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## National Security Federalism in the Age of Terror

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# ARTICLES

## NATIONAL SECURITY FEDERALISM IN THE AGE OF TERROR

Matthew C. Waxman\*

*National security law scholarship tends to focus on the balancing of security and liberty, and the overwhelming bulk of that scholarship is about such balancing on the horizontal axis among branches at the federal level. This Article challenges that standard focus by supplementing it with an account of the vertical axis and the emergent, post-9/11 role of state and local government in American national security law and policy. It argues for a federalism frame that emphasizes vertical intergovernmental arrangements for promoting and mediating a dense array of policy values over the long term. This federalism frame helps in understanding the cooperation and tension between the federal and local governments with respect to counterterrorism and national security intelligence, and also yields insights to guide reform of those relationships. The Article emphasizes two important values that have been neglected in the sparse scholarship on local government and national security functions: (1) accountability and the ways vertical intergovernmental arrangements enhance or degrade it, and (2) efficiency and the ways those arrangements promote public policy effectiveness. This Article reveals the important policy benefits of our shared federal-local national security system, and it suggests ways to better capture these benefits, especially if terrorism threats evolve to include a greater domestic component.*

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## INTRODUCTION

National security law scholarship tends to focus on the balancing of security and liberty, and the overwhelming bulk of that scholarship is about such balancing at the federal level. That is, scholarship about national security institutional architecture focuses almost entirely on horizontal allocations, or relations among coordinate branches of the federal government, with an eye ultimately toward how those horizontal arrangements strike and enforce substantive liberty-security balances.<sup>1</sup>

This Article challenges that common focus by supplementing it with an account of the vertical axis: “national security federalism.” It shows that the near-

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1. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

exclusive concentration of contemporary national security law scholarship on horizontal relationships among the federal branches is too limited because significant, tangible effects of security policies on liberty and many other interests today take place at the local level as a result of actions by local government actors.<sup>2</sup> Consider, for example, intelligence gathering related to combating terrorism. There are more than 700,000 local police officers from about 17,000 state and local law enforcement agencies who may conduct relevant activities<sup>3</sup> such as surveillance, profiling-based investigation, and data collection and sharing.<sup>4</sup> If an individual is being watched as a potential terrorism threat because of his appearance, it may be a local officer watching.<sup>5</sup> If a government agent is looking around a mosque and asking questions of members, it may be a local cop.<sup>6</sup> If data are being mined for suspicious patterns, local officials may have collected and passed on some of that data.<sup>7</sup> Most of this activity is done in the service of broad local law enforcement and policing mandates. Critically, however, it also contributes to a national security policy principally led by the federal government.<sup>8</sup>

These activities, moreover, are governed by a complex web of law: not just federal law, but also state statutes and state constitutional doctrine, municipal legislation and regulations, judicial consent decrees, and state and local administrative guidelines. For example, some municipal police departments' investigatory powers are limited by state law and some by locally set administrative guidelines.<sup>9</sup> Those investigatory powers are overseen by a variety of institutional mechanisms, including state and local legislatures, agency oversight boards, external audits, and courts.<sup>10</sup> Local law enforcement agencies vary in

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2. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2139 (2002).

3. See MARK A. RANDOL, CONG. RESEARCH SERV., R40901, TERRORISM INFORMATION SHARING AND THE NATIONWIDE SUSPICIOUS ACTIVITY REPORT INITIATIVE: BACKGROUND AND ISSUES FOR CONGRESS 3 (2009).

4. See William Bloss, *Escalating U.S. Police Surveillance After 9/11: An Examination of Causes and Effects*, 4 SURVEILLANCE & SOC'Y 208 (2007).

5. See Nick Madigan, *Spying Uncovered*, BALT. SUN, July 18, 2008, at 1A.

6. See Andrea Elliott, *As Police Watch for Terrorists, Brooklyn Muslims Feel the Eyes*, N.Y. TIMES, May 27, 2006, at A1.

7. See Robert O'Harrow Jr., *Centers Tap into Personal Databases; State Groups Were Formed After 9/11*, WASH. POST, Apr. 2, 2008, at A1.

8. See generally Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SECURITY L. & POL'Y 377 (2009) (discussing challenges arising from greater state and local involvement in protecting national security).

9. See Paul G. Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735 (1984); David E. Kaplan, *Spies Among Us*, U.S. NEWS & WORLD REP., May 8, 2006, at 41, 44.

10. See Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 J. LEGIS. 1, 1 (2005).

how they codify and apply guidelines to regulate collection, use, dissemination, and retention of data related to counterterrorism.<sup>11</sup> Most, but not all, states have electronic surveillance statutes, covering different types of communications and regulated by different standards and processes.<sup>12</sup> And racial and ethnic profiling is regulated by states and many local governments through a combination of legislation, court decisions, and administrative guidelines.<sup>13</sup>

This is not by any means to deny the predominance of federal national security law and policy, on account of the massive resources and capabilities of the federal government and the primacy of federal law in this context. Rather, it is to point out that subfederal law and institutions in many cases affect daily lives of individuals more directly and in different ways across jurisdictions. The result is an uneven, textured legal and policy landscape with regard to national security.

The federalism frame emphasizes vertical relations and institutional arrangements between federal and state or local governments for promoting and mediating policy values over the long term, and produces the uneven, textured legal and policy landscape. I argue that this frame yields insights to guide refinement of the emergent national security intelligence architecture. I emphasize two important values that have been neglected or undertheorized in existing scholarship with respect to local national security functions: (1) *accountability* and the way vertical intergovernmental arrangements enhance or degrade it, and (2) *efficiency* and the way those arrangements promote public policy effectiveness. In those respects my account reveals important potential benefits of our shared federal-local national security system, and offers ways to enhance these values, especially if terrorism threats evolve to include a greater domestic component.

I assume throughout this Article that state and local governments will continue to play a significant role in national security intelligence. Not only is this a political, practical, and historically contingent reality, but harnessing state and local institutions for national security is needed to address parts of the national security challenge for which those institutions are much better suited than the federal government could ever be.

A major theme running through the Article, however, is that to the extent state and local governments continue playing a major role in the emergent national security architecture, such that some national security intelligence will be

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11. See K. JACK RILEY ET AL., STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM 31 (2005).

12. See *Electronic Surveillance Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/ElectronicSurveillanceLaws/tabid/13492/Default.aspx> (last updated Aug. 29, 2010), for a survey of these state laws.

13. For a compilation of state and local law regarding racial profiling that illustrates this variation, see *Racial Profiling: The State of the Law*, POLICE FOUND. (Mar. 2005), <http://www.policefoundation.org/pdf/racialprofilingDelete.pdf>.

decentralized, there remains a large question as to what degree these functions will be *localized*. By “decentralized” I mean a managerial concept, whereby policy is set at the top but executed at a local level with some limited discretion about how best to do so. Even countries with powerful national police forces like France and Israel may delegate implementation of some counterterrorism intelligence or investigation functions to lower levels of command.<sup>14</sup> By “localized,” I emphasize instead an agenda-setting role in law and policy, whereby state or local entities need not accept the federal policy entirely but are allowed some room to vary that policy as they choose. To some extent, distinctions between decentralization and localization<sup>15</sup> blur in the national security intelligence context, because so much of the policy *is* implementation discretion: we care a lot—from both a legal and policy perspective—about the details of how, to what extent, and with what sort of oversight government agencies and agents collect, analyze, and share information. Nevertheless, the analytic distinction is useful in thinking about those important legal and policy decisions that could be taken at several levels of government—such as how widely to cast the government’s authority to collect and compile information on individuals or groups, or how tightly to constrain and monitor the government’s authority to comb through and retain data on individuals.

In that light, a descriptive goal of this Article is to show that significant national security localism continues to exist in the United States, despite some countervailing pressures, and to help explain why and how it operates. A prescriptive goal is to better understand in what specific contexts such localism should be celebrated, and how vertical intergovernmental relations might better be structured to harness it in advancing simultaneously a range of policy priorities. This Article does not focus on the first-order question of whether national security federalism or localism would be optimal compared to sweepingly different constitutional structures if we were drafting from scratch, such as radically centralizing police powers related to national security. Instead, this Article accepts some vertical division of power as given in the United States—as historically determined to a large degree by foundational constitutional compro-

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14. David H. Bayley & David Weisburd, *Cops and Spooks: The Role of the Police in Counterterrorism*, in *TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM* 81, 86 (David Weisburd et al. eds., 2009).

15. I borrow and modify here the definitions used by Edward Rubin and Malcolm Feeley. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 910-14 (1994). As they explain, “[F]ederalism allows the states to vary as they choose, pursuing their own policies instead of the national one. This can be justified only by arguments favoring a variety of policies, not by arguments favoring the implementation of a single policy by a variety of methods.” *Id.* at 914. I use here the term “localism” rather than their “federalism” because I am primarily interested in actions at the municipal level. Roderick Hills draws a similar distinction between “managerial decentralization” and “democratic decentralization.” See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 *J.L. & POL.* 187, 192 (2005).

mises, even if also driven by some contemporary policy imperatives—and asks how we can make the most of that basic structure. Much more empirical research in this area is needed,<sup>16</sup> so the specific policy conclusions are necessarily tentative, but this Article can help guide further work.

In terms of substantive focus, this Article homes in on intelligence issues, which are just one element of national security policy, and puts aside some other significant elements such as disaster response. Intelligence is an area in which federal and state or local governments have significant resources and legal powers that raise especially salient civil liberties concerns and that overlap with other core local government responsibilities. While those factors make intelligence a fruitful case study of national security federalism generally, they also give rise to some distinct intergovernmental dynamics. Moreover, whereas most federalism discussion focuses on federal-state relations,<sup>17</sup> this Article focuses largely on federal-local relations and mostly groups state and local governments together. This is not to deny important differences in the way state and local governments may view national security matters or the public functions that affect security and liberty,<sup>18</sup> or the role state governments play in managing federal-local programs.<sup>19</sup> Rather, the focus here is on the relationship between federal and subfederal governments, especially law enforcement agencies, to highlight the vertical dimension of national security law as an important axis.

Part I of this Article argues that it no longer makes sense, if it ever did, to think of national security intelligence as an exclusive federal responsibility. It describes how contemporary terrorism threats have pushed some responsibility for particular national security functions—especially information collection, analysis, and sharing—down to state and local levels, and it situates those changes in historical context to highlight some relevant features of constitutional design as well as some risks posed by post-9/11 reforms. The federalist macrostructure of our national security system has changed dramatically during the course of our history, and it will continue to evolve.

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16. See Bayley & Weisburd, *supra* note 14, at 86 (citing dearth of systematic assessments of post-9/11 police departments and activities).

17. See generally Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1307-09 (1994) (discussing differences between the federal-state relationship and the state-local relationship).

18. See Charles R. Wise & Rania Nader, *Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas*, 62 PUB. ADMIN. REV. 44, 49 (2002); see also NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACTICES, 2007 STATE HOMELAND SECURITY DIRECTORS SURVEY 5 (2007), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/0712HOMELANDSURVEY.PDF> (reporting wide variation among states in the level of state-local government coordination on homeland security issues).

19. See Peter Eisinger, *Imperfect Federalism: The Intergovernmental Partnership for Homeland Security*, 66 PUB. ADMIN. REV. 537, 541-42 (2006) (explaining that federal-local homeland security partnerships are largely run through state governments).

Part II analyzes the leading scholarly accounts of how state and local governments today form part of the larger national security institutional configuration. Many accounts of the vertical dimension of national security intergovernmental relations see legal and policy decisionmaking as top-down, with state and local governments largely taking cues from the federal government. A counternarrative among some scholars holds, however, that state and local governments can and do also push back against federal inclinations—sometimes successfully, sometimes not—and that the vertical relationship among national security institutions at various levels creates space for diversity of legal and policy balances across jurisdictions in ways that may protect liberty. This Part argues that those leading accounts, while each having some explanatory value, are limited in their capacity to account for emergent intergovernmental relations and also in the normative criteria by which they assess those relations and their specific arrangements.

To sketch a more complete picture and offer lessons to guide institutional development into the future, Part III builds on the leading accounts by analyzing vertical intergovernmental relations regarding national security intelligence in some familiar federalism terms, including the ways allocation of government responsibility affects accountability and the economics of national security as a form of regulation. Examining accountability mechanisms in the national security context highlights the risk that state and local participation in federal programs will undermine the public's ability to influence government policy at those levels. However, this Part suggests ways that any such deficit should be offset by improvements in other types of accountability—reasoned decisionmaking and compliance oversight—by structuring cooperation to bolster joint federal-local policymaking and by creating a mix of centralized and localized monitoring. Examination of national security intelligence in terms of regulation economics helps distinguish which national security intelligence policies (such as information sharing) are probably best dictated at the federal level, because uniformity is important or because states and localities might otherwise externalize too many costs, and which policies (such as information gathering) are probably best set or heavily influenced at more local levels, because of the need to tailor intelligence policy to local contexts and to learn from processes of innovation and adaptation.

Part III then concludes with examples to illustrate application of the federalism frames developed throughout this Article to several pressing counterterrorism policy questions. Even if one remains convinced by standard narratives about intergovernmental relations in the national security domain, the federalism frames presented here and the insights they yield provide a richer account of how national security federalism operates, how its operation should be judged, and how we should think about improving it—especially as terrorism threats continue to evolve.

## I. NATIONAL SECURITY FEDERALISM BEFORE AND AFTER 9/11

In modern times it is natural to think of national security as primarily, if not exclusively, a centralized federal responsibility. That is, national security is seen as a policy waged mostly by the President—as commander-in-chief and chief executive—controlling massive federal defense and security departments and agencies, which are created, funded, and overseen by Congress and scrutinized by federal courts. In that light, the dramatic post-9/11 expansion of sub-federal roles in combating contemporary national security threats of terrorism seems not only like a reversal of pre-9/11 federal centralization of national security functions, but one that is potentially subversive of constitutional order. It is important, however, to understand recent institutional developments within an American constitutional structure that distributes governmental security powers vertically as well as horizontally.

A. *National Security Federalism and Domestic Intelligence in Historical Context*

Situating post-9/11 national security federalism in historical context reveals structural features of the original constitutional design that were intended to check or influence the federal national security powers and that are now re-emerging after lying dormant for a long period. However, it also highlights some contemporary risks of local government involvement in national security, not only based on past experience but also because local oversight institutions are weak or atrophied. Understanding those features and risks is important in Part II, which follows, for explaining and assessing post-9/11 institutional realignments, and in Part III, below, for proposing ways to improve them.

1. *Vertical arrangement of national defense powers and the centralization of national security*

It is well known that the Founders generally viewed vertical separation or shared authority between the federal and state governments, in addition to horizontal separation of authority among federal branches, as a check on governmental power. As James Madison famously explained in *The Federalist No. 51*: “In the compound republic of America, 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. Hence a double security arises to the rights of the people.”<sup>20</sup> It is less well remembered, however, that even as they sought to remedy deficiencies of the Articles of Confederation by strengthening central government defense and foreign affairs powers, the

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20. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* (discussing mutual checks between federal and state governments).

Founders also specifically checked those powers by leaving some responsibilities with the states.<sup>21</sup>

The Constitution institutionalized a dual-army system, for example, preserving the historic state militias while providing the new federal government with authority to establish a regular army and to provide for the common defense.<sup>22</sup> Federalism in the sphere of national defense offered another safeguard against security-driven tyranny, especially at a time when major security threats had internal components (including rebellions and conflicts with Native Americans) or lay just beyond the new republic's tenuous borders.<sup>23</sup>

The modern expansion and consolidation of national security resources and institutions at the federal level resulted from two major transformations starting in the mid-nineteenth century, both linked to dire national security threats and strategic necessity. The first was the Civil War, in which the requirements of mass mobilization and industrializing warfare produced a vast federal army and attendant centralized administrative structures.<sup>24</sup> The United States's aims in the Civil War—to preserve the Union from secessions and, later, to combat slavery—also publicly cast strong federal government national security powers as a vital check against liberty deprivation by states.<sup>25</sup>

The second transformation was the creation of the major, standing federal national security agencies during and after World War II, which followed on the footsteps of the ascending modern administrative state.<sup>26</sup> That war required federal mobilization of national security resources on an unprecedented scale. Superpower status and the Cold War then required that the United States retain rather than demobilize that massive national security apparatus. The National Security Act of 1947 created and consolidated much of the vast federal national security bureaucracy that exists today.<sup>27</sup>

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21. See ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 21-38 (1976).

22. See ALLAN R. MILLET & PETER MASLOWSKI, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA* 88 (1984); Jason Mazzone, *The Security Constitution*, 53 *UCLA L. REV.* 29, 39-47 (2005).

23. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 116-19 (2005); MILLET & MASLOWSKI, *supra* note 22, at 88-90.

24. See RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877*, at 94-237 (1990).

25. See PAUL FOOS, *A SHORT, OFFHAND, KILLING AFFAIR: SOLDIERS AND SOCIAL CONFLICT DURING THE MEXICAN-AMERICAN WAR* 171 (2002) ("The blue [U.S. Army] uniform had been a badge of shame for Mexican War volunteers; it quickly became an honorable symbol of national service in the Civil War."); see also AMAR, *supra* note 23, at 380.

26. Edward Corwin argued that World War II mobilization and post-war national security imperatives came at the expense of dual federalism. See EDWARD SAMUEL CORWIN, *TOTAL WAR AND THE CONSTITUTION* 70, 173-74 (1947).

27. See DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* 180-273 (2008).

2. *Twentieth-century domestic intelligence abuses and oversight reform*

The focus of twentieth-century American national security policy was overwhelmingly external and abroad, so state and local institutions were naturally not viewed as part of the security apparatus in any serious or sustained way. There was, however, an internal component to the threat as well, in the form of perceived subversion. The United States government feared that anarchists, communists, and other militant radicals with ties to foreign ideological movements posed a significant national security threat<sup>28</sup>—and this internal dimension necessitated an expanding domestic intelligence effort.<sup>29</sup>

In pursuing domestic intelligence programs, the federal government sometimes (including during some of the most notorious episodes) procured the support of local police agencies. For example, in the years following World War I—a period now remembered for overblown alarm, expansive targeting, and disgraceful security measures in response to radical leftist activity—J. Edgar Hoover's Bureau of Investigation (the forerunner of the FBI) enlisted local police agencies to conduct a series of raids directed by Attorney General A. Mitchell Palmer on suspected radicals.<sup>30</sup> In the 1950s and 1960s, the FBI requested local police agencies' assistance in its infamous Counter-Intelligence Program (COINTELPRO) efforts to monitor allegedly subversive political groups. Those Cold War programs included extensive surveillance, disruption, and smear campaigns against civil rights organizations and anti-Vietnam War groups.<sup>31</sup>

Disclosure of such intelligence abuses eventually spurred oversight reform. In the mid-1970s, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the Church Committee, as well as other major investigations, uncovered widespread excesses and illegalities among government intelligence agencies, especially at the federal level, including within the FBI and CIA.<sup>32</sup> Most relevant here, these investigations also exposed federal efforts to enlist local police in

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28. See Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1072-77 (2006).

29. See WILLIAM W. KELLER, *THE LIBERALS AND J. EDGAR HOOVER* 154-89 (1989); William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 20 (2000).

30. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 220-26 (2004).

31. For a history of these episodes, see generally RICHARD E. MORGAN, *DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA* (1980).

32. On the House side, Representative Otis Pike chaired a similar committee investigation. See Loch K. Johnson, *Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee*, 64 PUB. ADMIN. REV. 3, 10 (2004). President Ford also created the Commission on CIA Activities Within the United States. Banks & Bowman, *supra* note 29, at 32.

inappropriate or illicit domestic intelligence efforts, including infiltration of political groups and large-scale compilation of dossiers on citizens and local community groups by so-called “red squads,” special intelligence units formed to target suspected subversives. As shown below, these past collaborations between federal intelligence agencies and local police continue to reverberate as examples of how domestic intelligence can run amok.

The Church Committee found, for example, that during the 1964-76 period, “[i]n contrast to previous policies for centralizing domestic intelligence investigations, the Federal Government encouraged local police to establish intelligence programs both for their own use and to feed into the Federal intelligence-gathering process. This greatly expanded the domestic intelligence apparatus, making it harder to control.”<sup>33</sup> “These Federal policies,” the Committee further concluded, “contributed to the proliferation of local police intelligence activities, often without adequate controls. One result was that still more persons were subjected to investigation who neither engaged in unlawful activity, nor belonged to groups which might be violent.”<sup>34</sup>

Investigation of intelligence abuses also revealed efforts by federal agencies to avoid accountability for activities delegated to local agencies: “Local police intelligence provided a convenient manner for the FBI to acquire information it wanted while avoiding criticism for using covert techniques such as developing campus informants. . . . Instead of recruiting student informants itself, the FBI would rely on local police to do so.”<sup>35</sup>

At the federal level, intelligence abuse investigations of the 1970s eventually produced a constellation of formal oversight mechanisms and checks on domestic intelligence activities arrayed across all three branches of government.<sup>36</sup> Designing oversight mechanisms suited to practices necessarily shrouded in high degrees of secrecy was a challenge; public scrutiny would not provide a natural check, and meaningfully monitoring intelligence activities requires sophisticated expertise among the overseers that is difficult to acquire.<sup>37</sup> Congress therefore created permanent congressional intelligence oversight committees,<sup>38</sup> which were expected to develop stronger expertise and deploy it with greater vigor than the informal and loose congressional oversight mechan-

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33. S. REP. NO. 94-755, bk. 2, at 68 (1976).

34. *Id.* at 78. On the role of the CIA in recruiting local agency partners, see *id.* at 103.

35. *Id.* at 78.

36. See generally RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL32500, PROPOSALS FOR INTELLIGENCE REORGANIZATION, 1949-2004, at 19-26 (2004) (discussing the work and recommendations of the Rockefeller Commission, Church Committee, and Pike Committee).

37. See FREDERICK M. KAISER, CONG. RESEARCH SERV., RL32525, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES 27-29 (2008); Loch K. Johnson, *Ostriches, Cheerleaders, Skeptics, and Guardians: Role Selection by Congressional Intelligence Overseers*, 28 SAIS REV. 93, 104-06 (2008).

38. See Frederick M. Kaiser, *A Proposed Joint Committee on Intelligence: New Wine in an Old Bottle*, 5 J.L. & POL. 127, 130-38 (1988).

isms that preceded them.<sup>39</sup> A few years later, Congress passed the Foreign Intelligence Surveillance Act (FISA), which regulated foreign intelligence surveillance inside the United States or by U.S. persons and created the Foreign Intelligence Surveillance Court (FISC) to oversee special warrants for that purpose.<sup>40</sup> Internal executive branch reforms included executive orders limiting some intelligence activities, Justice Department guidelines on national security-related investigations,<sup>41</sup> new institutions like inspectors general for national security agencies,<sup>42</sup> and executive branch oversight boards to monitor intelligence activities and their compliance with federal law and policy.<sup>43</sup> Debate continues to rage over whether those oversight mechanisms are sufficiently robust,<sup>44</sup> but the point here is that together these layers of oversight constrained continuing federal domestic intelligence efforts from multiple directions and helped distribute intelligence expertise beyond the agencies or subagencies conducting it.

In contrast to reforms at the federal level following the intelligence abuses of the 1970s, many state and local agencies dismantled their national security intelligence apparatuses altogether or adopted tight restrictions—including judicial consent decrees—on their ability to function at all.<sup>45</sup> “In some cities and towns the [political intelligence] operation was simply ended without formal action. In larger cities restrictive guidelines were adopted to avoid more drastic, embarrassing, and expensive measures.”<sup>46</sup> Chicago’s “red squad” operations, which had especially tight links with federal national security agencies

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39. See Johnson, *supra* note 32, at 5-12.

40. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, §§ 102-103, 92 Stat. 1783, 1786-1788 (to be codified as amended at 50 U.S.C. §§ 1802-1803); GREGORY F. TREVERTON, REORGANIZING U.S. DOMESTIC INTELLIGENCE: ASSESSING THE OPTIONS 8 (2008) (discussing FISA and the “wall” between intelligence and law enforcement).

41. See Banks & Bowman, *supra* note 29, at 35, 68-70.

42. See Paul C. Light, *Federal Inspectors General and the Paths to Accountability*, in HANDBOOK OF ADMINISTRATIVE ETHICS 387, 388-92 (Terry L. Cooper ed., 2d ed. 2000).

43. These executive oversight mechanisms included the Intelligence Oversight Board created by President Ford in Executive Order No. 11,905, 3 C.F.R. 90 (1976), *reprinting* 41 Fed. Reg. 7703 (Feb. 19, 1976).

44. See, e.g., Frederick M. Kaiser, *Congressional Oversight of the Presidency*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 75 (1988). This debate has also continued regarding post-9/11 oversight. See, e.g., AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 1-11 (2011); Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721 (2007).

45. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, INTELLIGENCE-LED POLICING: THE NEW INTELLIGENCE ARCHITECTURE 5 (2005); Edward R. Maguire & William R. King, *Trends in the Policing Industry*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 19 (2004); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 593-94 (2010). See generally Chevigny, *supra* note 9 (discussing litigation related to local intelligence abuses and resulting reforms).

46. FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 346 (1990).

and involved extensive surveillance and intimidation campaigns against political organizations, were curtailed as a result of federal litigation and a settlement that severely restricted intelligence activities.<sup>47</sup> To deal with abuses such as police infiltration and monitoring of civil rights organizations in Baltimore, the Maryland state government restricted information collection by agencies and granted wide public access to file data.<sup>48</sup> The Detroit city government, whose police intelligence units had spied on student and antiwar groups as well as individual political activists, dismantled its “red squads” and prohibited investigations of persons or organizations except when sufficiently linked to suspected criminal violations.<sup>49</sup>

Because the federal government still served as the ultimate national security backstop, states and cities could afford to pull back from national security intelligence activities in ways that the federal government could not. From the 1970s until 2001, intelligence oversight reform at the federal level generally proceeded in parallel with intelligence atrophy at the local level. As explained later in Part III, these divergent historical paths of reform have important implications for designing effective oversight architecture going forward.

### B. *Post-9/11 National Security and Domestic Intelligence*

Following the September 11, 2001 attacks, the federal government underwent structural realignment and expanded resources and legal authorities directed toward domestic intelligence.<sup>50</sup> The USA PATRIOT Act brought down the “wall” that had previously stood between federal law enforcement and intelligence.<sup>51</sup> The FBI shifted its priorities and allocation of personnel toward intelligence and terrorism prevention,<sup>52</sup> and it expanded its guidelines for initiating inquiries and conducting investigations.<sup>53</sup> The new Department of Homeland Security, which Congress created in 2003, has an Office of Intelligence and Analysis responsible for collection, analysis, and dissemination of domes-

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47. *See id.* at 90-145, 353.

48. *See id.* at 300-05.

49. *See id.* at 296-98.

50. *See* Chitra Ragavan, *Who Ya Gonna Call?*, U.S. NEWS & WORLD REP., May 20, 2002, at 14 (describing the retooling of the FBI to combat terrorism after 9/11).

51. *See* William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1148 (2003).

52. *See* *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2004: Hearing Before a Subcomm. of the H. Comm. on Appropriations*, 108th Cong. 10-17 (2003) (statement of Robert Mueller, Director, FBI), available at <http://www.fbi.gov/news/testimony/progress-report-on-the-reorganization-and-refocus-of-the-fbi>.

53. *See* Charlie Savage, *F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries*, *Data Show*, N.Y. TIMES, Mar. 27, 2011, at A19.

tic security threat information.<sup>54</sup> The President directed the National Security Agency to conduct expanded electronic surveillance of individuals or communications inside the United States, first pursuant to his asserted executive powers<sup>55</sup> and then pursuant to amendments to the 1978 Foreign Intelligence Surveillance Act.<sup>56</sup> And the Intelligence Reform and Terrorism Prevention Act of 2004 created the Office of the Director of National Intelligence and the National Counterterrorism Center to coordinate intelligence activities among government agencies.<sup>57</sup>

The September 2001 terrorist attacks briefly produced calls among some lawmakers and experts for the United States to centralize domestic intelligence much further by creating a new agency dedicated solely to that function,<sup>58</sup> perhaps modeled on the United Kingdom's MI-5.<sup>59</sup> Such proposals were quickly shelved, however, in part due to likely political backlash over civil liberty concerns.<sup>60</sup> The 9/11 Commission rejected the idea of creating a large stand-alone domestic intelligence agency, proposing instead measures and coordination bodies to improve capabilities within and among existing agencies.<sup>61</sup>

This post-9/11 emphasis on intelligence coordination included a significant role for state and local governments, where so much intelligence capacity resides. "To meet this new threat and to prevent future attacks," Attorney General John Ashcroft wrote to all U.S. Attorneys in November 2001, "law enforcement officials at all levels of government—federal, state, and local—must work together, sharing information and resources needed both to arrest and prosecute the individuals responsible and to detect and destroy terrorist cells before they can strike again."<sup>62</sup> The 9/11 Commission concluded that state and local law enforcement agencies needed more intelligence training and needed to work

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54. See *About the Office of Intelligence and Analysis*, DEP'T HOMELAND SECURITY, [http://www.dhs.gov/xabout/structure/gc\\_1220886590914.shtm](http://www.dhs.gov/xabout/structure/gc_1220886590914.shtm) (last modified Aug. 26, 2011).

55. See Eric Lichtblau & James Risen, *Top Aide Defends Domestic Spying*, N.Y. TIMES, Feb. 7, 2006, at A1.

56. See Eric Lichtblau et al., *Reported Drop in Surveillance Spurred a Law*, N.Y. TIMES, Aug. 11, 2007, at A1.

57. See 50 U.S.C. §§ 403, 404(o) (2006).

58. See, e.g., RICHARD C. SHELBY, SEPTEMBER 11 AND THE IMPERATIVE OF REFORM IN THE U.S. INTELLIGENCE COMMUNITY 75-76 (2002), available at <http://intelligence.senate.gov/shelby.pdf>; William E. Odom, Editorial, *Why the FBI Can't Be Reformed*, WASH. POST, June 29, 2005, at A21.

59. See *Who We Are*, MI-5, <https://www.mi5.gov.uk/output/who-we-are.html> (last visited Feb. 16, 2012).

60. See Louie Freeh, Letter to the Editor, *Former FBI Director Says U.S. Doesn't Need a National Police Force*, WALL ST. J., Mar. 31, 2007, at A9; Ronald Kessler, Editorial, *No to an American MI5*, WASH. POST, Jan. 5, 2003, at B7.

61. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 423 (2004) [hereinafter 9/11 COMMISSION REPORT].

62. Memorandum from Attorney Gen. John Ashcroft to All U.S. Attorneys (Nov. 13, 2001), available at <http://www.fas.org/irp/agency/doj/agdirective5.pdf>.

more closely with federal authorities in identifying terrorism suspects.<sup>63</sup> Many of the informational “dots” comprising the 9/11 plot sequence had been detected by someone, somewhere, at some level of government in the United States; others should have been seen and passed on but were missed. Perhaps, the argument ran, the attacks could have been averted with better systems and policies to discern, analyze, assemble, and act on such “dots” throughout the country, ultimately uncovering patterns and the plot.<sup>64</sup>

The post-9/11 policy emphasis on integrating local security and law enforcement agencies within the national security architecture was heightened by the perception that future terrorism threats might already lie within U.S. borders, so-called sleeper cells waiting to strike.<sup>65</sup> Terrorism was by no means an entirely new problem for the United States in 2001, nor were state and local governments uninvolved in the counterterrorism effort before then.<sup>66</sup> A broad survey, however, found that “terrorism prevention never appeared to be a high priority for state and local law enforcement agencies before Sept. 11.”<sup>67</sup> After 9/11, consensus emerged across levels of government that preventing and investigating terrorism threats would require mobilizing and linking local governments.<sup>68</sup>

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63. 9/11 COMMISSION REPORT, *supra* note 61, at 390; *see also id.* at 401 (“A ‘smart’ government would *integrate* all sources of information to see the enemy as a whole.”).

64. *See id.* at 215-41, 416-18. The influential Markle Foundation Task Force on National Security in the Information Age likewise concluded that a new nationwide intelligence architecture was needed to link information horizontally among agencies and vertically among levels of government. *See* MARKLE FOUND. TASK FORCE ON NAT’L SEC. IN THE INFO. AGE, PROTECTING AMERICA’S FREEDOM IN THE INFORMATION AGE 48 (2002).

65. *See generally* DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR (2007) (describing the post-9/11 concern with sleeper cells inside the United States).

66. The 1990s alone saw the 1993 World Trade Center bombing, the Oklahoma City bombing, and the series of attacks by “Unabomber” Theodore Kaczynski. *See* Banks & Bowman, *supra* note 29, at 97-106.

67. COUNCIL OF STATE GOV’TS & E. KY. UNIV., THE IMPACT OF TERRORISM ON STATE LAW ENFORCEMENT: ADJUSTING TO NEW ROLES AND CHANGING CONDITIONS 9 (2006). One major survey in the mid-1990s found that only about thirty-eight percent of state and local governments had contingency plans for dealing with terrorist threats; another forty percent reported never having had contact with federal agencies regarding terrorism issues. *See* KEVIN JACK RILEY & BRUCE HOFFMAN, DOMESTIC TERRORISM: A NATIONAL ASSESSMENT OF STATE AND LOCAL PREPAREDNESS 26, 31 (1995).

68. *See* COUNCIL OF STATE GOV’TS & E. KY. UNIV., *supra* note 67, at 24 (citing survey results that ninety-two percent of state law enforcement agencies reported allocating more or many more resources for intelligence gathering, analysis, and sharing since September 2001). For views from the local government level, *see*, for example, INT’L ASS’N OF CHIEFS OF POLICE, INTELLIGENCE-LED POLICING: THE NEW INTELLIGENCE ARCHITECTURE 23 (2005). *But see* RILEY ET AL., *supra* note 11, at 27 (discussing survey findings suggesting that counterterrorism intelligence is not as pervasive a function among local law enforcement agencies as some believe); Cynthia Lum et al., *Police Activities to Counter Terrorism: What We Know and What We Need to Know*, in TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM, *supra* note 14, at 101, 115 (citing survey showing that very few police forces

Integration of local agencies into national security intelligence functions after 9/11 was driven not only by this imperative for tighter coordination among government components and levels, but also the widespread view that local agencies had some unique intelligence capabilities to offer.<sup>69</sup> Local police are often believed to be better suited to perform certain counterterrorism functions because of their superior familiarity with their local communities and their rich networks of relations with other local governmental and nongovernmental actors.<sup>70</sup> Whereas federal law enforcement officials are tasked with investigating specific federal crimes, local police functions include preventing and investigating crime as well as maintaining order, patrolling, and providing services—and these are not always distinct from national security functions in the counterterrorism context. Modern policing strategy trends also call for wide and deep engagement within the community.<sup>71</sup> It is often argued, then, that because local police are armed with this familiarity and these sets of community and institutional relationships, they are naturally positioned to detect and analyze suspicious irregularities and to cultivate sources of information—thus contributing to national security, often just in the course of their everyday activities.<sup>72</sup>

Efforts to harness local governments into national security functions, particularly into intelligence related to terrorism threats, have not abated over the past decade.<sup>73</sup> The Intelligence Reform and Terrorism Prevention Act, as amended in 2007 by the 9/11 Commission Act, specifically requires the Presi-

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have specialized intelligence analysts or intelligence units dedicated to terrorism, and that these features are virtually nonexistent in small agencies).

69. See NAT'L CRIMINAL JUSTICE ASS'N, *SERVING AND PROTECTING IN THE SHADOW OF TERRORISM* 2 (2003).

70. See RILEY ET AL., *supra* note 11, at 1.

71. The term has many different meanings, but generally “community policing” is “a partnership philosophy that increases collaboration (or at least consultation) between the community and the police, decentralises police organisational hierarchy, gives greater discretion to lower ranks, places greater influence in the hands of the community in determining police priorities, and promotes a social service ethos.” JERRY RATCLIFFE, *INTELLIGENCE-LED POLICING* 3 (2008).

72. See Badi Hasisi et al., *The Impacts of Policing Terrorism on Society: Lessons from Israel and the US*, in *TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM*, *supra* note 14, at 177, 181-87. As discussed later in this Article, however, there is a danger that perceptions of police spying and biases against minority communities could erode police-community trust and therefore render police involvement in counterterrorism intelligence counterproductive. See FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, *RETHINKING RADICALIZATION* 23-25 (2011). See generally Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 *LAW & SOC'Y REV.* 365 (2010) (arguing, based on empirical studies, that perceptions of procedural fairness promotes communities' cooperation with police).

73. See *DHS: The Path Forward: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 6-10 (2009) (testimony of Janet Napolitano, Secretary of the Department of Homeland Security); see also Dana Priest & William M. Arkin, *Monitoring America*, *WASH. POST*, Dec. 20, 2010, at A1 (describing growth of state and local intelligence capabilities).

dent to take action to facilitate sharing of terrorism-related information among federal, state, and local entities.<sup>74</sup> In 2008 the Office of the Director of National Intelligence published its information-sharing strategy, declaring “the imperative need of moving beyond considering State and local government to be only ‘first responders,’ preferring instead to thinking [sic] of them as the first line of defense in a very deep line of information assets.”<sup>75</sup>

Indeed, as elaborated further below, recent incidents of domestic (often called “homegrown”) terrorism or the involvement of U.S. persons with foreign terrorist organizations abroad has heightened attention to local intelligence and counterterrorism efforts.<sup>76</sup> In the past few years, for example, federal agencies working with local partners arrested and charged Najibullah Zazi, an Afghan immigrant who allegedly trained in an al Qaeda camp in Pakistan and planned to detonate bombs within the United States,<sup>77</sup> and Faisal Shahzad, who allegedly trained with the Pakistani Taliban and tried to detonate a bomb in Times Square.<sup>78</sup>

Once a major component of the national security threat was seen as residing or operating within U.S. borders, local police agencies were an obvious resource for the federal government to turn to given the vastness of the intelligence challenge. Despite the expansion and creation of new federal bureaucracies, much of the country’s domestic security and intelligence capacity resides below the federal level.

### C. National Security and Local Police After 9/11

Unlike democracies such as Israel with national police forces,<sup>79</sup> or Britain and Germany with regional police forces but high degrees of uniformity among just a few dozen such agencies,<sup>80</sup> the United States has a system of policing—

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74. Intelligence Reform and Terrorism Prevention Act of 2004, 6 U.S.C. § 485 (2006 & Supp. IV 2010).

75. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, UNITED STATES INTELLIGENCE COMMUNITY INFORMATION SHARING STRATEGY 18 (2008).

76. See PETER NEUMANN, NAT’L SEC. PREPAREDNESS GRP., BIPARTISAN POLICY CTR., PREVENTING VIOLENT RADICALIZATION IN AMERICA 12, 17, 33-34 (2011); Pierre Thomas et al., *Holder: Homegrown Terror Threat Increasing*, ABC NEWS (July 29, 2009), <http://abcnews.go.com/Politics/story?id=8202511&singlePage=true>.

77. See David Johnston & Scott Shane, *Terror Case: “Scary” Ingredients*, N.Y. TIMES, Sept. 25, 2009, at A1.

78. See William K. Rashbaum & Al Baker, *Smoking Car to an Arrest in 53 Hours*, N.Y. TIMES, May 5, 2010, at A1.

79. See Jack R. Greene & Sergio Herzog, *The Implications of Terrorism on the Formal and Social Organization of Policing in the US and Israel: Some Concerns and Opportunities*, in TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM, *supra* note 14, at 143, 150.

80. See Bayley & Weisburd, *supra* note 14, at 86 (describing the British organizational structure); Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A*

along with its domestic intelligence resources—that is highly localized and heterogeneous. Police scholars generally regard the U.S. system as the most fragmented in the industrialized world,<sup>81</sup> and historically the U.S. system of localized policing has been very resistant to any calls for centralization or consolidation.<sup>82</sup> The new national security intelligence architecture has been built on this landscape.

### 1. *The context*

Numbers and counting methods vary, but most sources estimate that there are about 17,000 state and local law enforcement agencies throughout the United States,<sup>83</sup> comprised of about 700,000 officers.<sup>84</sup> The FBI (the federal agency charged with lead responsibility for domestic counterterrorism intelligence) by contrast has about 12,000 agents, though its responsibilities are more narrowly focused.<sup>85</sup>

Policing in the United States is notable for its local variation along many dimensions. Police jurisdictions differ greatly in features such as population size and density, ethnic composition, geography, urbanization, location of high-profile targets, civic culture, and political orientation.<sup>86</sup> Forces vary in terms of size, resources, capability, operating procedures, equipment, and day-to-day priorities, not to mention variations in local laws, including those regulating police conduct.<sup>87</sup> In terms of size, for example, the forty-six largest metropolitan

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*Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 496, 503 (2007) (describing the German organizational structure).

81. See Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55, 58 (2010). On the U.S. system of localized policing in comparison with other democracies, see generally DAVID H. BAYLEY, PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS (1985).

82. See JOHN D. BREWER ET AL., THE POLICE, PUBLIC ORDER AND THE STATE 115 (2d ed. 1996); NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 51 (Wesley Skogan & Kathleen Frydl eds., 2004).

83. See RANDOL, *supra* note 3, at 3. The Department of Justice provided the following numbers for 2004: 12,766 local police departments, 3067 sheriffs' offices, 1481 special jurisdiction agencies, 49 state law enforcement agencies, and 513 other agencies. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 1 (Carolyn C. Williams ed., 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea04.pdf>.

84. See REAVES, *supra* note 83, at 2 (citing more than 17,000 state and local law enforcement agencies with more than 700,000 full-time sworn officers); David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC'Y REV. 635, 635 (2005).

85. See Bayley & Weisburd, *supra* note 14, at 91.

86. For a description of contrasting approaches to counterterrorism policing in New York City and Los Angeles, see Judith Miller, *On the Front Line in the War on Terrorism*, CITY J., Summer 2007, at 28.

87. See Shane Harris, *Fusion Centers Raise a Fuss*, NAT'L J. (Jan. 31, 2011, 12:44 PM), <http://www.nationaljournal.com/member/magazine/issues-ideas-fusion-centers-raise-a-fuss-20070210>.

police forces account for over a third of all police officers nationwide, while there are also nearly eight hundred local police agencies that have just a single sworn officer.<sup>88</sup>

Consider also the unique threats faced by New York City, which has the largest dedicated counterterrorism police force at the municipal level, as a densely populated, ethnically diverse home to much of the U.S. and global private financial system.<sup>89</sup> Some of its features contrast significantly even with other major cities, like Los Angeles, which not only differs in size, ethnic composition, and resources, but also in its local political system and civic cultural orientation especially suspicious of police.<sup>90</sup>

In short, harnessing local law enforcement agencies for national security means not simply linking and coordinating among a vast number of units but also among vastly different capabilities and local community-government relationships.

## 2. Federal efforts to promote local national security activities

Recognizing the post-9/11 need for better collection and coordination of information among government entities at all levels, the federal government promoted a multitude of initiatives aimed at bolstering state and local intelligence efforts and linking them with federal ones. These included intelligence initiatives focused on *collection*, *analysis*, and *sharing* of information related to terrorism and national security.

With regard to information collection, the federal government provides resources and training to state and local police forces to help them establish intelligence units, build databases, and develop standards for intelligence gathering.<sup>91</sup> Most states and many local law enforcement agencies have expanded intelligence programs since 9/11, including by adding specialized training in terrorism prevention. In some cases, they have developed dedicated counterterrorism units or capabilities,<sup>92</sup> all of which are then governed by a complex patchwork of federal, state, and local laws and guidelines.<sup>93</sup>

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88. NAT'L RESEARCH COUNCIL, *supra* note 82, at 49.

89. See *Homeland Security: The Next 5 Years: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. 74-76 (2006) [hereinafter *The Next 5 Years*] (statement of Richard A. Falkenrath, Deputy Comm'r for Counterterrorism, New York City Police Department).

90. See Miller, *supra* note 86, at 35.

91. See Kaplan, *supra* note 9, at 42-49. For criticism of counterterrorism training programs at the local level, especially concerning anti-Muslim stereotyping, see NEUMANN, *supra* note 76, at 44; Shaun Waterman, *Anti-Terrorism Training Draws Scrutiny*, WASH. TIMES, Mar. 30, 2011, at A4.

92. See COUNCIL OF STATE GOV'TS & E. KY. UNIV., *supra* note 67, at 24.

93. For some examples, see *supra* notes 9-13 and accompanying text.

Much of the federal-local collaborative intelligence gathering on terrorism threats occurs through FBI-led Joint Terrorism Task Forces,<sup>94</sup> to which other federal, state, and local agencies assign officers to help coordinate intelligence and law enforcement operations across bureaucratic lines. Such efforts resemble previous federal efforts to confront other law enforcement issues, like narcotics trafficking and gang or organized crime activity, that have national and international dimensions and that require coordination among federal and local police agencies.<sup>95</sup> In essence, those state and local personnel work day-to-day on behalf of the federal government. There were about three dozen such task forces before September 2001, compared with more than 100 today.<sup>96</sup>

With regard to information analysis, the federal government has worked with state and local governments to develop systems for synthesizing information collected within and across jurisdictions. For example, the Department of Homeland Security funds state-operated “fusion centers” to compile, analyze, and route electronically stored law enforcement and investigative information, including public as well as private sector data.<sup>97</sup> The federal government provides grants and intelligence personnel to these centers, which now number more than seventy,<sup>98</sup> and the 9/11 Commission Act of 2007 called for expanded federal efforts to “support efforts to include State, local, and regional fusion centers into efforts to establish an information sharing environment.”<sup>99</sup> Some programs to bring state and local government into the intelligence analysis process are motivated not only by a desire to produce and share more information, but also because expanded information collection efforts can create a problem of overload or too many “dots,” and state and local analytical

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94. See *Protecting America Against Terrorist Attack: Our Joint Terrorism Task Forces*, FBI, [http://www.fbi.gov/about-us/investigate/terrorism/terrorism\\_jtjfs](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtjfs) (last visited Feb. 16, 2012).

95. See Kip Schlegel, *Transnational Crime: Implications for Local Law Enforcement*, 16 J. CONTEMP. CRIM. JUST. 365 (2000). For example, the FBI manages Violent Gang Task Forces and the Drug Enforcement Agency manages Organized Crime Drug Enforcement Task Forces. See, e.g., *Organized Crime Drug Enforcement Task Forces (OCDETF)*, DRUG ENFORCEMENT AGENCY, <http://www.usdoj.gov/dea/programs/ocdetf.htm> (last visited Feb. 16, 2012); *Violent Gang Task Forces*, FBI, [http://www.fbi.gov/about-us/investigate/vc\\_majorthfts/gangs/violent-gangs-task-forces](http://www.fbi.gov/about-us/investigate/vc_majorthfts/gangs/violent-gangs-task-forces) (last visited Feb. 16, 2012).

96. *Protecting America: National Task Force Wages War on Terror*, FBI (Aug. 19, 2008), [http://www.fbi.gov/news/stories/2008/august/njttf\\_081908](http://www.fbi.gov/news/stories/2008/august/njttf_081908).

97. See JOHN ROLLINS, CONG. RESEARCH SERV., RL34070, FUSION CENTERS: ISSUES AND OPTIONS FOR CONGRESS 1 (2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-35, FEDERAL EFFORTS ARE HELPING TO ALLEVIATE SOME CHALLENGES ENCOUNTERED BY STATE AND LOCAL INFORMATION FUSION CENTERS 2, 23 (2007); O'Harrow, *supra* note 7.

98. See RANDOL, *supra* note 3, at 2.

99. Implementing Recommendations of the 9/11 Commission Act of 2007, 6 U.S.C. § 124(h) (Supp. I 2007).

processes can help sift through and improve the quality of data like tips and reports of suspicious activities coming into the system.<sup>100</sup>

As to information sharing, key issues include ensuring that disparate but related bits of information get pieced together and that intelligence products are delivered to those who need to act. Data are therefore increasingly exchanged via initiatives among federal, state, and local law enforcement agencies. In addition to fusion centers, these data-sharing initiatives include classified networks that circulate information between federal agencies and state fusion centers.<sup>101</sup> Fusion centers select and analyze information, sending it up to federal agencies that then produce classified intelligence by a series of processes, including pattern analysis and data mining.<sup>102</sup> Other networks transmit sensitive but unclassified information to and among federal, state, and local agencies.<sup>103</sup> As mentioned earlier, state laws on information collection and sharing vary,<sup>104</sup> reflecting local policy preferences.

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It is tempting to think of national security policy as inherently *national* under our constitutional scheme.<sup>105</sup> The federal government's primacy in foreign affairs is often defended as instrumentally necessary for effective diplomacy,<sup>106</sup> yet it also rests on understandings of national sovereignty and inherent centralized powers in the federal government as aspects of that sovereignty.<sup>107</sup> After 9/11, the rhetoric—as well as the law—of a “war” against terrorism also cast counterterrorism naturally as a federal responsibility.<sup>108</sup> Meanwhile, basic law and order and criminal justice remain stridently protected as a local domain.<sup>109</sup>

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100. See RANDOL, *supra* note 3, at 15-16; Ken Dilanian, *Security at What Price?*, L.A. TIMES, Nov. 15, 2010, at A8.

101. See RANDOL, *supra* note 3, at 2, 20.

102. See *id.* at 2.

103. See *id.* at 20.

104. See *supra* notes 11-12 and accompanying text.

105. Cf. Richard J. Riordan & Amy B. Zegart, *City Hall Goes to War*, N.Y. TIMES, July 5, 2002, at A19 (“Americans have always looked to the federal government for protection from enemies abroad.”).

106. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

107. See *United States v. Belmont*, 301 U.S. 324, 330-31 (1937); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317-18 (1936).

108. Cf. Press Release, The White House, President Bush Releases National Strategy for Combating Terrorism (Feb. 14, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030214-7.html>.

109. As the Supreme Court wrote in *United States v. Morrison*: “[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” 529 U.S. 598, 618 (2000).

As is probably clear by now, however, contemporary terrorism challenges have attributes of a police and law enforcement problem as well as attributes of a national defense and foreign affairs problem. They do not fall neatly into either of these familiar categories. Moreover, the brief historical account presented above reveals that national security and defense have never been such exclusive federal spheres as one might easily suppose.<sup>110</sup> Is contemporary terrorism a national and international problem with some local dimensions to it, or is it a local problem that has national and international implications? As a matter of basic constitutional allocation of responsibility, where does national security intelligence—especially counterterrorism work—fit?<sup>111</sup>

Post-9/11 institutional innovations related to information collection, analysis, and sharing have pushed some national security intelligence responsibilities down to state and local levels, though this intelligence architecture is very much a work in progress and continues to evolve. Although the federal government wields vast influence with law, politics, and resources, state and local governments have reemerged as significant players in the national security arena.

## II. VERTICAL RELATIONS AND NATIONAL SECURITY POWERS: LEADING ACCOUNTS AND THEIR LIMITS

What happens to state and local law and policy when it is coordinated or overlaid with federal initiatives to expand governmental national security powers? How should we understand and evaluate the vertical relationships among the levels of government in the national security arena? This Part explores the leading answers to those questions in contemporary counterterrorism law debates, and the limits of those answers.

One set of leading narratives of vertical national security relationships is what I call “top-down.” In describing state and local actions mostly in familiar terms of liberty versus security, it views major rebalancing as struck at the top, at the federal level, with state and local governments following that lead. A

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110. The Supreme Court considered and rejected a version of this exclusive sphere argument in the case *Gilbert v. Minnesota*, 254 U.S. 325 (1920), better known as a free speech case. Minnesota had passed a statute during World War I making it unlawful to interfere with or discourage military enlistment. *Id.* at 326. In challenging it, a criminal defendant argued that “Congress alone can under the Constitution ‘provide for the common defence.’” *Id.* at 328 (quoting U.S. CONST. art. I, § 8, cl. 1). Rejecting this claim that any individual state has no interest or power in protecting the United States from its enemies, the Supreme Court explained that “this country is one composed of many . . . [and] the constituted and constituting sovereignties must have power of cooperation against the enemies of all.” *Id.* at 329.

111. *Cf.* Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 715-17 (2008) (discussing challenges of categorizing issues as essentially foreign or domestic).

second set—“pushback accounts”—emphasizes the way in which state and local governments sometimes resist federal efforts. It posits a bottom-up role for state and local governments in shaping national security policy, again usually emphasizing liberty-security balances as the key metric. Although both sets of accounts help explain some important post-9/11 phenomena, neither adequately captures the complexities of the emergent domestic intelligence architecture and of some of the most pressing or salient policy questions going forward.

#### A. *Top-Down Accounts*

Proponents of federal efforts to promote state and local national security intelligence activities generally see the programs discussed in Part I as a way of promoting sound security policies and sound privacy protections downward. To many observers and scholars, however, these efforts are dangerous because aggressive security policies and legal rebalancing at the federal level distort local policy functions and legal balances in ways that corrode liberty down through the state and local level.<sup>112</sup>

##### 1. *Hierarchical or principal-agent accounts*

One common set of accounts holds that the vertical coordination of national security and law enforcement institutions effectively puts local governmental powers in the hands of the federal government—that state and local institutions and officials essentially become agents of the federal government. This “hierarchical” or “principal-agent” view of federal-local coordination sees the federal government as controlling local entities and their national security-related resources, and therefore sees local actions as often reflecting legal and policy balances set at the federal level.<sup>113</sup>

This vision of top-down control generally assumes a functional, not a formal, agency relationship, because constitutionally the federal government may not “commandeer” state and local legislators or executive officials.<sup>114</sup> In *Printz v. United States*,<sup>115</sup> the Supreme Court held unconstitutional the Brady Handgun Violence Prevention Act’s provision requiring that local law enforcement officers conduct background checks.<sup>116</sup> Writing for the Court, Justice Scalia explained: “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or

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112. For a discussion of both views, see Harris, *supra* note 87.

113. See, e.g., David A. Harris, *A Lack of Respect*, BOS. REV., Dec. 2004-Jan. 2005, at 12 (discussing imposition of federal counterterrorism policies on local law enforcement agencies).

114. See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 163-65 (2001).

115. 521 U.S. 898 (1997).

116. *Id.* at 933.

those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>117</sup>

Whether because of *Printz* or other concerns, the federal government uses other tools to exert heavy influence over state and local police and other agencies and to induce alignment of their activities with federal initiatives.<sup>118</sup> Some of these tools were described earlier, including information-sharing arrangements, financial grants, and training programs designed to help bolster and unify local capabilities.<sup>119</sup>

Sometimes federal control of local government intelligence resources can be quite strong and direct, as in the Joint Terrorism Task Forces, to which state and local governments voluntarily provide resources and personnel under the operational control of the FBI. In many cases, the federal government controls state and local entities by conditioning its grants and funding on federal guidelines, such as information-sharing protocols to promote uniformity as well as privacy standards.<sup>120</sup> And in other cases, the federal government may request specific local assistance in carrying out federal initiatives. For example, as discussed in greater detail below, the Justice Department requested in November 2001 that local police departments assist in locating and interviewing several thousand foreign men of Middle Eastern origin residing in their communities to determine whether any of them posed a terrorist threat or had useful information about possible terrorists.<sup>121</sup>

The notion of local police agencies or other state and local institutions being recruited into a national security function often conjures up images of past aggressive snooping and overbroad sweeps of political dissidents.<sup>122</sup> Opponents of federal efforts to enlist local governments in national security intelligence efforts often emphasize the experience of COINTELPRO and other past abuses involving federal-local intelligence partnerships, arguing that history

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117. *Id.* at 935. Justice Stevens suggested in dissent that the doctrine should be more flexible in national security or emergency contexts. *See id.* at 940 (Stevens, J., dissenting).

118. As Justice O'Connor explained in her concurrence in *Printz*: “Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs.” *Id.* at 936 (O'Connor, J., concurring); *see also* Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 106-11 (2001) (arguing that federal conditional spending practices threaten state autonomy).

119. *See supra* Part I.C.2.

120. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 97, at 3 (describing standards promulgated by the federal government for state fusion centers receiving grants).

121. *See infra* notes 201-03 and accompanying text.

122. For examples of such historical arguments, *see Protecting National Security and Civil Liberties: Strategies for Terrorism Information Sharing: Hearing Before the Subcomm. on Terrorism and Homeland Sec. of the S. Comm. on the Judiciary*, 111th Cong. 13 (2009) (statement of Caroline Fredrickson, Director, Washington Office, ACLU); *FBI Joint Terrorism Task Force (JTTF)*, BILL RTS. DEF. COMMITTEE (Apr. 3, 2009, 1:08 PM EDT), <http://www.bordc.org/resources/jttf-faq.php>.

might repeat itself—to the detriment of liberty and without corresponding security benefits.<sup>123</sup>

Anecdotal examples and some survey data seem to support such accounts. From 2005 to 2006, for example, the Maryland State Police allegedly collaborated with the Department of Homeland Security in carrying out surveillance of nonviolent political protest groups.<sup>124</sup> To critics of state and local cooperation with federal intelligence programs, such joint efforts and their attendant dangers seem eerily similar to Cold War abuses uncovered in the 1960s and 1970s.<sup>125</sup> And while state and local governments have been eager to receive federal funding, in recent years they have also complained that the strings attached to federal grants and programs are insufficiently attuned to local needs and priorities,<sup>126</sup> and that national security intelligence law and policy continue to be set at the federal level without adequate input from the other levels of government charged with implementing them.<sup>127</sup>

## 2. *Trickle-down accounts*

Another common account of federal-local national security relations focuses not on the direct role of state and local agents in federally directed national security programs, but on the effects that recalibrating liberty-security balances at the federal level would then have at state and local levels—what might be termed a “trickle-down” account.

Shortly after 9/11, William Stuntz predicted that expanded counterterrorism powers at the federal level would erode protections of privacy and other freedoms at state and local levels.<sup>128</sup> As federal agencies like the FBI asserted more powers, so would state and local agencies. Federal courts would likely

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123. See, e.g., Robert Dreyfuss, *The Cops Are Watching You*, NATION, June 3, 2002, at 12, 14; see also Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1455-65 (2011); Juliette Kayyem, *A Waste of Time*, BOS. REV., Dec. 2004-Jan. 2005, at 16, 16 (“[T]here is simply no reason to believe that the terrorist threat we face today is so pervasive that our entire local and state police apparatus must be complicit in the federal government’s overarching efforts.”).

124. See Madigan, *supra* note 5; Lisa Rein, *Federal Agency Aided Md. Spying; Homeland Security Dept. Gave Information to State Police*, WASH. POST, Feb. 17, 2009, at B1.

125. See Jerome H. Skolnick, *Democratic Policing Confronts Terror and Protest*, 33 SYRACUSE J. INT’L L. & COM. 191, 194 (2005).

126. See Eisinger, *supra* note 19, at 540; Eric Schmitt & David Johnston, *States Chafing at U.S. Focus on Terrorism*, N.Y. TIMES, May 26, 2008, at A1.

127. See HOMELAND SEC. COMM., MAJOR CITIES CHIEFS ASS’N, TWELVE TENETS TO PREVENT CRIME AND TERRORISM 9 (2008), available at [http://www.majorcitieschiefs.org/pdf/MCC\\_12TenetFinal52108.pdf](http://www.majorcitieschiefs.org/pdf/MCC_12TenetFinal52108.pdf) (“Since 9/11, a key question has been repeatedly posed: Who should be responsible for creating homeland security policies, doctrines, objectives and requirements? One default answer has emerged: The federal government should create those policies and the states should execute them.”).

128. See Stuntz, *supra* note 2, at 2160-91.

give the FBI more leeway, and state courts would follow that lead.<sup>129</sup> Moreover, these doctrinal shifts would be transsubstantive, so that adjustments to liberty or privacy protection in the national security context would expand to other areas of criminal justice or public order.<sup>130</sup>

Plenty of empirical and anecdotal data are consistent with the trickle-down account.<sup>131</sup> Examining state surveillance law, for example, shows that after 9/11, as the federal government expanded governmental powers through legislation like the USA PATRIOT Act, state governments followed suit and often modeled their statutory reforms on the federal legislation.<sup>132</sup>

In the wake of 9/11, some major municipal police agencies succeeded in petitioning courts for greater surveillance leeway of the sort enjoyed by federal agencies, including the shedding of judicially managed consent decrees that had been put in place following investigative abuses during earlier eras.<sup>133</sup> In 2002, for instance, the New York Police Department (NYPD) moved to modify an agreement that had emerged in the 1980s out of allegations that its intelligence unit had engaged in constitutionally improper surveillance and infiltration practices, including improper compilation of vast dossiers on individuals.<sup>134</sup> The NYPD argued to the district court that the resulting restrictions on intelligence practices now prevented it from using its surveillance powers before it was too late to stop an attack.<sup>135</sup> The district court agreed, finding that “the events of 9/11 and subsequent revelations about international terrorism [represent] a significant change in facts mandating modification of the Guidelines.”<sup>136</sup>

### B. *Pushback Accounts*

Common to top-down accounts is the idea that national security law and policy choices are generally set at the federal level, and that state and local in-

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129. *See id.* at 2139.

130. *See id.* at 2140-41, 2160; accord Corey Robin, *History's Shadow*, BOS. REV., Dec. 2004-Jan. 2005, at 20.

131. *See* Jerry Berman & Lara Flint, *Guiding Lights: Intelligence Oversight and Control for the Challenge of Terrorism*, CRIM. JUST. ETHICS, Winter/Spring 2003, at 2, 56.

132. *See* Charles H. Kennedy & Peter P. Swire, *State Wiretaps and Electronic Surveillance After September 11*, 54 HASTINGS L.J. 971, 977-85 (2003).

133. On the public law litigation that followed disclosure of 1960s and 1970s police intelligence abuses in New York City, Chicago, Los Angeles, Seattle, Memphis, Detroit, New Jersey, and Michigan, see generally Chevigny, *supra* note 9, at 744-82. Even before 9/11, the Seventh Circuit modified in 2001 a consent decree emplaced decades before to combat abuses by Chicago's infamous “red squads” by restricting police investigations of groups. *See Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 801-02 (7th Cir. 2001).

134. *See* Ford Fessenden, *Filing Opposes Giving Police More Latitude in Surveillance*, N.Y. TIMES, Nov. 6, 2002, at A21.

135. *See id.*

136. *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 337 (S.D.N.Y. 2003).

stitutions—the political branches, enforcement agencies, and courts—take their cues in this area from the federal government. In other words, involvement of state and local institutions in national security policy results in some decentralized execution of that policy, but it tends to suppress localization, or the extent to which states and localities set their own legal and policy agendas. These top-down accounts are limited, however, insofar as they fail to explain some behavior of states and localities in pushing back against federal national security agendas. A counternarrative holds that top-down accounts neglect the checks that vertical coordination may impose on federal liberty-security rebalancing, perhaps even with trickle-up effects of local political preferences on federal law and policy.

State and local involvement can affect national security law and policy in several ways, including through their expressive powers and through the leverage exerted by their control of resources residing in local agencies.<sup>137</sup> Although neither this local political voice nor operational leverage is likely to be as strong and concentrated as federal influence in the national security arena, both can affect how law and policy function at the local level and sometimes also in subtle ways at the national level.

In flexing their expressive powers, many local governments have criticized aggressive post-9/11 federal national security programs or statutes. For instance, more than four hundred state, county, and city legislatures have passed resolutions or laws opposing the USA PATRIOT Act as unduly burdening civil liberties and constitutional rights, and in some cases have declared their intention not to participate in enforcing parts of the Act.<sup>138</sup>

There are reasons to be skeptical that such expressive efforts alone have any significant practical impact on federal lawmaking; after all, Congress reauthorized the PATRIOT Act largely intact in 2005, despite those local expressions of opposition.<sup>139</sup> Moreover, so long as state and local governments can depend on the federal government to provide a floor of security and can expect the federal government to bear political responsibility for security lapses—issues I take up in more detail below<sup>140</sup>—state and local legislatures bear little political cost and may have much to gain politically by staking out these strident public positions. That said, civil liberty advocacy groups view local politi-

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137. See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285-91 (2004).

138. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1278 (2009). For a list of resolutions, see *Grassroots Opposition to the USA PATRIOT Act*, BILL RTS. DEF. COMMITTEE (Dec. 7, 2007), <http://www.bordc.org/resources/alphalist.pdf>. These efforts are reminiscent of resolutions passed in 1798 by the Virginia and Kentucky state legislatures condemning the Sedition Act as unconstitutional. STONE, *supra* note 30, at 44-45.

139. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified as amended in scattered sections of 18 U.S.C.); see also Bulman-Pozen & Gerken, *supra* note 138, at 1280 n.85 (acknowledging these limits).

140. See *infra* Part III.B.1.

cal efforts as an important vector of legal reform, sometimes accompanying litigation or regulatory actions mobilized at local levels, especially when faced with unfavorable odds at the federal level.<sup>141</sup>

Beyond expressive efforts, some local governments have pushed back more directly—including through their operational policy and practices—against federal national security efforts they view as too aggressive.<sup>142</sup> As mentioned above, in the immediate aftermath of 9/11, for example, the Justice Department requested assistance from local police agencies in locating and questioning thousands of men holding nonimmigrant visas from countries where al Qaeda was thought to be active.<sup>143</sup> Many local police departments declined to participate in the questioning, not wanting to jeopardize relationships with immigrant communities.<sup>144</sup> In other jurisdictions, local government pressure encouraged federal agents to modify their techniques and protocols in carrying out the interview program.<sup>145</sup>

In 2005, Portland, Oregon, became the first city to remove its law enforcement agencies from the FBI-led Joint Terrorism Task Force, as friction between the federal and city government escalated: soon after 9/11, Portland officials were widely criticized for refusing federal government requests to question resident foreigners,<sup>146</sup> and in 2003 the city council passed a resolution criticizing the PATRIOT Act.<sup>147</sup> Key members of the city government worried that the Task Force's surveillance activities, while complying with federal law, might not meet more stringent state law standards despite FBI assurances.<sup>148</sup> Nor, due to secrecy rules, could city government leaders oversee whether city police officers participating in the Task Force were abiding by agreed-upon guidelines.<sup>149</sup> The city therefore pulled its participation.<sup>150</sup> (Since then, howev-

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141. See Norman Dorsen & Susan N. Herman, *American Federalism and the American Civil Liberties Union*, in PAPERS FROM THE ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE LAW SCHOOL, WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 21, 28 (2008).

142. On state and local resistance to carrying out federal counterterrorism immigration policies, see David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 21-44 (2006).

143. On this program, see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 (2003).

144. See Tyche Hendricks & Suzanne Herel, *Terror Probe Interviews Unfinished in Bay Area*, S.F. CHRON., Dec. 22, 2001, at A7.

145. See *infra* notes 202-03 and accompanying text.

146. See Lynn Marshall & Tom Gorman, *Now Portland Comes In for Questioning*, L.A. TIMES, Nov. 30, 2001, at A1.

147. See Tomas Alex Tizon, *Portland, FBI Unit to Part Ways*, L.A. TIMES, Apr. 28, 2005, at A8.

148. See Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941, 947, 952-55 (2005).

149. See *id.* at 952-54.

er, the attempted bombing of a Portland festival in late 2010, thwarted by an FBI sting, has prompted Portland officials to reconsider<sup>151</sup> and decide to rejoin the task force—but under revised terms that create greater disclosure of police participation and impose tighter rules regulating task force activities.<sup>152</sup>)

These are among the most well-documented and visible examples of local government pushback against federal national security efforts. While more difficult to study and to assess in the negative, it is also worth considering policies or programs that slowed or terminated due to state and local resistance. For example, contrary to what the hierarchical or trickle-down accounts would predict,<sup>153</sup> since 9/11 local police have generally refused greater terrorism-related immigration authority despite federal efforts to delegate it.<sup>154</sup> State governments have also resisted some federally supported data-sharing initiatives that they viewed as too invasive of privacy or otherwise costly.<sup>155</sup>

One might dismiss these various examples as merely outliers against an overwhelming alignment of local institutions with federal national security efforts. But some scholars argue that they illustrate how state and local governments can operate as checks on federal policy.

Somewhat counterintuitively for those used to seeing the federal government historically step in to protect civil liberties against state excesses, Ann Althouse has suggested that the anticommandeering doctrine announced in *Printz* can work as a safeguard or circuit breaker to protect individual rights in national security rebalancing.<sup>156</sup> By denying the federal government comman-

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150. *Id.* at 955.

151. See Jim Redden, *Should Portland Rejoin Terrorism Task Force?*, PORTLAND TRIB. (Dec. 11, 2010), [http://www.portlandtribune.com/news/print\\_story.php?story\\_id=129203082526556400](http://www.portlandtribune.com/news/print_story.php?story_id=129203082526556400).

152. See Brad Schmidt, *Portland City Council Unanimously Approves "As-Needed" Involvement with JTTF*, OREGONLIVE.COM (Apr. 29, 2011, 10:46 AM), [http://blog.oregonlive.com/portlandcityhall/2011/04/portland\\_city\\_council\\_unanimou.html](http://blog.oregonlive.com/portlandcityhall/2011/04/portland_city_council_unanimou.html).

153. Cf. Dreyfuss, *supra* note 123 (arguing that federal policies will drive local counterterrorism policies by encouraging state and local governments to exercise greater powers and by offering them resources to do so).

154. See Harris, *supra* note 142, at 5-7.

155. The Multi-State Anti-Terrorism Information Exchange (MATRIX), for example, was a program launched in 2003 by the U.S. Department of Homeland Security and the Florida Department of Law Enforcement, with funding from the U.S. Department of Justice. The program, which additional states were expected to join, used advanced computer capabilities to access, share, and analyze public records to assist counterterrorism intelligence efforts and investigation. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32536, THE MULTI-STATE ANTI-TERRORISM INFORMATION EXCHANGE (MATRIX) PILOT PROJECT 1-2 (2004). Sixteen states participated, but one by one they dropped out over privacy and cost-efficiency concerns. See, e.g., Susan Gast, *Matrix and Privacy: Debate over Information Hits Close to Home*, ATLANTA J.-CONST., Oct. 19, 2003, at 1F (reporting Georgia's withdrawal); 2 *More States Turn Against Massive Anticrime Database*, L.A. TIMES, Mar. 12, 2004, at A30 (reporting New York's and Wisconsin's withdrawals).

156. See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1235 (2004).

deering power, “the courts have created an incentive [for Congress] to adopt policies that inspire [rather than demand] compliance, thus preserving a beneficial structural safeguard for individual rights.”<sup>157</sup> Jessica Bulman-Pozen and Heather Gerken argue that these expressions of disagreement or disobedience not only shape liberty-security balances within local jurisdictions but also shape legal and policy debate at the national level.<sup>158</sup> Ernest Young agrees that “[f]ederalism best protects liberty over time, through the day-to-day operations of a government in which nothing much can get done without the cooperation of multiple actors at multiple levels,”<sup>159</sup> and that this principle could apply in the national security context.<sup>160</sup> In other words, the federal government may exert some legal and policy tugs on local institutions, but those local institutions may exert their own tugs by responding to local politics in ways that favor civil liberties.<sup>161</sup>

These perspectives and data points offer a competing narrative to the more common top-down accounts, or at least caveats to those accounts. Rather than seeing state and local entities as passive players that take their liberty-security balancing cues from the federal government, pushback accounts posit a role for states and local entities in influencing national legal and policy agendas.

### C. *Limits of Leading Accounts*

In top-down accounts, state and local governments are generally susceptible—perhaps too susceptible—to federal power and influence in the national security arena. In pushback accounts, state and local governments retain some independent voice and leverage to oppose federal policy and initiatives that stray too far from local liberty preferences. Each of these accounts is helpful in understanding some of the trends, bureaucratic innovations, and events since the 9/11 terrorist attacks. Individually and together, however, they are limited in their capacity to explain and assess the complex intergovernmental relations that have emerged and continue to evolve.

Descriptively, these leading accounts are most useful in explaining the state and local effects of and reaction to the massive post-9/11 pendulum swing of federal policy favoring aggressive counterterrorism efforts. Born of a particular moment of rapid and dramatic expansion of federal counterterrorism powers, current narratives often reflect their authors’ policy views that the Bush

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157. *Id.* at 1272. As Susan Herman explains, this turns some political debates on their heads, as liberals now see the virtues of federalism. Susan N. Herman, *Introduction*, 69 BROOK. L. REV. 1201, 1205-06 (2004).

158. See Bulman-Pozen & Gerken, *supra* note 138, at 1278-84.

159. Young, *supra* note 137, at 1290.

160. See *id.* at 1290, 1311.

161. Samuel Rascoff cautions against putting too much stock in the role of local police as guardians of liberty in the counterterrorism area. See Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1722-23 (2010).

Administration's efforts unduly threatened individual rights. As a result, these accounts focus heavily on liberty-versus-security metrics, neglecting other policy values. They also pay little attention to how vertical intergovernmental dynamics might function in the national security arena over the long term as the liberty-security pendulum continues to swing back and forth.

Normatively, both top-down and pushback accounts are too narrow in the way they assess vertical intergovernmental relations, especially if—as I believe they will—state and local roles in national security intelligence become further institutionalized. To some subscribers of top-down accounts, the appropriate institutional relationship is one of separation: the federal government should handle national security intelligence on its own, and mostly leave state and local governments unencumbered in meeting their own local policy responsibilities.<sup>162</sup> To subscribers of pushback accounts, involvement of state and local governments in federal national security efforts is fine, and maybe even beneficial, so long as those governments and agencies retain sufficient autonomy to dissent.<sup>163</sup> Both of these prescriptive orientations assume that national security remains largely the province of federal policy; neither offers much of an affirmative role for local governments in contributing to national security law and policy formulation or agenda setting in a sustained way. Likewise, neither accounts for the special characteristics—the comparative advantages as well as weak spots—of local institutions in that realm.

In that regard, the leading accounts tend to assume a natural allocation of responsibility based on a priori constitutional categories: national security policy is the domain of the federal government, while local law and order is the domain of the states and their components. As Part I concluded, however, this neat and tidy division is no longer workable. Moreover, even the way we might presumptively allocate government national security duties based on traditional constitutional categories or conceptual divisions of responsibility depends on how wide a lens we cast on that public policy issue. If we see the national security problem as one of finding and neutralizing extremely dangerous individuals

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162. See, e.g., Herman, *supra* note 148, at 943 (“These joint federal and state/local enterprises might be viewed as weakening the vertical structures of the United States Constitution by collapsing previously autonomous spheres.”); Kayyem, *supra* note 123, at 16 (“[B]etter to keep the locals out of . . . federal [national security] politics—better to stay on the sidelines, to critique and undermine, to refuse and create legal loopholes—than to be part of it at all.”); Robin, *supra* note 130 (warning against liberty dangers of collaboration between federal and local governments).

163. See, e.g., Althouse, *supra* note 156, at 1261 (“[T]he ability of state and local government to resist being commandeered creates pressure on the federal government not to go too far, not to put too low a value on individual liberty . . . .”); Bulman-Pozen & Gerken, *supra* note 138, at 1280 (arguing that states “use their policymaking authority to thwart the Patriot Act’s provisions, something that is possible only because the federal government relies on the states for enforcement assistance”); Young, *supra* note 137, at 1288 (“[A]nti-commandeering doctrine . . . creates the constitutional space for state and local governments to vindicate their own, possibly broader understandings of these rights by refusing to participate in federal enforcement efforts they consider suspect.”).

or groups violently opposed to the government, and therefore the key tasks as collecting and analyzing information about those individuals or groups, then it is easy to look to the federal government as the major locus of responsibility. If, however, we step back and view the problem not only as collecting, sharing, and analyzing information but also cultivating the relationships with communities likely to provide information to the government, then responsibility is more naturally situated at various levels of government, including the local level. If we step back even further and view the problem as including how to identify and address social alienation and other factors that may contribute to terrorism and other forms of violent extremism, then responsibility might naturally fit even more comfortably at the local level of governance, which has significant responsibility for basic social policy and services including education, community relations, and public welfare.

Immigration federalism offers some useful parallels in that regard, because until recently immigration law and policy were viewed so strongly as exclusively federal domains, a view that also has roots in the idea that immigration is linked inextricably with foreign policy and national defense.<sup>164</sup> In challenging Arizona's aggressive immigration enforcement laws passed in 2010 as preempted by federal law, for example, the federal government argued that to permit varying state immigration policies would impermissibly interfere with its balance of "uniquely national interests and priorities."<sup>165</sup> Recently some scholars have called into question such hard, bright-line constitutional dividing lines of responsibility, though, because effective immigration policy and enforcement depends heavily on state and local government participation<sup>166</sup>—and that state and local participation draws on uniquely local capabilities and is shaped by diverse local politics and institutional pressures.<sup>167</sup>

Besides viewing too narrowly the roles that local governments might play in setting and implementing national security policy, the leading accounts are generally based on a narrow and static view of the terrorism threat. The threat itself is evolving, which is one reason why it is difficult to characterize terrorism as either a national problem with local dimensions or a local problem with national and international dimensions—the threat is in fact some combination of both.<sup>168</sup> That evolution will affect the way we think about which public in-

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164. See *Chae Chan Ping v. United States*, 130 U.S. 581, 606-10 (1889).

165. Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 19, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW), 2010 WL 2959365.

166. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 72.

167. Cristina Rodríguez argues that "immigration control occurs through a de facto multi-sovereign regime" in which state and local governments' participation is inevitably shaped by local conditions and competing policy demands. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609-10 (2008).

168. See PETER BERGEN & BRUCE HOFFMAN, ASSESSING THE TERRORIST THREAT: A REPORT OF THE BIPARTISAN POLICY CENTER'S NATIONAL SECURITY PREPAREDNESS GROUP 1,

stitutions should take the lead and about the balance of influence between federal and state or local institutions.

As alluded to above, the dramatic legal, policy, and bureaucratic changes following the 9/11 attacks were driven by a transnational terrorist network primarily based, operating, and sustained abroad. Since those attacks, however, there have been indications of a possible growing domestic terrorism threat within the United States that may be inspired ideologically from abroad but not controlled or even directly supported by foreign terrorist organizations.<sup>169</sup> This assessment is hotly debated among terrorism experts,<sup>170</sup> though recent terrorism attempts seem to confirm the prospect that indigenous activities could form a significant part of the future terrorism threat.<sup>171</sup>

The more that terrorism threats include domestic, and perhaps homegrown, elements, the stronger reliance on local government intelligence will likely become.<sup>172</sup> This is a different point from the familiar refrain that local governments play a critical role in preventing terrorism generally; rather, it is a point about the specific type and character of emergent terrorism threats and the ways the structure and nature of that threat could and should influence the distribution of responsibilities among levels of government. As a 2007 U.S. government intelligence assessment put it: “The ability to detect broader and more diverse terrorist plotting in this environment will challenge . . . the tools we use to detect and disrupt plots” and “will . . . require greater understanding of how suspect activities at the local level relate to strategic threat information and how best to identify indicators of terrorist activity in the midst of legitimate interactions.”<sup>173</sup> For example, because local police are better versed in the activities of their communities and often have better networks of relationships with other

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3 (2010), available at <http://www.bipartisanpolicy.org/sites/default/files/NSPG%20Final%20Threat%20Assessment.pdf>.

169. See NEUMANN, *supra* note 76, at 12; Sebastian Rotella, *U.S. Sees Homegrown Muslim Extremism as Rising Threat*, L.A. TIMES, Dec. 7, 2009, at A1.

170. See PATEL, *supra* note 72, at 5-7. A recent RAND report notes that “[w]hile radicalization and recruitment to jihadist terrorism are cause for continuing concern, . . . [t]he volume of domestic terrorist activity was much greater in the 1970s than it is today.” BRIAN MICHAEL JENKINS, WOULD-BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11, 2001, at viii (2010), available at [www.rand.org/pubs/occasional\\_papers/2010/RAND\\_OP292.pdf](http://www.rand.org/pubs/occasional_papers/2010/RAND_OP292.pdf).

171. See JEROME P. BJELOPERA & MARK A. RANDOL, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 1-2 (2010). *But see* Romesh Ratnesar, *The Myth of Homegrown Islamic Terrorism*, TIME (Jan. 24, 2011), <http://www.time.com/time/world/article/0,8599,2044047,00.html> (contesting claims that homegrown terrorism is a significant threat).

172. According to Brian Michael Jenkins of the RAND Corporation, “As [terrorism] metastasizes, cops are it. We’re going to win this at the local level.” William Finnegan, *The Terrorism Beat: How Is the N.Y.P.D. Defending the City?*, NEW YORKER, July 25, 2005, at 58, 61; *see also* *The Next 5 Years*, *supra* note 89, at 19 (“In combating ‘homegrown’ threats, the burden shifts . . . almost entirely to local law enforcement.”).

173. NAT’L INTELLIGENCE COUNCIL, THE TERRORIST THREAT TO THE US HOMELAND 6 (2007), available at [http://www.dni.gov/press\\_releases/20070717\\_release.pdf](http://www.dni.gov/press_releases/20070717_release.pdf).

local institutions and actors than do federal agents, some purely domestic threats are more likely to be uncovered through observations by local law enforcement agents and programs or tips originating from relevant neighborhoods.<sup>174</sup> By contrast, international terrorist networks—especially those, like al Qaeda, that are controlled or supported by a central core—are more detectable by federal communications monitoring and through centralized analysis that assembles disparate pieces of information.<sup>175</sup>

At the same time that we may see evolution of the terrorism threat, government counterterrorism strategy may adjust, too, and in ways that shift responsibility to local levels.<sup>176</sup> For example, to the extent that counterterrorism strategies adapt to include addressing social alienation and other factors that may give rise to violent extremism, responsibility naturally fits more comfortably at the local level of governance, which has significant responsibility for social policy and, therefore, the instruments for managing it. As explained at the conclusion of Part III, an emphasis on “counter-radicalization”—or efforts to stop the social processes that give rise to terrorism—would likely involve local institutions, which have better visibility of and access to relevant communities and influential actors within them.<sup>177</sup>

In other words, harnessing state and local institutions for national security may be needed not merely to bolster efforts otherwise naturally in the domain of the federal government, but to address parts of the national security challenge for which state and local institutions are better suited than the federal government could ever be. The leading accounts of federal-local relations and national security do not adequately incorporate these features into their analyses.

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Many leading accounts of the vertical dimension of national security inter-governmental relations see legal and policy decisionmaking as top-down, with state and local governments largely taking their cues about balancing liberty and security from the federal government. Other leading accounts emphasize that state and local governments can and do sometimes push back against fed-

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174. See NAT'L RESEARCH COUNCIL, PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISTS 16 (2008). Rascoff argues, for example, that local agencies “see” terrorism threats differently than federal ones do, and together they may develop a more complete and accurate assessment. Rascoff, *supra* note 161, at 1725-31.

175. See NAT'L RESEARCH COUNCIL, *supra* note 174, at 16.

176. See BERGEN & HOFFMAN, *supra* note 168, at 30 (“Who in fact has responsibility in the U.S. government to identify radicalization when it is occurring and then to interdict attempts at recruitment? Is this best done by federal law enforcement . . . or state and local jurisdictions working closely with federal authorities? What is the role of state and local governments?”).

177. See *infra* Part III.C.

eral policy. While each has some explanatory value, however, those leading accounts are limited in their capacity to describe emergent intergovernmental relations and to guide reforms.

How should federal-local relations be structured and managed for the long term, in which threats and political responses to them will continue to evolve? What other values besides liberty-security balances are at stake in structuring vertical intergovernmental relations with respect to national security intelligence? The next Part takes up these questions.

### III. NATIONAL SECURITY FEDERALISM IN THE AGE OF TERROR

This Part addresses gaps in leading accounts of vertical national security relations and builds on Part II's observations about the nature of contemporary terrorism threats by turning to some familiar arguments about federalism. The leading accounts already draw on federalism tropes in thinking about how to safeguard liberty: both top-down and pushback accounts see state autonomy as important to preserving rights or as a counterweight to federal power. This Part takes the federalism analysis further.

Specifically, this Part focuses on how governmental building blocks should be structured vertically to set appropriate policy balances and better ensure that those policy balances are carried out effectively. Such a focus on institutional structure and arrangements is important because liberty and security are only two among many policy values to be defended and balanced, and these balances require recalibration over time in an environment fraught with uncertainties. It is also important because actors at each level have particular characteristics—including some competencies and advantages as well as some shortcomings—relevant to these policy challenges. Given the deeply rooted vertical division and localization of American policing powers and the nature of terrorism challenges, this Part accepts that a significant degree of national security federalism will likely endure, and asks how we can make the most of it.

Among many federalism proponents, state and local authority—or devolved and distributed rather than national authority—is widely held to carry a range of virtues besides serving as a check on expansive federal power. Delegating policy authority to states is often thought, for example, to enhance political accountability by linking policy more closely to affected populations and to improve policy effectiveness by tailoring policies to local conditions and promoting experimentation.<sup>178</sup> These values are also often ascribed to local gover-

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178. As Justice O'Connor explained in *Gregory v. Ashcroft*, "the federalist system is a check on abuses of government power"; it helps ensure that government "will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." 501 U.S. 452, 458 (1991). On the virtues of federalism and counte-

nance. “Indeed,” Richard Briffault observes, “it would seem that the characteristics of the states and of federalism that promote these values are even more pronounced at the local level.”<sup>179</sup>

There is something almost oxymoronic about the notion of “*national security federalism*.” Besides the vision of distributed authority as a check on governmental power that runs through so many of the leading accounts discussed in Part II, however, two other visions of federalism merit close attention in this context. One vision focuses on accountability, or political responsiveness, both as a means toward achieving appropriate balances among policy values (including, but not limited to, liberty and security) and also as an independent normative value in itself. A second vision is concerned with the economics of public policy allocations, and how the distribution of decisionmaking between units of government relates to policy costs and benefits (including who bears what and the effects of scale on those tradeoffs).

These are not the only alternative frames to the standard narratives and counternarratives emphasizing liberty-versus-security balancing and strong-versus-weak checks on federal power. But together with these leading narratives, these alternative frames help illuminate special features of national security federalism and offer new ways for understanding, assessing, and improving emergent intelligence structures.

#### A. *Accountability and National Security Intelligence*

One common view of federalism holds that authority should be allocated and arranged among levels of government to promote responsiveness to the governed or to promote clarity for the public about whom (including what level of government) to hold responsible for actions or inactions.<sup>180</sup> In the national security context, this view prompts questions over whether integration of state and local institutions into intelligence programs and functions enhances or degrades the public’s ability to participate meaningfully in self-government through the political process.

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rarguments, see generally DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2-10 (1988).

179. Briffault, *supra* note 17, at 1312; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067-73 (1980) (discussing local autonomy as important to public participation).

180. This view is reflected in the anticommandeering cases. See *Printz v. United States*, 521 U.S. 898, 920-21 (1997); *New York v. United States*, 505 U.S. 144, 168-69 (1992); see also Friedman, *supra* note 178, at 394 (“Accountability in a democracy means responsiveness on the part of those petitioned.”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2205 (1998) (noting that “[f]ederal commandeering of states . . . can risk confusing the lines of political accountability”).

Comparing national security intelligence to other public policy areas in which devolution of political authority is thought to improve political responsiveness of government highlights the specific challenges attendant to secrecy and uncertainty in the national security context. More importantly, though, there are other types of accountability that are especially salient in this context, including promoting reasoned deliberation and monitoring compliance with law and policy to prevent abuses or misuses of power;<sup>181</sup> and there will sometimes be tradeoffs among these types of accountability.<sup>182</sup> While vertical intergovernmental arrangements in the national security intelligence context should be sensitive to the values and risks of political responsiveness, they should also be especially geared to enhance those other forms of accountability. This Subpart proposes some ways to do so.

### 1. *Accountability and political processes*

In thinking about the accountability values of federalism and national security, a good place to start is the familiar debate about criminal justice federalism. That debate provides not just an analogy, but also some empirical insights, because there is so much substantive and institutional overlap between criminal justice and national security intelligence. Both involve law enforcement agencies combating threats to public order and safety<sup>183</sup>—indeed, many states have their own criminal statutes against terrorism offenses<sup>184</sup>—though “national security” functions might be distinguished on account of features including the high magnitude, political purpose, and national and international consequences of the threat involved.

Proponents of criminal justice federalism usually regard local political dynamics as critical to a normative vision of law enforcement and policing that is responsive and tailored to local preferences and citizen demands.<sup>185</sup> This emphasis fits especially comfortably with anticommandeering doctrine and the Supreme Court’s rhetorical accent that the federal and state governments should be organized as acoustically distinct entities—separately accountable,

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181. On the various forms of accountability, see generally Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael W. Dowdle ed., 2006).

182. *See id.* at 132, 154.

183. *See* Thomas E. Feucht et al., *Policing, Terrorism, and Beyond*, in TO PROTECT AND TO SERVE: POLICING IN THE AGE OF TERRORISM, *supra* note 14, at 203, 204.

184. *See* Laura K. Donohue & Juliette N. Kayyem, *Federalism and the Battle over Counterterrorist Law: State Sovereignty, Criminal Law Enforcement, and National Security*, 25 *STUD. CONFLICT & TERRORISM* 1, 1-8 (2002).

185. *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, ABA, THE FEDERALIZATION OF CRIMINAL LAW 43 (1998).

therefore, to the citizenry for the benefits and burdens of criminal justice policies.<sup>186</sup>

Legal scholars frequently question political accountability arguments for federalism in general as overstating empirically the way citizens assign credit or blame for decisionmaking.<sup>187</sup> However, in the criminal justice context specifically, many policing scholars believe that local politics plays a significant role in shaping policy and constraining police behavior (though recent scholarship also emphasizes professionalization and institutional pressures that play out at local levels).<sup>188</sup> “It has long been accepted,” according to one major treatise on law enforcement and democracy, “that the best way to maintain the accountability of the police is to keep the lines between the local community and the police department as short as possible.”<sup>189</sup> “The main consequence of America’s decentralized system,” writes James Q. Wilson, “is that public opinion closely watches and deeply influences law enforcement.”<sup>190</sup> Most police agencies are locally financed and controlled, and are subject to direction and oversight by officials elected by and responsible to the communities they serve.<sup>191</sup> Combined with the institutional pressures and professional orientations of modern community policing trends, which emphasize partnership with local communities,<sup>192</sup> these political arrangements are often believed to make police agencies and their policies responsive to local demands and preferences.<sup>193</sup>

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186. See *Printz v. United States*, 521 U.S. 898, 930 (1997); see also *New York v. United States*, 505 U.S. 144, 169 (1992).

187. See Bulman-Pozen & Gerken, *supra* note 138, at 1289-90; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 828 (1998).

188. See Paul G. Lewis & S. Karthick Ramakrishnan, *Police Practices in Immigrant-Destination Cities: Political Control or Bureaucratic Professionalism?*, 42 URB. AFF. REV. 874, 877 (2007). But see David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1810-14 (2005) (presenting evidence questioning theories that localized policing enhances accountability).

189. See BREWER ET AL., *supra* note 82, at 115; see also HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 131-43 (1977) (discussing localized political control of American policing). But see Richard T. Ford, *Police Don’t Fight Wars*, BOS. REV., Dec. 2004-Jan. 2005, at 19, 19 (“True, local police are more likely to be more accountable to local constituencies than federal agents, but local police also tend to be most responsive to the local communities that are least likely to be victims of police abuse and most likely to fear the effects of violent crime.”).

190. James Q. Wilson, *Criminal Justice*, in UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 475, 476 (Peter H. Schuck & James Q. Wilson eds., 2008); see also William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 670 (2002) (“The single biggest constraint on local police behavior is local politics . . .”).

191. See Wilson, *supra* note 190, at 476.

192. See Lewis & Ramakrishnan, *supra* note 188, at 881.

193. See BREWER ET AL., *supra* note 82, at 115; NAT’L RESEARCH COUNCIL, *supra* note 82, at 51. This is not to minimize the dangers of racial or ethnic biases in local policing, nor

Applying a normative vision of devolved political accountability and recognizing that the localization of policing in the United States is widely credited with enhancing the accountability of state and local law enforcement agencies, there are several reasons to be concerned about the emergent national security architecture.<sup>194</sup> First, current efforts to incorporate state and local governments into national security programs could cloud the information necessary for effective public accountability from the federal level down to the local. Some critics of joint federal-local counterterrorism programs and overlapping federal and local responsibilities for national security intelligence worry that citizens can no longer be so certain whom to credit or blame for invasive counterterrorism policies and programs.<sup>195</sup> Even if vigilant members of the public or civic groups tried to untangle complex lines of authority, they might find the necessary information delineating federal and local government roles inaccessible.<sup>196</sup> For example, with few exceptions, the memoranda of understanding that spell out the terms of cooperation for Joint Terrorism Task Forces are not publicly available.<sup>197</sup> Moreover, as discussed further below, the details of many national security intelligence programs are often secret.<sup>198</sup> This opacity runs in obvious tension with local accountability premised on informed citizenries.

Second, current efforts to incorporate state and local governments into national security programs may undermine the public's capacity to exercise political clout by distorting the costs and benefits of government decisions in the political marketplace.<sup>199</sup> Because federal-local national security cooperation entails opportunities for state and local governments to gain resources, information, stature, and other goods in return for collaboration, the pull of public demand on law enforcement decisionmaking at the local level is diluted.

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the fact that in the past federal intervention and enforcement has been needed to combat state and local discrimination, which has sometimes been defended under the banner of "states' rights." See Young, *supra* note 137, at 1277.

Community policing also has its skeptics and detractors, and much controversy exists over how effective these strategies are, especially with respect to perceived legitimacy among communities. See NAT'L RESEARCH COUNCIL, *supra* note 82, at 329 (calling for more research in this area); Sklansky, *supra* note 188, at 1810-14 (critically analyzing community policing and its democratic legitimacy).

194. Cf. Bulman-Pozen & Gerken, *supra* note 138, at 1291 ("[A]ccountability is not simply about knowing who is responsible, but also being able to appeal to them.").

195. See Herman, *supra* note 148, at 942-43.

196. See Citron & Pasquale, *supra* note 123, at 1453-55 (arguing that fusion centers undermine accountability by blurring lines of authority).

197. See Herman, *supra* note 148, at 951 (explaining that the terms of Joint Terrorism Task Force agreements are usually kept secret); Alasdair Roberts, *Big Brother Keeps Secrets Under Wraps*, POST-STANDARD (Syracuse), Dec. 19, 2004, at C1 (discussing unsuccessful efforts by civil liberties advocates to obtain agreement documents under the Freedom of Information Act).

198. See *infra* notes 211-13 and accompanying text.

199. See Waxman, *supra* note 8, at 393-95 (arguing that some federal intervention in state and local counterterrorism efforts might be viewed as correcting a distorted political market).

Neither of these accountability concerns is new or unique to national security. In many other areas of criminal justice policy, such as violent crime and narcotics, the federal government has intervened with its own law enforcement resources, grants, training programs, and joint operational activities.<sup>200</sup> But, the argument might go, vertical national security arrangements exacerbate political accountability challenges in degree (greater distortion of the political marketplace) and kind (greater secrecy or obscuring of important information).

While there are several reasons to be concerned about the emergent national security architecture, however, shared federal-local responsibility also carries opportunities to enhance accountability. Rather than federal-local collaboration blurring lines of responsibility or spoiling local government responsiveness, perhaps local accountability mechanisms are sufficiently robust that they can boost accountability from the local to the national level.

As an example of how this might work, consider the handling of the Justice Department's immigrant interview requests after 9/11 by the police department of Dearborn, Michigan, a city near Detroit that contains a high concentration of Arab-Americans.<sup>201</sup> Investigation of that episode reveals that concerns about community trust influenced the way the city government participated in the interviews: local police declined to conduct interviews themselves, worked hard to explain their participation in a qualified way, and ultimately adopted a role of representing community concerns and monitoring the activities of federal agents.<sup>202</sup> The role of local police in Dearborn and elsewhere was shaped by their interest in setting boundaries on intelligence- and information-gathering efforts that threatened to undermine relationships with elements of the Arab community they had worked hard to develop, whereas federal agencies (with a narrower mandate toward that community) had less at stake in protecting those relationships.<sup>203</sup>

The ensuing resistance from local institutions favoring a less aggressive approach at least affected policy execution in that jurisdiction, and over time similar federal-local contestation in many other jurisdictions might have contributed to shifts in federal practices and policy with regard to intelligence collection and Muslim communities.<sup>204</sup> Such shifts in federal policy and practice

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200. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 382-400 (2006).

201. Detroit, Michigan, is home to a large Arab-American community, and its police forces were sensitive about disrupting their relations with them. See Siobhan Gorman, *Detroit Finds Some Answers*, NAT'L J., Mar. 29, 2003, at 998; Shannon McCaffrey, *New FBI Sweep Worries Muslims*, DETROIT FREE PRESS, May 27, 2004, at A1.

202. Thacher, *supra* note 84, at 661-62.

203. See *id.*; Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1.

204. See Karen DeYoung, *Distrust Hinders FBI in Outreach to Muslims; Effort Aimed at Homegrown Terrorism*, WASH. POST, Feb. 8, 2007, at A1 (discussing FBI outreach efforts to Muslim communities and noting that "[a]s the FBI and Muslims wrestle toward accom-

prompted by local pressure would represent a “trickle-up” phenomenon that bolsters accountability, tying policy and practice more tightly to local preferences and countering the trickle-down effect predicted by some leading accounts discussed earlier.<sup>205</sup>

This more sanguine scenario for accountability relies on local governments as important entry points for public political participation. Even if new vertical arrangements inhibit the public’s ability to discern exactly which level of government is ultimately responsible for policies, that informational deficit, the argument might go, is offset by greater and more direct public voice in shaping those policies and the way they are carried out.<sup>206</sup>

In part this debate comes down to empirical judgments, the data for which is sorely lacking. The answer is also likely to vary from locale to locale because, among other reasons, populations that may be especially burdened by intelligence efforts (such as Muslim communities) will be better represented or subjected to more intense prejudices in some places than others, and because states and localities are governed by diverse institutional arrangements and politics. However, this debate also raises deeper questions of what sort of accountability we expect and desire when national security is at stake, and what is the appropriate political unit or units for that accounting.

As described above, federalism discussions usually emphasize a particular type of accountability: responsiveness to the demands of the governed, defined in terms of a given political unit (a city, a state, a nation). With respect to national security and intelligence, however, there are several reasons why a simple model of government actors responding to public preferences is particularly unlikely to function effectively. Alternative modes of accountability therefore take on additional urgency.

First, the costs and benefits of national security programs are especially difficult for the public to discern.<sup>207</sup> With respect to most other police functions, local political pressures shape or constrain local policing because government actions and the problems at which they are directed are often observable and sometimes easily measurable.<sup>208</sup> Police patrols and stops or arrests, for example, are visible to the public eye and affect local communities in direct and

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modation, local law enforcement officials have come to occupy a safe middle ground for both”).

205. *See supra* Part II.A.2.

206. *See* Richman, *supra* note 200, at 419.

207. Moreover, this is a policy area in which public pressures and political incentives are especially likely to result in overreactions to perceived threats. *See* JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* 33-43 (2006); CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* 42-44 (2007). Therefore, it may be advantageous to arrange institutions in ways that buffer or insulate policy from public opinion swings.

208. *See* JEROME H. SKOLNICK, *ON DEMOCRATIC POLICING* 4-5 (Ideas in American Policing, No. 4, 1999), available at <http://www.policefoundation.org/pdf/62.pdf> (emphasizing the role of transparency in regulating police).

tangible ways; crime rates and disorder are measurable and subject to comparison over time.<sup>209</sup> By contrast, national security benefits, such as effectively deterring or disrupting terrorist planning, lack good publicly observable metrics or baselines other than defining “success” in terms of nonevents.<sup>210</sup>

Second, a significant part of the government’s work in this area is secret. By nature and design, much intelligence work is often clandestine or opaque, shielded from public (and, more importantly, enemy) view.<sup>211</sup> Even when the general policy is transparent, the operational details—which sometimes go to such critical and controversial questions as how and against whom intelligence is collected—may not be.<sup>212</sup> With respect to secretive activities, it is impossible to rely on standard mechanisms of direct political accountability that assume an informed citizenry.<sup>213</sup>

Third, with respect to domestic security and intelligence, many costs of government action are likely to be concentrated locally to provide benefits elsewhere or benefits that are very broadly distributed. For example, expensive efforts to disrupt terrorist activities through surveillance (in terms of resources, liberty, disruption of relations with immigrant or minority communities, etc.) in one locale may produce security elsewhere or for the entire nation<sup>214</sup>—an issue developed further in the next Subpart.<sup>215</sup> Alternatively, the costs of providing a benefit to one locale can spill over into other locales. Whether one thinks about national security in terms of a community’s physical and psychological safety or as a nationwide public good, costs and benefits are not borne or distributed evenly. And, much more so than with respect to routine criminal justice, states and localities have to invest in activities that generate little easily visible benefit to any particular community.<sup>216</sup>

209. See Richman, *supra* note 200, at 378.

210. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 45, at 21 (“One reason why intelligence operations are not always understood or appreciated is because they cannot be evaluated by traditional measures of law enforcement success . . . .”); Skolnick, *supra* note 125, at 203 (“Unlike crime, which is the familiar, inevitable, and measurable part of the police assignment, there are no measures of success against terrorism except the absence of attack.”).

211. See Banks & Bowman, *supra* note 29, at 5.

212. See, e.g., *In re City of New York*, 607 F.3d 923, 928 (2d Cir. 2010) (granting the city’s petition for a writ of mandamus overturning the district court’s order compelling production of confidential intelligence reports prepared prior to the 2004 Republican National Convention).

213. See BRUCE RUSSETT, *CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY* 147-48 (1990); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 *CONN. L. REV.* 1549, 1578 (2009).

214. See Richman, *supra* note 200, at 410-11; Thacher, *supra* note 84, at 637-38.

215. See *infra* Part III.B.

216. Cf. Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 *INT’L ORG.* 1, 7 (2009) (“In situations involving a public good that no individual group has an incentive to provide on its own, the resulting policy may be more representative of diffuse general interests and majority preference that pass the test of public deliberation . . . .”).

## 2. National security accountability as reasoned deliberation

None of these factors is entirely unique to national security law and policy, but they are all intensified in that area. It is therefore not surprising that “accountability” in other national security law contexts (such as war powers or foreign intelligence operations) is usually defined and emphasized in ways besides subjection to public scrutiny, including processes to ensure effective deliberation.<sup>217</sup> This is certainly not to deny that public responsiveness is also an important component of accountability in national security policymaking.<sup>218</sup> But scholars who study structural design or allocation of authority in the national security context often stress a deliberative component of accountability, or the desirability of checking the natural tendency of security institutions toward excesses or ill-advised policies—with processes and structural arrangements that require persuasive justifications for actions—especially when high degrees of secrecy preclude direct public appraisal.<sup>219</sup>

In this light, accountability analysis of national security federalism takes on a new dimension. Besides the degree to which governmental agents are responsive to public preferences—indeed, in some tension with that responsiveness—much of the potential accountability value of integrating local institutions into the national security architecture lies in processes of interlevel policy deliberation and validation.

With regard to *horizontal* arrangements among the executive, Congress, and courts, *interbranch* participation not only helps ensure broad-based political support for policies but also subjects executive action to scrutiny and assessment by other branches with shared responsibilities but distinct institutional perspectives and incentives. Similar arguments have been made recently in the administrative law context regarding the value of internal executive branch checks.<sup>220</sup> These sorts of deliberative processes within the governmental architecture are especially important when, due to secrecy or other difficulties in public appraisal or scrutiny, electoral politics or public pressures function poorly as a check.

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217. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 161-66 (1990) (discussing “internal” and “external” mechanisms of accountability for national security decisionmaking); Pearlstein, *supra* note 213, at 1578.

218. See KOH, *supra* note 217, at 111-12.

219. See *id.* at 153; David Golove & Stephen Holmes, *Terrorism and Accountability: Why Checks and Balances Apply Even in “The War on Terrorism,”* N.Y.U. REV. L. & SECURITY, Apr. 2004, at 2, 6; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2348 (2006).

220. See, e.g., Katyal, *supra* note 219, at 2317 (arguing that overlapping mandates of executive branch national security bureaucracies leads to better decisionmaking through discussion and debate); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429-30 (2009) (arguing that internal executive branch checks are important to ensuring depoliticization, harnessing expertise, and fostering consideration of different perspectives in administrative decisionmaking).

In similar ways, *vertical*, *interlevel* participation among federal, state, and local governments—while perhaps even cutting against a vision of direct public accountability by blurring lines of responsibility or spreading political risk—could subject collaborative policies to mutual review and validation by institutions with overlapping responsibilities but differing political pressures, as each level works to build and maintain the support of the others for its programs.<sup>221</sup> Here, scholars of national security institutions and scholars of federalism each have something important to offer, insofar as the former often study structures for policymaking when secrecy or low measurability trumps transparency, and the latter often study cooperative arrangements among levels of government amid robust political marketplaces.

By way of illustration, consider the differing responsibilities of the FBI and local police agencies, both of which are law enforcement institutions also charged with an intelligence function, and consider the way each level devises guidelines on the appropriate scope of investigations. In some respects, the FBI's mandate is broader than that of local police, as it includes combating threats like foreign espionage and foreign computer intrusion<sup>222</sup> that lie outside the scope of local responsibility or the technical capacity of local governments to confront. With that mandate in mind, federal investigatory guidelines, which are subject to periodic revision to expand or contract the government's authority to monitor individuals or groups perceived as threats, are generally thought of primarily in terms of national security tradeoffs with privacy and free expression.<sup>223</sup> In other respects, however, local police mandates are much broader than those of federal law enforcement agencies, because in addition to investigating specific crimes, local police functions also include maintaining order, patrolling, and directly providing community services that federal agencies do not.<sup>224</sup> Legal or policy decisions that might easily be framed at the federal level in terms of balancing security and liberty might, at the local level, involve balancing a more dense and heterogeneous array of policy imperatives and political and institutional pressures.<sup>225</sup> Investigatory guidelines are therefore likely

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221. Ernest Young makes a similar point in noting that “[r]equiring the consent of multiple actors before the government can act is a pervasive institutional strategy in the Constitution; it is most familiar, obviously, in separation of powers.” Young, *supra* note 137, at 1289. He goes on to suggest that counterterrorism might be an area of public policy in which the federal government, notwithstanding its powerful levers of influence, “must still persuade state authorities that federal policy is sufficiently legitimate, wise, and fair to warrant their participation.” *Id.* at 1289-90.

222. See ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 7 (2008), available at <http://www.justice.gov/ag/readingroom/guidelines.pdf>.

223. See *Attorney General Guidelines for FBI Criminal Investigations, National Security Investigations, and the Collection of Foreign Intelligence: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 2 (2008) (statement of Sen. John D. Rockefeller IV).

224. See Waxman, *supra* note 8, at 386.

225. See RATCLIFFE, *supra* note 71, at 229.

to be shaped by such locally diverse issues as resource allocation priorities and community relations.<sup>226</sup>

When these sets of interests are overlaid by processes of interlevel collaboration and mutual review, the need for officials at one level of government to persuade officials at the other can therefore serve a checking function. Although it may carry costly inefficiencies in the short term, some friction between intelligence agencies at various levels of government resulting from these distinctive institutional perspectives may be useful for combating the “groupthink” and politicization of intelligence that can occur within entirely unified structures.<sup>227</sup> And it is not just when state or local institutions resist federal efforts that their joint participation enhances such accountability: even when they cooperate, they provide localized feedback based on contextualized experience and community reactions to federal initiatives, including through dialogue among officials and by validating federal policy with continued or additional local government contributions and support. Further consideration of institutional design should focus on the effects of vertical national security arrangements on interlevel deliberative processes, with an eye toward how state and local involvement can provide genuine opportunities for joint planning and policy formulation and scrutiny—instead of states and localities merely following the federal lead, as top-down accounts would predict, or occasionally working to block it, as pushback accounts would suggest.

As discussed above, for instance, the emergent intelligence architecture includes mechanisms for collaborative investigation among federal and local agencies (for example, Joint Terrorism Task Forces) and efforts to involve state and local governments in intelligence sharing and analysis (including state or local fusion centers and interjurisdictional data-sharing initiatives).<sup>228</sup> The federal government has recently been supplementing these programs with efforts to integrate state and local representatives into its intelligence planning, though it is too early to judge the results. For instance, the Interagency Threat Assessment and Coordination Group at the National Counterterrorism Center, within the Office of the Director of National Intelligence, works specifically to provide advice and counsel to federal intelligence agencies about counterterrorism operations at the state and local levels.<sup>229</sup> The Department of Homeland Security has also set up an advisory council to help incorporate the views of state and

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226. See Richman, *supra* note 200, at 411-18.

227. Cf. Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1676-79 (2006) (discussing these advantages in the context of redundant rather than centralized intelligence agencies at the federal level).

228. See *supra* Part I.C.2.

229. See NATIONAL STRATEGY FOR INFORMATION SHARING: SUCCESSES AND CHALLENGES IN IMPROVING TERRORISM-RELATED INFORMATION SHARING 8 (2007), available at [http://permanent.access.gpo.gov/lps90310/NSIS\\_book.pdf](http://permanent.access.gpo.gov/lps90310/NSIS_book.pdf).

local agencies into information-sharing efforts.<sup>230</sup> Evaluation of these programs should look beyond whether they adequately resource counterterrorism efforts or break down barriers to necessary information flows—the priority questions that most naturally and urgently followed from assessments of pre-9/11 bureaucratic defects in “connecting dots”<sup>231</sup>—to whether they promote meaningful opportunities for joint deliberation or mutual review between levels of government involved in counterterrorism policy.

Limited studies to date suggest, for example, that many joint task forces do not actually provide opportunities for serious intergovernmental deliberation because their decisionmaking tends to be dominated by their federal leadership, and participating state and local agents often become disconnected from their home agencies while not fully integrated with federal ones.<sup>232</sup> That is, as currently configured the joint task forces neither adequately integrate local agencies’ competencies nor allow sufficient feedback between local agencies and the federal ones that draw on their resources. Recent efforts by the Office of the Director of National Intelligence to involve state and local government representatives in counterterrorism planning at the national level may prove better able to harness and integrate different perspectives in challenging assumptions and shaping policy. However, their impact is not yet clear, and it will be difficult for a small number of state and local representatives to help account for the diversity of concerns and experiences at that level.<sup>233</sup>

It is likely that for these jointly reasoned deliberation mechanisms to work effectively over time, both local and federal agencies would have to commit to major cultural shifts as a matter of long-term strategy. For their part, state and local governments would need to purchase more clout by devoting substantial resources and senior-level attention to collaborative national security programs.<sup>234</sup> It might require, for example, greater involvement of state and local personnel in joint task forces, and a restructuring of that participation to include more active and high-level dialogue between participating agents and their local home agencies, along with a weightier voice in managing investigations and joint intelligence activities. For their part, and to make those investments worthwhile, federal agencies like the FBI would have to view local agencies as essential players and demonstrate that commitment with greater information

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230. See DEP’T OF HOMELAND SEC., FINAL REPORT: HOMELAND SECURITY INFORMATION NETWORK ADVISORY COMMITTEE MEETING, FEBRUARY 10-FEBRUARY 12, 2009, at 3 (2009), available at [http://www.dhs.gov/xlibrary/assets/hsinac\\_mtg\\_2009-2-1012.pdf](http://www.dhs.gov/xlibrary/assets/hsinac_mtg_2009-2-1012.pdf).

231. See *supra* note 64 and accompanying text.

232. See Edward R. Maguire & William R. King, *Federal-Local Coordination in Homeland Security*, in CRIMINOLOGISTS ON TERRORISM AND HOMELAND SECURITY 322, 346-49 (Brian Forst et al. eds., 2011); Rascoff, *supra* note 161, at 1742-44.

233. See INFO. SHARING ENV’T, REPORT ON THE INTERAGENCY THREAT ASSESSMENT AND COORDINATION GROUP (ITACG) 1-2 (2010), available at [http://www.ise.gov/sites/default/files/2010\\_ITACG\\_Report\\_Final\\_30Nov10.pdf](http://www.ise.gov/sites/default/files/2010_ITACG_Report_Final_30Nov10.pdf); Rascoff, *supra* note 161, at 1746-47.

234. See Richman, *supra* note 200, at 419.

sharing and greater deference to local policy priorities.<sup>235</sup> Whereas local police culture will need to evolve over time to see their activities as part of a broader national security system, the FBI culture will need to evolve away from seeing local police as second-class partners.<sup>236</sup>

Any such tighter partnership creates some tension between direct political accountability and deliberative accountability, since greater integration of state and local efforts with federal ones may cause further blurring of lines of policy and even bureaucratic responsibility.<sup>237</sup> Some top-down accounts critical of federal-local collaboration advocate strict separation of state and local agencies from federal national security efforts, fearing that overlap and integration of activities results in local cooptation.<sup>238</sup> Such strict separation is increasingly impractical, though, after a decade of investment in state and local counterterrorism programs and the federal government's reliance on intelligence capacity at the state and local level—all of which could deepen if domestic terrorism threats grow. This analysis suggests instead that a more fruitful avenue to preserving and harnessing the values of local deliberative input may be through expanded local participation in joint intelligence planning and deliberative decisionmaking.

### 3. *Accountability oversight*

The danger to liberty, security, and other policy values in the national security arena comes not only from where official policy and legal lines are drawn, but also from the likelihood that some government agencies or agents will cross or fail to meet those official lines.<sup>239</sup> Because this is an area in which government powers historically have been prone to abuse, and in which standard political accountability mechanisms associated with federalism are undermined, oversight and monitoring mechanisms—another way to think about accountability—take on added import.<sup>240</sup>

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235. See Maguire & King, *supra* note 232, at 346-49.

236. See George L. Kelling & William J. Bratton, *Policing Terrorism*, CIVIC BULL., Sept. 2006, at 6-7.

237. Cf. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010) (“At the national level, we have two competing accounts of how to check a government: (1) separation of powers, which depends on separation and independence, and (2) checks and balances, which depends on integration and interdependence.”).

238. See *supra* Part II.A.1.

239. In addition to thinking about national security oversight architecture in both the horizontal and vertical dimensions, there is a need to focus on the public-private axis, especially as the government becomes more reliant on the private sector to support intelligence efforts. See Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 904 (2008).

240. “Accountability” is also often used in the national security context to mean monitored compliance with the law. See, e.g., Stephen Dycus, *The Role of Military Intelligence in Homeland Security*, 64 LA. L. REV. 779, 807 (2004) (calling for “reliable controls and meas-

There are reasons to be especially worried about oversight of national security intelligence activities at the local level, where significant activities will continue to take place.<sup>241</sup> First, recall from Part I the divergent histories of federal and local governments with respect to Cold War intelligence abuses and subsequent reform: whereas the federal government still had to bear responsibility for combating domestic national security threats, and so developed a set of formal checks, local governments could and did largely retreat from national security intelligence activities during the late Cold War reform period.<sup>242</sup> As a result, governmental intelligence oversight mechanisms are considerably less mature and developed at the state and local level, and they are very patchy and uneven across jurisdictions.<sup>243</sup>

A second reason to worry especially about local oversight of national security activities is that even policing oversight mechanisms that do exist and may generally operate well at the local level are often poorly adapted to government activities with very low public transparency. Recall also from the previous Subpart that visibility of police behavior and programs normally plays a major role in regulating coercive or invasive government conduct at the local level, but that intelligence activities are often not widely or easily detectable.<sup>244</sup> (Many traditional police functions also include surreptitious activities, such as criminal wiretapping, but those—much more so than intelligence programs and practices—are often overseen by courts or governed by well-honed internal guidelines.) With respect to surveillance of potential national security threats and other publicly imperceptible intelligence activities, some states have developed or are developing specialized audits and oversight boards.<sup>245</sup> However, many state and local governments lack sophisticated internal controls, and legislatures and courts at those levels generally lack expertise and resources to conduct rigorous investigation or monitoring.<sup>246</sup> If top-down accounts are correct that federal law and policy have mimetic effects at the state and local level, there is particular reason to worry that national security laws and policies developed at the federal level with federal oversight mechanisms in mind might be ill-suited for local governance, at least without added or improved checks,

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ures to provide accountability” for domestic military intelligence); Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 *STAN. L. & POL’Y REV.* 531, 538 (2006) (discussing how Title III “promotes better accountability [than FISA] through a far stronger system of sanctions”).

241. See Rascoff, *supra* note 161, at 1742 (“[L]ocal intelligence increasingly operates in a formal governance vacuum.”).

242. See *supra* notes 45-49 and accompanying text.

243. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 45, at 19-20.

244. See *supra* notes 207-10 and accompanying text.

245. See RILEY ET AL., *supra* note 11, at 34, 45-49.

246. See *Symposium on Security, Technology and Individual Rights—2003*, 2 *GEO. J.L. & PUB. POL’Y* 17, 76 (2004) (statement of Craig Burkhardt); Kennedy & Swire, *supra* note 132, at 984.

given that local oversight mechanisms vary considerably across jurisdictions.<sup>247</sup>

Informal oversight mechanisms—such as investigative journalism and civil liberty watchdog groups—play a role in monitoring compliance with intelligence law and policy at all levels of government as well, though reliance on informal oversight raises its own set of questions with respect to vertical allocation of governmental responsibilities. Although it is widely believed that these actors have played a growing role in recent decades as a check on government national security powers, there tends to be little research or systematic study of whether such checks operate more or less strongly at the federal level versus the state and local level, or in what types of jurisdictions these checks are likely to be especially strong or weak.<sup>248</sup>

If intelligence oversight is indeed underdeveloped or insufficiently robust at the state and local level—or within particular states and localities—how might vertical national security architecture help address those gaps? Several institutional structures are possible, and the appropriate choice among them depends on a number of local factors, such as the degree to which informal checks operate, as well as the specific intelligence functions at issue.

One approach is to rely on decentralized, or even localized, intelligence oversight. That is, state or local jurisdictions would be expected to develop, supplement, and retool their own oversight mechanisms—including internal agency review processes, legislative monitoring, and external audits—tailored to their particular interests, circumstances, and laws or guidelines. Some individual states, for example, are in the process of developing and formalizing governance boards or other oversight bodies to monitor intelligence fusion center activities, and some cities have independent auditing processes to monitor intelligence activities.<sup>249</sup> An obvious downside of this approach is cost, as each jurisdiction would have to spend resources and develop the necessary expertise and experience. This approach therefore fits most naturally with a vision of lo-

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247. In some cases, existing local oversight mechanisms can exercise strong checks. Mary Cheh studied the District of Columbia City Council's investigation of tactics used by the D.C. police to disrupt mass protests in 2000-03 by, among other things, preemptively arresting large numbers of suspicious individuals. This local legislative oversight led to D.C. legislation imposing strict standards on police practices that threatened First Amendment rights. See Cheh, *supra* note 10, at 20-21. By contrast, a series of investigative journalist accounts in 2011 of controversial NYPD surveillance practices pointed to weak formal oversight checks. See Samantha Gross & Matt Apuzzo, *NYPD Grilled on Anti-Terror Efforts*, NEWARK STAR-LEDGER, Oct. 7, 2011, at 2.

248. Jerome Skolnick argues that a strong civil rights bar and free press are important checks on surveillance powers at the local level and that these checks are stronger or weaker in some jurisdictions than others. See Skolnick, *supra* note 125, at 210-12. Kennedy and Swire argue that, in general, the press and civil liberties organizations pose a stronger check at the federal level than at the state or local level. See Kennedy & Swire, *supra* note 132, at 984. Intuitively I agree, but the federal government is also probably stronger in its ability to contest those forces.

249. See RILEY ET AL., *supra* note 11, at 34; ROLLINS, *supra* note 97, at 12.

calism, in which state and local governments play a strong role in setting law and policy within their jurisdiction, and with national security functions in which some state and local governments might be willing to invest and engage heavily. For example, the approach is well-suited for activities like police investigations and threat monitoring, which are—as noted above and discussed further in the next Subpart—often context-specific, subject to diverse laws and guidelines, and difficult to oversee from afar because they do not produce metrics that are easy to assess or compare across jurisdictions.<sup>250</sup> These are also intelligence activities that are not neatly separable from regular policing functions.

Another approach is to rely on the federal government to provide some centralized oversight. Whereas a decentralized or localized approach would accommodate or even encourage variation of monitoring mechanisms, this approach would do the opposite, concentrating oversight in existing mechanisms at the federal level (such as agency inspectors general) or promoting adherence to federal oversight standards through reporting and federal auditing. As mentioned earlier, many federal programs that build intelligence analysis and sharing capacity at the state and local level condition receipt of federal funds and resources on compliance with federal regulations and guidelines,<sup>251</sup> though the federal government does not generally take on complete responsibility for monitoring compliance. This centralized approach is probably best suited for programs like intelligence fusion centers that are administered mostly at the state level (to reduce the number of government units to be monitored) and that generate products or data, such as intelligence assessments or compiled data-sharing records, which could be audited from Washington on a periodic basis.

These are just a few among many factors that should shape intelligence oversight structures. Other combinations of centralized or decentralized and federal or local controls also exist. For example, the 1970s and 1980s federal court consent decrees limiting some major cities' intelligence programs, mentioned earlier, were a form of federal but decentralized control.<sup>252</sup> At the most general level, an important implication is that possible roles for local agencies in national security intelligence cannot be meaningfully assessed in terms of liberty, security, and other policy values independent of the institutional-oversight context in which they will take place. The result is that intelligence oversight, like the functions it monitors, should remain a combination of federal top-down and local bottom-up efforts, requiring some disaggregation of intelligence functions based in part on concerns about costs. The next Subpart takes a closer look at some of these economics.

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250. *Cf.* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, IMPROVING THE OFFICE OF COMMUNITY ORIENTED POLICING SERVICES' GRANT AWARDING, MONITORING, AND PROGRAM EVALUATION PROCESSES 8-9 (2009) (discussing limited capacity for oversight of local grant programs due to resource constraints).

251. *See, e.g.*, RILEY ET AL., *supra* note 11, at 62.

252. *See supra* note 45 and accompanying text.

## B. *The Economics of National Security as Regulation*

Besides a focus on accountability, another common federalism perspective emphasizes efficiency and the distribution of costs, and the economics of regulatory federalism provide an additional analytic lens through which to examine institutional design of intelligence architecture.<sup>253</sup> This view holds that authority should be allocated among levels of government to maximize welfare, often focusing on questions of externalities and the costs and benefits of uniformity versus variation. Such analysis is especially helpful when disaggregating national security intelligence into its component functions (such as collection, analysis, and sharing) and thinking about which should be set and regulated with strong top-down federal influence versus bottom-up localism.

### 1. *Intelligence law and policy as regulation*

Consider, by way of analogy, pollution regulation. Federal policymaking may be seen as necessary because states have an incentive to underspend on environmental protection, especially if the deleterious effects of environmental damage are felt elsewhere across borders, as “spillover effects.”<sup>254</sup> Those who favor localized environmental regulation often respond that interjurisdictional competition could pressure governments to regulate efficiently.<sup>255</sup> There are also policy advantages to uniformity to be weighed against efficiencies generated through localized tailoring and experimentation with practices and laws.

Intelligence efforts, including collecting and sharing information, can be thought of as a form of regulation of harmful activity (terrorism-related activities that threaten national security), in which the level or intensity of regulation comes at a cost (for example, privacy or other liberties, resources, and so forth). With regard to the economics of national security intelligence, there is probably no realistic, comparable danger of a “race to the bottom” in which states are discouraged from adopting optimal environmental protection levels due to commercial competition with other states.<sup>256</sup> Even the most privacy-protective state or city would not want to risk becoming a terrorist refuge, though that is not to say that some states or cities would not pride themselves publicly on their strong commitment to certain rights or as privacy beacons. Nor is there

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253. Cf. Rascoff, *supra* note 45, at 616-19 (arguing for a cost-benefit evaluation of intelligence architecture).

254. On environmental pollution spillover effects across state borders, see Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 538 (1997); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1215-16 (1977).

255. See Revesz, *supra* note 254, at 535-36.

256. See Stewart, *supra* note 254, at 1212.

evidence that suggests terrorists or their supporters locate themselves or their activities based on assessments of locally varying security law and policy.<sup>257</sup>

No doubt, too, some state and local governments have been eager to invest in many counterterrorism activities and programs, especially those that carry visible cachet or power.<sup>258</sup> Furthermore, many state and local jurisdictions that likely face low risk of terrorism have probably overinvested in counterterrorism programs, and federal programs to promote or support state and local counterterrorism efforts have been criticized as needlessly overspending in many low-risk locales.<sup>259</sup> Like other federal spending programs, homeland security and counterterrorism include their share of wasteful pork projects.<sup>260</sup>

However, it is also likely that some states and localities would be inclined absent federal intervention to spend too little (in terms of resources, liberties, etc.) on intelligence or other national security functions—or at least on some *types* of intelligence and national security functions—because of the way costs and benefits are distributed.<sup>261</sup> Much of the risk from states or localities underinvesting in counterterrorism intelligence is externalized for several reasons. First, the political fallout of terrorist attacks is likely to land heavily on the federal government, because (for now, at least) it is widely viewed as primarily—even if not exclusively—responsible for stopping *any* terrorist attack.<sup>262</sup> Second, some of the high costs of intelligence are borne locally, in forms like added surveillance and processing of information, and with little visible and measurable benefit.<sup>263</sup> Yet much of the benefits of local intelligence accrues elsewhere, because terrorist attacks may take place far away (maybe even in a different country) from where they are planned, coordinated, funded, and so forth.<sup>264</sup> A terrorist attack anywhere then carries tremendous costs for the entire country in terms of fear, economic dislocation, and other reverberating effects

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257. *But cf.* CHRISTOPHER DICKEY, *SECURING THE CITY* 170-71 (2009) (suggesting that aggressive counterterrorism efforts in New York City might cause terrorists to relocate to New Jersey or other areas).

258. *Cf.* Dreyfuss, *supra* note 123, at 12-14 (reporting post-9/11 efforts by police agencies to expand their power).

259. *See* David Johnston, *With Crime Up, a City's Police Force Questions the Focus on Terror*, N.Y. TIMES, July 24, 2008, at A17 (describing the increased counterterrorism investment in Providence, Rhode Island, and the attendant criticism from police officials); Schmitt & Johnston, *supra* note 126.

260. *See* Editorial, *Risk vs. Pork*, WASH. POST, May 17, 2005, at A20.

261. *See* Michael A. Sheehan, Op-Ed., *The Terrorist Next Door*, N.Y. TIMES, May 4, 2010, at A31 (discussing local government reluctance to invest in some counterterrorism intelligence functions).

262. *See* Richman, *supra* note 200, at 408 (observing that, after 9/11, the federal enforcement bureaucracy was “saddled with a politically unavoidable, and all-but-impossible, responsibility: preventing another such attack”).

263. Even the political rewards of successful counterterrorism intelligence are unlikely to accrue to local governments, because most terrorism prosecutions quickly become federalized.

264. *See* Thacher, *supra* note 84, at 637-38.

of terroristic violence. Third, some cities are likely to see themselves as facing an especially low risk of terrorism, and this view could affect their willingness to bear costs of shared or interlinked programs. Taking the earlier example of Portland, that city might have decided to spend little on intelligence (in terms of resources as well as liberty and privacy) because it assessed that any threats emanating from its area were unlikely, and was therefore unwilling to invest in the federally led joint task force.<sup>265</sup>

Importantly, the legal and policy decisions taken by state and local governments do not entirely set the level of liberty, security, and other values felt in a given jurisdiction. However much a state or local government might withdraw from counterterrorism activities or collaboration, the federal government still operates within local jurisdictions—perhaps even more so to compensate for state or local inaction. This points to a weakness in arguments that state and local governments should separate themselves from national security activities and programs to better protect their public policy domain from federal distortions. It is also similar to a point made by Justice Stevens in his *Printz* dissent: “By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself [through] . . . vast national bureaucracies to implement its policies.”<sup>266</sup> In other words, a strategy by local governments of distancing themselves from federal efforts may be successful in assuring that local government actions reflect their own policy choices about liberty, security, and other priorities. But such a strategy may not necessarily reflect how those choices are ultimately felt by their citizenry or how national security efforts affect other policies. This is because the federal government can step in where local governments insist on leaving off, and impacted communities may not discern which level of government is responsible. Indeed, as argued above, local withdrawal from federal efforts may forfeit opportunities to influence federal activities conducted there.<sup>267</sup>

Although many incentives point toward the possibility that—absent federal intervention—some states and localities would underspend on national security, the opposite is also possible, especially in areas that perceive themselves as especially threatened. New York City, for example, might decide to spend very heavily on intelligence—perhaps even more heavily in some respects than the federal government would prefer—because it remains a prime target and because attacks there are likely to carry immense local costs.<sup>268</sup> In 2008, New

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265. See Herman, *supra* note 148 and accompanying text.

266. *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting).

267. See *supra* Part III.A.2.

268. Courts recognize that New York City faces unique terrorism challenges and dangers. Besides the case involving its investigatory guidelines, see *supra* notes 134-36 and accompanying text, a good illustration is the NYPD’s random search policy for subway riders, which the Second Circuit upheld based in part on New York’s “continued desirability as a target.” *MacWade v. Kelly*, 460 F.3d 260, 272 (2d Cir. 2006).

York City Police Commissioner Ray Kelly complained vigorously to U.S. Attorney General Michael Mukasey that the Justice Department was using too strict a legal standard in considering intelligence wiretaps and other electronic surveillance.<sup>269</sup> This might be viewed as a rare example of local pushback aimed at federal counterterrorism policy deemed too protective of liberty. In response to New York City's urging the federal government to be more aggressive in seeking foreign intelligence wiretaps in its area, the U.S. Attorney General retorted that doing so might undermine security in other parts of the country (as well as New York) by eroding the Foreign Intelligence Surveillance Court's confidence in executive controls for wiretap applications.<sup>270</sup> In other words, the federal government argued, New York City's preferred policies would produce high costs widely dispersed elsewhere.

Viewed in this light, one way to think about federal programs to promote, support, or link state and local intelligence efforts is that the federal government has an interest—and should play a role—in ensuring that states and localities provide at least a minimum threshold of both security and liberty.<sup>271</sup> In terms of security, the federal government should work to ensure that states and localities prevent national security threats from acting or growing within their jurisdictions. It should help avoid what might crudely be thought of as “domestic safe havens” for terrorists or terrorist supporters in particular locales, because even if a state or locality were to discount heavily the harms that might result, those harms may have national-level effects, or even spillover effects across borders.<sup>272</sup> In terms of liberty, the federal government should work to ensure that states and localities protect civil liberties at least as much as required by the Federal Constitution or federal law, not only as an interest in itself but also because even localized violations of rights by states and localities in the name of national security could undermine political support for nationwide federal national security policies.

Working to assure minimum floors of security and liberty in each subfederal jurisdiction, however, still probably leaves a lot of room for localism in between. There will still be a zone in which states or localities should appropriately have discretion to set balances according to their own assessments of costs, including costs to other policy priorities. As an example of how this op-

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269. See Letter from Raymond W. Kelly, Comm'r, N.Y.C. Police Dep't, to Michael Mukasey, U.S. Attorney Gen., U.S. Dep't of Justice (Oct. 27, 2008), available at <http://online.wsj.com/public/resources/documents/Mukasey111908.pdf>.

270. See David Johnston & William K. Rashbaum, *New York Police Fight with U.S. on Surveillance*, N.Y. TIMES, Nov. 20, 2008, at A1.

271. See William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 98, 100-14 (William W. Buzbee ed., 2008).

272. Cf. Mazzone, *supra* note 22, at 39-47 (arguing that federal powers over national defense were designed to solve collective action problems among the newly independent states).

erates in practice with regard to information *collection* and *sharing*: The federal government has promulgated minimum privacy standards for compiling, recording, and accessing in a common database “suspicious activity reports” on certain types of observed activities that might fit terrorism profiles. However, the federal government has left participating local jurisdictions with substantial room to adjust policies and procedures for such reporting based on local conditions and state and local law.<sup>273</sup>

With regard to information *analysis*, too, some state fusion center activities are governed by federal regulations requiring compliance with federally mandated operating principles and standards,<sup>274</sup> and the Department of Justice also publishes fusion center guidelines for operational issues as well as privacy and civil liberty protection.<sup>275</sup> Yet fusion centers have taken a variety of forms in different states based on local assessment of needs and policy priorities, and they are also governed by a variety of state laws.<sup>276</sup> As the Department of Homeland Security reported in its 2008 Privacy Impact Assessment: “No two fusion centers define or carry out their missions in exactly the same way or are subject to the same authorities or regulations. Notions of comity and federalism, moreover, prohibit the Department from placing certain requirements on fusion centers.”<sup>277</sup> Federal guidelines, though, encourage states to appoint a chief privacy officer for each fusion center. These privacy officers help ensure compliance with federal standards as well as state law and policy standards, and they also serve as liaisons with civil liberties and other community organizations to help mold policies and practices to local priorities.<sup>278</sup>

## 2. *Uniformity and variation of intelligence law and policy*

Such unevenness across jurisdictions in calibrating policy raises another set of federalism economics concerns, though: the balance of uniformity and variation. It is well remembered that Justice Brandeis touted “the happy incident[] of

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273. See Philip Leggiere, *Fusion Centers: Tough Tightrope*, HOMELAND SECURITY TODAY (Jan. 3, 2011), [http://www.hstoday.us/index.php?id=3392&no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=16211](http://www.hstoday.us/index.php?id=3392&no_cache=1&tx_ttnews%5Btt_news%5D=16211).

274. See ROLLINS, *supra* note 97, at 13-14.

275. See *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (Aug. 2006), [http://it.ojp.gov/documents/fusion\\_center\\_guidelines.pdf](http://it.ojp.gov/documents/fusion_center_guidelines.pdf). As of 2010, more than eighty percent of the seventy-two fusion centers had submitted draft privacy policies to the federal government for review and technical assistance. INFO. SHARING ENV'T, ANNUAL REPORT TO THE CONGRESS 52 (2010).

276. See generally Trip Jennings, *Post-9/11 Intelligence Goes Local*, N.M. INDEP. (Aug. 12, 2008, 3:00 AM), <http://newmexicoindependent.com/481/post-911-intelligence-goes-local> (describing fusion centers in the Southwest).

277. DEP'T OF HOMELAND SEC., DHS/ALL/PIA-011, PRIVACY IMPACT ASSESSMENT FOR THE DEPARTMENT OF HOMELAND SECURITY: STATE, LOCAL, AND REGIONAL FUSION CENTER INITIATIVE 2 (2008).

278. See Leggiere, *supra* note 273.

the federal system that a single courageous State may, if its citizens choose, serve as a laboratory,"<sup>279</sup> but it is less well remembered that he spoke only of doing so "without risk to the rest of the country."<sup>280</sup> Institutional macrostructure should account for the risks and rewards, both locally and nationally, of local variation.

In the regulatory context, the efficiency advantages of uniformity are usually thought to include predictability and reduced costs for regulated actors that operate across jurisdictional borders.<sup>281</sup> In the national security intelligence context, top-down influences and pressures might similarly be defended in terms of promoting cross-jurisdictional cooperation or investigations that could be slowed or inhibited by conflicting rules, standards, and procedures. Such concerns are probably especially salient with respect to, for example, information-sharing law, such as rules regulating contribution to and access to law enforcement and intelligence databases. The costs to government agencies in ensuring compliance with a complex web of varying state and local data laws could be quite high, and experience to date suggests that states are unlikely on their own to coordinate effectively harmonized standards.<sup>282</sup> Government-wide standards with respect to minimum security and privacy practices also help facilitate information sharing by promoting trust among different agencies that might otherwise lack confidence about others' practices. Moreover, disparate standards on data sharing are especially likely to involve externalized costs (state *A*'s decision to withhold data from information-exchange networks to protect its residents' privacy might increase security costs to neighboring state *B*) that will be unequally distributed depending on whether a state is particularly likely to be targeted or particularly likely to include communities in which terrorism-related activities occur.

Variation, however, may also offer short-term advantages in other aspects of national security intelligence, insofar as intelligence regulation can be tailored to local conditions,<sup>283</sup> and long-term advantages can be gained through experimentation and resulting adaptation of regulation.<sup>284</sup> Consider the earlier

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279. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

280. *Id.*

281. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 325-26 (1985).

282. See THE MARKLE FOUND. TASK FORCE ON NAT'L SEC. IN THE INFO. AGE, NATION AT RISK: POLICY MAKERS NEED BETTER INFORMATION TO PROTECT THE COUNTRY 5 (2009) ("Information sharing outside the [intelligence community]—as well as information sharing across the law enforcement, domestic intelligence, and foreign intelligence communities—remains problematic.").

283. Cf. Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 581-82 (2007) (describing the benefits of such tailoring in the air pollution control context).

284. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentation*, 98 COLUM. L. REV. 267, 315-16 (1998).

example of federal programs to support state and local compilation, sharing, and analysis of suspicious activity reports.<sup>285</sup> There, participating state and local agencies have taken various approaches to improve public transparency and community outreach in developing their privacy-protection policies, including in some cases the direct involvement of local civil liberties advocacy groups.<sup>286</sup> The lessons learned and best practices drawn from these varied efforts are then fed back into federal programs to provide technical support and to periodically review state and local efforts, and they are also exchanged directly between states and localities through their own institutional networks.<sup>287</sup> Although it is too early to judge results, over time these adaptation and reappraisal processes may be beneficial not only in improving policy effectiveness within federally set parameters, but also in readjusting those parameters (the federally set minimum floors of liberty, security, and protection of other interests).<sup>288</sup>

The long-term benefits of experimentation and adaptation are probably especially likely to arise with respect to some information *collection* activities, because the effectiveness of investigation practices and information-gathering strategies tends to be context-specific to different types of communities and local government capabilities. The federal government has certain exclusive capabilities—such as technical capacities to monitor great quantities of electronic communications and vast networks of foreign contacts and counterparts arrayed across the globe—that are well suited to investigating transnational terrorist networks. But, as discussed earlier, local agencies have comparative advantages of their own: because of their continual presence and deep knowledge of local communities, local police are often better versed in local activities than are federal agents, and they have extensive networks of community relationships.<sup>289</sup> Some terrorist planning or supporting activities conducted inside the United States are therefore likely to be uncovered through resulting observations by local law enforcement and tips originating from relevant neighborhoods, or through innovative partnerships between the federal government and local agencies best positioned to design coherent information-gathering strategies attuned to particular community conditions, available resources, and other polic-

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285. See *supra* note 273 and accompanying text.

286. See INFO. SHARING ENV'T, PRIVACY, CIVIL RIGHTS, AND CIVIL LIBERTIES ANALYSIS AND RECOMMENDATIONS: NATIONWIDE SUSPICIOUS ACTIVITY REPORTING INITIATIVE 25-26 (2010), available at [www.ise.gov/sites/default/files/NSI\\_PCRCL\\_Analysis\\_July2010.pdf](http://www.ise.gov/sites/default/files/NSI_PCRCL_Analysis_July2010.pdf).

287. See *id.* at 17-19; Felisa Cardona, *Fusion Conference Brings In Officers Nationwide*, DENV. POST, Mar. 14, 2011, at A12.

288. Cf. Buzbee, *supra* note 271, at 113-14 (arguing that federal floors may promote effective experimentalism in areas of risk regulation).

289. See *supra* notes 69-72 and accompanying text. Some experts worry, however, that counterterrorism and national security intelligence responsibilities will crowd out other traditional police functions or will undermine police-community relations. See Ellen Scrivner, *The Impact of September 11 on Community Policing*, in COMMUNITY POLICING: THE PAST, PRESENT, AND FUTURE 183, 186-88 (Lorie Fridell & Mary Ann Wycoff eds., 2004).

ing and local government activities.<sup>290</sup> These comparative advantages can seed long-term, bottom-up learning.

C. *The Future of National Security Federalism and Counterterrorism Intelligence*

In sum, applying some common analytic frameworks of federalism to national security intelligence brings to the foreground issues otherwise obscured or neglected by the standard narratives of liberty versus security and by narratives of states as following versus checking federal power. Thinking about vertical national security architecture in terms of accountability mechanisms and efficiencies—and considering those federalism frameworks in terms of the unique features of national security intelligence—does not settle debates about security architecture. It does, however, inform them and open up new avenues of inquiry that should guide decisions about federal-local collaboration and structural design.

Returning to a concluding point of Part II, counterterrorism strategy—and therefore macrostructural design—will need to evolve as the threat does, especially if that threat includes a growing domestic component.<sup>291</sup> To be sure, a vast proportion of the terrorism threat will continue to have foreign dimensions and origins, and many aspects of counterterrorism intelligence will require centralized federal control and high degrees of uniformity—even if they also necessarily involve coordination with local agencies. Take, for example, government decisions to intervene and arrest suspected members of terrorist networks or cells that have plotted attacks but are not yet ready to carry them out, versus continuing to monitor the plotters and their communications to glean more intelligence about their ideology, contacts, travel, and recruitment. Besides tapping into local agencies for operational support, these decisions may require notification and coordination with local governments. Such coordination is needed to ensure that local law enforcement agents do not inadvertently tip off suspects prematurely, and also because local governments have a strong interest in public safety among communities in which plotters may be residing or traveling.<sup>292</sup> Generally these decisions require strong top-down control, though, because the federal government is best positioned to assess interlinkages to

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290. See Joshua D. Freilich et al., *Surveying American State Police Agencies About Terrorism Threats, Terrorism Sources, and Terrorism Definitions*, 21 *TERRORISM & POL. VIOLENCE* 450, 452 (2009); see also Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 *J. CRIM. L. & CRIMINOLOGY* 335, 366-67 (2011) (discussing how law enforcement agencies will make varying strategic and tactical choices with regard to intelligence gathering).

291. See BERGEN & HOFFMAN, *supra* note 168, at 1-3. For contrary assessments about this threat, see *supra* note 170.

292. See Waxman, *supra* note 8, at 400-01.

other investigations and foreign intelligence operations, as well as intelligence gains and risks that may be long-term and widely distributed.

Especially if the terrorist threat becomes more decentralized and fragmented, however, some institutional arrangements for combating it will also need to become more localized and adaptive. Consider by way of concluding examples two looming and interrelated sets of issues, each alluded to earlier, for which the analytic frames of this Part will be useful in understanding and designing vertical institutional relationships: government efforts to detect and address patterns of violent radicalization, and the use of certain information-gathering techniques such as confidential informants. Both have long-term strategic policy and day-to-day operational import, and both cut across intelligence collection, analysis, and sharing.

As to addressing violent radicalization, a burgeoning school of thought holds that if domestic terrorism threats grow, then deep engagement of police and other government agencies with local publics could become even more important. Such engagement could help not just in developing relationships of trust needed to acquire information about potential threats from community members, but also in directing resources and efforts against the problems that contribute to violent extremism or terrorist recruitment by religious communities and others.<sup>293</sup> To address these issues, the federal government is working to expand its outreach efforts toward some Muslim and Middle Eastern immigrant communities, and to develop a stronger knowledge base about radicalization and counter-radicalization processes.<sup>294</sup> Meanwhile, some city police departments are also working to build ties with local religious, ethnic, and immigrant communities to better understand their activities and identify pockets of extremism within them.<sup>295</sup>

Lessons from European countries more experienced in dealing with domestic terrorism threats and pockets of violent extremism among certain minority communities suggest that local governments are often better positioned than national ones to design and implement strategies for countering violent-extremist ideology and recruitment, but that counter-radicalization and national security intelligence efforts are difficult to meld because perceptions about the latter may erode trust among communities who see themselves as targeted.<sup>296</sup> Given their broader community protection and service mandate, in many places local police—as well as other local government agencies and institutions—can

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293. See Rascoff, *supra* note 161, at 1716-20, 1728-31; cf. MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 23-24 (2008).

294. See NEUMANN, *supra* note 76, at 32-33.

295. See Bill Gertz, *L.A. Police Use Intel Networks Against Terror*, WASH. TIMES, Apr. 12, 2011, at A6.

296. See NEUMANN, *supra* note 76, at 22; see also Martin Innes, *Policing Uncertainty: Countering Terror Through Community Intelligence and Democratic Policing*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 222, 235-37 (2006) (describing British counterterrorism reorientation toward neighborhood policing strategies).

probably serve as a better bridge between counter-radicalization and national security intelligence activities than could their federal counterparts,<sup>297</sup> though skeptics argue that where local law enforcement agencies are poorly informed and harbor ethnic or religious biases their efforts to identify and intervene to address radicalization processes are especially likely to backfire and infringe rights.<sup>298</sup>

Rather than taking a lead role or pushing for top-down standardization, when it comes to efforts to counter violent radicalization, the federal government's most effective role may be in funding local initiatives, facilitating the spread of programs bred from diverse local experience, and sharing information about best practices developed by state and municipal governments for building relationships with community actors (educational, religious, and others) to yield information about threats and address their incipient formation.<sup>299</sup> Local accountability mechanisms based on transparency and informal checks, including scrutiny from civil liberties organizations and open dialogue with religious and ethnic minority groups, will therefore be especially important to check overstepping and to bolster rigorous deliberation informed both by federal expertise and by local understanding of complex community relationships.

As to the closely related issue of intelligence-gathering methods, such as recruiting and running confidential informants—say, sending a recruited community member into a local mosque to observe activities within it—decisions about whether and how to use these methods raise issues of prioritizing and balancing a range of interests, such as detecting terrorist threats and protecting spheres of association and expression.<sup>300</sup> Those decisions also implicate some interests of particular and varying salience at a local level, such as cultivating and maintaining trust and cooperation between law enforcement agencies and minority communities—trust and cooperation that could be threatened by these tactics.<sup>301</sup>

To the extent that local governments want to protect those relationships—not only from a counterterrorism perspective but perhaps more urgently for lo-

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297. See generally Laurie Goodstein, *Police in Los Angeles Step Up Efforts to Gain Muslims' Trust*, N.Y. TIMES, Mar. 10, 2011, at A17 (“In many ways, local law enforcement agencies play ‘good cop’ to the F.B.I.’s ‘bad cop.’”).

298. See PATEL, *supra* note 72, at 14-18. Nevertheless, local efforts at engagement will often be more successful than federal outreach to such communities because of those communities' negative perceptions of the FBI. See *id.* at 31.

299. See NEUMANN, *supra* note 76, at 7, 9. The White House recently released an official strategy document emphasizing this approach. See THE WHITE HOUSE, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 3, 6 (2011).

300. See generally Ross, *supra* note 80 (discussing these issues in the American and German systems); Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES, June 13, 2011, at A1 (discussing new FBI guidelines regarding sending informants to religious services).

301. See David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123, 158-65 (2010).

cal policing, as necessary to provide public order and services—simply opting out of using informants may be of little help if the federal government continues to use them. Targeted communities may not distinguish among which level of government is surveilling them. With regard to promoting accountability and protecting local interests from costly burdens of federal initiatives, then, institutional separation of federal and local policymaking in this context is of little value. Instead, the solution probably lies in joint policymaking within state and local jurisdictions and at the national level, recognizing that the federal government also has a significant long-term interest in winning and maintaining the support of local agencies and thereby gaining their knowledge of communities and sources of information within them. Promising approaches include expanded local roles in joint task forces at the state and major urban area levels, which would still be federally led but would include a more substantial state and local role, and expanded local representative input to federal investigatory guidelines of the sort discussed in Part III.A.2.

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Domestic counterterrorism architecture is still very much a work in progress, even if the major post-9/11 structures—federal bureaucratic reorganization, collaborative arrangements and grant programs linking federal agencies with state and local partners, etc.—are now in place. The policy choices mentioned above and the institutional arrangements for implementing them are just a few among many possible examples that together show that our federal national security system will remain a mix of centralization, decentralization, and localization, but that opportunities and challenges exist with respect to how they are combined, leveraged, and checked.

Although it has shown resilience so far, on account of the deep roots of American local policing and some of the advantages it brings to counterterrorism efforts, the localization of some features of American counterterrorism architecture could face intense centralization pressures in the future if the frequency of terrorist attacks within the United States increases—especially if future terrorist attacks were to expose major breakdowns in cooperation or communication between the federal and local governments or among local governments.<sup>302</sup> The issues explored in this Article are therefore important not only for guiding the sorts of policy questions just discussed and the continued evolution and reform of the current post-9/11 institutional architecture—especially its vertical dimension—but also for informing possible future debate about radical alternatives.

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302. Cf. Eli Lake, *Intelligence Agencies Slammed over Christmas Plot*, WASH. TIMES, May 19, 2010, at A8 (describing political fallout after failure to connect intelligence dots regarding December 2009 airline bombing attempt).

## CONCLUSION

The overwhelming focus on national security law scholarship centers on federal liberty-security balances and the horizontal relationships among federal branches of government. Events since 9/11, however, warrant attention to the uneven, textured national security law landscape formed by law and policy set at the state and local level, and also to the vertical relationships among the levels of government.

A federalism frame reveals how vertical intergovernmental structures could be reformed to enhance reasoned deliberation and oversight of intelligence and, especially when considering specific counterterrorism intelligence functions, to set policy-appropriate balances of centralization and localization. Such analysis is important because for the foreseeable future, state and local governments will play a significant role in counterterrorism intelligence, and that role may even grow. Harnessing state and local institutions for national security purposes will be essential to addressing parts of the national security challenge for which they are better suited than the federal government, especially if the terrorism threat evolves to include a greater domestic component.