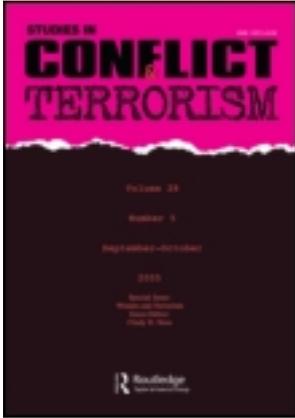


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Federalism and the Battle over Counterterrorist Law: State Sovereignty, Criminal Law Enforcement, and National Security

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In the late twentieth century, the United States' federal government responded to the threat of terrorism by passing a wide range of counterterrorist laws. The vigor that accompanied these initiatives echoed at a state level where, virtually unnoticed, states passed similar legislation. This article examines state measures in three areas: the funding of foreign terrorist organizations, the use or threatened use of weapons of mass destruction, and definitions of terrorist activity. While these statutes, as a legal matter, may not violate any specific federal provisions or constitutional prohibitions, they raise important questions about federal supremacy in foreign affairs and the constitutional protections afforded citizens. More significantly, as a policy concern, these provisions threaten America's ability to speak in one voice, introducing divisions into the domestic realm and diminishing the ability of the federal government to negotiate with foreign states and organizations. They also mask an appropriate role for the states in fighting terrorism. Both the policy implications and legal considerations suggest that such measures may ultimately undermine America's ability to counter the terrorist threat.

The closing decades of the twentieth century witnessed a proliferation in federal measures to combat terrorism. Initiatives ranged from the negotiation of new treaties, the imposition of economic and political sanctions, and the use of military strikes, to alterations in immigration procedures, the tightening of criminal law, and improvements in aviation security. A handful of incidents brought the issue of American vulnerability on U.S. soil into sharp relief, encouraging and accelerating the introduction of federal provisions. Events such as the 1993 World Trade Center bombing, thwarted attacks on New York City's infrastructure, and the 1995 Oklahoma City bombing stimulated fears that as the turn of the century approached, a new threat to U.S. security was emerging. The 1995 Aum Shinrikyo sarin attack in Japan, and the increased awareness of the possible proliferation of weapons from the former Soviet bloc countries, raised concern that not just a terrorist threat faced the U.S., but that possible terrorist use of weapons of mass destruction lay in the future. [Weapons of mass destruction (WMD), is generally defined

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to include chemical, biological, nuclear, or radiological devices.]¹ While great attention has been drawn to the federal response in this area, subject to substantially less debate and analysis has been the proliferation of state counterterrorist law that has kept pace with federal initiatives.

The state measures derive to some degree from the same incidents that spurred federal attention. They reflect the heightened awareness of terrorism and the increasingly expansive use of the term. Significant portions of state provisions refer to acts of terrorism unrelated to traditional political motivations. For instance, following the spate of school shootings in 1998, state legislatures introduced measures to address “school terrorism.”² These centered on preventing terrorist hoaxes, increasing penalties associated with terrorism on school grounds and against teachers and students, and requiring public schools to create emergency plans in the event that a major crime occurred on campus. State law also addressed single-issue terrorism, such as “ecoterrorism” or abortion clinic-related violence.³ Street or “gang terrorism” as well as “narcoterrorism” provided the focus for other statutes. In addition to these areas, a number of acts traditionally addressed under criminal law, such as kidnapping, stalking, sexual assault, targeting of public officials, and witness intimidation became referred to in state law as “terroristic offenses.”⁴ State legislatures also passed measures echoing federal provisions that focused on providing compensation to victims of international terrorism.⁵ Finally, other statutes were primarily presentational in nature, condemning acts of international or domestic terrorism.⁶ These later measures were nonbinding, and although they demonstrated an interest in international terrorism and its effects on the life and property of citizens in the state, they did not provide for any substantive violation of rights or the imposition of duties or obligations.

Putting aside this broad interpretation of acts that was classified as “terrorist,” three categories of specific measures fell within a more traditional understanding of terrorism, an understanding that was already reflected in federal statutes. Specifically, states adopted legislation prohibiting support for international terrorist organizations, legislation focusing on the actual or threatened terrorist use of WMD, and legislation defining terrorism, creating a dual enforcement regime within the United States. Whether there is a clear line between federal and state jurisdiction—indeed, to what extent there should be such a division—has been less than clear. The confusion has arisen in some measure from the multifaceted nature of terrorism. Not only are the aims, strategies, and origins of the perpetrators varied, but the tactics in which they engage run a wide gamut. Terrorist acts are criminal acts; states have significant, even preeminent public safety responsibilities. Regardless of the motivation, murder, kidnapping, extortion, torture, bombing, sniping, shooting, and use of incendiaries are illegal. Historically, states have executed jurisdiction over these areas. However, terrorist acts often entail more than mere criminality. They may encompass issues of national security, foreign affairs, and domestic defense—areas not typically falling within state jurisdiction.

This article examines these three areas of state counterterrorist legislation, which raise legal and practical questions regarding the role of the states in America’s efforts to combat terrorism. It begins by describing current state counterterrorist statutes, focusing on provisions that prohibit funding to foreign terrorist organizations, addressing terrorist incidents involving weapons of mass destruction, and seeking to define terrorism. The next section considers both the legal and policy ramifications of these state measures. Without questioning state primacy in general welfare laws, or the need for significant cooperation between the federal and state governments, these laws raise important questions about the most effective relationship between the federal and state government.

Further, some of these state statutes may challenge First Amendment protections of speech and assembly. More importantly, however, as states appear to become less concerned with traditional criminal enforcement, and expressly embrace a realm that may be better reserved for federal national security policy, these state laws may begin obfuscate the appropriate role for the states in fighting terrorism.

The States and Counterterrorism

This section describes three types of state measures enacted in the last decade. These include initiatives that prohibit funding to foreign terrorist organizations, address terrorist incidents involving weapons of mass destruction, and seek to define terrorism. It is intended to highlight key state initiatives and the themes that animated their enactment in order to understand both the scope and the impact of their passage.

Solicitation or Provision of Resources in Support of International Terrorism

The first area where the states have mimicked federal efforts to combat terrorism is in the realm of financial support for terrorist groups. In 1996, the federal government, through the Anti-Terrorism and Effective Death Penalty Act (AEDPA), empowered the Secretary of State to designate a list of foreign terrorist organizations (FTOs). The act provided three criteria: the organization must be foreign, engage in terrorist behavior,⁷ and conduct operations that threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States. The legislation criminalizes contributions to any organization associated with an FTO, thus reflecting Congressional awareness that terrorist organizations might cloak their activities behind lawful activities, such as humanitarian or social work. Congress addressed the matter squarely: "Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA also allows the federal government to deny entry to the United States to any member of a terrorist organization.⁸ In addition, it allows the government to freeze the assets of any FTO group or person affiliated with the group. In 1997, following an exhaustive inter-agency effort, the Secretary of State designated 30 foreign terrorist organizations. In 1999 the Secretary of State re-issued the list of designated terrorist organizations, as required by law, dropping three groups from the list and adding *Al-Qaida*, Usama bin Laden's terrorist network.⁹

Coincident with the federal government's decision to outlaw fundraising for terrorist groups, on 16 July 1996 Illinois introduced a state law that focused on prohibiting the solicitation or provision of resources in support of international terrorism. This legislation followed a series of events that brought attention to Palestinian fundraising in the Chicago area. After an October 1994 Hamas bombing in Tel Aviv that left 23 people dead, Israel's consul general in New York, Collette Avital, declared that Hamas had developed a military wing in the Chicago area to recruit and train potential members.¹⁰ Claiming U.S. money to be behind Hamas's actions, the State Department announced that it would seek to halt the flow of cash to the Islamic militant organization.¹¹ The city, with some 300,000 Arab Muslims, encompassed one of the largest and most well-organized Arab communities in the United States.¹² Although Jerusalem's ambassador to the United States, Itamar Rabinovich, later suggested that the consul general had alluded to a situation that had been addressed in the past, the federal government responded to Avital's allegations by forming a task force to look into the matter.¹³

Repeated attacks in Israel by Hamas kept the issue in the forefront of public attention. Between the September 1993 signing of the Oslo agreement to move the Middle East peace process forward, and December 1994, Hamas attacks claimed the lives of 94 people.¹⁴ News of suicide bombs through 1996 resulted in gatherings in Chicago to commemorate those killed in the Middle East.¹⁵ The threat was not always so far from home: during 1995 fears emerged over Hamas targeting O'Hare International Airport. City officials revealed that agents of the organization, which had obtained detailed maps of cargo facilities, had been sighted at the airport.¹⁶ Immediate federal efforts to uncover the financial underpinnings of Hamas in the United States, however, met with little success. Responding to growing concern among organizations in Chicago over the inability of the federal government to respond to the group's operations, as well as those of other Palestinian terrorist groups, the Illinois state legislature introduced antiterrorist funding bills.¹⁷

In 1995 Illinois initiated efforts to criminalize the solicitation of funds for international terrorist groups through introduction of the Solicitation for Charity Act.¹⁸ Under the Act the state attorney general could obtain an injunction to seize the assets of a charitable organization suspected of soliciting funds for or contributing to international terrorist organizations. Questions about its constitutionality, the vague wording of "international terrorist organizations," and the concentration of power vested in the attorney general, however, resulted in modifications to the original bill.¹⁹ Re-titled "International Terrorism," the final statute, passed in 1996 after AEDPA, gives the state attorney general the same injunctive relief as was provided in the original act.²⁰ However, an individual or charity could be found guilty under the act only if that person or organization knew, or had reason to believe, that the monies would be used to support international terrorism. In effect, the statute also allows Illinois to rescind the tax-exempt status of the organization in question.²¹ The statute defines international terrorism as behavior that:

- (1) Involve[s] a violent act or acts, perpetrated by a private person or non-governmental entity, dangerous to human life that would be a felony under the laws of the State of Illinois if committed within the jurisdiction of the State of Illinois;
- (2) Occurs outside the United States; and
- (3) [is] intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of government by assassination or kidnapping.²²

The act permits investigations when the facts indicate that an individual or an organization has knowingly or intentionally engaged in a violation of this "or any other criminal law of this State."²³ It prohibits the initiation or continuation of any investigation based on activities otherwise protected by the First Amendment, including "expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group."

Other states, including Maryland, Wisconsin, and New Jersey, have attempted to introduce similar measures, all of which derive from concern that charitable organizations in the United States were being used to funnel resources to terrorist organizations in the Middle East. In Maryland and Wisconsin, however, the measures failed because of constitutional concerns.²⁴ In 1999, New Jersey introduced legislation seeking to create a new offense of solicitation of material support or resources in support of international

terrorism or providing material support or resources for international terrorism. At the time of writing, New Jersey's Committee on the Judiciary had yet to decide the bill's fate.

Legislating against Weapons of Mass Destruction

Since the late 1980s, the federal government has focused on halting the proliferation of WMD. More recently, however, states have shown more concern with the threatened or actual use of such weapons on U.S. soil and with preparing for such an event. These state efforts involve a variety of different approaches to combating terrorist use of WMD in diverse areas such as alterations to emergency management structure, increases in criminal penalties, and strictures against the making of hoaxes.

The recent proliferation of anthrax hoaxes throughout the United States accelerated concern with WMD. According to the Federal Bureau of Investigation (FBI), 145 biological and chemical threats or incidents occurred in the United States in 1998.²⁵ In response, a number of states have taken steps to criminalize the acquisition, use, or threat of terrorist use of such weapons. For instance, Illinois lawmakers recently enacted measures to make it a Class 3 felony to transmit a false alarm that a container holding poison gas or a deadly biological, chemical, or radioactive substance is concealed in a place that its release would endanger human life, knowing that there is no reasonable ground to believe that a container holding such material is concealed.²⁶ Georgia also has enacted measures to address the threat.²⁷ Title 16, Article 4 of state code focuses on bombs, explosives, and chemical and biological weapons.²⁸ Georgia defines a WMD as "any device, which is designed in such a way as to release radiation or radioactivity at a level which will result in internal or external bodily injury or death to any person."²⁹

Some of the most significant measures relating to WMD have arisen in California, which has more reason than most states to be concerned about possible biological weapon attack. Between September and November 1998, 58 biological threats or incidents took place in California alone—roughly one-third of all WMD incidents that year in the United States, and the largest number in any one state.³⁰ In response, a group of law enforcement officials sought, and eventually obtained, legislation that would clarify the state's jurisdiction in this area, strengthen the current legal code, and consolidate the existing measures that applied to the possible use of WMD.³¹ The alterations ensure that, particularly where the FBI failed to pursue certain cases, the state can prosecute those involved in WMD hoaxes. Importantly, the state does not seek to go beyond federal law, but rather to create identical or parallel measures to enable the state to respond. The Assembly analysis of the bill states, "All terrorism statutes are currently filed at the federal level. This legislation seeks to bring similar statutes to the state level."³² It continues, "[This bill] will give California peace officers concurrent jurisdiction in situations involving WMD which means that they will be able to work to prevent or interdict these acts before disaster strikes."³³ From the California state officials' perspective, the magnitude of consequence of a terrorist attack, whether with or without weapons of mass destruction, would be the critical factor in determining whether an incident should be treated as criminal law or national security.³⁴ The real use or the actual possession of WMD with the potential to wreak havoc on a national scale, would make any particular case one of national security. Up until that point, lawmakers assumed that responsibility rested with the states to prosecute and to respond to WMD incidents.

The ease with which the bill passed through the California State Assembly illustrated lawmakers' concerns at this proliferation of WMD threats. It passed 8-0 in the

Assembly Public Safety Committee, 21-0 in the Assembly Appropriations Committee, 4-0 in the Senate Public Safety Committee, 13-0 in the Senate Appropriations Committee, and 79-0 on the Assembly Floor. On 1 January 2000, the bill became law.³⁵

Other states also have sought to make a crime of the threat of the use of weapons of mass destruction. For example, in Kentucky, a bill creates the crimes of “terroristic threatening” and using a WMD. This bill describes the elements of and penalties for the crime, making use of WMD eligible for the death penalty.³⁶ In Maine, legislation makes criminal any threat of violence, “the natural and probable consequence of which is to cause the evacuation of a building, place of assembly or public transport facility or to cause the occupants of any building to be moved or required to remain in a designated secured area.”³⁷

Nevada passed a similar measure. “An Act relating to biological weapons” prohibits the development, production, stockpiling, transfer, acquisition, retention, or possession of a biological agent, toxin, or delivery system in certain circumstances.³⁸ The legislation prevents individuals from making threats or conveying false information concerning the presence, delivery, dispersion, release, or use of a biological agent or toxin and provides penalties for the violation of the measures. As with the California legislation, this bill was written fully cognizant of federal statutory law. Nevada drew on the definition of “biological agent,” “delivery system,” and “toxin” as ascribed in 18 U.S.C. § 178. The legislation stated “A person shall not knowingly develop, produce, stockpile, transfer, acquire, retain or possess a biological agent, toxin or delivery system for use of a weapon; or assist another person to do any [such] act.”³⁹ The statute excluded the development, production, transfer, acquisition, retention, or possession of a biological agent, toxin, or delivery system for prophylactic, protective, or other peaceful purposes.

In addition to measures that deal with the actual or threatened use of WMD, a number of states have introduced provisions that provide for general consequence management in the event of a WMD attack. These reflect the growing federal concern about domestic preparedness for “catastrophic” terrorism. Maryland saw the introduction of a bill that would require the Secretary of Health and Mental Hygiene to develop a contingency plan for biological or chemical terrorism. This bill also would require the Secretary to consult with the National Coordinator for Security, Infrastructure, Protection, and Counter-terrorism.⁴⁰ In Utah, Executive Order 99-09 ordered the Division of Comprehensive Emergency Management within the Department of Public Safety to be designated as the single point of contact for, and the state counterpart to, the Federal National Domestic Preparedness Office.⁴¹ Implemented 30 August 1999, this order outlined the role and statutory powers of the division with regard to the threat of terrorism and terrorist use of WMD. Ohio specified authority and preparation for the consequences of terrorist incidents, including evacuation, control of traffic and panic situations, control of communications, coordination of disaster assistance programs, monitoring for effects from weapons, unexploded bomb reconnaissance, decontamination operations, and emergency management.⁴²

Virginia recently considered a bill that would require the Virginia Department of Health, with the assistance of the state’s Department of Emergency Services, to examine the preparedness of state hospitals to deal with terrorist attacks.⁴³ In another initiative Executive Order 41 provided for the promulgation of the Commonwealth of Virginia Terrorism Consequence Management Plan to designate the lead agencies for response to terrorist attack.⁴⁴ Hawaii saw proposals to require the adjutant general to report on terrorist incident preparedness capabilities.⁴⁵ In Indiana a bill would have established the

“State of Indiana Antiterrorism Fund.”⁴⁶ This fund, administered by the Department of Fire and Building Services, would have provided money to regional hazardous materials response teams and other entities providing terrorism response.⁴⁷

Other states have worked in tandem with their neighbors. For instance, New Hampshire’s “Interstate Emergency Management Compact” provided “mutual aid among the states in meeting any emergency or disaster that is duly declared by the governor of the affected state or states, whether arising from natural disaster . . . acts of terrorism, insurgency, or enemy attack.” Included in the compact were emergency-related exercises, testing, or other training activities using equipment and personnel. The law required the signatory states to consider potential emergencies arising from acts of terrorism, insurgency, or enemy attack. Although not all of the WMD-related measures introduced were passed or carried over to the next session, their dramatic increase indicates a growing concern for the state of domestic preparedness for possible terrorist attack and a trend taken at a state level to try to prepare for such events.

Terrorist Thought

A third type of legislation makes terrorism that seeks to overthrow the United States government or that of the states illegal. For the most part, it criminalizes conduct that is already prohibited (e.g., the use of explosives, murder, maiming, and threatening), yet these measures go further by adding a motivational element, called “terrorism,” to the crime of seeking to incite political change through violence. The legislation often augments penalties for criminal defendants, up to and including the death penalty.⁴⁸ To introduce the motivational element of “terrorist,” some of these provisions ascribe labels, such as “seditious,” “anarchic,” and “communist,” to organizations that engage in violent acts. The legislation also proscribes expressive activity in furtherance of the terrorist organizations’ aims.⁴⁹ These statutes raise critical first amendment issues, such as freedom of speech, assembly, and association. For instance, Nevada’s “Crimes against Public Peace” makes it unlawful for any person to:

- (a) . . . advocate or teach the duty, necessity or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform;
- (b) . . . print, publish, edit, issue or knowingly to circulate, sell, distribute or publicly to display any book, paper, document or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence or other unlawful methods of terrorism;
- (c) . . . openly, willfully and deliberately to justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence or other unlawful methods of terrorism with the intent to exemplify, spread or advocate the propriety of the doctrine of criminal syndicalism;
- (d) . . . organize or help to organize or become a member of, or voluntarily to assemble with, any society, group or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism;
- (e) . . . assemble for the purpose of advocating or teaching the doctrines of criminal syndicalism, or
- (f) . . . permit [the] assemblage of persons prohibited by . . . paragraph (e) . . .⁵⁰

It is not surprising that many of these measures update the anticommunist laws of the early twentieth century. The Red Scare, like terrorism, altered Americans' sense of security within the United States. Some 23 states between 1917 and 1919 introduced criminal syndicalism measures aimed at stemming the "red tide."⁵¹ By 1937 Alaska, Arizona, California, Colorado, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, and Wyoming had all come on board.⁵² Definitions of the doctrine of criminal syndicalism, "which advocate[s] crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform,"⁵³ is similar to terrorist definitions currently employed by states. And convictions are starting to result. Most recently, Montana, whose legislation prohibits certain advocacy and contains sanctions against landlords who might be renting to groups advocating violence, successfully prosecuted individuals for domestic terrorism under a criminal syndicalism statute.⁵⁴

Some states, such as Arizona and California, use language similar to that used in Nevada, Montana, and Minnesota, without specific reference to "criminal syndicalism" per se. For example, Arizona treats terrorism as a type of organized crime. It makes it illegal for a person to "(1) intentionally engage in an act of terrorism; or (2) intentionally organize, manage, direct, supervise or finance acts of terrorism; or (3) intentionally incite or induce others to promote or further acts of terrorism; or (4) intentionally furnish advice, assistance or direction in the conduct, financing or management of acts of terrorism."⁵⁵ California defines an act of terrorism as "any unlawful harm, attempted harm, or threat to do harm, to any state employee, state property, or the person or property of any person on the premises of any state-occupied building or other property leased or owned by the state."⁵⁶ These statutes focus the terms of reference of the legislation specifically to acts of terrorism that occur within the state itself.

Additionally, Michigan has enacted legislation "to make criminal certain activities relating to the overthrowing or destroying of government by force, violence, sabotage, or terrorism; to prescribe the penalties therefore; to define duties of the attorney general and the state police; to prevent unlawful disclosures of information and to prescribe penalties therefore. . . ."⁵⁷ A bill introduced into the South Carolina legislature establishes crimes of domestic terrorism, aiding and abetting domestic terrorism, and conspiracy to commit domestic terrorism, without reference to the subject of the attack of the domestic terrorist individual or organization.⁵⁸ Under Crimes Against the Public Peace, Nevada defines criminal syndicalism as "the doctrine which advocates or teaches crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform."⁵⁹ Similarly, Montana defines criminal syndicalism as "the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends."⁶⁰ For Mississippi it is the precept "which advocates, teaches or aids and abets the commission of crime, sabotage, . . . acts of violence and force, arson or other unlawful acts or methods of terrorism as a means of accomplishing or effecting a change in agricultural or industrial ownership or control or in effecting any political or social change or for profit."⁶¹

Political or social change may be related to state or national affairs. New York has augmented sentencing conditions for acts of terrorism by defining terrorist activities as those "involv[ing] a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by murder, assassination or kidnapping."⁶²

The Implications of State Statutes to Combat Terrorism

Both legal and practical problems arise from these state initiatives to combat terrorism. This section considers two potential legal concerns—federal preemption and the First Amendment right to freedom of speech and assembly—that may emanate from these state laws. It should be noted, however, that only a case-by-case analysis of these measures can determine whether they do, indeed, violate any federal or constitutional norms. The more significant concern may lie in the direction of practical politics and policy. The need for the federal government to be able to enforce a unified counterterrorist policy, for it to be able to speak with one voice, provides an important analytical basis by which to scrutinize the state laws. This suggests that, although states might be entirely free and valid in passing more legislation to combat terrorism, the effort is not without significant risk.

Legal Considerations: Preemption Doctrine and the First Amendment

All 50 states possess broad authority to pass statutes protecting the welfare of their citizens. The Tenth Amendment reserves to the states the power and authority in areas not explicitly under federal jurisdiction. States have significant, even preeminent, public safety responsibilities, so long as they do not violate provisions of the Constitution, in particular the prohibition against discrimination on race, ethnicity, or national origin. Indeed, the federal government has not challenged the right of states to pass legislation making terrorists acts illegal and providing appropriate punishment; nothing in the federal government's vast terrorism legislation prohibits, or preempts, state involvement in this area.

Thus, the legal concern that these statutes raise has less to do with what they look like now, and a lot to do with what this onslaught of state initiatives might mean for the future. The foundation of the Constitutional Supremacy Clause, which makes federal law the supreme law over conflicting state enactments, “was colored by concerns of the Framers that the constitution would strike an unworkable balance between federal and state interests.”⁶³ The doctrine of preemption law exists to determine whether the state law actually does, indeed, conflict with a federal law or policy. Thus, the state's interests, under preemption law, must be balanced against federal concerns as expressed through federal law.

The U.S. Constitution provides for substantive areas of governance exclusive to the federal government. For example, states cannot declare war on foreign entities. That authority lies with the federal government, which is vested with power over foreign affairs. State lines cease to exist in regard to international negotiations, compacts, and foreign relations.⁶⁴ This general prohibition does not imply that the states cannot have some interaction with foreign entities. Although article 1, section 8, clause 3 of the Constitution empowers Congress to “regulate Commerce with foreign Nations, and among the several States,” the states may, as market participants, engage with other countries so long as their actions do not affect foreign commerce.

To determine whether a state statute is preempted by federal legislation or intent, courts will look to the pervasiveness of federal statutes and regulations that govern a given field. The question is whether Congress intended to exercise exclusive control over the subject matter. Preemption of an entire field is one in which the federal interest is so “dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁶⁵ It is also relevant if the field is traditionally deemed

“national” in nature.⁶⁶ The Supreme Court, in those instances, is more deferential to the federal statutes and to areas that Congress has reserved to itself.⁶⁷ In effect, where foreign policy is concerned, the Court has indicated that preemption of local law will be presumed absent a clear statement to the contrary by federal authorities. Thus, in fields deemed to be in the national interest, it will be a relevant inquiry if Congress or the president has remained silent as to state interest in the same subject matter.⁶⁸ Courts must balance the Tenth Amendment rights afforded to the states with the constitutional promise of federal supremacy. This balancing is extremely fact-intensive and case based.

In a recent ruling, the Supreme Court sought to clarify the increasingly complex preemption doctrine. In March 1996, Massachusetts introduced legislation to ban contracts between the Commonwealth and those doing business with, or in, the Union of Myanmar (formerly Burma). Following precedent set by antiapartheid measures, the state claimed the right to condemn Burma’s terrible human rights record through restricting commerce. Three months later, Congress passed the Foreign Operations, Export Financing and Related Programs Appropriations Act to address how the federal government would do business with Burma. The act had several substantive and procedural provisions. Significantly, not only does it impose economic and visa sanctions directly on Burma, it also provides for the president to introduce further penalties—such as prohibiting U.S. persons from new investments in Burma—if the Burmese government physically harmed or exiled Daw Aung San Suu Kyi (the Nobel Peace Prize opposition leader who is under house arrest in Burma for leading a democracy movement against the military government). The federal statute requires the president to work with other countries and international bodies, such as the Association of Southeast Asian Nations (ASEAN), to develop a “comprehensive multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.” The Act also provides for the president to waive any of the restrictions in the event that such sanctions might threaten U.S. national security.

As a result of the federal initiative, a group of businesses brought suit against the Massachusetts law, arguing that the federal law preempted it. The district court, the First Circuit, and the United States Supreme Court all agreed that the Commonwealth’s measure undermined at least three provisions of the federal legislation: the discretionary powers delegated to the president to regulate economic sanctions against Burma, the limitation of federal sanctions only to U.S. persons and new investment, and the direction provided for the president to proceed diplomatically to develop a multilateral, comprehensive policy toward Burma. The Court took issue with several provisions in the state statute, noting that the authority granted by the federal measure enabled the president not only to make a political statement, but to achieve results. The Court continued, “It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.” Finally, the Court noted that the Massachusetts law undermined the president’s authority to speak with one voice to the world’s nations, including Burma. The Massachusetts law, which was criticized by other foreign governments and resulted in the lodging of a formal complaint against the United States in the World Trade Organization, thus complicated the unified objectives laid out in the federal statute.

While the Burma case did not look to the issue of terrorism or domestic preparedness, it is nonetheless useful as a means to unearth the difficulties inherent in state measures and the kind of analysis that should guide an examination of the growth of

state counterterrorism legislation. While the state laws may be well intentioned, they do not exist without some risk to the federal government's overall counterterrorism strategy. None of the present state laws are specifically preempted by federal legislation, nor have federal laws about terrorism prohibited state involvement. Nevertheless, the federal government has passed an extensive array of laws and procedures to combat international terrorism. Whether or not such action directly conflicts with a state law, Congress has legislated against foreign terrorist organizations and terrorist use of WMD, and has refrained from creating a crime of terrorism. This does not imply that there is no role for the states, as will be discussed later; indeed, most federal legislation and regulations require cooperation between federal and state governments, as does the Federal Emergency Management Agency's Federal Response Plan. What this does suggest, however, is that there exists a constitutional risk that the states may continue to venture into an area that is so closely linked to the nation's foreign policy—historically the federal government's sole domain.⁶⁹

Another significant legal issue revolves around First Amendment concerns regarding an individual's rights to free thought and speech. Scholars, political activists, and civil libertarians have often criticized U.S. counterterrorism strategy as sacrificing democratic norms in the name of national security. The Red Scare, the internment of Japanese Americans during World War II, and FBI abuses during the civil rights movement demonstrate that the United States has the potential to overreact and overlegislate, in response to generalized fears about the American public. Critics view the designation of foreign terrorist organizations under AEDPA, for example, as undermining protected speech and assembly guarantees, if not equal protection of the law, because they prohibit affiliations and membership in groups, rather than violent conduct.⁷⁰

These criticisms have some merit. The point, however, is that the maximization of state laws in the name of "fighting terrorism" is exceptionally risky when personal liberties are at stake. If subjected to legal challenge, some federal measures may be found to violate certain constitutional protections. An analysis of the state laws previously described suggests that some state efforts may also go too far. This multiplying effect could have serious consequences for personal liberties.

Significantly, during the 1980s federal prosecutors dealing with terrorist cases generally chose to ignore the politically motivated aspects of the crime, focusing instead on the violent crime itself. The mistrials and acquittals resulting from the May 19th, and United Freedom Front "seditious conspiracy" trials in the 1980s and Provisional IRA trials in the 1990s proved instructive in this regard.⁷¹ While the general nature of the activities arises during the proceedings, a specific focus on political ideology or religious beliefs can often subvert the trial and distract from the violent crime at hand. State efforts to signify terrorist thought raises equally difficult issues for prosecutors looking to punish the crime, not the motivation, of those engaged in terrorist activity. Furthermore, the potential for selective enforcement in this area always exists, especially as the United States focuses its attention on Middle Eastern charities that may be fronts for terrorist groups. This is not to say that state governments have no authority to act in this area. But, regardless of motivation, everything they seek to criminalize under their terrorism legislation is already a crime under state law. Indeed, states can punish unlawful activities such as the use of WMD under existing law that criminalizes, for example, theft, robbery, arson, intimidation, conspiracy, and attempt statutes.⁷² In addition to the concern for free speech and association, the imposition of a motivational requirement is likely to expose the states to constitutional challenge and add unnecessary proof requirements for state prosecutors.

Policy Considerations: Speaking with One Voice

On issues that encompass a variety of governmental needs and functions, like terrorism, the federal government should speak with one voice. While state and federal legal avenues are two distinct areas, they are obviously intertwined and both federal and state policy should be cognizant of that fact. Many state laws to combat terrorism allow too much leeway in a realm that, to be effective, needs coherence and unity. Indeed, the very executive branch flexibility that the Court spoke of in the *Burma* decision is the same flexibility necessary in any counterterrorism strategy. Groups change. Issues realign. Ideologies alter. To accommodate shifts in the foreign affairs arena, the federal government needs to be given the latitude to make effective policy decisions.

State lawmaking in the general area of foreign terrorism or terrorist threats in the United States may seem wholly unobjectionable. Given that in many instances the states do not specifically contradict federal legislation, they should be provided some leeway in protecting their citizens. This is, in some instances, true. But, as the *Burma* case showed:

[w]e need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain . . . without exception for enclaves fenced off willy-nilly by inconsistent political tactics. When such exceptions do qualify his capacity to present a coherent position . . . , is weakened, of course, not only in dealing with [the subject of the legislation], but in working together with other nations in hopes of reaching common policy and "comprehensive" strategy.⁷³

It is that flexibility, that wholeness, that is threatened by the states' new eagerness.

In addition, federal efforts to address terrorism are not limited to legislative initiatives. The federal government has many ways to address terrorism, and the law (including criminal prosecution) is just one tool.⁷⁴ States, on the other hand, approach terrorism from one vantage point: the legal perspective. They have no authority—let alone ability—to bomb foreign countries, write executive orders, change national policy, or negotiate international agreements with foreign leaders. These options are all available to the federal government, and the ability to choose among them should not be undermined by state insistence that it be a player in the legal realm. This is not to imply that the federal government does not have its own internal debates about how to approach the issue, but inherent in the federal government's ability to function is the knowledge of its own preeminence. State laws that confuse this role threaten to undermine the overall counterterrorist effort.

At least three policy prescriptions flow from this analysis. First, as part of the U.S. strategy against terrorism, the federal government must send a clear message to its citizens, other countries, terrorists, and terrorist organizations regarding the boundaries of acceptable and unacceptable conduct. State laws that suggest a different acceptable boundary blur the message. Furthermore, beyond the constitutionality of the measures, the cleavage created within America by the introduction and operation of such politically sensitive measures imports the affairs of foreign countries into the domestic realm. State measures targeted at terrorist thought and behavior that focus on limiting freedom of speech and association may generate increased friction with groups in the United States dedicated to preserving their independence from governmental involvement in their daily lives.

Second, while it was private trade groups that brought the *Burma* case, it is important to remember that several international organizations and foreign countries were concerned about the state legislation and reluctant to cooperate with the federal government's efforts to bring effective change to the region. Without a coherent strategy, the government appears disorganized, unable to resolve turf battles, and most importantly, unable to protect its citizens. This last aspect is, precisely, the aim of terrorism: to subvert the ability of the government to fulfill its most fundamental role. An uncoordinated, multipronged response conveys confusion and lack of control—a dangerous combination when faced by terrorist challenge to the political legitimacy of the United States both at home and abroad. It also is essential that the government uphold its international alliances and bilateral agreements regarding terrorism issues. State forays into this realm threaten that singularity.⁷⁵ The country cannot risk such dissension when the lives of its citizens are at stake.

Third, one purpose of federal measures is to create some incentive for terrorist organizations and sponsoring states to mend their ways. To some extent, this has been successful.⁷⁶ Economic and legal sanctions against state entities, coupled with penalties against terrorists and the groups that sponsor them, have been a central aspect of the United States's most recent federal counterterrorism efforts. The "carrot" of getting off the state sponsors of terrorism list or FTO designations is coupled with the "stick" of future economic or legal deprivations. The states cannot offer such incentives. Their recent attempts to curtail foreign funding or group affiliation undermine the singularity of purpose in the federal plan. For example, constituent organizations in Illinois publicly claimed that Hamas was running funds and arms through Chicago. It is the federal government, though, that should have the role in determining whether such concerns should make Hamas an outlaw organization. Comity currently exists between the Illinois designations and the federal designations. That may not always be the case. The Clinton administration changed its mind about the "intent" of Hamas over the course of its eight years.⁷⁷ By 1997, though, Hamas was on the foreign terrorist organization designation list. As the Middle East peace process unfolds, the federal government should have the flexibility to change the group's, or any group's, status. While Illinois may continue to have concerns about Hamas, the deterrent effect of the federal effort would be undermined if Illinois maintained state sanctions against the group. It would be a confusing message, and certainly one that would undermine the validity of federal government assurances to any organization in question and to key players in the Middle East.

A description of these laws is not meant to overstate the case law, nor to suggest that all these laws are necessarily problematic. State statutes in Illinois or Montana are not likely, alone, to cause federal counterterrorism strategy to collapse. These state laws, however, do mark a trend that, for the legal and policy reasons previously highlighted, should not go unrecognized. This trend does not appear to be slowing down; if anything, recent federal and state initiatives suggest that the concern driving their introduction is accelerating.⁷⁸ Importantly, these state efforts also may distract from a critical role that the states play in efforts to halt the advance of terrorism.

Recognizing the State Voice

States have an important role in efforts to respond to the terrorist threat in the United States. Given that such violence is criminal conduct, state criminal enforcement is relevant. Domestic terrorism is a threat, and the states have a primary responsibility to protect citizens. More than mere criminal implications are at stake, however. Federal

statutes and the U.S. legal framework give some indication of other considerations that need to be taken into account in determining the states' role.

Some WMD laws provide a good example of where that state voice is best articulated. The group of laws that discuss domestic preparedness should be understood to do exactly what Congress intended in its WMD legislation—enable the states to address consequence management in the event of a terrorist attack. For example, the training of emergency response and first responder personnel is essential because in the event of an attack they will likely be the initial providers of health and emergency care. Similarly, in areas where the states are responsible for domestic preparedness—such as in training, certification for the issuance of vaccines, and environmental consequences—legislation that helps facilitate these should not just be allowed but actively encouraged.

In addition, the states, seeking some recourse to the growing number of WMD hoaxes and the failure of the federal government to investigate and prosecute them, have sought expansive and easily referenced criminal enforcement of hoax attempts. These laws generally would not conflict with any federal statute or federal necessity for a unified anti-WMD approach. Hoaxes do not implicate WMD enforcement in the same way that a real WMD attack would. Understanding that terrorist acts may include elements of both criminal law and national security, our legal structure recognizes that hoaxes are, in actuality, closer to the traditional role of state general police power in ensuring that state authorities can respond.

Both legal and policy considerations suggest that states ought to exercise caution when venturing into the counterterrorist realm. The recent bombing of the *USS Cole* shows that the threat is still very real. State laws raise important legal issues that deserve particular attention, but the law should not be the only consideration. On the policy side, the state's efforts may prove useless, at best, or confusing, at worst. The primary goal of the states and the federal government is to maintain an effective and sound policy. Thus, U.S. efforts to combat terrorism need to be coherent (without domestic contradictions that would make federal policy difficult to defend to other countries), flexible (so that the federal government can be free to change its mind and use other avenues, not just the law, in combating terrorism) and legitimate (so that these efforts are defensible and democratic).

Notes

1. Federal statutes include a small number of conventional explosive devices in the definition of WMD. See 18 U.S.C. § 921.

2. See, for example, 1999 CA SB 570 (passed Oct. 10, 1999 and chaptered by the Secretary of State as No. 1013); 1999 DE HB 323 (amending the Safe School and Recreation Zone Act); 1999 DE S.C.R. 12 (providing for a uniform Threat Management Plan for all Delaware public schools); 1999 GA SB 74 (requiring school safety plans, signed by the governor in April 1999 as Act NO. 289); 1999 NY AB 7876 (creating a temporary committee for the coordination of emergency service response to bomb threats to schools and other public places); 1999 NY AB 9038 (proscribing conduct constituting falsely reporting an alleged occurrence or impending occurrence of an explosion or the release of a hazardous substance on school grounds, signed Oct. 19); 1999 WV SB 202 (relating to bomb threats and bodily injury to teachers, students, and government employees); and OCGA § 20-2- 1185 (1999) (requiring every public school to prepare a school safety plan).

3. See, for instance, on ecoterrorism 1999 ME SB 675 (establishing a crime of environmental terrorizing, described as “the destruction of property or the interference with a place of business's normal course of business by individuals or groups for the primary purpose of making

a political statement on natural resource and environmental issues”). In the pro-life/pro-choice battle see 1999 NY AB 4996/SB 2834 (including within the class B felony of manslaughter in the first degree the false reporting of an incident or false reporting of a bomb at a health care facility and a death to any person resulting therefrom).

4. See, for instance, 1999 CA SB 69 (passed Sept. 29, 1999, chaptered by the Secretary of State as No. 580); 1999 CT SB 916 (regarding witnesses at risk; signed by the governor July 8, 1999); 1999 PA HB 1238 (amending Crimes and Offenses Code, providing for terroristic threats); 1999 TX HB 726 (relating to punishment for the offense of a “terroristic” threat); GA Penalty for “terroristic” acts: § 16-11-37 (relating to “domestic” [ethnic] terrorism); and 1999 OH HB 277 (broadening the scope of the offense of ethnic intimidation, to designate ethnic intimidation by an organization as the offense of “domestic terrorism” and to enhance the penalty for an offense if the offender purposely selects the person or property that is the subject of the offense because of a person’s race, color, religion, gender, disability, sexual orientation, national origin, or ancestry).

5. 1998 VA HB 571; SD Codified Laws § 23A-28B-1 (1999); ORS § 147.005 (1997); 21 Okl St. § 142.3 (1998); Nev. Rev. Stat. Ann § 217.035 (1998); Mont. Code Anno., § 53-9-102 (1998); Conn. Gen Stat. § 540209 (1999); 330 ILCS 100/1 (1999); HRS § 351-31 (1999); and Fla. Stat. § 960.03 (1998).

6. See, for example, 1999 ID HCR 28 (concerning the threat of terrorism in the U.S. and recommending actions that should be considered to respond to the threat) and 1999 IN HCR 33 (condemning terrorist acts in general).

7. Defined in Section 212(a)(3)(B) of the Immigration and Nationality Act.

8. The term “member” was understood to include anyone who has had any dealings with a terrorist organization, even if that meant aiding the humanitarian and social programs of an organization.

9. U.S. State Department. *Patterns of Global Terrorism 1999*. Available at: (<http://www.state.gov/www/global/terrorism/1999report/appb.html>).

10. Stephen Franklin, “U.S. Probing Chicago Connection to HAMAS; Israel and the State Department Contend Chicago is a Center of Cash and Training for Militant Palestinians, but Hard Evidence is Difficult to Come by,” *Chicago Tribune*, 16 November 1994.

11. *Ibid.* See also “ Hamas Support,” *Chicago Tribune*, 28 November 1994, and “Muslims Wronged,” *Chicago Tribune*, 4 December 1994.

12. Victoria Meyerov, “Comment: The Buck Stops Here: Illinois Criminalizes Support for International Terrorism,” *30 J. Marshall L. Rev.* 871 (Spring 199), citing Franklin, *op. cit.*

13. Franklin, *op. cit.*

14. Nicolas B. Tatro, “ Hamas Sells Death-Wish Videotapes,” *Chicago Tribune*, 12 December 1994, p. 1, at 23.

15. See, for example, “Terror in Tel Aviv,” *Chicago Tribune*, 4 March 1996, “Agony in Tel Aviv,” *Chicago Tribune*, 5 March 1996, and “Service Mourns Bombings’ Victims,” *Chicago Tribune*, 8 March 1996.

16. “City Considers Tightening its Security Net at O’Hare,” *Chicago Tribune*, 15 August 1995, and “Daley tells Travelers Security is Adequate at Airports,” *Chicago Tribune*, 16 August 1995.

17. See, for example, Charles Kruthamer, “Anti-terrorism Measures not Strong Enough,” *Chicago Tribune*, 12 August 1996, pp. 1, 19.

18. 1995 IL HB 667.

19. Opposition came from the Anti-defamation League, the Council on Domestic Relations, the Illinois chapter of the American Civil Liberties Union, and the Chicago Committee to Defend the Bill of Rights. (Meyerov, *op. cit.*)

20. H.B. 3233, 89th Gen. Ass. (Ill. 1996).

21. H.B. 3233, 89th, Gen. Ass. (Ill. 1996).

22. H.B. 3233, 29C-5, 89th Gen. Ass. (Ill. 1996).

23. *Id.*

24. For example, Maryland legislators dropped H.B. 973 2(C) 1996 during the Committee stage as a result of constitutional concerns. (Reported March 11, 1996 by Maryland’s House Judiciary Committee.)

25. Statistics provided by the Federal Bureau of Investigation to lawmakers in California during consideration of AB 130. Telephone conversation with author, April 2000.
26. 1999 IL SB 509. This legislation, introduced February 24, 1999, was signed by the governor July 15, 1999 as Public Act No. 90-121.
27. OCGA § 16-7-80 (1999): Title 16: Crimes and Offenses, Chapter 7: Damage to and Intrusion upon Property.
28. “Bacteriological” or “biological” weapons are defined as any device: “designed in such a manner as to permit the intentional release into the population or environment of microbial or other biological agents or toxins whatever their origin or method of production in a manner not otherwise authorized by law or any device the development, production, or stockpiling of which is prohibited pursuant to the ‘Convention of the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction.’” “Convention of the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction.” (26 U.S.T. 583, TIAS 8063).
29. Enacted by Ga. L. 1996, p. 416, § 3.
30. Statistics obtained from the Federal Bureau of Investigation and provided to the author by Christopher Carlisle, Policy Director for California State Assembly Member Robert Hertzberg, December 1999.
31. Interview with Christopher Carlisle, Policy Director for California State Assembly Member Robert Hertzberg, December 1999.
32. California Assembly analysis of AB 140 (1999).
33. *Ibid.*
34. E.g., *U.S. v. McVeigh* (1996). Supporting this point was the omission in the bill of any reference to loss of life resulting from biological, chemical, nuclear, or radiologic attack. Such situations would be pursued at a federal level, with any state cases brought under murder provisions.
35. AB 140 (1999). Another attempt to address the cost of the hoaxes to the California treasury arose in February 1999 with Representative Jim Battin’s introduction of legislation to combat “Terrorist Threats.” This bill would have provided that in the threat, or actual conduct of, an offense to commit a crime that would result in death or great bodily injury, those responsible would be liable to local entities for the costs incurred in personnel, equipment, and materials engaged to respond. Battin was not the first state official to seek to transfer the financial burden of these threats to those making them: for instance, New Jersey recently signed into law a bill that provides for a civil penalty to cover the cost of responding to false alarms (1998 NJ SB 1436). In California, on July 14, 1999, a week after the Hertzberg-Alarcón bill had been amended and moved forward, however, the Terrorist Threats bill failed to pass the Senate Public Safety Committee [AB 331 (1999)].
36. 2000 KY BR 346.
37. Pub. L. No. 433.
38. 1999 NV SB 18, codified at 1999 Nev. ALS 4. 1999 Nev. Stat. 4; Nev. Ch. 4.
39. Section 6. It ascribed punishment as a Category A felony. The penalty was set at life with the possibility of parole and eligibility for parole beginning when a minimum of 10 years had been served.
40. 1999 MD HB 841. The session adjourned with no carryover.
41. 1999 UT EO 9.
42. Ohio: ORC Ann. 5502.21 (Anderson 1999).
43. 1998 VA SJR 425.
44. 1998 VA EO 41.
45. 1999 HI HCR 224/SCR 182.
46. 1999 IN HB 1429.
47. Introduced Jan. 12, 1999, first regular session adjourned; no carryover.
48. See, for instance, 1999 CA AB 1284; 1999 AL HB 109/SB 344; 1999 AR HB 2134, MA 1999; HB 3423, SB 199, SB 903, SD 192, and SD 1011; 1998 NJ SB 1436; 1999 NY AB

618; 1999 NY SB 4994; 1999 NY AB 6225/SB; 1999 NY SB 171; 1999 TN HB 724; and 1999 TN HB 726.

49. See, for example, Nev. Rev. Stat. Ann. § 203.117 (1998); 1999 NY AB 4260; Mont. Code Anno., § 45-8-105 (1998); Miss. Code Ann. § 97-7-23 (1998); ARS § 13-2308.01 (1999); and 1999 FL HB 141/SB 166.

50. Nev. Rev. Stat. Ann. § 203.117 (1998). See also 1999 NY AB 4260; Mont. Code Anno., § 45-8-105 (1998); Miss. Code Ann. § 97-7-23 (1998); ARS § 13 2308.01 (1999) and 1999 FL HB 14L/SB 166.

51. Woodrow C. Whitten, "Criminal Syndicalism and the Law in California: 1919–1927," *Transactions of the American Philosophy Society* (March 1969), pp. 3–4, 65.

52. AK c. 6 (1919); AZ c. 13 (ext. sess 1918) (repealed in 1928); CA c. 188 (1919); CO c. 1 (ext. sess 1919); HI Act 186 (1919); ID c. 145 (1917), c. 136 (1919), c. 51 (1925); IN c. 125 (1919); IA c. 382 (1919); KS c. 37 (ext. sess 1920); KY c. 100 (1920), c. 20 (1922); MI Act 255 (1919); OK c. 70 (1919); OR c. 12 (1919); WA c. 3 (1919) (replaced by c. 174 1919) (repealed in 1937); W VA c. 24 § 1(1919); WY c. 76 (1919). Cited in E. Dowell, *A History of Criminal Syndicalism Legislation in the United States* 57, John Hopkins University Study in History and Political Science 13 (1939), p. 147.

53. ID c. 145 (1917).

54. Aff. in Supp. Of Mot. For Leave to File Am. Information at 2, *State v. Holland*, No. CR-95-53 (21st Dist. Ct. Mont. Filed June 21, 1995), cited in Lawrence F. Reger, "Montana's Criminal Syndicalism Statute: An Affront to the First Amendment," *Montana Law Review* (Winter 1997), p. 298. See also Mont. Code Ann. Section 45-8-105 (Criminal Law Commission Comments in Annotations) (1996); Minn. Stat for Ann. Section 609.405 (West 1963) (emended by 1984 Minn. Laws, c. 628, art. 3, sec. 11); 1986 Minn. Laws, c. 444; repealed by 1987 Minn. Laws, c. 10, sect. 1, cited in *Id.* at pg. 289.

55. Arizona: ARS § 13-2308.01 (1999); Title 13 Criminal Code, Chapter 23 Organized Crime and Fraud. "Terrorism" defined as: "[A]ny unlawful act, including any completed or preparatory offense, involving the use of a deadly weapon or dangerous instrument, or the intentional or knowing infliction of physical injury or criminal damage to property committed for political or financial gain with the intent to: 1. Intimidate or coerce the state, any of its political subdivisions, agencies, instrumentalities, officers or agents or 2. Cause the impairment or interruption of public communications, public transportation, common carriers, public utilities or other public services."

56. Cal Gov Code § 8549.2 (1999).

57. Michigan: MSA prec § 28.243(1)(1999), Act 38, 1950 (Ex Sess), p. 121. Former Acts: Pub. Acts 1871, No. 144 and Pub. Acts 1873, No. 25.

58. 1999 SC HB 3089. This measure would provide the death penalty for violation of the statute. Introduced December 9, 1998, on August 9, 1999 the 113th, session adjourned, with the bill carried over to the next session.

59. Nev. Rev. Stat. Ann. § 203.117 (1998).

60. Mont. Code Anno., § 45-8-105 (1998).

61. Miss. Code Ann. § 97-7-23 (1998).

62. NY CLS (consolidates laws service) CPL § 400.27 (1999). "The defendant's commission of the crime of murder in the first degree through an act of terrorism, shall, if proven at the sentencing proceeding, constitute an aggravating factor."

63. David A. Hermann, "Comment, To Delegate or Note To Delegate—That is Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power," *Pacific Law Journal* 28 (1997), pp. 1157, 1161.

64. *United States v. Belmont*, 301 U.S. 324 (1937) ("in the case of all international compact and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"). *Id.* at 331.

65. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

66. Lawrence H. Tribe, *American Constitutional Law*, 3rd ed. (New York: Foundation Press, 2000) at 432.
67. *Hines v. Davidowitz*, 312 U.S. 52 (1941).
68. *Campbell v. Hussey*, 368 U.S. 297 (1961).
69. For a history of the litigation regarding Massachusetts's anti-Burma statute, see *Crosby v. National Foreign Trade Council*, 181 F. 3d 38 (1999) and the Supreme Court's decision, *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288 (2000).
70. After the Oklahoma City bombing, Arab groups reported a dramatic increase in the number of hate crimes against members and vandalism of mosques. See Arab-American Anti-Defamation Committee Annual Report (1997). See also James X. Dempsey and David Cole, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (Los Angeles: First Amendment Foundation Press, 1999).
71. Brent L. Smith and Kelly R. Damphousse, "The Prosecution and Punishment of American Terrorists: 1980–1996," paper presented at the Terrorism and Beyond . . . the 21st Century Conference, hosted by the RAND Corporation and the Oklahoma City National Memorial Institute for the Prevention of Terrorism, Oklahoma City, Oklahoma, April 17, 2000.
72. Lawrence F. Reger, "Montana's Criminal Syndicalism Statute: An Affront to the First Amendment," *Montana Law Review* 58 (Winter 1997), pp. 287, 303.
73. Crosby at 2292.
74. Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge, MA: MIT Press, 1998).
75. It is therefore significant that a number of countries filed briefs in the Crosby case complaining of America's diluted and inconsistent message after international agreements were made.
76. See *Countering the Changing Threat of International Terrorism, Report from the National Commission on Terrorism* (2000) at pp. 26–28.
77. Written testimony of Mary A. Ryan, Assistant Sec. For Consular Affairs, Dept. of State, before the Subcommittee on International Law, Immigration and Refugees of the House Judiciary Comm., Feb. 23, 1994, at p. 7.
78. Laura K. Donohue, "America's Counter-terrorist Complex," discussion paper (Cambridge, MA: Belfer Center for Science and International Affairs, John F. Kennedy School of Government, forthcoming).