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How the New Federalism Failed Katrina Victims[⊕]

ERIN RYAN*

I. INTRODUCTION: TOWARD A SYSTEM OF CHECKS AND BALANCE

In perhaps the most famous rhetorical gesture of the New Federalism,¹ Chief Justice Rehnquist opined that “[t]he Constitution requires a distinction between

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1. In the standard litany of the New Federalism decisions, the Court addressed: (1) the extent of the federal commerce power, *see, e.g.*, *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating a section of the Violence Against Women Act of 1994 (VAWA)); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (overturning the Gun-Free School Zones Act of 1990 as beyond the scope of commerce power); *but see Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (affirming federal authority to proscribe intrastate production and use of medical marijuana despite contrary state law); (2) the extent of Congress’ power under the post-Civil War Amendments, *see, e.g.*, *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (finding that the pecuniary remedy in the Americans with Disabilities Act of 1990 (ADA) did not satisfy the requirements of congruence and proportionality, which are needed to establish a valid exercise of Congressional power under the Fourteenth Amendment); *Morrison*, 529 U.S. at 627 (refusing to sustain a section of the VAWA under Section Five of the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000) (concluding that the Age Discrimination in Employment Act of 1967 (ADEA) is “not

what is truly national and what is truly local."² And yet, even conceding the value of the federalism principles thereby implied, we have yet to seriously reckon with the question that hangs after the rhetorical satiety dissipates: *What about everything in between?* The question makes a simple point about a complex body of jurisprudence—the Supreme Court’s controversial “New Federalism” decisions—which, in essence, is that the New Federalism breeds controversy precisely because it imposes an overly simple theoretical model on a complex area of law. Just as such critical legal fields as environmental, public health, and national security law have begun to embrace the need for greater interconnectivity in the management of regulatory problems that span multiple jurisdictions, the New Federalism decisions chart a course toward greater jurisdictional separation—setting the stage for the kind of conflict and confusion

‘appropriate legislation’ under Section Five of the Fourteenth Amendment”), *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding that the Religious Freedom Restoration Act of 1993 (RFRA) exceeded Congress’ authority under Section Five of the Fourteenth Amendment); (3) the extent of Congress’ ability to command state executive branch and legislative activity, *see, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not compel state and local law enforcement to implement a federal regulatory program); *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that the Tenth Amendment forbids Congress from “commandeering” state legislative action under a federal regulatory program); *but see Reno v. Condon*, 528 U.S. 141, 151 (2000) (finding that a federal law regulating state action did not commandeer state legislative and administrative process); and (4) the extent of state sovereign immunity, *see, e.g.*, *Alden v. Maine*, 527 U.S. 706, 712 (1999) (limiting Congress’ power to authorize suits against state governments in state courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (limiting Congress’ power to authorize suits against state governments in federal courts). For further discussion, see Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 *MD. L. REV.* 503, pt. III.A., at 539-54 (2007) [hereinafter *Tug of War*].

2. *Morrison*, 529 U.S. at 617–18 (emphasis added).

that characterized the failed response to Hurricane Katrina. This Article argues that American federalism can ably weather this storm, but it will require that we (1) recognize the interjurisdictional zone that so complicates the project; (2) better understand the tensions between underlying federalism values there exacerbated; and (3) articulate an administrable means of mediating between them so as to best realize the ultimate objectives of our constitutional design.

This the New Federalism fails to do, as have preceding interpretive movements that espoused similar ideals until they too were overcome by competing federalism concerns for which their theories could not account. In this most recent round, the Court's reasoning has proceeded from a model of state-federal relations based on a severe construction of dual sovereignty, the constitutional principle by which regulatory authority is allocated between the independently-functioning federal and state governments. Under this strict-separationist model, state and federal governments are idealized as operating in mutually exclusive spheres of jurisdiction, without overlap. Regulatory matters are styled as properly local or national concerns, state and federal authority is segregated accordingly, and the Tenth Amendment polices the supposed bright-line boundary between them. The distinguishing characteristics of the New Federalism decisions are premised on this ideal, which stands in contrast to much of the existing map of American government (so characterized by areas of concurrent or interlocking state and federal jurisdiction that its dual sovereignty has been likened to the intertwining layers of a marble cake³). Nevertheless, the

3.MORTON GRODZINS, THE AMERICAN SYSTEM 8, 60–153 (Daniel J. Elazar ed., 1966).

New Federalism's approach has altered the American federalism discourse, changing the way we think about the allocation of state and federal authority in modern regulatory endeavors.

Although they have attracted intense academic attention, these changes are hardly esoteric matters of interest only to judges and law professors. For better or worse (and in different respects, probably both), they would alter the way that Congress approaches lawmaking,⁴ and the way that the Executive approaches

4. Whether the lines of influence primarily run from the Court's decisions to Congressional legislation or vice versa is a chicken-and-egg problem over which much ink has been spilled. Still, when state actions or statutes are invalidated by the Supreme Court, Congress often seeks to repair the infirmity with conforming legislation. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (authorizing the President to prosecute enemy combatants in military tribunals in direct response to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which invalidated the practice for lack of Congressional authorization). The Court's federalism jurisprudence appears similarly motivating, as suggested by the care with which the 1994 Congress crafted the "federal interest" provision of the VAWA (albeit unsuccessfully, see *Morrison*, 529 U.S. at 613-14), presumably in response to the anticipated critique in *Lopez* of the Gun-Free School Zones Act of 1990 for failure to assert a constitutionally valid federal interest. (After a multiplicity of amendments, the VAWA was passed by the House and Senate in late August and signed into law on September 13, 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), before *Lopez* was decided in April 1995, but after the relevant briefing had been submitted on June 2, 1994 (Brief for the United States, 1994 WL 242541), July 19, 1994 (Brief for Respondent, 1994 WL 396915), and August 17, 1994 (Reply Brief for the United States, 1994 WL 449691).) *But see Boerne*, 521 U.S. at 536 (invalidating Congress' attempt to reverse the effect of a prior Supreme Court decision with the Religious Freedom Restoration Act of 1993). Although it is difficult to assert a definitive causal direction in the dialectic between legislative and judicial

administration.⁵ At least in the latter case, the answer may well be “for worse” because, by many accounts, the ideals associated with the New Federalism’s project of better differentiating state from national authority may have contributed to the delayed federal response to the devastating aftermath of Hurricane Katrina in New Orleans. News reports indicate that, as pressure mounted on the White House to assume responsibility for key tasks not performed at the local level, the federal response was paralyzed as senior advisors stalled in debate over the federalism implications of providing the needed assistance.⁶ This Article takes the Katrina aftermath as a primary example of how the New Federalism’s ideological trajectory⁷ can obstruct interjurisdictional problem-solving by confusing, rather than clarifying, the proper roles of national and local regulatory authorities. But the Katrina aftermath is only the most mediagenic example of

decisionmaking, the New Federalism’s ideals seek to impact decisionmaking at both levels, and have been embraced by decisionmakers at both levels. *See Tug of War, supra* note 1, at 539-54.

5. *See Tug of War, supra* note 1, at 522-39 (discussing the role of federalism considerations in the federal response to Hurricane Katrina).

6. *See id.*, at 522-39. Interestingly, the public castigation that the federal government received for its failed Katrina response suggests that the New Federalism has *not* changed the way that large sectors of the public think about the respective roles of state and federal government.

7. The strict-separation ideal extrapolated from the New Federalism decisions exceeds their doctrinal impact at present, and we continue to operate from within a predominantly cooperative federalism system. *See id.*, at 637-42. Nevertheless, it has already infiltrated the regulatory mindset of policymakers. *See id.*, at 522-39. As such, the strict-separationist trajectory of New Federalism warrants scrutiny now, before its culmination further complicates our ongoing navigation of good governance.

confusion spawned by the New Federalism's intolerance for interjurisdictional complexity. Similar confusion has arisen in other like contexts, ranging from environmental to antiterrorism programs, resulting in uncertain policymaking efforts and New Federalism-inspired legal challenges to regulatory partnerships that link state and federal actors in related spheres of authority.⁸

Challenging the strict-separationist premise that all regulatory issues *can* be clearly characterized as matters of either local or national jurisdiction, this Article suggests that some regulatory targets are better understood within a separate, interjurisdictional sphere that legitimately implicates both local and national responsibility. As defined here, an "interjurisdictional regulatory problem"⁹ is one whose meaningful resolution demands action from both state and federal regulatory authorities, either because neither has all of the jurisdiction necessary to address the problem as a legal matter,¹⁰ or because the problem so implicates both local and national expertise that the same is true as a factual matter.¹¹

8. *See, e.g., id.*, at 577-80.

9. In recognition that not every public quandary ranks among the "regulatory problems" with which we are here concerned, I note that for the purposes of this piece, "regulatory problems" are those associated with the classic targets anticipated by administrative law—such as market failures, negative externalities, and other collective action problems reasonably susceptible to efficient resolution by government activity. *See id.*, at 567-96.

10. An example of this type of de jure interjurisdictional regulatory problem is the regulation of stormwater pollution. *See id.*, at 572-80.

11. Examples of such de facto interjurisdictional regulatory problems include the regulation of air pollution and domestic efforts to combat terrorist attacks from abroad. *See id.* at 580-84.

Because assigning responsibility for management of such a problem to the exclusive attention of either the local or national government is an ultimately arbitrary endeavor,¹² the better criteria for federalism consideration is whether regulation within this interjurisdictional “gray area” ultimately advances or detracts from the full panoply of federalism values that underscore Tenth Amendment dual sovereignty. But the New Federalism approach vindicates some of these values to the exclusion of others, thus threatening the ability of state and federal government to cope with complex problems in adherence to a strict-separationist vision that misses the full federalism target.

Interjurisdictional problems pose special difficulty for federalism because their circumstances exacerbate inherent tension between the underlying values of American federalism, principally the promotion of government accountability, the checks and balances that dual sovereignty affords against tyranny, and the socially desirable benefits associated with the protection of local autonomy (including

12. Establishing precise boundaries around the category of interjurisdictional regulatory problems invites disagreement, ranging from dispute over whether a given problem truly implicates both local and national concern to dispute over whether the given problem is truly amenable to a regulatory solution. I leave such legitimate arguments aside for the purpose of this piece, which introduces an interjurisdictional conceptual framework to the federalism discourse through a sample of problems that meet the criteria in a relatively uncontroversial manner. They are uncontroversial because they address matters that have remained targets of regulatory response over time, and because most would agree that they implicate the obligation or expertise of both a local and a national actor. As discussed in Part IV of *Tug of War*, these include a variety of

regional diversity, regulatory efficiency, and innovation yielded by interjurisdictional competition). Each value represents an underlying principle of good government that we ask federalism to help us realize, and each is claimed in support of the need for judicially enforceable federalism constraints.¹³ But in addition to these more familiar values, the federalism premise of as-localized-as-possible governance (or “subsidiarity”) incorporates an often overlooked problem-solving value. Directing that public decisionmaking take place at the most local level *possible* implies the most local level with *capacity*—or the most local level of government that may actually be able to solve the problem. Tensions exist between the satisfaction of each of these values in any given model of federalism, but a central federalism tension is located between the anti-tyranny “check-and-balance” value and the underappreciated “problem-solving” value.¹⁴

Indeed, the historic progression of the various models of federalism that informed Supreme Court interpretation over the twentieth century reflects a pendulum-like attempt to achieve the proper balance between underlying federalism values, each model perhaps overcompensating for the excesses of its predecessor.¹⁵ After the Great Depression crippled the capacity of state and local governments to cope with unprecedented levels of social and economic despair,

environmental and land use problems, natural disaster management issues, public health crises, and counterterrorism and national security matters. *See id.*, at 567-96.

13.*See id.* , at 596-629.

14.*See id.* , at 620-28.

15.*See id.* ,at 629-43.

the Supreme Court adopted a model of federalism that exalted the problem-solving value at the expense of the check-and-balance value to approve pragmatic New Deal legislative programs that expanded federal jurisdiction into traditionally local arenas. Cooperative federalism, the predominant model of federalism since World War II, recovers some of the balance through a partnership-based approach to regulation in areas of interjurisdictional overlap, allowing state and federal governments to take responsibility for interlocking components of a collaborative regulatory program. However, cooperative federalism has also been criticized as an overly pragmatic model that insufficiently protects anti-tyranny values.¹⁶ Responding to concerns that cooperative federalism is, at best, undertheorized (and at worst, more coercive than collaborative), the New Federalism reestablishes the supremacy of the check-and-balance value over all others in an effort to bolster the line between state and federal authority against pressures (some perhaps political, others genuinely interjurisdictional) that would blur the boundary.

Demanding attention from both a national and local actor, interjurisdictional problems do blur that boundary, pitting concerns about tyranny and needs for pragmatism against one another. But it is arguably the tension between federalism's check-and-balance and problem-solving values that has made our system such a robust form of government—enabling it to adjust for changing demographics, technologies, and expectations without losing its essential character. A model of federalism that engages these tensions is a model that can

¹⁶.*See id.*, at 637-42.

endure. But the New Federalism's focus on preserving bright-line boundaries above all else renders it unable to effectively mediate the competition between federalism values, contributing to a governmental ethos that obstructs even desirable regulatory activity in the interjurisdictional gray area (such as federal initiative that might have been taken in the aftermath of Hurricane Katrina). Taken to its extreme, the New Federalism model can lead to jurisdictional gridlock, posing obstacles to novel approaches to interjurisdictional regulatory partnerships¹⁷ and discouraging efficient responses to some of society's most pressing problems.¹⁸

In this ironic respect, the New Federalism simply does what New Deal federalism did in the opposite direction—shortchanging the problem-solving value in the name of the check-and-balance value, which it mistakes for federalism generally. In so doing, the New Federalism lays too proprietary a claim to the essence of American federalism itself—implying that faithfulness to the Constitution requires its approach and *only* its approach, when federalism is

17.For example, the innovative state-federal partnership created by the Clean Water Act's Phase II Stormwater Rule, though negotiated with the participation of the states over a ten-year period, was challenged fiercely (though unsuccessfully) on Tenth Amendment grounds. *See* *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843–45 (9th Cir. 2003); National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,724, 68,743 (Dec. 8, 1999); *see also Tug of War*, *supra* note 1., at 577-80.

18.For example, federalism-related concerns may have frustrated a more efficient regulatory response during the aftermath of Hurricane Katrina. *See Tug of War*, *supra* note 1, at 522-39.

really a more variegated institution. Exploration of how different models of American federalism have variously prioritized different values over time reveals New Federalism's approach as merely one alternative among many, each true to constitutional design in its unique vindication of the fundamental federalism values. Like so many other constitutional concepts, then, federalism ultimately invites interpretive choices.¹⁹ As such, we should invest in the jurisprudential

19.Of course, some argue that the only valid interpretation is that of the original architects of the Constitution, and that anything else reflects "judicial activism," or inappropriate judicial aggrandizement. *See, e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 283–84, 363–70 (1997); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 46 (1997); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *SAN DIEGO L. REV.* 823, 824–25 (1986); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 *HARV. J.L. & PUB. POL'Y* 5, 7 (1988); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 698 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989). If textual directives prove problematic over time (for example, the original Constitution's tacit approval of slavery or dated plans for federal taxation), the appropriate response is not to engage in interpretive "subterfuge" but to correct the defect by formal amendment (for example, the Thirteenth and Sixteenth Amendments, respectively). U.S. CONST. amend. XIII, XVI. *See* William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 *U. FLA. L. REV.* 209 (1983).

Scholars from opposing schools of thought argue that all constitutional interpretive choices—including "originalist" interpretations—are equally subject to the hermeneutic biases of the interpreter by virtue of the pockets of ambiguity inherently embedded within written texts. *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 1032–34 (2002) (asserting that incorporation of historical understanding into modern constitutional interpretation is an "irreducibly normative" endeavor);

development of a federalism model that more explicitly (and capably) balances all competing values than have New Deal federalism, cooperative federalism, and New Federalism, enabling a structure of governance that best realizes the demands we make upon our political institutions.

There is, of course, a wide range of views on what those demands should rightly be. Some advocate for ambitious regulatory problem-solving,²⁰ others for a government that limits itself to as little interference with private activity as possible.²¹ Some, chafing against New Federalism excess, have suggested that American federalism is itself an anachronistic artifact of earlier times, which may

Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 287 (2004) (reviewing the “vast body of primary historical materials . . . that support a spectrum of constitutional meaning” and the accordingly futile project of constraining judicial interpretation with originalist principles); *see also* Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032–33 (1977); Robert Post, *Theories of Constitutional Interpretation*, in REPRESENTATIONS 13 (1990). Although none dispute the proper recourse to amendment for correcting clearly defective textual provisions, they argue that some degree of interpretive lawmaking is a necessary part of the judicial function in applying vague constitutional commands to new controversies. *See, e.g.*, Laurence H. Tribe, Comment, in SCALIA, A MATTER OF INTERPRETATION, *supra*, at 68–72 (discussing the problem of choosing the correct “level of abstraction” at which constitutional clauses should be construed). This Article proceeds from the latter assumption in finding deliberate interpretive space in the model of dual sovereignty implied by the Constitution, most directly in the text of the Tenth Amendment.

20.*E.g.*, RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004) (endorsing regulatory approach to many environmental problems).

21.*E.g.*, MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO (rev. ed. 1978).

as well fade into the same obscurity to which the distinction between law and equity has retired.²² But the suggestion is as unlikely as it would be unwise.²³ In the United States, the real issue is not *whether* federalism, but *what kind* of federalism best serves the hopes and needs that we hang on the continued vitality of our system of government. My first proposition is thus positivist but value-neutral: regardless of our competing views on what constitutes good government, we should recognize that the interpretive model of federalism we embrace is linked with this determination, as different blends of the foundational federalism values will foster distinctive characteristics in governance.

Acknowledging that reasonable minds will disagree on the characteristics of ideal government, I nevertheless take a normative stance in my criticism of the New

Comment [e1]: Just a note that the formatting appears to change here, from double spacing to 1-1/2 line spacing. I'm sure this will get fixed in the next editing phase, but thought I'd point it out.

22.For example, Edward Rubin has observed that

[f]ederalism is indeed worth discussing; it is a basic, truly fundamental question of political organization. Fortunately, the United States has not needed to confront this question, as a matter of practical politics, for nearly a century. That is what makes it so much fun to talk about. Like a healthy person talking about medical care, a congenitally thin person talking about dieting, or a rich person talking about money problems, we can lavish exuberant attention on the subject without any sense of urgency or danger. . . . [T]here is also an intrinsic pleasure in talking about how much one has of something that one does not need, and that other people desperately require.

Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1010 (1997).

23.See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213–23 (1998) (arguing in favor of American federalism's continued vitality despite cogent criticism of the New Federalism approach in the Tenth Amendment context); cf. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 951 (1994) (conceding, despite skepticism, that the states serve beneficial roles as mechanisms of decentralization and that American federalism might retain value for reasons of historical and cultural identity).

Federalism ideals, making the Article's second proposition less value-neutral. In critiquing strict-separationist dual sovereignty's failure to account for the interjurisdictional gray area, I proceed from the assumption that good government should address those market failures, negative externalities, and other collective action problems that individuals are ill-equipped to resolve on their own and that so threaten public welfare as to warrant a regulatory response²⁴ despite the libertarian-highlighted risks that inherently attend the exercise of governmental authority.²⁵ As we face interjurisdictional problems that meet these criteria, we deserve a model of federalism that anticipates the competition between federalism values that will arise in the interjurisdictional gray area so invisible to New Federalism.

II. The Stakes: How the New Federalism Failed Katrina Victims

A. Which Federalism?

Roughly defined, federalism refers to a system of government in which power is divided between a central authority and regional political sub-units, each with authority to directly regulate its citizens. Federal governments worldwide display a variety of structural choices by which this design is accomplished, but domestic federalism is well-defined in the concurrent sovereign authority of the central United States government and the fifty states, commonly referred to as "dual sovereignty."²⁶ Americans are citizens of both the United States and the

24.The most basic examples include the provision of common defense, the policing of border-crossing harms, and the facilitation of efficiency in commerce. *See supra* note 9; *Tug of War*, *supra* note 1, pt. IV.A., at 567-84.

25.*E.g.*, ROTHBARD, *supra* note 21, at 45-69 (outlining the dangers of state power accumulation for private property rights and personal freedoms).

26.*See, e.g.*, Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119, 119 (Jörg Fedtke &

individual states in which they reside, and subject to the respective laws of each. The Constitution enumerates those powers under which the federal government is authorized to make law (e.g., the commerce power, the spending power, and the war power),²⁷ and the states may regulate in any area not preempted by legitimate federal law.²⁸

Yet the fact that Americans are citizens of two separate sovereigns does not resolve the precise contours of the relationship between the two. Constitutional analysis sometimes reveals pockets of textual ambiguity that must be resolved by application of some interpretive federalism theory—a model that describes how the given federal system should work.²⁹ Accordingly, there is more to the variety among models of federalism than the specific array of regional sub-units around a

Basil S. Markesinis eds., 2006) (“Every federalism responds to a unique history, and thus every federalism is different from every other.”). For example, the European Union, Canada, India, and Switzerland are all federalism-based polities whose federations exhibit unique characteristics. The American dual sovereignty principle is well illustrated in *Collector v. Day*, in which the Supreme Court stated that

[t]he general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, “reserved,” are as independent of the general government as that government within its sphere is independent of the States.

78 U.S. (11 Wall.) 113, 124 (1870).

27.U.S. CONST. art. I, § 8.

28.U.S. CONST. amend. X.

29.*See supra* note 19.

centrality. Even within a single structural polity, conceptual variation may exist in construing the details of the relationship between sovereigns and the framework of federalism designed to protect it. This has been aptly demonstrated in the United States by the Supreme Court's ongoing experimentation with federalism constraints, in pursuit of its evolving vision of the dual sovereignty that is mandated but incompletely described by the Constitution.

American dual sovereignty is implied in various constitutional provisions that refer to the separate states,³⁰ but it is most encapsulated as a constitutional directive in the Tenth Amendment's affirmation that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³¹ This statement establishes that the Constitution (1) delegates some powers to the federal government, (2) prohibits some to the states, and (3) reserves powers that fit in neither of these two sets to the states (or perhaps the people). Standing alone, the Tenth Amendment's only unique contribution is to suggest that there are at least some unspecified powers that belong wholly to the states. But it does not specify what these are; we can only parse them out by negative inference to other constitutional provisions that specifically delegate federal authority or proscribe state action. It further (and unremarkably) affirms that the Constitution delegates some authority to the federal government, and, read together with the inherently vague

30. *E.g.*, U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

31. U.S. CONST. amend. X.

Supremacy Clause,³² suggests that at least some of this authority may be wielded exclusively at the federal level, preempting contrary state law. However, neither the Tenth Amendment nor the Supremacy Clause nor any other provision in the Constitution decisively resolves whether there may also be regulatory spaces in which both the states and the federal government may operate (if they have not been withdrawn from either's commission by express constitutional limitation or purposeful preemption). Drawing the conclusion that such overlapping regulatory space exists requires an interpretive leap, but so does the extrapolation of wholly mutually exclusive spheres of authority.³³ Either conclusion demands application of some exogenous theory about what American federalism means, or what, in essence, federalism is *for*. That we have relied on one theory or another to resolve the matter (in ways that may eventually come to seem obvious if only by virtue of their repetition) does not negate the role of federalism theory in getting us to that point.

32.U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). The Supremacy Clause tells us that federal law is “supreme,” but from there to field preemption nevertheless requires an interpretive leap.

33.*See Tug of War*, *supra* note 1, text accompanying notes 153-59; *see also* Jackson, *supra* note 23, at 2191 (noting that the Constitution’s assumption that states would continue to exist “does not tell us whether states can be required to help carry out federal law”).

What, then, is federalism “for”? Ultimately, polities turn to federalism to promote a set of governance values that they hope federalism will yield. As elaborated in Part V, foremost among them are the preservation of individual liberties through checks and balances on accountable sovereign power³⁴ and the promotion of diversity and competition associated with local autonomy,³⁵ both tempered with a healthy regard for the role of government as the superintendent of regional collective action problems.³⁶ Nevertheless, these values are suspended in a network of tension with one another. Preserving local autonomy can conflict with the protection of individual liberty. Centralized resolution of collective action problems can undermine checks and balances. In protecting its preferred vision of dual sovereignty, each interpretive approach advances the fundamental federalism values in some way, but the tension between them means that emphasizing one value may result in the de-emphasis of another.³⁷ In deciding which values take precedence under what circumstances, we choose, consciously

34. *See, e.g., New York*, 505 U.S. at 181 (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (internal quotation marks omitted)).

35. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism “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”).

36. *See Tug of War*, *supra* note 1, at 596-629.

37. *See id.*, at 596-643.

or not, among different models of federalism that then inform our lawmaking and adjudication.³⁸

In the United States, political discourse has tended more and more to treat the ideals of the diffusion of sovereign power and the pragmatic concerns of problem-solving as a federalism thesis and antithesis—principles in opposition to one another, rather than complementary elements of the overall federalism project. Regardless, a federalism model that subordinates pragmatic concerns to the maintenance of formalist boundaries between the reservoirs of state and federal power is clearly a legitimate political choice. Despite much of the rhetoric attending the New Federalism, however, it is not the *only* interpretive possibility, nor the only model true to the principles enshrined in the Constitution.³⁹ The

38. One might fairly ask, “[w]ho is the ‘we’ of whom you speak?” James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 442 (1982) (internal quotation marks omitted); see *id.* at 442–43 (“In place of the constituted ‘we,’ that it is the achievement of our past to have given us, we are offered an unconstituted ‘we,’ or a ‘we’ constituted on the pages of law journals.”). As aforementioned, this Article argues that American federalism, as set forth in the text and structure of the Constitution, invites interpretive choices by judges, legislators, and policymakers. See *supra* note 19 and accompanying text. The subject thus warrants consideration by all participants in the legal community, though it is ultimately the job of the Supreme Court to provide definitive interpretive guidance to the rest (as the Article recommends).

39. See generally David J. Barron, *Fighting Federalism with Federalism: If It’s Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081 (2006) (discussing how different Supreme Court justices have implicitly invoked different models of federalism in justifying their analyses).

same principles support a variety of other models, many of which have been experimented with over the course of our nation's history.⁴⁰ Each serves a slightly different understanding of the dual sovereignty relationship, promises a slightly different construction of governmental priorities, and thereby leads to slightly different substantive ends.

For interpreters of the American Constitution, then, the relevant choice is not one between federalism and non-federalism, but of *which federalism*—which model of federalism best promotes the kind of governance that we seek. These are, of course, the real stakes at hand. And so it could certainly be that, in the end, most Americans want exactly the kind of government promoted by the New Federalism model, although popular reaction to the Katrina disaster raises serious questions about such a proposition.⁴¹ Ultimately, I argue that the New Federalism model is not the best available choice, given the concerns raised here about its ability to contend with the interjurisdictional problems that confront all levels of government. Either way, however, we should at least recognize the true nature of the choice as one among alternatives—and make that choice with attention to the stakes involved. After all, this is not merely the stuff of political grandstanding and academic navel-gazing; the costs of our choices about federalism are very

40. *See Tug of War*, *supra* note 1, at 629-43.

41. *See id.*, at 522-39. (discussing the relationship between federal restraint during the Katrina aftermath and New Federalism ideals); *infra* note 92 (detailing public disapproval of federal restraint during the relief effort).

much extracted at the level of everyday lives (in the most tragic of cases, many at a time).

For this reason, our discussion begins with a brief consideration of the stakes of the federalism debate, illustrating the kinds of governmental decisionmaking that take place in the shadow of the model of federalism that we choose. The catastrophic aftermath of Hurricane Katrina in New Orleans provides such a scenario, one that called for governmental response from the most local to the most national level, requiring regulatory decisionmakers to contend with questions about how federalism principles should dictate their interaction. Surely, the spectacularly failed response owes much to the unprecedented demands of the circumstances (and perhaps to more ordinary problems of incompetence) that have nothing to do with federalism. And yet, the additional overlay of federalism issues helped further derail what might otherwise have been a more effective response, thanks to uncertainty among state and federal actors about their respective roles. This uncertainty appears to have stemmed from a set of beliefs about the proper exercise of state and federal authority coincident with the strict-separationist philosophy of the New Federalism revival.

B. Federalism and Katrina

Of all that was striking during the national tragedy of the Hurricane Katrina aftermath, a few things stood out: the shameful images of abject poverty within

the United States,⁴² the inspiring heroism of individuals who rose to the occasion, the staggering force of nature's fury, and the stunning failure of the most powerful nation on earth to respond effectively to the foreseeable effects of a predicted storm. But if we shouldn't have been surprised by the poverty, heroism, or storm surge, the latter failure was hard to fathom—and by many accounts, proceeded from unprecedented confusion among federal, state, and local responders regarding the allocation of their roles and responsibilities, and how to proceed in the face of this uncertainty.⁴³

1. *“Operating System Crash” by the National Response Plan*

According to eyewitness accounts and primary documents cataloging the relevant events,⁴⁴ the response to Katrina was characterized by failures in coordinated command and communications between local, state, federal, and

42. Equally shameful were the lingering dynamics of racial unfairness apparent in these images of abject poverty. See, e.g., Representative John Lewis, *“This is a National Disgrace”*, NEWSWEEK, Sept. 12, 2005, at 52 (“It’s so glaring that the great majority of people crying out for help are poor, they’re black. There’s a whole segment of society that’s being left behind.”).

43. See, e.g., Joe Whitley et al., *Homeland Security After Hurricane Katrina: Where Do We Go from Here?*, 20 NAT. RESOURCES & ENV'T 3 (2006) (describing the failures of state and federal coordination during the Katrina response).

44. For a compilation of documents collected by congressional investigators, including a conference call transcript between state and federal authorities before Katrina struck New Orleans, see Eric Lipton, *Key Documents Regarding the Government Response to Katrina*, <http://www.nytimes.com/ref/national/nationalspecial/10katrina-docs.html> (last visited Mar. 15, 2007).

volunteer responders, as authorities struggled to determine what the federalism directives in applicable federal laws mandated regarding whom should be responsible for which parts of the response. Revised after the 9/11 attacks and issued in 2004, the new National Response Plan (NRP) recognizes that saving lives and protecting the health of the public are top priorities of incident management.⁴⁵ However, the NRP also demarcates that, in emergency situations, states will be responsible for the implementation of police powers traditionally within their purview (such as local law enforcement, fire protection, and delivery of food and shelter), and the federal government will act in a supportive capacity, responding to specific requests by state authorities for assistance.⁴⁶

Although the Federal Emergency Management Agency's (FEMA) seeming paralysis in the face of the post-Katrina crisis may suggest incompetent leadership,⁴⁷ it is also attributable to a federalism-related "operating system crash" under the NRP, which faltered just as software does when unable to parse

45.U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN 6 (2004) [hereinafter NRP]. For an excellent review of the federal statutory framework dictating federal involvement in disaster response, see DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* 24–56 (2006).

46.NRP, *supra* note 45, at 8, 15.

47.In particular, former FEMA Director Michael Brown did not fare well in media accounts of his performance. See, e.g., Paul Krugman, Op-Ed., *The Effectiveness Thing*, N.Y. TIMES, Feb. 6, 2006, at A23 (characterizing Brown's performance as "ludicrous"); see also Evan Thomas et al., *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 30, 38 (questioning Brown's credentials for appointment as head of FEMA).

unanticipated inputs. According to the NRP's federalism directive, federal authorities could not act preemptively, lest they tread in the protected realm of state sovereign authority.⁴⁸ However, state authorities were unable to make the specific requests for assistance anticipated under the NRP. Local infrastructure was so damaged by the storm that communications were down,⁴⁹ and state and local authorities were apparently so overwhelmed themselves that they did not know what to ask for.⁵⁰ It may also be that state authorities were simply

48. See NRP, *supra* note 45, at 9.

49. The *New York Times* described the crippling effect on the National Guard:

The morning Hurricane Katrina thundered ashore, Louisiana National Guard commanders thought they were prepared to save their state. But when 15-foot floodwaters swept into their headquarters, cut their communications and disabled their high-water trucks, they had their hands full just saving themselves.

For a crucial 24 hours after landfall on Aug. 29, Guard officers said, they were preoccupied with protecting their nerve center from the waves topping the windows at Jackson Barracks and rescuing soldiers who could not swim. The next morning, they had to evacuate their entire headquarters force of 375 guardsmen by boat and helicopter to the Superdome.

It was an inauspicious start to the National Guard's hurricane response, which fell so short that it has set off a national debate about whether in the future the Pentagon should take charge immediately after catastrophes.

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

50. WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 42 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>. According to the White House's own report:

An important limiting factor of the Federal response . . . is that the Federal response is predicated on an incident being handled at the lowest jurisdictional level possible. A base assumption to this approach is that, even in cases where State and local governments are overwhelmed, they would maintain the necessary incident command structure to direct Federal assets to where they are most needed. In the case of Katrina, the local government had been destroyed and the State government was incapacitated, and thus the Federal government had to take on the additional roles of performing incident command and other functions it would normally rely upon the State and local governments to provide.

unprepared or incompetent to play the role anticipated of them by the NRP.⁵¹ But as former FEMA Director Michael Brown would later testify before Congress in defense of his agency's decisionmaking: "The role of the federal government in emergency management is generally that of coordinator and supporter. . . . [a role] fully supported by the basic concept of federalism, recognizing that the sovereign states have primary responsibility for emergency preparedness and response in their jurisdictions."⁵² Thus, as Katrina bore down on the Gulf Coast, these departures from the NRP's script left regulatory responders struggling to decipher, in essence, which parts of the response effort were the proper purview of the state, and which the proper purview of the federal government.⁵³

Id.

51. Michael Brown told Congress that his "biggest mistake was not recognizing, by Saturday [August 27, 2005], that Louisiana was dysfunctional." *Hurricane Katrina: The Role of the Federal Emergency Management Agency: Hearing Before the H. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. 12 (2005) [hereinafter *September 27 Katrina Hearing*] (testimony of Michael Brown, former Director, FEMA).

52. *September 27 Katrina Hearing*, *supra* note 51, at 3–4 (statement of Michael Brown, former Director, FEMA), available at http://katrina.house.gov/hearings/09_27_05/brown092705.pdf [hereinafter *Brown Statement*].

53. See Eric Lipton et al., *Storm and Crisis: Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1 [hereinafter *Lipton et al., Breakdowns*] (noting that dozens of interviews with officials showed that "the crisis in New Orleans deepened because of a virtual standoff between hesitant federal officials and besieged authorities in Louisiana"); Eric Lipton et al., *Storm and Crisis: Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at

Global security specialist Joseph Whitley, former general counsel at the U.S. Department of Homeland Security, made the following observations following the response to Katrina:

During the first few hours and days after landfall, we saw breakdowns in communication within and among every level of government: between federal, state and local officials; and, perhaps most critically, between government and the citizens of the affected areas. We saw an inability to establish with any certainty what was actually happening and to deploy the appropriate resources to deal with each situation. Many citizens in the Gulf Coast region and elsewhere in the United States may have lost confidence in the government's ability to respond to a catastrophic event.⁵⁴

A1 [hereinafter Lipton et al., *Political Issues*] ("Interviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority . . ."); Thomas et al., *supra* note 47, at 40 (reporting that as of September 2, "[a] debate over 'federalizing' the National Guard had been rattling in Washington for the previous three days").

54. Whitley et al., *supra* note 43, at 3. Whitley, a current member of Alston & Bird LLP's Global Security & Enforcement Practice Team, further observed:

From top to bottom, Katrina exposed some of our vulnerabilities as a nation. State and local governments must continue to address communication issues that were identified as crucial after the attacks of September 11, 2001. They must provide trained professional staff to manage response efforts. Continued and expanded coordinated training of federal, state, and local government officials is an absolute must. For emergency management lawyers, it is absolutely essential that we share "best practices" and coordinate our educational and training efforts so that government and the private sector at all levels better understands [sic] each other's needs and the legal requirements involved in disaster preparedness and relief.

Critically, DHS must immediately address areas of potential ambiguity or perceived confusion—who declares an emergency, who leads the response and recovery efforts,

Whitley suggests that coordination failures stemmed partly from inconsistencies between the two primary sources of procedural guidance for state and federal cooperation during emergencies—the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act)⁵⁵ and the NRP—and partly from the tensions inherent in catastrophic disaster management, due to the respect heeded by federal and state actors for the principles of federalism.⁵⁶

As he explains, the historic relationship between the federal, state, and local governments is best described as a “pull” approach, in which the federal government presumes that states and localities can cope independently with a disaster unless they specifically request (or pull) resources from the federal government.⁵⁷ This view of federalism in disaster response—that state officials are directly responsible for the health and safety of their citizens and that federal assistance is supplementary only—has long been the general rule, although the role has evolved toward greater expectations of federal assistance.⁵⁸ Although this approach works in the majority of instances, Whitley argues that disasters of Katrina’s magnitude show that federal policy must enable a “push” approach where needed, in which the federal government intervenes to provide assistance

how are resources managed—and we must create an expedited, transparent, and effective contracting and contract oversight process.

Id.

55.42 U.S.C. §§ 5121–5205 (2000).

56. Whitley et al., *supra* note 43, at 4–6.

57. *Id.* at 4.

58. *Id.*

even without a direct request by the state or local government.⁵⁹ After all, he explains, “[t]he ‘pull’ approach simply cannot work when the state and local governments are, as they were after Katrina, without communication, without the ability to assess the extent of damages or needs, and without even adequate personnel to make requests for everything needed.”⁶⁰ Although Whitley assigns a fair share of blame to state and local governments for their inadequate response, he holds the federal government especially accountable for failing to “promptly trigger[] the necessary federal legal authorities to begin the process of implementing federal assistance in the immediate aftermath of the storms,” when the state and local authorities were so incapacitated that they could not possibly have followed the rituals anticipated by the Stafford Act or the NRP.⁶¹ “Under such a catastrophic scenario,” Whitley concludes, “the federal government, without being asked, must intervene more promptly in the immediate aftermath of an event.”⁶²

Even before Hurricane Katrina hit the Gulf Coast, NRP drafters were aware that state and local governments might become overwhelmed during the course of a catastrophic emergency.⁶³ When Katrina hit, they had nearly finalized a “Catastrophic Incident Annex” to the NRP, enabling a push approach to address

59.*Id.*

60.*Id.*

61.*Id.* at 7.

62.*Id.*

63.*Id.* at 4.

these concerns.⁶⁴ However, this is a politically complicated innovation because it contradicts the relevant language of the Stafford Act, which authorizes federal disaster assistance to the states, sets forth the primary role of state and local responders, and clarifies the supplementary nature of federal support.⁶⁵ Whitley suggests that the Stafford Act may also need to be amended to enable a push approach in catastrophic circumstances.⁶⁶ In the meantime, the Katrina experience recently motivated passage of a new federal law that enables the President to deploy the military in response to natural disasters and other major domestic emergencies without consent of the states involved.⁶⁷

Although Whitley's blow-by-blow account of the post-Katrina failures are chilling, he also praises the great acts of generosity and self-sacrifice by those involved in the relief effort, commending members of the U.S. Coast Guard, FEMA, the National Guard, and first responders and law enforcement officers for

64.*Id.*

65.*Id.*

66.*Id.*

67. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006) [hereinafter Warner Act]; *see also* Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe* 1-2 (U. of Md. Legal Studies Research Paper No. 2006-37), available at <http://ssrn.com/abstract=946207> (arguing that the new law neither adds to nor subtracts from the President's existing powers but merely clarifies them after uncertainty suggested during the Katrina emergency).

their particularly heroic efforts to save lives and offer comfort to victims.⁶⁸ His seasoned observation of the details of the Katrina response indicate that failures were not the result of callous or careless behavior by individuals, but were institutional failures—namely, the rules or perceived rules of law that convinced decisionmakers not to proceed with the “push” response that was clearly necessary out of fear that doing so would, in essence, violate the Constitution.

2. *The President, the Governor, the Mayor, and the Stafford Act*

Federalism concerns were not limited to managerial choices in the field but pervaded the response effort up to the highest levels. News reports indicated that “[f]or days, Bush’s top advisers argued over legal niceties about who was in charge,”⁶⁹ that “[i]nterviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority,”⁷⁰ and that “the crisis in New Orleans deepened because of a virtual standoff between hesitant federal officials and besieged authorities in Louisiana.”⁷¹ The issues that most snarled the response effort were uncertainty about the point at which the federal government should stop waiting for instructions on how to assist the state and take initiative via its superior command

68. Whitley et al., *supra* note 43, at 3.

69. Evan Thomas et al., *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 41, 48.

70. Lipton et al., *Political Issues*, *supra* note 53, at A1.

71. Lipton et al., *Breakdowns*, *supra* note 53, at §1; *see id.* (reporting that “interviews with dozens of officials” supported this contention).

capacity (through the deployment of U.S. military or federalized National Guard troops),⁷² and after that, confusion about who would then be in charge.

Even as it became clear that federal assistance was necessary, uncertainty unfolded among all three levels of government as to who should be in control of the troops to be deployed.⁷³ Apparently desperate for results, New Orleans Mayor Ray Nagin supported federalizing the response,⁷⁴ while Louisiana Governor Kathleen Babineaux Blanco balked, and President George W. Bush, hesitant to offend federalism principles in this interjurisdictional no man's land, waited for clarity.⁷⁵ In one infamous exchange four days into the crisis at a strategy session aboard Air Force One, the distraught Mayor slammed the conference table with his hand and asked the President “to cut through this and do what it takes to have a more-controlled command structure. If that means federalizing it, let's do it.”⁷⁶ Mayor Nagin recommended the Pentagon's “on-scene commander,” Lieutenant General Russel Honoré, to lead the flailing relief effort on behalf of the federal

72. See Thomas et al., *supra* note 69, at 48–49 (“Beginning early in the week, Justice Department lawyers presented arguments for federalizing the Guard, but Defense Department lawyers fretted about untrained 19-year-olds trying to enforce local laws . . .”).

73. Thomas et al., *supra* note 47, at 40.

74. *Id.*

75. See *id.* The troops of each state's National Guard report to their Governor unless they are “federalized” by Presidential order in accordance with the terms of the Stafford Act. See 42 U.S.C. §§ 5191–5192 (2000) (authorizing the President to declare disaster emergencies and direct federal government response).

76. Thomas et al., *supra* note 47, at 40.

government.⁷⁷ According to another meeting participant, President Bush turned to Governor Blanco and said, “[w]ell, what do you think of that, Governor?”⁷⁸ But Governor Blanco declined to discuss the matter except in a private meeting with the President, which apparently followed the strategy session.⁷⁹ However, there was still no agreement over one week later,⁸⁰ leaving idle the assistance of an estimated 100,000 National Guard troops accessible on short notice in neighboring states.⁸¹ News accounts suggest that Governor Blanco did ask the President for 40,000 federal troops, but did not agree to surrender oversight of the relief effort to the federal government.⁸²

77.*Id.*

78.*Id.*

79.*Id.*

80.*Id.*

81. John M. Broder, *Guard Units’ New Mission: From Combat to Flood Duty*, N.Y. TIMES, Aug. 30, 2005, at A13.

82. See Karen Tumulty et al., *4 Places Where the System Broke Down: The Governor*, TIME, Sept. 19, 2005, § 2, at 34. *Time* reported:

Further tangling the post-Katrina disaster effort was a struggle for power. On the Friday after the hurricane, as the Governor met with Bush aboard Air Force One on the tarmac of the New Orleans airport, the President broached a sensitive question: Would Blanco relinquish control of local law enforcement and the 13,268 National Guard troops from 29 states that fall under her command? . . . [S]he thought the request had a political motive. It would allow Washington to come in and claim credit for a relief operation that was finally beginning to show progress.

Blanco asked for 24 hours to consider it, but as she was meeting at midnight that Friday night with advisers, [Chief of Staff Andrew] Card called and told her to look for a fax. It was a letter and memorandum of understanding under which she would turn over control of her troops. Blanco refused to sign it.

Had Governor Blanco surrendered her claim to control over the relief effort,⁸³ President Bush would have been able to reconcile the urgency of providing needed federal assistance with the federalism principles that he believed foreclosed such authorization in the interim.⁸⁴ Nevertheless, contemporaneous news accounts indicate that the Justice Department's Office of Legal Counsel researched the matter and "concluded that the federal government had authority to move in even over the objection of local officials."⁸⁵ Indeed, many commentators—including some close to the Bush Administration, such as former Deputy Assistant Attorney General John Yoo—argued vigorously that the

Id.; see also *Katrina Aftermath, Louisiana: Don't Want You on My Dance Card*, AMERICAN POLITICAL NETWORK, THE HOTLINE, Sept. 8, 2005, at 7 (discussing Governor Blanco's rejection of the White House proposal for federal control of troops in Louisiana).

83.It remains unclear why Blanco did not, given that the state resources at her disposal had proved insufficient to manage the relief effort independently. Viewed most generously, it may be that she was reluctant to turn control over to a federal government that had so far shown nothing but incompetence in its own handling of the disaster. Viewed less generously, her decision to refuse federal aid in the face of state incapacity tyrannically exacerbated the suffering of her own citizens by contributing to the delay. If she refused to relinquish control on federalism grounds while being unable to provide the needed resources independently, then her view of federalism warrants just as much criticism as that of the federal government. See *supra* note 52 and accompanying text (discussing Michael Brown's testimony on the role of federalism considerations during the response effort).

84.Under both the Stafford Act and the NRP, the President may federalize emergency response at the request of a state's governor. See *supra* notes 46 & 75 and accompanying text.

85.Greenberger, *supra* note 67, at 11 (internal quotation marks omitted).

President did not need the Governor's consent to federalize the response in light of available jurisdictional hooks in the Stafford Act, including state incapacity and federal obligation.⁸⁶ In addition to the President's authority to unilaterally federalize a State's National Guard in time of insurrection or war,⁸⁷ the Act authorizes the President to coordinate *all* disaster relief, including the use of Federal and State assets, in a time of crisis whenever "primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."⁸⁸ But what

86. John Yoo, Editorial, *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5; *see also* Greenberger, *supra* note 67, at 14–19 (arguing that the President had clear authority to intervene even before passage of the Warner Act); Candidus Dougherty, *While the Government Fiddled Around, The Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster* 39 (Jan. 1, 2006) (unpublished manuscript, *available at* <http://ssrn.com/abstract=938249>) (arguing that the Posse Comitatus Act did not bar the deployment of federal troops as part of the Katrina relief effort because it does not prohibit the military from providing humanitarian aid).

87. Insurrection Act, 10 U.S.C. §§ 331–335 (2000).

88. 42 U.S.C. § 5191(b) (2000). Unlike 42 U.S.C. § 5170, this section does not require the consent of a given state's Governor, though it does require as much consultation with the Governor as is practicable. 42 U.S.C. § 5191(b). The Stafford Act leaves the determination of when the United States exercises preeminent responsibility or authority up for interpretation, though commentators like Yoo have suggested that the particular circumstances after Katrina would have warranted unilateral federal action. *See* Yoo, *supra* note 86, at M5 (determining that Katrina would have

exactly does that mean? What counts as “a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or *preeminent responsibility and authority*”?⁸⁹

No court has interpreted this provision of the Stafford Act, because it has never arisen in a justiciable controversy.⁹⁰ But it goes to the heart of the federalism quandary: what does the Constitution tell us about when the United States exercises “preeminent responsibility and authority”? Although John Yoo is convinced that the text authorizes at least some measure of federal disaster response without a gubernatorial request, the question is unsettled. This uncertainty makes President Bush’s decision *not* to invoke his potential authority, especially in the face of such hideous human suffering and public pressure to act,⁹¹ all the more significant.

qualified as a national emergency and that “[o]nce a national emergency has been declared, the president can send troops to provide assistance and restore order”).

89.42 U.S.C. § 5191(b) (emphasis added).

90.The Warner Act recently affirmed that the President may unilaterally deploy federal troops, including National Guard troops in federal service, to respond to a major domestic emergency such as a natural disaster. *See supra* note 67 and accompanying text. However, the Warner Act does not provide additional bases of authority to federalize a state’s National Guard in the first place, leaving the Stafford Act issue unresolved. *See* Warner Act, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2404 (2006) (to be codified at 10 U.S.C. § 333) (adding circumstances in which “[t]he President may employ the armed forces, including the National Guard in federal service”).

91.For example, Anchor Brian Williams questioned Michael Brown:

Why can’t some of the Chinook helicopters and Black Hawks that we have heard flying over for days and days and days simply lower pallets of water, meals ready to eat,

Indeed, President Bush's reluctance to respond more proactively was not well received by the public,⁹² prompting his subsequent request that Congress study

medical supplies, right into downtown New Orleans? [“]Where is the aid?[]” It’s the question []people keep asking us on camera!

NBC Nightly News: FEMA Director Michael Brown Discusses Relief Efforts in Hurricane Zone (NBC television broadcast Sept. 1, 2005) [hereinafter NBC Nightly News].

92.*E.g.*, Michael A. Fletcher & Richard Morin, *Bush's Approval Rating Drops to New Low in Wake of Storm*, WASH. POST, Sept. 13, 2005, at A8 (“The bungled response to the hurricane has helped drag down Bush’s job-approval rating, which now stands at 42 percent—the lowest of his presidency—in the Post-ABC poll and down three points since the hurricane hit two weeks ago.”). Many members of the U.S. House of Representatives issued press releases emphasizing a popularly held sentiment about the primary role that the Federal Government should serve in disaster response and in providing aid to Katrina victims. *See, e.g.*, Press Release, Representative Marion Berry, Berry Issues Statement on Presidential Address (Sept. 15, 2005), *available at* <http://www.house.gov/berry/pressreleases/archive/katrina3.html> (“One of the primary roles of the federal government is to step in during times of national emergency.”); Press Release, Representative Elijah E. Cummings, Cummings: Brown Demonstrates Blurred Hindsight (Sept. 27, 2005), *available at* <http://www.house.gov/cummings/press/05sep27a.htm> (“Mr. Brown continues to blame state and local officials, many of whom were storm victims themselves, while denying the primary role of the federal government in helping its own citizens survive a catastrophe.”); Press Release, Representative Jan Schakowsky, Schakowsky Statement on the Approval of \$10.5 Billion in Emergency Supplemental Appropriations for Hurricane Victims (Sept. 2, 2005), *available at* http://www.house.gov/schakowsky/PressRelease_9_2_05_KatrinaAid.html (“[I]t is the primary role of the federal government to aid these victims.”). Newsweek Magazine’s *Special Report: After Katrina* “drew more than 1,000 letters,” most taking the federal government to task for its

proposals for guidance on federal initiative in future scenarios.⁹³ However, what is most significant about the President's decision is *why* he declined to exercise the potential Stafford Act authority in the first place, given such overwhelming political pressure to do so and his demonstrated confidence asserting untested federal executive authority in other realms.⁹⁴ One patent explanation for the President's hesitancy to explore all potential avenues of authority during the most devastating natural disaster in U.S. history is the profound influence of strict-separationist idealism. Federalizing the Louisiana National Guard and subjecting state and city police to federal command would have blurred the very lines of

"inept response to the catastrophe." *Mail Call: In the Wake of a Devastating Hurricane*, NEWSWEEK, Sept. 26, 2005, at 18.

93. *See, e.g.*, Shane & Shanker, *supra* note 49, at A1 (noting that the hurricane response touched off "a national debate about whether in the future the Pentagon should take charge immediately after catastrophes," and that President Bush had requested that Congress evaluate the question).

94. President Bush is often noted (both with praise and criticism) for expanding federal executive authority beyond that exercised by any previous administration in U.S. history. *See, e.g.*, Jeffrey Rosen, *Bush's Leviathan State: Power of One*, THE NEW REPUBLIC, July 24, 2006, at 8 ("One of the defining principles of the Bush administration has been a belief in unfettered executive power. . . . A conservative ideology that had always been devoted to limiting government power has been transformed into the largest expansion of executive power since FDR."); Press Release, Senator Patrick Leahy, Statement On Presidential Signing Statements (July 25, 2006), *available at* <http://leahy.senate.gov/press/200607/072506a.html> ("Whether it is torture, warrantless eavesdropping on American citizens, or the unlawful detention of military prisoners, this Republican-led Congress has been willing to turn a blind eye and rubber-stamp the questionable

regulatory authority that New Federalism so endeavors to preserve.⁹⁵ The best alternative explanation—and one equally troubling—is that the White House relied on New Federalism rhetoric for political cover in avoiding any involvement with the unfolding mess.⁹⁶ Either way, that New Federalism ideals could stall effective governance at such a key moment or provide reliable cover to so monumental an abdication suggests their infirmity.

In the end, reasonable people may disagree on how best to apportion blame between the amply culpable local, state, and federal authorities for the failed response, subsequently heralded as “a national disgrace.”⁹⁷ That said, it remains difficult to digest the confirmed reports that after fifteen-foot floodwaters swept

actions of this Administration, regardless of the consequences to our Constitution or civil liberties.”).

95.For example, Scott L. Silliman, Executive Director of Duke University School of Law’s Center on Law, Ethics and National Security, believes that delays were caused not by the limitations of the Posse Comitatus Act, which generally precludes the use of federal troops for domestic security concerns, but by confusion over the lines of authority between President Bush and Governor Blanco: “I think the problem was you had two heads of state . . . each having the authority, but one waiting for the other to act.” Anne Plummer, *Loosening Restrictions on the Military Enforcing Civil Law Unwise, Say Critics*, CONG. Q. WKLY., Sept. 24, 2005, at 2550 (internal quotation marks omitted).

96.*See id.* Silliman’s interpretation, of course, suggests another possible explanation for the administration’s reluctance to intervene despite an arguable legal basis for doing so: the desire to pass the hot potato and avoid responsibility for an intractable situation. *See Tug of War, supra* note 1, at 588-91.

97.*E.g.*, Lewis, *supra* note 42, at 52.

through the Jackson Barracks headquarters of the Louisiana National Guard Headquarters—severing communication lines, flooding high-water trucks, and converting the entire nerve center force into 375 more New Orleans refugees in need of a water rescue⁹⁸—White House officials stalled in Washington, debating how the finer principles of constitutional federalism dictated the scope of federal intervention.⁹⁹ In their defense, the debate was at least warranted by a faithful interpretation of the federalism model advanced by the sitting Supreme Court. But it raises the fair question, in light of the stakes and the results that can flow from that model—is this really the federalism we intended?

3. *The Price of Failure*

While the President's senior advisers fiddled with federalism, New Orleans drowned. The details of the debacle are by now painfully well-known to most Americans, but they bear repeating to highlight the scope of the failed response. Over a thousand residents perished in their homes and neighborhoods,¹⁰⁰ and up to thirty-four died in the makeshift mass shelters at the New Orleans Superdome and convention center,¹⁰¹ where some 39,000 evacuees were encamped without

98. Shane & Shanker, *supra* note 49, at A1.

99. *See supra* note 53 and accompanying text.

100. *Katrina's Official Death Toll Tops 1,000*, CNN.COM, Sept. 21, 2005, <http://www.cnn.com/2005/US/09/21/katrina.impact>.

101. Lipton et al., *Breakdowns*, *supra* note 53, at A1 (quoting official reports of thirty-four deaths: ten at the Superdome and twenty-four at the convention center).

adequate food, water, power, or sanitary facilities for up to seven days.¹⁰² Two-thirds of the occupants were women, children, or elderly, many of them infirm, and they huddled in darkness and 100-degree temperatures amidst the unbearable stench of human waste covering the floors and the ceiling debris fallen from holes torn from the roof by the storm.¹⁰³ Unchecked lawless behavior terrorized citizens and local law enforcement alike, both within the emergency shelters and on the flooded city streets.¹⁰⁴ The near total collapse of landline, satellite, and cell phone communications hindered the ability of local law enforcement and the Louisiana National Guard to coordinate a response—even available radio channels were so jammed with traffic that they became useless.¹⁰⁵

The chaotic rescue and evacuation efforts impacted families as well, as the National Center for Missing and Exploited Children reported in mid-September 2005 that 1,831 children from Louisiana, Alabama, and Mississippi were reported

102.*Id.* Food and water supplies stashed at the planned emergency shelter of the Superdome ran out within the first few days after Katrina made landfall. *Id.* After the Superdome had filled beyond all capacity, an additional 15,000 refugees were directed to the convention center, where there were no food or water supplies. *Id.*; see also John Riley & Craig Gordon, *Katrina—What Went Wrong*, NEWSDAY, Sept. 3, 2005, at A4 (describing the deplorable conditions in the convention center).

103.Lipton et al., *Breakdowns*, *supra* note 53, at A1 (citing Chief Lonnie C. Swain, an assistant police superintendent who oversaw ninety police officers on patrol at the Superdome).

104.*See id.* (quoting Captain Jeffrey Winn, head of the convention center’s police SWAT team: “The only way I can describe it is as a completely lawless situation.”).

105.Shane & Shanker, *supra* note 49, at A1.

as missing in the aftermath of the storm, and that weeks later, only 360 of these cases had been resolved.¹⁰⁶ At least a million evacuees took shelter in other cities and states,¹⁰⁷ and by March 2006 the federal government had committed \$6.9 billion in shelter and direct financial assistance to Gulf Coast residents affected by the hurricane.¹⁰⁸ Countless thousands of starving and injured companion animals continued to roam the streets or languish trapped within the homes of evacuated

106. Barbara Kantrowitz & Karen Breslau, *Some Are Found, All Are Lost*, NEWSWEEK, Sept. 19, 2005, at 51. Young children were often separated from parents during chaotic boat rescues and bus evacuations. *Id.* at 52.

107. See Lester R. Brown, *Global Warming Forcing U.S. Coastal Population to Move Inland*, EARTH POL'Y INST., Aug. 16, 2006, <http://www.earth-policy.org/Updates/2006/Update57.htm> (explaining that Hurricane Katrina forced one million people to move inland from the afflicted coastal cities); see also Eric Lipton, *Storm and Crisis: Hurricane Evacuees Face Eviction Threats at Both Their Old Homes and New*, N.Y. TIMES, Nov. 4, 2005, at A20 (discussing the large influx of displaced Katrina victims to Texas). For a graphical depiction of Katrina refugee displacement, see Kantrowitz & Breslau, *supra* note 106, at 53. Refugees have fled to forty-nine different states and the District of Columbia. See Press Release, White House, Fact Sheet: Gulf Coast Update: Hurricane Relief, Recovery, and Rebuilding Continues (Mar. 8, 2006) [hereinafter Gulf Coast Fact Sheet], available at <http://www.whitehouse.gov/news/releases/2006/03/20060308-8.html> (noting the federal aid flowing to local education agencies in forty-nine states and the District of Columbia for displaced school children).

108. Gulf Coast Fact Sheet, *supra* note 107. This is more than “double the combined total of Individuals and Households Assistance Program (IHP) dollars provided for six major U.S. natural disasters occurring since 1992.” *Id.*

owners for weeks following the storm,¹⁰⁹ most perishing before rescue but not before ghastly suffering.¹¹⁰

Damage to oil infrastructure was the worst ever experienced by the industry.¹¹¹ More than nine million gallons were reported spilled,¹¹² and gas prices skyrocketed to as high as \$6 per gallon in the following weeks.¹¹³ Chemical spills, rotting remains, and flooding resulted in environmental hazards ranging from land-based toxic sludge to poisoned water supplies that will

109. See, e.g., Oscar Corral, *Stranded Pets Facing Starvation*, MIAMI HERALD, Sept. 5, 2005, at A13 (noting that many pets were abandoned because their owners could not bring them on evacuation buses); Norma Mendoza, *Task Force Members Describe Devastation in New Orleans*, EDWARDSVILLE INTELLIGENCER, Oct. 11, 2005, at 1, 3 (“Another sad sight was the dogs that were everywhere, strays and abandoned pets that rescue workers wouldn’t allow people to bring with them. Some died, trapped in the houses where they were left. Others were starving and the officers had nothing to give them.”).

110. See, e.g., *Photo Gallery: Pets, Hurricane Katrina’s Other Victims*, NAT’L GEOGRAPHIC.COM, Sept. 8, 2005, http://news.nationalgeographic.com/news/2005/09/0908_050908_katrina_pets.html (illustrating the anguish of animals abandoned in Katrina’s wrath); cf. Karlyn Barker & Nia-Malika Henderson, *Plight of Stranded Animals Worsening Daily*, WASH. POST, Sept. 8, 2005, at B4 (estimating that thousands of animals abandoned by their owners after Katrina were in peril).

111. See Pam Radtke Russell, *Gulf Platform Damage Still Being Assessed*, NEWHOUSE NEWS SERV., Mar. 23, 2006 (on file with author) (explaining that the damage to oil and gas platforms from Katrina was the worst ever seen in the Gulf of Mexico, and that the harm caused by rigs was equally noteworthy).

112. Mike Taibbi, *Oil Coats Homes, Water After Katrina*, MSNBC.COM, Nov. 8, 2005, <http://www.msnbc.msn.com/id/9972220>.

continue to threaten human health and safety into the foreseeable future.¹¹⁴ Approximately \$88 billion in federal aid has already been allocated toward relief, recovery, and rebuilding efforts, and an additional \$20 billion has been requested to assist a variety of federal agencies in their continuing relief efforts.¹¹⁵ These moneys have been earmarked for programs including unemployment assistance,¹¹⁶ community disaster loans to local governments,¹¹⁷ housing assistance,¹¹⁸ and public assistance projects.¹¹⁹ Separate grants have also been awarded, including a \$1.6 billion special congressional appropriation to the Department of Education for public and private schools where relocated students enrolled.¹²⁰

113. Robert J. Samuelson, *Hitting the Economy*, NEWSWEEK, Sept. 12, 2005, at 54.

114. See Thomas et al., *supra* note 47, at 34–35 (listing environmental hazards affecting public health).

115. Gulf Coast Fact Sheet, *supra* note 107. As high as this figure seems, it nevertheless falls short of the \$150 billion of federal aid that experts had predicted would be necessary for recovery efforts. Nina J. Easton, *Katrina Aid Falls Short of Promises*, BOSTON GLOBE, Nov. 27, 2005, at A1.

116. See Press Release, FEMA, By the Numbers: FEMA Recovery Update in Louisiana (Mar. 24, 2006), available at <http://www.fema.gov/news/newsrelease.fema?id=24505> (allocating \$165 million to disaster unemployment assistance).

117. See *id.* (allocating \$700 million in loans to local governments in need of assistance).

118. FEMA has already dispersed checks in the amount of \$3.5 billion for rental assistance and home restoration. *Id.*

119. Over \$1.9 billion has already been set aside for such public assistance undertakings. *Id.*

120. Gulf Coast Fact Sheet, *supra* note 107.

Americans watched their televisions (and increasingly agitated journalists watched on the scene) in disbelief as day after day passed before anything resembling an organized disaster response was assembled in the devastated City of New Orleans.¹²¹ Public outrage brimmed over in the days and weeks following the crisis, exemplified by one news story's observation that "[t]he descent of the Superdome from haven to a fetid, crime-infested hellhole by the time mass evacuations began Thursday was emblematic of what appeared to many to be a government failure of epic proportions last week, leaving experts and ordinary citizens alike puzzled and infuriated."¹²²

Of course, much of the devastation that Gulf Coast residents suffered from the winds and rain of Katrina cannot be blamed on bad disaster management. Setting aside the degree to which anthropogenic climate change contributes to the intensity of hurricanes like Katrina,¹²³ hurricanes are a force of nature that we

121. Even journalists of ordinarily studied neutrality found themselves challenging official accounts of the relief effort. For example, in an interview with FEMA Director Michael Brown three days into the crisis, NBC Nightly News anchor Brian Williams incredulously demanded to know why federal Chinook and Blackhawk helicopters circling the area could not be used to deliver food, water, and medical supplies to the encamped evacuees. See NBC Nightly News, *supra* note 91 ("[']Where is the aid?['] It's the question [']people keep asking us on camera!"). In response, Brown indicated that the federal government had only just become aware of the thousands of desperate refugees that day. *Id.*

122. Riley & Gordon, *supra* note 102, at A4.

123. Compare Stefan Rahmstorf et al., *Hurricanes and Global Warming-Is There a Connection?*, REALCLIMATE, Sept. 2, 2005, <http://www.realclimate.org/index.php?p=181> (suggesting that man-

have long learned to fear. River and wetland management choices along the Mississippi Delta exacerbated the flooding that proved the worst of New Orleans' battles,¹²⁴ and Americans are right to ask for better long-term planning from the local, state, and federal authorities responsible for these activities.¹²⁵ Still, it was the bungled humanitarian relief effort—the disorganized response that stranded the sick and injured, separated young children from their parents, and left the most vulnerable members of society struggling to survive amidst prolonged *Lord of the Flies* conditions¹²⁶—that triggered public outrage.

made increases in greenhouse gases have, at least in part, led to a rise in ocean temperatures, which tends to cause more destructive hurricanes like Katrina), with James K. Glassman, *Katrina and Disgusting Exploitation*, TCS DAILY, Aug. 31, 2005, <http://www.tcsdaily.com/article.aspx?id=083105JJKG> (refusing to acknowledge a nexus between global warming and the severity of Hurricane Katrina).

124. See Erin Ryan, *New Orleans, the Chesapeake, and the Future of Environmental Assessment: Overcoming the Natural Resources Law of Unintended Consequences*, 40 U. RICH. L. REV. 981, 990–97 (2006) (describing the natural resource management choices made along the Mississippi River that made New Orleans particularly vulnerable to Hurricane Katrina's storm surge).

125. Cf. John Schwartz, *Army Builders Accept Blame Over Flooding*, N.Y. TIMES, June 2, 2006, at A1 (reporting that an Army Corps of Engineers' study concluded that the design of the New Orleans levees was flawed and incapable of handling a storm the strength of Katrina).

126. See, e.g., *Britons Describe Hurricane Ordeal*, BBC NEWS, Sept. 6, 2005, <http://news.bbc.co.uk/1/hi/uk/4214746.stm> (recounting the putrid conditions in the Superdome); see also Kantrowitz & Breslau, *supra* note 106, at 51–52 (describing one family that was separated when rescue helicopters dropped the children off at one location and rescue boats brought the parents to another); Evan Thomas, *Taken by Storm*, NEWSWEEK, Dec. 26, 2005/Jan. 2,

4. Coda: Which Federalism?

Given the proven ability of the United States to respond quickly and effectively in the face of natural disaster (for example, our immediate and ambitious relief effort in response to the South Asian tsunami just nine months earlier¹²⁷), what could possibly account for this spectacular failure of governance?

2006, at 47, 56 (recounting the same episode); Thomas et al., *supra* note 69, at 44–45 (comparing the images of helpless families and children begging for food and water to third-world conditions in Mogadishu or Port-au-Prince).

127. See Brigadier General John Allen, Principal Director of Asia and Pacific Affairs, Office of the Secretary of Defense, “Update—U.S. Government Relief Efforts in Asia,” Foreign Press Center Briefing, Washington, D.C. (Jan. 3, 2005), *available at*

<http://www.pacom.mil/speeches/sst2005/050103-wh-presstranscript.shtml> (“Within minutes of our notification of this disaster, we began military planning to assist in the U.S. Governmental response to this crisis Within hours, U.S. forces began to move to the affected area.”);

BUREAU OF INT’L INFO. PROGRAMS, U.S. DEP’T OF STATE, GOING THE DISTANCE: THE U.S. TSUNAMI RELIEF EFFORT 2005, at 1 (2005),

<http://usinfo.state.gov/products/pubs/tsunami/tsunami.pdf> (reporting that, at the height of the relief effort, “more than 15,000 U.S. military personnel were involved in providing relief support in the affected region. Twenty-five ships and 94 aircraft were participating in the effort. The U.S. military had delivered about 2.2 million pounds of relief supplies to affected nations”); *see also* Ralph A. Cossa, President of the Pacific Forum Center for Strategic and International Studies,

South Asian Tsunami: U.S. Military Provides ‘Logistical Backbone’ for Relief Operation, EJOURNAL USA: FOREIGN POLICY AGENDA (Nov. 2004),

<http://usinfo.state.gov/journals/itps/1104/ijpe/cossa.htm> (noting, in ironic contrast to the later Katrina relief effort, that “[w]hile the numbers of forces dedicated to the relief effort and the extent of aid they provided were impressive, the most invaluable U.S. contribution focused around

In the face of such unimaginable domestic despair, prompting ordinary Americans from the four corners of the nation to arrive at New Orleans' doorstep with whatever they had to offer, why couldn't the United States government properly protect, feed, and evacuate its own?

In his post-storm Congressional testimony, former FEMA director Michael Brown provided perhaps the best answer, and in so doing invokes several of the important federalism issues with which we began this Part. In his poignant defense of his agency's performance on federalism grounds, he explained:

Princip[les] of federalism should not be lost in a short-term desire to react to a natural disaster of catastrophic proportions, for if that concept is lost, the advantages of having a robust state and local emergency management system will lead not only to waste of taxpayer dollars at the federal level, but will inherently drive decision-making best left to the local and state level, to a centralized federal government, which inherently cannot understand the unique needs of each community across this nation.¹²⁸

Brown's statement is important for three reasons. First, he correctly articulates a central problem of federalism: structural constraints are only meaningful if they are followed in difficult times as well as easy times. For Brown, allowing the federal government to cross federalism's proverbial line in the sand to satisfy a short-term desire would undermine the very principles of constitutional government. But this brings us to the second important point in Brown's statement, which is his invocation of the fallacy perpetuated by New Federalism rhetoric that strict-separationist dual sovereignty is *itself* federalism, as opposed to one vision among alternatives. Although earlier federal intervention might have

another Defense Department unique capability: command, control, communications, and coordination. These attributes, critical in wartime, proved equally critical in ensuring an effective, coordinated response.”).

128. See Brown Statement, *supra* note 52, at 3.

violated the tenets of the strict-separationist ideal, it might have been an acceptable move within an alternative conception of federalism (such as one that acknowledges the interjurisdictional gray area).

This brings us to the third important reference point in Brown's statement—and as it happens, back to the core federalism question raised by this article—namely, that of *which federalism*? If there is a legitimate interpretive choice among alternatives, we should choose the model that best enables the kind of governance that serves the values we ascribe to government. For Brown, the regulatory impulse “to react to a natural disaster of catastrophic proportions” is little more than a “short-term desire,”¹²⁹ a crassly self-satisfying move in the foreground of a much greater drama about the grand diffusion of separately sovereign power. But to what end is power so divided, if neither one nor the other level of government can intervene to prevent the most galling (and continuing) episode of domestic human suffering in this lifetime? Is Michael Brown's FEMA the kind of federal government that we want? Or might it suggest the value of a different model of federalism, one that can afford meaningful constraints without requiring a like sacrifice?

In the end, we must remember that clear errors were made by federal, state, and local authorities that had nothing to do with federalism (for example, New Orleans failed to consider the plight of many citizens without the means or strength to evacuate themselves,¹³⁰ and the Army Corps of Engineers later

129.*Id.*

130.Joe Whitley observes that

acknowledged that levees protecting the City had not been designed to withstand the combination of known soil subsidence patterns¹³¹ and projected levee-top overflow during a storm of Katrina's magnitude¹³²). Still, we should be deeply troubled by accounts like Michael Brown's, which suggest that the most devastating post-storm errors—those crystallized in the delayed and uncoordinated relief effort—flowed from the good-faith but ill-fated vehemence with which our leaders hewed to a principled reading of the constitutional balance of state and federal power.

III. KATRINA AND THE INTERJURISDICTIONAL GRAY AREA

[Please add the new paragraphs here; they are currently at end of chapter]

Within this framework, we can understand the Katrina crisis as a colossal interjurisdictional regulatory problem, one demanding the unique capacities of

[w]hile more than 1.2 million people were successfully evacuated from coastal areas before Katrina hit, tens of thousands of people were not, including citizens from two of Louisiana's most populous localities, New Orleans and Jefferson Parishes. Despite the eventual declaration of a mandatory evacuation on Sunday before landfall, New Orleans officials were unable to provide adequate transportation to evacuate the population.

Whitley et al., *supra* note 43, at 6.

131. See Ryan, *supra* note 124, at 990–97 (noting how channelization of the Mississippi River has led to soil subsidence in the Delta and explaining its implications for New Orleans during Hurricane Katrina).

132. Schwartz, *supra* note 125, at A1. The Corps' 6,113-page report was remarkably candid about the failed levee system:

The region's network of levees, floodwalls, pumps and gates lacked any built-in resilience that would have allowed the system to remain standing and provide protection even if water flowed over the tops of levees and floodwalls Flaws in the levee design that allowed breaches in the city's drainage canals were not foreseen, and those

Comment [e2]: Here is where I would like to insert the additional three paragraphs about interjurisdictional regulatory problems (to alleviate the confusing gap left by the omission of thirty pages between here and the preceding paragraph). I am appending the additional text at the end of the chapter, so that inserting it here does not make all following footnotes appear changed (for having been numerically displaced). I have adjusted all *supra* and *infra* references within the new footnotes to be self contained (so that they do not refer back to missing parts of the full-length article), and my scan of the other footnotes in the piece suggests that nothing else needs to be changed in light of the numerical displacement of the footnotes that follow.

multiple levels of government. Especially in hindsight, it is hard to imagine a serious argument that preparation and response should have proceeded at an exclusively national or local level. Nevertheless, in accordance with the strict-separationist model, the White House viewed the Katrina response as a properly state regulatory affair, declining to take more aggressive federal initiative because it viewed avoiding interference with (let alone commandeering) state resources as its highest obligation.¹³³ Yet nothing could have proved this view more tragically simplistic than our actual experience in the aftermath of the hurricane.

Katrina was clearly a local problem, demanding the protection of public health and safety and the maintenance of domestic law and order that lie at the heart of traditional state function.¹³⁴ State regulatory concern was implicated in the dispatch of first responders with localized expertise, the provision of humanitarian aid for intrastate evacuees, and the protection and salvage of state infrastructure and private property. However, to the extent that the crisis implicated the channels of interstate commerce, the national economy, and the care of interstate evacuees, it was also a matter of national concern. The Port of New Orleans is the largest shipping port in the United States (measured by tonnage handled),¹³⁵ and a sizeable percentage of our domestic energy supplies

floodwalls failed even though the storm waters did not rise above the level that the walls were designed to hold.

133. *See Tug of War*, *supra* note 1, at 527-32.

134. *See* 16A AM. JUR. 2D *Constitutional Law* § 313 (2006) (noting that the “state cannot surrender, abdicate, or abridge its police power”).

135. Rip Watson, *New Orleans Port Opens to Relief Ships After Katrina*, BLOOMBERG.COM, Sept. 6, 2005, <http://www.bloomberg.com/apps/news?pid=10000082&sid=adNXIjdn4Z8Q>.

are pumped, delivered, or shipped via its channels.¹³⁶ In addition, a network of 20,000 miles of oil and gas distribution lines embedded in the New Orleans wetlands provide critical supplies to the rest of the nation,¹³⁷ lines so vital that the federal government tapped into the national oil reserves to make up for the shortfall when the network went offline.¹³⁸ Residents left homeless and destitute in the wake of the storm soon became refugees requiring assistance in countless other states.¹³⁹ Federal responsibility in the crisis may also attach to the federal role in constructing what the Army Corps of Engineers now itself concedes were structurally faulty levees.¹⁴⁰ Finally, it has even been argued that the anarchy following Katrina rendered federal intervention necessary to fulfill the Constitution's Guarantee Clause,¹⁴¹ which, in guaranteeing each state "a

136.Thanks to the convenient proximity of rich carbon-based fuels in the Gulf of Mexico to the Port of New Orleans, this region is perhaps the most important energy hub in the continental United States, supplying nearly twenty percent of domestic demand for oil and natural gas. Robert Viguerie, *Coastal Erosion: Crisis in Louisiana's Wetlands*, 51 LA. B.J. 85, 86 (2003).

137.*Stemming the Tide: The Mississippi River Delta and the Davis Pond Freshwater Diversion Project*, LACOAST.GOV, <http://www.lacoast.gov/programs/DavisPond/stemming-the-tide.htm> (last visited Mar. 15, 2007).

138.Jad Mouawad & Vikas Bajaj, *Gulf Oil Operations Remain in Disarray*, N.Y. TIMES, Sept. 2, 2005, at C1.

139.*See supra* notes 107–108 and accompanying text.

140.*See* Schwartz, *supra* note 125 (recounting reports that the Army Corps conceded that the levee designs were flawed).

141.U.S. CONST. art. IV, § 4.

Republican Form of Government” implicitly promised federal action to preserve at least *some* functioning governance in New Orleans when state and local government had collapsed.¹⁴²

Thus, responding to Katrina was indeed the state’s obligation, but it was also the nation’s obligation. Despite the NRP’s promise to protect lives, the relief effort failed the thousands of residents who died in their neighborhoods and nursing homes and the thirty-four who died in the Superdome and convention center.¹⁴³ Hundreds of thousands of evacuees sought shelter and employment in cities and towns across the nation, and federal expenditures on emergency housing for them amount to millions of dollars each day. Oil spills and damaged infrastructure spiked the price of fuel nationwide, triggering fears ranging from a national recession to an increase in domestic terrorist activity. With up to twenty-five percent of New Orleans’ housing stock condemned,¹⁴⁴ an epidemic of crime that has persisted more than a year after the storm,¹⁴⁵ and environmental hazards

142.Greenberger, *supra* note 67, at 23.

143.*See supra* notes 100–101 and accompanying text.

144.*See* Adam Nossiter, *Thousands of Demolitions Near, New Orleans Braces for New Pain*, N.Y. TIMES, Oct. 23, 2005, § 1 (noting that over 50,000 of the city’s 180,000 homes could be demolished).

145.*See* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 135–54 (2006) (describing the collapse of the criminal justice system in post-Katrina New Orleans); Adam Nossiter, *Storm Left New Orleans Ripe for Violence*, N.Y. TIMES, Jan. 11, 2007, at A24 (“The storm of violence that has burst over this city since New Year’s Day can be traced in part to dysfunctional law enforcement institutions,

threatening health and safety into the foreseeable future,¹⁴⁶ there is no quick end to the crisis in sight.

In other words, everyone had a stake—but as we now well know, the bifurcated disaster response itself proved disastrous. As the stories of failure after failure in the relief effort unfolded, culpability fell on city, state, and federal agencies alike. The City of New Orleans probably should have considered how the 100,000 New Orleans residents without motor vehicles would be able to heed Mayor Nagin’s evacuation command. The State of Louisiana probably should have considered the wisdom of moving the National Guard headquarters that would coordinate hurricane response to higher ground before the storm. The federal government apparently failed to heed National Weather Service warnings about the scope of the storm and failed to deploy FEMA resources appropriately before the storm. The federal government probably should have intervened sooner when it became clear (at least to the average American watching the nightly news) that local efforts to confront the hurricane aftermath were insufficient, and when it finally did intervene, it should have been able to provide a more effective chain of command to facilitate decisionmaking.

From the constitutional perspective, it is these last failures that are most troubling, given reports about the White House debate over the federalism

aggravated by a natural disaster that turned the physical and social landscape of New Orleans into an ideal terrain for criminals.”).

implications of taking initiative¹⁴⁷ and former FEMA Director Michael Brown's congressional testimony explaining the reluctant federal response (disingenuously or not) in overtly New Federalist terms.¹⁴⁸ The New Federalism decisions themselves may not have erected an explicit doctrinal barrier to the interjurisdictional response needed after Katrina,¹⁴⁹ but they define a trajectory pointing state and federal leadership toward the strict-separationist extreme that either convinced or confused them about the available regulatory choices. The fact that the crisis was a legitimate matter of state concern did not foreclose the fact that it was also a matter of legitimate federal concern, demanding proactive federal intervention from within the federalism order.

The Katrina debacle illustrated the risks of applying a binary decision rule in interjurisdictional contexts—characterizing matters as “either/or”: if national, then not local; if local, then not national.¹⁵⁰ Taken to its extreme, this approach

146. See EPA, Response to 2005 Hurricanes: Frequent Questions, <http://www.epa.gov/katrina/faqs.htm> (last visited Mar. 15, 2007) (providing a forum to address a host of continuing health and safety related issues for the residents of the New Orleans area).

147. See *Tug of War*, *supra* note 1, at 527-32.

148. See *supra* notes 52–53 and accompanying text.

149. That said, the anticommandeering rule of *New York* and *Printz* may well have discouraged the White House from “federalizing” the Louisiana National Guard without gubernatorial consent.

150. See Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1203-05 (2003) (arguing that the Rehnquist Court's narrow federalism perspective threatens to impermissibly impinge on proper federal legislative power).

obstructs effective governance by assigning jurisdiction over a matter requiring both a local and national response to *either* state *or* federal agents exclusively, and then zealously guarding the boundary against defensible (even desirable) crossover by the other. But this is a nonsensical approach when the problem requires both local and national competencies. The strict-separationist model regards regulatory activity as permissible if it fits neatly within the state or federal box anticipated by its test, and impermissible if it does not. But what if the problem is not with the activity, but with the limitations of a simple, two-box test?

If nothing else, Katrina has taught us that interjurisdictional regulatory problems require us, quite literally, to think outside the New Federalism boxes. Indeed, Michael Brown memorably intoned (from squarely within the box) that the “princip[les] of federalism should not be lost in a short-term desire to react to a natural disaster of catastrophic proportions,” fretting that a more proactive federal response would have undermined the very foundations of dual sovereignty.¹⁵¹ His testimony sadly demonstrates that the New Federalism failed Katrina victims not for lack of good intentions, but for lack of imagination.

Now that the 39,000 refugees have left the “Third World hellhole” that became New Orleans in the first few days after the storm,¹⁵² it is easier to find sympathy for how White House officials became mired in the federalism problems suggested by the response. After all, they were fairly interpreting the

151. Brown Statement, *supra* note 52, at 3.

152. Thomas et al., *supra* note 47, at 40.

trajectory of the Supreme Court's recent federalism rulings,¹⁵³ and thus hesitated to invoke potential Stafford Act authority to intrude upon the state's primary role as provider of intrastate relief and law enforcement services. But the interjurisdictional nature of the Katrina emergency demonstrates how a problem shaped beyond the comprehension of the strict-separationist model can cause the entire system to crash. Indeed, interjurisdictional problems spawn circumstances that exacerbate the inherent tension between underlying federalism values, with which the New Federalism is ill-equipped to handle. Although symptoms of this mismatch were evident in foundering regulatory responses to less mediagenic interjurisdictional problems preceding Katrina (e.g., the disposal of low-level radioactive waste and the management of respiratory disease in Los Angeles), the Katrina debacle brought home to the nation a clear message: a legal framework built around a theory that does not track the real-world targets of regulatory response is unstable and unsustainable.

It also suggested an alternative, at least in the Katrina response, that most Americans collectively imagined was possible. In this vision, the federal government would have assessed claims by the emergency to its own regulatory responsibility, and then weighed the regulatory crossover alternative (here, proactive federal intervention) against each of the federalism values at stake—the reasons for our federal system of government in the first place. It would have considered the severity of the problem, the capacity of the state and local

153. See *Tug of War*, *supra* note 1, at 554-63 (discussing the distinct spheres of state and federal power in the New Federalism).

governments to respond, and the relative risks to dual sovereignty checks and balances of crossing into the interjurisdictional gray area. The state and local governments would have made a similar evaluation, to the extent of their capacity. Most Americans apparently believed that the federal interest in saving the lives and relieving the human suffering of its own citizens far overwhelmed the risks to inter-sovereign diplomacy, but in any event, a conclusion would have been reached more efficiently and decisively if freed from the paralysis provoked by the New Federalism approach.¹⁵⁴

This paralysis reflects perhaps the most serious trap of binary thinking promoted by the New Federalism, which is its essential suggestion that we must choose between *either* federalism *or* interjurisdictional problem-solving. Either we are faithful to the constitutional ideal of dual sovereignty, or we can effectively grapple with the collective action problems that we ask regulation to help us control. New Federalism frames this as the choice by positing the check and balance value as synonymous with federalism in general. But as important as they are, checks and balances are only *one* of the principles of good government that undergird American federalism. Indeed, there are a host of others—accountability, localism, problem-solving—all in tension with one another. The interpretive model of federalism that we choose determines how we mediate this tension, and New Federalism’s solution is to privilege checks and balances over all others. So does faithfulness to federalism require that we forsake

154. *See supra* note 92 and accompanying text (reviewing public disapproval of the federal response).

interjurisdictional problemsolving? It depends on the operative federalism model. New Federalism suggests so, but this Article suggests not.

Instead, the Court's future federalism jurisprudence should draw from a model of federalism that continues to protect our important interest in the balance of state and federal power while also affording the flexibility necessary for government at all levels to meaningfully address the problems we entrust to their care. To the extent that the New Federalism model cannot accommodate the dimensions of the interjurisdictional gray area, then it must be adjusted until it can, enabling more effective governance in accordance with a more robust theoretical model. Whether an act of regulatory crossover should be considered a constitutional violation should depend on a consideration of all federalism values that lead us to the system of dual sovereignty symbolized by the Tenth Amendment, not just the strict separation of state and federal powers for its own sake. Once again, it is not a choice about federalism or not, but rather *which* model of federalism realizes the best balance of the values that motivate federalism to begin with.[±]

[±] The full length Article argues that, to remedy the theoretical problems left unresolved by cooperative federalism and the pragmatic ones caused by New Federalism, the Court should adopt a model of Balanced Federalism that better mediates between competing federalism values and provides greater guidance for regulatory decisionmaking in the interjurisdictional gray area. Where the New Federalism asks the Tenth Amendment to police a stylized boundary between state and federal authority from crossover by either side, Balanced Federalism asks the Tenth Amendment to patrol regulatory activity within the gray area for impermissible compromises of fundamental federalism values. The Article concludes by introducing the outlines of a

Additional Text to be added at beginning of Part III (page 50):

Against this backdrop of a federalism jurisprudence neatly cleaved between the truly national and the truly local, this piece asks how “Our Federalism” can better account for the tricky regulatory matters that straddle the boundary between them. Interjurisdictional regulatory problems—ranging from the environment to telecommunications to national security—simultaneously implicate areas of such national and local obligation or expertise that their resolution depends on exercise of authority by both a federal and a state actor. Identifying this third sphere of interjurisdictional concern should facilitate the development of a more stable American federalism by revealing where the strict-separationist premise of New Federalism fails. Where the New Federalism seeks to distinguish the local from the national, interjurisdictional problems monkey-wrench the system by being simultaneously *both*. This is so either because neither side has all the jurisdiction it needs to effectively solve the problem,¹⁵⁵ or because compelling circumstances make a partnership approach necessary to solve the problem *de facto* even if the federal government could theoretically preempt all local jurisdiction *de jure*.¹⁵⁶

The legal concept of an interjurisdictional problem is nothing new, having been recognized in the United States at least since the early border-crossing cases involving interstate litigation,¹⁵⁷ criminal law enforcement,¹⁵⁸ air pollution,¹⁵⁹ water pollution,¹⁶⁰ waterway management,¹⁶¹ and species protection.¹⁶² However, the advancing reach of

jurisprudential standard for interpreting Tenth Amendment claims within a model of Balanced

Federalism dual sovereignty that affords both checks and balances. *See* Erin Ryan, *Federalism*

and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area, 66

MD. L. REV. 503, 644-65 (2007).

155. For example, this is arguably the case with regard to the problem of stormwater pollution, which stems both from land uses regulated by municipal governments and water uses regulated by the federal government. *See* Tug of War, *supra* note 1, at 576-580.

156. In other words, in this type of interjurisdictional regulatory problem, though the national government could theoretically preempt local involvement as a legal matter, the regulatory target so implicates an area of local concern or expertise that to do so would obstruct, rather than facilitate, meaningful resolution of the problem (as regarding such national security matters as the National Response Plan).

157. *E.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (finding that federal courts hearing state law claims under diversity jurisdiction are to apply the substantive laws of those states and not federal common law).

158. *E.g.*, Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 66-67 (2006) (examining the federal government’s use of state law “to help effectuate its burgeoning criminal justice authority” while simultaneously “infus[ing] federal law with the normative judgments of the respective states”).

159. *E.g.*, Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 18 GEO. INT’L ENVTL. L. REV. 1, 2-4 (2005) (discussing the arbitration decisions in the 1930s and early 1940s between Canada and the U.S. regarding the Trail Smelter, a facility near the border of British Columbia that pumped sulphur dioxide into Washington State).

160. *E.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (finding that an interstate sewage discharge claim should be resolved under the Federal Water Pollution Control Act, rather than by federal common law).

161. *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251-52 (1829) (acknowledging overlapping state and federal concern in upholding the legality of a state-authorized dam through a waterway subject to the federal navigational servitude).

local impacts in the post-industrial era has also given rise to interjurisdictional problems that the Framers could never have foreseen—including such powerful environmental problems as stormwater pollution,¹⁶³ greenhouse gas emissions,¹⁶⁴ and mass extinctions,¹⁶⁵ but also such non-environmental problems as telecommunications law,¹⁶⁶ public health crises (e.g., bird flu),¹⁶⁷ and localized threats to national security and infrastructure (such as failures of the power grid¹⁶⁸ or Internet backbone¹⁶⁹). Moreover, the growing economic interdependence that accompanied us into the new millennium has transformed many problems that might once have been purely local into the interjurisdictional variety.¹⁷⁰ Products liability is such a realm, drawing scholarly attention to the “undertheorized attempts of federal courts (particularly the Supreme Court) to mediate the tensions between the claimed commitment to the states as sovereign overseers of the quotidian affairs of their citizens and the reality that the lives of citizens are increasingly accountable to broader market commands.”¹⁷¹ Public

162. *E.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (2000) (prohibiting interstate taking, killing, or transporting migratory birds, and their eggs, parts, and nests).

163. *E.g.*, John R. Nolon, *Katrina’s Lament: Reconstructing Federalism*, 23 PACE ENVTL. L. REV. 987, 987–91 (2006) (examining the overlapping state and federal regulatory jurisdiction of stormwater runoff); Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Problems in Urban Runoff Regulation*, 9 CHAPMAN L. REV. 409, 414–19, 427–28 (2006) (outlining regulation of stormwater pollution and the problems of traceability).

164. *E.g.*, Associated Press, *Agreement Close for Multistate Pollution Reduction Plan*, MAINE TODAY.COM, Sept. 21, 2005, <http://news.mainetoday.com/apwire/D8COLE481-263.shtml> (discussing the Regional Greenhouse Gas Initiative).

165. *E.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000) (banning the “taking” of threatened or listed species).

166. *E.g.*, Philip J. Weiser, *Towards a Constitutional Architecture For Cooperative Federalism*, 79 N.C. L. REV. 663, 675–77 (2001) (discussing interjurisdictional regulatory problems arising under the Telecommunications Act of 1996).

167. *E.g.*, Elisabeth Rosenthal, *Recent Spread of Bird Flu Confounds Experts*, N.Y. TIMES, Mar. 6, 2006, at A6 (discussing the potential global scope of the bird flu pandemic).

168. *E.g.*, Seth Schiesel, *In Frayed Networks, Common Threads*, N.Y. TIMES, Aug. 21, 2003, at G1 (examining the vulnerabilities of the vast, interconnected power networks that led to the summer 2003 blackout); *Power Returns to Most Areas Hit by Blackout*, CNN.COM, Aug. 15, 2003, <http://www.cnn.com/2003/US/08/15/power.outage> (quoting New York Governor George Pataki’s statement that the summer 2003 blackout was “the largest blackout in the history of America”).

169. *E.g.*, David McGuire & Brian Krebs, *Large-Scale Attack Cripples Internet Backbone*, WASH. POST, Oct. 23, 2002, at E5 (describing a coordinated attack on computers that serve as master directories for most computer networks and Websites around the world).

170. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1410–12 (2006) (discussing the increase in federalization of areas traditionally regulated by state law). For example, if a hurricane of similar strength to Katrina hit New Orleans a century earlier, it would have triggered fewer national interests than it does today, since the nerve center of oil and gas infrastructure that now exists seaward of New Orleans was nonexistent, and the Port of New Orleans was less central to the nation’s economy. *See* Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 17–18 (2006) (explaining the development of oil and gas infrastructure in Louisiana from the early 1900s to present); *see also* Simon Romero, *A Barren Port Waits Eagerly For Its People*, N.Y. TIMES, Oct. 6, 2005, at C1 (noting the significance of the Port of New Orleans to the national economy).

171. Issacharoff & Sharkey, *supra* note [please reference whatever number the preceding note ends up at], at 1358. Other recent federalism scholars have also grappled with the concept of interjurisdictionality. *See, e.g.*, Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248–49 (2005) (proposing the concept of polyphonic federalism, where the focus is placed upon the interaction between state and federal authority, rather than upon where the two spheres diverge); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1416–17 (1999), (applying the polyphonic concept to a defense of federal interpretations of state constitutions); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108–09 (2005) (noting the benefits of regulatory overlap and cooperative federalism structures); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 8–14 (2003) (examining how the “regulatory commons problem” can generate regulatory gaps for interjurisdictional problems like urban sprawl and global warming); Jody Freeman, *Collaborative Governance*

servants at the national, state, and municipal levels are working overtime to address modern problems that defy jurisdictional boundaries—but the strict-separationist premise associated with the New Federalism ideal leaves them unclear on the rules for solving them.¹⁷²

As a nation, we may lack consensus about the extent to which local regulation should be held vicariously accountable under the Endangered Species Act (ESA),¹⁷³ or to which the federal government should be able to regulate gay marriage.¹⁷⁴ But few now argue that the federal government should not play a role in disaster management (an area of regulatory authority traditionally assigned to the states), or that state law enforcement should not play a role in domestic efforts to prevent terrorist attacks initiated abroad (a realm in which the federal government might, if absurdly, preempt state participation as a matter of international affairs).¹⁷⁵ Similarly, the federal government is more often

in the Administrative State, 45 UCLA L. REV. 1, 4–8 (1997) (proposing a normative model of collaborative governance that involves cooperation between agencies and government in the administrative process); and Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 155 (2006) (arguing that the static allocation of regulatory authority to either the state or federal government obstructs good environmental management, and that broadly overlapping state and federal regulatory jurisdiction is needed).

172. In proposing the category of “interjurisdictional regulatory problem,” I should note first what I am *not* proposing to do. Although I believe that we can meaningfully discuss regulatory problems in general terms, I offer no unifying theory about the features of problems that make them more or less susceptible to regulatory solutions, other than to note that I am generally referring to such classic regulatory targets as market failures, negative externalities, and collective action problems that respond favorably to intervention. Reasonable minds may differ about the margin between the set of problems resolvable by government and the set of those that are not, but this definition enables a conversation about the best decision rules for government actors in a federal system regardless of that margin. In other words, to continue the conversation from here, we need only agree that there is such a thing as “regulatory problems” in some shape or form, allowing individuals to substitute different values for the variables in an otherwise stable equation.

Similarly, reasonable minds may disagree on the absolute boundaries between legitimate local and national regulatory *concern*, and this is ultimately the more important problem. It is, of course, the central federalism problem itself, and the fact that we have failed to achieve consensus on this point thus far suggests that it will not be easily forthcoming even if we can agree to acknowledge the existence of some set of interjurisdictional problems. I return to this problem in Part V of the full article, where I propose the outlines of a jurisprudential standard to assist in differentiating between legitimate interjurisdictional crossover and unjustifiable breach. Here, however, I put off debate about the margins to make the case for the more basic proposition that there are at least some problems that truly implicate both local and national regulatory obligations—in a way that warrants attention from both.

173. The most famous example of such “vicarious” liability for takes prohibited by the ESA arose in *Strahan v. Cox*, in which held a state agency was held responsible for illegal takings of endangered whales because it authorized the placement of fixed gear for commercial fishing operations near the whales’ spring feeding grounds. 127 F.3d 155, 161–66 (1st Cir. 1997). A more controversial instance arose in *Loggerhead Turtle v. Council of Volusia County*, in which the Eleventh Circuit ordered a county government agency to better regulate nighttime lighting on beaches where endangered loggerhead turtles hatched. 148 F.3d 1231, 1258 (11th Cir. 1998). In *Loggerhead Turtle*, the problem was that young turtles instinctively head from the beach sands where they hatched toward the ocean, following the reflection of the moonlight in the water, but the bright lights from beachside development caused excessive hatchling mortality by encouraging the turtles to head in the wrong direction. *Id.* at 1234–36.

174. Current proposals for a federal constitutional amendment banning the states from recognizing gay marriages sometimes proceed from arguments about border-crossing harms. *E.g.*, 152 CONG. REC. S5517 (daily ed. June 7, 2006) (statement of Sen. Byrd) (discussing the state role in defining marriage and family matters and noting that the federal government’s respect for these laws “is the essence of federalism”).

175. *Cf.* *ACLU of N.J., Inc. v. County of Hudson*, 799 A.2d 629, 654–55 (N.J. Super. Ct. App. Div. 2002) (allowing a federal regulation requiring that the identities of terrorist suspects be kept secret to preempt a preexisting state law requiring that their identities be disclosed). The court observed that “while the State possesses sovereign authority over the operation of its jails, it may not operate them, in respect of INS detainees, in any way that derogates the federal government’s exclusive and expressed interest in regulating aliens.” *Id.*

criticized for failing to address the bird flu threat¹⁷⁶ than it is for intruding on a classic realm of the state police power, and few argue that the federal government should assume top-to-bottom control over intrastate administration of the Clean Air and Clean Water Acts, which would vastly increase the size of the federal bureaucracy in an ironic move to protect the boundary between state and federal authority.¹⁷⁷

176. James Gerstenzang, *Bird Flu Warning Would Ravage U.S., White House Warns*, L.A. TIMES, May 4, 2006, at A6 (noting that as the Bush Administration presented its bird flu report, Senator Edward Kennedy issued a scathing report of his own, criticizing the administration for failing to prepare the country for a possible flu pandemic).

177. By contrast, some have argued that the federal government should devolve more of such regulatory responsibility to the states. See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 135 (2005) ("Because most environmental problems are local or regional in nature, there is a strong case that most . . . environmental problems should be addressed at the state and local level." (footnote omitted)). Despite these arguments, however, few propose the abolition of the federal Clean Air Act and Clean Water Act, which fulfill a classic centralized regulatory role of preventing negative externalities and remedying collective action problems.