printz*.[34] Even at the time those decisions were announced, they were criticized for needlessly hampering the ability of the federal government to respond to important national problems. In *Printz*, Justice Stevens's dissent noted with eerie prescience that the "threat of an international terrorist[], may require a national response before federal personnel can be made available to respond . . . . [I]s there anything [in the Constitution]," Justice Stevens asked, "that forbids the enlistment of state officials to make that response effective?"[35]

After September 11th, Justice Stevens's dissent resonates all the more deeply—so much so that it is difficult to imagine the Court treating lightly the federal government's need to respond to problems of national dimension. Some observers have suggested—wishfully,

31. North Dakota v. United States, 495 U.S. 423, 435 (1990).

32. *See* United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (stating that "[w]ere the Federal Government to take over regulation of the entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

33. New York v. United States, 505 U.S. 144 (1992).

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

35. *Id.* at 940 (Stevens, J., dissenting).

in my view—that as a consequence of September 11th the Court may realign its perception of the correct federal–state balance. But radical shifts in constitutional doctrine are not necessarily what Justice Breyer appeared to advocate when, in a recent lecture, he counseled a new sensitivity to the importance of giving the federal government wide berth to respond to pressing problems of national concern in the wake of the terrorist attacks.[36]

What does all this mean for Supremacy Clause immunity? Perhaps it suggests that the time has passed, at least for now, when the Court might have taken a case in this area to further elaborate on the constitutional constraints on federal power. In the current climate it is hard to imagine the Supreme Court reaching out to invigorate state limits on the law enforcement authority of federal officers. And in any event, the prevailing support for homeland security initiatives suggests that it is extremely unlikely any state or county prosecutor would even be inclined to trigger the issue by attempting to prosecute a federal officer for conduct undertaken within the scope of his duties. If, as I suggested earlier, Supremacy Clause immunity cases tend to appear in particular historical moments of heightened friction between state and federal interests, our present moment may be the least likely time for such a case to arise.

But arise again it will. And the same difficult questions will demand resolution. Next time, for Heaven's sake, the legal academy should be ready. Ladies and gentlemen, start your search engines.

36. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 260 (2002) (stating in the thirty-second annual James Madison Lecture on Constitutional Law delivered on October 22, 2001, that "the current national crisis[] also suggests a need for federal legislative flexibility").