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EMERGENCY FEDERALISM: CALLING ON THE STATES IN PERILOUS TIMES

Adam M. Giuliano*

The attacks of September 11 prompted a historic debate concerning terrorism and domestic emergency response. This ongoing dialogue has driven policy decisions touching upon both liberty and security concerns. Yet despite the enormous effort that has gone into the national response, the role of the sovereign states, and with it federalism, has received comparatively little attention. This Article explores the relevance of federalism within the context of the “War on Terror” and in the aftermath of Hurricane Katrina. Acknowledging that theories of federalism developed elsewhere are insufficient, he outlines a doctrine of ‘emergency federalism.’ The author argues that the Framers consciously retained federalism in times of threat and conflict analogous to today’s challenges. He finds that, relative to the national authority, the scope of states’ interests wax and wane depending upon the severity of the threat and the territorial context, though in no instance are they completely extinguished. Giuliano shows that this design reflects a judgment, written into the Constitution, that emergency federalism enhances both security and liberty relative to a more unilateral approach. He then illustrates how the experience of September 11, the national response since that date, and Hurricane Katrina together indicate that increasing the states’ role should, in practice, promote both security and liberty. Having described emergency federalism and identified its potential advantages, the Article concludes by suggesting possible legal and policy reforms, including those based on the conclusion that the National Guard is constitutionally unstable as currently constituted.

INTRODUCTION

All catastrophes are local. Even in an age of globalization, the point of the spear falls upon, and originates from, discrete locales. Man-made and natural catastrophes ultimately affect individual people and places. As a consequence, such challenges demand an appreciation of the small as well as the large scale.¹

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1. After this Article’s initial drafting but prior to its publication, Hurricane Katrina struck the Gulf Coast. While this Article primarily addresses emergency federalism in light of terrorism,

Yet the majority of literature written following the attacks of September 11, 2001 concerned the exercise of national power.² Even in the aftermath of Hurricane Katrina, which drew attention back to the role of the states,³ the experience of domestic disaster has again spurred calls to increase federal authority.⁴

Recognizing that the relative gap in attention afforded state governments merits further scrutiny, some commentators have suggested that federalism should be reconsidered as it relates to man-made⁵ and natural disasters.⁶ These inquiries have often fol-

the experience of Katrina suggests that this doctrine also provides guidance concerning natural disasters. Where appropriate, notations discussing this possibility have been added.

2. An informal survey of post-September 11 literature suggests a dominant federal slant. This approach has been adopted by those generally supportive of the approach to terrorism thus far. *See, e.g.*, NATIONAL STRATEGY FOR COMBATING TERRORISM (Feb. 2003) [hereinafter NATIONAL STRATEGY], available at http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf. *See generally* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002). It is also evident in the writings of those more critical of current efforts. *See, e.g.*, DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* *passim* (2002); PHILLIP B. HEYMANN, *TERRORISM, FREEDOM & SECURITY: WINNING WITHOUT WAR* *passim* (2004).

3. *See, e.g.*, Robert Block & Amy Schatz, *Local and Federal Authorities Battle to Control Disaster Relief*, WALL ST. J., Dec. 8, 2005, at A1 [hereinafter Block & Schatz, *Authorities Battle to Control*] (characterizing the debate over responses to "natural and man-made" disasters as concerning state versus federal control of recovery efforts).

4. *See, e.g., id.* (reporting that "[t]he Bush administration says Katrina showed that some states can't deal with large-scale disasters" and that the head of U.S. Northern Command (NORTHCOM) "told lawmakers that active-duty forces should be given complete authority for responding to catastrophic disasters").

5. Federalism received some attention immediately after September 11, largely in the context of how the attacks might alter the doctrine's then-current course. *See* Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, at D14; Marci Hamilton, *Federalism and September 11: Why the Tragedy Should Convince Congress to Focus on Truly National Topics*, Oct. 25, 2001, <http://writ.findlaw.com/hamilton/20011025.html> (last visited Jan. 16, 2006) [hereinafter Greenhouse, *Federalism and September 11*]; Ernest Young, *The Balance of Federalism in Unbalanced Times: Should the Supreme Court Reconsider Its Federalism Precedents in Light of the War on Terrorism?*, Oct. 10, 2001, http://writ.findlaw.com/commentary/20011010_young.html (last visited Jan. 16, 2006) [hereinafter Young, *Balance of Federalism*]. Thereafter, the issue has emerged again, in the context of how federalism might be applied given the actual experience since September 11. *See* Ann Althouse, *The Vigor of the Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004); Erwin Chemerinsky, *Empowering States When it Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004); Jill Keblawi, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817 (2004); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277 (2004) [hereinafter Young, *Welcome to the Dark Side*]; *see also* David S. Broder, *Shaping Our Defense*, WASH. POST, Jan. 13, 2005, at A21; Franklin Foer, *The Joy of Federalism*, N.Y. TIMES, Mar. 6, 2005, § 7, at 12; James G. Gimpel, *Democrats Now Argue for States' Rights*, BOSTON GLOBE, Dec. 19, 2004, at K12.

6. Federalism has been a central subject of debate following Hurricane Katrina. *See, e.g.*, Block & Schatz, *Authorities Battle to Control*, *supra* note 3; Robert Block & Amy Schatz, *Chertoff Promises Revamp of FEMA to Katrina Panel*, WALL ST. J., Oct. 20, 2005, at A3 [hereinafter Block & Schatz, *Revamp of FEMA*] (quoting Florida Governor Jeb Bush as testifying that

lowed an ends-oriented approach; in other words, federalism might be useful to get somewhere we already want to go.⁷ However, standing alone, otherwise desirable objectives provide neither the constitutional nor the practical answer to questions such as *why* federalism should matter respecting terrorism *in particular*.⁸ After all, combating terrorism would appear to be a core function for the national government.⁹

For the states to significantly contribute towards fighting a more effective, more liberty-conscious War on Terror, they must first be empowered by a constitutional doctrine that explains why federalism applies and how it operates given the particularities of

“[f]ederalizing emergency response to catastrophic events would be a disaster as bad as Hurricane Katrina”); Robert Block, *Brown Portrays a Broken FEMA, Faults Local Level*, WALL ST. J., Sept. 28, 2005, at A3 (quoting Michael Brown, the head of the Federal Emergency Management Agency (FEMA) during Katrina, as testifying before Congress that “[i]f we break that concept of federalism, we minimize our effectiveness and maximize our potential for failure”).

7. See, e.g., Young, *Welcome to the Dark Side*, *supra* note 5, at 1311 (“Federalism is about dividing power; nothing much depends on what the power in question is being used for”); Foer, *supra* note 5, at 13 (“[L]iberal federalists would retreat from national politics and focus on effecting change in their own blue states—passing health care reforms, expanding gay rights.”); Gimpel, *supra* note 5 (“[L]iberals are embracing state government as a means for protecting and advancing their political interests.”); Richard Thompson Ford, *The New Blue Federalists: The Case for Liberal Federalism*, SLATE, Jan. 6, 2005, <http://www.slate.com/id/2111942/> (on file with the University of Michigan Journal of Law Reform) (“[T]he American legal tradition does offer liberals a *practical* alternative to secession or a condo in Vancouver. It’s called federalism, aka ‘state’s rights.’”).

8. Justice John Paul Stevens’ dissenting opinion in *Printz v. United States* anticipated this issue. See *Printz v. United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting) (“[Terrorist threats] may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment . . . that forbids the enlistment of state officers to make that response effective?”); see also Young, *Welcome to the Dark Side*, *supra* note 5, at 1291 (citing Justice Stevens’ dissent in *Printz* as an example that “[s]ome critics of the commandeering doctrine have suggested that it may fatally undermine national anti-terrorism efforts”).

9. See Delahunty & Yoo, *supra* note 2, at 488–89 (describing how “[f]oremost among the objectives committed to [the federal government’s] trust is the nation’s security”); see also Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 3, 6–7 (John A. Ferejohn et al. eds., 1997) (discussing defense as a traditional core area of national concern). The same has also been suggested with respect to large-scale natural disasters. See Block & Schatz, *Authorities Battle to Control*, *supra* note 3 (reporting that the head of NORTHCOM “told lawmakers that active-duty forces should be given complete authority for responding to catastrophic disasters”); Tim Naftali, *Department of Homeland Screw-Up: What is the Bush Administration Doing?*, SLATE, Sept. 6, 2005, <http://www.slate.com/id/2125494/> (on file with the University of Michigan Journal of Law Reform) (“In terms of the challenge to government, there is little difference between a terrorist attack that wounds many people and renders a significant portion of a city uninhabitable, and the fallout this week from the failure of one of New Orleans’ major levees.”).

terrorism.¹⁰ Speaking more broadly, states' responsibilities and rights respecting significant domestic crises must be linked to a kind of "emergency" federalism. Absent such a topical mooring, today's new, often policy-liberal converts to federalism risk committing the sin of arbitrariness of which they have previously accused conservatives.¹¹ Additionally, providing such a context will allow states to feel more secure in their constitutional footing, making them more willing to act accordingly where they might previously have deferred to federal authority during times of crisis.

The Supreme Court attributes federalism's broad relevance to the multiplicity of its sources within the Constitution, as "[o]ur system of dual sovereignty is reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly."¹² Proceeding with this in mind, several provisions reasonably implicate a distinct state role regarding certain emergency situations, represented today by the War on Terror and homeland security.¹³

The Framers' rationales for extending federalism in troubled times deserve special consideration as current exigencies appear analogous to those considered in the drafting. In this way, applying federalism to homeland security can be justified as an expression of what the Constitution says and implies on the subject, rather than as an extension of more general principles developed in a different context. In particular, proceeding in this manner should produce tangible benefits in terms of both efficacy and liberty. Emergency federalism thus encourages a debate about competing security claims at the state and federal levels, rather than a more

10. This applies equally to natural disasters, such as hurricanes, earthquakes, eruptions, and epidemics, which may equal or exceed the destructive impact of a terrorist strike.

11. See, e.g., Editorial, *Scrutinizing John Roberts*, N.Y. TIMES, July 20, 2005, at A22 ("The far right is on a drive to resurrect ancient, and discredited, states' rights theories."); Foer, *supra* note 5, at 12 ("For conservatives, 'states' rights' often seems just another way of asserting their libertarianism, their dislike of government in any form".).

12. *Printz*, 521 U.S. at 923 n.13 (citation omitted).

13. The terms "homeland security" and "homeland defense" are not necessarily interchangeable. See, e.g., Courtney Wirwahn, Association of the United States Army, National Security Watch: Homeland Security and Homeland Defense: Protection from the Inside Out 1-2 (Oct. 2003) (on file with the University of Michigan Journal of Law Reform), available at http://www.ausa.org/PDFdocs/LWpapers/nsw03_3.pdf; see also Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong., A Failure of Initiative: The Final Rep. of the Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina 39 (2006) [hereinafter Katrina Report]. For the purpose of this article, the term "homeland security" is used for natural and man-made threats in the domestic sphere and "national security" or "national defense," as opposed to homeland defense, is employed for outwardly oriented protective efforts.

simplistic tradeoff between security and liberty within a single level of government.

In light of these observations, this Article assesses what the Constitution says and implies on the question of why, and therefore how, emergency federalism might apply to the War on Terror and homeland security.

In order to frame the theoretical analysis that follows, Part I reviews the experience of the states on September 11, in the War on Terror, and following Hurricane Katrina. It finds recent historical support for the conclusion that the states can and do matter when it comes to emergency response.

Part II argues that the Constitution extends federalism to issues of national security, including emergency situations, with the relative relationship between the national and state governments varying depending on the territorial context. The federal government takes primary though not exclusive responsibility for existential threats and manifest conflicts, while the states operate most prominently with respect to relatively less serious domestic concerns.

Part III explores how emergency federalism evidences a constitutional judgment that state involvement during times of crisis serves both efficacy and liberty interests. It posits that such potential security and liberty gains may be expected when confronting terrorism in particular.

Having developed a theoretical doctrine of emergency federalism, Part IV addresses how the Constitution provides for this as a practical expression of state power suitable for implementation.

Part V then applies emergency federalism to terrorism. It finds that the War on Terror appears to be comprised of two segments, a war on terrorists and homeland security. While the states contribute to both efforts, under emergency federalism they potentially offer greater benefits with regard to homeland security.

Finally, in looking beyond the scope of the current inquiry, Part VI highlights a few potential areas for practical application of emergency federalism.

I. THE STATES SINCE SEPTEMBER 11

Before entertaining any discussion of the constitutionality of emergency federalism, we must first ask whether the states offer practical benefits when it comes to large-scale natural and man-made disasters. In other words, would it be desirable to

implement this doctrine? The experience of and since September 11 provides a sufficient basis upon which to determine that the states do, in fact, have much to offer.

A. “*This Is Not an Exercise*”

FAA: We have a hijacked aircraft headed towards New York, and we need you guys to, we need someone to scramble some F-16s or something up there, help us out.

NEADS [NORTHEAST AIR DEFENSE SECTOR]: Is this real-world or exercise?

FAA: No, this is not an exercise, not a test.¹⁴

On September 11, 2001, “[t]he air defense of America began with this call.”¹⁵ Within minutes, two fighter jets scrambled from Otis Air National Guard Base in Falmouth, Massachusetts.¹⁶

This initial military response to the worst surprise attack in modern United States history did not come from the regular armed forces.¹⁷ Rather, it came from the Air National Guard, “part of the organized militia of the several States.”¹⁸ The National

14. Nat’l Comm. on Terrorist Attacks Against the United States, *The 9/11 Commission Report* 20 (2004) [hereinafter *9/11 Report*].

15. *Id.*

16. *Id.* at 17, 20 and 32; JAMES BAMFORD, *A PRETEXT FOR WAR: 9/11, IRAQ, AND THE ABUSE OF AMERICA’S INTELLIGENCE AGENCIES* 10 (2004). It has since been proposed that Otis be closed, although several state governors have questioned the constitutionality of the move to close such Air National Guard bases without state consent. See Eric Schmitt, *States Opposing Plan to Shutter Air Guard Bases*, N.Y. TIMES, Aug. 11, 2005, at A1 [hereinafter Schmitt, *Air Guard Bases*].

17. In addition to the aircraft from Otis, which subsequently patrolled over New York City, two sets of fighters were scrambled to guard Washington, D.C. The first, airborne at approximately 9:30 a.m., were regular Air Force units from Langley Air Force Base; these were ordered into the air through the North American Aerospace Defense Command (NORAD). See *9/11 REPORT*, *supra* note 14, at 27. In addition, the Secret Service launched fighters from the 113th Wing of the District of Columbia Air National Guard just over an hour later. *Id.* at 44.

18. 32 U.S.C. § 101(6) (2000). The National Guard is the modern name for the state militia. See *Selected Draft Law Cases*, 245 U.S. 366, 387 (1918) (noting that, by statute, “the organized body of militia within the States as trained by the States under the direction of Congress became known as the National Guard”). See also 32 U.S.C. § 101(3) (2000); 10 U.S.C. § 311 (2000). Unless otherwise indicated, references to the National Guard shall be to its constitutional role as the states’ militia. Consequently, the terms “militia” and “National Guard” shall be used interchangeably, with “militia” employed for the institution’s historical and constitutional role, and with “National Guard” used in the context of its present-day embodiment.

Guard, of which the Air National Guard is part,¹⁹ constitutes the modern descendant of the state militias.²⁰

On September 11, state and local agencies accounted for the majority of emergency first responders.²¹ In New York City, several thousand uniformed service members arrived at the World Trade Center before its collapse at 10:28 a.m.;²² remarkably, “[w]ell over a thousand first responders had [already] been deployed” during the brief seventeen-minute interlude between the first and second plane strikes.²³

Among other resources, on the morning of September 11, New York City possessed an 11,000-member fire department²⁴ and a 40,000-member police department²⁵ with which it responded to the attacks.²⁶ The state’s governor, George Pataki, provided additional support by mobilizing the New York State National Guard.²⁷ Within days, 5,000 Guard troops had been provided for the relief effort, joined by 500 state troopers as well as other state agents.²⁸

Similarly, “[t]he emergency response at the Pentagon represented a mix of local, state, and federal jurisdictions”²⁹ Despite

19. The “Air National Guard [is] part of the organized militia of the several States . . . active and inactive.” 32 U.S.C. § 101(6) (2000). However, the “‘Air National Guard of the United States’ is the reserve component of the [regular] Air Force all of whose members are [simultaneously also] members of the Air National Guard.” 32 U.S.C. § 101(7) (2000) (emphasis added). Current broad federal authority over the National Guard stems from the legal fiction that members of the Guard dual enlist at both the state and federal levels. *See* 32 U.S.C. 101(5), (7) (2000); *see also* *Perpich v. Dep’t of Def.*, 496 U.S. 334, 346 (1990) (“[A] member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.”).

20. *See Selected Draft Law Cases*, 245 U.S. at 387; *Perpich*, 496 U.S. at 346.

21. *See generally* 9/11 REPORT, *supra* note 14, at 278–325.

22. *See id.* at 278–325.

23. *Id.* at 293. This constituted “the largest rescue operation in the city’s history.” *Id.*

24. *Id.* at 282.

25. *Id.*

26. The Fire Department of New York, Port Authority of New York and New Jersey Police Department, and New York Police Department suffered, respectively, 343, 37, and 23 fatalities on September 11. These in turn constituted “the largest loss of life of any emergency response agency in history,” as well as the largest and second largest loss of life by any police department in history. *Id.* at 311.

27. *See* Press Release, N.Y. State Office of the Gov., Governor Pataki Announces Actions in the Wake of WTC Events (Sept. 11, 2001) (on file with the University of Michigan Journal of Law Reform), available at http://www.ny.gov/governor/press/01/sept11_1_01.htm.

28. *See id.*; Press Release, N.Y. State Office of the Gov., WTC Response Update: Search and Rescue Efforts Continue (Sept. 12, 2001) (on file with the University of Michigan Journal of Law Reform), available at http://www.ny.gov/governor/press/01/sept12_01.htm; *see also* Press Release, N.Y. State Office of the Gov., WTC Response Update: Governor Provides Latest Information on State Response as Rescue and Recovery Efforts Continue (Sept. 14, 2001) (on file with the University of Michigan Journal of Law Reform), available at http://www.ny.gov/governor/press/01/sept14_5_01.htm.

29. 9/11 REPORT, *supra* note 14, at 314.

its occurrence at the heart of the United States military command, this effort was coordinated by the Arlington County Fire Department.³⁰ In retrospect, “the response to the 9/11 terrorist attack on the Pentagon was mainly a success,” in large part, because of the well-coordinated, interagency, and regional nature of the effort.³¹

B. “The Guard Will Be Broken”

Four years after September 11, National Guard and Reserve personnel in active federal service numbered over 137,000.³² Though it represents a decline from a peak of 220,000,³³ this figure underscored a historic shift towards federal reliance on the Guard and the Reserves, both in terms of absolute numbers and duration.³⁴ However, unlike in the immediate aftermath of the attacks, these numbers reflected overseas commitments. For instance, in September 2005 “[m]ore than a third of the 135,000 US troops in Iraq [were still] National Guard members”; among casualties, “more than half were either National Guard or military reserve forces.”³⁵ Overall, “[o]f the estimated 400,000 members of the National Guard, about 175,000 have been called to active duty to support the wars in Iraq and Afghanistan”³⁶ In some instances, these

30. *Id.*

31. *Id.*

32. News Release, Office of the Assistant Sec’y of Def., U.S. Dep’t of Def. (Public Affairs), National Guard (In Federal Status) and Reserve Mobilized as of December 28, 2005 (Dec. 28, 2005) (on file with the University of Michigan Journal of Law Reform), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=9194>.

33. Eric Schmitt & David S. Cloud, *Part-Time Forces on Active Duty Decline Steeply*, N.Y. TIMES, July 10, 2005, at A1 (“The number of Reserve and National Guard troops on domestic and overseas missions has fallen to about 138,000, down from a peak of nearly 220,000 after the invasion of Iraq two years ago . . .”).

34. The number of National Guard and Reserve members in active federal duty during any given month has not fallen below 50,000 since October 2001; it has remained near or above 100,000, and at times has been above 200,000, since January 2003. See News Releases Archive, Office of the Assistant Sec’y of Def., U.S. Dep’t of Def. (Public Affairs), <http://www.defenselink.mil/releases/archive.aspx> (providing archives of Department of Defense news releases organized by year and month; “National Guard (In Federal Status) and Reserve Mobilized” reports contain data about the number of National Guard members) (last visited Nov. 30, 2006); see also Bryan Bender, *Demands of Wars Since 9/11 Strain National Guard’s Efforts*, BOSTON GLOBE, Sept. 2, 2005, at A30 (arguing that the National Guard “has [since September 11] been relied upon as never before to conduct overseas combat missions, contribute to homeland security, and simultaneously fulfill its traditional obligation of domestic disaster relief”).

35. Bender, *supra* note 34.

36. *Id.*

National Guard units had previously deployed in the immediate domestic response to September 11.³⁷

In addition to their human cost, these deployments degraded the National Guard's capacity. In late 2004 the head of the National Guard Bureau argued that, unless the Army National Guard received twenty billion dollars to replace lost or destroyed equipment, "the Guard will be broken and not ready for the next time it's needed, either *here at home* or for war."³⁸ By July 2005 governors had begun to charge "that the Iraq war threatens to leave states unprotected against natural disasters and to make retention more difficult."³⁹ When faced with the additional issue of Air National Guard base closures, state officials and representatives "argue[d] that the plan would leave them vulnerable to terrorist attacks," and two states even sued.⁴⁰ In May 2006 a presidential proposal to deploy the Guard on yet another federal mandate, this time along the Mexican border, raised similar concerns.⁴¹

The nationalization of the National Guard was not the only way in which the federal government sought to increase control over homeland security.⁴² For example, other efforts had prompted

37. See, e.g., *id.* ("The Maryland National Guard's 115th Military Police Battalion, for example, has been on active duty for more than 24 months since September 2001 and has been deployed three times, including securing the Pentagon crash site and providing security in Iraq," and it has since sent approximately 100 members to Mississippi following Hurricane Katrina.); Kirk Semple, *New York Nerve, Tested on Meanest Streets*, N.Y. TIMES, Mar. 4, 2005, at B1 (documenting how the First Battalion, 69th Infantry, with an armory in Manhattan, "was mobilized after the Sept[ember] 11, 2001, attacks to guard ground zero, West Point, and the city's bridges, tunnels and subways," and later was committed to a year-long tour of duty in Iraq).

38. Eric Schmitt, *Guard Reports Serious Drop in Enlistment*, N.Y. TIMES, Dec. 16, 2004, at A32 (quoting Lt. Gen. H. Steven Blum (emphasis added)). Along these lines, at least one news outlet reported that "[t]he National Guard Bureau estimates that its nationwide equipment availability rate is 35 percent, about half the normal level." Bender, *supra* note 34.

39. Dan Balz, *Guard Deployments Weigh on Governors: Length, Frequency of Tours Worry States*, WASH. POST, July 19, 2005, at A3. These overseas deployments sometimes represent a double loss for states and cities, as many individual Guard and Reserve members otherwise serve in local law enforcement or emergency response capacities. See, e.g., Kareem Fahim, *City Police Officer Killed by Sniper in Iraq*, N.Y. TIMES, Aug. 4, 2005, at B1 ("Among the tens of thousands of American soldiers serving in Iraq are more than 200 New York police officers on leave from the city's precincts . . .").

40. Schmitt, *Air Guard Bases*, *supra* note 16.

41. Yochi J. Dreazen & Sarah Lueck, *Bush Aims to Quell Infighting with Border Moves*, WALL ST. J., May 16, 2006, at A3 (quoting Sen. Lindsay Graham of South Carolina as stating that the Mexican border deployment of the Guard "will continue to stress an overstressed force, and it's not the right skill set for border issues").

42. See OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY (July 2002) [hereinafter HOMELAND SECURITY], available at http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf (detailing a comprehensive approach

mayors to cite inadequate information sharing and insufficient funding,⁴³ unfunded mandates,⁴⁴ and prioritizations based on the potential national impact from terrorist attacks, rather than local effects,⁴⁵ as jeopardizing their ability to confront crises.

C. *"It's Our Turn to Help Our Own, and We're Not There"*

In late August 2005, the eleventh named tropical storm of that year's Atlantic hurricane season formed; designated Katrina, it went on to become "the costliest and one of the five deadliest hurricanes to ever strike the United States."⁴⁶ The storm effectively destroyed one of the nation's most populous and historic cities, New Orleans, and left millions of victims in its wake.⁴⁷

The near universally criticized response to Katrina,⁴⁸ coming almost four years to the day after September 11, "suggested to many that the nation is not ready to handle a terrorist attack of similar

to homeland security incorporating numerous non-military actors including law enforcement, federal and state governments, and the private sector).

43. See *U.S. Homeland Security Effort Irks Mayors*, A.P., Jan. 18, 2005 (on file with the University of Michigan Journal of Law Reform).

44. See Lori Montgomery, *D.C. Pushes to be Paid for Security: Mayor Speaks Out on Inaugural Costs*, WASH. POST, Jan. 19, 2005, at B1 ("D.C. Mayor Anthony A. Williams yesterday criticized the Bush administration's refusal to reimburse the District for costs related to tomorrow's inauguration, calling it 'an unfunded mandate' that promises to gobble up cash needed to prepare the nation's capital for a potential terror attack." (emphasis added)).

45. See Lara Jakes Jordan, *Chertoff: States Foot Transit Safety Bill*, A.P., July 15, 2005 (on file with the University of Michigan Journal of Law Reform) (following the July 7, 2005 terrorist attacks on London's mass transit system, comments by Homeland Security Secretary Michael Chertoff were summarized as stating that, "The [federal] government must focus on preventing airline hijackings and other terror threats that could inflict mass casualties, and is limited in the help it can give cities and states to protect trains and buses.").

46. Richard D. Knabb et al., National Hurricane Center, Tropic Cyclone Report Hurricane Katrina 23–30 August 2005, at 1–2 (Dec. 20, 2005), available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

47. By one metric, nearly 1.5 million hurricane victims registered with FEMA. See Adam Nossiter, *Wearying Wait for Federal Aid in New Orleans*, N.Y. TIMES, Dec. 3, 2005, at A1.

48. See *KATRINA REPORT*, *supra* note 13, at 359 ("The preparation for and response to Hurricane Katrina should disturb all Americans. . . . We are left scratching our heads at the range of inefficiency and ineffectiveness that characterized government behavior right before and after this storm."). The President himself admitted that mistakes had been made at all levels of government. Elisabeth Bumiller & Richard W. Stevenson, *President Says He's Responsible in Storm Lapses*, N.Y. TIMES, Sept. 14, 2005, at A1; see also Thomas L. Friedman, *Osama and Katrina*, N.Y. TIMES, Sept. 7, 2005, at A25; Fred Kaplan, *\$41 Billion, and Not a Penny of Foresight*, SLATE, Sept. 2, 2005, <http://www.slate.com/id/2125478/> (on file with the University of Michigan Journal of Law Reform); Naftali, *supra* note 9.

dimensions.”⁴⁹ In short, Katrina made Cassandras⁵⁰ of those who had questioned the direction of homeland security.⁵¹

While history will undoubtedly identify many factors that contributed to the inadequate response, the experience of the National Guard is illuminating for present purposes. When Katrina struck, approximately forty percent of the Louisiana and Mississippi National Guard were on active duty in Iraq.⁵² Domestically, the Guard’s equipment was even more depleted, with perhaps a third available for use.⁵³

Along with the direct effect of the storms on units positioned in its path,⁵⁴ overseas commitments received blame for a lag in the recovery effort.⁵⁵ As a Louisiana National Guard captain preparing to leave Iraq when Katrina hit put it, “It’s our turn to help our own, and we’re not there.”⁵⁶

49. Susan B. Glasser & Josh White, *Storm Exposed Disarray at the Top*, WASH. POST, Sept. 4, 2005, at A1.

50. “[A] ‘Cassandra’ tends to describe someone who makes true predictions which are disbelieved.” Wikipedia “Cassandra” Page, <http://en.wikipedia.org/wiki/Cassandra> (last visited Nov. 30, 2006).

51. Although ultimate responsibility for the failures following Hurricane Katrina remain disputed, it is almost universally acknowledged that mistakes were made. In some cases, Katrina proved eerily correct specific warnings that had previously been made. See, e.g., KATRINA REPORT, *supra* note 13, at 81–84 (noting tabletop exercise dubbed “Hurricane Pam” in many ways predicted Hurricane Katrina); Adam Cohen, *If the Big One Hits the Big Easy, the Good Times May Be Over Forever*, N.Y. TIMES, Aug. 11, 2002, § 4, at 12 (reporting that in a severe hurricane “experts say, [New Orleans] could fill up like a cereal bowl, killing tens of thousands and laying waste to the city’s architectural heritage”).

52. Bender, *supra* note 34.

53. Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, at A1.

54. *Id.* (reporting that “[f]or a crucial 24 hours after landfall on Aug. 29, [Louisiana National] Guard officers said, they were preoccupied with protecting their nerve center from the [storm surge] The next morning, they had to evacuate their entire headquarters force of 375 guardsmen by boat and helicopter to the Superdome”).

55. See, e.g., *id.* (“Guard commanders and state and local officials in Louisiana said the Guard performed well under the circumstances. But they say it was crippled in the early days by a severe shortage of troops that they blame in part on the deployment to Iraq of 3,200 Louisiana guardsmen.”); Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1 [hereinafter Lipton, *Political Issues*] (“‘Over the last year, we have had about 5,000 [National Guard members] out, at one time,’ [Louisiana] governor Kathleen Blanco said. ‘They are on active duty, serving in Iraq and Afghanistan. That certainly is a factor.’”); Robert Burns, *Guard Deployment in Iraq Hurt Katrina Response General Says*, A.P., Sept. 9, 2005 (on file with the University of Michigan Journal of Law Reform) (reporting that while the head of the National Guard Bureau ultimately believed that “‘overseas commitments d[id] not inhibit our ability to sustain [the Katrina response] effort here at home,’ [he also] said that ‘arguably’ a day at most of response time was lost due to the absence of the Mississippi National Guard’s 155th Infantry Brigade and Louisiana’s 256th Infantry Brigade”).

56. Michael Moss, *Anxiety in Iraq as Guardsmen Head Home to Uncertainties*, N.Y. TIMES, Sept. 4, 2005, § 1, at 26 (quoting from his interview with Captain Terrence P. Ryan).

Certainly arguments have been made from, among others, the Secretary of Defense,⁵⁷ the National Guard Bureau,⁵⁸ and political commentators,⁵⁹ that deployments did not slow recovery efforts. Yet the grudging admission by the National Guard Bureau that Mississippi and Louisiana National Guard deployments “arguably” delayed the response time by a day,⁶⁰ the move to speed the return of troops from Iraq,⁶¹ and the serious consideration of inserting active-duty troops,⁶² not to mention the views of the Louisiana governor,⁶³ strongly suggest that deployments either were a significant factor or came dangerously close to becoming one.

The National Guard was not the only, or even the primary focus of concern following Katrina. State and local government came under significant scrutiny for everything from levee management to law enforcement to the evacuation effort.⁶⁴ Federal decisions also gained considerable attention, from the weakening of the Federal Emergency Management Agency (FEMA) following its incorporation into the Department of Homeland Defense, to inadequate funding of levee construction.⁶⁵

In total, Katrina should be understood as making it clear that, four years after September 11, *national* directives at best make it no easier, and at worst may make it difficult or impossible, for the states themselves to respond to *state and local* needs in the event of a similarly serious catastrophe.

57. Lipton, *Political Issues*, *supra* note 55; Burns, *supra* note 55.

58. Bender, *supra* note 34.

59. James S. Robbins, *Where are the Guardsmen? Right where they ought to be.*, NAT'L REV. ONLINE, Sept. 2, 2005, <http://www.nationalreview.com/robbins/robbins200509020719.asp> (last visited Nov. 30, 2006) (on file with the University of Michigan Journal of Law Reform).

60. Burns, *supra* note 55.

61. Moss, *supra* note 56.

62. The existence of a serious debate amongst senior executive officials over “whether the president should speed the arrival of active-duty troops by seizing control of the hurricane relief mission from the governor” by invoking the Insurrection Act supports the fact that available National Guard forces were possibly insufficient. Lipton, *Political Issues*, *supra* note 55.

63. *Id.*; see also KATRINA REPORT, *supra* note 13, at 228 (“In Louisiana, Blanco asked for the immediate return of Louisiana National Guard troops from Iraq, but the National Guard Bureau was satisfied it could provide sufficient troops from other states to meet the needs of Louisiana more quickly than trying to extract Louisiana troops from combat operations in Iraq.”).

64. See, e.g., *Blanco Gets Blame for Katrina Bodies*, PITTSBURGH POST-GAZETTE, Oct. 28, 2005, at A10; Block, *supra* note 6; John M. Broder, *In Plans to Evacuate U.S. Cities, Chance for Havoc*, N.Y. TIMES, Sept. 25, 2005, § 1, at 1; Frank Donze, *Failure of Levee Merger Sparks Outrage: Supporters Say they Won't Let Issue Drop*, TIMES PICAYUNE, Nov. 22, 2005, at 1; Clifford J. Levy, *Political Willfulness: New Orleans Is not Ready to Think Small, or Even Medium*, N.Y. TIMES, Dec. 11, 2005, § 4, at 1; Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES, Sept. 17, 2005, at A1.

65. See generally Broder, *supra* note 64; Glasser & White, *supra* note 49.

Washington reacted to September 11 by systematically requisitioning state resources and by assuming the mantle of leadership in the War on Terror. Washington did so to advance present federal policy needs without due regard to future domestic requirements. While some state and local officials raised objections, in many cases the states willingly yielded to this new order.⁶⁶ This strongly suggests that in confronting the national emergencies, the involvement of the states, which proved their vital importance on September 11, requires reconsideration and readjustment by both federal and state actors.⁶⁷

The story of the National Guard since September 11 illustrates a central paradox of America's War on Terror. On the one hand, the effort to combat terrorism has led to a vigorous expansion of federal authority through legislation,⁶⁸ departmental reorganization,⁶⁹ appropriations,⁷⁰ and executive fiat.⁷¹ The very notion of a War on Terror suggests a unified, national response.⁷² Yet, though

66. See, e.g., Block & Schatz, *Authorities Battle to Control*, *supra* note 3 (indicating that Florida was an exception to the general rule of state acquiescence to federal control of hurricane emergency response); Eric Lipton, *New Rules for Giving Out Antiterror Aid*, N.Y. TIMES, Jan. 3, 2006, at A1 [hereinafter Lipton, *New Rules for Antiterror Aid*] (citing acceptance of Department of Homeland Security grants by low-population centers in amounts disproportionate to such communities' perceived risk of terrorist attack).

67. Notably, the Department of Defense agrees on the importance of state and local actors, having emphasized that "[d]omestic security is primarily a civilian law enforcement function." DEP'T OF DEF., STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT 26 (2005), available at <http://www.defenselink.mil/news/Jun2005/d20050630homeland.pdf>. See also Bradley Graham, *War Plans Drafted to Counter Terror Attacks in U.S.: Domestic Effort Is Big Shift for Military*, WASH. POST, Aug. 8, 2005, at A1 (reporting that in relation to preparing the "first-ever war plans for guarding against and responding to terrorist attacks in the United States . . . defense officials continue to stress that they intend for the troops to play largely a supporting role in homeland emergencies, bolstering police, firefighters and other civilian response groups").

68. See, e.g., USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006), and Pub. L. No. 109-178, 120 Stat. 278 (2006) [hereinafter *Patriot Act*].

69. See, e.g., Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (creating the Department of Homeland Security); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (creating the position of Director of National Intelligence).

70. See, e.g., CONG. BUDGET OFFICE, FEDERAL FUNDING FOR HOMELAND SECURITY (2004), available at http://www.cbo.gov/ftpdocs/54xx/doc5414/homeland_security.pdf; WHITE HOUSE, HOMELAND SECURITY BUDGET FACT SHEET (2006) (on file with the University of Michigan Journal of Law Reform), available at <http://www.whitehouse.gov/omb/pdf/Homeland.pdf> (detailing homeland security funding); WHITE HOUSE, DEFENSE BUDGET FACT SHEET (2006) (on file with the University of Michigan Journal of Law Reform), available at <http://www.whitehouse.gov/omb/pdf/Defense-06.pdf> (detailing defense funding).

71. See, e.g., David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, § 1, at 1; THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen Greenberg et al. eds., Cambridge University Press 2005).

72. The Office of Homeland Security (now a cabinet department) has acknowledged the principle of federalism. See generally HOMELAND SECURITY, *supra* note 42. However, it did

this massive effort may seek to prevent “another September 11,” an overly dogged federal focus ignores a crucial lesson of Hurricane Katrina—when it comes to homeland security and emergency response, states matter.

Though states matter for numerous reasons, two are the most important. First, states and their political subdivisions can marshal significant resources. Second, and more crucially, because federal “jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects,”⁷³ the sovereign states possess distinct, geographically dispersed, and armed executive power outside of national control.⁷⁴

II. EMERGENCY FEDERALISM AND NATIONAL SECURITY

As experience demonstrates that the states can make a practical difference, the next step is to analyze whether, and if so how, the Constitution provides for such emergency federalism.

A. Congress and the President Generally Enjoy Broad Control over National Security

The Constitution charges the federal government with the conduct of national defense and foreign policy.⁷⁵ Though related,

so in the context of a *nationally* directed strategy. *See id.* at vii (“Our structure of overlapping federal, state, and local governance . . . provides unique opportunity and challenges for our homeland security efforts. . . . A national strategy requires a national effort.”). Several commentators have likewise expressed a strongly national perspective on the appropriate response to terrorism. *See, e.g.*, MICHAEL A. LEDEEN, *THE WAR AGAINST THE TERROR MASTERS: WHY IT HAPPENED. WHERE WE ARE NOW. HOW WE’LL WIN.* (St. Martin’s Press 2002); Delahunty & Yoo, *supra* note 2.

73. THE FEDERALIST NO. 39, at 213 (James Madison) (Clinton Rossiter ed., 1999); *see* *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (“It is incontestable that the Constitution established a system of ‘dual sovereignty.’”).

74. A current debate concerns reliance upon the “unitary executive” theory by the administration of President George W. Bush; the theory provides that the Constitution grants the President the whole of the executive power, meaning that neither the courts nor Congress can cabin purely executive actions. *See generally* Jess Bravin, *Judge Alito’s View of the Presidency: Expansive Powers*, WALL ST. J., Jan. 5, 2006, at A1; Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2006, at A11; Noah Feldman, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, § 6, at 52. While outside the scope of this Article, even assuming the correctness of the unitary executive model respecting the *federal* executive power, emergency federalism might provide a limited check to the extent that certain executive authority constitutionally remains with state executives and not the federal executive.

75. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–15 (2003); *Perpich v. Dep’t of Def.*, 496 U.S. 334, 353 (1990) (noting that “several constitutional provisions commit mat-

these two areas represent different kinds of power, one primarily martial and the other, largely, persuasive; they may be collectively categorized as national security powers.

The Constitution contains several provisions regarding the exercise of war powers, euphemistically known today as national defense.⁷⁶ The Constitution likewise allocates to the national government significant foreign relations powers.⁷⁷

To the extent that controversy surrounds these provisions, it generally relates to separation of powers, rather than the premise that government of the United States, in its totality, may exercise such authority.⁷⁸ Thus, in general there is no external check on the

ters of foreign policy and military affairs to the exclusive control of the National Government"); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (implying joint authoritative control of the war powers between the President and Congress).

76. Article I of the Constitution grants Congress the authority to:

declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; [t]o raise and support Armies . . . provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces; [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and t]o provide for organizing, arming, and disciplining, the Militia . . .

U.S. CONST. art. I, § 8, cls. 11–16. Article II further provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .” U.S. CONST. art. II, § 2, cl. 1; *see also* John B. Mitchell, “*Preemptive War: Is it Constitutional?*,” 44 SANTA CLARA L. REV. 497, 499 (2004) (discussing constitutional sources for federal national security powers); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 175–76 (1996) (same).

77. These include Congress’s authority to “regulate Commerce with foreign Nations . . . establish an uniform Rule of Naturalization . . . define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” and, through the Senate, to provide advice and consent regarding the making of treaties and the appointment of ambassadors. U.S. CONST. art. I, § 8, cls. 2–9, 10; U.S. CONST. art. II, § 2, cls. 1–2. The Constitution also provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties [and to] receive Ambassadors and other public Ministers.” U.S. CONST. art. II, § 2, cls. 2–3. Additionally, the President enjoys the residual foreign policy authority inherent in the office’s “executive Power” and in the duty to “give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient [and to] take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3.

78. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (“The national security, after all, is the primary responsibility and purpose of the Federal Government.”); *Youngstown*, 343 U.S. at 634–655 (Jackson, J., concurring) (Justice Jackson’s three-point analysis focuses on the structural allocation of authority between Congress and the President); *see also* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME passim* (1998) (generally adhering to this view); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 72 (1981) (“the Constitutional Fathers . . . divided authority over war and peace between the

use of these powers. This arrangement reflects the Framers' desire to avoid the shortcomings of the Articles of Confederation, both as perceived and as realized.⁷⁹

During the ratification debate, Federalists lauded the constitutional structure described above.⁸⁰ Through their vigorous dissent regarding the ultimate wisdom of this arrangement, the Anti-federalists confirmed the conclusion that the Constitution indeed provides the national government with these broad powers.⁸¹

B. Federal Authority over National Security Varies with the Territorial Context

Though vast, the national government's defense and foreign policy powers nevertheless wax and wane depending upon the territorial context. Specifically, the Constitution qualifies these powers when applied within the domestic sphere relative to their application abroad;⁸² this carries particular import as experience shows that the most dramatic and asymmetric threats arise at home.⁸³

President and Congress"); Delahunty & Yoo, *supra* note 2, at 488–93; Yoo, *supra* note 76, at 170–71 n.1–2, 170–73, 188–89; *supra* note 74 and accompanying text (discussing the unitary executive theory).

79. See *Printz v. United States*, 521 U.S. 898, 945–46 (1997) (Stevens, J., dissenting) (noting that the “method of governing [under the Articles of Confederation] proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient”); see also KEITH L. DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* 102–161 (2001); Yoo, *supra* note 76, at 256 (“Delegates came to Philadelphia to repair the defects of the Articles of Confederation, including what they saw as an inability to provide a sufficient defense against invasion.”).

80. See THE FEDERALIST NO. 23, at 120–25 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (justifying federal control of national defense and related military powers); THE FEDERALIST NO. 42, at 232 (James Madison) (Clinton Rossiter ed., 1999) (“This class of powers [foreign affairs] forms an obvious and essential branch of the federal administration.”).

81. See, e.g., BRUTUS, *Certain Powers Necessary for the Common Defense, Can and Should be Limited*, reprinted in THE ANTI-FEDERALIST PAPERS 57–62 (Morton Borden ed., 1965) (responding to THE FEDERALIST NO. 23 (Alexander Hamilton)). See generally CHARLES A. LOFGREN, “GOVERNMENT FROM REFLECTION AND CHOICE” CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM (1986) (portraying anti-federalist arguments as accepting the premise that the proposed Constitution greatly expanded national power).

82. Outside the issue of federalism, the Supreme Court has recognized that territoriality can affect the exercise of federal power even when confronting a security threat such as that posed by international terrorists. See *Rasul v. Bush*, 542 U.S. 466, 480–82 (2004).

83. Though the present Article concerns constitutionally imposed limitations on national power, it must be noted that statutes also shape how the federal government acts. Perhaps most famously, the Posse Comitatus Act prohibits the use of “any part of the Army or the Air Force” for domestic law enforcement, subject to some exceptions. 18 U.S.C. § 1385 (2000). See also 10 U.S.C. § 375 (2000) (providing for the Secretary of Defense to promulgate regulations to preclude activities that would otherwise “include or permit direct

This reflects James Madison's overriding principle that "[if] we are to be one nation in any respect, it clearly ought to be in respect to other nations."⁸⁴ The Constitution ensures that the United States presents a unified front to the world, without regard to the nature or imminence of any potential threat;⁸⁵ simultaneously, in order to safeguard the United States' structure as a "compound republic,"⁸⁶ the exigencies of presenting a united front externally are domestically balanced against the states' competing interests and contributions.

I. Congress and the President Enjoy Greater Discretion Abroad than at Home

The national government's military powers reach their zenith when exercised outside the United States. Not only does the Constitution grant the national government, led by a single executive, the means and ability to raise and maintain a standing army, float a navy, declare war, enter into treaties, and define "Offenses against the Law of Nations," but it also expressly forbids the exercise of such powers by the states.⁸⁷

An important exception to this scheme occurs in the domestic context of armed state militias, in which the states retain an interest.⁸⁸ In addition, certain liberty-protective limitations on military power, respecting the writ of *habeas corpus*⁸⁹ and the stationing of troops inside homes,⁹⁰ apply only within the domestic sphere.

participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar [domestic] activity unless participation in such activity by such member is otherwise authorized by law"). The National Guard is not "part of the Army or Air Force" for Posse Comitatus purposes. *United States v. Hutchings*, 127 F.3d 1255, 1257 (10th Cir. 1997).

84. THE FEDERALIST NO. 42, at 232 (James Madison) (Clinton Rossiter ed., 1999).

85. THE FEDERALIST NO. 23, at 121-22 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

86. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.")

87. U.S. CONST. art. I, § 8, cls. 1, 10-14; art. I, § 10, cls. 1-2.

88. U.S. CONST. art. I, § 8, cls. 1, 16; art. II, § 2, cl. 1; *see also* U.S. CONST. art. II, § 10, cl. 3 (a state's limited right to self defense if "actually invaded, or in such imminent Danger as will not admit of delay" implies the use of the militia *by the states* in the domestic context).

89. U.S. CONST. art. I, § 9, cl. 2.

90. U.S. CONST. amend. III.

From an operational perspective, the story remains the same, with national defense authority being relatively more expansive and less constrained overseas than at home. Some powers, such as letters of marque and reprisal⁹¹ and the navy,⁹² have little inherent domestic relevance. Others, such as the ability to raise armies,⁹³ declare and make war,⁹⁴ and repel invasions,⁹⁵ though internally relevant, in practice reach their maximum extent when used abroad.

Similarly, the national government's authority over relations with foreign nations differs markedly from the far more complex arrangements amongst the states and between them collectively and the federal government,⁹⁶ as the treaty and foreign relations powers granted to the federal government are forbidden to the states.⁹⁷

The non-conditional endowment of military and foreign relations powers on the national government when used abroad maximizes flexibility.⁹⁸ Debate relating to the proper use of this authority concerns absolute limits on power. It is thus not applicable to the *relative* distinctions of federalism.

91. U.S. CONST. art. I, § 8, cl. 11.

92. U.S. CONST. art. I, § 8, cl. 13.

93. U.S. CONST. art. I, § 8, cl. 12.

94. U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. II, § 2, cl. 1; *see also* Campbell v. Clinton, 203 F.3d 19, 26 (D.C. Cir. 2000) (Silberman, J., concurring) ("The Constitution grants Congress the power to declare war, which is not necessarily the same as the power to determine whether U.S. forces will fight in a war." (citing *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 668 (1863)). Scholars disagree as to the exact difference between the power to "declare" war and the power to "make" war, a distinction of the relative power of the Congress and the President. However, agreement exists that the federal government, not the states, enjoys a monopoly on this power except in the case of surprise attack. *Compare* Yoo, *supra* note 76 (arguing for expansive federal executive power), *with* LOFGREN, *supra* note 81, at 3–38 (arguing for shared power amongst the federal branches). The case of surprise attack constitutes an exception and, thus, an example of residual state authority within the larger, nationally oriented scheme.

95. U.S. CONST. art. I, § 8, cl. 15; art. I, § 9, cl. 2; art. II, § 2, cl. 1.

96. *Compare* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003) (holding state legislation regarding a foreign affairs matter preempted by federal action), *with* Printz v. United States, 521 U.S. 898, 935 (1997) (holding federal domestic legislation unconstitutional for seeking enforcement through commanded state action).

97. *See* U.S. CONST. art. I, § 10, cl. 1.

98. THE FEDERALIST NO. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."). The distinction to be made is that, taken together, the President and Congress hold a virtual monopoly on these powers when directed abroad.

2. In the Domestic Context, the Balance Between National and State Authorities Depends upon the Nature of the Conflict or Threat Faced

In the domestic sphere—the context in which the prior analysis suggests that the states participate—a distinction must be made between manifest threats, *i.e.*, actual or impending conflict, and more generalized threat conditions or potentialities. This is because the Congress and the President may only wield military force to combat domestic threats or conflicts contingent upon certain, albeit ambiguous, constitutional thresholds to which no foreign counterpart exists.⁹⁹

This distinction may be understood by reference to the Republican Guarantee Clause, which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”¹⁰⁰ This suggests national responsibility for protection against existential threats, with an existential threat being one likely to extinguish the state’s sovereignty and/or its form of government.¹⁰¹ Notably, the Constitution qualifies this mandate depending upon the nature and origin of the threat.

The national authority “shall protect each of [the states] against Invasion.”¹⁰² This represents an absolute compulsion with regard to the external threats represented by invasions, applicable whether

99. See *supra* note 83 (noting statutory limits on domestic use of the regular armed forces).

100. U.S. CONST. art. IV, § 4. The language in the clause referencing “Application of the Legislature, or of the Executive (when the Legislature cannot be convened)” points to the state, not federal, legislature and executive. Congress appears to recognize this reading. See 10 U.S.C. § 331 (2000) (“Whenever there is an insurrections [sic] in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.” (emphasis added)).

101. The Republican Guarantee Clause “has never been enforced by the judiciary because, ever since *Luther v. Borden* in the 1840s, the Supreme Court says that cases under it are not justiciable.” *TRANSCRIPT The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates, Edited Transcripts from the Panel Discussions Held in Phoenix, Arizona on November 3rd and 4th, 1995*, 28 ARIZ. ST. L.J. 17, 29–30 (1996) (quoting Professor Erwin Chemerinsky citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)) [hereinafter *Chemerinsky Transcript*]; see also *Baker v. Carr*, 369 U.S. 186, 222–23 (1962). For present purposes the clause is important because of what it implies about the relationship between state and federal governments during times of crises.

102. U.S. CONST. art. IV, § 4.

one is imminent or merely possible.¹⁰³ This broad mandate, coupled with the federal government's open-ended national security powers,¹⁰⁴ makes nearly any national action aimed at invasions, real or reasonably imagined, arguably constitutional.

By contrast, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."¹⁰⁵ Even though the threat may be equivalent to an invasion, the Framers here believed that the domestic context was sufficiently distinct to require some limitation on national action.

At the time of the Constitution's drafting, many feared that the national government's powers might be misappropriated, thus risking the states' republican form of government.¹⁰⁶ Therefore, while the national interest in preservation may be paramount when facing an external threat, the Constitution conditions the federal response to even the gravest "domestic Violence" upon the consideration of the citizenry of the state in question.¹⁰⁷

Other provisions similarly suggest respect for federalism during domestic emergencies. Though the Constitution does not define war,¹⁰⁸ it does envision conflict, broadly speaking, taking place within the United States. The Constitution's approach to these situations can be divided into two general categories, those of invasion and of domestic unrest. As previously suggested, the first implicitly originates abroad, while the second derives from within.

Coupled with the extensive, open-ended federal military and foreign relations powers, the Republican Guarantee Clause might be taken to suggest that, in cases of invasion, the national authority acts without domestic constraint. This is not, strictly speaking, cor-

103. Note that at the time of the Constitution's framing, given the size and level of development of the former Colonies relative to potential adversaries and the knife's edge experience of the Revolution, an invasion would almost invariably have presented an existential threat. This understanding of invasions generally comports with the function of the Republican Guarantee Clause.

104. See *supra* Part II.A.

105. U.S. CONST. art. IV, § 4 (emphasis added); see also 10 U.S.C. § 331 (2000) (adhering to this scheme in the event of "an insurrections [sic] in any State against its government").

106. See LOFGREN, *supra* note 81, at 44.

107. Read literally, the Republican Guarantee Clause requires that either the state's legislature or governor be in power, thus arguably allowing the national government to intervene if domestic violence has already overthrown a state's republican government, having made it impossible for either the governor or the legislature to act.

108. See HEYMAN, *supra* note 2, at 19 ("Surprisingly, the term 'war' is without real definition in either the law of the United States or the law of nations.").

rect. Within the domestic sphere, the Constitution places several liberty-enhancing limitations that operate *even in the case of an actual invasion*.¹⁰⁹

For instance, Congress must “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”—thus necessity itself in the form of an invasion or insurrection does not federalize the militia.¹¹⁰ Similarly, neither the writ of *habeas corpus* nor the prohibition on soldiers being stationed in private homes becomes suspended *by the event* of an invasion.¹¹¹

The comparison of the Constitution’s approach to conflict in the foreign and domestic spheres may appear an exercise in academic technicalities. The United States does and should retain broad authority to provide for the national defense, exclusive of state interference. The outlines of this scheme, which favor national power in many situations, have long enjoyed support; notably, “[t]he explicit restrictions on state war-making in the Constitution received almost no attention, adverse or otherwise, in the state [ratification] debates.”¹¹² Instead, the crucial distinction reflects the *relative* divergence between the constitutional exercise of national security authority within the United States as compared to outside its borders.¹¹³

109. See U.S. CONST. art. I, § 8, cl. 15 (the militia is not automatically called forth in times of invasion but only upon provision of Congress); U.S. CONST. art. I, § 9, cl. 2 (the writ of *habeas corpus* is not automatically suspended in times of invasion but only as required); U.S. CONST. amend. II (the state militias retain the independent right to bear arms at all times); U.S. CONST. amend. III (war, including necessarily an invasion, does not automatically allow for troops to be stationed in private homes, as such may only occur by operation of law).

110. U.S. CONST. art. I, § 8, cl. 15.

111. See U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. amend. III. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (“Our Federal Constitution contains a provision explicitly permitting suspension [of the writ of *habeas corpus*], but limiting the situations in which it may be invoked Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause’s placement in Article I.”).

112. LOFGREN, *supra* note 81, at 17.

113. The United States’ borders may not necessarily be the proper legal boundary in a particular matter related to terrorism or national security. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 475–85 (2004). Though their exact parameters may be difficult to map out, for present purposes the important point is that the Constitution largely distinguishes between domestic and foreign spheres.

*C. States Perform National Security Functions
in Relation to the Territorial Context*

1. States Supplement National Power

The Framers incorporated limited but significant state roles regarding national defense and homeland security. These accommodations, which resulted from widespread concern that unchecked national power would lead to inefficiencies and, at worst, risk tyranny,¹¹⁴ stand out in part because in some cases they appear alongside absolute prohibitions on state action in similar situations.

The Constitution unequivocally states that “[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal, coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; . . . or grant any Title of Nobility.”¹¹⁵ This provision contrasts with the clause following it:

No State shall, *without the Consent of Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay.*¹¹⁶

This second clause represents a unique divergence from the general scheme allocating national defense to the federal government, particularly in the context of domestic emergencies. As at least one scholar has noted, “this is the only explicit reference to [surprise attack] in either the completed Constitution or the earlier drafts.”¹¹⁷ Given the mortal danger inherent in a surprise attack, especially at the time of the Philadelphia Convention, the Framers pragmatically “felt it necessary to explicitly grant emer-

114. See LOFGREN, *supra* note 81, at 44 (finding that with respect to liberty “the Antifederalists . . . portrayed the Constitution’s allowance of a peacetime standing army as an opening for tyranny”); *id.* at 16 (noting that, respecting the provision of an efficient defense, the Constitution was written at a time “when communications and transportation would not have allowed an immediate federal response to a truly surprise attack . . . the real problem would have been whether states might act prior to a national decision”).

115. U.S. CONST. art. I, § 10, cl. 1.

116. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

117. LOFGREN, *supra* note 81, at 15; see also REVELEY, *supra* note 78, at 40 (“The states, of course, are the beneficiaries of the Constitution’s only explicit indication that a need for speed may justify combat unauthorized by Congress.”).

gency military powers to the states rather than to the national executive, probably on the assumption that state militia would bear the first brunt of repelling sudden attack."¹¹⁸ As a consequence, the states possess constitutionally delegated emergency powers.

Beyond their position as emergency first responders, Article I, section 10, clause 3 also hints at a broader role for the states as permissible instruments of national defense. Restating the proposition in affirmative language, *given* Congressional consent, states *may* "lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War," and they *may also* independently "engage in War . . . [when] actually invaded, or in such imminent Danger as will not admit of delay."¹¹⁹

Comparison with Article I, Section 10, clause 1 illuminates the matter since it provides a total ban, even though the prohibited powers might also have been, from Congress's point of view, useful tasks for states to perform at its direction.¹²⁰ The difference is that conditionally-permitted state actions go directly towards effective national defense, whereas those absolutely prohibited are of a more general character touching upon the presentation of a united front to the world.

2. In the Domestic Context, State Authority Respecting National Security Depends upon the Nature of the Conflict or Threat Faced

The conditional approach to state action present in section 10, clause 3 of Article I provides two insights.

First, the Constitution limits state action to something akin to self-defense, which is by definition self-focused and thus domestic. Second, the prohibition lifts for two categories of emergencies, either when "actually invaded, *or* in such imminent Danger as will not admit of delay."¹²¹ Critically, it speaks of "imminent Danger," not imminent *invasion*. It thus suggests that the states may respond to crises *other than* extraterritorial invasions that occur within their

118. REVELEY, *supra* note 78, at 60. While much has changed in the over two hundred years since ratification, it is worth noting as related at the outset that the Air National Guard provided the first military response to the attacks of September 11. *See supra* Part I.

119. U.S. CONST. art. I, § 10, cl. 3.

120. U.S. CONST. art. I, § 10, cl. 1.

121. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

borders. This difference implies a distinction between foreign and domestic threats.

In the first instance, state responses to external dangers are severely limited to those cases where foreign troops have already occupied state territory, as in the case of an actual invasion. In other words, the states' independent role in externally-oriented defense is limited to situations of actual conflict. This makes sense in light of the United States' absolute responsibility to "protect each of [the states] against Invasion."¹²² It also represents a rational principle of self-help where reliance on the alternative, national forms of defense might be untenable.

In contrast, the states may themselves respond to "imminent Danger."¹²³ This most properly encompasses domestic unrest, those actual domestic conflicts other than invasions, as well as imminent threats of such hostilities. Taking the Republican Guarantee Clause, together with the "imminent Danger" language in Article I, section 10, the Constitution here defines a discrete role for states in confronting grave domestic conflicts or threats.

In the breach, the states comprise legitimate emergency first responders. The national government might underestimate domestic unrest,¹²⁴ or lack the capacity to respond given a posturing of resources to meet the paramount concern of foreign invasion or attack.¹²⁵ Therefore, the Constitution's allowance for the states to respond independently to surprise attack makes it more likely that at least some sovereign force shall be both empowered *and* attentive in all eventualities.¹²⁶ Moreover, the qualifications on federal

122. U.S. CONST. art. IV, § 4. The President's Oath of Office interestingly contains the only other occurrence of the word "protect" found in the Constitution outside the Republican Guarantee Clause. U.S. CONST. art. II, § 1, cl. 8 ("I do solemnly swear (or affirm) that I will . . . *preserve, protect and defend* the Constitution of the United States.") (emphasis added)).

123. U.S. CONST. art. I, § 10, cl. 3.

124. Domestic threats (as distinct from conflicts) may be inherently harder to gauge for two reasons. First, the liberty-protective goal of the federal system and the Bill of Rights counsels respect for domestic criticism of established and majority interests, thus making it difficult to sort permissible from seditious threats (again, conflicts are more clear-cut). Second, foreign threats are, by nature, more suspect than domestic threats due to the lack of domestic ties and allegiances, as well as the relatively greater difficulty of gathering clarifying information regarding them.

125. For example, reflecting Cold War influences, on September 11, 2001, large portions of the United States arsenal, including stealth bombers, nuclear missiles, submarines, overseas military bases, and heavy (tank) divisions were irrelevant in kind and location to the problem at hand—hijacked civilian aircraft domestically employed as missiles against urban targets.

126. Under the Articles of Confederation, the states filled a similar role, though for different reasons. See DOUGHERTY, *supra* note 79, at 105 ("[During Shays' Rebellion] [s]tate

authority within the United States serve to limit the potential for abuse. In this sense, the Republican Guarantee Clause's legislative action requirement provides a rough test that the danger is in some sense "real." It does so by requiring, outside the more clear-cut situation of an invasion, that a separate and sovereign state government pre-approve armed federal intervention within its territory.

Limits on the federal authority to call up the state militias contained in the Militia Clauses,¹²⁷ though now stretched to the point of possible unconstitutionality,¹²⁸ support the interpretation above. As a default, these limits should leave the militias at the states' disposal for confronting either internal threats or actual conflict.¹²⁹

*D. Emergency Federalism Distinguishes Existential
and Non-Existential Threats*

Through its assignment of security responsibilities along a continuum, the Constitution evidences an awareness of potential differences both between foreign and domestic spheres, as well as between perceived threats and actual conflicts. With respect to manifest conflicts, the federal government takes a leading role while the states retain certain distinct responsibilities. At the other extreme, the states regulate matters of non-national concern.¹³⁰

These two poles might be understood as embodying total war and total peace. Potential domestic threats exist somewhere in between. Here the Constitution envisions the federal government and the states as co-equal actors. In other words, the states carry out pre-conflict homeland security on behalf of a country that collectively concerns itself with broader issues of national, externally oriented defense and foreign policy.

militias allowed Massachusetts and New York to pursue the insurgents according to local interests, when it was clear that the union would not come to their aid.”).

127. U.S. CONST. art. I, § 8, cls. 15–16.

128. See *supra* Part VI.A (critiquing the modern “dual enlistment” system in light of the post-September 11 experience).

129. See U.S. CONST. art. I, § 8, cl. 15; see also *infra* Part IV.

130. While the regulatory power of the federal government has vastly expanded over the past century, under the Constitution the states nonetheless retain their roles as the level of government properly oriented towards “everyday” issues ranging from law enforcement to public education.

1. The Constitution Envisions Primary Federal Responsibility for Existential Threats and Conflicts

Those conflicts and threats previously shown to be considered of national importance, such as war, invasion, or rebellion,¹³¹ share a common trait: on their face they pose potentially existential challenges. This emphasis on national power reflects a conscious design principle.¹³² In arguing that “[t]he authorities essential to the common defense . . . ought to exist without limitation,” Alexander Hamilton employed the language of existential threat, noting that “[t]he circumstances that *endanger the safety of nations* are infinite.”¹³³ Though federal authority may engage the world in a variety of ways well short of life-and-death struggles, federal power was designed to allow sufficient flexibility and muscle to address existential threats, including actual conflicts.

At home, the Framers also provided the federal government with primacy for ensuring the continuity of republican government.¹³⁴ While the Republican Guarantee Clause may not have proven to be greatly important in practice,¹³⁵ its orientation, along with other elements of the Constitution’s emergency framework, suggests a degree of national responsibility for those threats that endanger the most basic defining characteristic of the states—their form of government.¹³⁶

2. States Supplement National Responses to Existential Threats, While Maintaining Primary Responsibility for Less Fundamental Domestic Concerns

In times of emergency, the Constitution envisions a discrete, though important, role for the states. When no crisis exists, the states operate as the primary caretakers of domestic peace. The

131. See *supra* Part II.A–B.

132. See generally LOFGREN, *supra* note 81, at 3–38; DOUGHERTY, *supra* note 79.

133. THE FEDERALIST NO. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis added).

134. U.S. CONST. art. IV, § 4; see DOUGHERTY, *supra* note 79, at 167 (“The new constitution would improve the defense of the nation and thereby protect *state independence*. Without an effective general government, the states might be overrun by foreign invaders and *lose their sovereignty* entirely. ‘New York’s *existence as a state*,’ wrote [Robert] Livingston [during the ratification debate in New York], ‘depends upon a strong and efficient government.’” (emphasis added)).

135. See *Chemerinsky Transcript*, *supra* note 101, at 29–30.

136. See generally Part II.B.2.

states' orientation with regard to homeland security reflects the inverse of the federal position: one expands as the other contracts.

The Framers justified national primacy over the military and foreign affairs upon necessity grounds. During the ratification debates, John Jay tied support for federal authority as the best means to ensure public safety to an existential definition of safety "as it respects security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes."¹³⁷

Nevertheless, the Constitution provides that the states may confront even the most serious threats.¹³⁸ Provisions related to the writ of *habeas corpus*¹³⁹ and stationing troops inside homes,¹⁴⁰ as well as limitations on the federal ability to marshal the militia,¹⁴¹ state appointment of militia officers,¹⁴² and the Second Amendment,¹⁴³ provide either conditional or absolute limits on federal power. In total, these allowances evidence an extension of federalism to the most troubled of times.

Besides maintaining the militia and serving as a potential first line of defense against surprise attack, at least two other aspects of the constitutional scheme envision state involvement during times of existential threat. First, Congress may authorize the states to provide military assistance beyond the militia system in the form of *state* "Troops, or Ships of War in time of Peace."¹⁴⁴ Thus, Congress may employ state military forces as a deterrent to potential external threats (*i.e.*, "in time of Peace") that would otherwise fall within the exclusive purview of the federal government.

Second, any person charged with treason, the ultimate crime against the *nation*,¹⁴⁵ "who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the

137. THE FEDERALIST NO. 3, at 10 (John Jay) (Clinton Rossiter ed., 1999). At the time, "foreign arms and influence" posed a very real threat to the nation's existence. Thus, by tying the definition of domestic security concerns to these foreign threats, Jay defined both in existential terms.

138. U.S. CONST. art. I, § 10, cl. 3; U.S. CONST. art. IV, § 4. See generally *supra* Part II.C.

139. U.S. CONST. art. I, § 9, cl. 2.

140. U.S. CONST. amend. III.

141. U.S. CONST. art. I, § 8, cl. 15.

142. U.S. CONST. art. I, § 8, cl. 16.

143. U.S. CONST. amend. II.

144. U.S. CONST. art. I, § 10, cl. 3 (emphasis added). Since the states always retain the right to maintain a militia, the reference here to troops and naval ships equates to regular forces of the kind otherwise reserved to the national authority.

145. U.S. CONST. art. III, § 3, cl. 1 (Treason consists "only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.").

State from which he fled, be delivered up, to be removed *to the State* having Jurisdiction of the Crime.”¹⁴⁶

The states, of course, also retain general police powers over a host of crimes beyond treason.¹⁴⁷ In keeping with this principle, emergency federalism provides that the states serve as the primary guarantors of domestic peace and security in most times and against most non-existential threats. While the federal power may appear vast, it nonetheless remains bound by the Constitution. Outside of war, invasion, or insurrection, violence and threats of a more limited, dispersed, and/or individualized nature exist. The constitutional structure puts the states at the forefront of confronting such challenges.

III. PROMOTING SECURITY AND PROTECTING LIBERTY THROUGH FEDERALISM

Having observed that the Constitution adheres to federalism even on national and homeland security matters, a motivating rationale must be sought to explain *why* the Framers’ extended the doctrine into this realm.

Two primary forces emerge that explain the Constitution’s embrace of emergency federalism—security and liberty. The Framers understood that the states could promote both liberty and efficacy interests, thereby protecting basic rights while also furthering the nation’s security. These theoretical, systemic advantages were incorporated into the Constitution because of analogous challenges present in the late Eighteenth Century.

Since September 11, many have grappled with a problem common to times of war: how to ensure that the United States enjoys both liberty *and* security.¹⁴⁸ Thus, the Framers’ design remains particularly relevant today.

146. U.S. CONST. art. IV, § 2, cl. 2 (emphasis added); *see also supra* Part IV.B. (providing a fuller discussion of treason and the Extradition Clause).

147. *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (holding that because the federal government is one of limited powers, “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States” (citing *United States v. Lopez*, 514 U.S. 549, 566 (1995))).

148. *See, e.g.*, HOMELAND SECURITY, *supra* note 42, at 48 (“We are a Nation built on the rule of law, and we will utilize our laws to win the war on terrorism while always protecting our civil liberties. . . . Where we find our existing laws to be inadequate in light of the terrorist threat, we should craft new laws carefully, never losing sight of our strategic purpose for waging this war—to provide security and liberty to our people.”); David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1760 (2004) (noting

A. *Emergency Federalism Promotes Security*

Political and legal theorists have advanced a number of hypotheses regarding the potential efficiency benefits to be derived from federalism.¹⁴⁹ It has been suggested that “the public finance and the public choice perspectives . . . [offer] persuasive arguments suggesting that federalism, *if properly designed*, offers substantial advantages over unitary governments.”¹⁵⁰ The explanation for such a result flows from “[e]conomic theory[,] [which] suggests that the appropriate level of government to provide a given public good critically depends on the degree of spatial nonrivalry of that good.”¹⁵¹

Of course, the Framers lacked access to modern theories that explain how federalism might advance important efficiency interests. However, this does not mean that they lacked their own conception of how the Constitution’s framework could provide a more efficient and security-enhancing system of government.

The Framers drafted the Constitution to address infirmities observed under the Articles of Confederation.¹⁵² These were identified with the Confederation’s manifest inefficiencies:

The truth is that the great principles of the Constitution proposed by the convention may be considered less as absolutely new than as the expansion of principles which are found in

modern terrorism “dramatically raised the bar for the scale of carnage that terrorists are willing to inflict [which] pose[s] a real threat[] to our security and in turn to our liberty”); Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 484 (2002) (“The true values here are liberty, privacy, the rule of law, and safety.”). See generally WILLIAM H. REHNQUIST, *supra* note 78 (providing a historical overview of the tension between liberty and security concerns during times of war).

149. *E.g.*, WALLACE E. OATES, *FISCAL FEDERALISM passim* (1972) (expanding on public choice theory); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (providing a classic formulation of the advantages of sorting, whereby “[t]he consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods . . . [thus] [t]he greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position”); see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1549–50 (1994); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987); Susan Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152, 154–57 (1981).

150. McKinnon & Nechyba, *supra* note 9, at 47. See also Tiebout, *supra* note 149, at 418 (providing theoretical support for this conclusion). Some have argued that particular applications of federalism might also lead to inefficient results and diminished safety. See, *e.g.*, *Printz v. United States*, 521 U.S. 898, 940–41 (1997) (Stevens, J., dissenting); Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 601–02 (2004).

151. McKinnon & Nechyba, *supra* note 9, at 6.

152. See generally DOUGHERTY, *supra* note 79, at 129–61.

the Articles of Confederation. The misfortune under the latter system has been that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of enlargement which gives to the new system the aspect of an entire transformation of the old.¹⁵³

Perhaps more than any of his contemporaries, Alexander Hamilton argued that sweeping national powers were necessary in order to provide for the common defense “[b]ecause it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.”¹⁵⁴ Any other arrangement would be less efficient and potentially fatal to the young republic. The specific powers actually granted to the national government represent the practical implementation of the Federalists’ vision.

When they felt it was necessary for the nation’s security, the Framers knew how to delegate authority not subject to state limitations.¹⁵⁵ After all, “[o]ne of the major reasons for the Constitution, claimed the Federalists, was the Confederation’s inability to raise armies; surely, therefore, the Federalists did not intend to deny this power to the new government.”¹⁵⁶

By the same token, the Framers’ inclusion of the states within the larger sphere of the common defense¹⁵⁷ evidences a conscious judgment that the provision of security turns upon the context. The inclusion of the Militia Clauses¹⁵⁸ bears on this point, as it balances Hamilton’s national exigencies with “the concern that the states’ local needs for the militia would be unmet if the militia was often in federal service.”¹⁵⁹ The Constitution’s respect for state au-

153. THE FEDERALIST NO. 40, at 219 (James Madison) (Clinton Rossiter ed., 1999).

154. THE FEDERALIST NO. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis in original omitted).

155. See, e.g., U.S. CONST. art. I, § 8, cl. 12 (providing for a standing army). State interests were of course still expressed indirectly, for example through the state selection of Senators and the Electoral College. See also LOFGREN, *supra* note 81, at 14 (noting that, during the Constitutional Convention, “limitations [on the ability of the states to independently engage in war,] even stricter than those which had been included in the Articles [of Confederation,] emerged during the deliberations of the Committee on Detail” (citations omitted)); *id.* at 17 (noting that these “explicit restrictions on state war-making in the Constitution received almost no attention, adverse or otherwise, in the state debates”).

156. LOFGREN, *supra* note 81, at 46.

157. See *supra* Part II.

158. U.S. CONST. art. I, § 8, cls. 15–16.

159. Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 927 (1988); see also *id.* at 959 (“The militia clauses were designed to give the

thority safeguarded the militias' position as emergency first responders, in times of either local or national need.

The security and efficiency concerns evident in the Constitution's adherence to federalism extend to coordination on issues of national concern. Alexander Hamilton anticipated the arrangement of states as sovereign instruments applied towards certain shared national objectives:

[T]he laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*, and will be rendered auxiliary to the enforcement of its laws.¹⁶⁰

As shown here, even an arch-Federalist such as Hamilton recognized that, at some level, the Constitution incorporated limits on the ability of the federal authority to incorporate the states "into the operations of the national government."

Even assuming the Framers were in fact motivated by an efficiency rationale, the realities of the Twenty-First Century might make federalism a less useful doctrine. For instance, modern public goods theory holds that "[t]he national nonrivalry embodied in national public goods . . . gives rise to large cost advantages to central governments."¹⁶¹ National defense generally, or something like a nuclear shield specifically, constitutes the prototypical public good for provision at the national level.¹⁶²

Emergency federalism deals with a broader range of public goods than those that exclusively fall within the national sphere. With respect to defense provisions, the Framers acted in part based upon the failures observed during Shays' Rebellion.¹⁶³ At that time, "[a]ll states gained public, nonexcludable benefits from the suppression of Shays' Rebellion . . . But only Virginia and the New

federal government access to the citizen army in emergencies while leaving the states with their own militias at all other times.").

160. THE FEDERALIST NO. 27, at 145 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

161. McKinnon & Nechyba, *supra* note 9, at 7 (emphasis in original omitted).

162. *Id.*

163. See generally DOUGHERTY, *supra* note 79, at 103–61 (discussing Shay's rebellion).

England states received the private, excludable benefits needed to encourage contributions."¹⁶⁴ While they may have been unable to articulate the problem in such modern terms, the Framers understood the issue and acted accordingly, for example by creating a national monopoly on war making.¹⁶⁵

Yet the Framers also recognized that not all conflicts or threats present the same set of issues, the same mix of costs and benefits, as an armed rebellion.¹⁶⁶ A localized, non-specific domestic threat might challenge a state first and foremost. By contrast, a large-scale invasion or rebellion demands relatively greater and more immediate national attention, though not to the exclusion of the state in which it takes place. Thus, emergency federalism derives from the observation, made in the context of different but analogous challenges observed over two centuries ago, that the common defense may best be served by applying the relative strengths of both state and federal authorities.

B. Emergency Federalism Serves Important Liberty Interests

The Constitution was "built on the assumption that liberty [is] best secured through a rigorous commitment to federalism and separation of powers."¹⁶⁷ It protects liberty both directly, through the Bill of Rights, and indirectly, through the institutional structure of government itself. According to one commentator, these "two approaches—the institutional one and the one promoting individual rights—are profoundly distinct [therefore] the foundation of the institutional approach derives from an acknowledgment of the autonomy of supraindividual bodies [*i.e.*, states] within any well-conceived constitutional theory."¹⁶⁸ Under this construction, "an institutional or group-oriented approach [*i.e.*, federalism] is a necessary complement to the individual-rights-oriented approach to protecting individuals."¹⁶⁹ The Supreme Court likewise recognizes

164. *Id.* at 106.

165. U.S. CONST. art. I, § 8, cl. 11.

166. Shays' Rebellion presented a grave threat to the young nation; lasting several months, it included an attempted assault on the national arsenal in Springfield, Massachusetts. See DOUGHERTY, *supra* note 79, at 103–04.

167. Young, *supra* note 5, at 1284.

168. Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 SUP. CT. REV. 341, 374.

169. *Id.*

that “[t]his separation of the two spheres is one of the Constitution’s structural protections of liberty.”¹⁷⁰

The idea that federalism might promote civil liberties in a meaningful way may appear anathema to some, in particular “[t]o many liberals, [because] ‘states’ rights’ is almost synonymous with the old South and Jim Crow.”¹⁷¹ Yet, as the War on Terror illustrates, national policies can also give rise to serious civil rights concerns.¹⁷² This should not suggest a blind embrace of federalism. Rather, it recommends balance, as “the autonomy of the states and the idea of limited national power are no less important bulwarks of individual liberty than the more familiar provisions of the Bill of Rights.”¹⁷³ Neither liberty-protective mechanism—the doctrine of federalism or the Bill of Rights—should be dismissed out of hand.

During the ratification debates, the Framers championed federalism as an institutionalized, liberty-enhancing system. James Madison assured contemporaries that as “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. . . . The different governments will control each other, at the same time that each will be controlled by

170. *Printz v. United States*, 521 U.S. 598, 921 (1997).

171. Ford, *supra* note 7; *see also*, Foer, *supra* note 5, at 13; Editorial, *Scrutinizing John Roberts*, *supra* note 11.

172. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952))); Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1 (“[T]he director of central intelligence . . . could not assure Congress that the Central Intelligence Agency’s methods of interrogating terrorism suspects since Sept. 11, 2001, had been permissible under federal laws prohibiting torture.”); *Man Convicted in Millennium Bomb Plot Is Sentenced*, WASH. POST, July 28, 2005, at A15 (during sentencing for the “Millennium Bomb Plot,” U.S. District Judge John C. Coughenour criticized tactics employed in the War on Terror by arguing that the United States does “not need to use a secret military tribunal, detain the defendant indefinitely or deny the defendant the right to counsel”); Sanger, *supra* note 71 (reporting that the President had authorized the National Security Agency to wiretap telephone conversations without court warrants). *But see* Gary Fields & Anne Marie Squeo, *Bipartisan Fix for Patriot Act Takes Shape: Both Parties in Congress Share Misgivings About Provisions on Libraries, Searches, Wiretaps*, WALL ST. J., Apr. 6, 2005, at A4 (noting bipartisan political support for the renewal of the Patriot Act, with civil liberty concerns limited to a few of the Act’s provisions); Eric A. Posner & Adrian Vermeule, *Judicial Cliches on Terrorism*, WASH. POST, Aug. 8, 2005, at A15 (critiquing the “sentiment that yesterday’s law enforcement procedures are adequate for today’s security threats—and that any deviation from them is a betrayal of the Constitution”); Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23 (supporting the rendition program).

173. Young, *Balance of Federalism*, *supra* note 5.

itself.”¹⁷⁴ In other words, the Constitution embodies the principle that “[s]ometimes it takes a government to check a government.”¹⁷⁵

The Framers extended federalism as a means to promote liberty by countering the risk of tyranny.¹⁷⁶ Federalism can advance state and individual liberty in a variety of ways.¹⁷⁷ However, the crucial observation is that modern federalism, developed in other contexts, receives *independent* justification in the specific context of armed conflict or threat most closely related to terrorism. This conclusion responds to the critique that, because modern federalism developed in a vastly different context, the doctrine “may fatally undermine national anti-terrorism efforts.”¹⁷⁸ It does so by suggesting that the Framers specifically took this concern into account for situations analogous to terrorism and nevertheless concluded that the proper balance includes states as co-guarantors of liberty.

IV. EMERGENCY FEDERALISM AS A PRACTICAL DOCTRINE

Having devised a distinct role for the states that promotes important security and liberty interests, the Constitution provides the states with the necessary power to serve those interests in a meaningful capacity. The Constitution’s adherence to federalism is not superficial. Rather, it is intended to be carried out in practice, and thus remains relevant with regard to homeland security and emergency response.

174. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999).

175. Young, *Welcome to the Dark Side*, *supra* note 5, at 1285.

176. See Rapaczynski, *supra* note 168, at 381 (“[T]he Framers did not believe that a bill of rights was a sufficient guarantee against the danger of ‘tyranny,’ and they insisted in the first place on institutional rather than individual-rights-oriented solutions. Some of these institutional arrangements were quite specific . . . but most had a more general purpose of fragmenting governmental authority and of creating special interest groups. In this category, next to separation of powers, federalism plays the most important role.”).

177. See Kramer, *supra* note 149, at 1485 (“There are, for example, huge literatures on how—depending on one’s take—federalism either . . . protects individual liberty or encourages tyranny.”); Young, *Welcome to the Dark Side*, *supra* note 5, at 1286–87 (arguing that, given the volume of academic writing on federalism, the opposite conclusion—that Federalism can retard liberty—also receives support). For present purposes, the crucial observation is that the Constitution supports federalism as a means for promoting liberty in emergency situations. See *infra* Part VI.C (positing at least one way in which this doctrine can actually be implemented so as to achieve liberty benefits).

178. Young, *Welcome to the Dark Side*, *supra* note 5, at 1291; see also *Printz v. United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting).

A. *The Constitution Grants the States Significant Martial Powers*

Even those Federalist Framers who supported a standing army admitted that “[t]he militia would be useful against foreign foes and in supporting the federal government in its domestic functions.”¹⁷⁹ From a constitutional standpoint, state militias serve a dual purpose. On the one hand, by default the militias remain creatures of the state under the authority of the governor.¹⁸⁰ On the other, the United States can call forth the militia knowing that it will already be trained in accordance with basic federal standards.¹⁸¹

Seeking to allay Anti-federalist fears that this balance risked too much national control, Alexander Hamilton argued: “The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. . . . [T]herefore, *the power of the President would be inferior* to that of either the monarch *or the governor.*”¹⁸² Regardless of whether Hamilton correctly characterized the exact counterpoise of this balance, his basic point remains undeniable: the Constitution envisions the militia as a significant instrument of state power, with a secondary federal role.

Absent compelling national necessity,¹⁸³ the militias should be available for use by the states. As George Nicholas argued during the Virginia ratification convention, “[t]here is a great difference between having the power in [these] three cases, and in all cases. [Congress] can not call [the state militias] forth for any other purpose than to execute the laws, suppress insurrections and repel invasions.”¹⁸⁴ Further support for this conclusion comes from the amendment during the Philadelphia Convention of the President’s commander-in-chief power to limit authority over the “Militia of

179. LOFGREN, *supra* note 81, at 44 (noting that the Anti-Federalists “regarded the militia [alone] as a reliable line of defense in peacetime”). The states sought to tweak the militia system and thus its utility by offering amendments to the proposed Constitution; of the seventy-five amendments offered by five of the eleven states that ratified the Constitution before the federal government began operation, “six [dealt] with the raising and maintenance of armies and control of the militia (*i.e.*, the war-supporting function).” *Id.* at 16.

180. U.S. CONST. art. I, § 8, cls. 15–16. The limited power of Congress to call forth the militia necessarily implicates its baseline embodiment as an entity of the state. *See id.*

181. *Id.*

182. THE FEDERALIST NO. 69, at 385 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis added) (comparing the proposed Presidential power to the power of Great Britain’s king and New York’s governor).

183. U.S. CONST. art. I, § 8, cl. 15.

184. Hirsch, *supra* note 159, at 930.

the several states” to times “when called into the actual Service of the United States.”¹⁸⁵

To the extent that today the National Guard may be called into federal service for purposes beyond those set forth in the Constitution, this results largely from the peculiarities of the “dual enlistment” system, which acts as an end run around the Constitution’s restrictions.¹⁸⁶ The evolution of the state militias into the modern National Guard began a hundred years ago.¹⁸⁷ Given World War I and the Attorney General’s “opinion that the Militia Clauses precluded [the militias’] use outside the Nation’s borders,” in 1916 Congress effectively federalized the National Guard by stripping Guard members drafted into the regular army of their state positions.¹⁸⁸ While this arrangement secured troops for the army, it “virtually destroyed the Guard as an effective organization [because it] terminated the members’ status as militiamen, and the statute did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army.”¹⁸⁹ As a result, the law was amended in 1933 to create the dual-enlistment system, whereby “all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States.”¹⁹⁰

Since under dual-enlistment “a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard,”¹⁹¹ this arrangement avoids certain constitutional limitations.¹⁹² It reflects the opinion that, while “[t]he congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare . . . [,] it does not limit those powers.”¹⁹³

185. U.S. CONST. art. II, § 2, cl. 1; see REVELEY, *supra* note 78, at 90.

186. Under the dual-enlistment system, members of the National Guard are also enlisted as members of the National Guard of the United States, which is a reserve component of the regular federal armed forces. See *Perpich v. Dep’t of Def.*, 496 U.S. 334, 345–50, 347 n.19 (1990); 32 U.S.C. § 101(5), (7) (2000).

187. See *Perpich*, 496 U.S. at 341–43.

188. *Id.* at 343–44. This arrangement was upheld in *Selective Draft Law Cases*, 245 U.S. 366 (1918).

189. *Perpich*, 496 U.S. at 345.

190. *Id.*

191. *Id.* at 346.

192. See *infra* Part VI.A (discussing the wisdom and constitutionality of this arrangement).

193. *Perpich*, 496 U.S. at 350.

This scheme adheres to the constitutional structure, at least to a point.¹⁹⁴ In a review of this arrangement, the Supreme Court noted that it provides a gubernatorial veto over those “federal training mission[s that] interfere with the State Guard’s capacity to respond to local emergencies.”¹⁹⁵ Notably, the Court has not directly addressed what would occur if the National Guard was deployed out of state *before* an emergency arose.

The states must have the militias at their disposal in order to give meaning to the provision of state response to surprise attacks,¹⁹⁶ as well as to other emergencies that fall within their authority. Otherwise, the Constitution’s provision of state emergency response efforts and the express limitations on federal authority over the militia would ring hollow. Whether the defects of the system, highlighted by the present, unprecedented deployment of National Guard resources overseas at a time of heightened domestic threat, might render the dual-enlistment system unconstitutional if challenged today remains unknown.¹⁹⁷

B. The States Enjoy Certain Inviolable Powers

Being hardwired into the discrete constitutional provisions previously discussed, “[q]uite likely the states retain a few hard-core rights that limit national war powers, even after the passing of most other vestiges of federalism.”¹⁹⁸ This reflects the intent both to efficiently address an infinite array of threats and emergencies, and to

194. This should not suggest that the current level of adherence to the constitutional structure is sufficient or optimal. See *infra* Part VI.A (assessing the dual-enlistment system’s constitutionality and desirability).

195. *Perpich*, 496 U.S. at 351 (citing 10 U.S.C. § 672(f) (1988) (current version at 10 U.S.C. § 12301(f) (Supp. IV 2004))).

196. See U.S. CONST. art. I, § 10, cl. 2. A state’s response to these emergencies takes place in the absence of a national decision on the matter—*i.e.*, “[n]o State shall, without the Consent of Congress . . . engage in War, *unless*” implies that the militia has not already been called up by the national government. *Id.* (emphasis added).

197. As explored in Part VI.A, some of the assumptions upon which the constitutionality of the modern dual-enlistment system rests may no longer hold. Compare *Perpich*, 496 U.S. at 351 (“The Minnesota unit . . . is affected only slightly when a few dozen, or at most a few hundred, soldiers are ordered into active service for brief periods of time. . . . [Thus the state’s] ability to rely on its own Guard in state emergency situations, is [not] significantly affected.”), with Bob Anez, *Mont. Governor Predicts ‘Blowup’ Wildfires*, A.P., Mar. 4, 2005 (on file with the University of Michigan Journal of Law Reform) (reporting that the loss of National Guard equipment and personnel overseas jeopardized Montana’s ability to respond to wildfires), and Schmitt, *supra* note 38 (quoting the head of the National Guard Bureau as stating that, due to commitments in Iraq and Afghanistan, “the Guard [risks] be[ing] broken and not ready for the next time it’s needed, either here at home or for war”).

198. REVELEY, *supra* note 78, at 10.

protect state sovereignty (and therefore individual liberty) from national infringement.¹⁹⁹

Under the Constitution, the militia constitutes a hybrid force.²⁰⁰ This arrangement respects a continuity of state involvement in the militia regardless of its actual use. Alexander Hamilton alluded to this non-diminishing core of state “influence over the militia” when he asked:

What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary, while the particular States are to have the *sole and exclusive appointment of the officers*? If it were possible seriously to indulge [this fear], the circumstance of the officers being in the appointment of the States ought at once to extinguish it. *There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.*²⁰¹

Hamilton here reflects the belief that “[i]f militia officers were appointed by their friends at the state level . . . their ultimate loyalty would be to the state, and this would safeguard against federal oppression.”²⁰² The state appointment system also carries with it practical benefits, as it facilitates a rapid and locally knowledgeable response to crises.

The Second Amendment lends further support to the observation that the state militias retain effective local power that the

199. The case against federal control of the state militia, which ultimately led to the compromise contained in the Constitution, reflected both efficiency arguments (*e.g.*, “the fear that the federal government would call militiamen far away and harass them and the concern that the states’ local needs for the militia would be unmet if the militia was often in federal service”), and liberty concerns (*e.g.*, “the dominant concern of opponents of clause fifteen was that it would lead to domestic tyranny”). Hirsch, *supra* note 159, at 927 (citations omitted). See also *Perpich*, 496 U.S. at 340 (“On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.” (citations omitted)).

200. Hirsch, *supra* note 159, at 925 (“Clause sixteen represented a compromise. While Congress could prescribe methods of disciplining, arming, and organizing the militia, the states provided the actual training (except when the militia was called into federal service). In addition, the power to appoint militia officers was left with the states.”). See also U.S. CONST. art. I, § 8, cl. 16.

201. THE FEDERALIST NO. 29, at 154 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (second emphasis added).

202. Hirsch, *supra* note 159, at 925.

national government cannot defang.²⁰³ Its inclusion “ensured that the federal government would not disarm the militias.”²⁰⁴ As such the Second Amendment protects local armed power from being either entirely nationalized or disarmed.²⁰⁵

The Constitution requires the federal government to always weigh disagreements with the states as between quasi-equal, armed powers. In other words, the Second Amendment protects a duopoly on the state use of force. With this comes a check on sovereign power at both the state and federal level.²⁰⁶ More practically, by ensuring that the states remain armed, it allows them to independently and quickly act in response to emergencies without having to acquire weaponry, and thus permission, from a central authority.

Beyond strictly martial powers, states enjoy inherent police powers. The Constitution, in part through the Tenth Amendment,²⁰⁷ points to the state’s general police powers. State law enforcement activities may be useful in confronting a range of domestic security challenges, from situations of actual armed conflict to post-disaster disorder and organized crime.²⁰⁸ As a practical matter, the states collectively do possess enormous law enforcement resources.²⁰⁹

203. U.S. CONST. amend II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

204. Hirsch, *supra* note 159, at 925 n.35.

205. This conclusion can be reached without the need to resolve more controversial matters concerning an individual right to bear arms.

206. See THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1999).

207. U.S. CONST. amend. X (“The 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.”). See *Printz v. United States*, 521 U.S. 898, 923 (1997) (“[T]he Tenth Amendment imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers ‘not delegated to the United States.’”).

208. Recall that the Extradition Clause is not suspended in times of conflict, even for the extreme and relevant crime of treason. U.S. CONST. art. IV, § 2, cl. 2. See also DEP’T OF DEF., STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT, *supra* note 67, at 26 (“The employment of military forces to conduct missions on US territory is constrained by law and historic public policy. . . . Domestic security is primarily a civilian law enforcement function.”).

209. “A 2000 census of state and local law enforcement agencies counted over one million full-time law enforcement personnel, while a 2002 survey of federal law enforcement found approximately 93,000 full-time personnel.” Young, *supra* note 5, at 1280–81 (citing BRIAN A. REAVES & MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2000, at 1 (Oct. 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cslea00.pdf>, and BRIAN A. REAVES & LYNN M. BAUER, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: FEDERAL LAW ENFORCEMENT OFFICERS, 2002, at 1 (Aug. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf>).

This general conclusion gains considerable weight from the fact that the Constitution not only defines treason,²¹⁰ but the Extradition Clause authorizes *states* to demand the extradition of those charged with treason.²¹¹ Though perhaps surprising today, the Extradition Clause indicates an intentional and enduring role for state authorities in responding to, and dealing with, threats to national security through their criminal justice systems. This includes times of actual conflict, *i.e.*, “levying War,” or potential threat, *i.e.*, “adhering to their Enemies, giving them Aid and Comfort.”²¹²

V. EMERGENCY FEDERALISM AND THE WAR ON TERROR

Assuming that it may be permissible, the next question is whether emergency federalism is a desirable policy. In order to address this matter, terrorism and the War on Terror must be defined. Having done so, it becomes apparent that, with respect to federalism, the War on Terror consists of two elements, a war on terrorists and homeland security. This analysis concludes with observations regarding the application of the doctrine of federalism developed here to practical efforts that might benefit security and liberty.

A. Name That War

The United States is engaged in a War on Terror,²¹³ as “[t]he terrorists and their supporters declared war on the United States, and war is what they got.”²¹⁴ “‘War’ is neither a persuasive description of the situation we face nor an adequate statement of our objectives.”²¹⁵ Or perhaps, “[t]his is not a war, but a *state of emergency*.”²¹⁶

210. U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

211. See U.S. CONST. art. IV, § 2, cl. 2.

212. U.S. CONST. art. III, § 3, cl. 3.

213. The Supreme Court appears to accept the general concept of a ‘war on terror,’ although it has expressed concern with its undefined nature. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (“We recognize that the national security underpinnings of the ‘war on terror,’ although crucially important, are broad and malleable.”).

214. Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 96 (Jan. 20, 2004).

215. HEYMANN, *supra* note 2, at 19.

216. Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004).

Confronting terrorism contains elements of both a war and a crime.²¹⁷ “All terrorist acts are crimes,”²¹⁸ whether they take place at home or abroad.²¹⁹ Alternatively, maybe the United States is “fighting a worldwide Islamic insurgency—not criminality or terrorism.”²²⁰ Or perhaps it might be “a global struggle against violent extremism.”²²¹

Since September 11 the United States has engaged terrorists, and the problem of terrorism more generally, with significant vigor. The scope of what has taken place, from the creation of the Department of Homeland Security²²² to the passage of intelligence reform²²³ and the Patriot Act²²⁴ to the wars in Afghanistan²²⁵ and Iraq,²²⁶ far exceeds any counterterrorism effort that could have

217. See generally Feldman, *supra* note 148 (discussing the criminal and martial approaches to terrorism).

218. MIPT (Memorial Institute for the Prevention of Terrorism) Terrorism Knowledge Base, <http://www.tkb.org/Glossary.jsp> (last visited Nov. 30, 2006) [hereinafter Terrorism Knowledge Base]. This resource is supported by awards from the Memorial Institute for the Prevention of Terrorism and the Office for Domestic Preparedness of the Department of Homeland Security. MIPT web page, About TKB, <http://www.tkb.org/AboutTKB.jsp> (last visited Nov. 30, 2006).

219. 18 U.S.C. § 2331 (2000).

220. Michael Scheuer, *Imperial Hubris: Why the West is Losing the War on Terror* x (2004); see also *id.* at 239 (accepting the war modality).

221. Eric Schmitt & Thom Shanker, *Rumsfeld Seeks Broad Review of Iraq Policy*, N.Y. TIMES, Jan. 7, 2005, at A1, A11.

222. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

223. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408, 118 Stat. 3638.

224. *Patriot Act*, *supra* note 68.

225. See 9/11 REPORT, *supra* note 14, at 363 (including operations in Afghanistan as part of the War on Terror) (“Calling this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field, notably in Afghanistan.” (emphasis added)).

226. The question of whether the invasion of Iraq constitutes part of a larger War on Terror, or a diversion from it, remains an issue of considerable disagreement. This divergence was highlighted during the 2004 presidential campaign when President Bush asserted that “[i]n Iraq, we saw a threat, and we realized that after September the 11th, we must take threats seriously, before they fully materialize,” while challenger Senator John Kerry offered that “smart means not diverting your attention from the real war on terror in Afghanistan against Osama bin Laden and taking it off to Iraq.” Debate Transcript, Commission on Presidential Debates, Sept. 30, 2004, <http://www.debates.org/pages/trans2004a.html> (on file with the University of Michigan Journal of Law Reform). Parallels can be drawn suggesting that the situation in Iraq could create conditions similar to those that gave rise to Al Qaeda. Compare NAT’L INTELLIGENCE COUNCIL, MAPPING THE GLOBAL FUTURE: REPORT OF THE NATIONAL INTELLIGENCE COUNCIL’S 2020 PROJECT 94 (2004) (hereinafter 2020 PROJECT) (“Iraq and other possible conflicts in the future could provide recruitment, training grounds, technical skills and language proficiency for a new class of terrorists who are ‘professionalized’ and for whom political violence becomes an end in itself.”), with 9/11 REPORT, *supra* note 14, at 55 (“A decade of conflict in Afghanistan . . . gave Islamist extremists a rallying point and training field. . . . Young Muslims from around the world flocked to Afghanistan to join as volunteers in what was seen as a ‘holy war’—*jihād*—against an invader.”). See also Dana

been reasonably anticipated before that date.²²⁷ Yet, as the foregoing shows, surprisingly little agreement exists about the exact nature of the threat. No consensus exists as to whether the War on Terror falls more along the lines of the War on Drugs or the “Long War” against fascism and communism.²²⁸ No consistent legal definition of terrorism even exists.²²⁹

For the purposes of this Article, terrorism need not be defined with exacting specificity—it may very well be a war, a crime, both, or neither. Though not unimportant, from the viewpoint of federalism, such definitions miss the mark. Rather, following the analysis in Parts II and III, by mapping the Constitution’s general guidance about emergency federalism onto the *reality* of terrorism, terrorism can be assessed within the basic structure of federalism.

Such analysis suggests that, in terms of emergency federalism, the War on Terror exists on two planes: a war on terrorists and homeland security. While the states should play a role in both, their primary responsibilities fall within the latter category. Given this division, the priorities of the one, the war on terrorists, cannot totally override the other, homeland security.

Priest, *Iraq New Terror Breeding Ground: War Created Haven*, *CIA Advisers Report*, WASH. POST, Jan. 14, 2005, at A1 (“Iraq has replaced Afghanistan as the training ground for the next generation of ‘professionalized’ terrorists, according to a report released yesterday by the National Intelligence Council, the CIA director’s think tank.”).

227. See generally 9/11 REPORT, *supra* note 14, at 71–143, 174–214; DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR: RADICAL ISLAM’S WAR AGAINST AMERICA* 219–349 (Random House 2002).

228. See generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY passim* (Anchor Books 2002) (articulating the theory of the “Long War”). The Long War is defined to include “the First and Second World Wars, the Bolshevik Revolution and the Spanish Civil War, the Korean and Viet Nam Wars, and the Cold War.” *Id.* at 19.

229. See, e.g., 18 U.S.C. § 2331 (2000) (defining terrorism as a crime); 6 U.S.C. § 101(15) (Supp. IV 2004) (defining terrorism for homeland security purposes); 22 U.S.C. § 2656f(d) (Supp. IV 2004) (defining terrorism for purposes of State Department reporting requirements). See also INGRID DETTER, *THE LAW OF WAR* 23 (2d ed. 2000) (indicating that, of the current international conventions related to terrorism, “none of them contain any useful definition of terrorism; nor does the current literature on terrorism provide much clarification”); Ad Hoc Comm. established by Gen. Assembly resolution 51/210 of 17 Dec. 2006, *Report of the Ad Hoc Committee*, Annex II, art. 2, U.N. Doc A/57/37 (Jan. 28, 2002) (containing the proposed text of Article 2, defining terrorism, of the draft Convention on Terrorism). See also Ed McCullough, *Annan Calls for Treaty Outlawing Terrorism*, A.P., March 10, 2005 (on file with the University of Michigan Journal of Law Reform) (noting “[a]lthough the United Nations and its agencies already have 12 treaties covering terrorism, a universal definition has been elusive”).

B. Defining Terrorism

Regardless of whether terrorism should be fought with the military, law enforcement, or something else, at its heart “[t]errorism is a tactic used by individuals and organizations to kill and destroy.”²³⁰ Focusing on terrorism as a tactic, “[t]errorism is violence, or the threat of violence, calculated to create an atmosphere of fear and alarm. These acts are designed to coerce others into actions they would not otherwise undertake, or refrain from actions they desired to take.”²³¹ In sum, in the War on Terror “[t]he enemy is terrorism—premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”²³²

Though not in agreement on the specifics, both United States law and international law generally agree with this approach, which holds that terrorism involves intentional violence, or the threat of violence, that seeks to coerce or manipulate towards a particular end, an end that is effective at the societal or national level.²³³

Thus, at least in part, terrorists can be defined in relation to the tactics they employ. Thus, terrorists are those individuals or organizations that, either directly or indirectly, seek to carry out terrorist acts.²³⁴ As history shows, terrorists may be individuals, non-state actors, nation states, or some unholy alliance of the three. The general objective of “[t]hose who employ terrorism, regardless of their specific secular or religious objectives, [is] to subvert the rule of law and effect change through violence and fear.”²³⁵

C. The War on Terrorists and Homeland Security

It remains to be determined how terrorism fits into the overall scheme of federalism. Upon consideration, it appears that the War on Terror properly divides into two categories, the war on terrorists and homeland security. The states are in a position to aid in both, though more significantly in the latter category.

230. 9/11 REPORT, *supra* note 14, at 363.

231. Terrorism Knowledge Base, *supra* note 218; *See also* DETTER, *supra* note 229, at 23 (concluding that “[t]errorism is thus basically ‘extortionate’”).

232. NATIONAL STRATEGY, *supra* note 2, at 1.

233. *See supra* note 229.

234. *See, e.g.*, Terrorism Knowledge Base, *supra* note 218 (defining terrorism and its relation to acts committed by terrorists).

235. NATIONAL STRATEGY, *supra* note 2, at 1.

1. Learning from the Experience of Terrorism

The United States' response to terrorism cannot be considered outside the experience of September 11.²³⁶ While the country had been attacked before,²³⁷ including attacks by the same organization²³⁸ and a prior attack on the World Trade Center in New York,²³⁹ by any measure the actuality of September 11 stands alone.

Given the existence of other, prior plots evidencing similar intent, complexity, and potential fatalities,²⁴⁰ preventing "another September 11" or something worse, such as a "nuclear September 11," has become a top national priority. Significantly, in large part, existing counterterrorism efforts are aimed specifically at the perpetrators of September 11, Osama bin Laden and Al Qaeda, as well

236. See *supra* Part I.

237. The bombing on April 19, 1995 of the Murrah Federal Building in Oklahoma City, the worst prior domestic terror attack, resulted in 168 fatalities. See Oklahoma City National Memorial, <http://www.oklahomacitynationalmemorial.org/> (last visited Jan. 16, 2006); see also Terrorism Knowledge Base, *supra* note 218 (providing an Incident profile of the Oklahoma City Bombing). While true comparisons between such events cannot be made, by way of reference 2,973 people died on September 11; an estimated 16,400 to 18,800 people were in the World Trade Center complex at the time the first plane struck, which indicates the death toll could have been several multiples higher absent the heroic rescue and evacuation efforts. See 9/11 REPORT, *supra* note 14, at 311, 316; see also NAT'L INST. OF STANDARDS AND TECH., FEDERAL BUILDING AND FIRE SAFETY INVESTIGATION OF THE WORLD TRADE CENTER DISASTER (BRIEFING) 79 (2005), available at http://wtc.nist.gov/pubs/Media_Public_Briefing_040505_final.pdf ("Had the buildings been full, it is possible that as many as 14,000 people may have lost their lives based on rough estimates using existing models."). A more apt comparison might be to the December 7, 1941 surprise attack on Pearl Harbor, which killed 2,390. See National Park Service, U.S.S. Arizona Memorial, <http://www.nps.gov/u sar> (last visited Jan. 16, 2006).

238. See, e.g., 9/11 REPORT, *supra* note 14, at 115–19, 190–97 (detailing attacks against American embassies in Africa in August 1998 and against the U.S.S. Cole in October 2000).

239. See *id.* at 71–73.

240. One planned attempt, the Bojinka Plot, "intended bombing of 12 U.S. commercial jumbo jets over the Pacific during a two-day span." 9/11 REPORT, *supra* note 14, at 147. The Landmarks Plot sought to "bomb major New York landmarks, including the Holland and Lincoln tunnels." *Id.* at 72. Planned attacks around the millennial celebrations included multiple bombings in and around Jordan as well as an attack on the Los Angeles airport. *Id.* at 174–82. Even excluding those taking place in terrorist hot-spots such as Iraq and Israel, since September 11, several large-scale terrorist strikes against civilian targets have been carried out. See, e.g., Raymond Bonner, *Bombing at Resort in Indonesia Kills 150 and Hurts Scores More*, N.Y. TIMES, Oct. 13, 2002, § 1, at 1; C.J. Chivers & Steve Lee Myers, *250 Die as Siege at Russian School Ends in Chaos*, N.Y. TIMES, Sept. 4, 2004, at A1; Alan Cowell, *Subway and Bus Blasts in London Kill at Least 37*, N.Y. TIMES, July 8, 2005, at A1; Mona El-Nagggar & Greg Myre, *Blasts in Egypt Kill at Least 59 at Sinai Resort*, N.Y. TIMES, July 23, 2005, at A1; Eclaine Sciolino, *10 Bombs Shatter Trains in Madrid, Killing 192*, N.Y. TIMES, Mar. 12, 2004, at A1; Michael Wins, *At Least 67 Captives and 50 Chechens Die in Siege*, N.Y. TIMES, Oct. 27, 2002, § 1, at 1.

as similar terrorist groups or state sponsors known, or suspected, of engaging in terrorism.²⁴¹

2. The War on Terrorists

September 11 was an event of violence, embedded within a pattern of similar and attempted attacks.²⁴² The responses to September 11 specifically targeting Al Qaeda have ranged from domestic criminal investigations to military action overseas.²⁴³ The crucial question for this Article is how such efforts relate to the observed characteristics of emergency federalism.

Applying the overlay developed in Parts II and III, a battle such as that against Al Qaeda appears to fall within the category of conflicts in which the national government plays the leading role. It is, in brief, a "war on terrorists," that is, a war against those who organize and engage in terrorism. Al Qaeda has conducted missions both within and without the United States,²⁴⁴ with the objective of destroying the country as now constituted.²⁴⁵ Its use of hijacked aircraft and its interest in weapons of mass destruction, as well as its attacks on military installations, lend credence to its capacity to inflict substantial harm.²⁴⁶ As a known, albeit shadowy, entity, Al Qaeda poses the type of threat that the Framers believed the federal authority should take the lead role in combating.²⁴⁷ The war on terrorists is likely to continue for some time.²⁴⁸ However, unlike the

241. See generally NATIONAL STRATEGY, *supra* note 2 (generally defining the terrorist threat in relation to groups like Al Qaeda).

242. See *supra* notes 237–240.

243. Press Release, White House, Three Years of Progress in the War on Terror (Sept. 11, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040911.html> (on file with the University of Michigan Journal of Law Reform).

244. See *supra* notes 237–240.

245. See Osama bin Laden, Declaration of War Against the Americans Occupying the Land of the Two Holy Places (Aug. 1996), available at http://www.pbs.org/newshour/terrorism/international/fat_wa_1996.html (last visited Jan. 16, 2006).

246. See generally 9/11 REPORT, *supra* note 14, at 47–214 (chronicling the history of Al Qaeda and its terrorist plots through the final stages of planning for September 11).

247. The Congressional Authorization for Use of Military Force that followed September 11 illustrates this approach. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (“[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”).

248. Measured from September 11, 2001, the war against Al Qaeda is already longer than the United States’ involvement in the Second World War. Measured from the organization’s involvement in attacks on American interests in Somalia in 1992 and in the first World

War on Terror, which may exist indefinitely,²⁴⁹ the war on terrorists should have *relatively* greater temporal limitations, at least with respect to particular defined enemies.²⁵⁰

The repercussions and limitations of this approach must be considered. Two stand out. First, federalism cannot answer the larger question of whether this is a “war” or whether a particular overseas engagement properly fits within such a war. All that emergency federalism can suggest is whether or not a particular threat falls on the federal side of the national/homeland domestic security power continuum.

Consequently, since the conflict in Iraq, as well as that with Al Qaeda, has the hallmark of those confrontations over which the federal government enjoys relatively more power vis-à-vis the states, and since the federal government has announced that both are part of the War on Terror,²⁵¹ then *as far as federalism is concerned*, both exist within the war on terrorists. Only application of other constitutional tools outside the present focus may determine whether either conflict may be otherwise distinguished.

Second, as discussed in Part II, the Constitution incorporates principles of federalism when addressing threats to national security and actual conflicts. This is true, particularly within the domestic sphere, *even when the federal power reaches its apex*.²⁵² As a consequence, even accepting the most expansive approach to the

Trade Center Bombing in February 1993, the conflict with Al Qaeda is now in its thirteenth year, making it approximately as long as the (to date considerably more deadly) Vietnam War. See 9/11 REPORT, *supra* note 14, at 59–61, 71–73 (detailing Al Qaeda’s links to attacks on the United States and its interests during the first half of the 1990’s).

249. “There can be no final victory in the fight against terrorism, for terrorism (rather than full-scale war) is the contemporary manifestation of conflict, and conflict will not disappear from earth.” Roger Cohen, *What’s in it for America?*, N.Y. TIMES, March 6, 2005, § 4, at 1 (quoting Walter Laqueur).

250. See, e.g., 2020 PROJECT, *supra* note 226, at 94 (“expect[ing] that by 2020 al-Qa’ida will have been superceded by similarly inspired but more diffuse Islamic extremist groups”). For the war against terrorists similar to Al Qaeda, it appears possible, at the very least, to divide it up into discrete anti-terrorist campaigns, such as the War on the Taliban, the War on Al Qaeda, or perhaps now the War on Al Qaeda in Iraq, the Iraq-based organization of Abu Musab al-Zarqawi. Such groupings fit roughly with the approach taken in defining a ‘Long War’ between parliamentary democracy, fascism, and communism. See BOBBITT, *supra* note 228, at 19. Alternatively, these conflicts could bear the same relation as the Korean and Vietnam Wars did to the Cold War.

251. See, e.g., Three Years of Progress in the War on Terror, *supra* note 243, (“We were right to go into Iraq. . . . Although we have not found stockpiles of weapons of mass destruction, in the world after September 11th, that was a risk we could not afford to take.”). See also *supra* note 226 (highlighting the debate over the official federal treatment of Iraq as part of the war on terror).

252. See *supra* Part II.

war on terrorists,²⁵³ emergency federalism remains legitimate, relevant, and in force. Both because it is intended to promote security and liberty,²⁵⁴ and because the Constitution provides the means to enforce the doctrine in practice,²⁵⁵ emergency federalism offers a realistic option for improving America's engagement of terrorists.

3. Homeland Security

While September 11 highlights the national dimensions of terrorism, November 9 suggests that a local focus must also be considered alongside the global "war on terrorists"—namely, homeland security.

On November 9, 1990, El-Sayyid Nosair shot Meir Kahane in New York City. Though federal investigators assisted local police with the investigation, it initially appeared to be the act of a lone, mentally unstable individual. Years passed before Nosair's ties to Al Qaeda became apparent.²⁵⁶

The experience of El-Sayyid Nosair highlights the problems inherent to terrorism. At its heart, "[t]errorism is a *tactic* used by individuals and organizations to kill and destroy."²⁵⁷ From a constitutional perspective, this presents the problem of combating a tactic when the aims, actors, or even the act itself may be obscured or not yet fully formed. This is the challenge of homeland security.

Excepting some limited issues as to the employment of the states in overseas battle,²⁵⁸ from the standpoint of federalism it remains the national government's prerogative to decide whether and how it might wish to wage a war on terrorism abroad. The balance shifts when considering terrorism within the United States. Taken as a tactic, terrorism is likely to exist for an indefinite period of time; after all, under other names it has existed since the nation's founding. Terrorism in this sense represents a potential threat of an ever-shifting nature. Thus, like natural disasters and similar emergencies, within the domestic sphere terrorism is exactly the type of national security concern to which the Constitution assigns significant state responsibility.²⁵⁹

253. See *supra* note 74.

254. See *supra* Part III.

255. See *supra* Part IV.

256. See BENJAMIN & SIMON, *supra* note 227, at 3–7.

257. 9/11 REPORT, *supra* note 14, at 363 (emphasis added).

258. The dual-enlistment system is a possible exception to this. See *infra* Part VI.A.

259. See *supra* Part II.

Admitting the problems of separating out generalized concern over terrorism from the specifics of a group such as Al Qaeda, the point to be understood from the Constitution's perspective is that the states bear a substantial responsibility in protecting against certain aspects of terrorism's threat, ranging from law enforcement to general emergency response.²⁶⁰

This should not suggest that the national government abdicate responsibility. Rather, as the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) concluded, "long-term success [against terrorism] demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense. If we favor one tool while neglecting others, we leave ourselves vulnerable and weaken our national effort."²⁶¹ Only by proceeding out of respect for the Constitution's division of national power may such success be achieved; otherwise, the risk exists that the full vigor of government will be sapped and misapplied.

An objection might be raised that defining homeland security as an area of significant state responsibility represents an inappropriate approach to terrorism. In short, terrorism is unique in a way that differentiates it from other problems. On this point, the National Strategy for Combating Terrorism (the National Strategy) proves instructive.²⁶² A product of the administration of President George W. Bush, it outlines a hawkish, federal government-centric approach to the war on terrorism.²⁶³ Yet, though it does not explicitly focus on matters of federalism, it presents a vision of terrorism that closely mirrors the emergency federalism described in Part II.²⁶⁴

For instance, the National Strategy contains a series of charts that portray the threat of terrorism waxing and waning along two axes: along one, the scope of a terrorist organization may range from local to global, while along the other, the severity of the threat rises from low to high.²⁶⁵ The bottom category of the arc formed by such organizations, those with the most localized and least severe threat, are those that fall under homeland security, while those at the other end of the spectrum—global, high-danger

260. *See id.*

261. 9/11 REPORT, *supra* note 14, at 363–64.

262. NATIONAL STRATEGY, *supra* note 2.

263. *See generally id.*

264. *See id.* at 9 fig. 2, 13 fig. 3.

265. *Id.*

entities such as Al Qaeda—represent the object of the war on terrorists.

Tellingly, the National Strategy identifies as an ultimate objective pushing all terrorist organizations into the least dangerous quadrant, that discussed here as an object for homeland security (though not by implication excluding all federal involvement).²⁶⁶ Terrorists in this category are defined by four characteristics that mirror those proposed earlier in this Article:²⁶⁷ “Unorganized,” “Localized,” “Non-sponsored,” and “Rare.”²⁶⁸ The goal is to “Return Terrorism to the ‘Criminal Domain.’”²⁶⁹ Thus, the National Strategy presents a framework implicitly in harmony with the application of emergency federalism.

VI. POTENTIAL APPLICATIONS OF EMERGENCY FEDERALISM

The purpose of the analysis thus far has been to legitimize a space for state action within the War on Terror. Consequently, a full exploration of how to apply federalism to terrorism lies beyond the scope of the current Article. Nevertheless, a few observations may be made regarding how emergency federalism might apply to exemplary, observed problems regarding the war on terrorists and homeland security. These can be framed around the twin interests that federalism serves—efficacy (security) and liberty.

Today, neoconservatives and arch-nationalists speak of national power that is coextensive with the demands of security: “Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance with the realistic purposes of the entire instrument.”²⁷⁰ Others emphasize that “recognizing the States’ constitutional power is a *necessary* means of ensuring that our federal government devotes the time and the resources to fulfill its

266. *Id.* at 13 fig. 3.

267. *See supra* Part II (distinguishing between existential and non-existential threats, as well as between threats and conflicts and between the domestic and foreign spheres).

268. NATIONAL STRATEGY, *supra* note 2, at 13 fig. 3. *Compare id.* (describing terrorism within the ambit of homeland security using these terms: “Unorganized,” “Localized,” “non-sponsored,” and “Rare”), *with* Part II (discussing federal versus state responsibility with regard to potential threats in similar terms related to geographic scope and the severity of the threat posed).

269. *Id.*

270. Delahunty & Yoo, *supra* note 2, at 489, (quoting *Lichter v. United States*, 334 U.S. 742, 782 (1948)).

most important role—protecting us from our enemies.”²⁷¹ Similarly, in the realm of civil liberties, the bipartisan 9/11 Commission has called for acknowledging that the “shift of power and authority to the government [in response to terrorism] calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.”²⁷²

Given the uniqueness of September 11, it should not be surprising that the initial solutions pursued will not always prove to be the most effective, an observation that arguably has been borne out by the experience of Hurricane Katrina. For present purposes, it is sufficient to examine briefly one example of a claimed inefficiency that potentially impinges on homeland security. Additionally, one area of domestic civil rights concern also bears consideration.

A. *Security v. Security: The National Guard*

The condition of the National Guard the day Katrina bore down on New Orleans, almost exactly four years after Al Qaeda struck New York and Washington, reflects decisions made in Washington.²⁷³ De facto nationalization of the Guard when states were facing considerable threats had come to constitute a misallocation between the federal and state governments.

Not long ago it could still be argued that the Founders’ “fear of states being left without sufficient forces for their own internal needs has . . . proven unfounded” and that “[s]imilarly, the concern about Guard members being sent far away for lengthy periods against their will has proven unfounded.”²⁷⁴ In a pre-September 11 decision upholding the constitutionality of the dual-enlistment sys-

271. Greenhouse, *Federalism and September 11*, *supra* note 5; see also *Governors Balk at Bigger Role for Military*, A.P., Nov. 6, 2005 (on file with the University of Michigan Journal of Law Reform) (“It’s a bad idea for the military to make that decision and usurp the authority that under the U.S. Constitution stays with the governor and local authorities.” (quoting Governor Mike Huckabee of Arkansas)).

272. 9/11 REPORT, *supra* note 14, at 394.

273. See *supra* Part I.B (discussing Hurricane Katrina and the National Guard). Note that criticism has been directed at the effects of a perceived over-reliance on the military more generally, including the National Guard, in the prosecution of the War on Terror. See Thom Shanker, *All Quiet on the Home Front, and Some Soldiers Are Asking Why*, N.Y. TIMES, July 24, 2005, at A18 (“‘Nobody in America is asked to sacrifice, except us,’ said one officer just back from a yearlong tour in Iraq, voicing a frustration now drawing the attention of academic specialists in military sociology.”).

274. Hirsch, *supra* note 159, at 947–48.

tem, the Supreme Court indicated in dictum that it found such a rationale persuasive.²⁷⁵ This may no longer be the case.

National Guard members today are increasingly stationed overseas for long deployments,²⁷⁶ and their governors have vocalized concerns.²⁷⁷ At home, the announcement of Air National Guard base closures and realignments led Pennsylvania Governor Edward G. Rendell to charge that the move “would strip the state’s efforts to prevent a terrorist attack and respond to natural disasters,” while Senator Ron Wyden of Oregon alleged that, “[such plans] would leave the Pacific Northwest with a Little League air defense capability.”²⁷⁸ In the case of the Army National Guard, such fears became reality for Louisiana; Governor Kathleen Blanco has remarked that “5,000 [state Guard troops] out, at one time . . . serving in Iraq and Afghanistan” at the time of Katrina “certainly [was] a factor.”²⁷⁹

This situation raises three concerns, one obvious and the others less so. The obvious problem is that, in the event of another September 11, Hurricane Katrina, or worse, the United States may lack the domestic capacity to mount a rapid and effective response and recovery effort without resort to either active-duty forces or federal martial law.²⁸⁰ By design, the Guard is intended to be used by state authorities for these kinds of efforts,²⁸¹ yet in the eyes of many state officials, unilateral decisions at the federal level have

275. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 351 (1990) (finding that, under the challenged federal conditions, Minnesota’s “ability to rely on its own Guard in state emergency situations, is [not] significantly affected”).

276. *See supra* Part I.B. The National Guard has become so stretched by foreign deployments that its leadership began considering changing the structure of deployments, from a maximum of two years during one’s *entire time* in the Guard to a cap of two years *at a time*. Schmitt & Shanker, *infra* note 221.

277. *See* Balz, *supra* note 39; Schmitt, *Air Guard Bases*, *supra* note 16; *see also supra* Part I.B.

278. Schmitt, *Air Guard Bases*, *supra* note 16, at A18.

279. Lipton, *Political Issues*, *supra* note 55, at A22.

280. This runs counter to a long history of restricting the use of active-duty forces within the United States. *See supra* note 83 (discussing the Posse Comitatus Act). According to at least one press report, Hurricane Katrina caused the White House to seriously consider “whether the president should speed the arrival of active-duty troops by seizing control of the hurricane relief mission from the governor” through invocation of the Insurrection Act. Lipton, *Political Issues*, *supra* note 55. That storm also triggered calls by some, including the President, to plan for expanded use of federal troops in future domestic crises—calls to which several state governors vigorously objected. *See* Block & Schatz, *supra* note 3 (reporting that the head of NORTHCOM “has told lawmakers that active-duty forces should be given complete authority for responding to catastrophic disasters” and that the President has “suggested that the military be ready to quarantine cities and states in the event of a flu pandemic”); *Governors Balk at Bigger Role for Military*, *supra* note 271.

281. Similarly, under current Department of Defense plans for homeland security and emergency response “[p]articular reliance is being placed on the National Guard.” Graham, *supra* note 67, at A7.

severely degraded the Guard's capacity.²⁸² This drives a negative feedback loop, whereby Guard units are diminished,²⁸³ a disaster then occurs that shows state resources are inadequate, which leads to calls for increased national involvement to compensate for those *state* deficiencies that resulted in part from *national* decisions.²⁸⁴

Less obviously, upsetting the natural constitutional balance of control over the Guard risks diminishing the quality of the disaster response even if the total level of resources remains constant. As Florida Governor Jeb Bush has warned, "If you federalize [the emergency response to catastrophic events], all the innovation, creativity and knowledge at the local level would subside."²⁸⁵ In keeping with public goods theory,²⁸⁶ to the extent that local first responders and state National Guard units can deliver spatially relevant knowledge and expertise, federalism argues that replacing them with otherwise similar national forces risks a less effective response.

Finally, and perhaps most dangerously, the ease with which the national government can employ the National Guard overseas raises efficacy concerns because it alters the calculus of going to war. Since the Framers did not contemplate the use of the militia overseas,²⁸⁷ the Constitution intended that calculations over

282. See, e.g., Dreazen & Lueck, *supra* note 41 (following a presidential proposal to deploy National Guard units along the Mexican border for immigration control purposes, several lawmakers noted that the Guard units "are meant to be at the ready in case of a natural disaster in their home states" and that Hurricane Katrina "demonstrated the risks of allocating National Guard forces elsewhere"); Schmitt, *Air Guard Bases*, *supra* note 16, (reporting criticism by state officials and representatives of a proposed federal plan to overhaul Air National Guard units, which in their view would leave "states without emergency aircraft to fight fires, recover from hurricanes and cope with other natural disasters" while also increasing vulnerability to terrorists). Illustrating the tension between national and local priorities, among the Air National Guard bases slated for closure is Otis Air National Guard Base, which launched the first air response to the hijackings of September 11. See *id.*; 9/11 REPORT, *supra* note 14 (discussing the role of the Otis Air National Guard Base on September 11).

283. As is discussed below in Part VI.B., states also may suffer in other ways, including being under-funded in terms of federal homeland security funds relative to their objective risk profile.

284. For example, following the experience of Hurricane Katrina, federal officials at FEMA and NORTHCOM moved to assert federal primacy over the response to Hurricane Wilma in Florida. State officials pushed back and eventually secured control of the effort. See Block & Schatz, *Authorities Battle to Control*, *supra* note 3.

285. See *id.*

286. See *supra* Part III.A.

287. See Hirsch, *supra* note 159, at 931 ("Might it even be that the framers believed the federal government *could* call forth the militia for such foreign operations as might be necessary such as attacking an enemy or defending a friend or ally . . . ? This last leap cannot be made, for there is no evidence that the framers contemplated the use of the militia for such purposes."); see also *Perpich v. Dep't of Def.*, 496 U.S. 334, 343-44, 343 n.13 (1990) (imply-

whether to engage in war overseas would hinge upon the use of the regular army. By appropriating the National Guard as a substantial part of the forces deployed in an active-combat zone, thirty-five to forty percent of those in Iraq,²⁸⁸ the federal government is deciding to go to war on the "cheap." This does not mean that the overall cost is any lower. Rather, it allows Washington to contemplate a similar level of success for itself (victory), while shifting some of the cost ("broken" military units) to the states.²⁸⁹ As a consequence, the current National Guard system both diminishes the states' ability to provide for homeland security and encourages potentially inefficient decision-making regarding the choice of the national government to enter into foreign military conflicts.

Given these problems, which are rooted in the dual-enlistment system, there are at least two possible means for redress outside of voluntary federal restraint. The first of these is unlikely to provide a permanent solution, while the second would prove difficult to achieve.

First, a state may organize and fund its own defensive force, independent and apart from the largely federally funded National Guard.²⁹⁰ While this would solve the issue of states being left without the power to effectively respond to, and deter, emergencies including terrorist strikes, it would not address federal overuse of the National Guard. More to the point, this route appears impracticable as it would require a state to create, in essence, a duplicate state militia.

Second, the constitutionality of the current dual-enlistment scheme should be questioned.²⁹¹ Since the Constitution's text, the

ing that, under the Militia Clauses and absent the dual-enlistment scheme, the retention of the militia's separate state status when called into federal service might preclude its use overseas).

288. *Supra* note 35–38.

289. Since the federal government largely funds the National Guard, cost in this sense means the loss of the Guard as an available instrument of power. *See Perpich*, 496 U.S. at 351 ("The Federal Government provides virtually all of the funding, the materiel [sic], and the leadership for the State Guard units.").

290. 32 U.S.C. § 109(c) (2000) ("In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, or the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces.").

291. At present, the dual-enlistment system is constitutionally valid. *See Perpich*, 496 U.S. at 349–50 (citing Selective Draft Law Cases, 245 U.S. 366 (1918)). However, in *Perpich*, the constitutionality of the system was not directly challenged. *Id.* at 347 ("The Governor does not, however, challenge the authority of Congress to create a dual enlistment program."). As of this writing, "Illinois and Pennsylvania have gone so far as to file suit in federal court

relevant drafting history, and the observed structural design of federalism all suggest that the states are to control the militia subject only to three exceptions, the line extending from *Selective Draft Law Cases* seems unstable. Given that the dual-enlistment system has now proven to be functionally unbalanced, the time has come for a critical reevaluation.

Ideally, such a review would originate within the political branches of the federal government. Unfortunately, this appears unlikely since judicial involvement in state-initiated suits may be unavoidable.²⁹² In the event of adjudication, one possible analytical approach would be through the principle of evisceration along the lines of the holding in *Railway Labor Executives' Ass'n. v. Gibbons*.²⁹³

In *Railway Labor Executives' Ass'n*, the Supreme Court invalidated a statute that violated the Bankruptcy Clause's uniformity requirement,²⁹⁴ even though it could have been sustained under the Commerce Clause.²⁹⁵ It did so by stating that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."²⁹⁶ Similarly, the Court could plausibly find that the current National Guard system tramples upon the express limitations placed on Congress and the President by the Militia Clauses, even though this system might be otherwise sustainable. Such a conclusion would require the Court to revisit how it approaches these provisions.²⁹⁷

contending that the Defense Department [through the Defense Base Closure and Realignment Commission] cannot move Air Guard units without the consent of the state governors" Schmitt, *Air Guard Bases*, *supra* note 16, at A1. Even "[l]awyers on the commission have said the governors may indeed have a sound legal argument, and, as a result, the Justice Department has been called in to give its opinion." *Id.* These cases might raise issues regarding the constitutionality of dual enlistment.

292. See *supra* note 291 (noting current state challenges to the federal Air National Guard base closure plans); *Governors Balk at Bigger Role for Military*, *supra* note 271 (reporting that governors in Washington, Mississippi, Michigan, Arkansas, West Virginia, Delaware and Alabama have "panned the idea" that "active-duty military take a greater role in disaster response," including "questioning whether it would even be constitutional").

293. *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). But see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (upholding a statute under the Commerce Clause that could not be sustained under the Fourteenth Amendment given the precedent of the Civil Rights Cases, 109 U.S. 3 (1883)).

294. U.S. CONST. art. I, § 8, cl. 4.

295. U.S. CONST. art. I, § 8, cl. 3.

296. *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982).

297. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 349 (1990) ("[T]he Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress." (citing *Selective Draft Law Cases*, 245 U.S. at 377, 381-84)).

In addition to this constitutional claim, the Supreme Court might also be swayed by the present factual context. In *Perpich*, the Court stated in dicta that the challenged federal use of state Guard units did not significantly impact the state's ability to respond to emergencies.²⁹⁸ By contrast, ample evidence now exists that overseas commitments have degraded the Guard's ability to serve at home at a time when the importance of its domestic mission has dramatically increased for the foreseeable future.²⁹⁹ In addition, federal decisions regarding the domestic posturing of Air National Guard resources have attracted considerable state criticism.³⁰⁰

On the one hand, a decision holding the dual-enlistment system constitutionally defective would be extremely difficult to reach, requiring great dexterity in the details. It would necessitate an overhaul of the nation's system of defense. Such a judicial determination would in fact be only the first step in a process ultimately led by the executive and legislative branches, in consultation with the states, to determine how to repurpose the Guard. This is by many orders of magnitude a far more complex and risky prospect than striking down a bankruptcy law. However, the interests being protected, state sovereignty and the effective provision of homeland security, are also much greater. It ultimately raises a question of conflicting state and federal executive authorities each when facing security threats, the apex of their respective authority.³⁰¹

B. Protecting Civil Liberties: The Anti-Commandeering Doctrine

Since September 11, the federal government—by statute,³⁰² through the courts,³⁰³ and perhaps most vigorously through

298. *Id.* at 351.

299. See generally *supra* Part I.B.

300. See Schmitt, *Air Guard Bases*, *supra* note 16.

301. Even assuming that Congress acquiesces to the President's current exercise of power over the National Guard, this leaves open the question of where the President's authority ultimately ends and that of the Governors begins. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum If his act is held unconstitutional under these circumstances, it usually means that *the Federal Government as an undivided whole lacks power.*” (emphasis added)).

302. The Patriot Act has become the focus of considerable debate on this subject. *Patriot Act*, *supra* note 68. Compare Editorial, *Revising the Patriot Act*, N.Y. TIMES, Apr. 10, 2005, § 4, at 11 (arguing for a revision of the Patriot Act based on perceived abuses) and Althouse, *supra* note 5, at 1253 (noting “[c]oncerns about racial profiling, invasions of privacy, unreasonable searches, and infringement on free speech”), with Fields & Squeo, *Bipartisan Fix for Patriot Act Takes Shape*, *supra* note 172.

303. See *In re Sealed Case*, 310 F.3d 717 (Foreign Intelligence Surveillance Ct. Review 2002).

executive action³⁰⁴ — has expanded national authority in response to terrorism. These actions have drawn considerable criticism for risking violations of civil liberties without providing corollary security benefits.³⁰⁵

The 9/11 Commission recommended “an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.”³⁰⁶ Similarly, the Office of Homeland Security, now the Department of Homeland Security, stated as part of its national vision that “we should refrain from instituting unnecessary laws, as we remain true to our principles of federalism and individual freedom.”³⁰⁷ Perhaps most significantly speaking to the issue of executive power, the Supreme Court has held that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”³⁰⁸

The examples from the Supreme Court and the 9/11 Commission are instructive because they illustrate how the courts and the political branches *can* serve the interests of liberty. However, by constitutional design, the states can also provide a liberty guaranty.³⁰⁹ While several approaches could serve this end, the most salient might be the anti-commandeering doctrine.

Under the anti-commandeering doctrine, “[t]he Federal Government may not compel the States to enact or administer a

304. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (though the Supreme Court did not determine its viability, it noted the executive’s contention that “no explicit congressional authorization is required [to detain citizens as enemy combatants], because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution”); John C. Yoo, Office of Legal Counsel, *Memorandum Opinion for the Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm> (arguing that decision “as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response . . . are for the President alone to make” and, as such, no statute passed by Congress can place any limit on the President in these areas); Sanger, *supra* note 71 (reporting that President Bush acknowledged that he “had secretly instructed the [National Security Agency] to intercept the communications of Americans and terrorist suspects inside the United States, without first obtaining warrants from a secret court that oversees intelligence matters”).

305. See, e.g., Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 74, 99 (Richard C. Leone & Greg Anrig, Jr. eds., 2004) (arguing that “[t]he Bush administration’s counterterrorism strategy is not captured by the cliché about ‘shifting the balance’ from liberty to security because so many of its actions encroach on liberty *without* enhancing security”).

306. 9/11 REPORT, *supra* note 14, at 394.

307. HOMELAND SECURITY, *supra* note 42, at 48.

308. *Hamdi*, 542 U.S. at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

309. See *supra* Part III.B.

federal regulatory program.”³¹⁰ In operation, under this doctrine “[t]he national government is free to take the steps it wants to take with its own personnel and state and local government is able to refuse to contribute to those efforts.”³¹¹

The anti-commandeering approach, adopted by the Supreme Court in a strict, bright-line form,³¹² becomes more attractive “[t]he more intrusive on individual rights particular measures are” because “[b]y denying the means of commandeering to the federal government, the courts have created an incentive to adopt policies that inspire compliance, thus preserving a beneficial structural safeguard for individual rights.”³¹³ However, as Justice John Paul Stevens’ dissent in *Printz* argued, doctrinal rigidity risks non-compliance from local officials at the worst possible moments:

Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment . . . that forbids the enlistment of state officers to make that response effective?³¹⁴

In *Printz*, Justice Stevens expressed a concern that the majority’s ostensibly liberty-protective rule would fail in an emergency situation due to a lack of consideration for security concerns. This line of criticism can be addressed in two ways.

First, Justice Stevens’ concern arose from the perceived inapplicability of the anti-commandeering doctrine, which had been developed out of Commerce Clause and Tenth Amendment Federalism, to issues of national security. As the present Article argues, there is a strong case for an independent strain of emergency federalism designed for, and therefore applicable to, precisely the kinds of situations Justice Stevens contemplated.

Second, state governments are not without incentives to follow the national government’s lead. In most instances, especially

310. *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (internal quotation marks omitted)).

311. *Althouse*, *supra* note 5, at 1271.

312. *See Printz*, 521 U.S. at 932–33.

313. *Althouse*, *supra* note 5, at 1272.

314. *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

emergencies, there are compelling reasons to believe that state and local authorities will comply with federal requests.³¹⁵ In those rare instances where a state might resist, it would do so after finding the cost of compliance—in terms of liberty or security—too great to bear. In such situations, the theory of federalism explored in Part III suggests that state inaction serves both liberty and efficacy. The mere possibility of state resistance may become increasingly important as the national government contemplates an increased domestic role for the regular armed forces following future terrorist attacks or natural disasters.³¹⁶

The theory of federalism put forth in this Article does not, by itself, show whether or not the anti-commandeering doctrine should be vigorously enforced. However, to the extent that this theory of federalism is relevant, it does suggest that supporters of the anti-commandeering doctrine might be correct in drawing attention to its use in the specific context of homeland security, given that the Framers specifically extended federalism to this area.

CONCLUSION

Accepting that federalism can provide an important guaranty of liberty and security does not, on its own, justify meaningful adherence to the doctrine in the post-September 11, post-Katrina era. Embodying a Machiavellian approach, more than one commentator has suggested that, in the War on Terror, “[t]he important thing, indeed the only thing, is to win the war.”³¹⁷ The same can be said regarding all kinds of life-threatening domestic emergencies. After all, a free society bears few fruits for those no longer alive to enjoy them.

315. Young, *Balance of Federalism*, *supra* note 5, at 1257–733. In practice, the plausibility that local officials would offer meaningful resistance to federal assistance with an attack on their own community seems unlikely, particularly given the actual reaction to events such as the Oklahoma City Bombing and September 11. *See also* Young, *Welcome to the Dark Side*, *supra* note 5, at 1292 (“But the Justice never explained why, given pervasive bonds of political party and shared administration of existing programs that tie state, local, and national officials together, as well as their common accountability to the same constituents, state and local governments would ignore a request for support from national officials on a matter of imminent national emergency.”).

316. Graham, *supra* note 67, at A7 (“Civil liberties groups have warned that the military’s expanded involvement in homeland defense could bump up against the Posse Comitatus Act of 1878, which restricts the use of troops in domestic law enforcement.”). *See also* Posse Comitatus Act, 18 U.S.C. § 1385 (2000); 10 U.S.C. § 375 (2000).

317. LEDEEN, *supra* note 72, at 237.

Following the terrorist attacks on Washington and New York, some drew the lesson that “[t]he era of states’ rights decisions, a luxury of tranquil times, now seems like a vestige of a bygone era.”³¹⁸ Conscious reflection and subsequent experience demonstrate that this should not be the case. The Framers intentionally incorporated emergency federalism into the Constitution. It applies even in times of sudden or grave danger. Their decision reflected an understanding that, properly positioned, including the states within the overall approach to national security would produce greater efficiencies and help preserve liberty relative to either a purely nationalized, or completely decentralized, system.

On September 11, “the last best hope for the community of people working in or visiting the World Trade Center rested not with national policymakers but with private firms and local public servants, especially the first responders: fire, police, emergency medical service, and building safety professionals.”³¹⁹ Yet, some have taken the experience of the attacks to justify a broad expansion of national authority without demonstrating like vigor at the state level. The experiences of September 11 and Hurricane Katrina demonstrate that the states can, and should, play a role in protecting the United States. This remains particularly true with regard to homeland security. While there are numerous ways in which the states might aid in the War on Terror and during times of national emergency, they can only do so if their participation is provided with constitutional legitimacy. Properly understood, the doctrine of emergency federalism accomplishes just that.

318. Greenhouse, *supra* note 5.

319. 9/11 REPORT, *supra* note 14, at 278.

